
(1983) 04 CAL CK 0013
In the Calcutta High Court

Rallis India Ltd.

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 28-04-1983

Acts Referred:

Constitution of India, 1950 — Article 136, 22, 226
Industrial Disputes Act, 1947 — Section 10, 2, 2A

Citation : 87 CWN 688 : (1983) 2 LLJ 293

Hon'ble Judges : Amitabha Dutta, J

Bench : Single Bench

Judgement

Amitabha Dutta, J.—In this Writ petition the Petitioner Rallis India Limited (hereinafter called the Company) has invoked the jurisdiction of this Court under Article 226 of the Constitution to quash the decision dated 24.4.81 of the 4th Industrial Tribunal, West Bengal that the respondent No. 3 Sri M.M. Kundu was a workman of the Company and the subsequent order Nos. 31 and 32 dated 10.8.81 by which the Tribunal rejected the company's prayer for adjournment and heard the case ex pane to make the Award.

2. The respondent No. 3 Sri Kundu was appointed as a clerk under the Company in April, 1943. He became a Commerce Graduate in 1948. He was promoted to supervisory cadre on 1.12.1955 (Exts. 2 and 3) He signed the service agreement dated 15.11.1967 (Ext. 1). Sri Kundu worked in the Accounts Department of the Company's Howrah factory for about two years from 1974. He signed vouchers (ext.5) in the absence of the Factory Manager and pay sheets (ext.6). He was not a party to the settlement dated 19.7.1974 between the Company and the Staff Union (ext.4) as he belonged to the supervisory grade. Sri Kundu was transferred to the Calcutta Regional Office of the Company on 25.4.1977 and posted in the Cash Department. While he was working there his service was terminated with effect from the afternoon of 31.7.78 in terms of Clause 14 of the aforesaid service agreement. Sri Kundu raised dispute before the Conciliation Authority. On the basis of conciliation proceedings the Government of West Bengal referred an industrial dispute u/s 10 read with Section 2A of the

Industrial Disputes Act 1947 to the 4th Industrial Tribunal, West Bengal for adjudication on the issue viz., "Is the termination of service of Sri M.M. Kundu justified? To what relief if any he is entitled."

3. The Company raised a preliminary objection to the maintainability of the order of 294 reference on the ground that at the time of termination of his service Sri Kundu was employed as a supervisory staff in the Cash Department of the Company's Calcutta Office having power to allocate jobs, to recommend the appointment of additional staff and leave for the staff working in the Cash Department and to control the work of the department, that at all material times his work involved the exercise of initiative and independent discretion that Sri Kundu himself in his letter dated 27th July, 1978 admitted that he was a member of the management staff and that Sri Kundu used to receive monthly salary of about Rs. 1710/- and perquisites. It was contended on behalf of the company that Sri Kundu was employed mainly in a managerial or administrative capacity and or in a supervisory capacity drawing more than Rs. 500/- per month and his function was mainly of managerial nature and so he was not a workman within the definition of Section 2(s) of the Industrial Disputes Act.

4. The Tribunal after taking evidence from the parties on the preliminary point raised by the company and considering the evidence on record has come to the finding that Sri Kundu at the time of termination of his service was a workman as his main functions were clerical. Admittedly Sri Kundu drew salary over Rs. 500/- per month at the relevant time. The Tribunal has observed that the company has not produced any evidence to show that Sri Kundu used to allocate jobs or recommend appointment of additional staff or leave for staff of the Cash Department nor has the company produced any document to show that Sri Kundu had any control over staff of the Cash Department. Ext. A is the list of duties which Sri Kundu performed during different periods of his service and this document has been marked as an exhibit without any objection from the company. Item No. 4 in Ext. A enumerates the following jobs performed by Sri Kundu in Cash Department of the company's office at Calcutta from 25th April, 1977 to 31st July, 1978 while he was holding the last assignment under the company:

(a) the main job was "writing out the Daily Cash Book"

(b) "All Division Daily Summary Statements"

(c) entering "Daily Incoming Cheque Register"

(d) forwarding the above cheques to Bank under cover of Bank's pay-in-slips

(e) entering "Daily Outgoing Cheque Register"

(f) entering "Unpaid Cheque Register"

(g) writing "Receipts" for deposits of daily collection by Company's Pharmaceutical Division Depots

- (h) entering "outstanding collection cheque Register"
- (i) daily reconciliation of "Bank Balance" as per "Bank Register" with "All Division" summary statements (Item No. 4(b) above)
- (j) forwarding letters, cheques, Drafts etc. from Cash Dept. to various places through Postal Dept.
- (k) distribution of "Pay Packets to clerical/technical etc. staff at their "Desk"
- (1) distribution of monthly salary to the subordinate staff
- (m) distribution of monthly over time bill of clerical, technical and subordinate staff
- (n) maintaining of "Returned cheque Register" and follow up action on account of such "Returned Cheques"
- (o) occasionally to accompany the Cashier while he visited Bank for depositing or withdrawing cash.

5. It appears from the letter dated 26th July, 1978 (Ext. 10) especially the last three lines thereof, that there were only three employees in the Cash Department of the Company's Calcutta Office and among them one Sri S.K. Ghosh was incharge of cash and on the proposed termination of Sri Kundu's service a clerk was to be appointed as substitute in the department.

6. The Tribunal in its judgment has observed as follows:

PW.I is a solitary witness for the company in this preliminary hearing. He has admitted that all the jobs mentioned in Item No. 4 of the chart are done in the company. He has further admitted that the jobs mentioned in Item Nos. 4(i)(n) and (o) were done personally by Sri Kundu. He has however said that Sri Kundu used to get the other jobs mentioned in this Item No. 4 done by others. But curiously enough not a scrap of paper has been filed by the company to show that Sri Kundu got these jobs done through others. The onus is on the company to prove that the duties of the workman concerned was supervisory in nature. Therefore, it is not the duty of the workman to call for the records from the company. On the other hand when the jobs mentioned in Item No. 4 were done in the company, the duty of the company was to produce the documents to show that these were not done personally by the workman concerned.

Now the jobs enumerated in Item No. 4 show that Sri Kundu used to do clerical job, It has been argued by the company that the jobs mentioned in Item Nos. 4(b) and (j) were not clerical jobs. No evidence has been adduced before me to show that in doing these jobs Sri Kundu would exercise independent discretion of his own. Therefore, it shows that these were done as routine jobs.

7. The Tribunal has not relied on the uncorroborated testimony of PW.I Sri Prabhat Kumar Dey that Sri Kundu was controlling the Cash operation or used to

supervise the job of clerical staff of the Cash Department as the best evidence viz, the document in possession of the company have been withheld. While considering the claim of Sri Kundu in the penultimate paragraph of Ext.7 of letter dated 27th July, 1978 written by him to the Deputy General Manager (Administration) of the company that he was a member of the management staff, the Tribunal has observed that it does not mean that the stand taken by Sri Kundu was correct. According to the Tribunal the main function of Sri Kundu in performing the jobs as enumerated in Item No. 4 of Ext. A was clerical and so he was a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947.

8. Dr. Mukherjee appearing on behalf of the company before this Court has raised several points. He has submitted that the Tribunal had erred in law in placing the burden of proving that Sri Kundu was employed mainly in administrative or managerial capacity on the company. He has argued that the preliminary onus is on the respondent No. 2 Sri Kundu to show he was a workman and if such onus is discharged the onus would shift to the company. It has been submitted that the Tribunal has not held that the onus at any stage shifted to the company. In this connection Ur. Mukherjee has relied on the decision of a learned Single Judge of this Court in Swapan Dasgupta v. First Labour Court, West Bengal and Ors. 1976 LIC 202 and another decision of a learned Single Judge of Kerala High Court in N.C. John Vs. Secretary, Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Others, . But these decisions do not, in my view help the petitioner as the questions involved in them relate to the burden of proving the employer-employee relationship when the employer denied such relationship with the person claiming to have been his employee. In such a case it was for the employee to call for documents from the employer and no adverse inference could be drawn against the employer for not producing his documents But in the instant case the point at issue is materially different. In this case there is no dispute that Sri Kundu was employed with the company and that the State Government made a reference of the industrial dispute arising out of termination of service of Sri Kundu to the Tribunal u/s 10 read with Section 2A of the Industrial Disputes Act. In Reckitt Coleman of India Limited v. 5th Industrial Tribunal 1980 L IC 92 (at page 95 para 7) it has been held by a Division Bench of the Court that when a reference is made u/s 10 of the Industrial Disputes Act there is a presumption of existence of industrial dispute, For the purpose of rebutting the presumption evidence is required to be adduced by the employer I respectfully agree with this view and hold that the Tribunal has not erred in law in placing the burden of proof on the company to rebut the presumption that Sri Kundu was a workman and the dispute was an industrial dispute. In fact PW. 1 who was cross-examined in part on the point of existence of papers to show that Sri Kundu used to get jobs done by others on 20th November, 1980 got sufficient time to produce such papers if any when he was next cross-examined on 22nd December, 1980, but no such papers were produced by the company before the

Tribunal. There is no question of shifting of onus when the initial onus of burden of proof was on the company to establish that Sri Kundu had administrative or managerial function. Moreover when evidence has been adduced by the contesting parties on the question in controversy abstract considerations of onus are out of place and the truth or otherwise of the case must always be adjudged on the evidence led by the parties (see *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*,).

9. It is next contended on behalf of the company that the Tribunal has spoken in two voices as it has held (at the end of the 4th paragraph of the judgment) that the admitted position is that Sri Kundu was in the supervisory post till the date of termination of his service on 31st July, 1978. It is also submitted that the Tribunal has erred in explaining away the admission of Sri Kundu in his letter (Ext.7) that he was a member of the management staff and that the Tribunal has failed to consider that Sri Kundu after his appointment in supervisory grade ceased to be a member of the employees' union according to the terms and conditions of his appointment. But in my view the Tribunal has rightly held relying on the two decisions of the Supreme Court in *Lloyds Bank Ltd., New Delhi Vs. Panna Lal Gupta and Others*, and *Ananda Bazar Patrika (P) Ltd. Vs. The Workmen*, that in deciding the status of an employee the designation of the employee is not decisive and what determines the status is a consideration of the nature and duties of the function assigned to the employee concerned. So the admitted position that Sri Kundu held a post in the supervisory cadre or grade is not decisive. In *Ananda Bazar Patrika's* case the Supreme Court observed (at page 671 2nd column) as follows:

As has been repeatedly held by this Court the mere designation as manager cannot be decisive of the nature of employment. The appellant company in order to succeed had to show that Gupta was in fact mainly doing the work stated in the pleading.

It has been held in that case that an employee doing mainly clerical work and occasionally discharging some duties of supervisory nature is a workman as defined in Section 2(s) of the Act. In the light of the aforesaid decisions it must also be held that a claim of the employee concerned in a different context for getting redress of his grievances or asserting right to obtain certain clarification from the authority as in this case that he is a member of the management staff is not decisive of the real status of the employee. What has to be considered is whether he was mainly performing the clerical or managerial/[administrative function, The fact that Sri Kundu was a member of the employees' Union before he got appointment as supervisor and ceased to be so after he got such appointment is also not germane to the decision of his status u/s 2(s) of the Act.

10. The question involved in this case is not whether the relationship between the parties is one as between employer and employee which is a pure question of fact. The point at issue in the instant case is whether Sri Kundu was mainly doing managerial or supervisory function or he was a workman. This question is one of

drawing a legal inference as to the status of the employee concerned from facts found and that is not a pure question of fact but a mixed question of fact and law. In drawing the inference certain legal tests have to be applied because a function is administrative or managerial if it involves command and decision including exercise of discretion, although within a limited range without day to day control by any superior authority. His Lordship Gajendragadkar, f. speaking for the Supreme Court in *Lloyds Bank Ltd., New Delhi Vs. Panna Lal Gupta and Others*, has observed that when such mixed question of fact and law is involved the court would not readily interfere with the conclusion of the Tribunal (in (appeal) under Article 136 of the Constitution) unless it is satisfied that the said conclusion is manifestly or obviously erroneous. In my view the same principle should be followed in judicial review under Article 22b of the Constitution, although it is not an appellate jurisdiction.

11. Reliance has been placed on behalf of the company on the decision of a Division Bench of Delhi High Court in the case of *D.P. Maheshwari Vs. Delhi Administration and others*, that the finding of fact that the status of an employee is that of a workman u/s 2(s) of the Industrial Disputes Act even if it is not one of jurisdictional fact can be assailed under Article 226 if the said finding is perverse or is based on no evidence on record. In the said reported case the Labour Court failed to take into consideration the fact that the appellant was instructing Counsel, drafting pleadings, doing liaison work etc. which clearly showed that such duties could under no circumstances be regarded as clerical. So it has been held that the finding to the contrary, given by the Labour Court was perverse. But in the present case it cannot be said that the Tribunal has failed to take into consideration the evidence adduced by the company. Its judgment shows that it has considered all the material evidence on record. The finding of the Tribunal cannot in my view be said to be based on no evidence or perverse that is to say such that no reasonable authority properly instructed in the law could have arrived at it nor is the conclusion of tribunal manifestly erroneous. In the circumstances the decision in *D.P. Maheshwari's* case is of no assistance to the petitioner.

12. It has been contended on behalf of the petitioner that the Tribunal after its decision dated 24th April, 1981 on the preliminary issue heard the case ex parte on 10th August, 1981 rejecting by its order Nos. 31 and 32 dated 10th August, 1981 the company's prayer for adjournment of the case on the ground that all its files were with the Counsel of the company in connection with drafting a writ petition for moving against the Tribunal's order dated 24th April, 1981 and that thereby the Tribunal stood biased and violated the principle of natural justice. But it appears that the petitioner has suppressed material facts in this connection by omitting to mention the order Nos. 29 and 30 dated 8th June, 1981 and 14th July, 1981 respectively passed by the Tribunal granting adjournment twice to the petitioner after it had fixed the hearing of the case on 8th June, 1981 about one and half months after the date of the order deciding the preliminary point. Thus the company got in all about three and half months time between 24th April,

1981 and 10th August, 1981. The Tribunal's order No. 30 dated 14th July, 1981 shows that the case was adjourned to 10th August, 1981 on the undertaking given by the learned Counsel for the company that he would not pray for further time in future. In the circumstances it cannot in my view, be said that the Tribunal has denied the company a reasonable opportunity of being heard or that it has not acted fairly in disallowing an unreasonable prayer for adjournment made by the company on 10th August, 1981 which was repeated more than once on the same date.

13. The learned Counsel for the company has referred to Rule 21 of the West Bengal Industrial Disputes Rules 1958 which runs as follows:

21. If without sufficient cause being shown, any party to a proceeding before a Board, Court, Labour Court, Tribunal or Arbitrator fails to attend or to be represented, the Board, Court, Labour Court, Tribunal or Arbitrator may proceed as if such party had duly attended or had been represented.

But I fail to understand how this rule helps the petitioner in any way. In my view it does not require that the Tribunal should fix a date for ex parte hearing before proceeding to hear the case ex parte although both parties are present and one of them refuses, however unreasonably, to be heard unless the case is adjourned.

14. In the result I find that the contentions raised on behalf of the petitioner company are not well founded and the writ petition must fail. The writ petition is, therefore, dismissed and the Rule is discharged. The interim order is vacated. No order is made as to costs.