

(1964) 02 BOM CK 0007

In the Bombay High Court

Case No : Special Civil Application No. 320 of 1962

S.H. Motor Transport Company

APPELLANT

Vs

Motilal Hiralal Mudholkar

RESPONDENT

Date of Decision : 04-02-1964

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : AIR 1965 Bom 24 : (1964) 66 BOMLR 588 : (1964) ILR (Bom) 822 : (1965) MhLj 50

Hon'ble Judges : V.G. Wagle, J;N.L. Abhyankar, J

Bench : Division Bench

Advocate : Shankar Anand, for the Appellant; R.M. Joharapurkar and H.W. Dhabe, for the Respondent

Judgement

Abhyankar, J.—This is an application under Art. 226 of the Constitution, for quashing the orders of two authorities under the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. Respondent 1, Motilal, claimed to be an employee of the petitioner-company since November 1956. The petitioner-company was doing the business of motor transport. According to Motilal, he was employed as a checker by the company since 15 November, 1956. His services were terminated orally from 1 June, 1957, without any enquiry and without any justification. Motilal claimed that he was employed on a salary of Rs. 40 per month and he was given Rs. 3 per day an bhatta to do work as a checker. He, therefore, filed an application on 30 October, 1957, before the Additional District Magistrate, who was the officer then empowered to exercise the powers of an Assistant Commissioner of Labour under S. 16 of the Central Provinces and Berar Industrial Disputes Settlement Act 1947. It appears, the petitioner remained absent at one hearing and the case proceeded ex parte. Thereafter the petitioner appeared and filed its written statement. Before that authority Motilal examined himself and was also cross- examined. On behalf of the petitioner one Dr. M. A. Aziz Yarmohammad, who claimed to be the managing partner of the petitioner-company, examined himself. The Additional District Magistrate, by his order

dated 4 August, 1960, held that Motilal was employed by the petitioner-company as a checker and his discharge was illegal and not according to law. He, therefore, held that the termination of the services of Motilal was wrongful and he ordered that Motilal be paid back-wages from the month of April 1957 at the rate of Rs. 40 per month and also be reinstated.

2. Against this order both the petitioner as well as the employee Motilal preferred revisions before the State industrial court. The petitioner's revision was numbered as Industrial Revision No. 74 of 1960 and that of Motilal as Industrial Revision No. 80 of 1960. Ultimately both the revisions failed, but we are concerned with the order in Industrial Revision No. 74 of 1960. filed by the petitioner.

3. It appears a complaint was made before the State industrial court on behalf of the petitioner-company that the Additional District Magistrate had not given a finding on the question whether Motilal was an "employee" within the meaning of S. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947, contention of the petitioner being that Motilal was not employed for doing manual or physical work but was employed for doing supervisory duties. The industrial court, therefore, by its order dated 19 September, 1961, remitted the proceedings to the lower Court to record a finding whether in view of the duties of a checker, Motilal was an "employee." The finding was to be certified within a week's time and the parties were directed to appear before the Additional District Magistrate on 4 October 1961.

4. When the case was sent back for recording a finding, the requisite authority, viz., the Assistant Commissioner of Labour, recorded the statement of the respondent on 5 October, 1961, and also gave a finding on the question whether the petitioner's contention that Motilal was not an employee was valid. That finding was against the contention of the petitioner. When the finding was received back by the industrial court, a complaint again seems to have been made by the petitioner that it was not allowed to examine its witnesses. The State industrial court, therefore, again remitted the matter for the second time before the Deputy Commissioner of Labour by its order dated 14 November, 1961. By this order which was passed with the consent of parties, the Assistant Commissioner of Labour was directed to permit the employer to lead the evidence of a checker whom he desired to examine and after taking into consideration his evidence decide the issue afresh. This was again not a complete disposal of the revision application, but an interim remand calling for a fresh finding on the issue whether Motilal was an employee. Thereafter evidence of one Sri Naidu was recorded on 8 January, 1962, on behalf of the petitioner and the Deputy Commissioner of Labour who dealt with the case gave a finding on 22 February, 1962, holding that Motilal was an employee within the meaning of the Central Provinces and Berar Industrial Disputes Settlement Act. Thereafter the matter was considered by the State industrial court on merits, and by its order dated 15 March 1962, the State industrial court held that the finding recorded by

the Deputy Commissioner of Labour that the checker was an "employee" within the meaning of the Act is a finding of fact and the Court refused to interfere with that finding. Thus, the order of reinstatement and payment of back-wages became final between the parties.

5. Thereafter Motilal filed an application on 10 April 1962, before the Assistant Commissioner of Labour for recovery of the amount of back-wages to which he was held entitled by the order of that authority. When this application was pending before that authority, the petitioner filed this application invoking the extraordinary jurisdiction of this Court under Art. 226 of the Constitution on 11 June 1962. By this petition, the petitioner has asked for two reliefs :

(1) a writ of certiorari or direction or a suitable order quashing the order dated 22 February 1962, passed by the Deputy Commissioner of Labour and the order dated 15 March 1962, passed by the State industrial court, and

(2) an interim writ of prohibition against respondents 1 and 2 from proceeding with the claim for recovering back-wages and reinstatement in a case pending before the Assistant Commissioner of Labour for 21 June 1962.

6. The petition came for admission on 20 August 1962, when it was admitted by a Bench of this Court and a stay was also granted to the petitioner in the recovery proceedings.

7. When the learned counsel for the petitioner opened his case at the hearing, a preliminary objection was raised on behalf of respondent 1 that the petitioner has suppressed material facts and has obtained orders on misleading statements that the petitioner is not made liable to pay back-wages or reinstatement by any order and on this ground the petition is liable to be dismissed. We have heard the parties on the preliminary objection as well as on merits and in our opinion, there is considerable force in this preliminary objection raised on behalf of respondent 1, though we have not preferred to dismiss the petition upholding only the preliminary objection.

8. The petitioner has stated in Para. 5 of the petition that the State industrial court had set aside the order of the Additional District Magistrate dated 4 August 1960, by its order dated 19 September 1961. It is now admitted that this is not true. The order of the Additional District Magistrate directing reinstatement and payment of back-wages on 4 August 1960, has never been set aside. The petitioner has also not made any reference to the second order of interim remand passed by the State industrial court on 14 November 1961. Actually - as it is now clear and no longer disputed by the petitioner - the State industrial court never finally decided the revision application until it was disposed of by its order dated 15 March 1962. During pendency of the revision applications, at the request of the petitioner himself, the State industrial court seems to have been persuaded to remit the matter twice to the Assistant Commissioner of Labour to give an opportunity to the petitioner to lead evidence and to record a clear finding as to whether Motilal was an "employee" within the meaning of the

Central Provinces and Berar Industrial Disputes Settlement Act, 1947. All along the State industrial court was in season of the case and what was required to be done by the Assistant Commissioner of Labour was to record a finding after recording evidence of both sides. The Assistant Commissioner of Labour, in fact, submitted his findings on both the occasions. Somehow the petitioner either has not realized the relevance and importance of these facts or has deliberately omitted to refer to them in the petition. The result of these omissions and an entirely untrue statement that the order of the Additional District Magistrate dated 4 August, 1960 was set aside is that the petitioner purported to represent to this Court in the petition that there was no order of reinstatement or payment of back-wages, that the only finding that was recorded was that Motilal was an employee and yet the State industrial court had dismissed the revision application which had the effect of making the petitioner liable for back- wages as well as reinstatement of respondent 1. We cannot but express too strongly our disapprobation of the utter lack of care and, therefore, bona fides displayed by the petitioner in this case in reciting the sequence of events as they took place when the proceedings were going on in the lower Courts, and in representing to this Court that the order of the Assistant Commissioner of Labour was set aside. We fail to see how any one having participated in the proceedings or having before him the copies of the orders of the various authorities could at all represent to this Court that the order of the Additional District Magistrate was set aside. By no process of thinking or interpretation it could be said that there is any indication in the orders of any authorities that the order of the Additional District Magistrate was ever set aside or even put in suspense. We would have been justified in dismissing this petition upholding the preliminary objection on this short ground. Petitioners who invoke the extraordinary jurisdiction of the High Court under Art. 226 and/or 227 of the Constitution are required to exercise utmost care, inform themselves fully of every stage of the proceeding that has taken place up to the date the petition is filed, give a full and true account of those proceedings, file all the necessary documents in support of their averments and then claim relief on the basis of facts disclosed in the petition. It is not open to a petitioner under Art. 226 or 227 of the Constitution to pick and choose his own facts or to determine in advance what is relevant and material, omit to mention any material facts and proceedings and orders and then claim that he has acted bona fide even though he has made untrue statements, omitted to inform the Court of all the proceedings and the orders passed at different stages in the proceedings up to date and claim indulgence.

9. However, in our opinion, even on merits the petitioner has no legs to stand upon and the petition is liable to be dismissed in view of the findings recorded by the two Courts below.

10. It is fairly well-established by now that the question whether a person is an "employee" within the meaning of S. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act. 1947, is a question of fact. Unless, therefore, there is any bar of procedure vitiating such a finding, or that the finding is

arrived at without any evidence on record, there can hardly be any case where such a finding can be challenged successfully. The learned counsel for the petitioner argues that the finding recorded by the two authorities that Motilal was an employee is vitiated because they have not taken into consideration that Motilal as a checker had to do duties which were by their nature supervisory. Three witnesses have been examined in this case, Motilal himself, i.e., the employee, Dr. M. A. Aziz Yarmohammad on behalf of the employer and one Naidu, who was also working as a checker. Motilal stated that while on checking duty he used to sign the summary sheets in the buses and maintain diaries in his own hand and on these diaries he used to take the signatures of the drivers and conductors. He produced two such diaries (Exs. A. 3 and A. 4). It does not appear that Motilal was cross-examined with regard to this part of his testimony. Dr. Aziz Yarmohammad stated that Motilal who was working as a checker had no manual work to do; he had only to check the buses to find out if there was any breach of rules or laws. According to Yarmohammad, Motilal had not got to do any clerical work. During the cross-examination Yarmohammad had to admit that they maintained the attendance registers for the period during which Motilal claimed to be in their employment, but they were not produced in Court. He was given time for production of these attendance registers, but when he appeared the next day he only produced the ledger books and intimated to the Court that he did not find the attendance register. He also could not explain how the payments made to Motilal found place in the cash book of the petitioner company. Respondent 1, Motilal, was again called in the witness-box after the case was first remitted on 19 September 1961, and he was also cross-examined. According to Motilal, a checker gets a memo regarding the number of passengers sitting at the time of starting, then there are memos for the intervening stations, then accounting of road passengers in the memo maintained by the conductor and also the amounts mentioned therein have to be verified, whether they are correct or not and then he has to make a report to the manager after return. There was a specific question whether it was his duty to supervise the work of the conductor. Motilal replied that his work was to check whether the memo given by the conductor was all right. As to the work regarding loading of goods and realizing money for the same, Motilal said that he was not concerned with that. He also admitted that he has to see whether the account given by the conductor is correct or not and that he kept a diary for his own personal use. Naidu was another checker on whose testimony the petitioners principally relied in support of their contention that the duties of a checker are of a supervisory nature and do not amount to manual or clerical work, either skilled or unskilled. According to Naidu, the duties of the checker were to check whether the conductor had issued tickets to passengers, whether luggage charges had been recovered by the conductor, and in case tickets were not issued by the conductor to any passenger to instruct the conductor to issue him the ticket, and to check one or more buses of the company. In cross-examination he admitted that the checker had no power to dismiss or give a report against the conductors. According to him, the checker is not required to sign the memo of account

maintained by the conductors. He also stated in answer to a question by the Court that the checker had no power to warn conductors for late-coming and in case tickets were not issued properly, he had to bring it to the notice of the employer; the checker had no power to change duties; he had no other power except to check on lines and he had no control on the conductors.

11. In our opinion, the evidence on record fully justified the finding that respondent 1, Motilal, who was a checker, was a person who came squarely within the definition of "employee" within the meaning of S. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. The learned counsel for the petitioner has invited our attention to certain decisions of industrial tribunals and Courts. In *A. R. Nataraja Ayyar v. Trichy-Srirangam Transport Company, Ltd.* 1955 I L.L.J. 608, the industrial tribunal, Madurai, had to consider whether a checking inspector employed by a bus transport company was a "workman" within the meaning of S. 2(s) of the Industrial Disputes Act, 1947 (Central). The definition of a "workman" under S. 2(s) of the Industrial Disputes Act, 1947, prior to its amendment in 1956, was analogous to the definition of "employee" in S. 2(10) of the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. The tribunal found on the evidence in that case that a checking inspector employed by a bus transport company exercised a limited supervision over conductors and drivers; he had to check the work of the conductors and drivers and had authority to issue warnings to conductors and drivers for minor offences. In the circumstances, the checking inspector was held as not to be a "workman" within the meaning of S. 2(s) of the Act (Central). We do not see how this case is of any assistance to the petitioner in view of the clear finding of the tribunal in that case that the checking inspector there had authority to issue warnings to conductors and drivers and also did supervision over the work of such conductors and drivers. Thus the supervisory nature of his duties was clearly found in that case and in view of that finding, a checking inspector would be outside the definition of a "workman" under S. 2(s) of the (Central) Industrial Disputes Act. Reference was also invited to a decision of the Kerala High Court in *Malabar Industrial Co. Ltd. Vs. Industrial Tribunal, Trivandrum*, . The report does not indicate what was the nature of duties or work done, and it is not, therefore, possible to deduce any principle from this case. The *Upper India Couper Paper Mills Co. Ltd. Vs. J.C. Mathur*, was the case of a shift foreman of the soda recovery plant and the finding was that the main work of the defendant was that of a supervisor and merely because in connexion with that work he was required to do some writing work, that would not convert him into a clerk. In Para. 8, at p. 666, it has been observed that in the capacity of a shift foreman his duty was to supervise the work of a number of workmen though no manual or clerical work was entrusted to him. As a supervisor he was given thirty days' privilege leave in a year and was also as such entitled to the membership of the provident fund. On the other hand, workmen used to get only ten days' leave in a year, and were not entitled to the benefit of the provident fund prior to 1948. The attendance register of the supervisory staff was separate

from that of workmen. He was not required to take a token; only workmen were given token. His attendance was noted in the register of supervisors. He had given an application to the regional conciliation officer and in that application the plaintiff-company itself had objected that the defendant was not a workman, and, therefore, the regional conciliation officer had no jurisdiction. Thus it was clear in that case that the nature of duties performed by the shift foreman was far superior where a certain amount of independence of action and initiative was contemplated and he could not be called a "workman." Reliance was placed on two more decisions :

(1) Indamer Company (Private), Ltd. v. Barin De 1958 II L.L.J. 556 and (2) Malabar Industrial Co. Ltd. Vs. Industrial Tribunal, Trivandrum, .

12. In the latter case, again, there was no indication what were the kinds of duties required to be performed. In the case of an aircraft maintenance engineer [Indamer Company (Private). Ltd. v. Barin De] (vide supra) it was found that his duties were to inspect the aircraft and aero-engines before the flight and to issue a certificate of airworthiness and where their duties mainly consisted of inspecting and checking the jobs and repairs done by skilled mechanics who worked under them, those duties were essentially of a supervisory nature.

13. In our opinion, these cases do not lay down new principle. The principle, however, seems to be well-settled. It is not the designation by which a person is known in the employment which would be determinative of the question whether the duties are supervisory in character. Again the mere fact that in course of duties some manual or clerical work is required to be done will not be also a decisive factor. What has to be seen is whether the person who claims to be employed is a supervisory capacity has to exercise any independent judgment or initiative, or has any independence of action, or where he is concerned with the work of other persons, he has any authority to direct or control the work of such other persons. It must always happen that in an industry or an undertaking or a plant or activities of a commercial nature, there has necessarily to be a co-ordination between several activities of several workmen. The mere fact that the work of one person is required to be checked by another will not make that other person; who is so required to check the work, a supervisor in the sense of a superior officer. Every kind of check does not imply an authority in the checker either to direct or control the person whose work is being checked. The work of a touring auditor, for instance, who has to prepare reports after visiting depots and checking and calculating figures, etc., is not the work of a supervisor or a person in a superior capacity - National Tobacco Company of India v. G. P. Sarathi 1954 I L.L.J. 160. Unless a person occupies a position of command or direction and is authorized to act without the sanction of the manager or other supervisors, such person will not be treated as a supervisor or acting in a supervisory capacity - Burmah-Shell Oil Storage and Distributing Company of India v. Their employees 1954 I L.L.J. 21. A depot superintendent, or an assistant depot superintendent employed by an oil distributing and marketing company who are responsible for

stock receipts, storage and issue of stocks and also for compiling the company's standard forms and returns, have been held to be "workmen" within the meaning of S. 2(s) of the Industrial Disputes Act (Central). As they have no power to punish clerks and have no initiative and have to work on instructions from the others, they have been held to be merely workmen - *Burmah-Shell Oil Company v. Labour Appellate Tribunal of India* 1964 II L.L.J. 155. Similarly, a timekeeper, who does not exercise any supervisory control over the workers but whose duties are confined merely to checking the arrival and departure of the workmen which are purely of a clerical nature, has been held to be a workman - *East India Industries (Madras), Ltd. v. Industrial Tribunal, Madras* 1954 II L.L.J. 418.

14. Thus it is clear that in the instant case, except the statement of Naidu that in case a ticket is not issued to any passenger a checker can instruct the conductor to issue ticket, there is no suggestion of any kind that a checker in this organization has any superior or supervisory duties or any degree of control over the conductors. Principally the duties are both of a clerical and manual character. He is to check whether passengers are covered with tickets, whether the memo sheets tally with the number of passengers and their distances as he finds them on checking in the running bus and whether tickets have been issued to all who are travelling. We do not think any of these duties call either for initiative or independent action or indicate that a checker exercises any degree of control or direction over the acts of the conductors. In fact, Naidu has admitted that whatever is the finding of the checker he has to report it to the manager and he cannot give any direction or order to a conductor. If that is the sphere of the duties, it can hardly be contended that a checker is a supervisor in any sense of the term. We must, therefore, hold that the finding that respondent 1 was an employee is correct and the petitioner could not successfully challenge the order.

15. The result is the petition fails and is dismissed with costs. The petitioner was directed to deposit the amount of the backwages. The amount which has been deposited will be allowed to be withdrawn by respondent 1.