

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. 133/2015

Date of Passing Award- 11.04 .2023

Between:

Shri Sanjai Kumar S/o Sh. Harnam Singh
R/o Jamalpur Alam, Aamkheda, Sanjarpur
Pargana, & Station Dhampur, Distt. Bijnor,
Uttar Pradesh

Workman

Versus

M/s. The State Bank of India,
Dhampur, Bijnor, Uttar Pradesh

Management

Appearances:-

Sh. B.S Rawat, Ld. A/R for the claimant.

Ms. Savita Singh, Ld. A/R 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 (i) The State Bank of India, Dhampur, Bijnor, Uttar Pradesh 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-12012/47/2014-(IR(B-1)) dated 31/08/2015 to this tribunal for adjudication to the following effect.

“Whether the workman Shri Sanjai Kumar was removed from the service of State of Bank of India w.e.f. 07.01.2012 without any valid reason, due procedure and compensation? If so, should he be reinstated with back wages or any compensation?”

As per the claim statement the claimant Sanjay Kumar was appointed as a messenger/peon in the state Bank of India Dhampur, Bijnor U.P. on 14.07.2001 on monthly remuneration 2000. Though he was discharging his duty to the utmost satisfaction of the employer, not getting the legitimate dues and the benefits guaranteed under law. He was often making demand for appointment letter casual leave over time wage and minimum wage notified by the Government. This demand of the claimant created annoyance in the mind of the employer and as a result thereof, his service was terminated illegally on 07.01.2012. At the time of termination no notice of termination, notice pay or termination compensation was paid by the mgt. Not only that his earned wage for the month Jan., 2012 was also not paid. Finding no other way he served demand notice on the mgt Bank on 12.03.2012. The mgt did not reply to the same. He then raised a dispute before the Central Labour Commissioner Dehradun, where a conciliation proceeding was initiated. The mgt appeared and filed written reply denying the claim as advanced by the Workman. The conciliation since failed, the appropriate Govt. referred the matter for adjudication as per the terms of reference. The claimant in the claim petition has prayed that he be reinstated into service with consequential benefits and back wages and continuity of service.

The mgt Bank appeared and filed w/s denying the claim advanced by the claimant. It has been stated that the claimant was never employed by the Bank and there is not sanction post of water man in the Bank as claimed by the claimant. Neither he was employed as a part time worker nor a full time worker too. The specific stand of the management is that, he was working as a daily wager on need basis and getting the wage calculated for day's work. He had worked as such from 14.07.2004 to Dec 2011 on need basis and after December 2011 he stopped reporting for work. During this period, he

had never worked for 240days in a calendar year. With an ill intention of obtaining the status of a permanent employee in the Bank, he filed a writ petition before the Hon'ble High Court of Allahabad in the year 2012. But the writ petition was dismissed with observation that the workman can seek redress under the Industrial Dispute Act. The claimant instead of approaching the Labour Court, made an application before the Additional Labour Commissioner Bijnor U.P. For the objection raised by the Bank Management, the said petition was rejected. He filed another claim petition before the Labour Commissioner Bijnor U.P. where a conciliation took place and the Bank made payment of Rs.3000/- to the claimant towards full and final settlement of the claim. But the claimant with an evil intention again filed a petition before the Labor Commissioner (central) Dehradun where reconciliation took place in the year 2015. The conciliation since failed the matter was referred to this Tribunal. Thereby, the mgt Bank has stated that the claim advanced by the claimant is not maintainable as there exists no employer and employee relationship between the parties. The claimant was neither a part nor a full time employee of the Bank. He was being engaged as a contractor and getting the remuneration for the service rendered which was purely on need basis. No salary was ever paid and the payment were made on the basis of the voucher raised by the claimant. The mgt Bank has thus prayed for dismissal of the claim petition.

The claimant filed rejoinder denying and challenging the stand of the Bank mgt. In the written rejoinder it has been stated that the claimant was working as a Peon cum messenger in the Bank for a pretty long period, which is for more than 11 years. As a part of his service, he was the work of the peon as well as messenger. He was carrying the voucher boxes to the treasury and for the said work, the Bank was paying him the traveling allowances. But he was subjected to unfair labour practice when the Bank without following the procedure of the ID Act terminated his service illegally.

On this rival pleadings the points which need to be adjudicated are:

1. Whether there exists employer and employee relationship between the claimant and the mgt Bank.

2. Whether the Service of the claimant was illegally terminated by the Bank in gross violation of the provisions of the ID Act.
3. To what relief the claimant is entitled to.

Before commencement of the evidence the claimant had filed an application invoking the provisions of Section 11(3) of the ID Act wherein a prayer was made for a direction to the Bank to produce the documents. The documents called for by the claimants were the attendance register and the register showing payment of remuneration to the claimant. The mgt did not file any reply to the application and the same was allowed, giving liberty to the claimant to produce secondary evidence.

The claimant examined himself as WW1 and produced some documents which are marked in the series of WW/1/1 to WW1/6. Similarly the mgt examined its manager as MW1 who also produced documents marked in the series of MW1/1 to MW1/1. Both the witness were cross examined as length by their adversaries. Whereas the claimant has filed the photocopy of the Bank passbook, Bank statement and the Rickshaw fare paid to him by the Bank for carrying the voucher boxes to the treasury and the representations made to the Branch Manager of the Bank, the mgt witness filed the photo copies of the attendance register of the Bank for a fraction period in respect of which claim has been filed. On behalf of the Bank several photo copies of the vouchers raised by the claimant for serving water to the Bank employees has been filed. In addition to that, the Bank has also filed the objection filed during the conciliation proceeding and a document showing receipt of 3000 rupees by the claimant during the conciliation proceeding etc.

Finding

Point no.1 &2

At the outset of the arguments the Id. Counsel representing the mgt submitted that the entire claim advanced by the claimant is baseless and

stands upon a misconception of fact. Placing reliance on the vouchers showing payment to the claimant for supply of drinking water, she submitted that the workman should initially discharge the burden of proving his relationship with the mgt as its employee. The mgt from the very beginning is pleading that the claimant was a contractor engaged for execution of some work on need basis. Sometimes he was working himself and sometimes through the men engaged by him and getting the payment as per the bill raised for the specific work. This pleading of the mgt has been corroborated by the witness examined as MW1 who has further stated that the claimant was not appointed against any vacancy and through the procedure followed by the Bank. Neither he was a part time nor a full time employee of the Bank. The Ld. Counsel for the mgt while pointing out to the cross examination of the claimant stated that the claimant has admitted not have received any appointment letter from the Bank. Had he been an employee of the Bank he would have been issued with an appointment letter. By producing the attendance register of the Bank, she also submitted that the employees of the Bank use to sign on the attendance register and the attendance register of a part period filed by the Bank does not contain the signature of the claimant, which proves that he was not appointed as an employee of the Bank and the claimant thus has failed to prove the initial burden of showing the employer and employee relationship. The contrary argument advanced by the claimant is that that documents exhibited as WW1/3, the Bank passbook and the Bank statement clearly proves that he was working exclusively for the Bank and getting fixed amount of remuneration credited to his account every month. Had he been a contractor or a daily wager engaged on need basis, the amount of remuneration of payment made every month in the Bank account would not have been the same. The claimant has filed several other documents to show that as a part of his work as the messenger and peon, he was doing the job of carrying the challan copies to the treasury in respect of the Govt. transaction. The Bank was paying the traveling allowance to him in form of Rickshaw fare. The Ld. A/R for the claimant submitted that had the claimant not been an employee he would not have been entrusted with the responsibility of carrying the vouchers and treasury challans of Govt. Transaction from the Bank to the

treasury. The other argument advanced by him is that the claimant had filed an application for production of relevant documents relating to his employment from the custody of the bank. But the Bank intentionally did not file the documents and on that ground also adverse inference is to be drawn against the Bank mgt.

The Ld. A/R for the mgt further submitted that besides the burden which lies on the claimant to prove the employer and employee relationship, in order to get the relief of regularization, he is also required to prove that he had worked in the Bank for 240 days in a calendar year. Unless this burden is discharged, in view of the objection raised by the mgt in the w/s and through the witness, the claimant is not entitled to the benefits prayed for. In his reply the Ld. A/R for the claimant argued that the claimant is a poor employee working as the peon/messenger of the Bank. The documents filed by him clearly proves that he was working for the Bank from 2001 to 2012. But the Bank for no valid reason terminated his service and at the time of termination the provisions of the ID Act were not followed. But as an abundant caution the claimant had made a prayer for a direction to the mgt for production of the valid documents which could have thrown light on the point of controversy. But the mgt intentionally withheld the documents.

The claimant while deposing as WW1 has stated that he was appointed in the Bank on 14.07.2001 as a Messenger/Peon and his last drawn wage was 3200 per month. At the time of initial appointment his remuneration per month was Rs 2000 only. The mgt was depositing this amount in his Bank account. The copy of the bank statement has been filed as WW1/3 and WW1/4. The claimant has also stated that when the service was terminated illegally, he served a demand notice which was not replied by the mgt. By filing the copies of the applications filed before the Labour Commissioner, the witness had stated that the conciliation failed for the non cooperation of the Bank and the appropriate Govt. referred the matter to this Tribunal. The witness was cross examined at length by the mgt and during the cross examination

suggestions were given to the effect that he was working as a contractor and providing the service to the Bank on need basis either through himself or through men supplied by him. For the said service rendered, he was raising voucher and getting payments. But the claimant clearly denied the suggestions and added that he was a regular employee. The mgt witness examined as MW1 while supporting the stand taken in the W.S, has stated that as per his knowledge the claimant was working for the Bank as a contractor from 2004 to 2011 and the Bank has records to prove the same. But surprisingly no document has been filed by the Bank to prove that the claimant during the relevant period was working as contractor or any written contract was ever entered between the parties.

It is the consistent stand taken by the claimant that he was working as peon for the Bank and discharging all the works discharged by the regular peons of the Bank. To counter this the mgt has filed few voucher marked in the series of mw1/3 (colly) which appears to be receipts granted by the claimant for receiving Rs.2200/- for providing drinking water. These documents do not appear relevant as against Bank statement filed by the claimant which clearly shows that every month the claimant was getting a fixed amount credited to his Bank account for his remuneration through cheque paid by the Bank. The amount as shown in the Bank statement was increasing year after year which means his wage was getting increased by efflux of time. The vouchers filed by the mgt might be with relation to some other additional work done by the claimant and has no reference to the claim of the claimant.

It is a fact noticeable that the mgt is not clear in respect of its stand on the claim advanced by the claimant. In the W.S, when it has been stated that the claimant was working as a contractor, the witness MW1 at one point of time has described the claimant as a daily wager engaged from 2004 to 2011 and at the other point, it has been stated that he was a contractor. At the cost of repetition, be it stated here that no document has been filed to prove that the claimant was getting remuneration as a contractor though the witness MW1 has claimed that the Bank has documents to prove the same.

During cross examination the claimant was asked if any appointment letter was issued to him by the Bank at the time of his appointment. To this, he replied that one appointment letter was issued to him at the time of initial appointment, but the same was taken back on the pretext of sending the same to the head office for regularization of his service. The witness examined on behalf of the mgt stated that the Bank has its own procedure for recruitment of the employees and the claimant was never appointed through the said procedure. The said witness, while producing the attendance register of the Bank for a part period that is from 19.10.2009 to 11.09.2012, deposed that the regular employees of the Bank use to sign the attendance register and the said register does not reflect the name of the claimants. On the basis of the said statement the Ld. A/R for the Bank argued that had the claimant been an employee of the Bank, his name would have appeared in the attendance register. This argument of the Ld. A/R for the Bank has lost the importance in view of the fact that the claimant had made a prayer for production of the attendance register from the custody of the Bank which was never done by the Bank. Moreover, the claimant has explained that the attendance register produced by the Bank is in respect of the clerks only whereas separate attendance registers are being maintained for the different category of the employees. Thus, the oral and the documentary evidence adduced by the claimant proves that he was working for the Bank from 14.07.2001 to 07.01.2012 and the copy of the attendance register filed by the mgt no way satisfies the stand of the claimant.

Now it is to be examined if the oral and documentary evidence adduced by the claimant proves the employer and employee relationship between the claimant and the Bank mgt. The Hon'ble Supreme Court in the case of **B.S.N.L Vs Bhurumal reported in 2014 7 SCC 177** have held that the nature of initial appointment cannot be challenged by the mgt to justify the illegal termination. In this case, the claimant has asserted to prove that he was appointed as a peon on 14.07.2001 and worked as such till 07.01.2012. While filing w/s and by examining the witness the mgt has stated that the claimant was working as a contractor

and getting the remuneration for the work done by himself or through his men as per the bill raised. At the other point the stand taken by the mgt is that the claimant was working on daily wage basis and getting the remuneration. This contradictory stand taken by the mgt leads to a conclusion that the Bank mgt is not sure about the nature of the employment of the claimant and to conceal the same the documents called for were not produced.

There is no dispute about the proposition of law that onus to prove that the claimant is in the employment of the mgt is always on the workman and it is for him to adduce evidence to prove the said relationship. Such evidence may be in form of receipt of salary or evidence with regard to 240 days of work or document of employment etc. This tribunal has to consider the oral as well as the documentary evidence placed on record by both the parties so as to decide the question of relationship of employer and employee between the parties.

The workman in his affidavit has stated that he was engaged directly by the mgt to discharge the due of a peon which was perennial in nature. He has further stated that he was performing the duty under the supervision and control of the Bank mgt and getting remuneration from the Bank directly which is proved from the Bank statement. The mgt has not adduced any evidence to disprove the stand of the claimant and to prove that he was working intermittently and purely on need basis. Though the mgt had made a faint attempt of describing the claimant as a contractor, no documentary evidence has been adduced to prove the same. On the contrary, the Bank statement clearly proves that the claimant was working continuously from 2001 to Jan 2012 and the Bank was crediting his remuneration to his Bank account every month and regularly.

In this case except the bald statement that the claimant was a contractor or daily wagger the mgt has not filed any record to prove the same. It seems the mgt though paying remuneration to the claimant is not sure about the nature of his employment which has been proved to be

continuous from 1991 to 2011. In the case of **Steel Authority of India vs. National Union Waterfront Worker Union reported in (2001) 7SCC Page 1**, the Hon'ble Apex Court have also prescribed for the effective control test to ascertain about the relationship of the workman with the management or the contractor. Not only that in the case of **Chintaman Rao vs. State of MP (1958(II)LLJ252)** the Apex court ruled that the concept employment involves 3 ingredients (i) Employer (ii) Employee (iii) Contract of Employment. The employer is one who employees or engaged the service of other person. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee, where under the employee agrees to serve the employer subject to his control and supervision. In the case of workman of **Food Corporation of India vs. Food Corporation of India reported in (1958(ii)LLJ4)** the Hon'ble Apex Court pronounced that the contract of employment always discloses a relationship of command and obedience between them.

In this case the claimant has all along stated that he was working as a peon of the Bank and getting remuneration from the Bank. Except denial no evidence has been adduced by the Bank to disprove the oral and documentary evidence adduced by the claimant. The documents which could have been very relevant in proving employer and employee relationship are in the possession of the bank. The demeanor of the respondent Bank is noticeable from the fact that it choose to not to produce the documents called by the claimant except few pages of the attendance register which does not contain the name of the claimant. Therefore an adverse inference is bound to be drawn against the Bank for withholding material documents.

Thus, from all the facts as adduced by way of evidence, when considered, it is evidently clear that the claimant was directly working under the control of the mgt and getting remuneration from the said mgt. The documents filed by the workman which has not been seriously challenged by the mgt proves beyond doubt that the workman was working with the mgt and as a peon and getting remuneration directly

from the bank. The nature of initial appointment cannot be challenged by the mgt to justify the illegal termination which is an admitted fact that the claimant's service was terminated without serving notice of termination, notice pay or termination compensation to him. The explanation in this regard as given by the mgt witness is not acceptable. Hence it is concluded that the claimant was an employee of the mgt Bank and his service was illegally terminated without following the procedure laid down under the ID Act.

Point No. 3

The reference has been received to adjudicate if the termination of service is illegal and if so whether the claimant would be reinstated with back wages or compensation.

The claimant in his cross examination has stated that he had joined the service of the Bank in the year 2001 when his age was 20-22 years old. On calculation, claimant must be more than 40 years now. The evidence adduced by the parties is not clear, if there exists any vacancy to accommodate the claimant in the post he was working prior to his termination. Thus considering these aspects it is held that no interest of justice would be served by giving a direction to the Bank for reinstatement of the claimant into service. The proper recourse is therefore, a direction for back wages and compensation.

In the case of **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (2013) 10 SCC.324**

It has been held by the Hon'ble Supreme Court :-

“If the employers wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he /she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about it's existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the

employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.”

But in this case neither the mgt has pleaded nor proved the gainful employment of the claimant after termination of his service . Hence considering the facts and circumstances it is felt proper to direct the mgt to pay the back wages and compensation to the claimant in lieu of reinstatement into service. Hence ordered

Order

The reference be and the same is answered in favour of the claimant. It is held that the service of the claimant was illegally terminated by the mgt without following the procedure laid down under the ID Act. Thus the mgt in absence of proof of gainful employment is directed to pay the full back wages as per the last drawn wage of the claimant for the intervening period between his termination and publication of this award with interest, @4% per annum together with a lump sum amount of 3 Lakh as litigation expenses. The mgt is directed to make the payment within two months from the date of publication of the award with interest as directed falling which, the amount shall carry interest @of 6 % per annum from the date of accrual and till the final payment is made.

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.
11th April, 2023.

Presiding Officer.
CGIT-cum-Labour Court.
11th April, 2023.

