**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 28475 of 2007**
**With**
**R/SPECIAL CIVIL APPLICATION NO. 8871 of 2008**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE A.Y. KOGJE Sd/-**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | **Yes** |
| 2 | To be referred to the Reporter or not ? | **Yes** |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | **No** |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | **No** |

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GUJARAT INSECTICIDES LTD. & 1 other(s)
Versus
PRESIDING OFFICER & 2 other(s)

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**Appearance: - SCA No.28475 of 2007**
MR SACHIN VASAVADA with MR MEHUL C MEHTA (9386) for M/S TRIVEDI & GUPTA (949) for the Petitioners
MS TRUSHA K PATEL(2434) for LAW OFFICER BRANCH (420) for the Respondent No. 1
MR SURBHI BHATI, AGP for the Respondent(s) No. 2
MR KM PATEL, SENIOR ADVOCATE assisted by MR. RISHIN R PATEL (7222) for Respondent No. 3

**Appearance: - SCA No.8871 of 2008**
MR KM PATEL, SENIOR ADVOCATE assisted by MR. RISHIN R PATEL (7222) for the Petitioner
MR SACHIN VASAVADA with MEHUL C MEHTA (9386) for M/S TRIVEDI & GUPTA (949) for the Respondent

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CORAM:**HONOURABLE MR. JUSTICE A.Y. KOGJE**

**Date : 01/08/2022**

**ORAL JUDGMENT**

1. **RULE**. Learned AGP Ms.Surbhi Bhati waives service of Rule on behalf of respondent No.1, learned Advocate Ms.Trusha K.Patel waives service of Rule on behalf of respondent No.2 and learned advocate Mr.Rishin Patel waives service of Rule on behalf of respondent No.3 in Special Civil Application No.28475 of 2007 and learned Advocate Mr.Mehul C.Mehta waives service of Rule on behalf of the respondent in Special Civil Application No.8871 of 2008.

2. The present two petitions are cross-petitions against the same award of the Labour Court. With consent of learned Advocates for the parties, both these petitions are taken up for joint hearing and disposal. The facts are recorded from Special Civil Application No.28475 of 2007.

2.1 Special Civil Application No.28475 of 2007 is filed by the employer with prayers as under:-

> "(B) YOUR LORDSHIPS may be pleased to issue writ of mandamus or a writ in the nature of mandamus or any other appropriate writ order or direction, holding and declaring that the impugned award dated 30.03.2007 is without jurisdiction and authority in law and is also arbitrary and misconceived and the respondent No.1 Labour Court ought not have directed the petitioner company to reinstatement the respondent No.3 and/or to pay back wages from 2003 and that the

impugned award suffers from manifest and patent irregularities and errors of laws and jurisdiction and YOUR LORDSHIPS may also be pleased to hold and declare that the impugned order dated 5.4.2006 is unjust, unreasonable and has been passed in irregular and arbitrary exercise of jurisdiction and that consequently the impugned award suffers from errors of law of jurisdiction and that the order of reference dated 2.1.2003 is without jurisdiction, arbitrary and misconceived and the said impugned award dated 30.3.2007 as well as the order of reference dated 2.1.2003 and the order dated 5.4.2006 are untenable in law as well as on facts;

(C) YOUR LORDSHIPS may be pleased to issue writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ order or direction quashing and setting aside the impugned award dated 30.3.2007 as well as the impugned order dated 5.4.2006 and the order of reference dated 2.1.2003."

2.2 Special Civil Application No.8871 of 2008 is filed b the workman with following prayers:-

"(a) Your Lordships be pleased to issue a writ of certiorari and/or any other appropriate writ, order or direction in the like nature quashing and setting aside the impugned award dated 30-3-2007 passed by the Labour Court, Bharuch in Reference (LCB) No.6 of 2003 at Annexure-A in

so far as it declines back wages for the period prior to 2003 and be further pleased to modify the award by directing payment of full back wages;”

3. Learned Advocate for the petitioners submitted that the impugned order of reference is without jurisdiction and authority in law and therefore, it is void and non-est. The authority under the Act i.e. the respondent No.2 can make order of reference only in respect of the dispute which can be classified as industrial dispute and which would fall within the purview of the said term defined under Section 2(k) of the Act. The respondent No.3 being in the non-workman category and/or being engaged and working in the supervisory category drawing salary of more than Rs.1600/-would not be covered within the meaning of the term workman defined under Section 2(s) of the Act and a grievance or a dispute by or of a person who is not workman within the meaning of the term under Section 2(s) of the Act cannot be treated as industrial dispute.

3.1 It is submitted that he respondent No.1 Court erred in not appreciating that the respondent No.3 was not a "workman” within the meaning of the said term under Section 2(s) of the Act. The respondent No.3 was engaged and working as a Shift Engineer i.e. he was engaged in working in supervisory cadre and capacity and at the initial stage of his employment i.e. when he joined the service, his salary was in the pay-scale of Rs.1,800/basic and the total salary came to the tune of about Rs.3,000/whereas at the time

when he was relieved in March 1991, his basic salary was Rs.2,730/ and the total salary came to around Rs.4,200/-. The respondent No.3 was mainly and substantially discharging functions and duties of supervisory nature and was exercising authority and discretion of supervisor over the workmen working under his supervision and control and that, therefore, the respondent No.3 would fall outside the Purview of the term "workman" defined under Section 2(s) of the Act and he would be in a supervisory or non workman category.

3.2 It is further submitted that due to the actions of the respondent No.3 and more particularly the action of delay caused by the respondent No.3 by consuming time in prosecuting the petition and then by Letters Patent Appeal, the defence of the petitioner company got prejudice and was adversely affected inasmuch as the delay caused disposal/loss of documents contemporaneous or absence of or non-availability of witnesses and though the petitioner company had, at the relevant time, likely to demonstrate that the respondent No.3 was conferred with and exercising power of recommending leave and/or overtime, signing gate passes, deciding the requirement of material and intending required material etc. Instead of appreciating the situation, the respondent No.1 Court has unfortunately led the burden of or consequence of failure to produce documentary or oral evidence regarding nature and type of the functions and jobs discharged by the respondent No.3, at the steps of the petitioner company. The

petitioners humbly submit that in arriving at such consequence and recording such observations, the respondent No.1 Court has committed error of law and jurisdiction.

4. As against this, learned Advocate for the respondent-workman submitted that the petitioner was working with the respondent company as Engineer (Maintenance).Having regard to the nature of duties assigned and performed by petitioner, he was covered by the definition of term “workman” as per section 2 (s) of the Industrial Disputes Act, 1947. The services of the petitioner were terminated on 93-1991 by way of punishment and without following any procedure prescribed in law and without paying retrenchment compensation and other legal dues.

4.1 The said Reference has been partially allowed by the Labour Court by award dated 30-3-2007 whereby the Labour Court has held that the petitioner is covered by definition of the term “workman”; that the order of termination dated 9-3-1991 is illegal and consequently the Reference is partially allowed.

4.2 Reliance on the decision of the Apex Court in case of ***Arkal Govind Raj Rao Vs. Ciba Geigy of India Ltd., Bombay***, reported in **AIR 1985 SC 985**., to contend that definition of a workman cover the nature of work of the workman.

4.3 Reliance is also placed on the decision of the Apex

Court in case of ***Anand Regional Coop. Iol Seeds Growers' Union Ltd. Vs. Shaileshkumar Harshadbhai Shah***, reported in **(2006) 6 SCC, 548**.

4.4 Reliance is placed on the decision of this Court in case of ***Rameshbhai D.Patel Vs. United Catalyst India Limited***, reported in **2006 (3) GCD, 2514**.

5. Having heard learned Advocates for the parties and having perused documents on record, it appears that the Employer's petition being Special Civil Application No.28475 of 2007 has been admitted and interim stay of award is granted on compliance of Section 17B by this Court as per order dated 12.05.2008.

6. It also appears that the respondent herein had joined the company on 24.091985. He had joined the company on the basis of the appointment letter. He had been given the post of Shift Engineer (Maintenance) when he joined his duty in the said company. Thereafter, the post was revised to the Engineer (Maintenance). The said company kept him on probation for the period of one year. Thereafter, on 15/11/86, the first party was made permanent by the letter issued by the company and the pay increment was also granted from time to time.

7. Petitioner No.1 company is, inter alia, carrying on activities-of manufacturing technical grade pesticides like

Fenvalerate, Carbendazim, Cypermethula, MPB and Quinalphos and for that purpose, the petitioner company has a manufacturing facility / plant at the address shown in the cause title. Respondent No.3, as mentioned hereinabove earlier, joined the petitioner company as Shift Engineer (Maintenance) w.e.f. 24.9.1985, for which an appointment letter dated 12.10.1985 was issued in his favour by the petitioner company. The petitioner was, on completion of the probation period, confirmed by an order dated 15.11.1986, Respondent No.3 was relieved and his employment was put to an end by the petitioner company by order dated 9.3.199. Along with the said communication order dated 9.3.1991, the petitioner company had also forwarded a cheque dated 9.3.1991 for an amount of Rs.11,521/towards payment of one month's notice pay and other dues payable to him upon being relieved. Upon being aggrieved by the said communication-order dated 9.3.1991, the respondent No.3 approached the High Court directly by preferring a writ petition being SCA N0.1664/1991. The said writ petition was finally heard and disposed of by this Court by the judgment and order dated 13.12.1991. Being aggrieved by the said judgment and order, the respondent No.3 preferred Letters Patent Appeal being LPA N0.166/1992. The said LPA was, subsequently, disposed of by the Court, in view of the statement made by the respondent No.3, by order dated 24.01.2002 permitting the respondent No.3 to withdraw the petition so as to avail alternative remedy. It appears that subsequently the

respondent No.3 approached the authorities under the Act with his grievance against the aforesaid communication and order dated 9.3.1991 relieving him from the employment of the company. Upon conclusion of the proceedings initiated by the authority under the Act in pursuance of the grievance made by the respondent No.3, the respondent No.2 herein made the impugned Order of Reference dated 2.1.2003 (at Annexure-B). The said Order of Reference culminated into Ref. (LCB) N0.6/2003 and thereafter, the respondent No.1issued notices to the parties. In the said proceedings of the subject reference, the respondent No.3 filed his statement of claim on 27.1.2003. During the proceedings of the said reference, the respondent No.3 filed various documents under a list documents being Exh.5 dated 21.4.2003, Exh.16 dated 7.7.2004, Exh. 19 dated 21.07.2004, Exh.32 dated 13.04.2005 and Exh.56 dated 07.07.2006.

8. After his services were terminated by order dated 09.03.1991, the respondent had in the first instance filed writ petition in this Court being SCA No. 1664/1991. The writ petition was filed on a premise that the respondent company was “State” within the meaning of Article 12 of the Constitution of India and action of termination of service of the petitioner without holding any inquiry was violative of Articles 14 and 16 of the Constitution of India. The said writ petition however came to be dismissed by the learned Single Judge of this Court by judgment and order dated

13-12-1991 as not maintainable. In Special Civil Application No.1664 of 1991, this Court passed an order on 13.12.1991, where this Court in no uncertain terms observed as under:-

> "18. As pointed out in the Affidavit-in-Reply services of the petitioner were terminated in accordance with Clause (10) of the Appointment letter and accordingly, the petitioner was given one month's notice pay as well as other legal dues payable to him. It is well settled that remedy of Article 226 is unavailable to enforce a contract. Contractual obligation in the ordinary course, without even statutory complexion cannot be enforced in the petition under Article 226. A contract of personal service cannot ordinarily be specifically enforced and Court normally would not give declaration that the contract subsists and the employee even after having been removed from service, can be deemed to be in service against the will and consent of the employer. This Rule however is subject to three well recognized exceptions:-
>
> (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India (ii) here a worker is sought to be reinstated on being dismissed under the Industrial Law; (iii) where a statutory body acts in breach of violation of mandatory provisions of statute. The present case does not fall in any of the above referred recognized exceptions and, therefore, I am of the view that the petitioner is not entitled to the reliefs prayed for in the petition. <u>The petitioner at the best would be entitled to institute a suit in regular civil court and if the civil court comes to the conclusion that</u>

> the dismissal order is bad in law, then the petitioner would be entitled to damages according to law."

9. The petitioner therefore filed LPA No.166 of 1992 which came to be admitted. when the appeal came up for hearing, the petitioner sought permission to withdraw the writ petition itself with liberty to avail alternative remedy. This Court by order dated 24-1-2002 granted permission to withdraw the main writ petition to avail alternative remedy and the petition was disposed off as withdrawn. The Division Bench in LPA No.166 of 1992 passed an order on 24.01.2002, which reads as under:-

> "….. After having heard the learned advocates for the other side and considering the facts, permission Io withdraw the petition to avail the alternative remedy is granted. Obviously, therefore the petition shall stand dismissed as having been withdrawn. Further, as a necessary corollary, LPA would not assume any survival value and therefore, It shall, also, stand dismissed as having become infractuous in view of the permission for withdrawal of the writ petition……"

10. The Court has taken into consideration the evidence of the witness vide Exh.45, who has deposed regarding the nature of work performed by the respondent-workman. Yet another deposition recorded vide Exh.59 would also indicate the nature of duty discharged by the respondent-workman. These evidences indicate that the petitioner was discharging duty of Maintenance Engineer in Plant-B and was in Grade-9. The depositions also

specify the hierarchical grading in the petitioner-company. The employees above Grade-7 are of the Management Cadre. The Labour Court has completely disregarded this evidence, which according to this Court is most relevant for the purpose of deciding the status of workman.

11. While disregarding the aforesaid evidence, the Labour Court has proceeded specifically in para-33 of the impugned award that the petitioner-company ought to have produced evidence in the nature of whether the respondent-workman has sanctioned any leave, sanctioned any overtime or prepared any gate passes for employees to go home or has made any appointment or ordered dismissal.

12. When the Labour Court, instead of referring to this evidence already on record to establish the nature of work of the respondent, has decided to chase the evidence which is not on record and then on the basis that such evidence not being on record, concluded the workman will be covered in the definition of workman, this is where, in the opinion of the Court, perversity has crept in. The nature of work referred to hereinabove is not the only and exhaustive list of work to differentiate between the workman and the management employee.

13. At this stage, it will be useful to refer to another set of documentary evidence in the form of appointment letter dated

12.10.1985 at Mark 5/15 and also letter dated 15.10.1986 by which the workman was confirmed vide Mark 5/10. The relevant clause of this document is as under:-

> "This has a reference to your application for the position of "SHIFT ENGINEER" in out organization and the subsequent interview you had with us. WE have pleasure in offering you the following post on the terms and conditions stated in this letter.
>
> 1. Your designation will be "SHIFT ENGINEER'."

13.1 Similarly, the relevant portion of the confirmation order is as under:-

> "The Management is pleased to confirm your services with the company as "SHIFT ENGINEER" with effect from 24 September 1986 on your successful completion of the probation Period with US.
>
> Further, you are granted an increment of Rs.130/- in your present basic salary in Grade IX of the Company with the same effect. Hence, you shall now be paid a basic salary of Rs.1930/per month effective, 01 July, 1986.
>
> You shall now be eligible for the next increment on O1 July, 1987."

14. The definition of a workman under the Industrial Disputes Act reads as under:-

> "2(s) 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"

15. The Labour Court appears to have lost sight of aforesaid document, which cannot be disputed by the parties and which clearly specifies the grade of the respondent, the pay scale of the respondent and the fact that the salary of the respondent was above the salary of Rs.1600/-, which was stipulated for attracting the definition of the workman at the relevant time. Hence, the Court is of the view that on the basis of the nature of work of the respondent as well as his salary, the respondent will not attract definition of a workman.

16. The Labour court Court erred in not appreciating that the company witness Mr. R.M.Patel had stated in his oral evidence that while he (R.M.Patel) was working in Production Engineering Department, he frequently had to interact with the respondent No.3 in his capacity as Maintenance Engineer in Maintenance Department and that under his supervision, workman in the category of fitter, helper, etc. were working. It was also stated by

said Mr.R.M.Patel that there would be about 2-3 fitters in one plant in a shift, whereas in general shift there would be 3-4 fitters and that it was the respondent s No.3 who used to give instructions regarding work to fitter and helper. The petitioners humbly submit that while overlooking the said evidence by Mr.R.M.Patel, the respondent No.1 Court chose to refer to only cross-examination and has erred in discarding the evidence of Mr.R.M.Patel by disbelieving the same. The respondent No.1 Court has also erred in ignoring and misconstruing the evidence of Mr. R.M. Maidamwar, who also in his oral evidence stated that the fitter and helper used to work under respondent No.3 and that the fitter and helper are supposed to work as per the instructions of Maintenance Engineer and in the event of breakdown, it is the Maintenance Engineer, who guides and instructs the fitter and helper to carry out the repair work and it is the Maintenance Engineer, who would determine the requirement of parts, spares, etc.

17. In view of the aforesaid, where this Court is convinced that the respondent will not fall in the definition of a ‘workman’, the issue of raising industrial dispute will have to be decided in favour of the petitioner-company as a necessary consequence. The judgment and award of the Labour Court therefore requires to be quashed and set aside. Accordingly, judgment and award dated 30.03.2007 passed by the Labour Court, Bharuch in Reference (LCB) No.6 of 2003 is quashed and set aside. Special Civil

Application No.28475 of 2007 stands allowed. Rule is made absolute. No order as to costs.

18. Considering the prolonged litigation, after relieving of the respondent from service in the year 1991, the Court deems it fit not to pass any separate order regarding Section 17B allowances. Accordingly, the allowances paid to the respondent under Section 17B may not be recovered from the respondent. Special Civil Application No.8871 of 2008 stands dismissed accordingly. Rule is discharged. No order as to costs.

**Sd/-**
**(A.Y. KOGJE, J)**

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