

I/29039/2018

Government of West Bengal
Labour Department
I.R. Branch
N.S. Buildings, 12th Floor,
1, K.S. Roy Road, Kol-1

No.Labr./784/(LC-IR)/22015(18)/5/2018

Date : 09.10.2018ORDER

WHEREAS under the Government of West Bengal, Labour Department Order No. 1607-IR/13L-3/95 dated 19.11.1997 the Industrial Dispute between **M/s. Ananda Bazar Patrika Ltd., 6, Prafulla Sarkar Street, Kolkata-700001** and their workman **Shri Tapan Kumar Ghosh, 9, Town Hall Para Road, P.O. & Dist.-Burdwan** regarding the issues mentioned in the said order, being a matter specified in the Second Schedule to the Industrial Dispute Act, 1947(14 of 1947), was referred for adjudication to the Judge, Third Industrial Tribunal, Kolkata.

AND WHEREAS, the Judge of the said Third Industrial Tribunal, Kolkata, has submitted to the State Government its award on the said Industrial Dispute.

NOW, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said award as shown in the Annexure hereto.

ANNEXURE
(Attached herewith)

By Order of the Governor



Deputy Secretary to the
Government of West Bengal.

No.Labr./784/1(5)/(LC-IR)

Date : 09.10.2018

Copy with a copy of the Award forwarded for information & necessary action to :-

1. M/s. Ananda Bazar Patrika Ltd., 6, Prafulla Sarkar Street, Kolkata-700001
2. Shri Tapan Kumar Ghosh, 9, Town Hall Para Road, P.O. & Dist.-Burdwan
3. The Assistant Labour Commissioner, West Bengal in-Charge, Labour Gazette,
4. The Labour Commissioner, W.B. New Secretariat Buildings, (11th Floor), 1, K.S. Roy Road, Kol-1.
- ✓ 5. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Deptt.'s website.



Deputy Secretary to the
Government of West Bengal

No.Labr./784/2(2)/(LC-IR)

Date : 09.10.2018

Copy forwarded for information to :-

1. The Judge, Third Industrial Tribunal, West Bengal with reference to his Memo No. 1824-L.T. dated 05.09.2018.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kol – 1.

Deputy Secretary to the
Government of West Bengal


09/10/18
Sabita/IR/09102018

In the matter of an Industrial dispute between M/s. Ananda Bazar Patrika Ltd., 6, Prafulla Sarkar Street, Calcutta – 700 001 and their workman Shri Tapan Kumar Ghosh, 9, Town Hall Para Road, P.O. & Dist. Burdwan referred before this Tribunal.

Case No. VIII-136/1997

BEFORE THE THIRD INDUSTRIAL TRIBUNAL: WEST BENGAL

PRESENT

SRI HAR GOVIND SINGH, JUDGE, THIRD INDUSTRIAL TRIBUNAL

A W A R D D A T E - 31 August 2018

This case was referred by the Government of West Bengal, Labour Department, Vide G.O. No.1607/IR/IR/13L-3/95 dated 19.11.1997 relating to an Industrial Disputes between M/s. Ananda Bazar Patrika Ltd., 6, Prafulla Sarkar Street, Calcutta – 700 001 and their workman Shri Tapan Kumar Ghosh, 9, Town Hall Para Road, P.O. & Dist. Burdwan to this Tribunal for adjudication of the following issues:

I S S U E (S)

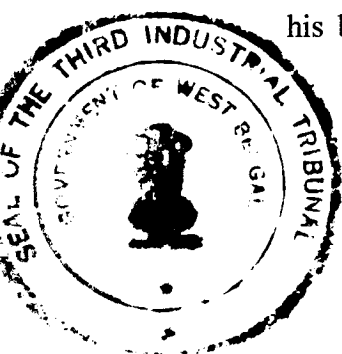
Whether the dismissal of Shri Tapan Kumar Ghosh is justified?

What relief, if any, is he entitled to?

The case of the applicant/workman as it appears from his written statement filed in the instant case is that the above named workman was an employee employed in Ananda Bazar Patrika Ltd.. He was appointed in 1965. He worked there most sincerely, diligently and without any iota of blemish.

At the time of dismissal his designation was Preproduction & scheduling Co-ordinator Executive Magazine.” Though it is high sounding designation but his real nature of duty was purely clerical. The nature of duties of the workman was to sort out the advertisements, copy testing, proof reading etc. His duties also included sorting out advertisements and sending it for publication to the respective magazine departments i.e. Sunday, Sports World, Business World, Desh, Anandaloke, Sananda etc. Sometimes he had to send information relating to the advertisement in writing to the customers. He was also a regular feature writer in different Magazines of Ananda Bazar Patrika. At no point of time he had any managerial, administrative and/or supervisory powers. The workman submits that he was a workman U/s. 2(s) of the Industrial Disputes Act, 1947.

That on 24th March, 1992 the workman left the Office at 5:30 P.M. At that time, his brief case was not checked at the office gate but, after he proceeded to a certain



distance, he was called on by the Head Havildar, Shri Dharamaraj Tewari and on his demand the workman opened his brief case and the aforesaid Havildar found that there were Journals along with other papers. As Pre-Production & Scheduling Co-Ordinator Executive, the workman concerned had to look after the publication sorted out by him and report it to the customers either in writing or orally over phone. Hence, it was quite obvious that he may carry some of the journals home for the purpose of verifying whether his sorted-out advertisements were actually published in the Magazines by the respective departments.

After that the said Havildar reported the incident to the Management on that very day and on the basis of his report the management of the above named company issued a purported show cause notice, on 25.03.1992, which was actually issued by Advertisement Manager, Administration by making false allegation against the workman. Since he was having the Magazines as mentioned in the Charge sheet, the company issued the Charge Sheet on the Ground that it was an act of dishonesty in connection with the property of the company.

The applicant/workman duly replied to the said show cause notice which was issued by the company on 28.03.1992. He further stated that at the time of his duty his brief case used to remain beside his table without any lock and key. He used to keep it unguarded at the time when he moved from one department to another. He also stated that he never saw his brief-case prior to leaving the office on the date of the incident. Besides above, the workman submitted that he used to carry magazine home to see whether the Advertisements sorted out by him were published or not. In such cases the magazines were stamped. Therefore, it was merely a technical mistake and question of any dishonest intention did not/does not arise or as alleged or at all. The charge levelled against him are false, vague, baseless and absolutely ill motivated and issued with ulterior motive.

Further, he contended that the entire incident was a conspiracy hatched by a particular union along with some interested employees. Besides that his salary at the material time was over Rs. 8,000/- and the cost of the Magazines were Rs. 40/- only. The applicant was a good feature writer. In the year 1983 he received the cash award of Rs. 2,00,000/- (Two Lacs) from M/s. Food Specialities India Limited for a "Slogan Contest" for their products "Nescafe". He was also appointed as "expert spectator" of All India Radio to Judge best commentators. Therefore, the allegation of "dishonesty" against a person of such quality is nothing but the conspiracy and ill motivated design not only to



victimise him but also to malign him. Besides above the Magazines in question had been released for circulation in the market long back.

The Company did not pay any heed to the workers reply and initiated a sham farce and an eyewash domestic enquiry. The workman prayed for a representation through a lawyer but his prayer was refused. The management engaged a Lawyer to conduct the enquiry who was absolutely biased and held the enquiry without jurisdiction. He did not allow the workman to be represented by an outsider, who is not a lawyer. In spite of repeated demands the enquiry officer violated the principles of natural justice by refusing to allow him to be represented by an outsider in spite of having no such rules in the company. The workman repeatedly demanded the rules & regulations of the company but the Enquiry Officer declined to pass any direction to the management.

The workman repeatedly wrote to the enquiry officer that no employee was willing to assist him in the enquiry in apprehension of being victimised by the company. The enquiry officer committed grave and serious error by violating the principles of natural justice by proceeding with the enquiry without allowing the workman to be assisted by an outsider, who is not a lawyer. Therefore, the enquiry was held in gross violation of the principles of natural justice. The worker repeatedly demanded copies of proceedings so that he could prepare himself for cross examination but the same was not allowed. In course of enquiry no witness who appeared on behalf of the company, could prove any dishonest intention on the part of the workman. The domestic enquiry held by the management is a farce, sham and an eye wash and the same should be declared to be vitiated. After the enquiry was over, the management remained silent for almost a year and thereafter, served him with a dismissal letter dated 28.02.1994 by virtue of which he was dismissed with immediate effect.

The workman suffered serious prejudice as he was in the dark as to how the enquiry officer came to the conclusion that he was "dishonest" and therefore, he could not reply to the same. If the management would have served a second show cause notice proposing the punishment enclosing the findings of the E.O. then the workman could have given proper reply to it and he would not have suffered the fate of dismissal. The dismissal is bad in law and is liable to be set aside.

That the workman submitted that the order of dismissal is illegal, perverse, bad in law and in violation of the principles of natural justice.



That against the said illegal order of dismissal the worker wrote a letter dated 28.03.1994 to the management but, the management turned a deaf ear and did not reply to the same.

Being aggrieved with that action, the worker raised an industrial dispute with the Assistant Labour Commissioner through his letter dated 26.04.1994 for proper justice. After several correspondences made, the management finally informed the Joint Labour Commissioner through their letter dated 14.12.1994 that it is not agreeable to the company to reinstate him/Mr. Ghosh in the company. In this way, the conciliation proceeding ended in a failure due to the adamant attitude of the management.

On the other hand, the O.P./Company contested the instant case by filing its written statement in Two Parts, as of its Part-A & Par-B. Part-A-dealt with the preliminary issue as to the maintainability of the order of reference and jurisdiction of the Tribunal to adjudicate the issue specified in the order of reference and Part-B dealt with the further preliminary issue as to the maintainability and the jurisdiction of the Tribunal and the Govt. of West Bengal and with the rejoinder to the written statement of the applicant/workman. Further, the O.P./Company denied all the allegations made by the applicant/workman in his written statement against the O.P./Company including the legal and technical aspects thereof. The O.P./Company contended specifically in its written statement that at all relevant point of time the applicant/workman was appointed by the O.P./Company as an Executive in employment of the O.P./Company and his designation was being Pre-Production and Scheduling Co-ordinator – Magazines. His duties were administrative and supervisory and his salary was Rs. 6,594.16 p.m. His administrative duties amongst other things included as follows:

- a) Sri Tapan Kumar Ghose had been working as a Group Head since 17.04.1989.
- b) As Group Head he used to supervise the work of four (4) scheduling personnel and one (1) sales production (Advt) Clerk (1). As a matter of fact, he was to supervise 5 staff who used to work under him.
- c) Release of advertisement space for every issue of all magazines to editorial department for finalization of dummy.
- d) Liaison with Advertising Agencies, over phone or over telex.
- e) Liaison with Regional offices (East Delhi, Mumbai, Chennai, Bangalore, Hyderabad), over phone or over telex.
- f) Inter-department co-ordination, process department(Production), Editorial department and Art Department.



- g) Check-up of advertisement material supplied by the Advertising Agencies or clients. The job includes careful scrutiny of the copy and material specification.
- h) Instructing the Company's Department Studio regarding guidelines or preparing art work and also checking up the final art work.
- i) Arranging preponement of Advertisement in cases of under booking and postponement of advertisement in case of over-booking. The job used to be done with prior approval of Regional Offices or Advertisement Agencies or Advertisement Manager.
- j) To organize scheduling and production of ad-supplement through constant follow up with Sales Team, PTS, Proof-reading, Art department and Process department.
- k) Checking up reproduction of each Advertisement immediately after each issue is published and apprised the Advertisement Manager about the nature of defect, if any, in the published advertisement.
- l) Special assignment of Puja Numbers: Overall supervision and co-ordination – both Intra and Inter department; rescheduling of 5 Puja Numbers, if necessary.
- m) To keep the Advertisement Manager – Administration apprised of the Booking position, material position or of any sort of delay or anomaly.

Apart from the above he had following routine functions:-

- n) All release orders (R.O) and materials were routed through him. He checked the R.O. and if it was found alright he used to sign the R.O. and pass the same to respective Scheduling Personnel which is commenced, if any.
- o) Process slips (instructions issued for processing art work of advertisement) were usually signed by him after checking the materials.
- p) All leave applications of the magazines scheduling staff were routed through him. He was to recommend and put his signature on the applications and forward the same to the Advertisement Manager – Administration for his approval.
- q) He also had an additional responsibility apart from Magazines Section scheduling:



He was entrusted with the responsibility of supervising the checking and processing of colour ads scheduled in pull-outs and dailies and of sorting out any problem relating to this.

In the above circumstances, Sri Tapan Kumar Ghose is not a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and as such, the Order of Reference is bad in law and the Ld. Tribunal is not conferred any jurisdiction.

The O.P./Company has denied repeatedly as regards to the statement made by the applicant/workman in his written statement that at no point of time he had any managerial, administrative or supervisory power, as alleged or at all.

The O.P./Company's case as made out in its written statement is that the company received a report dated 24.03.1992 from Mr. Dharamraj Tewari, Head Havildar of the Company who was on duty at about 5:30 p.m. on 24.03.1992 at the Time Office Gate that Shri Ghose was apprehended while taking out the Company's premises the following articles which were the properties of the company without permission and authority.

- a) A copy of Sports World dated 25.03.1992
- b) A copy of Sunday dated 08.03.1992
- c) A copy of Sunday dated 22.03.1992
- d) A copy of Business World dated 25.03.1992.

The company served a show cause letter dated 25.03.1992 basing upon the report of said Head Havildar of the company dated 24.03.1992 and thereby, the allegation was brought against the applicant/workman as of the dishonesty committed by him in respect of the property of the company.

Further, the company contended that the applicant's statement that the act and conduct of the applicant of taking out the magazines i.e. the property of the company in his brief case, which were not stamped, out of the premises of the company without permission or authority was an act of dishonesty in connection with the company's property and was not merely a technical mistake and as such the excuse of it being merely a technical mistake, is lame and not maintainable. Further, the question of his dishonesty having been the subject matter of the domestic enquiry held into the allegation brought against him, the report and the findings of the enquiry officer are relevant in this context. In the circumstances, the company contended that it did not violate the principles of natural justice and the department where the applicant worked being administrative department of the company, is not covered by the Industrial Employment Standing Orders Act, 1946. He was duly furnished with the copies of the enquiry proceedings and



he duly participated in the enquiry. He signed the proceedings almost on all dates excepting on 15.07.1992 and 03.08.1992, notwithstanding his presence and participation in the proceedings including on both such dates. However, on conclusion of the enquiry the alleged workman was given opportunity to submit his final defence report to the Enquiry Officer, before any decision could be taken and he availed of such opportunity by filing his final defence report on 8th July, 1993. Thereafter, the Enquiry Officer submitted his report and findings on the enquiry along with the proceedings of the enquiry to the management of the company and thereby, the Enquiry Officer found the workman guilty of committing the offence as alleged against him.

Further, the company having agreed with the findings of the enquiry officer and having considered the gravity of the offence committed by said Shri Ghosh by acting dishonestly in connection with the property of the company and thereby flouted the discipline of the company, dismissed him from service of the company with immediate effect vide its letter dated 28.02.1994. Thereafter, Sri Ghosh on or about 26th April, 1994 made a representation to the Assistant Labour Commissioner, Govt. of West Bengal enclosing therewith a copy of letter dated 28th March, 1994 addressed to the company alleging that his dismissal from service was illegal and sought for intervention in the matter. On basis of the aforesaid representation the matter was seized in conciliation before the conciliatory machinery of the Govt. of West Bengal but ultimately, it yielded no result, which prompted the Govt. of West Bengal to make order of reference No. 1607-IR dated 19th November, 1997.

On being directed by the Tribunal, the parties filed their respective pleadings and written statement, the company denied and disputed the allegations made by the workman in his written statement and also submitted that the said purported order of reference is invalid, void and of no effect and has conferred no jurisdiction on the Tribunal to adjudicate on the issues pretendedly referred to and thereby, the Tribunal has no jurisdiction to adjudicate or to make any award. Further, before hearing of the matter on merits the company filed an application on 18.08.1998 before this Tribunal to hear the preliminary issue as set out (i) (ii) & (iii) of paragraph 2 of the said application and to decide whether Shri Tapan Kumar Ghosh is a workman or not. In the said application the company also prayed for that if the answer to the said preliminary issue goes against the petitioner company, the company prayed further to hear the validity of the domestic enquiry and if the answer goes against the company, leave be granted to the company to adduce evidence on merits of the case. The said application for deciding the said issue was taken up for hearing by this Tribunal and vide order no. 16 dated 16.12.1998 this Tribunal was pleased to refuse to decide the said preliminary issues in a piecemeal



manner and ultimately, it rejected the petition filed by the company. The company challenged the impugned order before the Hon'ble High Court at Calcutta by filing a writ petition being W.P. No. 212 (w) of 1999 which was ultimately disposed of by the Hon'ble Court observing inter alia that the petitioners shall get a chance for adjudication of the said issue at the time of hearing of the main issue which were pending before the Tribunal.

Further, the company proceeded with the matter of the validity of the domestic enquiry which was also disposed of by this Tribunal vide its order no. 89 dated 01.01.2004 and thereby, the Tribunal held that the domestic enquiry held by the management against Sri Ghosh was not at par with the rules of natural justice. Consequently, the domestic enquiry is found to be invalid and improper. As no opportunity was given by the Tribunal to the company to adduce fresh evidence to substantiate the charges levelled against the petitioner in the charge-sheet the company again challenged the impugned order dated 01.01.2004 by filing a writ application being W.P. No. 6258 (W) of 2004 before the Hon'ble Court, which was also ultimately heard and disposed of by the Hon'ble Court vide its order dated 30.03.2004. The Hon'ble High Court observed inter alia that the Ld. Judge of this Tribunal should be allowed to proceed on merit and thereafter, if the award goes against the petitioner he can challenge these points and order also. It is therefore, directed that the proceeding will be completed after hearing on merit but the petitioner will be given opportunity of adducing fresh evidence to substantiate the charges and he will be given all opportunities to defend its case and principles of natural justice will be strictly followed at the time of hearing on merit.

Thus, the proceeding and hearing on merit commenced.

During the proceeding and hearing on merit as commenced, the O.P./Company in order to substantiate its case examined six (6) witnesses as P.W. 1 to P.W.6 and filed and proved certain papers/documents through the P.Ws which are marked as exhibits as follows: -

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
01	1 series	4 magazines (sport world, 2 Sunday and Business World)		05.07.2014
02	2 series	Signature of Dharmaraj Tewari on deposition sheets before E.O.		14.01.2005
03	3	Letter dt. 12.04.89 by C.B Sen appointing Sri Ghosh		16.02.2005



04	4	Letter dt. 07.06.92 issued by P. Sengupta appointing T. Ghosh		16.02.2005
05	5	Memo of Settlement (Formal Proof Dispensed with) dt. 26.10.89		22.09.2016
06	6	Memo of Settlement (Formal Proof Dispensed with) dt. 12.01.94		22.09.2016

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
07	7	Telegraph magazine	29.05.1983	07.04.2017
08	8	Telegram	26.04.1983	07.04.2017

On the other hand to substantiate his case, the workman/he himself deposed as O.P.W.1 and filed and proved certain documents/papers, which are marked exhibits as follows: -

S.L No.	Exhibit	Name of Documents	Documents Date	Exhibit Date
01	A	Show – cause notice to workman (2 sheets)	25.03.1992	15.02.2017
02	B	Reply to show cause by workman (2 sheets)	28.03.1992	15.02.2017
03	C	Dismissal letter of workman (2 sheets)	28.02.1994	15.02.2017
04	D	Letter of workman raising dispute before A.L.C	26.04.1994	15.02.2017
05	E	Workman's letter to Jt. Labour Commissioner (2 sheets)	22.07.1994	15.02.2017
06	F	Workman's letter to Jt. Labour Commissioner (3 sheets)	01.09.1994	15.02.2017

'X' for identification Workman's letter to Company dt. 28.03.1994(marked on 15.02.2017)

Decision with reasons

In compliance with the order dated 30.03.2004 passed by the Hon'ble High Court, Calcutta in W.P.No.6259 (W) Of 2004 directing this Tribunal to hear the case on merit by complying with the principle of natural justice and accordingly, this Tribunal proceeded with the same. In order to substantiate their case, both parties after advancing their



respective evidences and arguments also submitted their written notes of arguments after causing service of copies thereof, which have been accepted and kept with the record.

The company produced six witnesses and examined as P.W. 1 to P.W. 6. Company also produced and exhibited certain documents as per the list of exhibited documents, above noted. On the other hand, applicant/workman examined himself as sole O.P.W.1 and exhibited certain documents as per list of exhibited documents, also noted above.

Company's witnesses namely Sri Apurba Kumar Naha (P.W. 1) stated on S.A. that he joined the service on 01.04.1985 as Time Keeper. His duty was to check entry in and out of the workmen. On 24.03.1992, he was on the same post as Time Keeper. He was knowing T. Ghosh who was working under the company as Executive in Advertisement Department of the company. On 24.03.1992 at about between 5:30 p.m. and 5:45 p.m. Sri Dharmaraj Tewari, Head Habildar of the company searched the briefcase of Sri Ghosh at the gate before going out from the factory premises. After search, Head Habildar recovered 4(four) magazines from his bag. The said four magazines were published by A.B.P.(P) Ltd. As there was no complimentary stamp or signature for entry of time keeper or main gate receptionist, Sri Ghosh was taken to Personal Department. In the process, P.W.1 identified said four (4) magazines namely Sports World, Sunday and Business World and accordingly, the said magazines marked as Ext. 1 series.

Further, it appears from the cross-examination of P.W. 1 that he had deposed before the Enquiry Officer as told by Tapan Babu that somebody had implanted the said four magazines in his briefcase.

Sri Jairam Shaw (P.W.2) the then Security Watcher of the company deposed almost in the same tune. He stated that the aforesaid magazines do not contain any stamp of the company.

Sri Dharmaraj Tewari (P.W. 3) stated that on 24.03.1992 at about 5:45 p.m that he was standing near the time office Gate when he saw Tapan Kr. Ghosh was going out with a briefcase. On suspicion, he asked Mr. Ghosh to open his briefcase and accordingly, Mr. Ghosh opened his bag. He checked and found four magazines belonging to their organization. The magazines did not have either complimentary stamp or signature of the appropriate authority. He took Mr. Ghosh to the Personnel Department but, since the Personnel Advisor was not in his chamber then, he took him to Mr. Partha Sengupta, Manager Advertisement and narrated the whole incident to him. He handed over the copies of magazines to him and thereafter submitted a report in writing about the incident to the Personnel Advisor, as per usual practice.



Further, it appears from the cross-examination of P.W. 3 that he was ignorant about the nature of job of Sri Ghosh in Advertisement Department. It also appears from his cross-examination that at the material time he never searched any officer.

Sri Ramendra Nath Basu (P.W. 4) the then posted as Deputy Executive in the Advertisement Department stated that Sri Ghosh was Pre-production Scheduling and Co-Ordinator Executive and he used to work under the direction of Sri Ghosh. As Group Head Sri Ghosh used to supervise the work of Supervisor, Deputy Executive and advertisement clerk. Sri Ghosh used to supervise in all five staff including himself.

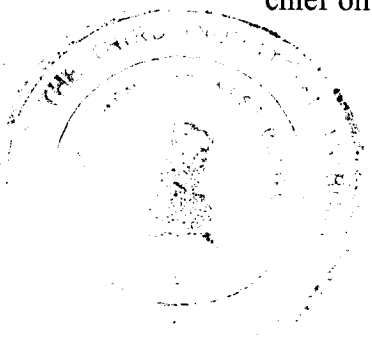
Further, it appears from his cross-examination that he was ignorant as to whether save and except Exts. 3 & 4 any other documents were produced to show that Sri Ghosh was appointed as Head of the Magazines section or not. But, admittingly, he stated that the letter - Ext. 3 was issued by the Marketing Controller Sri C.B. Sen and addressed to Senior Advertising Manager and all other Regional Managers and Assistant Managers. The letter - Ext. 4 was issued by Sri Partha Sengupta, Advertising Manager addressed to Sri Ghosh. But, both the exhibited documents as aforesaid, do not contain any endorsement of receipt of Sri Ghosh or service of the same upon him. Mr. Ghose also asserted that both said documents (Ext. 3 & 4) were never served upon him and said two documents have been manufactured by the management for the purpose of this case.

Sri Tirthankar Gupta (P.W.5) the then Semi Clerk of Ananda Bazar Patrika (P) Limited stated that he heard Sri T. Ghosh was Pre-production Co-ordinator scheduling executive magazine allotted duty to him and used to look after his work and forwarded leave applications to the manager.

Further, in his cross-examination he stated that save and except the documents (Ext. 3 & 4) no other document was lying with him to show that his duty was allotted and looked after by Sri Ghosh. However, he stated admittedly that Sri Partha Sengupta was the Manager of Advertisement Department.

Lastly, Sri Dilip Kumar Sengupta (P.W. 6) the then Senior Clerk of Magazine Section of Advertisement Department of the company stated that Sri Tapan Kr. Ghosh was his immediate boss. Sri Partha Sengupta was the Departmental Head. He himself, Sri Moloy Shankar Dasgupta, Sibomoy Dasgupta, Ramendra Nath Bose and Tirthankar Gupta were working under Sri Ghosh. But, in his cross-examination he stated that he has no document to show that all aforesaid persons worked under Sri Ghosh and/or Sri Ghosh was his immediate boss.

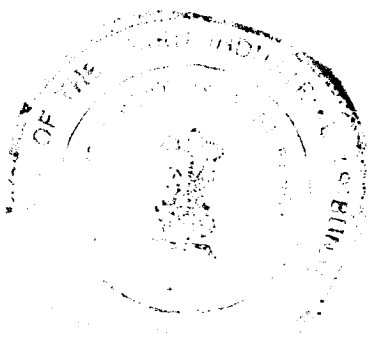
On the other hand, workman, Sri Tapan Kumar Ghosh examined himself as O.P.W. 1. He filed his examination in chief as well as supplementary examination in chief on affidavit and stated inter alia that he was permanent employee of Ananda Bazar



Patrika Limited. He was appointed in the year 1965. He worked there with most sincerity, diligently and without any iota of blemish. At the time of his dismissal his designation was pre-production & scheduling co-ordinator executive magazine. Though, it appeared to be high sounding designation but, his real nature of duty was purely clerical. At no point of time, he had any managerial, administrative and/or supervisory powers. On 24th March, 1992, he left the office at 5:30 p.m. At that time his briefcase was not checked at the office gate but, after he proceeded upto a certain distance, he was called on by the Head Habildar, Dharmaraj Tewari and on his request, he opened his briefcase and on that, the aforesaid Habildar found some journals along with other papers. As pre-production and scheduling co-ordinator, he had to look after publication of advertisement sorted out by him and report it to the customers, either in writing or over phone. However, said Habildar reported the matter to the management on the very day and on the basis of the same, the management of the company issued a purported show cause notice on 25.03.1992 making some false allegations against him. He replied to the show cause notice on 28.03.1992 stating inter alia that at the time of duty his briefcase was lying beside his table without any lock and key and unguarded. He used to move from one department to another. Prior to leaving the office, on the particular day, he failed to check his briefcase. Besides that, he used to carry magazines to his home to see whether the advertisement sorted by him were published or not but, in such cases the magazines used to be stamped. Therefore, it was merely a technical mistaken and question of any dishonest intention on his part does not/did not arise as alleged or at all. Further, he also stated that the order of his dismissal was illegal, perverse, bad in law and violative of the principles of natural justice. Without prejudice to the rights and contentions, he also submitted that his dismissal was most disproportionate with the charge leveled by the management against him and as such the same is liable to be set aside.

In addition to his such evidence, he further stated as and by way of supplementary affidavit that there was no subordinate under him during tenure of his employment. He never supervised the work of any supervisor, Dy. Executive and/or Advertisement Clerk or any other staff during the period of employment. He had no power or capacity to act independently without sanction of his higher authority, which had binding effect on the company. He was never empowered to forward any leave applications of any employee for approval. He also denied that the above named P.Ws had ever worked under his supervision and control.

Further, the concerned workman stated that neither any complaint was lodged before the police authorities nor any complaint was lodged against him on such alleged misconduct and even no seizure list was prepared and apart from that the magazines in



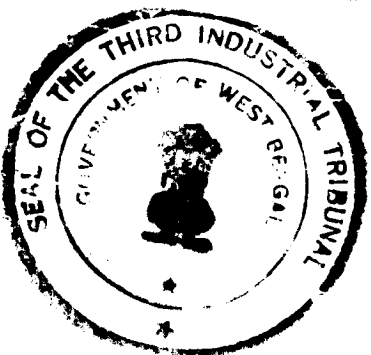
question do not bear his signature or of anybody else and thereby, it is also not correct to say that the magazines (Ext. 1 series) were recovered from him.

However, in course of his cross-examination, the workman (O.P.W.-1) expressed his ignorance that any settlement took place between the management and the employees of the company and whether his pay scale was fixed as per any settlement made between the management and the union. There were several unions of the employees of M/s. A.B.P Limited but, he was not a member of any of such unions. He was not aware of the fact that whether sometimes conversation between the union and the management used to take place regarding the demands of the workers and other things.

Ld. Counsel appearing for the workman argued in the context that the workman concerned was not a workman in terms of Section 2(s) of the I.D. Act, 1947 as he used to work as an executive of the company and his designation was "Pre-Production & scheduling co-ordinator Executive Magazines etc, as contended by the company. *He relied upon the judgment reported in 1985 II L.L.J 401, Arkal Govind Raj Rao and Ciba Geigy of India Ltd., Bombay, wherein Hon'ble Court held that workman as defined in Sec. 2(S) of the Act that to decide whether an employee is workman or not court should find out primary and basic duties and additional duties cannot change the character and status of a person. Dominant purpose of employment should be determining factor. Difference in salary is hardly decisive nor the designation of a clerk by itself decisive. Focus has to be on the nature of the duties performed. These high-sounding nomenclature are adopted not only to inflate the ego of the employer but primarily for avoiding the application of the Act. They apart from being misleading are not in tune with the free India's Constitution culture. We remain unimpressed by these high-sounding labels.*

Where an employee has multifarious duties and a question is raised whether he is a workman or someone other than a workman the Court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basic duties these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of a person.

Further, in 1989 (59) F.L.R 441 Bombay Dyeing And Mfg. Company Limited and R.A. Biddo, it was held that one must find out the nature of the work from the purpose for which a particular person is employed. It is not the nomenclature of the employment, but what the main functions or duties that are discharged by the person concerned that



determine the nature of the work performed by that person or the capacity in which that person is employed. Relied on- Murugalli Estate V. Industrial Tribunal, 1964(2) LLJ 164.

In, 1969 II LLJ 670 Ananda Bazar Patrika (Private) Limited and Its workmen it was held that the principle which should be followed in deciding the question whether a person is employed in a supervisory capacity or on clerical work is that if a person is mainly doing supervisory work but incidentally or for a fraction of the 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, the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity.

On the other hand, Ld. Counsel appearing for the O.P./Company argued that in order to establish that Sri Ghosh is not a workman the company felt it prudent to produce certain settlements between the management of the company and their workmen represented by various recognized unions. The purpose of production of the said documents were that of the benefits that provided to the employees under the said settlements were not available to the category of employees like the workman as he was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. With that view of the matter the company filed an application on 16th January, 2007 for relying upon the documents vide special leave petition by contending inter alia that the documents in question were very much vital for the purpose of establishing by the management of the petitioner company that Sri Tapan Kr. Ghosh was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. But, vide an order no. 143 dated 15th February, 2007 this Tribunal rejected the said application. Impugning the said order dated 15th February, 2007 the company moved before the Hon'ble High Court at Calcutta vide a writ application being W.P. No. 305 of 2007 whereupon the Hon'ble High Court at Calcutta by an impugned Order dated 17th May, 2007 was pleased to stay the proceedings that was pending before this Tribunal.

Ultimately, by a judgement and Order dated 4th May, 2016 the Hon'ble High Court at Calcutta was pleased to set aside the impugned order dated 6th February, 2007 passed by this Tribunal and directed this Tribunal to reconsider the application for production of additional documents made by the company before it. In terms of the said order those documents as referred hereinbefore were placed before this Tribunal at the time of hearing by making contentions that the said two documents as placed before this Tribunal to justify that Shri Ghosh was not a workman within the meaning of Section 2(s) of the Industrial Disputes At, 1947.



Ld. Counsel of the company further argued that from the evidence as adduced before this Tribunal would be evident that the nature of the duties that were being performed by Sri Ghosh was of supervisory nature and there no evidence that could be adduced by the alleged workman concerned that his nature of duties were clerical nature. In this connection, he referred a decision of the Hon'ble Supreme Court of India reported in AIR 1994 SC 1824, S.K. Maini Vs. M/S. Carona Sahu Co. Ltd., wherein it held as noted hereunder-

"it has been rightly contended by both the Learned Counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the concerned employee and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of 'workman' as defined in S. 2(s) of the Industrial Disputes Act."

It is an admitted position of the case that the magazines were found in the brief case of Sri Ghosh, were not stamped. Nothing could be proved from the side of Sri Ghosh to establish that those magazines were implanted in his briefcase by some one else.

Ld. Counsel appearing for the company argued that Sri Ghosh was holding a very responsible position and as such it is not a question how much or what was the price of those magazines? The question here is whether the management could repose confidence in him to retain in service. Sri Ghosh was holding a position of trust and confidence. By abusing such position, he committed an act which resulted in forfeiting the same and to continue him in the service would be embarrassing and inconvenience to the employer and it would be detrimental to the discipline or security of the establishment. In this connection, he placed reliance on a decision of the Hon'ble Supreme Court reported in (2001) 9 SCC 609 (Para 9) (Kanhaiyalal Agrawal And Others Vs. Factory Manager, Gwalior Sugar Company Limited)

At last but not of least impact, Ld. Counsel of the Company argued that in view of the aforesaid even assuming but not admitting that Sri Ghosh was a workman but, having regard to the fact that the management has lost confidence in him for pilfering the



magazines, he has no right of reinstatement in service or any other benefit of any nature whatsoever.

Having considered the discussions made above in the foregoing paragraphs with reference to the materials on record including the evidence led by the respective parties, cited case laws and arguments so advanced, this Tribunal is of the view that the domestic enquiry as held by the Enquiry Officer at the instance of the management as against the workman was not at par with the rules of natural justice and the domestic enquiry was found to be invalid and improper vide order no. 89 dated 01.01.2004 passed by this Tribunal as it evident from the materials on record. However, the order was challenged by the company vide W.P. No. 6258 (W) of 2004 before the Hon'ble High Court at Calcutta whereby the Hon'ble Justice Arun Kumar Mitra vide order dated 30.03.2004 was pleased to dispose of the same directing this Tribunal to hear the matter on merit after complying with the principle of natural justice and accordingly, the hearing of the case commenced.

In course of hearing on merit inclusive of preliminary points as raised by the company as to the maintainability of the reference on the ground that the workman is not a workman within the meaning of Sec. 2(s) of I.D. Act, 1947 as he had been working in supervisory capacity. The company felt it expedient to produce certain documents to substantiate that the workman was not a workman within the meaning of sec. 2(s) of the Act and accordingly, the company filed an application but the said application was rejected by this Tribunal vide its order no. 143 dated 15.02.2007.

Being aggrieved and dis-satisfied with the order, the company moved before the Hon'ble High Court at Calcutta by filing writ petition being W.P. No. 305 of 2007 whereupon, the Hon'ble Court was please to set aside the impugned order and directed this Tribunal to consider the application for production of documents and accordingly, said documents were produced before this Tribunal and marked as Exhibits 3 & 4 to justify that Sri Ghosh was not a 'workman' within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947. Let, it be noted here that besides said two (2) documents marked as Exhibits 3 & 4, no other substantive or documentary evidence has been produced and/or exhibited by the Company in the context of the case. The purpose of production of the documents were that the benefits provided to the employees under the settlements not available to the category of employees like the workman as he was not a workman within the meaning of Sec. 2(s) of the I.D. Act, 1947.

Further, on the point under reference, the workman asserted that he was appointed in the year 1965 and he worked in the company with most sincerity, diligently and

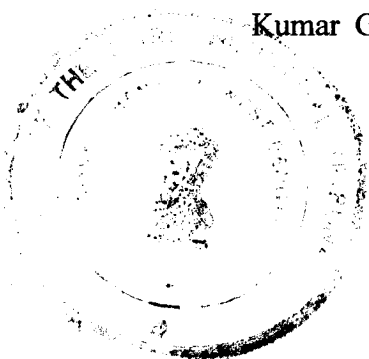


without any iota of blemish. However, admittedly at the time of his dismissal from the employment his designation was Pre-Production Scheduling Co-Ordinator Executive Magazine. Although the designation was high sounding but, his real nature of duty was purely clerical. His nature of duties was sorting out of advertisement, copy testing, proof reading etc. As contended, order of his dismissal was illegal, perverse, bad in law and violative of principles of natural justice. Furthermore, without prejudice to his rights and contentions, he submitted that his dismissal was most disproportionate with the charges levelled by the management against him. Further, he urged that Exhibit 3 & 4 were subsequently manufactured for the purpose of this case. He had never performed any duty in the nature as described in Ext. 3 & 4. He never worked in supervisory and/or in administrative capacity. He had no authority or on which had any binding effect on the company. The management had never given him any power or authority to allot the duties of employees of the company. He also categorically denied that Dilip Sengupta, Malay Shankar Dasgupta, Shibamoy Dasgupta, Ramendra Nath Bose and Tirthankar Gupta had ever worked under his supervision and/or control.

In the fact and circumstances of the case the workman asserted himself of being the workman. He had never any administrative, managerial or supervisory power or capacity. Further, on the evidence available on record he claimed to fall within the definition of 'workman' in Sec. 2(s) of the Act. In the context, he relied upon a decision reported in AIR 1984 (SC) 500 (Ved Prakash Gupta And Messrs Delton Cable India (P) Ltd.). Reliance also placed upon reported cases in 1978 1 LLJ (SC) 322, K.C.P Employees' Association, Madras And Management of K.C.P. Ltd., Madras and others; 2013 LLR 820(All.), Ircon International Limited Vs. Presiding Officer, Central Government Industrial Tribunal-cum-labour Court, Kanpur (U.P.) and Others.

Needless to be noted here that relationship of employer and employee is an admitted proposition of the case. Onus is upon the employer to prove that the employee is not a workman or he is not entitled to derive the benefit of exceptional clauses, as contended and/or pleaded by him. It is settled position of law that managerial capacity in the main must exists otherwise character of the employee will not change.

Supervision over men not on machine is the material factor. Supervisory capacity and supervisory work are distinct and different. Nomenclature and salary both are highly decisive. Relied on 1989 (59) FLR 441(DB) Rel. Para 445; 2002 (2) CLR 235; 1969 (2) LLJ 670. Thus, this Tribunal has now no hesitation to hold that the employee- Sri Tapan Kumar Ghosh was an employee of the company namely M/s. Ananda Bazar Patrika



Limited and he being a workman entitled to derive benefits under the exceptional clauses of Sec. 2(s) of the Industrial Disputes Act, 1947.

Sri Ghosh was a workman but having regard to the fact that the management has lost confidence in him for pilfering the magazines and or as alleged, he has no right of reinstatement in service or any other benefit of any nature whatsoever but where an industrial dispute relating to discharge or dismissal of a workman has been referred to Tribunal for adjudication and in course of adjudication proceedings the Tribunal is satisfied that the order of discharge or dismissal was not justified, it may by its award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

In the given case, company received the report on 24.03.1992 from Head Habildar of the company that on said date at about 5:30 p.m. at the time office gate Sri Ghosh was apprehended while taking out some magazines of the premises, which were the properties of the company without any permission or authority. On being prima facie satisfied as to the misconduct committed by the employee/workman, the Company issued show-cause notice against him on 25.03.1992 and accordingly, said Sri Ghosh gave reply of the show cause notice, on 28.03.1992 but since, the management of the company did not find it satisfactory and decided to hold an enquiry into the matter and accordingly the domestic enquiry was being held. The Enquiry Officer had submitted report with his findings to the management of the company whereby he found the workman guilty of committing the offence, as alleged against him and to that effect, this Tribunal also finds itself in agreement with the findings of the Enquiry Officer after consideration and relying upon the materials on record including evidences of the parties, recorded on merit. of the case.

Let, it be placed on record that admittedly the magazines were found from the briefcase of the workman and were not stamped.

The company argued that in terms of findings of the Enquiry Officer and the offence committed by Sri Ghosh by acting dishonestly with respect to the property of the company and flouted the discipline of the company and consequently, he was dismissed by the management of the company vide its letter dated 28.02.1994. However, the Tribunal in consideration of the matter of domestic enquiry held that the domestic enquiry was invalid and improper and thereby, the company challenged the impugned order before the Hon'ble High Court at Calcutta in W.P. No. 212 of 1999, which was ultimately disposed by the Hon'ble Court observing inter alia that the petitioner shall



Hence it is -

ordered

that the dismissal of the workman be and the same is not justified and accordingly, it be treated as set aside. Since there is no scope of reinstatement of the workman as because of the fact, he has already attained the age of superannuation, on 03.06.2001 but, the fact remains that he deserves to an award of lesser punishment in lieu of his dismissal in the fact and circumstances of the particular case. So, this tribunal is inclined to grant relief of 50% back wages in lieu of dismissal of the workman with effect from the date of his dismissal i.e., on 28.02.1994 till the date of his superannuation from the service i.e., on 03.06.2001.

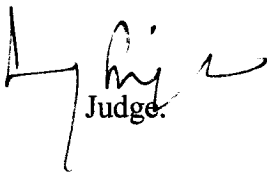
However, there would be no order as to cost.

Parties do bear their own cost.

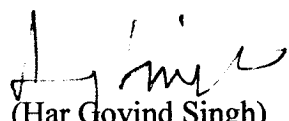
Thus, both the issues under reference are considered and disposed of.

Let, the copies of the Award be sent to the Principal Secretary, Labour Department, Government of West Bengal for information and necessary action if any.

Dictated & corrected by me.


Judge.




(Har Govind Singh)
Judge,
Third Industrial Tribunal,
31/08/2018