

Bank of India Workers Organization Vs. Bank of India and anr.

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Court : Mumbai

Decided On : Oct-01-2008

Reported in : 2009(1)BomCR650; [2009(121)FLR778]

Judge : Dharmadhikari B.P., J.

Acts : [Industrial Disputes Act, 1947](#) - Sections 2, 10(1), 102(A) and 25F;
[Constitution of India](#) - Articles 226 and 227

Appeal No. : Writ Petition No. 247 of 2005

Appellant : Bank of India Workers Organization

Respondent : Bank of India and anr.

Advocate for Def. : A.S. Jaiswal, Adv. for respondent No. 1 and ;D.B. Patel,
A.G.P. for respondent No. 2

Advocate for Pet/Ap. : R. Deo, Adv.

Judgement :

Dharmadhikari B.P., J.

1. The employee working as Driver on a car belonging to respondent No. 1 has filed this writ petition under Articles 226 and 227 of the [Constitution of India](#), challenging the Award dated 5.2.2002 delivered by Central Government Industrial

Tribunal, Nagpur, in Reference No. C.G.I.T. No. 24 of 1999. According to him, he was appointed as Driver-cum-Sepoy in the proposed regional office of Bank of India at Kamptee on 22.9.1990 and when that office came to be abolished on 31.5.1993, he was not accommodated/absorbed elsewhere like other bank employees. He, therefore, complained of termination in violation of Section 25-F of [Industrial Disputes Act, 1947](#). After conciliation and failure report, the reference was made by Union of India as contemplated by Sections 10(1) and 10-2(A) of [Industrial Disputes Act, 1947](#), on 25.8.1994, which read as under:

Whether the action of the management of Bank of India, Nagpur, in terminating the services of Shri K.D. Kanholkar, Driver-cum-Sepoy with effect from 31.05.1993 is justified If not, what relief the said workman is entitled to?.

2. The parties led evidence and after appreciation thereof, the Presiding Officer found that there was no evidence on record to show that the petitioner was appointed as Driver-cum-Sepoy by bank and his termination was, therefore, not established. It also found that there was no record to show that he was regular employee of the bank. In view of these findings, as he was not entitled to any relief and therefore, it answered the reference in the negative. It is against this award, the present writ petition has been filed.

3. I have heard Shri Deo, learned Counsel for the petitioner, Shri Jaiswal, learned Counsel for respondent No. 1 and Shri Patel, A.G.P. for respondent No. 2.

4. By placing reliance upon the judgment of the Hon'ble Apex Court in the case of (Pottery Mazdoor Panchayat v. Perfect Pottery Company) reported at : (1983)ILLJ232SC , and (Sitaram v. Administration, Government of Goa reported at 1984 B.C.I. 52 : 1984 Mh.L.R. 566. Shri Deo, learned Counsel has argued that the jurisdiction to be exercised by reference Court was circumscribed by the language of the reference and hence question whether the petitioner was or was not the employee of the bank, was not open for adjudication at all. He states that if respondent No. 1-bank wanted to raise any such issue it was essential for it to immediately challenge the reference as made, so as to have it modified to keep that issue open and to have the same referred to Central Government Industrial Tribunal. According to him, as that has not been done, Central Government

Industrial Tribunal has traveled into arena which was not available to it and that has resulted in jurisdictional error. He further argues that evidence on record has been appreciated by Central Government Industrial Tribunal only to find out whether this relationship as employer and employee is established between parties. He states that four witnesses were examined by the petitioner to show that he was doing the work as Driver-cum- Sepoy regularly in the bank and he was not a Driver personally engaged by its Regional Manager. He states that after noticing the stand of the bank, a notice to produce document was served upon the bank by the petitioner and total 12 documents were sought from it. However, only six documents were produced by the bank and remaining documents were never produced. According to him, documents No. 1 to 6 as mentioned in the list of documents at page 37 of Writ Petition were produced only after the petitioner applied for quashing of defence of bank but then remaining documents were never produced. He points out that the bank has stated that the documents were not available as Regional Office was closed long back and the bank also contended that documents were not relevant. He has also invited attention to some communications and correspondence on record to show how employment of the petitioner with bank was viewed by the bank authorities. He points out that for proposed Regional office at Kamptee, posts of two Drivers were sanctioned and one out of them was occupied by the petitioner and he was driving the car of the bank. He further states that even for revising the salary of the petitioner, consequent upon general revision of salaries of other bank staff, by communication dated 5.6.1992, approval was sought by the Deputy Regional Manager from head office. He further invites attention to records of places visited by the petitioner with various officers and bank staff to urge that said record shows that apart from Regional Manager, the petitioner has even carried other officers and staff members to various places. According to him, this reveals that the petitioner was being used as a driver of the bank by the bank itself. He also invites attention to reply in this respect filed before Central Government Industrial Tribunal by the bank and points out that bank has denied such use of vehicle for other officers or for the purposes of bank's work. He states that Central Government Industrial Tribunal has initially formed a view that the petitioner was never employed by the bank & thereafter has searched for material in support of that

view and has come out with said finding. According to him, therefore, this is a case which must be remanded to Central Government Industrial Tribunal for reappreciation of entire evidence adduced by both the parties.

5. Shri Jaiswal, learned Counsel for respondent No. 1-bank by placing reliance upon the judgment of Division Bench of this Court in the case of (N.O. C.I. Ltd. v. State of Maharashtra) reported at : 2007(4)BomCR653 , the judgment of Division Bench of Delhi High Court in (Madho Ram v. P.K. Jain) reported at : (1997)IILLJ38Bom , judgment of the Hon'ble Apex Court in (National Council for Cement & Building Materials v. State of Haryana) reported at : (1996)IILLJ125SC , and judgment of this Court in the case of (Mukund Staff & Officers' Association v. Mukund Limited) reported at 2007(6) Bom.C.R. 75, to state that these rulings show that objection being raised by the petitioner is misconceived. He argues that examination of said controversy, which is treated as incidental, is always judicially recognized as is apparent from these judgments and jurisdiction, therefor is also found vested with Central Government Industrial Tribunal. He states that otherwise in all such cases where employer wants to raise some preliminary objection or other objection to the jurisdiction, the employer would be required to file writ petition, obtain appropriate orders and the commencement of adjudication process upon reference will, therefore, be unnecessarily delayed. He argues that view taken in all the above judgments, therefore, needs to be accepted and implemented. He invites attention to stand taken in written statement and points out that at the very threshold, the bank had made it clear that there is no relationship of master and servant between it and employee. He further invites attention to various documents on record to comment that these documents are not sufficient to conclude that the petitioner was employee of the bank. Even regulations placed on record are also pointed out to show that the regulations contemplated that the bank has to reimburse the Regional Manager from time to time for expenses of Driver's wages and maximum amount therefor is to be decided by the Managing Director. He states that the petitioner approached with a case that he was given appointment order but it was taken back by the Regional Manager. He points out that the petitioner was not extended any leave, allowances, overtime etc. He never signed on attendance register and he received his salary only on voucher. He also states that the petitioner also did not bring on

record any document showing that anybody else has used the car or got any work done from him. In these circumstances, it is his contention that the view taken by Central Government Industrial Tribunal is in accordance with law and requires no interference.

6. During arguments, Shri Deo, learned Counsel has invited attention to the judgment of the Hon'ble Apex Court in the case of (Punjab National Bank v. Ghulam Dastagir) reported at : (1978)ILLJ312SC . Which is a case of a Driver of the bank. Shri Deo, learned Counsel has stated that the said judgment is cited by him only to show that whether there exists relationship of employer and employee between the parties is a question, which needs to be answered in the factual back ground of each matter and there are several factors which need to be looked into to arrive at that finding. He has relied upon paragraphs 2, 3 and 4 of this judgment specifically. I do not find it necessary to refer to this judgment at length because the same view is reiterated in (Workman of Nilgiri Co-operative Society v. State of Tamilnadu) reported at : (2004)IILLJ253SC and the issue needs to be examined in the light of evidence which has been brought on record by the parties.

7. The first question which, however, needs to be decided is whether it was open to Central Government Industrial Tribunal to embark upon an enquiry to find out whether the petitioner was or was not an employee by the respondent bank.

8. The judgment of the Hon'ble Apex Court in the case of Pottery Mazdoor Panchayat v. Perfect Pottery Company (supra), holds that Tribunal while adjudicating Industrial dispute has to limit itself to points specifically referred for adjudication and the matters incidental thereto and the Tribunal cannot go beyond the terms of reference. In said case, the reference initially made on 26.6.1960 was whether the proposed closure by the Management of the Perfect Pottery Company Limited, Jabalpur, is proper and justified? The second question referred was about quantum of retrenchment compensation, if the closure was found to be proper and justified. The actual closure appears to have taken place later, and on 16.9.1987 another reference was made which read whether the employers in relation to Poly Pather Clay Mines of Perfect Pottery Co. Ltd., Jabalpur, were justified in closing down the said mine and retrenching the following 81 workers with effect from

1.7.1967. The case of the Union (appellant before the Hon'ble Apex Court) before the Tribunal was that the closure was only a camouflage and was in substance and essence, a lock-out. The two Tribunals came to the contrary conclusion on the principal question as to whether they had jurisdiction to inquire into the propriety of or justification for the closure. The Central Government Industrial Tribunal, Jabalpur, held by its award dated 3.7.1968 that it had no such jurisdiction to look into propriety or justification of management's decision but it was entitled to consider whether in fact business was closed. The Industrial Court by its award dated 15.11.1968 held that it had no jurisdiction to either inquire into propriety of closure or then because of terms of reference, to consider whether there was a real closure or not. Before High Court, two questions were argued. The first was whether the Tribunals had jurisdiction to examine propriety or justification of the closure and second was whether it has jurisdiction to go into the question of retrenchment compensation. The High Court held on first question that jurisdiction of Tribunal was limited to points specifically referred for its consideration and matters incidental thereto. The Hon'ble Apex Court in paragraph 11 observes that the very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. Thus, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretense of closing the business, the workers were locked out by the management-employer. The Hon'ble Apex Court observed that the reference being limited to the narrow question as to whether the closure was proper and justified, the Tribunal by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management.

9. The Division Bench of this Court has considered the similar controversy in the case of Sitaram Vishnu Shirodkar v. The Administrator, Government of Goa and Ors., (supra), there the petitioner employer had approached this Court and respondent No. 4 was the employee. Since 1.3.1978, respondent No. 4, did not report for duty and on 26.9.1978, he raised dispute. Conciliation proceedings were conducted and respondent No. 4 stated that he was removed from service. The

petitioner employer contended that respondent No. 4 used to remain absent from duty without any prior intimation and he abandoned the job from 1.3.1978 and never turned up. The dispute was, therefore, referred to the Industrial Tribunal and Tribunal passed award holding that respondent No. 4 was illegally terminated and granted relief of reinstatement with full back wages. That award was challenged in High Court. The petitioner there contended that reference as made was itself bad in law because it presumed termination of services of respondent No. 4 by the petitioner and only question left open for decision by the Tribunal was whether termination was legal and justified. The Tribunal, therefore, could not have decided the question whether respondent No. 4 has abandoned his job and enlarged the scope of reference which was the stand accepted by Hon. Full Bench of Delhi High Court in the case of India Tourism Corporation, New Delhi v. Delhi Administration, Delhi and Ors.) reported at 1982 L.I.C. 1309. The Division Bench of this Court noticed that a dispute before Full Bench was whether there was a closure or lock out and the terms of reference were whether workers shown in annexure were entitled to wages for the period of lock out. The Full Bench found that the reference proceeded on the assumption that there was lock out and that making of an order of reference was found to be an administrative function but it was held to be open to judicial review if it was shown that appropriate Government did not apply its mind to material before it or certain vital facts were not taken into consideration. The Full Bench of Delhi High Court noticed that existence of lock out itself was real dispute between the management and its workmen and hence the terms of reference were not proper. The Industrial Tribunal could not have gone into real question as real dispute was not made the subject matter of order of reference. The Industrial Tribunal could not have enlarged the scope of jurisdiction though nobody objected; the investigation, whether it was a closure or lock out, could not have been undertaken by the Industrial Tribunal. After noticing this Full Bench judgment of Delhi High Court, the Division Bench of this Court has found that what was referred was only the dispute about termination of services of respondent No. 4 and hence the Tribunal could not have traveled beyond the reference and decided the question whether respondent No. 4 has abandoned his services. It was noticed that the termination of services of respondent No. 4 was an act fastened on that petitioner by this reference and the only question left open

for decision was whether the termination was legal and proper. The Division Bench, therefore, allowed writ petition, quashed the award as also reference.

10. The Division Bench of this Court in the case of N.O.C.I. Ltd. v. State of Maharashtra (supra), cited by Shri Jaiswal, learned Counsel, mentions the reference and also the grounds on which the legality or correctness of the reference order was questioned. The perusal of those grounds show that the employer had contended that authority exceeded its jurisdiction in referring the dispute raised without primarily determining whether there existed relationship of employer and employee and according to it, the employees were of Canteen Contractor. There second contention was that it was a clear case of absence of Industrial dispute because the employees by their consent stood retired on account of notice of closure & ceased to be employees voluntarily. The third and last objection was that there was no prima facie material to establish the privity of contract between the parties. Thus, all three objections raised show that challenge was to the satisfaction of referring authority and contention was that there was no material to support the satisfaction reached by that authority. Shri Jaiswal, learned Counsel has also invited attention to other parts of the judgment and perusal of paragraph 47 reveals that Hon. Division Bench of this Court found that there existed an industrial dispute and the Government has formed opinion and made reference after satisfying itself about its existence. It has been also observed that though this Court can look into such satisfaction under Article 226 of [Constitution of India](#) but within very limited scope and this Court cannot sit in appeal and examine the exercise of that jurisdiction. The Government while referring the dispute was not competent to go into these niceties of law and evidence and then write a judgment and such an expectation and approach would be an apparent contradiction to the concept of formation of an opinion. The Hon'ble Division Bench, therefore, expressed that it was unable to appreciate the argument that there was no prima facie case for reference. It noticed that parties were neither strangers to each other nor any conclusive finding answering the query whether there existed or did not exist relationship of employee between the parties which has attained finality between parties was recorded. The question of relationship itself was to be adjudicated upon though there was more than prima facie material before the Government to form an opinion in that respect. The attention is also

invited to paragraph 32 wherein Division Bench has found that power under Section 10(1) was purely administrative in nature and referring authority cannot abrogate on to itself the power to adjudicate any question. It is also observed that serious dispute with regard to relationship between employer and employee could not be gone into by appropriate Government in view of said power. The other judgments in the case of National Council for Cement & Building Materials v. State of Haryana and Ors. (supra), again shows the approach on more or less same lines. The reference there was to find out whether activities of National Council for Cement & Building Materials amounted to industry within the meaning of definition of Section 2(j) of Industrial Disputes Act. The Tribunal after written statement was filed before it, framed preliminary issue to find out whether reference was bad in law and by subsequent order it directed that preliminary issue and other issues would be considered together. The employer, Council then approached High Court and after High Court dismissed the writ, they approached the Hon'ble Apex Court. The Hon'ble Apex Court in paragraph 10 states that matters are incidental to reference may sometimes assume significant proportions and may relate to questions which go to the root of the jurisdiction of the Tribunal as, for example, question relating to the nature of the activity of the employer as to whether it constitutes an industry' or not. Then in paragraph 11, the Hon'ble Apex Court has stated how the adjudication of reference is delayed by making request to decide various preliminary issues. Both these judgments, therefore, do not consider the question whether language of the reference itself limits the jurisdiction of the Industrial Tribunal. Even in third judgment of this Court cited by Shri Jaiswal, learned Counsel in the case of Mukund Staff & Officers' Association v. Mukund Limited, (supra), the consideration of question of onus whether upon employer or employee proceeds on accepted premise that enquiry into such aspect is permissible. None of these judgments, therefore, can assist the case of respondent No. 1. The issue about scope of enquiry upon reference answered by the Hon. Apex Court in the case of Pottery Mazdoor Panchayat v. Perfect Pottery Company (supra), was not required to be looked into in any of these cases.

11. In the Division Bench judgment of Delhi High Court in Madho Ram v. P.K. Jain, (supra), the reference made was whether services of the petitioner Madho Ram were terminated illegally and/ or unjustifiably. The Tribunal framed the points for

determination and first point framed was whether relationship of employer and employee exists between the parties. In paragraph 10, a Full Bench judgment in the case of (Hindustan Lever Limited and Ors. v. Management of Hindustan Lever Limited) reported at : (1984)ILLJ388SC , has been cited to show that there are two types of issues. The first is one referred by Government for adjudication and set out in the order of reference and the second type is incidental issues which sometimes are issues of law or issues of mixed law and fact. In paragraph 20, the judgment of the Hon'ble Apex Court in the case of (Madras State v. C.P Sarathy) reported at : (1953)ILLJ174SC , has been relied upon to show that Government while making reference may use very general terms and merely because dispute was not particularised, reference cannot be held to be bad. In paragraph 21, it has been found that it is open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute at all. In paragraph 22, the Division Bench of Delhi High Court holds that the later decisions do not stipulate that existence of relationship of employer and workmen cannot be gone into by the Tribunal if there were pleadings therefor, even though the existence of such relationship was assumed in the order of reference. Thus, letters patent appeal filed by the employee was dismissed and order of learned Single Judge of Delhi High Court was maintained.

12. It is brought to my notice that the Full Bench of Delhi High Court in the case of India Tourism Corporation v. Delhi Administration, (supra) is considered by this Hon. Division Bench of Delhi High Court and the ruling was held not applicable because it did not relate to issue of existence of relationship of employer and workmen. The consideration of this Full Bench judgment of Delhi High Court by Division Bench of this Court in Sitaram v. Administrator, Government of Goa, (supra) clearly shows that Division Bench has found that the Industrial Tribunal cannot go into a question if real dispute was not subject matter of order of reference. It has been also held that Industrial Tribunal could not enlarge scope of jurisdiction on concession and hold that there was a closure and no lock out. The application of this ratio by Division Bench is apparent in paragraph 8 wherein the Division Bench found that Tribunal could not have considered the question whether respondent No. 4 (employee before it) had abandoned the services. It found that the act of termination was fastened on the petitioner by the language of

reference only. Thus, the plea of abandonment has not been accepted when the reference was only in relation to termination. The judgment of the Hon'ble Apex Court in the case of Pottery Mazdoor Panchayat v. Perfect Pottery Co., (supra) specifically holds that the Tribunal cannot go beyond the terms of reference. Judgment of Hon. Apex Court in the case of Pottery Mazdoor Panchayat v. Perfect Pottery Company (supra), the Division Bench judgment of this Court in the case of Sitaram Vishnu Shirodkar v. The Administrator, Government of Goa and Ors. (supra) and the Full Bench judgment of Delhi High Court in the case of India Tourism Corporation, New Delhi v. Delhi Administration, Delhi and Ors. clearly show that a question or issue, which cuts the very roots of reference proceedings and proposes to demonstrate the absence of facts supporting it; has been treated as outside the purview of Industrial Tribunal to which the reference is made.

13. In present facts, it is, therefore, apparent that because of language of reference, the employment of petitioner as Driver- cum- Sepoy was fastened upon the management of respondent No. 1-bank and as such it was not open to Central Government Industrial Tribunal to consider whether the relationship of employer and employee existed between the petitioner and respondent No. 1.

14. The perusal of award delivered by Central Government Industrial Tribunal shows that Central Government Industrial Tribunal has proceeded to consider whether the petitioner was employee of the bank or not and its appreciation of evidence is only from that point of view. It has found that Manager of Bank of India filed affidavit mentioning that the petitioner was not appointed as Driver- cum- Sepoy and from statements of various witnesses examined by the bank, that no appointment letter was issued by respondent No. 1 to the petitioner. It also found that the petitioner as also his witnesses did not come up with a case that he was appointed by the bank as Driver and there was no document filed to show that he was getting any salary or allowances from the bank. It also found that he also did not sign any attendance register. It, therefore, concluded that he was not appointed by the bank as Driver-cum-Sepoy. This evidence on record has been examined to find out whether there existed relationship as employer and employee between the parties. Various documents placed on record by the parties or its impact has not been considered by Central Government Industrial Tribunal at all.

The learned Counsel appearing before me have in their attempt to demonstrate existence of such relationship or otherwise, invited my attention to annexures filed with Writ Petition and have advanced arguments about the effect of those documents. The effect of those documents is not considered by Central Government Industrial Tribunal at all. Even the arguments as sought to be canvassed before me are not mentioned by the Central Government Industrial Tribunal in the impugned award. The petitioner had called for total 12 documents and out of them only six were produced before C.G.I.T. The Central Government Industrial Tribunal has not considered the relevance of documents which were not produced and their possible impact, had the same been produced by the bank. Even the duty chart which is produced by the petitioner as part of Annexure-K at page No. 73 with this writ petition shows that he has taken other officers of the bank also to various branches of Bank of India on some occasions.

15. As I find that the documents brought on record or oral evidence placed on record by the petitioner to show that he was working as Driver-cum-Sepoy of Bank have not been appreciated by the Central Government Industrial Tribunal at all, the award dated 05.02.2002 cannot be sustained. The same is accordingly quashed and set aside. The matter is remanded to Central Government Industrial Tribunal for appreciation of oral as well as documentary evidence placed on record by the parties and to record a finding on reference as placed before it by the appropriate Government: As the matter is old and being sent back, Central Government Industrial Tribunal shall decide the reference as early as possible and in any case on or before 30th June, 2009.

16. R. & P., if any, be sent back immediately. The parties to appear before the Central Government Industrial Tribunal on 20th November 2008. Writ petition is thus partly allowed & rule made absolute accordingly. No order as to costs.