
(2015) 08 CAL CK 0079
In the Calcutta High Court
Case No : W.P. No. 878 of 2003

J.K. Industries Ltd.

APPELLANT

Vs

Upendra Chowdhury and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 12, 12(4), 4, 4(1)

Citation : (2015) 4 CALLT 67 : (2016) 148 FLR 620

Hon'ble Judges : Arindam Sinha, J.

Bench : Single Bench

Advocate : Partha Sarathi Sengupta, Senior Advocate, Swapan Kumar Dutta, Dipankar Das Gupta and Sambuddha Dutta, for the Appellant; R.N. Majumder and Nayan Rakshit, for the Respondent

Final Decision : Allowed

Judgement

Arindam Sinha, J.—The petitioner is a company having challenged the award dated 21st November, 2002 made by the IVth Industrial Tribunal, West Bengal, Kolkata in which, inter alia, the following was held and directed-

"Considering the facts and circumstances and in view of my above observation I have no hesitation to hold that the concerned workman was the employee of the concerned company as a driver and I am to hold that the termination of service of the concerned workman named Upendra Chowdhury w.e.f. 07.09.1997 is not justified, and the concerned workman is entitled to get reinstatement in his service with full back wages and other consequential reliefs.

The company is directed to reinstate the concerned workman Shri Upendra Chowdhury in his service with immediate effect and to pay all back wages and other reliefs."

Mr. Sengupta, learned Advocate appearing on behalf of the petitioner, submitted that the findings in the award were perverse. The burden of proof had been

shifted on to his client to establish the negative to the effect that the respondent No. 1 was not the employee of the petitioner. He further submitted the Tribunal in making the award had relied on the opinion of the Conciliation Officer on matters of fact, taking them to be proved as facts. He by relying on sections 4 and 12 of the Industrial Disputes Act, 1947 submitted the Conciliation Officer was not empowered to adjudicate on facts and his opinion, in case of failure of conciliation, was to be regarding reasons on account of which the settlement could not be arrived at between the parties.

2. He also relied on the decision in the case of Punjab National Bank Vs. Ghulam Dastagir, in particular the following portion of paragraph 3 in that report.

"Of course, the jeep which he was to drive, its petrol and oil requirements and maintenance, all fell within the financial responsibility of the Bank. So far as the driver was concerned, his salary was paid by Shri Sharma as his employer who drew the same granted to him by way of allowance from the Bank. There is nothing on record to make out a nexus between the Bank and the driver. There is nothing on record to indicate that the control and direction of the driver vested in the Bank. After all, the evidence is clearly to the contrary. In the absence of material to make out that the driver was employed by the Bank, was under its direction and control, was paid his salary by the Bank and otherwise was included in the army of employees in the establishment of the Bank, we cannot assume the crucial point which remains to be proved. We must remember that there is no case of camouflage or circumvention of any statute. It is not unusual for public sector industry or a nationalized banking institution to give allowances to its high level officers leaving it to them to engage the services of drivers or others for fulfilling the needs for which the allowances are meant. In this view, we are clear that the award fails as it is unsupportable. We, therefore, reverse the award."

He submitted the respondent No. 1 was unable to produce any document to show he was the employee of the petitioner. Furthermore, he had admitted in cross-examination before the Tribunal that the officer of the petitioner used to pay his salary though he also had alleged later that he had received salary from the petitioner as well as also from the officer of the petitioner.

3. Mr. Sengupta submitted the facts of this case were those which would attract the application of the judgment in Punjab National Bank (supra). He further relied on the decision of a Division Bench of this Court in the case of The Collector of Customs, Calcutta and Others Vs. Biswanath Mukherjee, for the scope of interference under Article 226 of the Constitution of India in cases of findings of fact made by the Tribunal which may be considered to be perverse on the circumstances as held in that judgment which are reproduced below:--

"a) The Tribunal has come to the finding on no evidence.

b) The Tribunal has based the finding on materials not admissible and has excluded relevant materials.

- c) The Tribunal has not applied its mind to all the relevant materials and has not considered the same in coming to the conclusion.
- d) The Tribunal has come to the conclusion by considering material which is irrelevant or by considering material which is partly relevant and partly irrelevant.
- e) The Tribunal has disabled itself in reaching a fair decision by some considerations extraneous to the evidence and the merits of the case.
- f) The Tribunal has based its finding upon conjectures, surmises and suspicion.
- g) The Tribunal has based the finding upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found.
- h) If the Tribunal in conducting the enquiry has acted in flagrant disregard of the rules of procedure or has violated the principles of natural justice, where no particular procedure is prescribed."

4. Mr. Majumdar, learned Advocate appearing on behalf of the respondent No. 1, submitted the award should not be interfered with. The Tribunal had duly considered the evidence and come to findings in favour of his client. There was no procedural lapse in the Tribunal adjudicating the dispute before it. The findings of fact could not be said to be perverse inasmuch as it would appear from the award that his client had deposed no appointment letter was issued to him, he was disallowed to sign the Attendance Register, the company terminated his service on 7th September, 1997 and lastly that he was appointed as driver of the company and he had been working since 1994 drawing salary of Rs. 2000/- per month on the date of termination of his service to which there was no cross-examination. He relied on the decision in the case of Bank of Baroda v. Ghemarbhai Harjibhai Rabari, reported in 2005 II Current Labour Reports 279 in which, according to him, the Supreme Court of India on similar facts and circumstances had held that the respondent in that case claiming to have been employed as driver by the officer of the company had discharged burden of proof that he was in employment of the company.

5. As would appear from the record of the submissions above the respondent No. 1 failed to produce any documentary evidence regarding this appointment, payment of salary or termination having been made by the company/petitioner. It appears from the impugned award the company had filed written statement before the Tribunal denying all material allegations and categorically stated that the concerned workman was never an employee or a workman of the management. The workman was neither engaged nor employed by the management as driver or otherwise in 1994 or at any other time was the allegation made in the written statement as recorded in the award. The Tribunal then also observed in the award as follows:--

"But no document was produced or proved by the company in support of their contention of written statement."

6. Thus, it does appear that the burden of proof was shifted upon the petitioner to prove the negative which it could not be expected to discharge.

7. The Tribunal went on to further rely on the opinion of the Conciliation Officer in the matter of coming to his findings as would appear from the following portion of the award as reproduced below:--

On careful consideration of Ext. 8 specially the report of Conciliation Officer and Assistant Labour Commissioner, West Bengal dated 18.03.1999 that the said conciliation officer formed his opinion in his report that "after going through the papers and compound slips it is observed that the M.V. Tax of the Car (DL 20G-3751) was paid on behalf of the company which was under the possession of the Regional Manager of the said company who used this car for official purpose and Shri Upendra Chowdhury was engaged as a driver. During conciliation meeting, the representatives of the Management had agreed to produce vouchers of car allowance in the name of Shri T.C. Sharma, the Regional Manager but they avoided to do so with an intention to conceal the fact. Hence it is observed that Sri Upendra was an employee of the aforesaid company who service had been terminated without obeying the principle of natural justice."

8. Section 4(1) of the said Act provides as follows:--

"(1) The appropriate Government may, by notification in the Official Gazette, appoint such number of persons as it thinks fit to be conciliation officers, charged with the duty of mediating in and promoting the settlement of industrial dispute."

Section 12(4) of the said Act provides as follows:--

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"(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at."

9. It is clear from the provisions in the said Act reproduced above that the conciliation officer cannot adjudicate on the dispute. The report that is to be filed in case no settlement is arrived at must relate to the steps take by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof. That report must also contain his opinion regarding the reasons on account of which a settlement could not be arrived at. However, it appears from the award, the conciliation officer had opined on matters of fact which was relied upon by the Tribunal in making impugned order as has been reproduced above.

10. Furthermore, the facts and circumstances of the case are squarely covered by the facts in the case of Punjab National Bank (supra). The decision of the Supreme Court in those facts is, therefore, applicable to this case. In Bank of Baroda (supra) the Supreme Court in dismissing the appeal of the employer, in that case challenging the award in favour of the driver employee, had found as follows:--

"He has produced 3 vouchers which showed that he had been paid certain sums of money towards his wages and the said amount has been debited to the account of the bank."

11. In this case the materials on record to show the absence of any proof whatsoever regarding nexus between the respondent No. 1 and the petitioner save and except allegations made by the former. The findings of the Tribunal in the impugned award, therefore, are also perverse in satisfying the circumstances laid down in Collector of Customs (supra). For the reasons aforesaid, the writ petition succeeds. The impugned award and the order publishing the same are both set aside.

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