
(2010) 10 CAL CK 0076
In the Calcutta High Court
Case No : Writ Petition No. 373 of 2008

Civcon Construction Pvt. Ltd. and Another	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2

Citation : (2011) 1 CHN 509

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Soumya Mozumdar, for the Appellant; Indrajit Sarkar, Mrinal Kanti Sardar and Asish Kumar Das, for Private Respondent, for the Respondent

Judgement

Aniruddha Bose, J.—The writ Petitioners in this proceeding have challenged an award passed by the Fifth Industrial Tribunal directing reinstatement of the Respondent No. 3 with 50% of back wages with effect from 20th July, 2001. The proceeding in which the award was passed arose out of an industrial dispute raised by the Paschim Banga Nirman Karmi Union, being the Respondent No. 4 in the writ petition, over allegation of illegal termination of the service of the Respondent No. 3. Reference was made by the State Government to the Fifth Industrial Tribunal for adjudication on the following issues.

(1) Whether termination of services of Shri Tapas Das by the management w.e.f. 20.07.2001 is justified? (2) What relief, if any, is the workmen entitled to?

2. As it appears from records, the Respondent No. 3 was initially engaged by the Petitioner No. 1 in the month of April, 1993 and his service, described as a site supervisor in the organisation was confirmed with effect from 1st April, 1994. This appears from the letter of appointment of the Respondent No. 3, a copy of which has been made Annexure "PI" to the writ petition. The service of the

Respondent No. 3 was terminated by a letter dated 20A June, 2001 on the ground that the company was going through a lean period of business. The letter of termination however specified that as the company was unable to utilise the service of the Respondent No. 3 in a manner beneficial to the company, his termination was sought to be effected. Clause 8 of the letter of appointment contained stipulation for termination upon giving a notice of one month. The industrial dispute originated from this letter of termination.

3. The respective parties filed their written statements before the Tribunal. The company (i.e. the Petitioner No. 1) took preliminary objection on maintainability of the order of reference on two grounds. The first one was that the Respondent No. 3 was not a workman. The second ground was that the union, which espoused the cause of the Respondent No. 3 had no representative character to represent any employee of the company. Evidence was led on behalf of the respective parties before the Tribunal. The character of the Respondent No. 3 as a workman was disputed on the basis that he was discharging supervisory duties in course of employment.

4. Upon considering evidence adduced on behalf of the parties, the Tribunal held against the company on both the preliminary issues. On merit, the Tribunal found that retrenchment of the Respondent No. 3 was not justified.

5. The main ground on which the said award is challenged before me is that the Tribunal wrongly came to conclusion in deciding the status of the Respondent No. 3 as a workman. Further submission on behalf of the Petitioner is that back wages was directed to be paid by the Tribunal without any evidence adduced on behalf of the Respondent No. 3 that he had remained unemployed for the period commencing from the date of his termination from employment. In support of his submissions, learned Counsel for the Petitioners relied on three decisions, being the cases of (i) Management of Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh, and (ii) Mukesh K. Tripathi Vs. Sr. Divisional Manager, L.I.C. and Others, and a decision of this Court in the case of Subir Guha Thakurta Vs. Johnson and Johnson Ltd. and Others, . The basic proposition of law in support of which these authorities were cited is that the issue as to whether an employee is a workman or not is a jurisdictional issue, and the finding of the Tribunal on this issue is subject to judicial review under Article 226 of the Constitution of India. I accept the submission advanced on behalf of the Petitioners that adjudication on the question as to whether an employee is a workman or not is a jurisdictional issue. Accordingly, I shall examine first whether the Tribunal committed any jurisdictional error in coming to its finding on these preliminary issues.

6. The decisions of the Hon"ble Supreme Court in the cases of Sonapat Cooperative Sugar Mills Ltd. (supra) and Mukesh K. Tripathi (supra) have been cited on behalf of the Petitioners primarily to assail the finding of the Tribunal to the effect that the Respondent No. 3 was a workman. It has been argued, relying on the decision in the case of Sonapat Cooperative Sugar Mills Ltd. (supra), that to come within the ambit of the definition of workman within the ambit of Section

2(s) of the Industrial Disputes Act, 1947, it is not sufficient for a workman to demonstrate that he was not engaged to perform any managerial or supervisory duties. My attention has been drawn to the following passage of that judgment where it has been held, after referring to the definition of workman in Section 2(s) of the Act:

15. A bare perusal of the aforementioned provision clearly indicates that a person would come within the purview of the said definition if he: (i) is employed in any industry; and (ii) performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work.

(16) Thus, a person who performs one or the other jobs mentioned, in the aforementioned provisions only would come within the purview of the definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regards the dominant nature thereof. With a view to give effect to the expression to do "any manual, unskilled, skilled, technical, operational, clerical or supervisory work," the job of the employee concerned must fall within one or the other category thereof. It would, therefore, not be correct to contend that merely because the employee had not been performing any supervisory duties, ipso facto he would be a workman.

A decision of the Hon'ble High Court of Allahabad in the case of Delta Engineering Company (P) Ltd. Meerut v. Industrial Tribunal v. Meerut and Ors. reported in 1998 LLR 622 was also cited for the proposition that the primary burden was on the party who alleged existence of certain state of affairs that such a state existed.

But this case is not an authority that absolute onus would be on the workman to establish that he is a workman. Moreover, the factual context of that case is entirely different from the facts of this. In the case of Delta Engineering Company (P) Ltd. Meerut (supra), allegation was that thumb impressions/signatures of the employees were obtained on blank papers, and later on these papers were being misused as resignation letters. It was in that context it was held that the primary burden of establishing the fact that thumb impression were obtained on blank papers.

7. In this case, the Tribunal began its probe on the issue as to whether the Respondent No. 3 had initially-discharged the onus of establishing that he was a workman. Upon being satisfied that he had discharged the onus in demonstrating that he was not working as a supervisor, the Tribunal examined the employer's case on the same issue. Learned Counsel for the Petitioners argued that the initial onus was never discharged, as the workman did not establish that he was performing the categories of work specified u/s 2(s) of the Act. He had merely established that he was not working as a supervisor. But the Tribunal did not come to its ultimate finding on the preliminary issue that he was a workman

solely on the evidence that the Respondent No. 3 was not discharging the work of a supervisor. The Tribunal thereafter considered the evidence adduced by the respective parties and thereafter came to a specific finding that the principal and substantial work done by the Respondent No. 3 was nothing but work done by a workman.

I do not think that the Tribunal committed any jurisdictional error in embarking upon this exercise, which was conducted on the basis of evidence adduced by the respective parties. The Tribunal did not come to its ultimate finding solely on the basis that the Respondent No. 3 was not doing the work of a supervisor. The Tribunal went one degree beyond, and on the basis of evidence, arrived at a further finding that he was discharging the duties of a workman.

8. A proceeding before the Industrial Tribunal cannot be subjected to a forensic probe as in the case of a criminal trial, where an accused runs the risk of losing his life or liberty. It was argued on behalf of the Petitioners that the preliminary issue, in this case being whether the Respondent No. 3 is a workman or not, can be subjected to judicial review. I accept this as a proposition of law. But the scope of judicial review of an award of the Tribunal is limited, as held in the cases of *P. Kasilingam Vs. P.S.G. College of Technology*, and *Titagarh Paper Mills Co. v. 1st Industrial Tribunal, W.B.*, reported in 1982 Lab IC 307. In the present case, I do not think the finding of the Tribunal is perverse. The Tribunal has appreciated the evidence led before it, and has arrived at its decision upon appreciation of such evidence. There is no allegation of non-compliance of the principles of natural justice. Accordingly, I sustain the finding of the Tribunal on the preliminary point that the Petitioner is a workman.

9. In his letter of appointment, a copy of which has been made Annexure P-I, the job of the said Respondent was described as site supervisor. But such description by itself cannot transform the Respondent No. 3 as a supervisor. The actual work done by him was required to be examined to decide his status. And this is what the Tribunal has done. Such approach of the Tribunal cannot be faulted as being misdirected or erroneous.

10. The impugned award was assailed in the writ petition on two other grounds. One of them is that the union could not have espoused the cause of the workman, and the other one was that the order of termination was otherwise valid. These points, however, were not emphasised in course of hearing. Both these points have been dealt with in the award and I do not find any error on the part of the Tribunal on its findings on these two issues either.

11. The other point urged before me was that the Tribunal had committed error of law in awarding 50% back wages for the period commencing from the date of his termination from employment. Back wages cannot be granted automatically and it would be the primary responsibility of the workman to establish that he was not gainfully employed during the period he remained under termination, as grant of back wages is compensatory in nature.

12. In this case, in their written statement, the union had pleaded that the workman was not gainfully employed. It has been recorded in the award that practically no evidence was adduced on behalf of the workman or the union on this count. The Tribunal however observed that a pragmatic approach was to be adopted, and in the interest of justice awarded 50% back wages. For the month of June, 2001 and upto 19 July, 2001, arrear salary has been directed to be paid. Learned Counsel for the Petitioners argued that since the employee or the union did not discharge their initial onus on the point that the employee was not employed during this long period of time, the Tribunal committed error in law in awarding 50% as back wages. The case of the Petitioners is that no sum should have been awarded as back wages at all.

13. The position of law on this point is that even if an order of dismissal is set aside, direction for back wages would not automatically follow. Ordinarily, a workman would have to demonstrate that he had remained unemployed during the period in question to claim back wages for the period between the date of his termination and the date on which he is directed to be reinstated. The nature of his job, the length of his service, his conduct would be some of the other factors which would have to be considered by the Tribunal while examining the question of back wages and a Tribunal would have wide discretion in deciding this issue. In the present case, the Tribunal has observed that a pragmatic approach is called for, and awarded 50% back wages even though the workman did not adduce evidence to establish that he had remained unemployed during the subject period.

14. Judicial authorities are uniform that the Tribunal has wide discretion on this issue. But in my opinion, the Tribunal had erred in awarding 50% back wages in the absence of the workman discharging his initial onus in establishing that he was not gainfully employed during the subject period, i.e. the period between 20th July and the date of the award. I accordingly, set aside that part of the award.

15. Under ordinary circumstances, I would have remanded the matter to the Tribunal to re-examine the question of back wages, because in the present case, the claim of the workman that he had remained unemployed was not altogether absent. In the written statement of the union, it was specifically pleaded that the workman had no other source of income and he was not gainfully employed elsewhere. Because of failure to adhere to the principle of evidence of discharging the onus in course of the proceeding, I am setting aside this part of the award. But I do not expect a workman or the union for that matter to possess sufficient legal skill on the aspect of adducing evidence in course of an industrial adjudication. For this reason, I do not think that the claim of the workman for back wages shall stand altogether forfeited.

16. In the present case, however, I am not inclined to remand the matter on practical considerations. The dispute is almost a decade old, and I do not think another round of adjudicatory proceeding shall serve the interest of any of the

parties. The workman was confirmed in service in the year 1995, though his name remained on muster roll of the company prior to 1993. Thus he served in permanent post for about six years before being terminated. Considering all these factors I am of the opinion that 20% back wages would be equitable in the present case, and I direct the Petitioners to pay back wages at the rate of 20% instead of 50% as directed by the Tribunal, for the period specified by the Tribunal. So far as the direction for payment of arrear salary, I do not think this direction warrants any interference. The other parts of the award shall stand affirmed.

17. From the date of the award till the date of this judgment the Petitioner would be paid his entire wage as the Tribunal in the award had directed reinstatement of the Respondent No. 3 and that part of the award is being confirmed. Since the Tribunal had directed his reinstatement, depriving the Respondent No. 3 the full benefit of such reinstatement just because that part of the award was challenged in a writ proceeding would not be in the interest of justice. Computation of dues of the Respondent No. 3 shall be made expeditiously and such dues shall be released within eight weeks from the date of communication of this order.

18. The writ petition shall stand disposed of in the above terms.

19. There shall, however, be no order as to costs.

20. Urgent photostat certified copy of this order, if applied for, be supplied to the parties forthwith, subject to compliance with all requisite formalities.