

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:

The Hon'ble Justice V.M. Velumani

&

The Hon'ble Justice Rai Chattopadhyay

FMA No. 165 of 2018

ABP Limited & Anr.

Vs.

State of West Bengal & Ors.

For the appellants

: Mr. Susanta Pal,
: Mr. P. Basu,
: Mr. N. Banerjee.

For the respondent No.3

: Mr. R. Guha Thkurata,
: Ms. Senjuti Sengupta,
: Ms. Dona Ghosh,
: Ms. Dipa Roy.

Hearing concluded on: 18/10/2023

Judgment on: 13/02/2024

Rai Chattopadhyay, J.

1. This appeal is to challenge a judgment of the Hon'ble Single Bench dated 06.05.2016, delivered in W.P. No. 8837 (w) of 2001.
2. The issue in question before the Hon'ble Single Judge was with regard to the legality, validity and propriety of an 'award' of the First Industrial Tribunal, West Bengal, dated 04.04.2001. By dint of the same the First Industrial Tribunal has set aside an order dated 13.01.1993, of the present appellant, that being illegal, whimsical and arbitrary. The Tribunal in the said 'award' dated 04.04.2001, had further directed that the present

respondent, i.e, Sri Ashok Nandi should be reinstated and absorbed in the post of 'Junior Clerk' under library department, with all back wages and consequential benefits, with effect from 10.01.1998, till the date of his actual reinstatement in service. Tribunal further has directed that 'award' to be implemented within three months.

3. The present appellant, being aggrieved with the said 'award' of the Tribunal dated 04.04.2001, had preferred the writ petition as mentioned above. The final verdict of the writ Court has also not been in favour of the appellant. The Hon'ble Single Judge in its judgment dated 06.05.2016, as impugned in this appeal, has held *inter alia* that, neither the direction of the Tribunal for reinstatement of the present respondent can be termed as beyond jurisdiction of the Tribunal or having been passed in exercise of the jurisdiction not vested in it, nor the termination of the present respondent can be termed to have been done by the appellant, remaining within the limits of statutory provisions, he being virtually a 'workman' of the present appellant. The Hon'ble Single Judge has further held, that, on the basis of the facts of the case and by dint of the legal fiction, the present respondent would be considered as a 'workman' of the appellant, in terms of the provision of the Industrial Disputes Act, 1947. Therefore, abrupt termination of the respondent without following the procedure as prescribed under law, as well as the principles of natural justice, would render such an action of the present appellant as null and void. The Hon'ble Single Bench has finally concluded that the 'award' of the Tribunal dated 04.04.2001 should be upheld and that there would not be any merit in the writ petition before it. As such the writ Court has dismissed appellant's writ petition, by dint of the impugned judgment dated 06.05.2016.

4. While assailing the said impugned judgment before this Court the appellant has put forward its grounds of challenge *inter alia* that:-

- (i) The respondent No.3 Sri Ashoke Nandi, was a trainee and not a 'workman' of the appellant, within the meaning the term as envisaged of the Industrial Disputes Act, 1947;
- (ii) The respondent Sri Ashoke Nandi was appointed as a 'trainee' and for a 'trainee' the appellant would always reserve its right to terminate him on the basis of dissatisfactory performance;
- (iii) That the fact of the respondent being appointed as a 'trainee' has never been disputed either before the Tribunal or before the Hon'ble Single Judge;
- (iv) In such circumstances, findings of the Tribunal or the Hon'ble Single Judge, that the said respondent to be a 'workman', is only an erroneous interpretation and unworthy application of the settled legal principles;
- (v) The dispute allegedly raised by the said respondent, cannot be termed as an 'Industrial Dispute', within the meaning of the Industrial Disputes Act, 1947, the respondent No.3 being not a 'workman', under the statute;
- (vi) The dispute raised by the concerned respondent being not an industrial dispute within the meaning of the Act, the Tribunal would not have any jurisdiction to entertain the same or pass an 'award';

- (vii) As such the Tribunal has acted beyond scope of its jurisdiction and the same has rendered the concerned 'award' dated 04.04.2001 as a nullity;
 - (viii) Since the Hon'ble Single Judge has not been able to appreciate these points and has come to a finding which is neither based on the proper appreciation of the facts of the case nor due observance of the settled law in this regard, the impugned judgment of the Hon'ble Single Bench also suffers from gross illegality and is thus not maintainable.
- 5.** Thus, on behalf of the appellant Mr. Pal has submitted that the appeal may be allowed, by setting aside both the impugned judgment of the Hon'ble Single Bench dated 06.05.2016 and the 'award' of the Tribunal dated 04.04.2001.
- 6.** According to the appellant there has never been any employer-employee relationship amongst the parties within the purview of the law and the said fact has not been appreciated by the appropriate government as well the Tribunal. That the respondent no. 3 voluntarily accepted the traineeship with the appellant and is now barred to raise grievance against the same, is also a fact overlooked by all concerned. It is stated further that an extended time for traineeship would not render a 'trainee', the status of a 'workman' and successful completion of traineeship of a 'trainee' would depend upon objective satisfaction of the employer, i.e, the appellant here -- are also the facts which were required to be considered but have not been considered. Termination of service of the present respondent no. 3 who has been 'trainee' with the appellant would never come under the purview of 'retrenchment' within the meaning of Section 2 (oo) of the Industrial Disputes Act, 1947, and also non-compliance of the requirement of Section

25 (F) of the said Act would not vitiate or nullify the order of termination of the 'trainee'. Finally, it has been submitted that at best the present case would come under the exception Clause of Section 2 (oo) (b) of the Industrial Disputes Act, 1947, by dint of which the appellant would have been authorised to terminate employment of a 'trainee' due to dissatisfactory performance.

- 7.** *Per contra*, on behalf of the respondent no. 3 both the impugned judgment as well as the 'award' of the Tribunal dated 04.04.2001 have been supported. Mr. Guha Thakurata has stated that there would not be any error apparent regarding consideration of the attending facts and circumstances of the case as well as in application of the legal principles to the facts of the case – by the Hon'ble Single Judge and the Tribunal as well. It is submitted that considering the nature of duties and obligations assigned to the respondent no. 3 by the appellant during the entire period of his service, he must be considered as a 'workman' of the appellant, within the meaning of the Industrial Disputes Act, 1947. To this, according to Mr. Guha Thakurata, the Tribunal has made no error while considering the evidence on record as well as the settled law. As such the Hon'ble Single Judge has been please to find not to interfere into the same in any manner whatsoever, which is also a just and proper decision, Mr. Guha Thkurata has suggested. He has sought for no interference by this appeal Court, into the impugned judgment as well as the 'award' of the Tribunal dated 04.04.2001.
- 8.** The factual background of the case so far as necessary for proper adjudication of this appeal may be narrated as herein below.

9. The respondent no. 3 was appointed with the appellant company, pursuant to an engagement letter dated 23.10.1987. The said letter *inter alia* speaks as follows:-

“..... **1.** Your training will be for a period of 4 years (i.e/ 48 months) from the date of joining.

2......

3......

4. The Management may, at its discretion extend or reduce the period of your training in consideration of special circumstances.

5. On satisfactory completion of your training your case will be reviewed for employment as Junior Clerk/typist or in any other position suited to your training and ability initially as a probationer in the said position.

6. You may be transferred from one job or section or department to another or to any of the branches or subsidiaries or office of the company anywhere in India.

7. The management reserves the right to terminate your training any time during the period of your training or on expiry of the same, as the case may be, without notice or stipend in lieu of notice and without assigning any reason if your progress/performance/conduct is not found satisfactory or if you are otherwise found unsuitable. Your training may also be terminated without notice or stipend in lieu of notice if you are found guilty of any act of misconduct.

8......

9......

10......

11. The management may suspend you pending enquiry into the offence alleged against you, if any.

12.

13. You shall be subject to the rules and regulations of the company implied or notified and also any instruction that may be notified from time to time.”

- 10.** He joined on 02.11.1987. Since thereafter, he has been continuously and uninterruptedly in service with the appellant till 18/20.01.1992. Vide a letter dated 18/20.01.1992 the respondent was informed, that his progress, performance and conduct during the training period have not been found satisfactory, that the respondent no. 3 did not improve himself in spite of repeated reminder. Hence, he would be terminated with immediate effect, according to 'Clause 7' of the letter dated 23.10.1987.

Clause 7 of the letter dated 23.10.1987 has been quoted above.

- 11.** Being aggrieved the said respondent had espoused grievance against the appellant before the appropriate authority under the provisions of the Industrial Disputes Act, 1947, that is, the Assistant Labour Commissioner. The order of reference was issued by the said authority dated 23.06.1998, enumerating following issue:-

"Issue

Whether the termination of employment of Shri Ashoke Nandi is justified & what relief, if any, is he entitled to?"

- 12.** Subsequently after adjudication upon the said issue, the Tribunal has passed the 'award' dated 04.04.2001, which has already been mentioned as hereinabove. The issue involved in this appeal is whether the respondent no. 3 in spite of being appointed as a 'trainee' and terminated on 18/20.01.1992 being in the same capacity, should be considered as a 'workman', within the meaning of the Industrial Disputes Act, 1947. In that case, whether severance of service of the respondent no. 3 with the appellant, would entail severance of relationship of employer and employee between the appellant and himself and cessation of his service with the appellant would come within the purview of the expression 'retrenchment' as enumerated under Section 2 (oo) of the Industrial Disputes Act, 1947.

Also that if the answer of question is in negative, whether the Industrial Dispute raised by him and entertained by the appropriate authority would be maintainable and the Tribunal would be legally justified to entertain adjudication over the issue framed in the order of reference.

- 13.** Some facts in this appeal are admitted by all the parties. Respondent's induction in service with the present appellant vide letter dated 23.10.1987 and his joining on 02.11.1987 are the undisputed facts. His termination pursuant to letter dated 18/20.01.1992, with immediate effect, has also not been disputed. Parties have also conceded as regards the fact that in the interregnum, i.e, from 23.10.1987 to 18/20.01.1992, the respondent No.3 has continuously and uninterruptedly been employed with the appellant and that the said termination is not a result of any well defined lawful fact finding procedure, as to any alleged misconduct of the said respondent.
- 14.** On the backdrop of these admitted facts, it is to be seen if the appellant was justified in terminating the respondent no. 3, in the manner as stated above by virtue of 'Clause 7' of the letter of appointment dated 23.10.1987.
- 15.** While answering the 'issue' framed in this case, as mentioned above, the appellant has made out a case, that respondent's termination from 'traineeship' has been absolutely justified, due to his non-satisfactory performance, during the period of training. In doing so the appellant has strongly relied on the letter dated 23.10.1987, to say that the period of 'traineeship', of the said respondent was governed by the stipulations made therein and that the appellant has acted in accordance with those stipulations only. So far as the respondent no. 3 is concerned, according to the appellant, it would not be obliged to follow any other statutory duties, excepting the norms as mentioned in the said letter dated 23.10.1987, in his case. Hence, their case is that the steps taken by them, in case of the

respondent no. 3, in terms of stipulations made in letter dated 23.10.1987, to terminate his 'traineeship' with the company, due to dissatisfactory performance of him, has been absolutely justified.

16. A contrary case has been made out by the respondent no. 3. He says that his termination is only unjustified, being motivated, arbitrary, revengeful and illegal. He has said that his demanding equal pay a like his contemporaries has cost him his employment. He has made out a case, that, in the guise of a 'trainee', he has been made to work as a permanent employee, of perennial nature. He has made out that considering the nature of job dispensed by him, he has to be treated with the purview of the Industrial Disputes Act, 1947, as a 'workman' of the appellant company. He also says that his termination, ought to have been, in due observance of statutory formalities, which is not. Hence, his termination of employment is illegal and unjustified.

17. The issue relates to the legal status of the respondent no.3, in the organisation. The position of labour law in India is that the criteria to decide whether a person is a workman or not, is not his designation. Courts have time and again held that one should not go by the nomenclature attached to post to determine whether an individual was a 'trainee' or a regular workman. It is the nature of job which is material. Therefore, no wonder that, it is now well settled, that factors like deployment of persons in the guise of trainees to permanent employment, the kind of work extracted from such persons, record of training maintained by the employer, factor of training, mode of payment of emoluments etc, are necessarily to be considered by the Court.

18. An organisation would have human resource, to materialise its business objects, by utilising effectively and mobilising its other resources, like,

finance, machinery, materials etc. Human resource management is very crucial from the point of view of its industrial sustenance and growth, to which an organisation is always targeted to. This germinates a need for preparing a next generation of workers, who, by the time mature enough to take up the organisational responsibility, would already be attuned to the special and particular need of the organisation, commensurate to the object and target of it. There develops the requirement of training programme, within the organisation and a cluster of manpower, to be educated and guided, within that programme. They would of course be exposed to the live like situation, but would not be bestowed with the responsibility of discharging duties at the dispensation of the organisation, as a regular worker does for the organisation. They would also not be entitled to the institutional protection and benefits, as a regular worker is. The pivotal purpose to impart training to a person by an organisation is aimed at preparing a future work force, for it. For this it would require a properly designed training schedule in place, a specifically designated trainer or instructor (as held in the case of ***Trambak Rubber Industries Ltd. vs. Narik Workers Union & Ors.*** reported in ***(2003) 6 SCC 416***), and a well defined system of performance appraisal of a trainee. Without this, the management would fall short in justifying that it has not employed manpower to discharge regular and substantial works of the organisation, in the guise of trainees and thereby is evading legal duties to the said man power and also mandatory compliance under various statutes, which are determined, on the strength of manpower, employed by the said organisation.

- 19.** In the light of principles as set forth herein above, the facts of the present case are to be considered.
- 20.** The respondent no. 3 was appointed by the appellant vide letter dated 23.10.1987, relevant portions of which have been extracted above. To see

how far a well defined training programme is in vogue in the company, the following portion of the depositions of the witnesses, may be mentioned:-

Deposition of the respondent no. 3.

“Nobody used to impart training to me during my training period.”

Deposition of the Personnel Officer.

“I have got no paper to show who has imparted training to Ashok Nandi.”

“I have got no paper to show specific work to be done by Mr. Ashok Nandi during his traineeship under our company.”

21. Therefore in this case, there is nothing on record to show that the appellant had maintained well defined training programme, for the trainees. There is also no indication about who would be the trainer for a person, who is being appointed as a trainee. The documentary evidence, that is, the appointment letter dated 23.10.1987, has also not stipulated about any schedule of training or a trainer for the trainee, so appointed. Therefore, as a newly inducted person, the respondent no. 3 does not appear to be situated differently, than a permanent workman, in terms of duties assigned to him. Only addressing him as a ‘trainee’ and employing him for a particular period, said to be extendable upon satisfactory performance of him without that being supported by a well formulated system of job, different from that of a regular employee of the company, must not be considered as the satisfactory compliance of the settled principles of law, in this regard, as discussed above.

22. Let us now see, how his performance appraisal has been made. Relevant portion of deposition of witnesses are quoted below:-

Deposition of the Personnel Officer.

“When I have enquired about his performance, Mr. Saktidas Roy told me that performance of Ashok Nandi was not satisfactory (objected to as this

statement has been made in the company's written statement). Mr. Roy told me that Ashok Nandi was not following his instruction given to him, even he was not carrying but the orders to perform his duties and he always showed negligency in performing his daily work. He was unable to learn the job as he did not follow the instruction of his superior Boss. There was no charge of in subordination against Ashok Nandi. The training period was for four years. Before completion of four years training I asked Mr. Saktidas Roy about his performance and Mr. Roy stated to me that present performance of Ashok Nandi was not satisfactory."

"We have not informed him in writing about his non-satisfactory work during traineeship, but we have verbally warned him about his unsatisfactory work during traineeship. Verbal warning was given by the Departmental Head of Library Department, Mr. Saktidas Roy, of course not in my presence."

- 23.** The respondent no. 3 has never stated about any performance evaluation of him, being made by the Management. He has not been cross-examined on this point. Instead, from the deposition of 'Personnel Officer', it is evident that there has not been any performance appraisal done, during four years engagement of the respondent no.3, with the appellant. It is only, after four years four months of engagement, a confidential report of the 'Head' of the concerned department was considered, i.e, letter dated 15.01.1992, to formulate opinion regarding dissatisfactory service of the said respondent. To explain as to why his performance has not been satisfactory, the 'Chief Librarian' has stated as follows:-

Deposition of the Chief Librarian

"The tasks which were given to Ashok Nandi were not complied with by him. He was very slow and lazy. He faced difficulties in explaining the problems which he was faced. He was quite inattentive of his jobs, as a result clippings were misplaced and we were not able to give proper service (objected to). I advised him to take proper step repeatedly, so that he can recover the odds he was facing, for not doing the service properly, but unfortunately he did not comply my instruction. He was not interested in learning the said jobs. I sat down with him and explained the matter repeatedly, even then he did not modify himself."

This statement of the 'Chief Librarian' has, however, remained uncorroborated by any ocular or documentary evidence. Thus, is a mere statement, unsupported and unsubstantiated and not sufficient to be relied on.

- 24.** Next, the Court has to compulsorily see as to what job the respondent no.3 was assigned to perform. Relevant evidence to that effect, is as follows:-

Deposition of the respondent no.3

"I used to make Xerox copy of News clipping, making over there news clipping to the Staff Reporter I used to collect reference Book to the Staff Reporter. I used to make and handle clerical jobs like other permanent employee."

Deposition of the Personnel Officer

"I have got no paper to show specific work to be done by Mr. Ashok Nandi during his traineeship under our company."

Deposition of the Chief Librarian

"He used to keep every day clipping of news item as published in Anandabazar Patrika and others. He was instructed to short out those clippings and file them in Newspaper envelope. He used to keep new newspaper clipping envelope and file them in the boxed. He used to file reference volume books and other books in the Library. He used to keep those books on proper Selves."

- 25.** Therefore, the job of the respondent no. 3 was sorting and catagorising the newspaper clippings, which would be substantial and perennial in nature, *vis-à-vis* the ultimate job, which the company performs. Evidence shows that only the respondent no. 3 and no other person would do the said job, for the library. It is also noted that the job performed by the respondent no. 3 was not of a sparable nature, which the company might or not be in requirement of. It would be a mandatory performance, in discharge of the job of a publication house, like the appellant company. Therefore, this Court has no hesitation to hold that the job performed by the respondent

no.3, during this period was a permanent nature of job, to be performed by a regular employee. The Court finds this, being alive of the fact that, for the respondent no. 3, there has not been any well defined training programme or a designated trainer, for all this period of time. Also that the respondent alone was the person entrusted for discharge of the said job. The sum total would prompt this Court only to a conclusion that the respondent no. 3 was discharging permanent nature of job, in the appellant company.

26. The nature of employment cannot be judged on the letter issued by the employer but on the nature of duties performed by the employee. 4 years and odd is a sufficiently long period for a training to continue. Be that as it may, a schedule of training programme as well as performance appraisal programme might have justified even that. Unfortunately, nothing is available in case of the appellant. It has also been seen that the respondent was made to discharge perennial nature of job, bearing the entire responsibility thereof, in absence of any other person engaged for the said job. Where the job continues without even any performance appraisal or periodical renewal, and the person engaged in the same would be termed as a 'trainee', as it is in the present case, the same would be considered as unfair labour practice. An employment if is resorted to as a mechanism to frustrate the claim of the employee to become regular or permanent against a job which continues or the nature of duties is such that the colour of traineeship is given to take it out from the clutches of S. 2(oo) of the said Act of 1947, then such stipulations cannot be regarded as fair or bona fide. Instead, this Court finds that termination, if any, of the respondent No.3, should have been preceded with due observance of the provisions under section 25F of the Industrial Disputes Act, 1947.

27. At this juncture, the finding of the Hon'ble Supreme Court, in ***Trambak Rubber Industries Ltd. vs. Nashik Workers Union*** reported in (2003) 6 SCC 416, be

noted. The Supreme Court considered the evidence that no permanent employees were employed there and the entire works were being discharged by the so called 'trainees'. That the workers concerned were engaged in production of goods and that no other workmen were employed for production of goods. The Court has held that the evidence would not show that for the prolonged period of one and half years, the concerned persons were 'trainees', in the true sense of the term. Also, as it has been said earlier, that a trainer was not assigned. The Court has further held that on the facts and evidence brought on record, the conclusion was inescapable that the appellant employer resorted to unfair labour practice. The Court's finding is that the management evidently came forward with a false plea dubbing the employees/workmen as trainees so as to resort to summary termination and deny the legitimate benefits. Thus , the High Court's verdict of setting aside of the 'award' of the Tribunal, was upheld.

28.Supreme Court's decision in ***Tungbhadra Sugar Works (P.) Ltd. vs. Labour Court, Mangalore & Anr.***, reported in **1983 Volume 46 Indian Factories & Labour Reports page 10**, may also be noted, where the Court has held that a trainee comes within the definition of the word 'workman' as envisaged under Section 2(s) of the Industrial Disputes Act, 1947.

29.On consideration of the judgments as above, *vis-à-vis* the facts of the present case, this Court is unhesitant to hold that the respondent no.3 would have to be considered as a 'workman' of the appellant, within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. The findings of the Tribunal, as well as the Hon'ble Single Judge, as to the same, is liberated from any error and not to be interfered, in any manner, whatsoever.

30.The final verdict of the two earlier for a, depends of this fact, that the respondent no.3 having been found to be a 'workman' of the appellant, within the purview of the Act, the appellant was duty bound to comply statutory obligations and principles of natural justice, before terminating him. Also that in absence of the same, the appellant's act would be unjustified and illegal. This Court finds no reason, not to concur with such findings. Hence, it finds that to be just and proper. Therefore, there is no ground in this appeal, to interfere with the verdicts of the Hon'ble Single Bench dated 06.05.2016, as well as the Tribunal dated 13.01.1993.

31.Appeal being FMA No. 165 of 2018 is dismissed. The impugned judgment dated 06.05.2016, as well as the "award" of the Tribunal dated 13.01.1993, are upheld.

The respondent no. 3 shall immediately be reinstated and allowed to join in the appellant company. All the consequential benefits, including back wages, shall be released, within a period of sixty days, from the date of this judgment.

32.Appeal being FMA 165 of 2018 is disposed of.

33.Urgent Photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

I agree,

(Rai Chattopadhyay, J.)

(V.M. Velumani, J.)