

(1989) 02 CAL CK 0025

In the Calcutta High Court

Case No : Appeal No. 668 of 1988 and Matter No. 30 of 1983

Indian Aluminium Co.

APPELLANT

Vs

Third Industrial Tribunal and Others

RESPONDENT

Date of Decision : 08-02-1989

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : 96 CWN 827 : (1993) 3 LLJ 199

Hon'ble Judges : Suhas Chandra Sen, J; Baboolal Jain, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Suhas Chandra Sen, J.—Suhas Chandra Sen, J: This case arises out of an order passed by the Third Industrial Tribunal on 16th November, 1982 on a reference from the Government of West Bengal, Labour Department on 4th November, 1980.

2. The facts relevant for the purpose of this case may be briefly set out as under:

Animesh Chandra Sen is a Geologist. He passed M.Sc. from Calcutta University and joined Indian Aluminium Co. Ltd. The initial appointment was as an Assistant Geologist on temporary basis at the Company's Lohardaga Mines, near Ranchi in the State of Bihar. This appointment was with effect from 1st November, 1963 at a salary of Rs. 500A per month. Shri Sen was made permanent with effect from 1st June 1965 and his salary was raised to Rs. 550/- per month. Later on his salary was further increased to Rs. 988/- per month.

On 25th September, 1969, Shri Sen was given a promotion to the post of Geologist and was assigned also technical, personnel and public relation activities and there was further increments to Rs. 988/- per month.

On or about 5th December, 1970, the respondent No. 2 Animesh Chandra Sen along with two other officers of the company T.K.. Dey and A.K. Mondal met with

a serious accident on a highway while travelling in a hired taxi. At that time, the respondent No. 2 Shri Sen worked at Chandghad Mines of the company. The result of the accident was serious and respondent No. 2 was admitted to a Nursing Home in Belg. The respondent No. 2 had suffered a fracture in his right hip bone. Thereafter, the respondent No. 2 came to Calcutta and was posted at the Head Office with effect from 31st December, 1970. According to the company such transfer was made purely on a compassionate ground in order that the respondent No. 2 might receive medical care and treatment according to his choice. This is, however, disputed by the respondent No. 2.

3. The case of the company is that the respondent No. 2 continued to remain ill and unfit to take up the responsibility of Geologist in the field for any continuous period of time. The case of the company is that the company required the respondent No. 2 to return to Chandghad for field work during the dry season from October, 1979 to May, 1980. One Dr. S. Dasgupta who examined the respondent No. 2 advised him to avoid strenuous work over a long period. As a result, the respondent No. 2 expressed his inability to go to Chandghad and perform the work for which he was employed. The company, therefore, decided to terminate the service of the respondent No. 2 on the ground of ill health.

4. The case of the company is that it is not a case of retrenchment at all. The respondent No. 2 continued to remain ill and was unfit to take up the responsibility of Geologist in the field throughout the season. The company waited for a long time to enable the respondent No. 2 to recover completely from the injury that he had suffered since the respondent No. 2 was incapable of discharging the duties for which he was employed, his service had to be terminated on the ground of ill health. The respondent No. 2 was informed of the decision of the company to terminate his service by a letter dated 26th November, 1979.

5. On or about 10th December, 1979, the respondent No. 2 by a letter dated 10th December, 1979 addressed to the Labour Commissioner raised an industrial dispute on the termination to his employment. The company's case was that the respondent No. 2 was never "workman" within the meaning of Section 2 of the Industrial Disputes Act, 1947 and could not, therefore, claim any protection of the provisions of the Industrial Disputes Act. The Labour Commissioner or the Conciliation Officer could not entertain any application of the respondent No. 2.

6. The Assistant Labour Commissioner being the Conciliation Officer held a meeting for conciliation on 30th June, 1980. In that proceeding, the stand taken by the company was that the respondent No. 2 was not a workman and was not capable of continuing his service due to ill health in the same manner in which he was discharging his duties on or about 5th December, 1970. Therefore, there was no question of Conciliation Officer entertaining any application made by the respondent No. 2.

7. The conciliation efforts failed. On 4th November, 1980 the Government of

West Bengal referred to the Third Industrial Tribunal the following dispute for adjudication:

"Whether termination of service of Shri Animesh Chandra Sen is justified ? To what relief, if any, is he entitled ?

8. The Third Industrial Tribunal made an award on 16th November, 1982 holding, inter alia, that the respondent No. 2 was a workman and the termination of employment of the respondent No. 2 was without justification. It was further held that it was a case of retrenchment without complying with the provisions of Section 25F of the Industrial Disputes Act. The Tribunal further held that, since the termination of service of the respondent No. 2 was not justified, he was entitled to reinstatement in the service of the company with full back wages. The decision of the Industrial Tribunal was challenged before this Court by a writ petition by the company. The writ petition was dismissed on 15.4.1988 by Prabir Kumar Majumdar, J. The appeal has been preferred from that Judgment. At the time when prayer was made for interim order staying the operation of the Judgment and order passed by Prabir Kumar Majumdar, J. on April 15, 1988, we decide to hear out the appeal without formalities and by consent of the parties, the appeal and the application are taken up together for hearing.

9. The contention of Mr. Ginwala appearing on behalf of the writ petitioner, the appellant herein are two-fold. Firstly, he has argued that the Industrial Tribunal had erred in coming to the conclusion that the respondent No. 2 was a "workman" within the meaning of Industrial Disputes Act. The second contention is that the Tribunal failed to appreciate that the respondent No. 2 was suffering from the aftermath of the accident and was not capable of doing work as he was doing before the accident. He was posted at the Head Office merely on compassionate ground but a Geologist has to work at any site where the company may employ him and is to undertake all the jobs that all the Geologists have to do at the Camp site for the purpose. The respondent No. 2 was not physically fit for this type of activity. The company had no alternative but to terminate his service on the ground of ill health and this could not be treated as retrenchment in any way.

10. The order of the Third Industrial Tribunal has been annexed to the writ petition. It appears that the Tribunal had gone in depth about the question whether the respondent No. 2 should be treated as a "workman". The facts that were brought on record were examined in detail, the documents that were produced were also examined. The issue framed before the Tribunal was : "Whether the termination of A.C. Sen is justified ? To what relief he is entitled to ?" The case before the Tribunal on behalf of the respondent No. 2 was that even after the accident on 5.9.1970, the respondent No. 2 had worked outside the Head Office for a number of times from 7.2.1970 to 30.12.1978 as and when the occasion demanded. There was a proposal to transfer him to West Coast Project again and he wanted medical clearance. The company did not wait for him to get medical clearance but terminated his service in a most unjust

manner. He had moved the Labour Commissioner and subsequently, the reference was made.

11. In the written statement the company said that the respondent No. 2 was not a workman at all. He was involved in a serious accident and became physically unfit. He was unable to take the appointment for field work on medical ground because of his ill health. When the respondent No. 2 was asked to return to field work, he could not do so and because there was no work at the Head Office, the company had to come to the conclusion that the respondent No. 2 could no longer be retained as Geologist. The company was justified in coming to the conclusion that the respondent No. 2's ill health was continuing and he could not work any more. The respondent No. 2 was not a "workman" at all as he was assigned to the Administrative and Personnel Department where he was supervising the activities of others and in the field he used to supervise the activities of drillers who were working under him. His job was akin to a Transport Engineer who, according to the Supreme Court, cannot be treated as a workman. The respondent No. 2 was exercising Managerial and Administrative functions and was receiving a salary of over Rs. 500/- (which was the material figure at that time) and as such he was not at all a workman.

12. This question has been examined by the Tribunal at length. The Tribunal found that while working in the West Coast Mines, respondent No. 2 had performed personnel and public relations work once in the year 1970. The only evidence in support of this contention was a letter dated 30.12.1970, This letter, however, was issued before he was transferred to Head Office. This letter was not shown to the respondent No. 2 while he was in the witness box and Sri Sen was not examined on this letter. Apart from this solitary material the company could not produce any other evidence to show that the respondent No. 2 was not "workman".

13. The company took a legal stand that it did not have to establish that respondent was working mainly in a supervisory character. This was not accepted by the Tribunal. The Tribunal relied upon a Judgment of the Supreme Court in the case of Ananda Bazar Patrika (P) Ltd. Vs. The Workmen, where the Supreme Court observed that in deciding the question whether a person is employed in a supervisory capacity or on clerical basis it has to be seen whether a person was mainly doing supervisory work. If the person was doing supervisory work mainly but incidentally or for a fraction of the time he was also doing some clerical work, then he was employed in a supervisory capacity. Conversely, if the main work done by a person was of clerical nature, the fact that some supervisory duties were also carried out incidentally or as a small fraction of the work done by him, will not convert his employment as a clerk into one in supervisory capacity.

14. The Tribunal thereafter examined the evidence and found that there was no document or any other evidence to show that the respondent No. 2 while employed at the Head Office was working in a supervisory capacity and exercised

functions mainly of a Managerial nature.

15. According to respondent No. 2 he had to do geological exploration and had to assist Mines Manager. The Branch Manager used to hand over data after chemical analysis at Belgaon to him for further study. He had visited the mines at least 27 times from the Head Office as ordered from time to time after the accident. Only once he had to cut short his programme on the ground of medical check up and was relieved by another assistant geologist. According to him, he had enough work in his hand when his service was terminated at the Head Office. In the cross examination, he stated that the Chief Geologist used to decide on the nature of the types of camps whether the camp should be large or small and the decree of geological exploration that had to be carried out. The Chief of Geologist also deputed one of his geologists to the field with specific instruction about survey and drilling work and assembling work to be done. He sought permission for repairing road while working in Lohardaga as he had no authority to spend money on his own. Various other witnesses including the Chief Geologist and the General Manager of the company were examined. After examination of the witnesses and the materials placed before it, the Tribunal came to the conclusion:

"I, therefore, hold that the job which Sen was asked to perform as a geologist was totally different from that of a transport engineer under Burma Shell Co. or Aircraft Maintenance Engineer under Indian Explosive. He merely took the assistance of manual labourers, such as drillers and samplers. The surveyors would merely locate the drill holes according to the plan prepared by the geologist. It is true that in the past he had some personnel and public relations activities, but there is no material to show apart from Ext. H/H that from 1971 onwards while working in the Head office he had any managerial or supervisory job. I, therefore, hold that Sen is a "workman" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. It must be remembered that personnel and public relations job was not mentioned in Sen's original appointment letter. The evidence reveals that while working in the Head Office Sen had done field work times without number. There is no paper to show that mercifully the company kept him at the Head Office at the cost of shareholders, money where he had practically done nothing. On the contrary, the evidence reveals that the geologist are posted at the Head Office for company's work. It is true that medical reports are damaging for Sen, but it is also likely that he might have improved physically, had he undertaken at least or a month a course in physiotherapy. On top of it, it must be remembered that no order of transfer to Changed Mines was actually served on Sen before terminating his appointment."

16. The point of termination of service was also dealt with by the Tribunal in the following manner:

"The letter dated 26.11.1979 - Ext .7, shows that the company terminated his employment, and I must say without justification. So it is very much a case of retrenchment without fulfilling Section 25F of the Industrial Disputes Act, 1947. Sri D.N. Mitra can hardly say that there was no work for him at the Head Office,

because Sen was not reporting to him ever. It is true that he could not conclude his field work in 1978, but from this, it cannot be said that he was ill throughout, for, he had been working at the Head Office. He did not say that he would not do field work but he merely prayed for time to accept transfer order which was yet to be passed. So, the order of termination was a trifle premature."

17. Mr. Ginwala has contended that the Tribunal failed to appreciate that at the campsite the respondent No. 2 was working in a supervisory capacity in that he had to supervise the drilling operation and the documents were produced in evidence and the evidence that were given from the witness box were not properly appreciated by the Tribunal. It was argued that the respondent No. 2 was not a workman at all. If the respondent No. 2 was not a workman, the Industrial Tribunal had no jurisdiction to go into the questions. The Tribunal could not give itself jurisdiction by wrongly deciding the preliminary issue. The jurisdictional fact could be examined and reappointed by the Court to decide whether the Tribunal had jurisdiction to entertain the reference and pass any order. Strong reliance was placed by Mr. Ginwala on the Judgment of the Supreme Court in the case of *State of M.P. v. Sardar D.K. Jadav* AIR 1968 SC 1186. The Supreme Court held that where the jurisdiction of an Administrative authority depended upon preliminary finding of a fact, the Court was entitled to determine on its own whether or not that finding to determine on its own whether or not that finding was correct.

18. In the case before the Supreme Court, the dispute was about whether Section 17 of the M.P. Abolition of the Jagirs Act was applicable to the facts of that case. The writ petitioner had prayed for quashing of two orders passed by the Collector and the two orders of the Additional Commissioner. The scope of controversy was whether the property in dispute could be described as "tank" and as such came within the purview of Section 25(1) of the Madhya Pradesh Land Revenue Act, 1959. The case of the State of M.P. was that the "tanks" claimed by the writ petitioner were really not tanks at all and in any case were in an "occupied land within the meaning of Section 5(c) of the Abolition Act.

19. The High Court had quashed the finding of the Collector and the Additional Commissioner, Gwalior Division that the property in dispute was not a "tank". On further appeal, the Supreme Court expressed the opinion that the High Court was in error in holding that Section 17 of the Abolition Act was applicable to the case and the disputes raised by the respondent should have been determined in accordance with the procedure envisaged u/s 17 of the Abolition Act.

20. Therefore, the decision of the Supreme Court really was that wrong provision of law was applied and the case did not come u/s 17 of the Abolition Act at all and therefore, the High Court was in error in following the wrong provision of law. The Supreme Court did not reappraise the evidence and come to the conclusion that the disputed property was a tank.

21. In the case of *Baldev Singh v. Union Explosives* 76 CWN 342 it was held by

this Court that the appellant Baldev Singh was not a workman within the definition of Industrial Disputes Act and could not raise an industrial dispute and the Tribunal had no jurisdiction to entertain or adjudicate upon such a dispute. In that case the appellant had appeared in person. He was an aircraft maintenance engineer drawing Rs. 2,275/- as salary. There was no doubt that the appellant was employed in a supervisory capacity and was doing managerial work. He controlled the workers working under him, and, even took disciplinary steps against the workers working under him in appropriate cases. As the head of the unit at the hanger, he was doing all the managerial work connected with maintenance and repairing jobs. On these acts, the Court held that in view of this evidence the petitioner could not be treated as a workman.

22. We were also referred to a Judgment of this Court in the case of Enamelnager Development Corporation v. Second Industrial Tribunal 1976 LIC 1741 where G.N. Ray, J. held that an employee who was appointed as Typist-cum-clerk and continued as such for about 7 years and thereafter was appointed as Officer-in-charge of the establishment was a workman. It was held in that Judgment that on the main and substantial part performed by the employee as an Officer-in charge, he was part of the management. In that case the Court did not go into any disputed findings of fact by the Industrial Tribunal but held that the dispute related to a workman within the meaning of Industrial Disputes Act.

23. Mr. Gupta placed strong reliance on two decisions of the Supreme Court. But these decisions have been relied on in the Judgment under appeal.

In the case of Sadhu Ram Vs. Delhi Transport Corporation, , the Supreme Court held that the jurisdiction under Article 226 was very wide, but it had to be exercised with great circumspection. It was not for the High Court to constitute itself into an appellate Court over Tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and the Court should not re-adjudicate upon questions of fact decided by those Tribunals. That the questions decided certain to jurisdictional facts did not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal was well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court would have been justified in interfering. But where the Tribunal got jurisdiction only if a reference was made and, therefore, it was impossible to say that the Tribunal had clutched the jurisdiction, it was not proper for the High Court to substitute its Judgment for that of the Labour Court and hold that the workman had raised no demand with the management and there was no industrial dispute which could be properly referred to by the Government for adjudication. In that case the finding of the Tribunal was set aside by the High Court on a reappraisal of evidence. The Supreme Court emphasized that the disputes that are settled by the Tribunals are qualitatively different from ordinary civil disputes. Secondly, the Supreme Court laid down that even the jurisdictional facts should be left to the Tribunal for decision and unless the decision of the Tribunal was such that will go to show

that the Tribunal had snatched at jurisdiction, the High Court would not be justified in interfering.

The Supreme Court pointed out that where a reference was made to the Tribunal by the Government it would not be proper to hold that the Tribunal had snatched at jurisdiction.

24. In the instant case, the Tribunal had taken up the dispute only on reference by the Government. It is not a case of snatching at jurisdiction but a case of deciding a dispute by the Tribunal on reference by the Government.

Moreover, it is to be seen that the Tribunal had decided the case on appraisal of the entire evidence. It is not a case of ignoring evidence or making a decision without going into evidence at all. Therefore, it is very difficult to find fault with the decision of the Tribunal. At this stage sitting in writ court, it is not possible to reappraise the evidence and come to a conclusion different from the conclusion that had been reached by the Tribunal.

25. The next case is D.P. Maheswari v. Delhi Administration and Ors. AIR 1984 SC 153. There the Supreme Court pointed out that the Tribunals entrusted with the task of adjudicating labour disputes where delay may lead to miseries and jeopardise industrial peace. The High Courts in the exercise of their jurisdiction under Article 226 should not stop proceeding at the stage before a Tribunal so that a preliminary issue may be decided by them. Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of the Supreme Court under Article 136 may be allowed to be exploited by those who could well afford to wait to the detriment of those who can ill afford to wait by dragging the latter from Court to Court for adjudication of peripheral issues. It was further observed that where the Labour Court while deciding a preliminary issue in a labour dispute considered the entire evidence on record and had recorded a positive finding that the delinquent employee whose services was terminated, was discharging the duties of a clerical nature and was a "workman" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947, the High Court could not interfere with such finding on a petition under Article 226 of the Constitution. In that case the Supreme Court pointed out:

"The Labour Court considered the entire evidence and recorded a positive finding that the appellant was discharging duties of a clerical nature, the finding was distinct from the finding that the appellant was not discharging supervisory functions as claimed by the company".

The Supreme Court emphasized later in the Judgment that the Labour Court considered the entire evidence and recorded a positive finding that the workmen was discharging duties of a clerical nature.

26. In view of the clear pronouncement of the Supreme Court in the two industrial disputes case, we are of the view that the order of the Tribunal cannot be disturbed by this Court in writ jurisdiction when the respondent had failed to

establish that the order was perverse in any way.

27. Mr. Ginwala appearing on behalf of the company contended that the proper understanding of the Supreme Court Judgments was that the question whether person is a workman or not, has to be gone into and decided by the Tribunal along with other issues. The company challenged that preliminary issues separately before the final hearing took place before the Industrial Tribunal. A writ of prohibition at this stage would be premature but after the case was decided even though the High Court could not issue a writ of certiorari on the ground that the Tribunal had not acted on any evidence at all or without going to the relevant evidence, still the company could seek an order or prohibition after the order was passed by the Tribunal on the ground that proper inference of facts would be that the employee was not a workman within the meaning of Industrial Disputes Act. In this connection, a large number of decisions were cited as to the scope of a writ of prohibition.

28. We do not propose to enter into that controversy since we are of the view that in the facts of this case the decision of the Tribunal cannot be quashed and a writ of certiorari cannot be issued. That order must remain in force and will have to be carried out. I fail to see how a writ of prohibition can be issued restraining the Tribunal from carrying out the order when the order itself cannot be set aside in writ jurisdiction.

29. The question of retrenchment has been gone into by the Tribunal. The Tribunal has come to the conclusion that the respondent No. 2 was not physically incapacitated in such a way that he could not discharge his duties properly. The Tribunal took into account the fact that the employee even after the injury discharged his duties. We see no reason to disturb that finding of fact made by the Tribunal.

30. The Appeal and the Application are both dismissed. Having regard to the fact that the case has been dragged on for more than five years in the Court below and this Court and bearing in mind the observation of the Supreme-Court depreciating the tendency of the employers to break down the resistance of the workman by taking them through various process of law, in my opinion, the respondent No. 2 is entitled to get costs of this case. Such costs are assessed at 500 Gms.

31. The prayer for stay of operation of this order is refused.

32. There is also a prayer for a certificate of fitness to appeal to the Supreme Court. Since we have only applied the principles laid down by the Supreme Court, this prayer is also refused,

33. It is pointed out on behalf of the respondent No. 2 that by virtue of the injunction obtained in the Court below, the enforcement of the award had remained suspended for a period of five years and the award has not been implemented even after the interim order was vacated. The respondent No. 2 has

not got any benefit of the award given by the Tribunal. In the circumstances the appellant is directed to implement the effect of this order within a period of three months from date.

Baboolal Jain, J.

34. I agree.