CASE NO.:
Appeal (civil) 2622 of 2002

PETITIONER:
SHARAD KUMAR

Vs.

RESPONDENT:
GOVT. OF NCT OF DELHI & ORS.

DATE OF JUDGMENT: 11/04/2002

BENCH:
D.P. Mohapatra & Brijesh Kumar

JUDGMENT:

D.P.MOHAPATRA,J.

Leave granted.

This appeal filed by the employee is directed against the order dated 10.7.2000 of the Delhi High Court declining to interfere with the order of the Government of National Capital Territory of Delhi (NCT of Delhi) refusing to refer the dispute raised by the appellant to the Industrial Tribunal/Labour Court on the sole ground that he is not a 'workman' within the meaning of section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act').

The factual backdrop of the case relevant for appreciating the questions raised in the case may be stated thus :

The appellant was holding the post of 'Area Sales Executive' when his service was terminated vide the order dated 20.12.1995. The order was communicated to him on 28.12.1995. No show cause notice was served nor any enquiry was held before the order terminating appellant's service was passed. However, one month's salary was sent to him alongwith the termination letter. The appellant questioned the legality and validity of the order of termination of service. The matter was taken up for conciliation. The Conciliation Officer submitted a failure report to the State Government on 23.10.1996. On receipt of the conciliation Officer's report the State Government declined to refer the dispute to the Industrial Tribunal or the Labour Court for adjudication vide order dated 14.7.1998. The relevant portion of the order reads :

"All the documents filed and submissions of the parties and the report of the Conciliation Officer have been perused and it is found that this is not a fit case for reference to Industrial Tribunal or Labour Court of Delhi for adjudication for the reasons

given below:

"Admittedly the applicant was designated as Area Sales Executive and performing the duties of Area Sales Executive, as such he is not covered by the definition of "Workman" as defined under Section 2(s) of the Industrial Disputes Act, 1947."

Feeling aggrieved by the said order the appellant filed the writ petition before the High Court of Delhi which was dismissed by order dated 10.7.2000. The said order is under challenge in this appeal.

The relevant portion of the impugned order reads as follows:

"The only reason why the Respondent refused to make a reference was that the petitioner who is working as an Area Sales Executive is not a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947.

Learned counsel for the petitioner submits that whether he is a workman or not should be decided by the Labour Court.

A reading of Section 2 (s) of the Industrial Disputes Act makes it quite clear that an officer appointed as an Area Sales Executive cannot be considered to be a Workman within the meaning of Section 2(s) of the Act.

Dismissed"

From the order passed by the State Government and the Order of the High Court it is clear that the sole reason for declining to refer the dispute relating to discharge/termination of the appellant's service for adjudication to the Industrial Tribunal or Labour Court is that he is not a 'workman' within the meaning of section 2(s) of the Act. To put it differently since the appellant was holding the post of Area Sales Executive at the time of termination of service he was not a workman as defined in section 2(s) of the Act. The order of refusal of reference of the dispute was passed by the respondent in exercise of the power under section 10(1) read with section 12(5) of the Act.

The question that arises for consideration is whether on the facts and circumstances of the case the State Government was right in rejecting the appellant's request for a reference and thereby nipping the proceeding at the threshold. Is it a just and proper exercise of the jurisdiction vested under the statute ?

Shri S. Prasad learned counsel appearing for the appellant strenuously contended that the State Government committed error in declining to refer the dispute to the Industrial Tribunal/Labour Court for adjudication merely going by the designation of the post

held by the appellant. According to him the appellant was performing multifarious duties which came within the purview of definition of the expression workman in section 2(s) of the Act and the nature of his duties did not come within any of the exceptions provided in the said section. Sri Prasad also contended that the question whether the appellant was a workman within the meaning of section 2(s) or not involves inquiry into facts which could not be finally decided by the State Government while exercising the power under Section 10(1) of the Act. Sri Prasad further submitted that the State Government should have referred the mater to the Industrial Tribunal/Labour Court for adjudication of the dispute including the question whether the respondent was a 'workman' within the meaning of section 2(s) of the Act.

Per contra Shri V.R. Reddy learned senior counsel appearing for the employer M/s Usha International Ltd., contended that in the facts and circumstances of the case the State Government was right in refusing to refer the dispute to the Industrial Tribunal/ Labour Court for adjudication. According to Shri Reddy, on the materials produced by the appellant himself in the conciliation proceeding it is clear that he did not come within any of the categories of employees mentioned in the first part of section 2(s) of the Act, and therefore, he was not a 'workman' as defined in section 2(s).

Shri B.A. Mohanty, learned senior counsel appearing for the Government of National Capital Territory of Delhi, respondent No.1 herein, supported the order of the State Government refusing to refer the dispute to the Industrial Tribunal/Labour Court. He contended that under section 10(1) of the Act it was for the appropriate Government to take a decision whether the dispute raised was an 'industrial dispute' as defined in Section 2(k) of the Act for which it was necessary to ascertain whether the dispute was between the employer and workman. According to Shri Mohanty it was absolutely necessary for the Government to satisfy itself whether the appellant was a workman within the meaning of section 2(s) of the Act, and that was done by the authority in the case. Therefore, the order did not call for any interference by the High Court and the writ petition filed by the appellant was rightly dismissed.

It will be convenient to quote certain relevant provisions of the Act at the outset :

Section 2(k)- "industrial dispute" means any dispute or difference between employers and employers, 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 condition 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(1) under which the order under challenge was passed reads as under:

Reference of disputes to Boards, Courts or Tribunals

10. (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 mater 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:

The provisos to the Section are not relevant for the case in hand.

Section 12 of the Act provides the duties of the Conciliation Officer.

In sub-section 4 thereof it is laid down that if no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reason on account of which, in his opinion, a settlement could not be arrived at.

Sub-section(5) of Section 12 in which power is vested in the appropriate Government to make a reference reads as follows:

"If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

It was not disputed before us that the jurisdiction vested in the appropriate Government to make a reference or refuse to do so is administrative in nature and depends on the opinion formed by it on perusal of the report and the materials received from the Conciliation Officer. The question on answer of which the decision in this case depends is what is the scope and extent of the power to be exercised by the appropriate government in such a matter ?

On a fair reading of the provisions in section 2(s) of the Act it is clear that 'workman' means any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward including any such person who has been dismissed, discharged or retrenched.

The latter part of the section excludes 4 classes of employees including a person employed mainly in a managerial or administrative capacity, or a person employed in a supervisory capacity drawing wages

exceeding Rs.1600/- per month or exercises functions mainly of a managerial nature. It has to be taken as an accepted principle that in order to come within the meaning of the expression 'workman' in section 2(s) the person has to be discharging any one of the types of the works enumerated in the first portion of the section. If the person does not come within the first portion of the section then it is not necessary to consider the further question whether he comes within any of the classes of workmen excluded under the latter part of the section. The question whether the person concerned comes within the first part of the section depends upon the nature of duties assigned to him and/or discharged by him. The duties of the employee may be spelt out in the service rules or regulations or standing order or the appointment order or in any other material in which the duties assigned to him may be found. When the employee is assigned a particular type of duty and has been discharging the same till date of the dispute then there may not be any difficulty in coming to a conclusion whether he is a workman within the meaning of section 2(s). If on the other hand the nature of duties discharged by the employees is multifarious then the further question that may arise for consideration is which of them is his principal duty and which are the ancillary duties performed by him. In such a case determination of the question is not easy at the stage when the State Government is exercising the administrative jurisdiction vested in it for the limited purpose of satisfying itself whether the dispute raised is an industrial dispute within the meaning of section 2(k) of the Act. While deciding the question, designation of the employee is not of much importance and certainly not conclusive in the matter as to whether or not he is a workman under section 2(s) of the Act.

At this stage we may refer to certain decisions in which the question has been considered by this Court as well as by the High Court.

In Management of M/s May and Baker (India) Ltd. vs. Their Workmen AIR 1967 SC 678 a Bench of three learned Judge of this Court construed the provision of section 2(s) (as it stood before the Amendment of 1956) in order to ascertain whether the manual or clerical work done was merely of an incidental nature and whether the employee was not a workman as defined under the section. The Court made the following observations:

"9. 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 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 of 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 Mukerjee 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. We, therefore, set aside the order of the tribunal directing reinstatement of Mukerjee along with other reliefs.

(Emphasis supplied)

A similar question came up for consideration before a Bench of three learned Judges of this Court in Burmah Shell Oil Storage and Distribution Company of India Ltd. vs. The Burma Shell Management Staff Association and others 1970(3) SCC 378, wherein it was held, inter alia that if a person is mainly doing supervisory work and incidentally or for a fraction of the time also does some clerical work, it would have to be held that he is employed in a supervisory capacity, and conversely, if the main work

done is of clerical nature the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity. This Court considering several classes of employees including sales engineering representative and district sales representative, held on the materials placed before the Industrial Tribunal that both these classes of employees do not come within the meaning of the expression 'workman' in section 2(s). It is relevant to note here that this Court was considering the validity of an interim award passed by the Industrial Tribunal, Maharashtra, Bombay in the case.

Taking note of the above mentioned two three Judge Bench decisions and other cases decided by this Court a Constitution Bench in the case of H.R. Adyanthaya and others vs. Sandoz (India) Ltd. and others 1994(5)SCC 737 made the following observations:

"23. However, the decisions in the later cases, viz., S.K. Verma, Delton Cable, and Ciba Geigy cases did not notice the earlier decisions in May & Baker, WIMCO and Burmah Shell cases and the very same contention viz., if a person did not fall within any of the categories of manual, clerical, supervisory or technical, he would qualify to be workman merely because he is not covered by either of the four exceptions to the definition, was canvassed and though negatived in earlier decisions, was accepted. Further, in those cases the Development Officer of the LIC, the Security Inspector at the gate of the factory and Stenographer-cum-Accountant respectively, were held to be workmen on the facts of those cases. It is the decision of this Court in A. Sundarambal case which pointed out that the law laid down in May and Baker case was still good and was not in terms disowned.

24. We thus have three three-Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz., manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-Judge Bench decisions which have without referring to the decisions in May & Baker, WIMCO and Burmah Shell cases have taken the other view which was expressly negatived, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID

Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. 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".

(Emphasis supplied)

In Nirmal Singh vs. State of Punjab and others 1984 (Suppl) SCC 407 this Court construing the provisions of section 2(s) and 12(5) of the Act for determining the question whether a Branch Manager of a cooperative bank is a workman observed as follows:

"3. The grievance made by Shri N.D. Garg, who appears on behalf of the appellant, that the Labour Commissioner ought to have given reasons in support of his decision, is justified. All that the Labour Commissioner has stated in the order is that the post held by the appellant did not fall "within the category of workman". This, really, is the conclusion to which the Labour Commissioner came but no reasons are given to justify that conclusion. We are of the opinion that the Labour Commissioner ought to have given reasons why he came to the conclusion that the appellant is not a "workman" within the meaning of the Section 2(s) of the Industrial Disputes Act, 1947.

This Court while allowing the appeal directed the respondent No.2 the Labour Commissioner, Chandigarh to make a reference under Section 12 of the Act.

In the case of Telco Convoy Drivers Mazdoor Sangh and another vs. State of Bihar and others 1989 (3) SCC 271 this Court construing the provision of s.10(1) held as follows:

"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 vs. State of Haryana (1985 (3) SCC 189; M.P. Irrigation Karamchari Sangh vs. State of M.P. (1985) 2 SCC 103; Shambhu Nath Goyal vs. Bank of Baroda, Jullundur (1978) 2 SCC 353.

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. 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, 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)

In M.P. Irrigation Karamchari Sangh vs. State of M.P. and others 1985 (2) SCC 103 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 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:

"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 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)

In S.K. Maini Vs. M/s Carona Sahu Company limited and others (1994) 3 SCC 510 this Court interpreting section (2)(iv) made the following observations:

"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 strait-jacket 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. vs. Burmah Shell Management Staff Assn. In All India Reserve Bank Employees' Assn. vs. Reserve Bank of India 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 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)

The Rajasthan High Court in the case of S.L.Soni vs. Rajasthan Mineral Development Corporation Ltd., Jaipur, (1986) LAB I.C. 468, S.C. Agrawal, J. (as he then was) considering the question whether an Assistant Manager (Accounts) came within the meaning of expression 'workman' under section 2(s) of the Act accepted the contention raised on behalf of the petitioner therein that

the question could not be agitated before the High Court under Article 226 of the Constitution and the appropriate remedy for the petitioner was to seek a reference under Section 10 of the Industrial Disputes Act, made the following observations:

"In my view the aforesaid contention urged by Shri Rangrajan must be accepted. In the present case there is a dispute between the parties as to whether the petitioner was a workman under section 2(s) of the Act at the time of the passing of the impugned order terminating his services. The said question involves determination of facts with regard to the nature of the duties that were being discharged by the petitioner while functioning as Assistant Manager (Accounts). Such a determination can only be made on the basis of evidence. The said question cannot be properly adjudicated in these proceedings under Article 226 of the Constitution and the appropriate remedy that was available for the petitioner was to raise an industrial dispute and have it referred for adjudication under Section 10 of the Act. The first contention urged by Shri Singhvi cannot, therefore, be accepted."

(Emphasis supplied)

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 April 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.

Accordingly, the appeal is allowed. The order dated 10th July, 2000 of the High Court in Civil Writ Petition No.3561/2000 is set aside. The Government of National Capital Territory of Delhi, respondent No.1 herein, is directed to refer the dispute raised by the appellant including the question whether the appellant is a workman under the Act, to the Industrial Tribunal/Labour Court for adjudication. The appellant shall be entitled to receive from the respondents a sum of Rs.20,000/- (Rupees twenty thousand only) towards cost and hearing fee of the case.

J.
(D.P.MOHAPATRA)

..J.
(BRIJESH KUMAR)

April 11, 2002