Government Of India & Ors vs Sapna on 29 May, 2023

Author: Yashwant Varma

Bench: Yashwant Varma, Dharmesh Sharma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ LPA 431/2021, CM APPL. 40102/2021 (stay)
GOVERNMENT OF INDIA & ORS. ..... Appe
Through: Mr. Ajay Digpaul, CGSC w
Mr. Kamal Digpaul, Adv.
versus
SAPNA ..... Resp
Through: Appearance not given.
CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA
ORDER

% 29.05.2023

1. This appeal is directed against the final decision rendered by the learned Single Judge dated 23 July 2021. The Union has assailed the correctness of the decision rendered by the learned Single Judge contending that the Ministry of Labour is not an industry and consequently, the referring authority had rightly refused to exercise the powers conferred by Section 10 of the Industrial Disputes Act 1947.

2. The learned Single Judge has, and in our considered opinion, rightly drawn sustenance for her conclusions on the basis of the judgement rendered in All India and General Mazdoor Union v. Government of NCT of Delhi and Others1 to hold that the referring authority cannot possibly take upon itself the right to adjudicate the question of whether the employer is an industry. That question must necessarily be left for the consideration of the Industrial Tribunal/Labour Court. The principles laid down in All India and General Mazdoor Union while explaining the scope of the power vested in the referring authority in terms of Section 10 of the Industrial Disputes Act, 1947 have been consistently recognised to be the correction enunciation of the legal position which would obtain. A 2003 SCC OnLine Del 1308 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/10/2023 at 00:11:51 learned Judge of this Court in Sushil Kumar & Anr. v. The Secretary (Labour) Govt. of NCT. Delhi & Anr.2 explained the scope of Section 10 as follows: -

> "6. The law regarding the ambit and scope of the powers of the appropriate Government to make or decline a reference under Section 10(1)(c) of the Act, was considered at great length by this Court in the case of Shri. Subhash Chand (supra),

wherein the lear ned single Judge took into consideration a catena of judgments on the said issue in cluding the following:--

(i) State of Madras v. C.P. Sarathy, (1952) 2 SCC 606 : 1953 SCR 334 : (AIR 1953 SC 53).

(ii) State of Bombay v. K.P. Krishnan, AIR 1960 SC 1223.

(iii) Bombay Union of Journalists v. The State of Bombay, AIR 1964 SC 1617.

(iv) Western India Match Co. Ltd. v. Western India Match Co. Workers Union, (1970) 1 SCC 225 : (1970) 3 SCR 370 : (1970 Lab IC 1033).

(v) Shambhu Nath Goyal v. Bank of Baroda, Jullundur, (1978) 2 SCC 353 : (1978) 2 SCR 793 : (1978 Lab IC 961).

(vi) The M.P. Irrigation Karamchari Sangh v. State of M.P., (1985) 2 SCC 103 : AIR 1985 SC 860 : (1985 Lab IC 932).

(vii) Ram Avtar Sharma v. State of Haryana, (1985) 3 SCC 189 : AIR 1985 SC 915 : (1985 Lab IC 1001).

(viii) Workmen of Syndicate Bank, Madras v. Government of India, 1986 Supp SCC 483 : AIR 1985 SC 1667 : (1986 Lab IC 63).

(ix) Telco Convoy Drivers Mazdoor Sangh v. State of Bihar, (1989) 3 SCC 271 : AIR 1989 SC 1565 : (1989 Lab IC 1546).

7. The facts of the case of Subhash Chand (supra) and the question that arose for consideration therein are squarely applicable to the facts of the present case as also the issue that arises for consideration herein, since the appropriate Government therein had also rejected the claim of the petitioner workmen on the ground of delay and had refused to refer the matter for adjudication. After having referred to various decisions of the Supreme Court and High Courts on the issue and after having traced the development of law in this regard it was observed as under:

2007 SCC OnLine Del 1923 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/10/2023 at 00:11:51 "20. Reading of the above judgments of the highest Court of the land shows that provisions of Section 10 of the Act were construed not quite liberally. The jurisdiction of the State Government was stated to be an administrative function and not a judicial or quasi judicial function.

Formation of an opinion under Section 10(1) of the Act was relatable to whether an industrial dispute existed or is apprehended. „It was not the same thing as to adjudicate the dispute itself on merits . In other words, the appro- priate Government was not competent to travel beyond the limits of forming a prima facie opinion with regard to existence of the dispute or that an industrial dispute was apprehended. The Government was not competent to directly or indirectly determine the merits of the dispute. Formation of an opinion without encroaching upon the domain of adjudication was the essence of powers vested under Section 10(1) of the Act.

21. The Industrial Law, developed as a result of subsequent amendments to the Act as well as by judicial pronouncements by different Courts, is having far reaching effects on the various facets of this law. Section 11(a) was incorporated in the Act by Section 3 of the Industrial Disputes Amendment Act, 1971 with effect from 15th December, 1971. The purpose of this amendment was primarily to enlarge the scope of the adjudication process before the Industrial Court or Tribunal and vest powers of wider magnitude in the Courts. The basic intent was to prevent the unfair labour practice by the Management and to ensure that the workman was not subjected to victimisation. This Section really did not effect the power of the Government under Section 10(1) of the Acfin relation to refer or not to refer the industrial dispute to the Labour Court or Tribunal in exercise of its admin istrative power. One obvious conclusion of this amendment is that a workman can also claim a reference even with regard to the quantum of punishment even in a case of proven misconduct. He could raise an issue that the punishment inflicted upon him was ex-facie disproportionate to the gravity of the misconduct. The Government would have hardly any jurisdiction to decline a refer ence even of this kind within the purview and scope of the provisions of Section 10 of the Act.

25. It will be appropriate to conclude that the dimensions of the powers vested in the appropriate Government under Section 10(1) of the Act are wide which require proper application of mind in consonance with the above enunciated principles but in no way the appropriate Government could usurp or abdicate to itself the powers of determination which are exclusively vested in the Labour Court/Tribunal. Long delays by itself may not be This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/10/2023 at 00:11:51 sufficient to deny the reference requested for by the workman unless it is so seriously prejudicial to the other party to result in unfair unjust advantage to the workman and would permit the workman to take undue advantage of his own conduct or the dispute is so belated and stale that in the eyes of law it has extinguished or lost its substance."

9. What flows from the above mentioned cases is that, while exercising power under Section 10(1) of the Act, the function of the appropriate Government is an administrative function and not a judicial or quasi ju-dicial function, and that in performing this administrative function, the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the powers conferred on it by Section 10 of the Act. In the present case, the act of the appropriate Government in rejecting the claim of the petitioner workmen and declining to refer the dispute for adjudication amounts to going into the merits of the matter, and

the same is not within the powers of the appropriate Government. Also, the factum of delay, if any, is an issue which is to be considered by the Industrial Adjudicator and not the appropriate Government. Such delay can be taken into consideration by the Industrial Adjudicator at the time of answering the reference."

3. The aforesaid position was lucidly explained by the Supreme Court in Sharad Kumar Vs. Govt. of NCT of Delhi3 as under:-

> "27. In the case of Telco Convoy Drivers Mazdoor Sangh v. State of Bihar [(1989) 3 SCC 271 : 1989 SCC (L&S) 465] this Court construing the provision of Section 10(1) held as follows : (SCC p. 276, paras 13-14) "13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi- judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See Ram Avtar Sharma v. State of Haryana [(1985) 3 SCC 189 : 1985 SCC (L&S) 623] ; M.P. Irrigation Karamchari Sangh v. State of M.P. [(1985) 2 SCC 103 :
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> 1985 SCC (L&S) 409] ; Shambu Nath Goyal v. Bank of Baroda [(1978) 2 SCC 353 : 1978 SCC (L&S) 357].
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> 14. Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute.

(2002) 4 SCC 490 This is a digitally signed order.

Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh case [(1985) 2 SCC 103 : 1985 SCC (L&S) 409] , there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory."

(emphasis supplied)

28. In M.P. Irrigation Karamchari Sangh v. State of M.P. [(1985) 2 SCC 103 : 1985 SCC (L&S) 409] taking note of the decision in the case of Bombay Union of Journalists v. State of Bombay [AIR 1964 SC 1617] wherein it was held that the appropriate government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5), or not, this Court held that the Court had made it clear in the same judgment that it was a province of the Industrial Tribunal to decide the disputed questions of facts. This Court made the following observations :

> (SCC pp. 108-09, para 5) "5. Therefore, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. Section 10 permits appropriate government to determine whether dispute „exists or is apprehended and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2) adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi-judicial Tribunal by an administrative authority namely the appropriate government. In our opinion, the reasons given by the State Government to decline reference are beyond the powers of the Government under the relevant sections of the Industrial Disputes Act. What the State Government has done in this case is not a prima facie examination of the merits of the question involved. To say that granting of dearness allowance equal to that of the employees of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/10/2023 at 00:11:52 the Central Government would cost additional financial burden on the Government is to make a unilateral decision without necessary evidence and without giving an opportunity to the workmen to rebut this conclusion. This virtually amounts to a final adjudication of the demand itself. The demand can never be characterized as either perverse or frivolous. The conclusion so arrived at robs the employees of an opportunity to place evidence before the Tribunal and to substantiate the reasonableness of the demand."

(emphasis supplied)

29. In S.K. Maini v. CaronaSahu Co. Ltd. [(1994) 3 SCC 510 :

> 1994 SCC (L&S) 776] this Court interpreting Section 2(s)(iv) made the following observations : (SCC p. 518, para 9) "9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials

> on record and it is not possible to lay down any straitjacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organizations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it.

In this connection, reference may be made to the decision of this Court in Burmah Shell Oil Storage and Distribution Co. of India Ltd. v. Burma Shell Management Staff Assn [(1970) 3 SCC 378] . In All India Reserve Bank Employees' Assn. v. Reserve Bank of India [AIR 1966 SC 305] it has been held by this Court that the word „supervise and its derivatives are not words of precise import and must often be construed in the light of context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of the manual work of others. It has been rightly contended by both the learned counsel that the designation of an employee is not of much importance and what is important is the nature of duties This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 08/10/2023 at 00:11:52 being performed by the employee. The determinative factor is the main duties of the employee concerned and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of „workman as defined in Section 2(s) of the Industrial Disputes Act."

(emphasis supplied)

31. Testing the case in hand on the touchstone of the principles laid down in the decided cases, we have no hesitation to hold that the High Court was clearly in error in confirming the order of rejection of reference passed by the State Government merely taking note of the designation of the post held by the respondent i.e. Area Sales Executive. As noted earlier determination of this question depends on the types of duties assigned to or discharged by the employee and not merely on the designation of the post held by him. We do not find that the State Government or even the High Court has made any attempt to go into the different types of duties discharged by the appellant with a view to ascertain whether he came within the meaning of Section 2(s) of the Act. The State Government, as noted earlier, merely considered the designation of the post held by him, which is

extraneous to the matters relevant for the purpose. From the appointment order dated 21-4-1983/22-4-1983 in which are enumerated certain duties which the appellant may be required to discharge it cannot be held therefrom that he did not come within the first portion of Section 2(s) of the Act. We are of the view that determination of the question requires examination of factual matters for which materials including oral evidence will have to be considered. In such a matter the State Government could not arrogate on to itself the power to adjudicate on the question and hold that the respondent was not a workman within the meaning of Section 2(s) of the Act, thereby terminating the proceedings prematurely. Such a matter should be decided by the Industrial Tribunal or the Labour Court on the basis of the materials to be placed before it by the parties. Thus the rejection order passed by the State Government is clearly erroneous and the order passed by the High Court maintaining the same is unsustainable."

4. The learned Judge has, additionally, also held that it would be incorrect for the Ministry to assert that merely because it is This is a digitally signed order.

 discharging a sovereign function, it would not be liable to be viewed as an "industry" and the reference that was sought was incorrectly rejected.

5. Insofar as the issue of the Union being industry is concerned, the argument proceeds on the basis of the decision of the Supreme Court in Bangalore Water Supply & Sewerage Board v. A. Rajappa4. It would be pertinent to note that the correctness of the view expressed therein came to be questioned by two different Benches of the Supreme Court. In light of the aforesaid, the matter came to be placed before a Constitution Bench of the Supreme Court. The said Constitution Bench in State of U.P. v. Jai Bir Singh5, while holding that the matter should be placed before a suitable larger Bench, observed as under: -

> "29. For the purpose of these cases, we need not go into the aforesaid side issue because neither is there any substantive petition nor has a prayer been made in any of the cases before us seeking issuance of mandamus to the Government to publish notification in the Official Gazette for enforcement of the amended definition of "industry" as provided in the Amendment Act of 1982. The only question before us is as to whether the amended definition, which is now undoubtedly a part of the statute, although not enforced, is a relevant piece of subsequent legislation which can be taken aid of to amplify or restrict the ambit of the definition of "industry" in Section 2(j) of the Act as it stands in its original form.
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> 30. On behalf of the employees, it is submitted that pursuant to the decision in Bangalore Water case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] although the legislature responded by amending the definition of "industry" to exclude certain specified categories of industries from the purview of the Act, employees of the excluded categories of industries could not be provided with alternative forums for redressal of their grievances. The unamended definition of industry, as interpreted by

> Bangalore Water case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] has been the settled law of the land in the industrial field. The settled legal position, it is urged, has operated well and no better enunciation of scope and effect of the "definition" could be made either by the legislature or by the Indian Labour Organisation in its report.
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> (1978) 2 SCC 213 (2005) 5 SCC 1 This is a digitally signed order.

33. With utmost respect, the statute under consideration cannot be looked at only as a worker-oriented statute. The main aim of the statute as is evident from its preamble and various provisions contained therein, is to regulate and harmonise relationships between employers and employees for maintaining industrial peace and social harmony. The definition clause read with other provisions of the Act under consideration deserves interpretation keeping in view interests of the employer, who has put his capital and expertise into the industry and the workers who by their labour equally contribute to the growth of the industry. The Act under consideration has a historical background of industrial revolution inspired by the philosophy of Karl Marx. It is a piece of social legislation. Opposed to the traditional industrial culture of open competition or laissez faire, the present structure of industrial law is an outcome of long-term agitation and struggle of the working class for participation on equal footing with the employers in industries for its growth and profits. In interpreting, therefore, the industrial law, which aims at promoting social justice, interests both of employers, employees and in a democratic society, people, who are the ultimate beneficiaries of the industrial activities, have to be kept in view.

37. A worker-oriented approach in construing the definition of industry, unmindful of the interest of the employer or the owner of the industry and the public who are the ultimate beneficiaries, would be a one-sided approach and not in accordance with the provisions of the Act.

38. We also wish to enter a caveat on confining "sovereign functions" to the traditional so described as "inalienable functions" comparable to those performed by a monarch, a ruler or a non-democratic government. The learned Judges in Bangalore Water Supply & Sewerage Board case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] seem to have confined only such sovereign functions outside the purview of "industry" which can be termed strictly as constitutional functions of the three wings of the State i.e. executive, legislature and judiciary. The concept of sovereignty in a constitutional democracy is different from the traditional concept of sovereignty which is confined to "law and order", "defence", "law-making" and "justice dispensation". In a democracy governed by the Constitution the sovereignty vests in the people and the State is obliged to discharge its constitutional obligations contained in the directive principles of State policy in Part IV of the Constitution of India. From that point of view, wherever the Government undertakes public welfare activities in discharge of its constitutional obligations, as provided in Part IV of the Constitution, such activities should be treated as activities in discharge of sovereign functions falling outside the purview of "industry". Whether employees employed in such welfare activities of the Government require protection, apart from the constitutional rights conferred on them, may be a subject of separate legislation but for

that reason, such governmental activities cannot be brought within the This is a digitally signed order.

 fold of industrial law by giving an undue expansive and wide meaning to the words used in the definition of industry.

39. In response to Bangalore Water Supply & Sewerage Board case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] Parliament intervened and substituted the definition of "industry" by including within its meaning some activities of the Government and excluding some other specified governmental activities and "public utility services" involving sovereign functions. For the past 23 years, the amended definition has remained unenforced on the statute-book. The Government has been experiencing difficulty in bringing into effect the new definition. Issuance of notification as required by sub-section (2) of Section 1 of the Amendment Act, 1982 has been withheld so far. It is, therefore, high time for the court to re-examine the judicial interpretation given by it to the definition of "industry". The legislature should be allowed greater freedom to come forward with a more comprehensive legislation to meet the demands of employers and employees in the public and private sectors. The inhibition and the difficulties which are being exercised (sic experienced) by the legislature and the executive in bringing into force the amended industrial law, more due to judicial interpretation of the definition of "industry" in Bangalore Water Supply & Sewerage Board case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] need to be removed. The experience of the working of the provisions of the Act would serve as a guide for a better and more comprehensive law on the subject to be brought into force without inhibition.

40. The word "industry" seems to have been redefined under the Amendment Act keeping in view the judicial interpretation of the word "industry" in the case of Bangalore Water [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] . Had there been no such expansive definition of "industry" given in Bangalore Water case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] it would have been open to Parliament to bring in either a more expansive or a more restrictive definition of industry by confining it or not confining it to industrial activities other than sovereign functions and public welfare activities of the State and its departments. Similarly, employment generated in carrying on of liberal professions could be clearly included or excluded depending on social conditions and demands of social justice. Comprehensive change in law and/or enactment of new law had not been possible because of the interpretation given to the definition of "industry" in Bangalore Water case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] . The judicial interpretation seems to have been one of the inhibiting factors in the enforcement of the amended definition of the Act for the last 23 years.

44. We conclude agreeing with the conclusion of the Hon'ble Judges in the case of Hospital Mazdoor Sabha [State of Bombay v. Hospital Mazdoor Sabha, (1960) 2 SCR 866 : AIR 1960 SC 610] : (SCR p. 876) This is a digitally signed order.

"[T]hough Section 2(j) used words of very wide denotation, a line would have to be drawn in a fair and just manner so as to exclude some callings, services or undertakings."

(emphasis supplied) This Court must, therefore, reconsider where the line should be drawn and what limitations can and should be reasonably implied in interpreting the wide words used in Section 2(j). That no doubt is rather a difficult problem to resolve more so when both the legislature and the executive are silent and have kept an important amended provision of law dormant on the statute-book.

45. We do not consider it necessary to say anything more and leave it to the larger Bench to give such meaning and effect to the definition clause in the present context with the experience of all these years and keeping in view the amended definition of "industry" kept dormant for long 23 years. Pressing demands of the competing sectors of employers and employees and the helplessness of the legislature and the executive in bringing into force the Amendment Act compel us to make this reference."

6. For the completeness of the record it may be noted that when the matter thereafter came to be placed before seven learned Judges of the Supreme Court, they in terms of the order reported in State of U.P. v. Jai Bir Singh6 referred the matter to be heard by a Bench of nine judges. It is there where the matter rests presently. In any case the learned Single Judge has taken care of ensuring that all contentions of parties are kept open to be addressed before the Industrial Tribunal.

7. The Court, on an overall consideration of the aforesaid conclusions, finds no merit in the appeal which stands preferred. It shall, consequently, stand dismissed.

YASHWANT VARMA, J DHARMESH SHARMA, J MAY 29, 2023 sp (2017) 3 SCC 311 This is a digitally signed order.