

(1991) 08 BOM CK 0043
In the Bombay High Court
Case No : Writ Petition No. 300 of 1983

R.M. Nerlekar

APPELLANT

Vs

The Chief Commercial Supdt., Central Rly.

RESPONDENT

Date of Decision : 20-08-1991

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 2

Citation : (1993) 3 LLJ 753

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : J.R. Lalit, for L.M. Nerlekar, for the Appellant; S.I. Shah, for the Respondent

Final Decision : Allowed

Judgement

B.N. Srikrishna, J.—This writ petition, under Article 227 of the Constitution of India, impugns an order of the Central Government Labour Court No. 2, Bombay, dated 2.8.1982 made, inter alia, in Application No. LC/2/111 of 1971.

2. Application No. LC/2/111 of 1971 was filed jointly by the petitioner and eight others, who described themselves as Commercial Inspectors, The applications were made under the provisions of Section 33-C(2) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The applicants were allotted files for investigation pursuant to which they were sent on line on Central Railway as well as other Railways for the purpose of investigation of various claims. During the course of their duties they were required to travel on almost all the days in a month and attend the office on first of every month to submit the report of the work done and then leave the headquarters with the newly allotted work. The applicants alleged that under Rule 8, Subsidiary Instructions to Sections 71-A to 71-H of the Indian Railways act as also under the Railway Servants (Hours of Employment) Rules, 1961, it was provided that in the case of staff travelling as passengers on duty for whom administration does not normally provide travelling

facilities and who were not usually expected to be working during their journey, short journeys not exceeding four hours would be disregarded. In the case of the longer journey, full credit should be allowed to Essentially Intermittent, and 2/3rd to continuous workers in excess of four hours provided that the practice of counting in full the time spent in the journey during the rested hours of duty may on practical grounds be allowed to remain. The applicants contended that they were continuous workers and therefore entitled to credit of 2/3rd time spent in travelling for the purpose of overtime and, as a result, the applicants claim that they were entitled to overtime payments which they prayed to the Court to determine.

3. The respondents appeared before the Labour Court and contested the applications. The respondents contended that the applicants were Claim Inspectors who belong to an "excluded" category and not to "continuous" category as contended by the applicants and hence no overtime payment was admissible to them under the Rules. It was also contended that by virtue of the nature of duties of the Commercial Inspectors or Claims Inspectors, the applicants belong to the Supervisory Cadre and as admittedly their monthly wages exceeded Rs. 500/-, they did not come within the ambit of the definition of "workman" u/s 2(s) of the Act and hence their applications were not maintainable u/s 33-C(2) of the Act.

4. The Central Government Labour Court, recorded evidence and found that the applicants did not belong to "excluded" category as contended by the respondents but that they rightly belonged to the category known as "continuous." The Labour Court rejected the contention of respondents based on a Circular dated 22nd September, 1962, issued by the Railway Board, by holding that u/s 71-A(a) of the Indian Railways Act the employment of the Railway servant could be said to be excluded if he belongs to any of the categories specified in Sub-clause (v) thereof. Sub-clause (v) refers to such staff as may be specified as supervisory staff by the Central Government by Rules made u/s 71-E. However, following a judgment of this Court in *The Divisional Superintendent, Central Railway, Bombay Division V.T. Bombay and Ors. (S.C.A. No. 413 of 1976 decided on 31st March/11th April, 1978, by Deshmukh and Pendse JJ.)*, the Labour Court held that the Railway Board could not be equated with the Central Government and that the Circular would not make the applicants "excluded" staff for the purpose of the Railway Servants (Hours of Employment) Rules, 1961. On analysis of the evidence before it, the Labour Court recorded a categorical finding that the applicants before it were "continuous" staff for the purpose of the said rules. The Labour Court, however dismissed the application on the tenuous reasoning that though the applicants could not be said to be employed in supervisory capacity within the meaning of the said Circular, the evidence on record showed that they were not "workmen" within the meaning of Section 2(s) and therefore the application was not maintainable u/s 33-C(2) of the Act. The evidence on record consisted of the affidavit of the petitioner and his cross-examination, and the affidavit of one N.C. Sharma, Assistant Commercial

Superintendent (Claims) and his cross-examination.

5. Ordinarily, when a competent Tribunal has recorded a finding of fact on the evidence before it, the High Court is reluctant to interfere with such finding of fact in exercise of its powers under Articles 226 or 227 of the Constitution of India. However, in the present case the finding that the petitioners were not "workmen" appears to be based on a misdirection in law and therefore calls for interference.

6. It is a trite law that a party who sets up a defence of ouster of the jurisdiction of a Tribunal must prove the material requisite for supporting such a plea. In the instant case, the respondents having set up the defence that the applicants were not workmen within the meaning of Section 2(s) of the Act, the burden lay upon them to satisfy the Labour Court on cogent material that it was so. The only material placed before the Court by the respondent consisted of the affidavit of Mr. Sharma wherein he annexed a list of duties of Commercial Inspectors to support his case. The list of duties annexed to the affidavit of the respondent's witness contains the following:

- (1) To conduct verification of claims
 - (2) To make investigations in important claims cases.
 - (3) To trace consignments in important cases specially entrusted to them.
 - (4) To grant open delivery and assessments when directed by the Office.
 - (5) To attend Courts in Court Cases whenever required.
 - (6) To attend to any other work in regard to claims work entrusted to them. Any other duties given by the immediate superior."
7. In his cross-examination Mr. Sharma admitted that though he had enumerated the aforesaid six duties as supervisory duties, Item Nos. 4 and 6 involve supervisory duty. The duty described at Item No. 4 is "to grant open delivery and assessments when directed by the Office." Mr. Sharma amplified this in his evidence and stated :-

"While granting the open delivery the Inspector (claims) had to remain present as a responsible official so that in case of claim there is authentic record. Open delivery is given in the presence of, besides Commercial Inspector (Claims), R.P.F., Commercial Staff of the Station. To determine the shortage the Commercial Inspector has to weigh the damaged consignments as well as sound consignment containing identical goods. He has also to inspect packages and packing conditions to see that whether there are any gaps. He reports the factual position while the decision is taken by the higher authorities."

Miss Shah learned counsel appearing for the respondent, attempted to sustain the finding of the Labour Court by contending that the evidence on record shows that the applicants as Commercial Inspectors (Claims) were mainly carrying on supervisory duties. It is not possible to accept the submission of the learned counsel. The settled law in the application of Section 2(s) is that an employee is

to be considered to be employed in the capacity for which he is mainly employed. The test is one of the dominant characters of employment. The evidence on record does not show that the applicants were employed to do mainly supervisory duties.

8. Further, it is also not possible to accept the contention of the learned counsel that merely because the duties discharged by the applicants were of a responsible nature, they must be considered to be supervisory in character. The expression "supervise" means to oversee, to extract work from other employees by giving them suitable directions or to accept responsibility for the execution of work by others under one's control. Unless these elements are present in the character of an employment, it is not possible to accept that there is employment in supervisory capacity. In my view, the evidence on record falls woefully short of this as there is nothing whatsoever of supervisory capacity in the list of duties enumerated by Mr. Sharma in his evidence. The only solitary sentence on which perhaps emphasis could be laid is his statement in cross-examination "Commercial Inspector (Claims) is required to supervise Assistant Commercial Inspector and is required to attend raids in the company of Commercial Inspectors"". He was forced to admit that he was not in possession of any data to indicate as to on how many occasions the applicants had carried out this task or duty. In the absence of cogent material to show that this was the main character of the employment, it is impossible to hold that the applicants were employed in the supervisory capacity. Considering the evidence on record as a whole, in my view, the evidence on record could not have led a reasonable person to the finding that the applicants were employed in a supervisory capacity, as strenuously contended before me. On the other hand looking at the nature of duties described in the evidence, there would have been no difficulty in taking the view that the employment was mainly clerical in character, even if on occasions it partook of the nature of supervision. I am, therefore, of the view that the finding of the Labour Court that the applicants were not workmen within the meaning of Section 2(s) of the Act is clearly contrary to the evidence on record and is required to be set aside.

9. The alternative reasoning of the Labour Court for holding that the applicants were not workmen within the meaning of Section 2(s) of the Industrial Disputes Act, 1947, also does not impress me. Apart from the view which I have taken about the main character of employment of the petitioner, the Supreme Court has indicated in *S.K. Verma Vs. Mahesh Chandra and Another*, that the scheme of the definition is such that all persons employed are workmen within the meaning of Section 2(s) of the Act, except those employed in managerial or strictly supervisory capacity, who would be excluded therefrom. Assuming that a few jobs were allotted to the petitioner which were in the nature of checking the work of others, I am of the view that, those were not the main work of the applicants as disclosed by the evidence on record. In such a circumstance, it would be unreasonable to take the view that the petitioner was not a workman covered within the meaning of Section 2(s) of the Industrial Disputes Act, 1947

(See in this connection National Engineering Industries Ltd. Vs. Shri Kishan Bhageria and Others, .

10. In the result, the petition is allowed and the impugned order of the Labour Court in Application No. LC/2/111 of 1971 is quashed and set aside. It is held that the applicants in the said application, including the petitioner, are "workmen" within the meaning of Section 2(s) of the Act and consequently that their application is tenable u/s 33-C(2) of the Act. Application No. LC/2/111/71 is remanded to the Central Government, Labour Court, for the purpose of calculating the amount due to the applicants in the said application. Rule is accordingly made absolute.

11. Since the matter is already old, the Presiding Officer of the Central Government, Labour Court No. 2, Bombay, shall expeditiously take up the matter and dispose it of within a period of three months after the receipt of the writ in this petition.

12. The office to send the writ expeditiously. Certified copy to be expedited.

13. No order as to costs.