

*** THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO**

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+ WRIT PETITION Nos.646, 950 and 3300 of 2015

% Dated 02.04.2015

W.P.No.646 of 2015

Sukeshini Kalohe

D/o Late Kishan Kalokhe

H.No.15-15-179, Sudarshan Nagar Colony

Opp. H.C.U. Bus Depot, Hyderabad-19Petitioner

Vs.

\$ The State of Telangana

Rep. by its Principal Secretary

Department of Labour, Secretariat,

Hyderabad-500 004 and 2 othersRespondents

! Counsel for the petitioners : M/s U.D. Jai Bhima Rao

^ Counsel for the respondents :

1. G.P. for Revenue Labour (TG)

2. Sri S. Ravi for Sri A. Sanjay Kishore

W.P.No.950 of 2015

R. Uday Kumar

S/o Satyanarayana

Plot No.3, Satya Enclave

Bandlaguda Jagir, Kalimandir

Hyderabad-86Petitioner

Vs.

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Rep. by its Principal Secretary

Department of Labour, Secretariat,

Hyderabad-500 004 and 2 othersRespondents

! Counsel for the petitioners : M/s U.D. Jai Bhima Rao

^ Counsel for the respondents :

1. G.P. for Revenue Labour (TG)

2. Sri S. Ravi for Sri A. Sanjay Kishore

W.P.No.950 of 2015

Y. Prabhu Praveen Kumar

S/o Rama Krishna Rao

H.No.2-2-185/55/E, Harsha Homes

Bagh Amberpet

Hyderabad-13Petitioner

Vs.

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Rep. by its Principal Secretary

Department of Labour, Secretariat,

Hyderabad-500 004 and 2 othersRespondents

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? Cases referred

1. (2002) 4 Supreme Court Cases 490
2. AIR 1953 SC 53
3. AIR 2000 SC 915
4. AIR 1967 SC 678
5. (1970) 3 SCC 378
6. (1994) 3 SCC 737
7. (1989) 3 SCC 271
8. (1985) 2 SCC 103
9. (1994) 3 SCC 510
10. AIR 1966 SC 305

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

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WRIT PETITION Nos.646, 950 and 3300 of 2015

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COMMON ORDER:

All these 3 cases raise a common question of law and hence they are dealt with together. The opposite parties, in particular the contesting respondent is the same in all the three cases.

The petitioner in W.P.No.646 of 2015 was employed as an Assistant Consultant with the 3rd respondent company, which is considered a Gaint amongst Indian Information Technology and Information Technology enabled service providers. The petitioner in this case joined the 3rd respondent – company on 25.04.2012.

The petitioner in W.P.No.950 of 2015 was also employed as an Assistant Consultant from April, 2011 by the 3rd respondent.

The petitioner in W.P.No.3300 of 2015 was employed as an Assistant Consultant from June, 2007 by the 3rd respondent.

The 3 petitioners in a sense are aggrieved by the respective communications issued by the 3rd respondent setting out that their respective continued employment with the company is not warranted and hence would be relieving them from employment from the 30th day of the letter of discontinuance of employment.

It is the common case of the petitioners that they have approached the Commissioner of Labour urging him to conciliate the industrial dispute and make an appropriate reference for adjudication by the competent Labour Court/ Industrial Tribunal. The petitioners have also sought for consequential direction to the 3rd respondent to await the resolution of the Industrial Dispute before giving effect to the order of termination of their respective employments.

On behalf of the 3rd respondent – company, its Human Resources Head at Hyderabad has filed a detailed counter-affidavit inter alia pointing out that the 3rd respondent is the country's largest software company with a work-force of 3,15,000 employees operating in diverse sectors ranging from banking solutions to Formula One racing technology in various geographies across time-zones worldwide. It is also asserted that the 3rd respondent has been the largest private sector employer in the country and the employee retention rate of the 3rd respondent has been the best among the companies in the Information Technology sector. It was further urged that the specialized information technology needs of the 3rd respondent can brook

anything other than '0' error rate and if the skills possessed by the employees in charge of projects and modules are inadequate that would cause serious repercussions not only on the 3rd respondent company but its customers. It is brought out that there are in-house procedures which have been formulated and reviewed consistently for the performance assessment of the individual employees and also put in place redressal mechanism of any grievance. It is the specific assertion that employees occupying the positions of Assistant Consultant and above are in the Managerial cadre and hence their performance review is undertaken by a multimember body for ensuring fairness in all respects. It is further stated that employees, whose skills are found not matching with the requirements of the organization are put through a detailed exit process. Since the respective writ petitioners are managerial cadre employees of the 3rd respondent, they cannot invoke the provisions of the Industrial Disputes Act (for short henceforth "the Act").

Heard Sri U.D.Jai Bhima Rao, learned counsel for the petitioners and Sri S.Ravi learned Senior Counsel for Sri A.Sanjay Kishore on behalf of the 3rd respondent.

The principal contention advanced by Sri U.D.Jai Bhima Rao is that the 3rd respondent answers the description of "Industry" and the petitioners answer the definition of 'workman' as spelt out in the Act. It is further contended that the process of adjudication as to whether one is a workman or not has got to be decided by the Labour Court/Industrial Dispute Tribunal or the other mechanism provided for under the Act and it is not open to the Labour Commissioner, while performing his role as a conciliator to adjudicate any such dispute. It is also further urged by the learned counsel for the petitioner, placing reliance upon the judgment rendered by the Supreme Court in "**Sharad Kumar v. Government of NCT of Delhi and others**" that the dispute between the workman and the 3rd respondent has got to be referred by the conciliator/Government, to the forum concerned, and they cannot adjudicate any such dispute.

Sri S.Ravi, learned senior counsel, appearing for the 3rd respondent would place reliance upon the judgment rendered by a Division Bench of Madras High Court on 03.03.2015 in W.A.No.99 of 2015, which considered an identical question between the 3rd respondent company and one other employee, like that of the petitioners herein, stationed at Chennai and upheld the plea of the 3rd respondent- company.

It will be appropriate to notice the provisions contained in Sections 2 (k), 2 (s) and 10 of the Act, where the relevant expressions have been defined.

“Section 2(k)- "industrial dispute" means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

In Section 2(s) 'workman' is defined as follows :

"workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercise, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

Section 10. Reference of disputes to Boards, Courts or Tribunals:-

(1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing-

(a) refer the dispute to a Board for promoting a settlement thereof, or

(b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) refer the dispute or any matter appearing to be connected with, or relevant to the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication."

At the very outset it will be profitable to note that the power to make a reference under Section 10 of the Act is purely administrative power and consequently the order of reference made by the appropriate Government is a pure and simple administrative order in contrast to a quasi judicial one, where a determination of rights of parties is attempted. In this context, it is instructive to take note of the view of the Constitution Bench speaking through M. Patanjali Sastri, C.J in **State of Madras Vs. C.P. Sarathy and Anr.**

“17. This is, however, not to say that the Government will be justified in making a reference under section 10(1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry, and it is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But, it must be remembered that in making a reference under section 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award....”

The Supreme Court crystallized the principles in **The Secretary Indian Tea Association Vs. Ajit Kumar Barat & Ors** as under:

“This law on the point may briefly be summarized as follows:

1. The appropriate Government would not be justified in making a reference under Section 10 of the Act without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or apprehended and if such a reference is made it is desirable wherever possible, for the government to indicate the nature of dispute in the order of reference;
2. The order of the appropriate Government making a reference under Section 10 of the Act is an administrative order and not a judicial or quasi-judicial one and the Court, therefore, cannot canvass the order of the reference closely to see if there was any material before the Government to support its conclusion, as if it

was a judicial or quasi-judicial order;

3. An order made by the appropriate government under Section 10 of the Act being an administrative order no lis is involved, as such an order is made on the subjective satisfaction of the Government;

4. If it appears from the reasons given that the appropriate government took into account any consideration irrelevant or foreign material, the Court may in a given case consider the case for a writ of mandamus and;

5. It would, however, be open to party to show that what was referred by the Government was not an industrial dispute within the meaning of the Act.”

In “***May and Baker (India) Ltd. v. Workmen***” a three Judge Bench of the Supreme Court speaking through K.N. Wanchoo, J (as he then was) construed the provision of Section 2 (s), as it stood before the amendment of 1956 and held as under:

“9. The next contention on behalf of the company is with respect to the order of reinstatement of Mukherjee. The company's case is that Mukerjee was discharged with effect from April 1, 1954. At that time the definition of the word "workman" under Section 2(s) of the Industrial Disputes Act did not include employees like Mukerjee who was a representative. A "workman" was then defined as any person employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward. Therefore, doing manual or clerical work was necessary before a person could be called a workman. This definition came for consideration before industrial tribunals and it was consistently held that the designation of the employee was not of great moment and what was of importance was the nature of his duties. If the nature of the duties is manual or clerical then the person must be held to be a workman. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be a workman. It has, therefore, to be seen in each case from the nature of the duties whether a person employed is a workman or not, under the definition of that word as it existed before the amendment of 1956. The nature of the duties of Mukerjee is not in dispute in this case and the only question, therefore, is whether looking to the nature of the duties it can be said that Mukerjee was a workman within the meaning of Section. 2(s) as it stood at the relevant time. We find from the nature of the duties assigned to Mukerjee that his main work was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he

had to work. In the circumstances the tribunal's conclusion that Mukerjee was a workman is incorrect. The tribunal seems to have been led away by the fact that Mukherjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore, as Mukerjee was not a workman his case would not be covered by the Industrial Disputes Act and the tribunal would have no jurisdiction to order his reinstatement.....”

Therefore, whether or not the employee answers the expression “workman” has to be examined in each case going by the nature of the duties in main performed by such a person and any other work performed which was purely incidental to his main work occupying a small fraction of time for which he had to work is of no significance. Hence it has to be taken as a guiding principle that in order to fall within the meaning of the expression “workman” as per Section 2 (s) of the Act, a person has to be engaged for discharging any of the types of work enumerated in the first portion of the said provision and in case the nature of work mainly performed by such a person does not fall within the ambit of the first portion of that section, it is not necessary to consider the question whether his case is also covered within any of the classes of workman excluded under the later part of that section. The whole concentration, therefore, centers around upon the main nature of duties assigned and performed by the employee concerned regularly without unduly worrying about the incidental nature of duties discharged. While deciding this question the designation of employee is not of much significance or importance and certainly not conclusive in the matter as to whether or not he is a workman under Section 2 (s) of the Act. Similar view was expressed in “**Burmah Shell Oil Storage and Distribution Co. of India Ltd. v. Burma Shell Management Staff Assn**”. The constitution Bench of Supreme Court in “***H.R.Adyanthaya v. Sandoz (India) Ltd***” has culled out the relevant principle in the following words:

“Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation.”

In “***Telco Convoy Drivers Mazdoor Sangh v. State of Bihar***” considering the provision contained in Section 10 (1) of the Act the Supreme Court held as under:

“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..... 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”

In “***M.P.Irrigation Karamchari Sangh v. State of M.P.***”, the Supreme Court held as under:

“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..... Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power.....”

In “***S.K.Maini v. Carona Sahu Co. Ltd***” and “***All India Reserve Bank Employees’ Assn. v. Reserve Bank of India***” also set out as under:

“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.”

“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.”

In fact all these cases have been considered by the Supreme Court in “Sharad Kumar v. Government of NCT of Delhi and others” (referred supra) and

ultimately it was held in paragraph No.31 as under:

“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 respondent 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/ 22/04/1983 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 the 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 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.”

It is, therefore, only appropriate that the Commissioner of Labour, confine the area of scrutiny available to him to these four (4) corners of law.

So far as the consequential relief as prayed for by the petitioners is concerned, it cannot be granted by this Court at this stage.

Accordingly, the writ petitions stand disposed of. No order as to costs.

All the miscellaneous petitions pending in these writ petitions shall stand closed.

JUSTICE NOOTY RAMAMOHANA RAO

02.04.2015

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