

Government of India
Ministry of Labour & Employment,
Central Government Industrial Tribunal-Cum-Labour Court-II, New Delhi.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

INDUSTRIAL DISPUTE CASE NO. 233/2011

Date of Passing Award- 01.08.2022

Between:

Shri Chetan Khandpal,
2148, Indira Nagar,
Lucknow -226016.

Workman

Versus

The Chief Executive Officer,
Hong Kong and Shanghai Banking Corporation (HSBC)
M. G Road, P.O Box 128,
Mumbai-400001.

Management

Appearances:-

Shri Pradeep Saini
(A/R)
Shri Sanjay Gupta
(A/R)

For the claimant

For the Management

A W A R D

The Government of India in Ministry of Labour & Employment has referred the present dispute existing between employer i.e. the management of Hong Kong and Shanghai Banking Corporation (HSBC), and its workman/claimant herein, under clause (d) of sub section (1) and sub section (2A) of section 10 of the Industrial Dispute Act 1947 vide letter No. L-12012/74/2010 (IR(B-I) dated 24/05/2011 to this tribunal for adjudication to the following effect.

“Whether the action of the management of Hong Kong and Shanghai Banking Corporation (HSBC) Ltd. New Delhi in terminating the services of Shri Chetan Khandpal, Ex Relationship Manager, Consumer Finance W.e.f 22/05/2009, is legal and justified? To what relief he workman is entitled to?”

The claimant in the claim statement filed, has stated that he started working with the management Bank as a Relationship Manager, consumer finance, with effect from 06/08/2007 as per the job offer letter accepted by him. His first place of posting was Lucknow. The management decided to shut its Lucknow office and worked out a plan to throw the claimant out of the system. Another reason behind the same was the pro active nature of the claimant in bringing the misdeeds of some senior employees to the fore front. When he was discharging his duties with utmost sincerity, suddenly the management on 20/08/2008 took a decision that the claimant for his underperformance shall be put under the Performance Improvement Plan (PIP). Before that, in the middle of July 2008, the

claimant was forced to resign, but he did not accede to the pressure. After putting him under PIP, in the month of Nov 2008, he was transferred to Delhi Office at an entry level position and was asked to perform the job of tele-calling and cold calling in the market. That created tremendous dissatisfaction in his mind making him unable to perform at his best. He took up the matter with the appropriate authorities requesting change in his job profile and several e mail communications in this regard were made. Finally the management on 22nd May 2009 served a notice of termination from service on him and with immediate effect discharged him from service. At that time a cashier order for Rs 98,550/- drawn in his favour was handed over to him. He accepted the same under protest and without prejudice to his claim. Having realized that he has been made a victim of the situation for the pro activeness shown in un veiling the mis deeds of some seniors, he served a legal notice on the management on 11.11.2009 and also raised a dispute before the labour commissioner and the matter was referred to this Tribunal for adjudication. In the claim petition the claimant has further pleaded that the action of the management in terminating his service illegally in gross violation of the provisions of ID Act and replying vaguely to the legal notice has given rise to the cause of action for raising this dispute. Thereby the claimant has prayed for an award to be passed setting aside the illegal order of termination and direct the management to reinstate him in to service with full back wages from the date of such Termination and all consequential benefits.

In reply the management has denied all the allegations leveled by the claimant leading to his termination which he describes as illegal. The main objection taken by the management is that the claim is not maintainable as the claimant is not a workman as defined u/s 2(s) of the ID Act. He as per his own averments in the claim petition, was initially appointed as the Relationship manager consumer finance in band 7 vide appointment letter 06/08/2007 accepted by him on 13.08.2007 and posted in the office at Lucknow. A contract of employment was executed between the management and the claimant. As per the condition stipulated in the said contract the management reserves the right of terminating the service of the employee after giving a three month notice or notice pay for such period, the in lieu of the notice. The claimant for his under performance was offered to undergo a performance improvement programme where he had ample opportunity of up grading and improving his performance. He was then transferred to Delhi office and closure of the Lucknow office has nothing to do with his transfer. In Delhi he was asked to perform the duties as the Senior Premier Sales Associate drawing monthly emoluments of more than 32,850/-but in his new position too he could not perform up to the set Targets, leaving the management with no other option than terminating his service as per the term and contract of employment. On 22.05.2009 he was served with the order of Termination along with a cheque of Rs. 98,550/- which was equal to his three months salary and the same was given as notice pay in lieu of three month notice. The claimant accepted the same without protest and later encashed the same. After a considerable time gap he served a legal notice on the management and raised an industrial dispute.

Before the labour commissioner the management took the stand that the claimant was appointed as a relationship Manager in Lucknow and on his Transfer to Delhi as a part of PIP, he was working as the senior premier sales associate. In both the positions he was in band 7 which as per the Banks service condition was an officer cadre. At Lucknow he was a Manager, apart of the management Team and in Delhi he was in the supervisor grade looking over and monitoring the work of hiring team to source customers. In Delhi though he was asked to work for a different role his salary etc remained unchanged. Rather, Delhi being a tier 2 city his total emoluments was increased by increase in allowances. While denying that his service was illegally terminated as he came out to be a whistle blower, the management has stated that the claimant had raised some false allegations against some officers of the Bank which were found to be baseless after an in house inquiry. Thus the management has pleaded that the claim is liable to be answered against the claimant as he is not a workman as per sec 2(s) of The ID Act and no illegality was committed in terminating his service for his performance below the expected standard. The said Termination can not be termed as Retrenchment.

On these rival pleadings the following issues were framed for adjudication.

1. Whether the claimant is not the workman within the meaning of sec 2(s) of the ID Act.
2. Whether the Termination of claimant's service amounts to retrenchment defined u/s 2(oo) of the ID Act.
3. As in terms of reference.
4. Relief .

The claimant examined himself as ww1 and filed documents which have been exhibited in a series as ww1/1 to ww1/12. these documents include the appointment letter of the claimant containing the terms and conditions of service, the termination letter, one compact disc containing the conversation between the claimant and authorities of the Bank, the Transfer order dated 08.10.2008, several e mail correspondence in which the claimant had requested for change of his job profile, the legal notice served on the Respondent before raising the Industrial Dispute and the reply given by the management. Similarly the Management examined it's vice president Employee Relation as MW1, who, besides testifying orally, also proved the documents marked as Ext MW/1. The management also confronted some documents to the claimant during cross examination, which were marked as WW1/M1 to WW1/M4.

At the outset of the argument the learned AR for the management argued that while framing of issue they had prayed for a preliminary issue hearing on the maintainability as the claimant is not a workman. But this Tribunal took a view that the issue can be considered along with other issues.

Perusal of the Record shows that earlier an award was passed on 14/06/2017 wherein it was held that the claimant is a workman and

the order of termination was illegal. With such finding the Tribunal passed the award directing reinstatement of the claimant with back wages. But the award was challenged by the Respondent Bank in WPC No 9755/2017 and the Hon'ble Court by order dated 25/09/2019 passed the order setting aside the said award directing re consideration.

The learned AR for the claimant argued that the management since has disputed the status of the claimant as a workman, the burden is on him to prove the same and management has failed to prove the same. The oral and documentary evidence filed by the claimant very well proves the status of the claimant as a work man. He urged for deciding the maintainability in favour of the claimant.

FINDING

ISSUE No. 1

The claimant has described himself as a workman for raising the Industrial Dispute which has been objected to by the management. The stand of the management in this regard is that the claimant was initially appointed as a relationship manager of consumer finance at Lucknow and transferred to Delhi for a new position as Senior Premier Sales Associate. His basic salary for both the positions per month was 32,850/- with admissible allowances. He was discharging his duties as a manager and at the time of termination of service he was the supervisor and leading a team of outsourced and called as hiring team. Hence, he does not fall under the definition of workman as defined u/s 2(s) of the Act.

Sec2(s) reads as follows

“workman means any person (including an apprentice) employed in any industry to do any manual, skilled, unskilled, technical, operational, clerical or supervisory work for hire or reward, whether the term of employment be express or implied, and for the purpose of any proceeding under this Act, in relation to an Industrial Dispute, includes any such person who has been dismissed, discharged retrenched in connection with, or as a consequence of that dispute, but does not include any such person

- (1) ****
- (2) ****
- (3) who is employed mainly in a managerial administrative capacity, or
- (4) who being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

The admitted facts are that the claimant was initially appointed as Relationship Manager in Lucknow and subsequently transferred to

Delhi for a new position i.e senior premier sales associate. Where as the management alleges that both the positions are managerial and supervisory in nature, the claimant has stated that at the time of his termination, i.e when the cause of action arose he was discharging the function of no more than a clerk, a lower functionary. Hence he very well falls within the definition of workman.

Since the management of this proceeding has disputed the status of the claimant as a workman, the burden lies on the management to prove the fact asserted and the burden then shifts on to the claimant to disprove the same. The management in order to discharge the burden has adduced both oral and documentary evidence. The witness for the management, who is the Vice president, employees Relation has stated that the claimant was appointed as Relationship Manager in Lucknow and transferred to Delhi as senior premier sales associate and worked in that capacity till the date of termination of his service. By filing the document marked as Ext W1/M1 and Ext WW1/M2, which contains the job description and a part of the contract of employment, the witness has stated that the claimant was discharging the job of a manager only and in Delhi he was leading a team and his basic salary ,then was more than 10,000/- per month. The witness has also exhibited a comparative chart of the benefits and allowances paid to clerical staff and managerial staff. The claimant being confronted with the documents during cross examination admitted the same to be the job description attached to his contract of employment. He also admitted during cross examination that all the officers of the Bank are given a band in terms of their seniority and usually the officers get Band 7. He was appointed in Band 7. There is no evidence placed on record that the pay band of the claimant was changed when he was re located to Delhi in a different Role. On the contrary the oral evidence of MW1 reveals that the basic salary remaining unchanged, the gross salary of the claimant increased in Delhi as the allowances paid in Delhi a tier 2 city are more in comparison to Lucknow, a tier 3 city. This evidence has remained un rebutted.

In the pleading and oral statement the claimant stated that irrespective of the job description in the contract of employment, he was discharging the job of a lower functionary and at the time of termination he was no better than a clerk whose job was to make tele-calling and cold calling an entry level job. Few e mail correspondence made by the claimant ventilating his dis satisfaction has been placed on record. The learned AR for the claimant by placing reliance in the case of **Anand Bazar Patrika (p) Ltd vs. Workman(1970)3 SCC 248** argued that the words managerial, administrative or supervisory are not synonyms to each other. In the case of Anand Bazar Patrika, the Hon'ble SC have held that:-

“the question whether the a person is employed in a supervisory capacity or on a clerical work, in our opinion depends upon whether the main and principal duties carried out by him are those of a supervisory character, or of a nature of work carried out by a clerk. If

a person mainly doing supervisory work, but, incidentally or for a fraction of time also does some clerical work it would have to be held that he is employed in supervisory capacity, and conversely, if the main work done is of clerical nature, he can not be said as employed in a supervisory post”

The learned AR for the claimant thereby argued that the management since admitted that after relocation to Delhi, the main job of the claimant being Tele calling and cold calling , it is proved that he was in the entry level job band and a workman under the definition of sec 2(s) of The Act..

The reply argument of the management is that the job description given in the transfer order describes his primary duty and any other work done by him was ancillary to his primary job. His job band having not been changed at the time of transfer, the claimant that he had joined in an entry level post in Delhi can not be accepted. The job description provided to the claimant, when he was placed under PIP, has been filed and marked as EXT WW1/M2 and WW1/M3. These documents show that the primary job of the claimant in his new position would be to acquire quality premier relationship for HSBC among others and to execute marketing events and promotions to generate business as a part among other responsibilities. The number of non executive staff to report him during this position has been mentioned as 3to 5. The claimant during cross examination has also admitted the same. The learned AR for the management Bank by placing reliance in the case of Standard Chartered Bank vs. Vandana Joshi & another pronounced by the Hon’ble High Court of Bombay, (WP No 975/2009, decided on 17.12.2009) submitted that the Hon’ble Court having taken note of the shift in the Managerial Responsibility in an organization on account of Team work and other methods introduced, have held that:-

“burden lies on the person who asserts the status of a workman under sec 2(s) to establish with reference to the dominant nature of the duties the workman performs, falls in one of the stipulated category in sec 2(s). The court must have regard to the dominant nature of the work or duties assigned. Work which was assigned to the first Respondent clearly shows that she was intrinsically associated with the provision of a high level customer service of the Bank. While doing such work, the employee had to do incidental work including doing with her banking request, request for closure of accounts etc. the over all nature of duty assigned was not of clerical nature”

The facts of the case of Standard Chartered Bank referred supra is identical to the case of the claimant and the principle decided is the same as was held by the Hon’ble SC in the case of Anand Bazar Patrika referred supra. Thus it is concluded that the claimant was discharging the function of relationship manager in Lucknow and on

relocation to Delhi as a step towards PIP, his position was Premier Sales Associate and any incidental work done by him can not change the nature of his primary duties. More over when his pay Band 7, granted to the officers of the Bank was not changed through out his employment he can not claim that he was not discharging managerial or supervisory function at the time of the alleged illegal termination of service. Thus it is held that the claimant has not succeeded in disproving or , rebutting the evidence adduced by the management which proves that the claimant, not being a workman as defined u/s 2(s) Of The ID Act , has raised this dispute and thus the proceeding is not maintainable. The issue is accordingly answered against the workman.

ISSUE No. 2&3

The claimant has challenged the termination as illegal mainly on the ground of non compliance of the provisions of sec 25F of the ID Act. He has also alleged about the unfair labour practice meted to him and he falling to a victim of the illegal activities going in the management tried to be brought to the fore front. Several e mail communications in this regard has been placed on record. In the pleading and in the oral evidence he has stated about the pressure created on him for resignation for his proactive attitude to expose the illegality. The management has denied all the allegations and stand taken by the claimant. It has been pleaded that some allegations were made by the claimant against the management and those were duly investigated and found to be baseless. The management witness has added that the claimant, without waiting for the result of the in house investigation was making e mail correspondence and those have been placed on record. Those documents have no relevancy with the alleged termination.

The claimant has stated that for the grudge borne against him and for closure of Lucknow office management hatched a plan to remove him fromservice and held him as an under performer though he was discharging his duties with utmost sincerity. He was illegally placed under PIP. In reply the management has stated that the underperformance was brought to the notice of the claimant time and again and the performance improvement plan was discussed with the claimant. With his agreement, he was relocated to Delhi for a new Role. The bonafides of the management is proved from the fact that the claimant, for the under performance was not removed from service and offered a chance for self improvement. While going through the PIP his salary and other emoluments were not changed. Since the claimant could not perform up to the expected standard in his new role, the management had no other option than terminating his service. While terminating the condition of employments were scrupulously followed and at that time the claimant had not raised any objection. Thus, there was noneed of complyingthe provisions of sec 25F of the ID Act.

Management as well as the claimant have pleaded that the notice of termination vide Ext WW1/2 was served on the claimant on

22nd May 2009 and i.e. that date, the service of the claimant was terminated. It is also admitted by both the parties that on that date a cheque of Rs 98,550/- as mentioned in the notice Ext WW1/2 was given to the claimant. The management has stated that the said amount was given towards three months pay in lieu of three month notice as mentioned in the contract of employment. The management has placed the job offer letter dated 6th August 2007 on record which was on record which contains the Terms and conditions of employment as enclosure. The claimant has not denied the contents of the document. As per the said Terms and conditions, either party to the contract of employment, can terminate the contract either by giving three months notice or three months salary in lieu of the notice. The claimant during cross examination admitted that the cheque for Rs 98,550/- given along with the notice of Termination was equal to his three months salary and the same was paid in terms of his employment contract. Of course the claimant stated that he received the same under protest. No document with regard to the protest has been placed on record. Rather the evidence suggests that the cheque was encashed by the claimant in time.

Now the question for a decision is if payment of three month salary would stand for compliance of the provisions of sec 25 F of the ID Act? The learned AR for the claimant argued that the meaning of retrenchment given in sec 2(oo) is wide to include all termination for whatever reason may be except termination by way of punishment in disciplinary action, voluntary retirement and retirement on superannuation. For all other act of termination the act amounts to retrenchment and makes it mandatory for the employer to comply the provisions of sec 25F of the Act. The said provision having not been complied in case of the claimant, the termination is illegal and liable to be set aside and the claimant is entitled to the relief of reinstatement.

In this case admittedly sec 25 F was not complied. On behalf of the management reliance has been placed in the case of Manju Saxena vs. Union of India, decided by the Hon'ble SC in civil appeal no 11766-11767/2018 by order dated 3rd December 2018, wherein by relying upon the earlier judgments of the Hon'ble Apex Court in the case of **Gurmail Singh & others vs. state of Punjab(1991) 1 SCC 189** and **Pramod Jha & others vs. State of Bihar & Others (2003) 4 SCC 619**, have held that compliance of sec 25F is not mandatory when a sum as per the contract is paid in lieu of the notice u/s 25F of the Act. Hence it is held that the termination of service of the claimant on account of his under performance after paying him three month salary in lieu of three month notice as stipulated in the contract of employment can not be termed as illegal termination of service.

Accordingly it is held that the claimant is not entitled to the relief of reinstatement with back wages as prayed by him. Issue no 2&3 are accordingly answered against the claimant. Hence, ordered.

ORDER

The reference be and the same is answered against the claimant and he is held not entitled to the relief sought for in this proceeding. Send a copy of this award to the appropriate government for notification as required under section 17 of the ID act 1947.

The reference is accordingly answered.

Dictated & Corrected by me.

Presiding Officer.
CGIT-Cum-Labour Court.
1st August, 2022.

Presiding Officer.
CGIT-cum-Labour Court.
1st August, 2022.