

(2005) 12 DEL CK 0160

In the Delhi High Court

Case No : Writ Petition (Civil) No. 16064 of 2004

Anand Kumar

APPELLANT

Vs

The Management State Bank of India

RESPONDENT

Date of Decision : 23-12-2005

Acts Referred:

Evidence Act, 1872 — Section 114
Industrial Disputes Act, 1947 — Section 2, 25F
State Bank of India Act, 1955 — Section 50(3)

Citation : (2005) 12 DEL CK 0160

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Nitin Bhardwaj, for the Appellant; Rajiv Kapoor, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—By way of this writ petition an Award dated 6th May, 2004 by the Central Government Industrial Tribunal cum Labour Court has been impugned by the workman whereby the reference was answered against him. The entire challenge by the petitioner is raised on the plea that he had placed sufficient material on record and had established that he was appointed by the respondent bank to do miscellaneous jobs including the work of a waterman with effect from 1st May, 1984 on a last drawn salary of Rs. 325/- per month. Placing reliance on a document dated 1st September, 1989, it is contended that this document constituted a letter of appointment which established that the petitioner had been engaged by the bank. In these circumstances, according to the petitioner/workman, the action of the respondents in terminating the services of the workman on 27th March, 1990 tantamounted to retrenchment as defined u/s 2(oo) of the Industrial Disputes Act, 1947. The same having been effected without compliance of Section 25F of the enactment, rendered the action of the respondents illegal entitling the petitioner to reinstatement with all consequential benefits.

2. The respondent has repudiated the contentions of the petitioner. It has come in the evidence that there is a local implementation committee which runs the canteen in the branch of the bank. The composition of this committee is from members of all categories of the staff working at the local branch/office. The respondent bank has nothing to do with the affairs of this local implementation committee which runs the canteen. The committee is an independent and voluntary association formed by employees for their own welfare. The petitioner was engaged by this local implementation committee as a canteen boy and during this period he was bringing drinking water from the ground floor to the second floor of the bank premises which was of barely half an hour duration for which he was paid a mutually a daily wage rate. The recruitment to the posts in the bank has to be as per its recruitment rules. All appointments are made after proper advertisement, test/interview. In the instant case, there is nothing on record to show that any appointment of the petitioner was effected by the bank after following any rules and guidelines. The bank placed material on record to show that it was a local implementation committee which discontinued the services of the petitioner with effect from 28th March, 1990. Since there was no privacy or contract with the petitioner in terms of payment of salary etc. it had to be and was rightly held that the petitioner was not entitled to any amount.

3. The petitioner has placed strong reliance on the photocopy of the document dated 1st November, 1989 which was produced before the industrial adjudicator in support of his employment by the bank. Perusal of this document shows that the same is a photocopy and has been signed by the petitioner and two witnesses. The document is hand written in vernacular purporting to be an agreement entered into between the petitioner and the manager of the respondent bank of its Kirti Nagar branch. Perusal of this document shows that the petitioner had agreed to supply fresh water in glasses, jug, etc and to fill the water in the desert cooler and undertake their weekly cleaning with effect from 1st December, 1989 to 30th October, 1990 as per the needs of the bank. For this period, the remuneration which the petitioner was to receive was clearly stipulated.

4. This document was not proved in the evidence in accordance with law and was not even put to the management in its evidence. The petitioner also did not refer to this document in his affidavit by way of evidence. The document, is at the face of it, not an agreement between the bank and the petitioner. It is also not signed by any person authorised to execute the same on behalf of the bank. In the affidavit by way of evidence filed by the petitioner on 23rd September, 1996, the petitioner claimed to be appointed as a peon/waterman with effect from 1st May, 1994 and claimed that his last drawn salary was Rs. 325/-

5. There is material variance in the dates from which the petitioner has claimed to have been employed. In the statement of claim filed by the petitioner, he had claimed that he was appointed with effect from 1st May, 1984 while in evidence he has stated that he was appointed on 1st May, 1994. In his cross examination,

the petitioner stated that he was working as a watchman and not as a peon. He further stated that he was not given any appointment letter by the bank from 1st May, 1984 and that he was being paid only Rs. 2 per day for filling water. So far as his appointment was concerned, the workman could not deny that he was appointed by the local implementation committee but submitted that his appointment was by the manager of the bank.

6. It is well settled that the primary burden of proof to establish a plea rests on a person so claiming. In this behalf reference can be appropriately made to the judicial pronouncement in *State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, Nilgiri Coop. Marketing Society Ltd. v. State of Tamil Nadu*; 2001 LLR 148 *Dhyan Singh v. Raman Lal* 1996 Lab. I.C. 202 *Swapan v. First Labour Court, West Bengal* and 1973 Lab. I.C. 398 N.C. *John v. TTS and CE Workers Union*; Thus burden lies on a person claiming the establishment to be an industry to place positive facts before the court in this behalf. For this reason, the primary burden to establish relation of employment also lies on the workman who is claiming the same.

7. The present case Therefore has to be examined in the light of this legal position.

8. The respondent bank had specifically urged that no appointment letter was issued to the petitioner and he had never marked his attendance or presence in any attendance register and he was never paid wages or other benefits by the bank. No evidence to the contrary has been pointed out.

9. Even the post on which the petitioner has claimed employment is not certain. In the order dated 20th February, 2002 of the Central Government referring the dispute for adjudication, reference is made to the petitioner being engaged as a canteen boy. However, in the claim filed the workman has stated that he was appointed to perform the job of peon/waterman.

10. In *State Bank of India and Others Vs. State Bank of India Canteen Employees' Union (Bengal Circle) and Others*, . it has been held that the local implementation committee is not a bank. The observations of the Apex Court in this pronouncement in this behalf are noteworthy and are to the following effect :-

29. Learned counsel for the employees referred to clause (12) of the scheme which provides that a canteen should be run on no-profit-no-loss basis. The said clause also makes it clear that the subsidy provided is only to the extent of funds made available and that members concerned of LIC would ensure that articles are purchased on cash payment and no liability is incurred from any source. It has nothing to do with the running of the canteens by the Bank. It is part of the scheme which provides how efficiently LIC should run the canteens.

34. Further, we entirely agree with the decision rendered in RBO case by the three-Judge Bench and the facts in the present case are similar to the facts of

that case. Presuming that the privilege of providing canteen facilities to the employees exists, yet it would be difficult to hold that the Bank should provide the said facility by running a canteen by itself. To promote canteen facilities by providing subsidy or other facilities is altogether different from running the canteen. Running of a canteen in a small branch having staff strength less than a particular limit may not be economical, but may be a waste. It has been pointed out by the learned counsel for the Bank that in some areas, staff strength may be less than 10. Further, the appointment of the employees by the Bank has been regulated by the State Bank of India General Regulations, which are statutory Regulations framed by Reserve Bank of India with the previous sanction of the Central Government in exercise of powers conferred by Sub-section (3) of Section 50 of the State Bank of India Act, 1955. In the case of employees of canteens run by LIC, the Bank does not have any control in their appointment and the aforesaid Recruitment Rules are not required to be observed.

36. Further, whether the Bank should provide canteen facilities in a branch having a staff strength of 100 or more employees on the basis of bipartite agreement between the Bank management and the All-India SBI Staff Federation, is a matter of policy decision and may depend upon viability and other factors of running of such canteens at other branches. It is for the Bank to decide in which branches canteen facilities should be provided and not by the employees of the canteens run by the Local Implementation Committees. At the most, employees of the Bank can raise such a contentions.

11. It now becomes necessary to examine the plea on behalf of the petitioner that the bank has made an admission to the effect that the petitioner was appointed by the bank and that the workman's services were actually terminated. It is noteworthy that pleas of the bank have to be seen in their entirety. There is nothing on record which could persuade this court to hold that there was an admission that the petitioner has been appointed as an employee of the respondent bank. There is a categorical statement on the part of the respondent that it had never employed the petitioner and that the petitioner had never marked any attendance in the register or received salary from the respondent bank. There is also no document to show that the petitioner was an employee of the respondent bank.

12. An objection has been taken by the petitioner that the respondent bank failed to produce any document to show that the petitioner was engaged by the local implementation committee. In this behalf, it was only if the petitioner had discharged the onus and burden of proof cast on him and had placed some material on record to indicate that he had been employed by the respondent bank that the respondent bank would have been required to displace the case set up by the petitioner by leading positive evidence.

13. In *Manager, R.B.I., Bangalore Vs. S. Mani and Others*, it was held by the apex court that it is only if the initial burden of proof, which was on the

workman, was discharged to some extent, that a finding can be returned in respect of the defense of the management. Furthermore, a plea having been set up by the workman, the initial burden of proof was on the workman to show that he had been employed by the respondent bank in the claim capacity on the stated terms. The circumstances in which the court may draw an adverse inference against the management has been succinctly set down thus :-

22. An adverse inference, Therefore, was drawn for non-production of the attendance register alone, and not for non-production of the wage-slips. Reference to other relevant documents must be held to be vague as the appellant herein had not been called upon to produce any other documents for the said purpose.

23. It appears that the learned Tribunal considered the matter solely from the angle that the appellant had failed to prove its plea of abandonment of service by the respondents.

24. The question came up for consideration before this Court recently in *Siri Niwas* wherein it was held : (SCCp.198, para 15)

15. A court of law even in a case where provisions of the Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non- production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds.

25. Referring to the decision of this Court in *Indira Nehru Gandhi v. Raj Narain* this court observed :(Siri Niwas case, SCC p. 199, para 19)

19. Furthermore a party in order to get benefit of the provisions contained in Section 114 III.(g) of the Evidence Act must place some evidence in support of his case. Here the respondent failed to do so.

26. In *Hariram* this Court observed : (SCC p. 250, para 11)

11. The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously.

27. As noticed hereinbefore, in this case also the respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference. Burden of proof

28. The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from

that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service stating :

It is admitted case of the parties that all the first parties under the reference CRs Nos. 1 to 11 of 1992 have been appointed by the second party as ticca mazdoors. As per the first parties, they had worked continuously from April 1980 to December 1982. But the second party had denied the above said claim of continuous service of the first parties on the ground that the first parties has not been appointed as regular workmen but they were working only as temporary part-time workers as ticca mazdoor and their services were required whenever necessity arose that too on the leave vacancies of regular employees. But as strongly contended by the counsel for the first party, since the second party had denied the above said claim of continuous period of service, it is for the second party to prove through the records available with them as the relevant records could be available only with the second party.

29. The Tribunal, Therefore, accepted that the appellant had denied the respondents' claim as regards their continuous service.

30. In Range Forest Officer v. S.T. Hadimani it was stated : (SCC p. 26, para 3)

3. ...In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year proceeding his termination. Filing of an affidavit is only his own statement in his favor and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside.

31. In Siri Niwas this Court held : (SCC pp. 197-198, para 13)

13. The provisions of the Evidence Act, 1872 per se are not applicable in an industrial adjudication. The general principles of it are, however, applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent workman herein to show that he had worked for 240 days in the preceding twelve months prior to his alleged retrenchment. In terms of Section 25F of the Industrial Disputes Act, 1947, an order retrenching a workman would not be effective unless the conditions precedent Therefore are satisfied. Section 25F postulates the following conditions to be fulfilled by an employer for effecting a valid retrenchment : (i) one month's notice in writing indicting the reasons for retrenchment or wages in lieu thereof; (ii) payment of compensation equivalent

to fifteen days" average pay for every completed year of continuous service or any part thereof in excess of six months. It was further observed : (SCC p. 198, para 14)

14. ... As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case.

32. Yet again in Hariram it was opined : (SCC p. 250, para 10)

10. ... We cannot but bear in mind the fact that the initial burden of establishing the factum of their continuous work for 240 days in a year rests with the respondent applicants.

14. In Karnataka State Road Transport Corporation and Another Vs. S.G. Kotturappa and Another, , the Apex Court held thus :-

13. Regulation 10 provides for procedure for appointment, sub-regulation (5) whereof reads as under :- 10. (5) A selected candidate waiting for being appointed regularly in accordance with these Regulations may be appointed as a temporary employee before such regular appointment against a short-term vacancy or as a substitute in place of regular employee under suspension pending enquiry or suspension as a measure of punishment or on leave for a period not less than one month but not exceeding 3 months.

15. In Cholan Roadways Limited Vs. G. Thirugnanasambandam, , the court observed thus :-

14. The learned Presiding Officer, Industrial Tribunal, as noticed hereinbefore, opined that the passengers of the bus should have been examined. It does not appear from the order dated 29-4-1988 passed by the Presiding Officer, Industrial Tribunal that the respondent herein made any prayer for cross-examining the passengers who travelled in the ill-fated bus and who were examined by the said Shri M. Venkatesan. It is evident from the order of the learned Tribunal that only in the show-cause notice filed by the respondent in response to the second show-cause notice, was such a contention raised. The learned Presiding Officer, Industrial Tribunal in his impugned judgment further failed to take into consideration that even if the statements of the said passengers are ignored, the misconduct allegedly adduced by Shri M. Venkatesan

together with the circumstantial evidence brought on record. The learned Single Judge of the High Court although referred to the sketch drawn by PW 1 on the site (Ext. P-2) and 4 photographs (Ext. P-8) but ignored the same observing that unless witnesses were examined in support of the two exhibits, it is not possible to draw any inference there from. The Division Bench of the High Court did not examine the materials on record independently but referred to the findings of the Industrial Tribunal as also the learned Single Judge to the effect that from their judgments it was apparent that the driver had not been driving the bus rashly and negligently.

16. Perusal of the record of the instant case shows that the petitioner miserably failed to discharge the primary burden of proof which was cast on him. There is no material which could at all indicate even, let alone, establish a relationship of employment between the respondent bank and the petitioner.

17. In view of the facts which have been established on record, the judgment of the Apex Court reported at Haryana Tourism Corporation Ltd. Vs. Fakir Chand, etc. etc., has no bearing on the issues raised in the present case. The petitioner has miserably failed to establish a relationship of employment with the respondent. The petitioner before this court cannot possibly be held to be entitled to reinstatement or to compensation from the respondent.

18. The parameters and scope of judicial review on issues of fact in industrial awards have been circumscribed within narrow limits by judicial pronouncement. Noteworthy in this behalf are the observations of the Apex Court in AIR 2000 SC 1508 entitled Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Anr. in which it was held thus:-

The learned single Judge seems to have undertaken an exercise, impermissible for him in exercising writ jurisdiction, by liberally reappreciating the evidence and drawing conclusions of his own on pure questions of fact, unmindful, though aware fully, that he is not exercising any appellate jurisdiction over the awards passed by a Tribunal, presided over by a Judicial Officer. The findings of fact recorded by a fact-finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another view which can be reasonably and possibly one taken. The Division Bench was not only justified but well merited in its criticism of the order of the learned single Judge and in ordering restoration of the Award of the Tribunal. On being taken through the findings of the Industrial Tribunal as well as the order of the learned single Judge and the judgment of the Division Bench, we are of the view that the Industrial Tribunal had overwhelming materials which constituted ample and sufficient basis for recording its findings, as it did, and the manner of consideration undertaken, the objectivity of approach adopted and reasonableness of findings recorded seem to be

unexceptionable. The only course, Therefore, open to the writ Judge was the relevant criteria laid down by this Court, before sustaining the claim of the canteen workmen, on the facts found and recorded by the fact-finding authority and not embark upon an exercise of re-assessing the evidence and arriving at findings of ones own, altogether giving a complete go-bye even to the facts specifically found by the Tribunal below.

19. In this context the law laid down by the Apex Court in *Sadhu Ram v. Delhi Transport Corporation* AIR 1984 SC 1967 observed :

Para 5... nor do we think that it was right for the High Court to interfere with the Award of the Industrial Tribunal under Article 226 on a mere technicality. Article 226 is a device to secure and advance justice and not otherwise. In the result, we allow the appeal, set-aside the judgment of the High Court and restore the Award of the Presiding Officer.

20. In *Harbans Lal Vs. Jagmohan Saran*, the court ruled :

Para 5 ... The limitations on the jurisdiction of the High Court under Article 226 of the Constitution are well settled. The Writ Petition before the High Court prayed for a Writ in the nature of certiorari, and it is well known that a Writ in the nature of certiorari may be issued only if the order of the inferior tribunal of subordinate court suffers from an error of jurisdiction, or from a breach of the principles of natural justice or is vitiated by a manifest or apparent error of law. There is no sanction enabling the High Court to reappraise the evidence without sufficient reason in law and reach finding of fact contrary to those rendered by an inferior court or subordinate court. When a High Court proceeds to do so, it acts plainly in excess of its power.

21. In *Calcutta Port Shramik Union Vs. Calcutta River Transport Association and Others*, , the court further observed that :

Para 10. The object of enacting the enacting the Industrial Disputes Act, 1947 and of making provision therein to refer disputes to Tribunals for settlement is to bring about industrial peace. Whenever a reference is made by the Government to the Industrial Tribunal, it has to be presumed ordinarily that there is a genuine industrial dispute between the parties which requires to be resolved by adjudication. In all such cases, an attempt should be made by Courts exercising powers of judicial review to sustain as far as possible the Awards made by the Industrial Tribunal instead of picking holes here and there in the Awards on rival points and ultimately frustrating the entire adjudication process before the Tribunals by striking down the Awards in hyper technical grounds. Unfortunately, the orders of the Single Judge and of the Division Bench have resulted in such frustration and have made the Award fruitless on an untenable basis.

22. In *Sudhoo Vs. M/s. Haji Lal Mohd. Biri Works and others*, was held that the High Court should not have interfered with the findings of the fact reached by the prescribed authority on appreciation of evidence.

23. In the instant case also the petitioner has assailed the award only on issues of fact which would be impermissible. The petitioner failed to discharge the primary burden of proof cast on him. For all the foregoing reasons, I find no merit in this petition which is hereby dismissed.