(2009) 12 BOM CK 0106

In the Bombay High Court

Case No : Writ Pettion No. 975 of 2009

Standard Chartered Bank APPELLANT

Vs

Vandana Joshi and Another RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

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

Citation : (2010) 112 BOMLR 69 : (2010) 124 FLR 960 : (2010) 2 LLJ 409 : (2010) 2 MhLj 22

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : J.P. Cama, Ashok D. Shetty and Rita K. Joshi, for the Appellant; Vandana K. Joshi, Respondent No. 1 and Party-in-Person, for the Respondent

Judgement

D.Y. Chandrachud, J.—The challenge in these proceedings is to an award of the Central Government Industrial Tribunal dated 22nd January, 2009. The Petitioner has been directed to reinstate the First Respondent with full backwages and continuity of service. The issue upon which the outcome of these proceedings turns is whether the First Respondent was a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. The Tribunal held that the First Respondent was a workman and that the termination of service was not lawful.

2. The First Respondent was appointed by the Petitioner as a Personal Financial Consultant on 2nd May, 2006. The letter of appointment stipulated that the First Respondent was being placed in the management cadre of the Petitioner at Band 8B. The addendum to the letter of appointment contained a declaration that the First Respondent had read and accepted the terms and conditions of appointment. During the course of the evidence before the Industrial Tribunal, the documents produced by the First Respondent were taken on the record and marked as Exhibit 18. Among the documents was the letter of appointment, the addendum and a document showing the job description and key responsibilities. Under the head "Job role" the duties expected of the First Respondent included

"achieving allocated business targets, ensuring high quality customer service, ensuring external and internal compliance on all branch transactions, handling difficult customer situations and contributing to the overall achievement of business growth". The "Key responsibilities" were the following:

? Achieve allocated business targets and actively cross sell Consumer Banking products and third party products

? Generate new business via sales promotions, out marketing calls and presentations and in branch contacts

? Participate actively in branch sales planning to generate action plans for meeting targets

? Ensure high level of customer service in the Branch, Manage difficult customer situations

? Ensure compliance with internal and external guidelines and ensure minimal comments in audits and other inspections

? Ensure transactions are processed with a high level of accuracy and commitment in order to satisfy customer needs

? Ensure validity and completeness of transactions processed and ensure concessions relative to exchange rate, fees. charges etc. are authorized / overridden by appropriate authorities

? Take responsibility for general reconciliation and control activities

? Find ways to improve operational efficiency and control costs to meet cost budgets

? Gather / prepare statistics for service quality and productivity indicators

? Active participation in branch sales planning to generate action plans for meeting targets

? Responsible for general reconciliation and control activities

? Be multiskilled to handle all kinds of transactions and services in bank

? Manage attrition of the base.

3. The services of the First Respondent were terminated on 23rd June, 2006. Prior to the order of termination certain emails were addressed to the First Respondent pointing out deficiencies in her performance of duties. The First Respondent by a letter dated 25th June, 2006 admitted the receipt of the memos that were issued to her and placed her version on the record. Be that as it may, on the termination of the services of the First Respondent, a reference to adjudication was sought to the Industrial Tribunal u/s 10 of the Industrial Disputes Act, 1947.

4. In the statement of claim that was filed before the Industrial Tribunal the First Respondent stated that the appointment related to ''management of personal banking customers which forms a part and parcel of the business activity of the bank''. The First Respondent, however, stated that she was answerable to the Branch Manager and was required to work under the instruction and control of the Branch Manager. The statement of claim, as it was originally filed, did not contain an averment that the duties of the First Respondent were of a clerical nature. However, in a rejoinder filed before the Tribunal the First Respondent set up the case that the work which was being rendered was "basically clerical in nature". The First Respondent stated that being a Personal Financial Consultant she had no authority or power to authorize or take any decision to complete a transaction. The Personal Financial Consultant and the Regional Head were separated in hierarchy by a Line Manager, Branch Manager and Cluster Head. The First Respondent claimed that all Personal Financial Consultants reported to the Line Manager and were not involved in any of the decision making processes or in the discharge of supervisory functions. The case of the First Respondent was that she was doing work of a clerical nature and not work of a managerial or supervisory nature. The management disputed this.

5. Evidence was adduced before the Tribunal on behalf of the employer and by the First Respondent. The two witnesses who deposed on behalf of the employer were (i) Ms Pooja Banerjee - Manager Human Resources and (ii) Ms Tripti Srivastava - Director Transaction Banking. The First Respondent stepped into the witness box. The Industrial Tribunal came to the conclusion that the First Respondent did not recommend leave; that she did not have the power to initiate disciplinary proceedings or to issue decisions which would bind the employer. The Tribunal held that her duties were to attend to customers and to observe the fulfillment of KYC norms. The First Respondent was held not to fall in the supervisory category. The termination of the First Respondent was held to be unlawful and a direction was issued to the Petitioner to reinstate the First Respondent with full backwages and continuity of service.

6. Counsel appearing on behalf of the Petitioner submitted that the letter of appointment and the addendum to it set out the conditions of appointment and the nature of duties of the First Respondent. During the course of her evidence the First Respondent accepted having signed and accepted the document and that it reflected the nature of her duties. According to the Petitioner the First Respondent had admitted during the course of her evidence that her appointment "was on the basis of sales and service" and that as a sales person, she had to sell the products of the bank. Counsel submitted that the nature of the duties that were performed by the First Respondent would clearly belie the case that the work which was being rendered was of a clerical nature. The burden of establishing that she was a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 lay upon the First Respondent in view of the judgments of the Supreme Court. The First Respondent failed to discharge that burden and the Tribunal had failed to apply its mind to the evidence on the

record which would establish that the work was not of a clerical nature.

7. On the other hand, the First Respondent who has appeared in person submitted that the nature of her duties was not related either to marketing or to sales and that she was not doing any work of a managerial nature. The First Respondent submitted that the work which was being rendered by her related to customer service. The work involved data entry which fell within the description of work of a clerical nature within the meaning of Section 2(s). The First Respondent placed extensive reliance on the notes of cross examination of MW 1 and MW 2 who had deposed on behalf of the bank and it was urged that the admissions during the course of the cross examination would belie the contention of the management in these proceedings.

8. The question as to whether the First Respondent was a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 must be decided with reference to the nature of duties that were performed by the First Respondent. Nomenclatures in this area of law, as in others, are not decisive. Therefore, the fact that the letter of appointment dated 2nd May, 2006 refers to the appointment being in the management cadre of the bank is not decisive of whether the First Respondent was in fact doing duties which predominantly were those of a workman u/s 2(s). However, what is of significance is that the addendum to the letter of appointment contains a declaration by the First Respondent of having read and accepted all the terms and conditions of appointment. During the course of her cross examination the First Respondent admitted that at the time of joining service she was served with the documents which she had produced at Exhibit 18. The First Respondent admitted that page 8 of Exhibit 18 shows the nature of her duties. Now as already noted earlier, the job role assigned to the First Respondent involved achieving allocated business targets, ensuring high quality customer service, ensuring external and internal compliance on all branch transactions, handling difficult customer situations and contributing to the overall achievement of business growth. The key responsibilities assigned to the First Respondent broadly included areas of generating new business, participation in branch sales, planning to generate action plans for meeting targets and ensuring high levels of customer service. Besides this, the First Respondent was required to ensure compliance with internal and external guidelines, ensure the processing of transactions with accuracy and to ensure the validity of transactions. The responsibilities included finding ways to improve operational efficiency and controlling of costs, responsibility for general reconciliation and control activities and to manage the attrition of the customer base. The First Respondent was required to be multi skilled to handle all kinds of transactions and services in the bank.

9. During the course of the submissions the First Respondent urged that the responsibilities which were assigned to her and which were accepted by her were not necessarily those which she had performed. Such a case, however, has not been set up in the course of the evidence. The Court must go by the nature of

the duties and responsibilities associated with the job particularly in the context of the fact that the First Respondent has in her evidence accepted having signed the appointment letter and the fact that the relevant page of Exhibit 18 shows the nature of her duties. During the course of her evidence the First Respondent stated that her appointment was on the basis of sales and service. She deposed that she had to attend walk in customers, get application forms from them and to attend to work as stated in the examination in chief. In her examination in chief the First Respondent admitted that the job objective / job description included the duty to ensure that all accounts were sourced in compliance with the bank''s Anti Money Laundering (AML) policies and the Know Your Customer (KYC) policies. The KYC norms, it may be noted, are those spelt out by the Reserve Bank of India. The First Respondent also stated that her duties included answering "non routine queries". During the course of the submissions the First Respondent has drawn the attention of the Court to the addendum to the job description. The job description inter alia states that the jobholder must ensure that she / he is fully aware of all the policies and procedures issued in relation to money laundering prevention. The jobholder must ensure compliance with these policies and procedures on ongoing basis and any suspicious transaction must be reported to the supervising officer. The First Respondent had to ensure that all accounts are sourced in compliance with AML / KYC policies of the bank; ensure "full proof verification of identity of banks customers" and to report any transaction where funds appear to originate from suspected illegal sources.

10. These duties upon which there is absolutely no dispute or caveat would belie the contention of the First Respondent that she was doing work predominantly of a clerical nature. Section 2(s) of the Industrial Disputes Act, 1947 defines the expression "workman" to mean any person "employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward". A Constitution Bench of the Supreme Court in H.R. Adyanthaya v. Sandoz (India) Ltd. 1994 II CLR 552 held that in order that a person can be designated as a workman u/s 2(s) he/she must be employed to do work which falls within one of the stipulated categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory. In other words, it is not enough that a person is not covered by either of the four exceptions to the definition. It is now also a well settled principle of law that the burden lies on the person who asserts the status of a workman u/s 2(s) to establish with reference to the dominant nature of his / her duties that the work which is performed falls within one of the stipulated categories in Section 2(s). (Mukesh K. Tripathi v. Senior Divisional Manager, LIC 2004 III CLR 534 at para 37 and Ganga Kisan Sahkari Chini Mills Ltd. v. Jaivir Singh 2007 III CLR 840 at para 9).

11. The question as to what constitutes work of a clerical nature has been dealt with in the judgment of the Supreme Court in the Management of Sonepat Cooperative Sugar Mills Ltd. v. Ajit Singh 2005 II CLR 66. Mr. Justice S.B. Sinha speaking for a Bench of two Learned Judges of the Supreme Court held thus:

A person who performs one or the other jobs mentioned in the aforementioned provisions only would come within the purview of definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regard the dominant nature thereof. With a view to give effect to the expression to do "any manual, unskilled, skilled, technical, operational, clerical or supervisory work", the job of the concerned employee must fall within one or the other category thereof. It would, therefore, not be correct to contend that merely because the employee had not been performing any managerial or supervisory duties, ipso facto he would be a workman.

12. In the present case, the work that was being rendered by the First Respondent and for which she was employed as a Personal Financial Consultant cannot be regarded as work of a clerical nature. The Court must have regard to the dominant nature of the work or duties assigned. The dominant nature of work or duties for which the First Respondent was engaged cannot be regarded as stereotypical, without an element of initiative or creativeness, which is the test which is elucidated in the judgment in Sonepat Cooperative Sugal Mills Ltd. (supra). On the contrary the work which was assigned to the First Respondent clearly shows that she was intrinsically associated with the provision of a high level of customer service to the customers of the bank. At one level the First Respondent constituted a public interface for the bank with its customers while at another level the First Respondent had to ensure that all the processes and mechanisms of the bank were duly complied with in relation to banking transactions. During her evidence the First Respondent in fact admitted in terms that the job description included work that would contribute to the business of the bank. The First Respondent admitted that a term deposit database was provided to her and the purpose of giving such a database was basically for generating and securing new business opportunities. While doing such work the First Respondent undoubtedly had to do incidental work including dealing with net banking requests, requests for closure of accounts or change of name and the management of the information system and data entry. What the Court must have due regard to, however, is the overall nature of the duties and responsibilities that are attached to the job. The duties and responsibilities that were attached to the job of the First Respondent were not of a clerical nature. As an employee engaged in contributing to the business of the bank the First Respondent was recruited to perform duties which cannot be regarded of a clerical nature.

13. The judgment of the Supreme Court in The Punjab Co-operative Bank Ltd. Vs. R.S. Bhatia (Dead) through Lrs., upon which reliance was placed by the First Respondent is clearly distinguishable. That was a case where the question as to whether the First Respondent was a workman was concluded by the principles of res judicata since it had been decided in an earlier proceeding between the same parties. Besides this, the evidence on the record showed that the employee in his

capacity as an accountant used to sign the salary bills of the staff, including himself, even while performing the duties of a clerk. The Supreme Court held that this did not render the employee being one employed mainly in a managerial or administrative capacity. The judgment is distinguishable.

14. During the course of her submissions, the First Respondent sought to place reliance on the cross examination of the two witnesses who deposed on behalf of the bank. MW 1, during the course of her cross examination admitted that the First Respondent did not sanction leave and that she was not aware as to whether the First Respondent could initiate proceedings against an employee of the bank. The Tribunal has during the course of its award placed a great deal of emphasis on the fact that the First Respondent could also not recommend leave nor could she initiate disciplinary action against other employees. The fact that an employee is not vested with the power to sanction leave or to initiate disciplinary proceedings is not conclusive of the question as to whether the work that is performed by the employee falls within one of the categories stipulated in Section 2(s). Whether leave can be sanctioned and whether disciplinary proceedings can be initiated may in a given case be one of the circumstances which may be considered in the balance. The balance, however, has to be drawn on the basis of the overall nature of the duties and responsibilities performed and the dominant nature of the work that is performed by an employee. Virtual offices are now a reality and paperless transactions are no longer a novelty. Managerial organisation today is radically different from the preliberalization era. Tests of control which were appropriate to a society thirty years ago have become relics of an era which India has left behind in the annals of history. The law has kept pace with the times by recognizing that in order to determine whether a person is a workman u/s 2(s), contemporary notions of business cannot be stratified by notions of economic organisation developed for an era which is no more.

15. In the judgment of this Court in Bharat Fritz Werner Karmika Sangha Vs. Bharat Fritz Werner Limited and Another, the Court had occasion to take note of the rapid evolution in business resultant upon the swift changes of technology in modern times. The Court cautioned against placing the discourse on Section 2(s) into a straitjacket, in the following observations:

In deciding a case such as the present, the Court must be careful not to place its construction of legal categories into a straitjacket. Business in recent years has been marked by rapid organisational changes. The swift evolution of technology has led to a quantum change in the business environment. Modern managements have to alter the structure of organisation in order to meet the exigencies of the time. Every employee in the managerial cadre may not necessarily have the power to appoint or dismiss personnel nor indeed would an employee engaged mainly in a managerial or administrative capacity always have the power to sanction leave applications. Similarly, the test of the existence of control over subordinates may be applicable in certain factual situations, but not necessarily in every conceivable case. In others, control over subordinates may not necessarily be by all personnel in the managerial cadre. The number and strength of the subordinate staff depends upon the nature of the business that is being conducted. It would, for instance, be wholly inappropriate to apply the same test which would govern the organisation of a traditional form of manufacturing business to a business founded on software, biogenetics or a business at the cutting edge of technology. The interpretation of Section 2(s) must be such as would not lead to stultifying innovation, development and change in managerial practice. Business managers should have a high degree of latitude to promote efficiency in a competitive business environment. Courts are of course vigilant to deal with subterfuge. The important thing for the Court is to evaluate the position of an employee with reference to the nature of his duties in the context of the business where those duties are performed.

16. In that case the Court held that the duties and functions showed that the work was anything but clerical. Similarly, in Dhruba Kumar Changkokoti v. Travel Corporation of India Ltd. 2000 II CLR 644 a Learned Single Judge of this Court observed that a person who was employed to promote tourism of a travel company in Eastern Europe could not be regarded as a workman within the meaning of Section 2(s). Though such a person had no power to recruit or terminate employees or to control employees of the organization, he was regarded as discharging a part of the function on behalf of the employer viz. looking after the business and promoting it in Eastern Europe. In Mukesh Tripathi''s case (supra) the Supreme Court emphasized that a person who had been recruited to develop the business of the employer could not have done so without being a full fledged officer of the Corporation and would not be a workman within the meaning of Section 2(s). The First Respondent was appointed to contribute to the development of the business of the Bank. Her duties were plainly not clerical.

17. The second witness who deposed on behalf of the employer, MW 2 deposed to the key responsibilities of the First Respondent. During the course of the cross examination the witness stated that the product team used to decide upon concessions relating to exchange rate fees and that she was unable to recall as to whether the First Respondent had no such right. The managerial staff of the bank was to decide the manner in which control over costs was to be made and the witness stated that there were no documents to show that the First Respondent had participated in a meeting for controlling costs. The witness also stated that the First Respondent was not the final authority for opening bank accounts; that she had no power to sanction leave or to take disciplinary action.

18. The fact that in an organizational structure the employee, in the course of the decision making process, is subject to checks and balances is not a matter which would establish that she / he is a workman within the meaning of Section 2(s). Modern forms of business in corporate organizations put into place a carefully crafted process of checks and balances. Rarely, if ever, would an

employee have authoritarian control over business decisions. Employees are made subject to checks and balances both at the lateral and vertical level. Managerial decisions are subject to verification and approval. The fact that decisions of an employee are subject to verification or subject to a system of controls and balances does not establish that the employee is a workman within the meaning of Section 2(s). Managers do not become workmen because their decisions are structured by processes and approvals. Absolute autonomy is not the norm in managerial decision making. Nor does the law insist on absolute discretion or absolute autonomy for a person to be a manager. Basically the answer to the question must depend upon the dominant nature of the duties and responsibilities.

19. The Industrial Tribunal has applied a superficial approach to the entire problem in determining as to whether the First Respondent was a workman within the meaning of Section 2(s). The Industrial Tribunal ought to have travelled beyond a superficial analysis of whether or not the First Respondent was entitled to recommend leave or to initiate disciplinary action. That the Tribunal has failed to do so has led to a manifest failure of justice. The Tribunal has failed to consider material aspects of the evidence on the record and to apply tests which are now settled in view of the judgments of the Supreme Court and this Court to which a reference has been made in the earlier part of this judgment. In the circumstances, the interference of this Court in the exercise of its jurisdiction under Article 226 is necessitated to correct a patent error on the part of the Tribunal in the exercise of its jurisdiction.

20. Once this Court comes to the conclusion that the First Respondent was not a workman within the meaning of Section 2(s), the Tribunal had no jurisdiction to entertain the reference which ought to have been rejected.

21. For these reasons, the Petition would have to be allowed and is accordingly allowed. The award of the Industrial Tribunal dated 22nd January, 2009 is set aside. The reference (Reference CGIT 2/ 37/of 2007) shall accordingly stand dismissed. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

