

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13923 of 1993

with

SPECIAL CIVIL APPLICATION No 8270 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

RAJENDRA MANUBHAI PATEL

Versus

VALSAD SAHAKARI KHAND UDYOG MANDLI LTD

Appearance:

1. Special Civil Application No. 13923 of 1993
MR PC MASTER for Petitioner No. 1
M/S TRIVEDI & GUPTA for Respondent No. 1
MR BM MANGUKIYA for Respondent No. 1
 2. Special Civil Application No. 8270 of 1999
MR PC KAVINA for Petitioner No. 1
MR BM MANGUKIYA for Respondent No. 1
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Date of decision: 30/06/2004

COMMON ORAL JUDGEMENT

The first petition is made with a prayer that the petitioner, a Chemist in the factory of the respondent, is entitled to equal pay and other allowances as were paid to another Chemist, namely, Shri P.J. Mistry with effect from the year 1989, and in the second petition tagged with the first, higher scale and dearness allowance as payable to other Heads of Departments with effect from 24-10-1991 are claimed by the petitioner who claims to be Head of the Security Department of the respondent-Cooperative Society. Both the petitions against the same employer are filed under Article 226 of the Constitution alleging discrimination in violation of Article 14 of the Constitution.

2. In either of the petition, it is not clearly shown by any undisputed facts or necessary averments that the respondent is amenable to writ jurisdiction as "the State" within the meaning and definition of Article 12 of the Constitution. It was, however, argued by the learned Counsel Mr. Master that the respondent, admittedly a Cooperative Society registered under the Cooperative Societies Act, was engaged in a very important manufacturing activity, and it was a public body discharging public duties. It was contended that the respondent is established with the funds of the people and the Government has control over the industry of the respondent. He relied upon a judgment of the Calcutta High Court in the case of MADAN MOHAN SEN GUPTA AND ANR. v. STATE OF WEST BENGAL reported in AIR 1966 Calcutta 23, for the proposition that the control which the State Government and the Registrar had over such Cooperative Societies was one of the main distinguishing features for the maintainability of an application under Article 226 of the Constitution. It is, however, also held in the same judgment that the issue could be decided in light of the particular facts of each case. The learned Counsel Mr. Kavina submitted that the respondent was performing public duties and was established by the funds of the Government and the State Government having complete control over the working of the respondent, the petition against it was maintainable. The second petitioner has, however, heavily relied upon the admission of the first petition as far as maintainability is concerned. As against that, the respondent has, by filing affidavit-in-reply in the first petition, denied the

factual averments in respect of the maintainability of the petitioner and submitted that the respondent is neither a State nor an instrumentality or agency of the State. It is also stated that the respondent-society is not discharging any public function cast upon it by the statute; nor is it discharging any public or statutory duties as an obligation either imposed by the State or by any statute. In short, on plain reading of the pleadings, no material is found to characterise the respondent as an agency or instrumentality of the State, particularly, in view of the admitted fact that the respondent is a Cooperative Society registered under the Cooperative Societies Act having distinct legal entity. Another limb of the argument of Mr. Kavina that a statutory duty was cast upon the respondent to pay wages in accordance with the recommendations of the Wage Board is also not substantiated by any material on record.

3. This Court has, in ARVINDBHAI MULUBHAI BHUTAIYA & ORS. v. AMRELI DISTRICT CENTRAL CO.OP. BANK LTD. [1998 (2) G.L.R. 1740], taken the view that, in a given case, a writ order or direction can be issued against a co-operative society even if it is not an 'authority' or an 'agency' or an 'instrumentality' of the State under Article 12 of the Constitution in the writ jurisdiction of the Court in the nature of public law remedy. The only rider is that it cannot be invoked for enforcement of any private right against such body. The question in such cases would be as to which is the statutory obligation on the co-operative as an employer in the nature of public duty obligation which it had failed to discharge. In the facts of the present cases, neither any public duty nor any statutory obligation on the part of the respondent is made out. Therefore, the judgment of the Supreme Court in ANDI MUKTA SADGURU SHREE MUKTAJEE VANDAS SWAMI SUVARNA JAYANTI MAHOOTSAV SMARAK TRUST AND OTHERS v. V.R.RUDANI AND OTHERS [(1989) 2 SCC 691] cannot help the petitioner.

4. Another plea of the petitioner that the respondent had meted out discriminatory treatment to the petitioner also appears to be incorrect. In the facts of the first petition, the claim of the petitioner is based upon the averment that higher pay was paid to another employee in the same cadre of Manufacturing Chemist even as wages in proper payscale of the Manufacturing Chemist, is not even alleged to have been denied to the petitioner. The respondents have justified the payment of higher salary to another Chemist mainly on the grounds of his longer period of service and higher qualification. Whereas in the second petition, except the assertion of

the petitioner that he is the Head of the Department eligible for dearness allowance at higher rates at par with other Heads of Departments, there is no material to substantiate the claim. Even the recommendations of the Wage Board on which the claim of the petitioners rest are not placed on record.

5. The learned counsel Mr.K.B.Naik of M/s. Trivedi & Gupta, appearing for the respondent, relying upon the judgment of the Supreme Court in STATE OF ANDHRA PRADESH AND OTHERS v. G.SREENIVASA RAO AND OTHERS [(1989) 2 SCC 290], submitted that equal pay for equal work did not mean that all the members of a cadre must receive the same pay packet irrespective of their seniority, source of recruitment, educational qualifications and various other incidents of service. When advance increments were given for experience, passing a test, acquiring higher qualifications or incentive for efficiency, a junior may draw higher pay than his senior without violating the mandate of equal pay for equal work.

6. As held by the Supreme Court in KARNATAKA RARE EARTH AND ANOTHER v. SENIOR GEOLOGIST, DEPARTMENT OF MINES & GEOLOGY AND ANOTHER [(2004)2 SCC 783], the doctrine of actus curiae neminem gravabit is applicable to the cases where the Court would not have acted in a particular way had it been correctly apprised of the facts and the law. When on account of an act of the party persuading the court to pass an order, which, at the end is held as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed.

7. In the above facts and circumstances, the respondent cannot be held to be an agency or instrumentality of the State amenable to writ jurisdiction; nor are the claims of the petitioners substantiated on facts. The alleged violation of Articles 14 or 16 is also not established. In these facts and circumstances of the case, the petitions are dismissed and Rule is discharged in each petition. Since the petitioner in the first petition i.e. S.C.A. 13923/2003 appears to have drawn higher salary under an interim order dated 18.8.1994 of this Court, subject to

filing of an undertaking to repay in case of not succeeding in the petition, that petitioner shall be liable to repay and the respondent shall be at liberty to recover the additional salary paid by virtue of the interim order.

(D.H.Waghela,J.)

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