

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% W.P.(C) 11344/2009

+ Date of Decision: 22nd March, 2013

**# THE HONGKONG & SHANGHAI BANKING
CORPORATION LTD.**

..... Petitioners

! Through: Mr. Rajiv Nayyar & Mr. Sandeep
Sethi, Sr. Advocates with Mr. Syed
Naqvi & Mr. P.P. Kanwar, Advocates

versus

\$ UOI & ORS.

..... Respondents

Through: Respondent no. 2 in person

CORAM:

*** HON'BLE MR. JUSTICE P.K.BHASIN**

ORDER

P.K.BHASIN, J:

Whether respondent no.2 Ms. Manju Saxena, who was employed as a Senior Confidential Secretary in the petitioner bank at the time of termination of her services and getting monthly salary of over fifty thousand rupees, was a 'workman' within the definition of this term given in Section 2(s) of the Industrial Disputes Act, 1947 is the only question which this Court has been called upon by the petitioner bank to decide in this writ petition wherein the correctness

and legality of the Award dated 1st June,2009 passed by the Central Government Industrial Tribunal-cum-Labour Court(in short ‘the Tribunal’) accepting respondent no.2 as a ‘workman’ has been challenged.

2. Respondent no.2, joined the petitioner bank in March, 1986 as a Lady Confidential Secretary and subsequently she came to be designated as ‘Senior Confidential Secretary’ on 1st October,2004, which designation she continued to have till the termination of her employment with the petitioner-bank. Due to restructuring in the bank sometime in the year 2005 the post which respondent no.2 was holding at that time became redundant. The petitioner bank, however, had offered her some other positions but she had not shown her willingness to accept any of those positions. She was also offered a severance/redundancy package but that was also not acceptable to her since she considered she was entitled to get much more than what was being offered to her and consequently the employer-employee relationship between the petitioner–bank and respondent no.2 came to an end w.e.f. 1st October, 2005.

3. Respondent no.2 considered herself to be an industrial workman and entitled to challenge her employer’s decision to snap

the employer-employee relationship under the provisions of the Industrial Disputes Act, 1947 and accordingly she approached the Labour Department of the Central Government to refer the dispute raised by her regarding the termination of services by the petitioner-bank to the Tribunal. Since conciliation efforts failed, the Central Government made a Reference to the Tribunal requiring it to adjudicate the dispute as to whether the services of the respondent no.2 had been terminated legally and validly. The following was the term of the reference in the Reference Order dated 8th March, 2006:-

“Whether the action of the Chief Executive Officer, HSBC, India Area Management Office, 52/60, Mahatma Gandhi Road; P.O. Box 128, Mumbai-400001 in terminating the services of Ms. Manju Saxena, Staff Officer w.e.f. 01.10.2005 without giving her full terminal benefits is just valid and legal? If not, to what benefits the workman is entitled for and what directions are necessary in the matter?”

4. Before the Tribunal, respondent no.2 filed her statement of claim in which she alleged that her services had been terminated arbitrarily and illegally by the petitioner bank without complying with the requirements of Section 25-F and other provisions of the Industrial Disputes Act as also various other labour laws . She sought her reinstatement in service with all consequential benefits.

5. The petitioner bank contested the claim of respondent no.2, inter alia, on the ground that she was not a 'workman' as she was performing jobs which were administrative, supervisory as well as managerial and so she was not entitled to invoke the provisions of the Industrial Disputes Act. It was also claimed that even otherwise there was no illegality in the decision of the bank in bringing an end to the employer-employee relationship with respondent no.2 since she herself had rejected other positions offered to her and she herself had opted out from the bank's services.

6. Respondent no.2 examined herself in support of her claim before the Tribunal. She was cross-examined at length on behalf of the petitioner bank. From the side of petitioner bank also only one witness was examined and she too was cross-examined at length by respondent no.2 herself.

7. The learned Presiding Officer of the Tribunal thereafter gave his Award, which is now under challenge at the instance of the petitioner bank, holding that respondent no.2 herein was a 'workman' and further that her services had been terminated illegally and unjustifiably. As a consequence of these conclusions, respondent no.2

was directed to be reinstated in service with all consequential benefits including full back wages,

8. Feeling aggrieved by the impugned Award this writ petition was filed by the petitioner bank.

9. The petitioner bank was represented by Mr. Rajiv Nayyar and Mr. Sandeep Sethi, Senior Advocates, while respondent no.2 presented her case in person as she had done before the tribunal also.

10. As observed already, the only point which this Court has been called upon by the petitioner bank to decide is whether respondent no.2 was a 'workman' or not. The learned senior counsel for the petitioner bank had submitted that the Tribunal had held the respondent no.2 herein to be a workman because she claimed to be a workman and, in fact, even she herself had also not stated in her evidence anything about the exact duties which she was performing. She simply deposed that she was performing clerical duties as a Secretary of a Senior Manager of the bank. Learned senior counsel also contended that even though from the side of the petitioner bank voluminous documents had been placed on record of the Tribunal and proved through its witness which showed the supervisory and managerial duties which respondent no.2 was actually performing

but the learned Presiding Officer of the Tribunal had most arbitrarily did not even take any notice of those documents in the impugned Award. It was also vehemently contended that the documentary evidence brought on record by the bank, which included many e-mails of respondent no.2 herself sent to managers who were senior to her, showed that she was, in fact, commanding her seniors to act in particular ways while performing their duties as managers but all that evidence was not even referred to in the impugned Award. Thus, the learned senior counsel submitted, there was no real adjudication of the main controversy between the parties done by the Presiding Officer of the Tribunal and he in a most arbitrary manner accepted the case respondent no.2 on the premise that whatever she had submitted before only had to be examined and not the version of the employer. Learned senior counsel cited one judgment of the Hon'ble Supreme Court in **“J.K. Iron and Steel Co.Pvt. Ltd. Kanpur vs The Iron and Steel Mazdoor Union”, 1955 (2) Supreme Court Reports**, wherein it was observed by the Hon'ble Supreme Court while deciding that matter that the industrial adjudicators cannot adopt the attitude of 'benevolent despots' and give any decision in respect of the dispute which is referred to them for adjudication. Two judgments of Andhra Pradesh High Court reported as **2009 Law**

Suit(AP) 437, “A.Ramaiah vs Hon’ble Industrial Tribunal” and “P.F.Khan E vs Depot Manager, A.P.S.R.T.C. Ananthapur Depot & another”, 2008(3) Andhra Law Times Reports 234”, were also cited wherein the High Court had remitted back the matters to the industrial adjudicators for fresh decision since the Awards under challenge did not have any discussion about the evidence led in the matter.

11. Respondent no.2, who has been fighting this legal battle in person from the beginning, however fully supported the conclusion of the Tribunal that she was a workman. She, in fact, went to the extent of submitting that this controversy stood decided in her favour much before the passing of the impugned Award. It was submitted that when the matter was pending before the Tribunal she had moved an application for grant of interim monetary relief which the Tribunal had accepted and awarded her interim payment of Rs.30,000/- per month. That interim Award was upheld not only by this Court but also by the Hon’ble Supreme Court. She submitted that while awarding interim relief to her the Tribunal had rejected the bank’s case that she was not a workman and, therefore, that dispute could not be reagitated by the bank.

12. As far as the submission of respondent no.2 that with the passing of the interim Award in her favour by the Tribunal the dispute whether she was a workman or not stood finally decided is concerned the same cannot be accepted since in the interim Award the Tribunal itself had observed that whatever had been observed in that Award was only on a prima facie view and would be irrelevant at the stage of final adjudication of the disputes between the parties to be done after examining the evidence to be adduced in the matter. The learned presiding officer had rightly made that observation at that stage of the matter.

13. Now I come to that part of the final Award of the Tribunal where the Tribunal dealt with this controversy between the parties. The relevant observations made by the learned Presiding Officer are as under:-

“29..... The most important point for consideration in this case is if Ms. Manju Saxena, claimant is a ‘workman’ or not. The jurisdiction of this Industrial Tribunal cum Labour Court could be invoked only if Ms. Manju Saxena happens to a workman.

30. It is an admitted position that Ms. Manju Saxena joined the services of the respondent bank on 10.03.1986 as a Lady Confidential Secretary. Later on she was promoted as Senior Confidential Secretary. Ms. Manju Saxena executed an agreement with the terms and conditions of service on 27/12/1986 Ex. MW 1/3. The duties entrusted to her post were primarily to assist the attached officer in

the performance of that officer's functions. On 01/10/2004 Ms. Manju Saxena was placed in the category of Senior Confidential Secretary SO Band 2.....

31. It is now a settled position in law that an undue importance need not be given to the designation of an employee, or the class to which he belongs. A nomenclature and designation are not very much material for deciding whether an employee is a workman or not. What is required to be seen is if the main and principal duties carried out by official are clerical or supervisory, administrative and managerial in character. If the main work done is of clerical nature, the mere fact that some supervisory duties were also carried out incidentally, the same will not cover the employment from that of a clerk into one in supervisory capacity.

32. In her evidence, Ms. Manju Saxena has asserted that she was all along been discharging duties mainly of a clerical nature and even after she was transferred to new terms and conditions, there was no change in her duties. She was not given even incidentally any supervisory duties and she has not discharged any managerial or supervisory functions. Her real and substantial employment was clerical. In her cross-examination Ms. Manju Saxena was enquired by the Ld. Counsel for the management if she was assigned the job of organizing events, liaisoning with bank managers, negotiating rates, finalizing the menu and the invitation list and she was also authorized to settle bills, etc. Further, if on behalf of the bank she used to assist and recommend to the bank the training needs of the employees and to such like questions, Ms. Manju Saxena answered that she was working under the instruction of Ms. Nancy Dickinson and had no supervisory powers to take any action on behalf of the bank. Further, no staff was reporting to her and no financial powers were assigned to her by the bank. Her main work was to type the reports under the instructions of her immediate boss who used to take action on areas of improvement and finally allocating the budget to all branches of the area. Regarding her visits she has replied that she was given additional responsibilities by her immediate boss, Miss Nancy

Dickinson to collect reports without any supervisory powers which is also clear from documents EX WW 25, WW 26 and WW 30. According to Miss Manju Saxena, Miss Dickinson used to call her at her residence and give instructions, which is also clear from document WW 29. Ms. Manju Saxena has asserted that she performed the duties not independently but under the instructions her immediate boss.

33. Thus, even if Ms. Manju Saxena was compelled to take up additional duties by her immediate boss, Ms. Nancy Dickinson, the same, by no stretch of imagination, could mean that she had stopped performing her main and essential duties. There is nothing to show that the bank paid any additional remuneration to Ms. Manju Saxena for performing duties assigned to her by her boss, Ms. Nancy Dickinson. It may further be noted here that the respondent bank could not file even a scrap of paper to establish that Ms. Manju Saxena was assigned managerial, supervisory or administrative duties. Staff Officer is a dignified designation but the nature of duties performed by the official cannot be ascertained from the mere use of work 'Staff Officer'. There is absolutely no material on record to provide that Miss Manju Saxena was employed to work in a managerial or supervisory capacity, or any number of persons were working under Ms. Manju Saxena whose work she was required to supervise. The real tests for ascertaining the status and functions of an employee are the primary, basic and the dominant nature of his or her duties and applying such tests it is difficult to hold that Ms. Manju Saxena is not a workman."

14. From these paragraphs of the impugned Award it becomes evident that the Tribunal accepted the respondent no.2 to be a workman by simply considering her part of the story and accepting the same without even making any reference to the oral as well as

voluminous documentary evidence adduced from the side of the petitioner bank. It was rightly submitted by the learned senior counsel for the petitioner bank that the learned Presiding Officer of the Tribunal had not given even treatment to the employer while deciding the reference and the adjudication of the dispute whether respondent no.2 was a workman or not simply by considering her evidence only and totally ignoring the bank's evidence by observing that the bank had not placed on record even a scrap of paper to show that she was performing supervisory or managerial functions is not a complete adjudication of the dispute which was expected to be done by the Tribunal after dealing with employer's evidence also and giving some reasons as to why the employee's evidence was being accepted in preference to the employer's evidence. It was also rightly contended by the learned senior counsel that if bank's evidence had been noticed and examined and then a conclusion had been arrived at by the Tribunal that respondent no.2 was a workman the petitioner would have got an opportunity to contend before this Court that the rejection of the bank's evidence was for erroneous reasons.

15. During the course of lengthy hearing of the matter learned counsel for the petitioner had drawn my attention to a number of documents proved by the bank during its evidence which according

to them supported their case. It was, however, also contended that it would be appropriate if findings in respect of those documents are obtained from the Tribunal itself at first instance by remitting the matter back to the Tribunal for a fresh adjudication of the dispute as to whether respondent no.2 herein was a workman or not, as was the course adopted even by the Supreme Court in J.K.Iron & Steel's judgment(supra) cited by them as also by the Andhra Pradesh High Court in the two judgments which were also cited by them.

16. In view of the fact that the Tribunal has not even adverted to the petitioner bank's evidence, oral as well as documentary, in the Award, I am of the view that it may not be appropriate for the writ Court to give its findings of fact, for the first time, based on an appreciation of the bank's evidence also which is to be done by the Tribunal. It was the primary duty of the industrial adjudicator, which in the present case has not been done and, therefore, the proper course would be to ask the Tribunal to give its findings afresh on the dispute whether respondent no.2 was a workman or not after dealing the petitioner bank's evidence also, oral as well as documentary.

17. Accordingly, it is ordered that before this Court gives its final decision in the matter the Tribunal is directed to give its fresh

decision only on the point whether respondent no.2 herein was a workman or not after fresh and proper analysis of the evidence adduced from both the sides and then to return its decision to this Court. It is needless to state that both the sides would be given an opportunity to make their submissions once again only on the said aspect of the matter, if they would so desire.

18. The matter shall now be taken up by the Tribunal on 15th April, 2013 at 2 p.m., before which date the record of the Tribunal shall be sent back, and fresh decision shall be given within a month and forwarded to this Court immediately alongwith the records. On receipt of the decision of the Tribunal the Registry shall place this petition before the Court once again and then the parties shall be given an opportunity to respond to the fresh findings of the Tribunal also.

P.K.BHASIN,J

March 22, 2013