

Item No.61.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 18.04.2022.

DELIVERED ON:18.04.2022

CORAM:

**THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**MAT 1873 of 2017 (FMA 205 of 2020) (not found)
With
I.A. No.CAN 3 of 2022**

**Subhash Jaiswara.
VERSUS
The Union of India & Ors.**

Appearance:-

Ms. Malabika Saha

.....for the appellant.

Ms. Sucharita Biswas

.. for the respondents.

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

Re: I.A. CAN 3 of 2022

1. We have heard Ms. Malabika Saha, learned advocate for the appellant/ and Ms. Sucharita Biswas, learned advocate appearing for the respondents.

2. This application has been filed to reconstruct the missing documents in connection with F.M.A. 205 of 2020 (MAT 1873 of 2017). Analogous matters have been disposed of by this Court in MAT No.1863 of 2017 etc. batch by judgment dated 18th November, 2021. The said judgment will cover the present appeal as well.

3. Since the material papers are not traceable, we allow this application and permit reconstruction of the documents in the appeal. The learned advocate appearing for the applicant / appellant has furnished a set of documents, which shall be treated as the material documents in the appeal.

4. Accordingly, the application is allowed.

Re: MAT 1873 of 2017 (FMA 205 of 2020)

5. This intra-Court appeal is directed against the order dated 23rd August, 2017 in W.P. No.16772(W) of 2017. Identical issue was considered by us in a batch of cases in MAT No.1863 of 2017

dated 18th November, 2021. By the said judgment, the appeals were allowed and the orders passed in the writ petitions were set aside. Consequently, the order passed by the Government of India dated 28th December, 2016 was quashed and direction was issued to the respondent nos.1 and 2 to refer the dispute raised by the appellant and others through their trade union and individually to the Central Government Industrial Tribunal for adjudication. Further taking note of the fact that the dispute was raised as early as in the year 2016, we directed the Government to refer the dispute within 12 weeks from the date of receipt of the copy of the order. The operative portion of the order reads as follows:-

*“After we have elaborately heard the learned counsel for the parties and carefully perused the materials placed on record, we are of the view that at the first instance, we need to take note of the legal position. The issue as to when the Government would be justified in refusing to refer the dispute for adjudication before an Industrial Tribunal is no longer res integra. In this regard, learned counsel for the appellants referred to the decision in the case of **TELCO Convoy Drivers Mazdoor Sangh & anr. (supra)**. In the said decision, the Hon’ble Supreme Court had referred to the various other decisions and held that in the said case, Government was not justified in deciding the dispute. In this regard, the Court referred to Section 10(1) of the said Act and held that the functions of the Government under the said provision is an administrative function and not a judicial or a quasi-judicial function and the Government, while performing its administrative function cannot delve into the merits of the*

dispute and take upon itself the determination of the lis and if done so, it would be in excess of the power conferred on it under Section 10 of the Act. Further, it was pointed out that 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, a word of caution was also added by observing that the Government should be very slow to attempt an examination of the demand with a view to declining reference and the Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes and that to allow Government to do so, would render Section 10 and Section 12 (5) of the Act nugatory. Therefore, in the said case, the Hon'ble Supreme Court held that appropriate Government was not justified in adjudicating the dispute, namely, whether there is relationship of employer and employees between TELCO and its Convoy Drivers of Mazdoor Sangh. Accordingly, the order passed by the Government was set aside. A direction was issued to the State of Bihar to make a reference under Section 10(1) of the Act.

*In the case of **Vice Chancellor Anand Agriculture University (supra)**, a contention more or less similar to the contentions advanced before us by the learned standing counsel was canvassed, namely, by placing reliance on the decision of the Hon'ble Supreme Court in **Uma Devi (supra)**. The said contention was negated and the Court held that the decision rendered in **Gujarat Agricultural University Vs. Rathod Labhu Bechar & Ors.** reported in **(2001) 3 SCC 574** requires to be adhered to.*

Bearing in mind the above legal principle, if we examine the order dated 28th December, 2016 which was impugned in these appeals, we have no hesitation to hold that the Government had entered into the merits of the dispute. When the Conciliation Officer submitted his failure report, it

was solely on the ground that the parties could not arrive at a consensus. The Government while exercising power under Section 12 (5) of the Act, which being an administrative function, is required to examine as to whether the reference sought for was either perverse or frivolous. Admittedly, there is no such finding rendered by the Government as to whether the reference sought for is either perverse or frivolous. If that is the case, then the Government could not have referred the decision of the Hon'ble Supreme Court in **Uma Devi (supra)** and declined to refer the dispute.

In our considered view, the decision in **Uma Devi (supra)** was rendered in a different factual background where the "back door entrants" sought for regularisation of the services as that of the regular employees, who had undergone a process of recruitment. In such cases concerning public employment where several organisations of the Government resorted to recruit the persons of their choice without undertaking a recruitment process, without notifying the vacancies and without complying with Articles 14 and 16(1) of the Constitution of India, in the background of those cases, the Hon'ble Supreme Court elaborately discussed all the issues and pointed out that persons who had illegally got employment without undergoing a recruitment process, cannot seek to get their services regularised after working for a considerable period of time. Therefore, in our considered view, the said decision may not be applicable to the facts and circumstances of these cases.

In any event, what the petitioner and other similarly placed persons sought for was a reference to the Industrial Tribunal for adjudicating their claim for absorption and regularisation in the rifle factory. Therefore, whether at all, the decision in **Uma Devi (supra)** can be applied to the case of the petitioner and others is a matter which is touching upon the merits of the individual case, which obviously could not have been a reason to refuse to refer the dispute for adjudication.

Therefore, we are of the considered view that the order passed by the Government dated 28th December, 2016 calls for interference.

Accordingly, the mandamus appeals are allowed. The order passed in the writ petitions are set aside. Consequently, the order passed by the Government of India on 28th December, 2016 is quashed and set aside and a direction is issued to the respondent nos.1 and 2 to refer the dispute raised by the petitioner and others, through their trade union and individually, to the Central Government Industrial Tribunal for adjudication.

Considering the fact that the dispute was raised by the workmen as early as in 2016, we direct the Government to refer the dispute within 12 weeks from the date of receipt of the copy of this judgment.”

6. Thus, following the above decision, this appeal is allowed and the order passed in the writ petition is set aside. Consequently, the order passed by the Government of India dated 28th December, 2016 is quashed and the respondent nos.1 and 2 are directed to refer the dispute raised by the petitioner to the Central Government Industrial Tribunal for adjudication. Considering the fact that the dispute was raised by the workman as early as in the year 2016, we direct the Government to refer the dispute within 12 weeks from the date of receipt of the copy of this judgment.

7. The learned advocate appearing for the appellant submitted that the judgment passed in the batch of appeals, referred above, has been complied with by the Government of India and the dispute has been referred to the CGIT cum Labour Court, Kolkata by an order dated 15th February, 2022. The copy of the order of reference has been placed before us, which shall be kept on record.

8. The appeal, accordingly, stands allowed.

9. No costs.

10. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB (AR.C)