

(1977) 04 CAL CK 0004
In the Calcutta High Court

Grindlays Bank Ltd.

APPELLANT

Vs

Central Government Industrial Tribunal

RESPONDENT

Date of Decision : 21-04-1977

Acts Referred:

Constitution of India, 1950 — Article 136, 226

Citation : 82 CWN 1041 : (1978) 2 LLJ 462

Hon'ble Judges : Sabyasachi Mukherji, J

Bench : Single Bench

Judgement

Sabyasachi Mukherji, J.—In this application under Article 226 of the Constitution, the petitioner, Grindlays Bank Ltd. challenges an award dated 4th April, 1977 made by the Central Government Industrial Tribunal. Before the Tribunal there was a reference of the following dispute :

Whether, the management of Chowringhee Road Branch of the Grindlays Bank, Calcutta is justified in posting Shri Nagina Ram, a junior staff to the post of dafttry, overlooking the claim of Shri Ramdeo Pandey, a senior sub-staff? If not, to what relief is the aggrieved workman entitled ?

2. The case of Ramdeo Pandey was taken up by the appropriate union and the reference was at the instance of the union. The contention of the union was that the petitioner-Bank had selected one Nagina Ram as dafttry with effect from 1st September, 1975 overlooking his seniority and therefore, the union wanted Ramdeo Pandey to be appointed to the post which carried a special allowance and the Bank should be ordered to pay arrears of allowance due to him from that day. It was contended on behalf of the petitioner-Bank that the practice of promotion was not followed among the subordinate staff whenever a member of the staff was put in charge of the dafttry work which carried a special allowance and further that Ramdeo Pandey had refused the offer to the post of dafttry when it was made to him on 24th November, 1973 and as such he had lost his right to claim the special allowance post of dafttry which fell vacant on a permanent basis with effect from 1st September, 1975. It is clear, therefore, that a post of dafttry

fell vacant. The said post carried a special allowance. It is not apparent and the Tribunal had not proceeded on that basis that there was question of any promotion, as such, but it was a clear case of selecting a staff for working as daftly, which as mentioned before, carried a special allowance. In this connection, it may be relevant to refer to the bipartite settlement dated 19th October, 1966, It is clear that there was nothing, in the bipartite settlement or earlier settlements, that the posting of members of subordinate staff to the post which carried special allowance should be on the seniority basis. The Tribunal has so held and, in my opinion rightly. However, learned Counsel for the respondents drew my attention to Clause 5, 11 of the settlement of 19th October, 1966 which reads as follows :

5. 11 Wherever a bank requires a workman to work in a post carrying a special allowance it will normally be done by an order in writing.

Clause 5. 13 of the said settlement is as follows :

5. 13 The standardization of nomenclature as aforesaid should not by itself lead to withdrawal of special allowances from persons already drawing them except where specifically provided in this settlement. Subject to this bank will be free to reallocate the duties of any workman to bring them in conformity with the duties specified in the Appendix "B" hereto. Where for the first time a special allowance provided for in this settlement is introduced in an office, in reallocating the duties, preference will be given from among those who are already performing the appropriate duties. In specifying the duties it is not the intention that in each office branch posts should be created in each category for which special allowance has been agreed to.

3. The Tribunal after discussing the evidence came to the conclusion that there was no satisfactory evidence that when the post of permanent daftly became vacant Ramdeo Pandey had refused to accept the post. On analysis of the evidence, the Tribunal was of the view that there was no evidence that any offer was made to Ramdeo Pandey on 1st September, 1975 when the post had become vacant on permanent basis. The Tribunal, further held, that the fact that Ramdeo Pandey had refused to accept the temporary post of daftly on 24th November, 1973 was not a ground or circumstance to hold that he was not entitled to get the post when it fell vacant on permanent basis, This was also admitted that Nagina Ram was junior to Ramdeo Pandey. On analysis of the facts and circumstance the Tribunal found that there was nothing on evidence to show that Ramdeo Pandey never worked as daftly. The Tribunal also found that there was no order passed in writing when Nagina Ram was appointed to the post of daftly on 1st September, 1975. It was also found by the Tribunal that the work of daftly did not require any special skill. The Tribunal had noted that Ramdeo Pandey had in fact worked as daftly in November, 1972 and January, 1973 as extras. There was nothing on record also, according to the Tribunal, which indicated that the work of Ramdeo Pandey was unsatisfactory. In those circumstances the Tribunal was of the view that overlooking the claim of Ramdeo

Pandey, who was senior subordinate staff in relation to Nagina Ram, the selection of Nagina Ram was not justified which amounted to discrimination of one workman against the other. The Tribunal thereupon observed as follows :

When there is a post which carries a special allowance and that post is given to a junior member of the subordinate staff, the senior member of the staff is definitely prejudiced and that amounts to a discrimination of one staff against the other and it is to avoid such discrimination it is necessary that seniority amongst the subordinate staff is maintained as and when selection is made to the post of dafttry. In para 5. 13 on the special allowance in the settlement dated 19-10-66 it is stated that in re-allocating duties preference would be given from amongst those who are already performing the appropriate duties which carry special allowance. It is admitted that Sri Ramdeo Pandey acted as dafttry in 1972 and 1973. There is no evidence that Nagina Ram acted as dafttry any time before 1972 and 1973. So, the fact that Ramdeo Pandey acted as dafttry earlier than Nagina Ram was a circumstance which should have weighed with the Bank when the permanent post of dafttry was offered to Nagina Ram. In this regard the fact that no order in writing was given either to Ramdeo Pandey or Nagina Ram is a circumstance to show that the Bank had no reasonable ground to refuse the dafttry's post to Ramdeo Pandey. It is apparent from the circumstances that the failure on the part of the Bank to choose Ramdeo Pandey as dafttry is an act of discrimination and that it cannot be allowed to stand. The Bank is not justified in overlooking the claim of Ramdeo Pandey, a senior man to Nagina Ram.

Having held as aforesaid the Tribunal held the Bank was not justified in overlooking the claim of Ramdeo Pandey to the post of dafttry and directed with effect from 1st September, 1975 Ramdeo Pandey may be deemed to have been appointed to the post of dafttry on that basis, being the seniormost staff but the back allowance was not wholly allowed and the Bank was directed to pay special allowance to Ramdeo Pandey from the date of the reference, that is, 24th June, 1976. The Tribunal further directed that the Bank should permit Ramdeo Pandey to work as dafttry with immediate effect. As mentioned hereinbefore, the said award is challenged in this application under/Art. 226 of the Constitution as erroneous in law.

4. Before I deal with other contentions, it may be noted that on behalf of the respondent-workman, it was submitted that in view of Clause (3) of Article 226 of the Constitution and in view of the fact that special appeal lay to the Supreme Court under Article 136 of the Constitution from the decision or the award of the Tribunal, this application under Article 226 of the Constitution was not entertainable. In view, however, of the decision of the Division Bench of this Court in the case of *Dabur Private Ltd. v. State of West Bengal* (1978) 1 C.L.J. 145: 82 C.W.N. 384, it must be held that Article 136 of the Constitution constituted no alternative remedy which on the provisions of Article 226(3) of the Constitution could be invoked as a bar to the entertainment of an application under Article 226 of the Constitution. This contention urged on behalf of the

respondent-workman, therefore, cannot be accepted.

5. The next question, is, whether it could be said that the award of the Tribunal contained errors apparent on the face of the award. On behalf of the petitioner, it was urged that selection was a management function. Selection of one employee in preference to another was a matter in which the management was free to act. Unless, it was urged, that the management had acted in a mala fide manner or in a manner which could be described as unfair labour practice or victimisation of anybody, the decision of the management could not be interfered with except in a case where the aggrieved workman could be said to have a legal right. It was urged that in the instant case the indisputable position was that there was no rule indicating that the seniormost person should be selected to a post having a special allowance. On this aspect of the matter on behalf of the petitioner reliance was placed on the observations of the Supreme Court in the case of *Management of Brooke Bond India (P) Ltd. Vs. Workmen*, , where at page 669 the Supreme Court observed that generally speaking promotion was a management function but it might be recognised that there might be occasions when a Tribunal might have to interfere with the promotions made by the management where it was felt that persons superseded had been so superseded on account of mala fide or victimisation. Even so after finding of mala fide or victimisation, it was not the function, according to the Supreme Court, of the Tribunal to consider the merits of the various employees itself and then to decide whom to promote or whom not to promote. If any Industrial Tribunal found that promotions had been made which were unjustified on the ground of mala fide or of victimisation, the proper course for it to take was to set aside the promotions and ask the management to consider the case of superseded employees and decide for itself whom to promote except, of course, the person whose promotion was set aside by the Tribunal.

6. Relying on the aforesaid observations of the Supreme Court it was urged on behalf of the petitioner in this case that the Tribunal has erred in holding that the selection of Nagina Ram was unjustified and further has also erred in directing that instead Ramdeo Pandey Should be selected to work in the post of daftry.

7. It was submitted, however, on behalf of the respondent-workman that in view of the order of reference and in view of the powers of the Industrial Tribunal it could not be said that the Tribunal had committed any error. My attention was drawn to the observations of the Supreme Court in the case of *Rohtas Industries Ltd. Vs. Brijnandan Pandey*, , where the Supreme Court observed that the discretion which the Industrial Tribunal had must be exercised in accordance with well-recognised principle. There was undoubtedly a distinction between commercial and industrial arbitration. Industrial arbitration might involve the extension of an existing agreement or making of a new one or in general creation of new obligation or modification of old ones while commercial arbitration generally concerned itself with the interpretation of the existing obligations and disputes relating to the existing agreement. A Court of law, according to the

Supreme Court, proceeded on the footing that no power existed in the Court to make contract for the people and the parties must be deemed to make their own contract. The Courts reached the limit of power when they enforced the contracts which the parties had made. An Industrial Tribunal, however, was not so fettered and might create new obligations or modify the contracts in the interest of industrial peace to protect legitimate trade union activities and to prevent unfair practice and/or victimisation. But an Industrial Tribunal could not ignore altogether an existing agreement and the existing obligations for no rhyme or reason whatsoever.

8. Reliance was also placed on the observation of the Supreme Court in the case of *Bharat Bank Ltd. v. Their Employees* 1950 II L.L.J. 921 and reliance was placed on the observations of the Court, at page 948 of the report which were as follows :

We would now examine the process by which an Industrial Tribunal comes to its decisions and I have no hesitation in holding that the process employed is not judicial process at all. In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within / the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligation between them which it considers essential for keeping "industrial peace. An industrial dispute as has been said on many occasions is nothing but a trial of strength between the employers on the one hand the workmen's organisation on the other and the Industrial Tribunal has got to arrive at some equitable arrangement for averting strikes and lock-outs which impede production of goods and the industrial development of the country. The Tribunal is not bound by the rigid rules of law. The process it employs is rather an extended form of the process of collective bargaining and is more akin to administrative than to judicial function.

9. These two decisions of the Supreme Court were reviewed by the Supreme Court in the case of *The New Maneck Chowk Spinning and Weaving Co. Ltd., Ahmedabad and Others Vs. The Textile Labour Association, Ahmedabad*, , where at page 870 the Supreme Court, after reviewing the various points observed that there was no doubt, therefore, that it was open to an industrial Court in an appropriate case to impose new obligations of the parties before it or modify contracts in the interest of industrial peace or give awards which might have the effect of extending existing agreement or making a new one. But the Supreme Court cautioned, that, however, did not mean that an industrial Court could do anything and everything when dealing with an industrial dispute. This power was conditioned by the subject-matter with which it was dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to that matter

and laid down by the Legislature or by the Court.

10. Therefore, for the purpose of industrial peace and harmony, it is true that the Industrial Tribunals are not fettered wholly in the way the Courts of law are fettered and can create new obligations and new rights between the parties. Yet in enforcing these new rights, the Tribunals are bound to be guided by the law as it is. In my opinion, it is indisputable that in the absence of any rule controlling promotion or selection, the management has the power to select or promote any one it chooses. The management, however, is not free to act in a manner which can be described as *mala fide* or victimisation or unfair labour practice. Therefore, in each case, where a question of this nature falls for consideration, it has to be examined, whether, there is any rule which the management has violated in selecting or promoting the person concerned. Secondly, it is necessary to find out whether the management has acted in a manner which can be described as *mala fide* or which conduct can be characterised as unfair labour practice or as victimisation.

11. Keeping the aforesaid principles in mind I have to examine the facts of the instant case. It is true that Ramdeo Pandey was the senior subordinate staff. It is, however, equally true that there is no rule which enjoins that only the senior person would be selected for the work of *daftary* which carried a special allowance. The position, therefore, is the management was free to select anyone it preferred but it could not act in a *mala fide* manner or in a manner which could be described as unfair labour practice or victimisation. On behalf of the respondent-workman it was urged that victimisation or unfair labour practice were not the expressions of art nor were they defined and, therefore, if from the facts found by the Tribunal it could be inferred that the Tribunal has in fact proceeded on these basis, then the decision of the Tribunal could not be interfered with as being erroneous in law. On this aspect learned Counsel for the workman urged before me that here in this case there were several factors which indicated that the management had acted in an unfair manner. He urged that both of the workmen concerned were equally fit for the work of *daftary*. Ramdeo Pandey had previously worked as a *daftary* and his work was not found to be unsatisfactory. It was also emphasised that he was the senior. Counsel also emphasised that in order to resist the claim of Ramdeo Pandey the management had put forward a plea that Ramdeo Pandey had refused to work though offered to him Which plea was found to be unsustainable by the Tribunal on facts. Basing his arguments on these facts, counsel, submitted that the Tribunal in effect had found that the management had acted in a *mala fide* manner or in a manner which could be described as unfair labour practice or victimisation. It is true that unfair labour practice or victimisation, or *mala fide* in this context are not defined expressions. But it is fairly well-settled what these convey. In a particular case, in my opinion, unfair labour practice would be if the management in order to curb any trade union activities or in order to punish a workman concerned for his trade union activities denies his lawful claim or prevents him from getting his lawful allowance or curbs his right, then in such circumstances the action of the

management could be described to be unfair labour practice or victimisation and such a conduct would be mala fide in this context. In the instant case there is no finding that Ramdeo Pandey was not being selected because of any of his activities which was objected to by the management. There is no evidence that there was any desire or attempt to victimise Ramdeo Pandey for any of his alleged trade union activities or otherwise. It is not so much a question whether anyone was unfit or not but selecting among the two fit persons there is an element of choice which indisputably, as mentioned by the Supreme Court, belongs to the management unless as I have indicated there are rules which gives the seniormost a claim to be chosen as such. In this case there is no such rule as such. In the absence of any such rule the facts enumerated before, in my opinion do not warrant that there was a finding of unfair labour practice or victimisation (sic) indeed the Tribunal has not found or used the expression unfair labour practice or victimisation. If there is no finding of mala fide conduct or undue labour practice or victimisation then, in my opinion, the Tribunal had no jurisdiction to interfere with the promotion or selection which, as I have mentioned before, is a function of the management. But counsel for the workman contended that in view of the order of reference, which was not challenged, the Tribunal was bound to proceed on the basis that Ramdeo Pandey had a claim and it could not say that Ramdeo Pandey had no claim as such. I am unable to accept this contention. The order of reference undoubtedly uses the expression, " overlooking the claims of Ramdeo Pandey". That does not in any way preclude the examination of the question whether Ramdeo Pandey had any claim. Ramdeo Pandey would certainly have a claim if his right was being denied to him, if there was any rule for giving promotion or selection to the seniormost staff or if Ramdeo Pandey had not been selected or prompted because of his trade union or labour activities. Therefore, the Tribunal had to examine and such examination was open before the Tribunal to consider this question. It cannot, therefore, be said that the order of reference precluded the petitioner from urging before this Court that the Tribunal had committed an error of law in making the award,

12. In the view I have taken, in my opinion, the award of the Tribunal is erroneous in law on the face of it and, therefore, it is set aside and the award is quashed. The respondents are restrained from giving effect to the award. In the facts and circumstances of this case the rule is made absolute and there will be no order as to costs.

13. The advocate-on-record of the petitioner will pay back the amount lying deposited with them to their client after four weeks from date.