

(1976) 11 OHC CK 0017
In the Orissa High Court

Gouri Charan Kanungo

APPELLANT

Vs

Industrial Tribunal and Another

RESPONDENT

Date of Decision : 09-11-1976

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 2, 2A

Citation : (1978) 1 LLJ 276

Hon'ble Judges : S. Acharya, J;B.K. Ray, J

Bench : Division Bench

Judgement

S. Acharya, J.—The petitioner was the head clerk-cum-accountant in the Kendrapara Central Co-operative Bank. That Bank in 1956 was amalgamated with the Cuttack United Central Co-operative Bank Limited (hereinafter referred to as the "Bank"), and the petitioner continued in service under the Cuttack Bank. While working in the Cuttack Bank the petitioner was promoted to the post of Branch Manager of that Bank and was confirmed in the said post with effect from 1-7-64. While working as such, the petitioner, by the order dated 19-10-68, was noticed to retire from service on superannuation with effect from 1-11-68 on completion of 55 years of age as prescribed in the subsidiary rules of the Bank framed in 1956. The petitioner made a representation against the said order on 11-10-68 and he was allowed to continue in service till 31-3-69 and was retired with effect from that date. The petitioner filed O.J.C. No.868/69 in this Court challenging the said order of retirement, but the said O.J.C. was dismissed as not maintainable. Thereafter, at the instance of the petitioner, the State Government referred the following question to the Industrial Tribunal (hereinafter referred to as the "Tribunal"), for adjudication:

Whether the superannuation of Sri G.C. Kanungo by the Management of the Cuttack United Central Co-operative Bank Ltd. with effect from 31-5-69 (the correct date is 31-3-69) is legal and/or justified ? If not, what relief Shri Kanungo is entitled to?

2. The Presiding Officer of the Industrial Tribunal by his award dated 27-9-74

held that as the petitioner was not discharged, dismissed, retrenched or terminated from service, the deeming provisions in Section 2A of the Industrial Disputes Act (hereinafter referred to as the Act) would not come to his rescue to make the question referred, an industrial dispute within the moaning of the Act. and since the said dispute was not an industrial dispute, the reference of the same to the Tribunal was not maintainable and the Tribunal had no jurisdiction to decide the said question. The petitioner by this writ petition has prayed for quashing the said award of the Industrial Tribunal.

3. It is urged by Mr. Misra, the learned Counsel for the petitioner, that the finding of the Tribunal, that the dispute referred to cannot be deemed to be an industrial dispute, is correct. According to Mr. Misra the superannuation of the petitioner by the, management amounts to termination and/or retrenchment of his service and that being so, the dispute or difference between the petitioner and his employer arising out of such superannuation which has been referred to the Tribunal is an industrial dispute as provided u/s 2A of the Act, and go the Tribunal was clearly within its jurisdiction to decide that question. According to the learned Advocate-General, who appeared for the opposite party, on the question as framed and referred to the Tribunal it was only expected to decide as to whether the superannuation of the petitioner was legal and/or justified, and not whether the said superannuation amounted to termination or retrenchment of service He contends that such a question regarding superannuation as referred to the Tribunal cannot be deemed to be an industrial dispute capable of being raised at the instance of an individual workman under the provisions of Section 2A of the Act, and so the said question could not have been referred to or answered by the Tribunal.

4. Section 2A of the Industrial Dispute Act is as follows:

2A. Dismissal, etc., of an individual workman to be deemed to be industrial dispute:

Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workman is a party to the dispute.

Only certain disputes as specifically mentioned in this section can be deemed to be industrial disputes which can be referred to the Tribunal at the instance of an industrial workman. All industrial disputes which come within Section 2(k) cannot be referred to the Tribunal at the behest of an individual workman. Only those disputes which are deemed to be industrial disputes under the provisions of Section 2A can be referred to the Tribunal at the instance of an individual workman. The above position of law is not contested by Mr. Misra. A dispute regarding superannuation, as specifically posed in the question referred to the

Tribunal, is not mentioned in Section 2A. Mr. Misra, however, contends that by the said order of superannuation the petitioner has actually been retrenched from service or his service has otherwise been terminated and the dispute referred to the Tribunal is in effect a dispute connected with, or arising out of such termination or retrenchment of service, and so the said dispute shall be deemed to be an industrial dispute as contemplated u/s 2A of the Act and hence reference of the same to the Tribunal at the instance of the petitioner was perfectly lawful and justified, and the Tribunal had jurisdiction to decide this dispute. In reply to the above submission, the learned Advocate-General contends that the petitioner's service was not terminated, nor was he ever retrenched from service and the question referred to is a pure and simple question relating to the superannuation of the petitioner which is not covered u/s 2A of the Act, and so the dispute referred to is not and cannot be a dispute regarding termination or retrenchment of the services of the petitioner, nor is it connected with or arises out of any termination or retrenchment of the petitioner's service, and hence it cannot be deemed to be an industrial dispute u/s 2A of the Act to be agitated by an individual workman under the provisions of the Act. He further contends that the Tribunal has to decide the particular dispute referred to it, if it is, or amounts to, an industrial dispute under the Act, and it cannot allow the parties to change the nature, complexion or the purport of the said dispute on the plea that the real dispute is what is contended before the Tribunal and not what has been referred to it. In support of his last mentioned contention, he has cited the decision reported in *Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others*, , in that case the 3rd and the 4th terms of reference are as follows:

3. Whether the strike at the Cloth Mills and the lock-out declared by the management on 24-2-1966 are justified and legal and whether the workmen are entitled to wages during the period of the strike?

with regard to the said terms of reference their Lordships observed:

...It was not competent to the workmen to contend before the Tribunal that there was no strike at all; equally, it was not open to the management to argue that there was no lock-out declared by it. The parties would be allowed by their respective statement of cases to place before the Tribunal such facts and contentions as would explain their conduct or their stand, but they could not be allowed to argue that the order of reference was wrongly worded and that the very basis of the order of reference was open to challenge. The cases discussed go to show that it is open to the parties to show that the dispute referred was not industrial dispute at all and it is certainly open to them to bring out before the Tribunal for the ratifications of the dispute. But they cannot be allowed to challenge the very basis of the issue set forth in the order of reference.

They further lay down that the parties cannot be allowed to go to a stage further and contend that the foundation of the dispute mentioned in the order of reference was non-existent and that the dispute was something else. u/s 10(4)

of the Act it is not open to the Tribunal to entertain such a question.

5. The question as framed and referred to the Tribunal is a pure question relating to the superannuation of the petitioner, and the Tribunal has been asked to decide whether that order of superannuation passed by the management is legal and/or justified. That being so, there was no dispute before the Tribunal relating to the termination or retrenchment of service of the petitioner, nor was there any dispute connected with or arising out of such termination or retrenchment of service. It is evident from Annexures 1 to 4 that the petitioner has been superannuated as he completed his 55th year as provided in the subsidiary rules of the Bank. The case made out by the petitioner before the Tribunal as it appears from the written statement (Annexure 5) filed by him, is that the subsidiary rules, framed by the Bank fixing the age of superannuation at 55 years, are not valid, they have no application to the petitioner, and that the superannuation of the petitioner is mala fide and not according to rules. Nowhere in the written statement the petitioner made out a case of retrenchment or termination of his service by the management. The Bank by its written statement and rejoinder before the Tribunal contested the petitioner's case mainly on the basis that as per the subsidiary rules of the Bank an employee was to retire at the age of 55 and so the petitioner was rightly retired on his reaching the age of superannuation, the petitioner was not a workman in the Bank, but was holding the post of the Manager of the said Bank performing duties purely of a managerial nature and as such the reference at his instance was not maintainable in law; and that dispute concerning superannuation could not be decided as industrial dispute under the provisions of the Act but could have been decided by competent authority u/s 68 of the Orissa Co-operative Societies Act, Before the Tribunal both the parties raised questions regarding the validity and justifiability of the order of superannuation, and no question of termination or retrenchment of service was agitated. There the petitioner did not also assert or allege that the order of superannuation in effect amounted to termination and/or retrenchment of his service. Nowhere in any manner it was alleged that, the petitioner's service was terminated or he was retrenched from service. So, on the question as referred to the Tribunal and the stand taken by both the parties before it, the only question was whether the superannuation of the petitioner was legal and/or justified That question is entirely different in its scope and ambit from the question whether the said order of superannuation amounts to termination or retrenchment of service. The issues for enquiry into these two questions and the materials required for the same would be entirely different. That being so, on the question specifically referred to the Tribunal the other question did not arise for consideration and the Tribunal was not called upon to answer to other questions. Moreover, on the authoritative decision of the Supreme Court as stated above, it was not permissible on the part of any of the parties to agitate such a question of retrenchment or termination before the Tribunal. The parties also cannot be allowed to urge that the reference is wrongly worded and that the real dispute is something else as now stated by Mr. Misra.

Moreover, to allow the parties to agitate the other question would require redrafting and amendment of the question referred and that would completely change the text, nature and the complexion of the question referred, and as is well settled, that is not permissible under the law.

6. On hearing the counsel appearing for both the parties, I am firmly of the question that the Tribunal is perfectly justified in saying that the dispute in question cannot be deemed to be an industrial dispute coming within the scope and ambit of Section 2A of the Act, and so the dispute could not have been referred to the Tribunal at the instance of the petitioner, and hence the said reference is not maintainable.

7 The learned Advocate-General has further urged that the petitioner was not a workman in the Bank, and so no industrial dispute could be referred to the Tribunal at his instance or behest.

8. Undisputedly, an industrial dispute coming within Section 2A of the Industrial Disputes Act can be initiated only by a workman. The "workman" as defined in the Industrial Disputes Act, so far as is relevant, is as follows:

2. (s). "Workman" means a person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed 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 retirement has led to that dispute, but does not include any such person

(i) xx xx xx(ii) xx xx xx (iii) Who is employed mainly in a managerial or administrative capacity?

Thus from the above definition it is obvious that a man who is employed mainly in a managerial or administrative capacity is not workman within the meaning of that word under the Act. So a person who is employed in any industry to do any managerial or administrative work cannot be said to be a workman. True it is that merely from the designation of a person as manager or administrative of an industry one cannot in all cases jump to the conclusion that he is or was not a workman. One has to see whether he is or was employed in the industry to do any managerial or administrative work. In this case, the petitioner himself has admitted in paragraph 3 of the writ petition that while he was working as Branch Manager of the Bank, he was noticed to retire from service on superannuation with effect from 1-11-68. In paragraph 3 of the written statement filed by the Bank before the Tribunal it was specifically asserted that the petitioner was not a workman as the duties performed by him in the Bank were purely managerial in nature, and so the reference to the Tribunal at his instance was not maintainable in law. In the additional affidavit filed in this Court by opposite party No.2 in connection with this writ petition it has again been specifically alleged that the

petitioner was holding the post of a Branch Manager in the Bank; he was performing mainly administrative and supervisory duties and was exercising all financial powers relating to his branch ; and that he was not a workman as defined in the Act, and so the Tribunal had no jurisdiction to entertain a dispute relating to him and referred to it at his instance. The petitioner has not refuted the above factual assertion on affidavit by the Bank. He has, nowhere mentioned that he was a workman in the said Bank. On the contrary in the writ petition itself he has stated that he was working as the Branch Manager of the Bank. In order to get an industrial dispute decided by the Tribunal, it was for the petitioner to specifically state and establish before the Tribunal and in this Court that he was a workman and was not employed mainly in a managerial or administrative capacity in the said Bank. Such a statement was necessary in this case in view of the above-mentioned assertion of the opposite parties before the Tribunal and in this Court. The petitioner at least should have refuted or countered the above-mentioned assertion in the additional affidavit of the Bank filed in this Court. On the un rebutted assertion of the opposite parties that the petitioner was the Branch Manager and was mainly performing the duties of managerial and administrative nature in the said Bank, and the admission of the petitioner himself in this writ petition that he was working as the Branch Manager of the Bank, the reference of the dispute to the Tribunal only at his instance was not maintainable on this ground also.

9. So this writ petition has no merit and is not maintainable and is accordingly dismissed. We assess the hearing fee at Rs. 100 (one hundred).