
(2011) 09 CAL CK 0122
In the Calcutta High Court
Case No : Writ Petition No. 20542 (w) of 2010

Nadia District Central Cooperative Bank Ltd. and Others APPELLANT
Vs
Nadia District Central Cooperative Bank Employees Union and Others RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 10A, 12, 2, 9A

Citation : (2012) 133 FLR 1045 : (2012) 2 LLJ 326

Hon'ble Judges : Sambuddha Chakrabarti, J

Bench : Single Bench

Advocate : Tarun Kumar Roy, Asish Kr. Das, Dinesh Ch. Nandi and Biplab Ranjan Bose, for the Appellant; Debabrata Saha Roy and Indranath Mitra, for the Respondent

Final Decision : Dismissed

Judgement

Sambuddha Chakrabarti, J.—The Petitioner No. 1 is a Central Cooperative Bank. It was registered in the year 1961. According to it, it has a total strength of about 139 employees belonging to either of the two registered and recognized trade unions, i.e. the Respondents Nos. 1 and 5 herein respectively. The employees comprise officers, supervisors, clerks and sub-staff who are members of either of the Unions.

2. The Petitioners' case is that since its inception the Respondent No. 1 Bank had been paying an allowance to all its employees on the eve of the Durga Puja every year. This was paid besides the regular salaries and other payments. Over the years it came to be known as the Customary Puja Allowance. The Petitioners have given a list of different rates at which such allowance was paid to its employees from year to year. It appears from their own statement that from 1966 to 1996 the allowance was paid @ 16.66 per cent of the basic pay along with the usual Dearness Allowance.

3. The Petitioners further state that there was a general pay revision which was implemented with effect from April 1, 1997 in terms of the decision of the Board of Directors of the Bank by merger of the half of the rate of the Customary Puja Allowance. Subsequently in the year 1999 by a bipartite agreement between the management of the Petitioner No. - 1 and both the trade unions in respect of the alteration in the payment of the Customary Puja Allowance it was agreed that the regular employees of the Bank shall be eligible for the Allowance in lieu of bonus from the year 1997 to 1998 @ 8.33 per cent of the aggregate of the basic pay and dearness allowance. The maximum amount of payment varied from Rs. 9,000/- to Rs. 16,000/- according to the official status of the employees. The Petitioners insist that the agreement was the result of a mutual and bilateral settlement and not in course of any conciliation proceeding nor was it the result of any reference u/s 10A of the Industrial Disputes Act 1947.

4. The Petitioners state that because of the dwindling financial condition of the Bank concerned it was resolved in the year 2003 that the system of paying Customary Puja Allowance (Allowance, for short) in lieu of bonus should be stopped from the year 2002 - 2003. Instead, the Bank was to pay bonus @ 8.33 per cent to the eligible employees in terms of the Provisions of the Payment of Bonus Act, 1965.

5. Obviously, such decision left the Respondent No. 1 trade union unhappy. They felt aggrieved with the decision of stopping the Allowance and approached the Deputy Labour Commissioner, Nadia. The matter was ultimately referred to the 5th Industrial Tribunal, West Bengal. The Tribunal below finally disposed of the matter on contest by an Award dated January 29, 2010.

6. The learned Judge of the Tribunal below while passing the Award had inter alia held that the Allowance became an implied condition of service. As such, to bring about any change in such a condition observance of the requirements of Section 9A of the Industrial Disputes Act (the Act, for short) was mandatory which the Bank authorities did not do. The Tribunal below declared the decision of the Board to be invalid and void ab initio. Consequently, the discontinuance of the Allowance was also held to be bad and unjustifiable. The Tribunal below further held that as the main function of the employees of the Bank who sought for the Allowance, did not involve any managerial function the employees under reference were workmen within the meaning of Section 2(s) of the Act and as the cause of the employees had been espoused by a substantial number of workmen the reference was not incompetent. The learned Judge of the Tribunal thus directed the management of the Petitioner No. 1 to pay the Allowance to its employees within 30 days from the receipt of the Award. In default, it would carry the statutory interest @ 8 per cent per annum.

7. This Award is under challenge in the present writ petition.

8. On behalf of the Respondent No. 1 union, its secretary had affirmed an affidavit. It was specifically denied that by virtue of the bipartite agreement

dated May 20, 1999 by and between the management of the Petitioner No. 1 and both the trade unions the Allowance had lost its customary character and became a product of an express mutual and bilateral settlement. It has been contended that the question whether the said agreement was arrived at u/s 2(e) of the Act or was the outcome of a reference u/s 10A of the Act was immaterial and irrelevant. Since there was no dispute the question of forwarding the agreement to the authorized officer or the Conciliation Officer or the appropriate government did not arise. The Petitioners' stand about the unsoundness of the financial condition was a pretext to deprive the employees of their Allowance. The agreement dated May 20, 1999 is binding upon all the parties to the agreement and no departure from the same was permissible in law. The answering Respondent has very firmly contended that the resolution to curtail the existing benefit of the Allowance was not sustainable as in the earlier agreement dated May 20, 1999 it was clearly provided that it would continue until further agreement. According to the Respondent No. 1 the conclusions of the Tribunal were just and correct and the Tribunal had rightly held that the employees of the Bank under reference were workmen within the meaning of Section 2(s) of the Act. The Respondents submitted that the Petitioners have miserably failed to make out even a prima facie case and prayed for the dismissal of the writ petition.

9. In the Affidavit-in-Reply the Petitioners contended that the agreement dated May 20, 1999 cannot change the provision of Section 2(e) or Section 10A of the Act and the said provisions cannot in any way be said to be immaterial. The Petitioners have denied the contention of the Respondent No. - 1 that the question of forwarding the same to the authorized officer or the Conciliation Officer cannot arise. The Petitioners have reiterated their statements made in the writ petition regarding the financial condition of the Bank.

10. It is the contention of the Petitioners that the order of reference was incompetent, as the employees of both the Unions comprise all the staff of the Bank. The clerks and sub-staff have been employed for Managerial and Administrative purposes. It also includes those employees who have been employed in supervisory capacities. The Petitioners strongly contended that they were not workmen within the meaning of Section 2(s) of the Act. As such the dispute was not an industrial dispute rendering the Award of the Tribunal to be without jurisdiction and authority of law. After the agreement of May 20, 1999 the nature of the Allowance was transformed into a product of an express mutual and bilateral deal by not only reducing the Bank's obligation to pay by half but also by putting different monetary limits in respect of different categories of employees.

11. The Petitioners have challenged the Award on the ground that the learned Tribunal erroneously had come to the conclusion that the members of the Respondent No. - 1 union was workmen despite the union itself having admitted that supervisors and managers of the Bank were also its members. A further

point of attack is that the Bank's obligation to pay the Allowance after the agreement of 1999 was regulated by the terms agreed upon by the parties. The Tribunal had no reason to hold that the Allowance had become an implied condition of service and that for failure to comply with the provisions of Section 9A of the Act the resolution of the Board of Directors was invalid and void ab initio.

12. The Petitioners further contended that the order of reference itself was incompetent since the dispute was not a dispute between the Bank and its employees as workmen. These employees consisted of Clerks and Officers employed in managerial, administrative capacity as well as supervisory capacities and their salary was more than 1,600/- per month. As such they do not qualify the requirement of being a workman as provided in Section 2(s) of the Act.

13. The Petitioners also submitted that the consistent payment of the Allowance for a very long time was without any statutory requirement and was not a part of the condition of service. That is how this assumed a customary character which was consciously given a go-bye by the agreement, dated May 20, 1999.

14. The highest concession that the Bank was willing to grant was that it could at most be said that there was a breach of the bipartite agreement dated May 20, 1999. But for that the Industrial Tribunal cannot have any jurisdiction to go into the question, as this bipartite agreement cannot be regarded as a settlement within the meaning of Section 2(p) of the Act as all the employees covered thereby were not workmen and no copy of this agreement was sent to any authorised officer of the State Government as is the requirement of law.

15. The Petitioners relied on the decision of International Airport Authority of India Vs. International Air Cargo Workers' Union and Another, on the point of the scope of judicial review. It has been held in the said decision that the findings of fact recorded by a fact-finding authority should ordinarily be considered as final. The findings of the Tribunal should not be interfered with in writ jurisdiction merely on the ground that the materials on which the Tribunal had acted was insufficient or not credible. The Supreme Court further held that while the above proposition was true it was also true that where the Tribunal recorded findings on no evidence or irrelevant evidence it was open to the High Court to interfere with the award of the Industrial Tribunal.

16. In Union of India (UOI) and Others Vs. Flight Cadet Ashish Rai, the Supreme Court had made the following observations about the duty of the court for judicial review:

There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision-making authority exceed its powers; (c) committed an error of law; (d)

committed breach of the rules of natural justice; and (e) reached a decision which no reasonable tribunal would have reached; or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:

(i) Illegality: this means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety. (Para- 6)

17. Again in the case of Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel and Ors. reported in (2006) 8 S.C.C. 200 the Supreme Court had occasion to deal with the scope of judicial review. It has been held there:

Article 226 of the Constitution is designed to ensure that each and every authority in the State, including the State acts bona fide and within the limits of its power. However, the scope of judicial review of administrative matters has always been a subject-matter of debate despite a plethora of case law on the issue. Time and again attempts have been made by the courts to devise or craft some norms, which may be employed to assess whether an administrative action is justiciable or not. But no uniform rule has been or can be evolved to test the validity of an administrative action or decision because the extent and scope of judicial scrutiny depends upon a host of factors, like the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable, etc. while appreciating the inherent limitations in exercise of the power of judicial review, the judicial quest has been to find and maintain a right and delicate balance between the administrative discretion and the need to remedy alleged unfairness in the exercise of such discretion. (Para- 12)

18. Again in paragraph 18 of the said judgment Supreme Court after considering the various judgments had held :

Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power,

and its jurisdiction is invoked, it is incumbent on the court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision making process and not the decision. (Para-18)

19. Relying on these judgments the Petitioners had submitted that when a court is satisfied that there is abuse or misuse of power the writ jurisdiction of Article 226 the Constitution of India can not only be invoked but it is incumbent on the court to intervene. The Petitioners had submitted that the Award of the Tribunal below is based on no evidence and the conclusion has thus been rendered a perverse one and as such the Award should be struck down.

20. The Respondent has argued that the point regarding the jurisdiction of the Tribunal below cannot be raised by the Petitioners as the same is barred by the principle analogous to the *res judicata*. During the pendency of the conciliation proceedings the Respondent union filed a writ petition challenging the inaction of the Deputy Labour Commissioner to settle the dispute raised by the union. The said writ petition being WP No. 1242 (w) of 2004 was disposed of on September 27, 2004. This Court had disposed of the said petition by directing the Deputy Labour Commissioner, Kalyani, to proceed with the conciliation proceeding with ? utmost dispatch? and to submit a report of the same before the appropriate authority within a period of four weeks from the date of the communication of the order. Against that no appeal was filed by the Bank Management. According to the said Respondents without challenging the conciliation proceeding or rather accepting of the authority of the Deputy Labour Commissioner the outcome of the said proceeding in the form of a reference cannot be challenged.

21. It is the further case of the Respondents that after the amendment a workman does not include a person who is employed mainly in a managerial or administrative capacity or who being employed in a supervisory capacity draws wages exceeding Rs. 1,600/- per month, or exercises either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature. The Respondents have sought to argue that an employee in a supervisory capacity also become a workman if his main function is not a managerial one. The Respondents while admitting that some of the members of the Union were Supervisors and Managers argued that the main duties of all the members of the Union being clerical in nature and they having no power to appoint, dismiss or take disciplinary action against any workman they should be considered as workmen. It also does not transpire from the evidence of the witnesses on behalf of the Bank that the Supervisor or the Manager had any power to appoint, dismiss and to take any disciplinary action. According to them the management failed to produce any evidence showing that the functions of these employees were managerial in nature. In this connection, they relied on the evidence of P.W.- 1 who is a member of the Board of Directors to the effect that the managerial function of the Bank was performed by a different body of the management of the Bank.

22. With regard to the second contention of the Petitioners that the finding of the

Tribunal that the Customary Puja Allowance had become an implied condition of service was erroneous the Respondents have submitted that this point was never raised before the Tribunal and was being raised for the first time in this Court. The Respondents have argued that through the bipartite agreement only the quantum of the Allowance had been settled and the Allowance had been continuing since 1961. Again the Respondents have relied on the evidence of P.W. ? 1 who had deposed that the Bank had introduced this Allowance according to the custom, and usage and that the payment of bonus must not be confused with the payment of the Customary Puja Allowance. Bonus under the Payment of Bonus Act is based on profit whereas the Customary Puja Allowance was paid to the employees irrespective of whether the Bank made any profit or not.

23. With regard to the submission made on behalf of the Petitioners that this Allowance was not a condition of service, the Respondents have countered the same submitting that the Allowance constituted a part of the condition of service as the same was paid to the employees every year before the Pujas on the basis of a custom prevailing for more than four decades. According to the Petitioners this will be all the more evident from a letter of the year 1978, written by the then Administrator of the Bank. This letter forms part of the Supplementary Affidavit, affirmed by the Secretary of the Respondent No. - 1, union. The said letter was written to the Registrar of Cooperative Societies, Government of West Bengal, wherein he intimated that after examining the entire facts of the case it was found that the demands of the employees were quite justified and they were certainly entitled to the payment of an additional 8.33 per cent as Customary Puja Allowance. He went further to intimate that ?an implied term of contract of service and Festival or Customary Bonus does not come under the purview of the Payment of Bonus Act, 1965?. The Respondents have referred to the cross-examination of Sri Santi Bhusan Pal who was working as an Assistant Manager (Administration). In the cross-examination of Sri Pal, as O.P.W.- 2, the witness has specifically said that in 2002 - 2003 the Bank sustained no loss but only the profit was reduced.

24. It was submitted on behalf of the union that the Award passed by the Tribunal below was well considered and the writ petition may be dismissed.

25. In support of their contentions the Respondents relied on the case of reported in S.K. Verma Vs. Mahesh Chandra and Another, where it was held that a Development Officer in the Life Insurance Corporation was a workman within the meaning of Section 2(s) of the Act. This decision has been held to be a decision per incuriam by the Supreme Court in the case of H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc.,

26. The Respondents further relied on the decision of Ved Prakash Gupta Vs. Delton Cable India (P) Ltd., In that case, the Appellant who was an employee of the Respondent company was charge-sheeted and then dismissed from service after being found guilty of the charges in the domestic enquiry. There a question arose whether the Appellant was a workman within the meaning of Section 2(s)

of the Act. The Supreme Court held that on the basis of the evidence available on record the Appellant fell within the definition of workman in Section 2(s) of the Act. The Respondents further relied on the case of *Arkal Govind Raj Rao Vs. Ciba Geigy of India Ltd. Bombay*, In that case a Stenographer- cum- Accountant working in a commercial organization was appointed as an Assistant and was designated as a Group Leader. His service was terminated and an industrial dispute was raised. The matter finally went to the Supreme Court and it was held that when an employee has multifarious duties and when a question is raised whether he is a workman or not the court must find what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basic duties, these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of the employment must be taken into consideration and the gloss of some additional duties must be rejected while determining the issue.

27. The Respondents further relied on the case of *Sharad Kumar Vs. Govt. of NCT of Delhi and Others*, . It was held in that case that the designation of an employee was not of much importance and what was important was the nature of the duties being performed by the employee. The determinative factor is the main duty of the employee concerned and not some works incidentally done by him.

28. The Respondents further relied on the case of *Nirmal Singh Vs. State of Punjab and Others*, The Supreme Court held that the question as to whether the Appellant was a workman was basically a question of fact and on the basis of the stray materials before it the Supreme Court did not consider it advisable to decide that question and directed the Labour Commissioner, Chandigarh, to make a reference u/s 12 of the Act.

29. The Respondents also relied on the case of *Mukund Ltd. Vs. Mukund Kamgar Union*, . In this case the Petitioner company impugned an award of the Tribunal directing the payment of Rs. 6,000/- as bonus and Rs. 250/- as cost to each workman. The High Court held that the claim of annual bonus was rooted in custom as it was paid even in years of loss and did not depend on the earning of profits and also as the payment had been made at a uniform rate

30. The Respondents further relied on the case of *Vegetable Products Ltd. v. Their workmen* reported in AIR 1964 S.C. 1499 for a proposition that when a dispute arises about payment of customary or traditional bonus, connected with festival like Puja it has to be proved, inter alia, that such payment had been made at a uniform rate throughout.

31. The Respondents also relied on the case of *Workmen of Kettlewell Bullen and Company Ltd. v. Kettlewell Bullen and Company Ltd.* reported in A.I. Rule 1994 S.C. 1550. Before the Tribunal it was submitted by the workmen that bonus was being paid to them since the year 1959 at different rates for different periods.

The management disputed the claim of the workmen and asserted that they were not entitled to claim customary bonus but were only entitled to statutory bonus @ 4 per cent payable under the Payment of Bonus Act, 1965. The Tribunal by its award found that the bonus which was paid by the management for a long period since 1959 onwards, not on the basis of profit calculation and usually before the Pujas, has ripened into a customary bonus due to a long usage. The matter ultimately went to the Supreme Court and it was held, following the decision of Vegetable Products Ltd. (supra), that the payment made during the years from 1959 to 1964 could be ignored and on the basis of the payment made during the years 1965 to 1973 at a uniform rate of 10.5 per cent of the salary or wages it could be said that the payment was made at a uniform rate during that period. The Supreme Court further held that since there was a payment at a uniform rate of 10.5 per cent of the salary or wages for an unbroken period of nine years, the Tribunal could have reasonably drawn an inference that the payment was customary or traditional bonus on the occasion of the Puja festival. The Supreme Court further held that the Payment of Bonus Act is confined in its application to profit bonus and other kinds of bonus recognized in industrial law are not covered by the provisions of the said Act.

32. With regard to the first point raised by the Respondents that the writ petition is barred by the principle analogous to res judicata the same must be held to be clearly not tenable on the facts of this case. In the Affidavit-in-Opposition the defence of res judicata was never raised. It is a well-settled principle of law that the plea of res judicata must be specifically pleaded and proved. Moreover, the ground on which res judicata has been sought to be raised was an order, dated September 27, 2004 passed by this Court in WP No. 1242 (w) of 2004. In that order the High Court had merely directed that in view of the submissions made on behalf of the Petitioner in that case, i.e. the Respondent No. - 1 herein, that a conciliation proceeding had already been initiated and several sittings had already been held the Deputy Labour Commissioner was directed to proceed with the conciliation proceeding with 'utmost dispatch' and submit a report before the appropriate authority within the time framed by the court. It was specifically mentioned that since no affidavit had been used by the Respondents the allegations made in the writ petition were deemed to be not admitted and with this order the writ petition was disposed of. From this it cannot be said that the matter directly and substantially in issue in this writ petition was also the matter directly and substantially in issue in the earlier writ petition. In this connection reference may be made to a judgment passed in connection with a civil suit. In Shaw Wallace and Co. Ltd. Vs. Bholanath Mandanlal Sherawala and Others, a Division Bench of this Court had relied on an earlier judgment of Sir Ashutosh Mookerjee J. in Bepin Behari v. Jogendra Chandra reported in A.I.R 1917 Cal 248, for a proposition that the matter in issue has reference to the entire subject in controversy between the parties and it was held that a mere identity and some of the issues in both the suits was not sufficient.

33. Reference may also be made to the decision of Mirta Lina Pr. Ltd. Vs. The

Finlay Mills Ltd. and Another, where it has been held that the matter in the context of Section 10 of the CPC meant disputed material questions in the subsequent suit which were directly and substantially in issue in the previous suit and materials not in issue cannot be regarded as heard or finally decided so as to operate as a res judicata in a subsequent suit.

34. This being the settled position of law the order passed in the earlier writ petition which had not decided any issue and which had been passed on the basis of the submissions made by the Petitioner cannot be said to operate as a res judicata so as to non-suit the writ Petitioner in this case. and as such the question of res judicata in this case does not arise.

35. The Petitioners have very strongly argued that the members of both the unions consisted of apart from clerks and sub-staff, officers employed mainly in managerial and administrative capacities and those employed in supervisory capacities. Such employees are not workmen within the meaning of Section 2(s) of the Act. and as such the dispute was not an industrial dispute within the meaning of Section 2(k) of the Act. Therefore, the Petitioners contend, the order of reference was incompetent. There is hardly any merit in such a submission.

36. In the case of The Associated Cement Companies Ltd. Vs. Their Workmen, a three-Judge Bench of the Supreme Court had held that an industrial dispute as defined by Section 2(k) of the Act means any dispute or difference between the employers and employers, or between employers and workmen, or between workmen and workmen which is connected with the employment or non-employment or terms of employment or the conditions of labour of any person. The dispute must relate to the terms of employment or with the conditions of labour and they must arise inter alia between workmen and their employer. Ordinarily an individual dispute which is not sponsored by a union or is otherwise not supported by any group of workmen is not regarded as an industrial dispute for the purposes of the Act. The basis of an industrial adjudication recognized by the provisions of the Act clearly appears to be that disputes between employers and their employees would be governed by the Act where such disputes have assumed the character of an industrial dispute. That is why industrial courts deal with disputes in relation to individual cases only where such dispute assumes the character of an industrial dispute by reason of the fact that they are sponsored by the union or have otherwise been taken up by a group of body of employees. In that case the Supreme Court quoted with approval the observation made in Central Provinces Transport Services Ltd. Vs. Raghunath Gopal Patwardhan, wherein it has been observed that the preponderance of judicial opinion is clearly in favour of the view that an individual dispute cannot per se be an industrial dispute but it may become so if it is taken up by a trade union or a number of persons. Therefore, a dispute taken up by a number of workmen may also assume the character of an individual dispute.

37. In the case of The Management of Indian Cable Co., Ltd., Calcutta Vs. Its Workmen, a five-Judge Bench of the Supreme Court held that the policy behind

the Industrial Disputes Act is to protect workmen as a class against unfair labour practices and not to enact special provisions for enforcing the claims of individual workmen. What imparts to the dispute of a workman the character of industrial dispute is that it affects the rights of the workmen as a class. The dispute of a single workman would become an industrial dispute when it is sponsored by a union or by a considerable number of workmen for it can then be taken that it does affect them as a class. No hard and fast rule can be laid down as to the number of workmen whose association will convert an individual dispute into an industrial dispute. That must depend on the facts of each case and the nature of the dispute. The group might even be a minority.

38. On the Petitioners' own admission the members of the union consisted of clerks who definitely fall within the definition of 'workman' within the meaning of Section 2(s) of the Act. That apart, the Supreme Court has held in various cases that the designation of the employee is not the crucial test. In *S.K. Maini Vs. M/s. Carona Sahu Company Limited and others*, the Supreme Court held that a large number of employees are often required to do more than one kind of work. In such a situation it becomes necessary to determine under which classification the employee u/s 2(s) of the Act will fall for deciding whether he comes within the definition of workman. The Supreme Court laid stress on the substance of the work which the employee does or the substance of the work he is employed to do. Viewed from this angle, if the employee is mainly doing some supervisory work but incidentally or for a fraction of time also does some manual or clerical work the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature the mere fact that some supervisory or other work is also done by the employee incidentally or a small fraction of time is devoted to some supervisory works the employee will come within the purview of 'workman' and defined in Section 2(s) of the Act.

39. Again, in *All India Reserve Bank Employees Association Vs. Reserve Bank of India*, , it has been held that what is important is the nature of duties performed by the employee. The determinative factor is the main duties of the employees concerned and not some works incidentally done by them.

40. The contention of the Petitioners that all the numbers of the union were not workmen is not a relevant factor for judging the validity of an industrial dispute. In *Workmen of Dharampal Premchand (Saughandhi) Vs. Dharampal Premchand (Saughandhi)*, the Supreme Court held that it would be expedient to require that a dispute raised by a dismissed employee unless it is supported either by his union or in the absence of a union by a number of workmen, cannot become an industrial dispute. Supreme Court further held that a union of workmen may validly raise a dispute even though it may be a minority union of workmen employed in any establishment. In the absence of a union even a group of employees can raise the dispute and the dismissal then becomes an industrial dispute though it may relate to the dismissal of an individual employee. This

judgment was relied upon by the Supreme Court in the case of Workmen of Indian Express Newspaper Private Ltd. v. The Management of Indian Express Newspaper Private Ltd. reported in 1970 Lab. I.C. 574. The Supreme Court again the case of Indian Oxygen Ltd. Vs. Workmen as represented by Indian Oxygen Karamchari Union, , echoed the same view that there was nothing in the Act to require that the dispute or difference should be raised by all the workmen of the industry or by every one of them or even by a majority of them. The Supreme Court specifically held that it is enough if there is a potential cause of disharmony which is likely to endanger industrial peace and a substantial number of workmen raise a dispute about it.

41. Thus it is obvious that the point taken by the Petitioners that the reference was bad as all the members of the union were not workmen is not a valid one in the context of the present case. Here the industrial dispute was after all sponsored by a union. Applying the tests laid down by the Supreme Court it can be held that the industrial dispute was validly raised. The Tribunal below on consideration of the materials on record, both oral and documentary, had come to a conclusion that the dispute was raised by a substantial number of workmen. This is absolutely a finding on fact based on an appreciation of evidence. Such finding of the Tribunal is not to be lightly disturbed by a High Court in exercise of its writ jurisdiction.

42. In the case reported in P. Kasilingam Vs. P.S.G. College of Technology, a three-Judge Bench of the Supreme Court held that the High Court from whose judgment that appeal by special leave was filed, had transgressed its jurisdiction under Article 226 of the Constitution of India by entering upon the merits of the controversy by embarking upon an enquiry into the factual aspect. The Supreme Court held that the writs are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunal or bodies or officers act wholly without jurisdiction or in excess of it or refuse to exercise a jurisdiction vested in them or there is an error apparent on the face of the record and such act, omission, error or excess has resulted in manifest injustice. The Supreme Court had approved the observations made in the case of T.C. Basappa Vs. T. Nagappa and Another, that a writ of certiorari will not issue as a cloak of an appeal in disguise. It does not lie to bring up an order or decision for rehearing. It exists to correct an error of law when revealed on the face of an order or decision or irregularity or absence of law or excess of jurisdiction when shown.

43. The Petitioners have challenged the observation made by the learned Judge of the Tribunal below that none of the witnesses appearing for the Bank had deposed anything to the effect that the supervisor and manager of the Bank had any power to appoint, dismiss and take disciplinary action against any workman of the Bank. The Petitioners have taken strong exception at this observation as placing the wrong onus on the Bank. According to them the onus should lie on the employees to prove that person employed in managerial and supervisory capacities had the power to appoint, dismiss and take disciplinary action against

any workman.

44. In support of their contention the Petitioners have relied on certain judgments. The Petitioners strongly relied on the decision reported in H.R. Adyanthaya and Ors. v. Sandoz (India) Ltd. and Ors. (Supra). There a five-Judge Bench of the Supreme Court had held that a person to be qualified to be a workman must be doing the work which fell in any of the four categories, viz. manual, clerical, supervisory and technical. It is not enough that he is not covered by any of the four exceptions to the definition of workman. From this the Petitioners have argued that there was no attempt on the part of the union to show the main nature of the works of the managers, supervisors, etc. In that case the question that fell for consideration was whether the medical representatives were workmen according to the definition of workman u/s 2(s) of the Act. The court has considered the changes in the definition since the promulgation of the Act and it was in this context that the court made the said observation and accepted the contention of the management that the medical representatives were not workmen and as such the complaint made by workmen were not maintainable. But the question involved in this writ petition is very different. The main nature of work of managers, supervisors etc. of the Bank is not the issue involved in this case.

45. Again in Mukesh K. Tripathi Vs. Sr. Divisional Manager, L.I.C. and Others, a three-Judge Bench of the Supreme Court held that the definition of workman as contained in Section 2(s) of the Act includes an apprentice but a workman as defined in the Act must conform to the requirements as laid down therein meaning thereby inter alia that he must be working in one or the other capacities mentioned in Section 2(s) of the Act and not otherwise. A workman within the meaning of Section 2(s) of the Act must establish that he is employed in the establishment for the purpose of doing any work contemplated in the definition. The Supreme Court further held, in respect of the case before it, that from a perusal of the award of the Tribunal in that case it did not appear that the Appellant therein had adduced any evidence as regards the nature of his duties so as to establish that he had performed any skilled, unskilled, manual, technical or operational duties. The court had further observed that the onus was on the Appellant in that case to prove that he was a workman and he failed to prove the same. This case factually differs from the case in hand as the question that arose in that case was whether the Appellant who was appointed as the Apprentice Development Officer of the Life Insurance Corporation and whose service was terminated, was a workman within the meaning of Section 2(s) of the Act. There the Appellant had not adduced any evidence about the nature of his duties. Moreover, there the status of one individual workman was involved and it was in this context that the Supreme Court had placed the onus on him. Here on behalf of the union its Secretary deposed as P.W. 1 and categorically stated that their union had the majority support at the relevant time. He also stated that the union members consisted of all categories of employees including officers and Field Officers. This is neither a case of the complaint of an individual employee

nor it is a case where no evidence at all was adduced.

46. Again the Petitioners had relied on Management of Sonapat Cooperative Sugar Mills Ltd. Vs. Ajit Singh, for a proposition that the question as to whether the employee had been performing a clerical work or not is required to be determined upon arriving at a finding as regards the dominant nature thereof. The Supreme Court rejected the contention that merely because an employee had not been performing any managerial or supervisory duty ipso facto did not make him a workman. The Respondents in this case, however, have not based their case on any negative proof. This has never been the finding of the Tribunal that merely because the employees of the Bank do not fall within any of the exceptions they satisfy the definition of workmen. The Tribunal has independently come to a conclusion that the dispute was raised by a substantial number of workmen and as such this was a valid one. A Division Bench judgment of our court in Subir Guha Thakurta Vs. Johnson and Johnson Ltd. and Others, , relied on the decision of Sonipat Cooperative Sugar Mills Ltd. (supra) to the effect that the jurisdiction of the industrial court to make an award would depend upon the finding whether the concerned employee was a workman or not. The Division Bench after scrutinizing the facts and materials of that case had concluded that the Appellant used to work in the managerial cadre of the company and his duties and functions only confirmed the managerial nature of his job. Therefore, the requirement of Section 2(s) of the Act was not satisfied and the Appellant in that case also could not claim himself to be a workman.

47. The Petitioners further contended that in the case of Sharad Kumar Vs. Govt. of NCT of Delhi and Others, it has been held that if an employee is mainly doing a supervisory work but incidentally or for a fraction of time does some manual or clerical work he should be held to be discharging supervisory work only. Conversely, if the main work is of manual, clerical or technical nature the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of work time is devoted to some supervisory works the employee will come within the purview of the definition of workmen. Based on such proposition of law the Petitioners have submitted that the burden of proving the main functions of the managers and supervisors of the Bank was not discharged by the union and as such the finding of the Tribunal that the employees before it were workmen was a perverse one. The principle of law laid down therein is very well settled. But the submission based on this judgment does not necessarily follow from it. That apart, the question in this case is not the nature of duties of the managers and supervisors of the Bank but whether a substantial number of workmen had raised the industrial dispute. The Tribunal found that they did. The Petitioners have assailed the same as a perverse finding on an allegation that the union had failed to discharge their burden of proving the nature of duties of the supervisors and managers. In the process, the Petitioners have overlooked a very major aspect. The union had not claimed their right to raise an industrial dispute on the ground that the supervisors and managers of the Bank by the nature of their jobs were qualified to be treated as

workmen. Such was never its case. As such, the Petitioners' emphasis on the purported failure of the union about the nature of duties of only two classes of employees of the Bank is a misplaced one.

48. That apart, as has been held by the Division Bench of this High Court in the case of *M/s. Reckitt & Colman of India Ltd. v. Fifth Industrial Tribunal and Ors.* reported in 1980 Lab. I.C. 92, that when a reference is made u/s 10 of the Act there is a presumption of existence of an industrial dispute. That presumption is no doubt a rebuttable one. But for the purpose of rebutting the same it requires evidence to be adduced by the employer. In this case the Bank has not produced any evidence on the point that a substantial number of workmen had not raised the industrial dispute or the union which had sponsored it was incompetent to do so. The presumption thus remains unrebutted. The onus in this case is very entirely different from the case of a dispute concerning an individual employee.

49. There is no doubt that these employees were enjoying the Allowance which over the years came to be known as a Customary Puja Allowance for a fairly long time. In the context of the present day industrial adjudication the word 'customary' cannot be used in the sense of something prevailing from time immemorial as was the concept under the traditional law. An uninterrupted practice continuing for a fairly long time may also be termed as a customary practice. It will be inappropriate to expect such a practice in respect of a cooperative bank formed under a modern legislation. The only problem is with regard to the length of time which ripens a practice into a customary one. A practice continuing for more than four decades may most certainly be called a customary one. In the Tribunal below O.P.W.- 1 Sri Abani Das who was a member of the Board of Directors of the Respondent No. - 1 Bank had very categorically stated in his cross-examination that this Allowance was paid to all employees of the Bank according to ceiling. When bonus was introduced those employees who were eligible for it were paid bonus. But payment of bonus was quite different from the payment of Customary Puja Allowance. Again Sri Das had further deposed that before the introduction of the Payment of Bonus Act according to customs and usages the Bank introduced payment of Customary Puja Allowance from the year 1961. Thus, when a member of the Board of Directors of the Bank has categorically admitted that this was introduced as a custom and usage and since this practice had continued for a fairly long period of time the Bank cannot raise any question about the customary character of this Allowance. In this connection reliance is placed upon the principle laid down in the case of *Kettlewell Bullen and Company Ltd.* (Supra)

50. Section 9A of the Act specifically lays down that no employer shall effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to the Act except without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected or within 42 days, as applicable to West Bengal, of giving such notice. The Fourth Schedule to the Act

lays down conditions of service for change of which a notice is required to be given. Item No. - 8 of the said list is withdrawal of any customary concession or privilege or change in usage.

51. In the present case one thing is clearly obvious. Here no notice was admittedly given by the employer to the workmen to be affected by the change. The Supreme Court in the case of Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others, had brought out that the real purpose of the enactment is to afford an opportunity to workmen to consider the effect of the proposed change and if necessary to present their points of view on the proposal. The Supreme Court was of the view that such consultation further served to stimulate a feeling of common joint interest in the management and the workmen in the industrial progress and increased productivity. This approach on the part of the industrial employer would reflect his harmonious and sympathetic cooperation in improving the status and dignity of the industrial employees in accordance with egalitarian and progressive trend of our industrial jurisprudence.

52. It has been sought to be argued on behalf of the Petitioners that the customary character, if any, of this Allowance was lost by the contract entered into between the employees and the management of the Bank on May 20, 1999 which governed the payment of this Allowance after the signing of that agreement. As a matter of fact what happened in the year 1999 was that the Customary Allowance was reduced to a written form. A subsequent agreement modifying the rate at which the Allowance was to be paid did not destroy the customary nature of this Allowance. As such the contention of the Petitioners that the nature and character of this Allowance was transformed into a product of an express mutual deal is a misplaced one. Putting different monetary limits on the rights of different categories of employees to receive such Allowance than what was being paid customarily was a change which has taken on the fringe and did not in any way alter the nature of the Allowance.

53. The Petitioners had made a very sharp and pointed attack upon the Tribunal's conclusion that this Allowance had become a part of the condition of service of the employees. According to the Petitioners at most there was a breach of the bipartite agreement dated May 20, 1999 over which the learned Tribunal had no jurisdiction as this bipartite agreement was not a settlement within the meaning of Section 2(p) of the Act as the employees were neither workmen under the Act nor any copy thereof was sent to any authorised officer of the State Government as is statutorily required in order to be a settlement.

54. We have already observed that the bipartite agreement was in fact a result of a customary Allowance being reduced into a written form of agreement. As such this contention of the Petitioner is absolutely without any basis.

54. Even if we accept the submission of the learned Advocate for the Petitioners that the Allowance was a concession and not a condition of service the fact remains that, as mentioned in item No. - 8 of the Fourth Schedule to the Act, the

concession is a customary concession. Therefore, a concession which has taken the form of a custom is also a condition of service and in order to effect any change thereto a notice u/s 9A of the Act was imperative after complying with the procedural requirements.

55. The learned Advocate for the Respondents have rightly pointed out that by a letter dated April 18, 1978 the then administrator of the Bank and Additional District Magistrate (Land Revenue), Nadia had intimated the Registrar of Co-operative Societies, Government of West Bengal, that the Puja Allowance had been given irrespective of the profit or loss or accumulated loss and that the Employees' Union had considered it a convention or an unwritten contract to allow such Allowance to them. He further intimated that the employees were certainly entitled to the payment of Customary Puja Allowance which he described as an implied term of contract of service and festival or customary bonus does not come under the purview of the Payment of Bonus Act 1965. A Puja allowance is very different from the concept of bonus inasmuch as bonus under the Payment of Bonus Act is relatable to the profit the employer earns whereas Customary Puja Allowance was paid irrespective of whether the employer had made any profit.

56. The allegation of financial stringency of the Petitioner No. 1 has also not been supported to the fullest extent by its own witness deposing before the Tribunal. Sri Abani Das appearing on behalf of the Bank frankly admitted in course of the cross-examination that the share capital reserve fund and all other funds of the Bank were still intact. and Sri Santi Bhusan Pal, who was at the relevant point of time the Assistant Manager (Administration) of the Bank had clearly deposed in his cross-examination that in 2002 - 2003 the Bank sustained no loss but merely the profit was reduced. He also categorically asserted that the Bank had not only not suffered any loss but the money of the depositors, share capital of the Bank, the funds of the Bank were intact. Such being the admissions on behalf of the Bank itself the contention that the Allowance had to be stopped because of the financial stringency seems to be an excuse for the decision taken by it.

57. The Petitioners have also sought to distinguish the judgments relied on by the Tribunal as not applicable to the facts of the present case. But since no reliance on those judgments has been placed in this judgment, it is not necessary to discuss them.

58. In such view of the matter I do not find any infirmity in the Award passed by the learned Tribunal below and all the contentions of the Petitioners thus fail.

59. The writ petition is devoid of all merits and is thus dismissed. The Award passed by the Tribunal is upheld.

60. In the facts and circumstances of the case, however, there shall be no order as to costs.