

The Hongkong and Shanghai Banking Corporation Ltd. Vs The Central Government Industrial Tribunal and Others

Court: Calcutta High Court

Date of Decision: Nov. 22, 2005

Acts Referred: Constitution of India, 1950 " Article 226
Industrial Disputes Act, 1947 " Section 2, 25F

Citation: (2006) 1 CALLT 1 : (2006) 4 CHN 146 : 110 CWN 37 : (2006) 109 FLR 496 : (2006) 2 LLJ 628

Hon'ble Judges: Soumitra Pal, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: Samaraditya Pal, P.S. Sengupta and Dipak Ghosh, for the Appellant; Lakshmi Gupta, Sumit Ghosh and Soumya Mqjumder for the Respondent No. 3, for the Respondent

Final Decision: Allowed

Judgement

Soumitra Pal, J.

Instant appeal arises out of a judgment and order dated 27th March, 2002 passed by a learned single Judge in W.P. No.

948 of 2000 affirming the award dated 20th December, 1999 passed by the Central Government Industrial Tribunal at Calcutta in Tribunal

Reference Case No. 14/1991.

2. The facts as stated by the appellant are that the respondent No.3 Chhabi Ghosh ("respondent" for short) was Initially appointed and, thereafter,

confirmed as a clerical staff on 26th July, 1969 by the then Mercantile Bank Ltd. now known as the Hongkong and Shanghai Banking

Corporation. Pursuant to an agreement dated 16th June, 1978 entered into by the Mercantile Bank Ltd. and the said respondent. The said

respondent was promoted as staff officer, Grade-I (Junior). The two grades of staff officers that is Grade-I (Junior) and Grade -II (Senior) were

merged with effect from 1st of July, 1984, thereby bestowing the powers and duties exercised by Grade II staff officers on Grade-I staff officers

also. The said respondent was in the grade of 1 300-7 725 (basic) and was drawing at the rate of Rs. 3419/- per month as basic salary besides

other allowances, it has been stated that from 1st November, 1977 to 30th November, 1984 the said respondent principally and substantially

discharged duties and functions which were supervisory cum administrative cum managerial in nature and had head clerks, special assistants, head

cashier, clerks/typists, clerk cum cashier, accounting machine operators, peons, daftaries, cash peons, sweepers under his control. The respondent

was vested with the power and authority to sign on behalf of the bank, to regularize and check transactions and to channelise fundamental

transaction postings, to approve the daily cash balance reconciled by the employees subordinate to him, had the power to authenticate savings

account customer ledger cards, the authority of approving the customer account opening, to look after the current account customer ledger cards,

the authority to authenticate/approve the vouchers prepared by the clerks; to approve the postings in various suspense account signing an

approving inward and outward remittances of local and foreign currencies, was empowered to sign demand drafts. He was authorised to sign the

vouchers pertaining to bank pay order, had the power to sign foreign inward remittance certificate, authority to sign various schedules for collection

of bills, to look after and sign ledger sheet, central registrars, had the authority to sign vouchers instructing another bank to debit an account, to sign

schedules to various banks for collection of bill proceeds, to sign schedules for collection of foreign bills drawn on branches of foreign banks, to

sign various customer account debit vouchers, to debit customer account and realize commission charges for the services rendered to customer, to

sign outward bills for collection voucher, authority to approve sundry remittances covered in Indian rupee vouchers made for the preparation of

demand drafts on the branches of the State Bank of India authority, to authenticate drawing payable account vouchers and to sign note purchase

account voucher authorizing purchase of foreign currency note to supervise the Central customer ledger cards and stocks, had the custody and

control of accounting machine keys, account opening forms to authorize various vouchers prepared by the clerical staff by initialing and validating

and/ or passing entries made by the clerical staff, to cancel and rectify errors committed by the clerical staff in any document and register, had the

authority to direct the staff working under him and to supervise the job assign to them, in case of emergency to take delivery of duplicate keys of a

sub branch of the bank from the main office safe custody and was the custodian of strong room keys for vaults which revealed that the said

respondent had the administrative cum supervisory cum managerial power.

3. It had been stated that as per clause 7 of the agreement dated 16th June, 1978 in order to enjoy leave prior sanction should have to be obtained

in writing. On and from 16th August. 1984 the said respondent went on leave for a period of 14 days. On 1st September, 1984 he was supposed

to report for duty which he did not. By letter dated 6th September, 1984 he was requested to resume duties. Still he did not. On 10th September,

1984 in response to a letter dated 31st August, 1984 the bank intimated that it was not possible to extend the leave indefinitely. However, as a

special case extension was granted upto 16th September, 1984. The said respondent, by letter dated 19th October, 1984 was intimated that in

spite of the expiry of the leave he had not turned up. Thereafter, by a letter dated 14th November, 1984 final opportunity was granted to report

for duty by 30th November, 1984. Since the petitioner failed to report for duty, accordingly, the bank was left with no other alternative and by a

letter dated 1st December, 1984 had to determine, with immediate effect the contract of employment as per clause 9 of the contract of

employment dated 16th June, 1978. According to the appellant, the contract was determined after affording adequate and reasonable opportunity.

The said respondent raised a dispute with the Labour Department, Government of India, under the provisions of Industrial Disputes Act, 1947(for

short "the Act"). The Conciliation Officer held the said respondent as a workman which was challenged in the writ proceedings. By an order dated

17th January, 1986 the said order was set aside and the Government of India was granted liberty to act in accordance with law. Thereafter, the

Central Government intimated that prima facie no ground existed for a reference as it appeared that the said respondent was not a workman under

the provisions of the Act. The said respondent by filing a writ petition challenged the same. The writ petition was allowed. On appeal the Central

Government was directed to refer the issue as to whether the said respondent was a workman or not.

4. By an order dated 10th April, 1991 the Government of India, the respondent No.2 referred the following dispute for a adjudication by the

Central Government Industrial Tribunal:-

Whether Shri Chhabi Ghosh, staff officer. The Honkong and Shanghai Banking Corpn., Calcutta was a workman? If so, whether the action of the

management of the Hongkong & Shanghai Banking Corpn., Calcutta, in terminating the services of Shri Chhabi Ghosh w.e.f. 1.12.84 was legal

and justified? If not, to what relief Shri Ghosh is entitled?

5. Before the learned Tribunal parties filed their respective written statements. The stand of the respondent was that while deciding the status of an

employee, the designation and the salary one draws are not decisive but it is the nature of duties and the functions performed that determine the

status of an employee. A list of the nature of job performed and documents were annexed to the written statement. It was further contented on

behalf of the said respondent that though by an order dated 11th October, 1977 in the name of promotion, the designation of the workman to the

staff officer was changed with effect from 1st November, 1977 yet he continued to perform the clerical job as before sitting in the same table and

chair under the direction control and supervision of the same person without being vested with managerial, administrative and supervisory power.

In the name of promotion only some more clerical work was added to his original job which was absolutely clerical in nature. The bank in its

written statement in reply to the written statement filed by the said respondent referred to the category and designation of staff control, the salary

drawn, the nature of duties performed and a host of documents to demonstrate that the said respondent was a staff officer having managerial and

supervisory powers. The said respondent also filed his rejoinder. On behalf of the appellant three witnesses adduced evidence, whereas the said

respondent on his behalf himself adduced evidence.

6. The learned Tribunal by its award dated 20th December, 1999 held that the said respondent was a workman u/s 2(s) of the Industrial Disputes

Act, 1947 and the action of the management of the appellant in terminating the service of the concerned workman was bad, illegal, inoperative and

void ab initio. The management was directed to reinstate him with full back wages from the date of termination along with all consequential benefits.

7. The appellant challenged the said award by way of filing a writ petition. The principal points which were urged as it appears from the judgment

of the single Judge were whether High Court while exercising certiorari jurisdiction has a limited scope of review or it should act as an appellate

authority over the decision of the Tribunal that the said respondent was a workman and can reappreciate evidence. Whether the finding of the

Tribunal holding that the respondent No.3 is a workman is perverse. What are the tests to determine who is a workman. Whether uncorroborated

testimony of respondent No.3 could be given credence. Whether culmination of service as per agreement can be said to be punitive so as to

require holding of enquiry. Whether culmination of service of the said respondent could be considered as retrenchment, requiring compliance of

section 25F of the Act.

8. The said writ petition was dismissed. It was held that the learned Tribunal after considering the materials and evidence on record arrived on a

factual finding that the said respondent was a workman and came within the definition of "workman" u/s 2(s) of the Act. It was also held that the

High Court in its constitutional writ jurisdiction should not reappreciate evidence in order to arrive at a finding on its own after giving a total go-by

to the facts specifically found by the Tribunal below. The Court did not find that the conclusions reached by the Tribunal were either perverse or

based on no evidence. It was held whether an employee is a workman or not cannot be decided by the designation. The primary, basic and

predominant duty performed by an employee will determine the actual status of the employee concerned and not by the incidental duties performed

by him. It was also held that from the award it appeared that the Tribunal after carefully considering the evidence of the concerned workman came

to a specific conclusion that the said respondent was discharging duties which were clerical in, nature inspite of his promotion as Staff Officer. The

learned single Judge in his judgment took note of the principal jobs performed by the respondent No.3 mentioned in paragraph 10 of the said

award and was of the view that on that basis the Tribunal on proper assessment of the evidence on record had held that the respondent No.3 did

not perform managerial function. The learned single Judge held that the termination of service of the said respondent was illegal.

9. Being aggrieved by the said judgment and order dated 27th March, 2002 passed by the learned single Judge the appellant had preferred the

instant appeal.

10. Mr. Samaraditya Pal, learned Senior Advocate ably assisted by Mr. P.S. Sengupta submitted that the petitioner was appointed as a clerk in

1969. Admittedly on 1st November, 1977 was promoted as Staff Officer and the salary drawn was Rs. 3.490/-. Submission was made that the

difference of benefits and the status enjoyed by a clerk and by a Staff Officer is evident from a perusal of the basic salary and the various facilities.

A clerk is required to mark his attendance which the respondent being a Staff Officer was not required. After promotion he used to sit in different

chair and table other than meant for the clerk. As an officer tea and snacks were used to be supplied which were meant for the officers, whereas in

case of a clerk it was served from a canteen. He had the privilege to use the special toilet meant for the officers other than those used by the clerks.

Regarding the issue relating to the power and supervision of control exercised by the said respondent reliance was placed on the evidence of the

respondent, Amit Ghosh and Debabrata Banerjee. Besides oral evidence, our attention was drawn to the annexures in the Paper Book containing

the documents which were before the learned Tribunal. On merit it was submitted that the learned Tribunal erred in holding that there was non-

compliance of the provisions of section 25F of the Act since the letter of termination was revealed that the termination was for misconduct. Hence,

the question of complying with section 25F of the Act did not arise. Further all communications prior to reference show that no dispute was raised

about the non-compliance with the provisions of section 25F but with regard to non-compliance with the principles of natural justice. Referring to

letter dated 10th October 1984 it was submitted that natural justice was meted out by asking the employee to explain why appropriate action

would not be taken. It was contended that the learned Tribunal erred in drawing presumption since the agreement of employment did not provide

duties of supervisory cum managerial nature, the respondent was not vested with any supervisory and managerial work. It was urged that the

agreement categorically provided that the duties shall be such as may be from time to time prescribed by or on behalf of the bank by the

Manager(India) or any officer authorized by him in that behalf. It is an admitted position that the duties of the staff officer were not to be found in

writing anywhere. Since duties were admittedly assigned orally no adverse inference could be drawn for non-production of non-existing

documents. Submission was made that the award passed by the Tribunal is erroneous since it held that the bank had failed to produce any

document showing that it had ever prescribed the performance of supervisory cum managerial nature of job to the respondent which is contrary to

the evidence on record. In this context reference was drawn to some of the exhibits which were submitted to be consistent with the terms of

agreement. It was submitted that the learned Tribunal erred in concluding that the paragraph 2 of the agreement that the said respondent have been

completely subordinate to the manager inasmuch as the Tribunal failed to appreciate that there is a hierarchy of officers and if there is one officer

above another the same cannot lead to the conclusion that the officer concerned is not vested with the supervisory cum managerial power. It was

contended that said paragraph 2 of the agreement speaks of Manager(India) not Manager simplicitor and naturally there will be many management

staff under him. Referring to the agreement it was submitted that it does not mention in detail about the jobs to be performed. However, agreement

M/30 categorically provides that the duties to be performed would be prescribed and exhibits M/82 would amply testify the duties assigned to the

said respondent and the performance of these duties would determine whether he was a workman or not.

11. It was further submitted that the Tribunal erred in holding that the respondent No.3 was discharging duty of clerical nature in spite of promotion

as Staff Officer on the presumption of withholding of documents. It was argued that the learned Tribunal erred in holding that the exhibits in

question might have been signed after being authorized to sign on behalf of the manager which is based on surmise and conjecture and such

signatures demonstrate that the respondent was entrusted with managerial duties. Moreover, the Tribunal erred in holding that the signature of any

officer in the documents of the bank were a mere formality and no undue importance should be given since such a conclusion is not only against the

norms of banking transaction but is based on surmise and conjecture and based on no evidence. Further the finding of the Tribunal that the

signature on the documents is a day to day affair and usual course of business erroneous since putting signature is purely a managerial Job. It was

submitted that the learned Tribunal erred in holding that it is immaterial whether the terms of bipartite settlement and its applicability might ceased to

be a workman under the bipartite settlement but the same would be bar for consideration u/s 2(s) of the Act. The said conclusion drawn by the

Tribunal is perverse since bipartite settlement is concept under the Act. There cannot be two different concepts. The said conclusion is contrary to

the evidence of the said respondent which is on record.

12. So far as the judgment of the learned single Judge is concerned it was submitted that the Court below erred in law and in fact since the

judgment was passed without scrutinizing the award passed by the learned Tribunal and it was held that the conclusion reached by the Tribunal are

not perverse or based on no evidence. The learned single Judge had erred in holding that the Tribunal below had carefully considered the evidence

on record and came to a conclusion that the respondent workman was discharging duties which were of clerical nature which is contrary to the

evidence on record. Submission was made that the learned single Judge erred in holding that the Tribunal on proper assessment of evidence came

to the conclusion that the said respondent did not perform managerial function which is contrary to the evidence. It was submitted that the learned

single Judge erred in holding that the termination was effected on the ground of failure to resume duty after the expiry of the sanctioned leave and

not any other ground involving moral turpitude. It was argued that it was not a question of moral turpitude since the dismissal was effected on the

ground of refusal to obey the lawful and reasonable order issued by the bank. By letter dated 6th September, 1984 the said respondent was

advised to intimate as to when he would be resuming his duties and in response thereto the said respondent by letter dated 10th September, 1984

intimated that he would return by September, 1984. Since he failed to report by letter dated 10th October, 1984 the said respondent was asked

to explain as to why appropriate action should not be taken. By telegram the said respondent was informed that it was not possible to extend the

leave indefinitely and the leave, as a special case was extended upto 16th September, 1984. By letter dated 14th November, 1984 the attention of

the said respondent was drawn to the fact that by letter dated 10th October, 1984 he was called upon to explain as to why appropriate action

should not be taken against him to which no answer was given whereby admitting the fact of misconduct being committed in the form of refusal to

obey the lawful and reasonable order of the appellant. Therefore, the respondent was given adequate opportunity which he did not avail. Reliance

was placed on the Judgments of the Apex Court in Kaushalya Devi and Others Vs. Bachittar Singh and Others, , Raza Textiles Ltd. Vs. Income

Tax Officer, Rampur, , Nagendra Nath Bora and Anr. v. Commissioner of Hills Division and Appeals reported in AIR 1950 SC 398 , Syed

Yakoob Vs. K.S. Radhakrishnan and Others, , Andhra Scientific Co. Ltd. Vs. A. Seshagiri Rao and Another, , Indian Overseas Bank Vs. I.O.B.

Staff Canteen Workers" Union and Another, , Lloyds Bank Ltd., New Delhi Vs. Panna Lal Gupta and Others, , Nirmal Singh Vs. State of Punjab

and Others, , Arkal Govind Raj Rao Vs. Ciba Geigy of India Ltd. Bombay, , South Indian Bank Ltd. Vs. A.R. Chacko, , S.K. Maini Vs. M/s.

Carona Sahu Company Limited and others, , Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and Another, , D.K.

Yadav Vs. J.M.A. Industries Ltd., . Upton India Limited Vs. Shammi Bhan and Another, , M.C.D. Vs. Praveen Kumar Jain and Others, and the

judgments of the Calcutta High Court in Shalimar Paints Ltd. v. 3rd Industrial Tribunal reported in 1974 LAB IC 213 and in Ramendra Narayan

Deb v. 8th Industrial Tribunal. West Bengal reported in 1975 LAB IC 94 in support of his contentions.

13. Mr. L.K. Gupta, learned Senior Advocate ably assisted by Mr. Soumya Majumder appearing on behalf of the respondent submitted that in

1969 the respondent was appointed as a clerical staff. On 16th June, 1978 he was promoted as a Staff Officer and was placed in Grade-I (Staff

Officer Junior). An agreement was executed between the bank and the said respondent specifying the duties and responsibilities. On 16th August,

1984 the said respondent applied two months leave to the officer in charge, Securities Department, Calcutta Main Branch, his superior officer, to

visit London as his brother in law had expired. On 31st August, 1984 the respondent sought leave for a period of two weeks explaining the

reasons to the Operations Manager. On 6th September, 1984 the bank issued a letter asking the said respondent to inform when he would be

resuming his duties. The bank as a special case on 10th September, 1984 extended the leave upto 16th September, 1984. Thereafter, since the

said respondent did not resume his duties the bank by a letter dated 10th October, 1984 sought for an explanation from the respondent for the

alleged breach of discipline. By letter dated 23rd October, 1984 the said respondent sought for further extension of leave and treat him without

pay. The manager of the bank by letter dated 14th November, 1984 directed the respondent No.3 to report for duty by 30th November, 1984

failing which his services would be terminated. Thereafter, by letter dated 1st December, 1984 the service of the said respondent was terminated in

terms of clauses 5 and 9 of the agreement. The respondent raised an industrial dispute contending that the job performed by him was akin to that

of special assistant. Ultimately on the direction of the Division Bench of this Court the dispute was referred to the learned Tribunal. Before the

Tribunal he had adduced evidence on merit. The appellant deposed through three witnesses. The first witness deposed on the aspect of disclosure

on the document in possession of the bank and the remaining on merits. The basic issue was whether the said respondent was a workman. It was

urged that the promotion order dated 1st November, 1977 and the agreement dated 16th June, 1978 did not specify the duties and

responsibilities. On the contrary the agreement revealed that the said respondent was to observe and perform all orders, directions and instructions

issued from time to time by any officer of the bank. Submission was made that the management witness in evidence had corroborated that no

duties were fixed on promotion. Before promotion he was working in the Management Information Service Department (MIS) and continued to

work there upto 1979 and, thus, on promotion there was no change of department. He had performed the same duties even on transfer. The

nature of job done in the promotional post was clerical. As indicated in the letter dated 14th January, 1985 the respondent performed jobs as that

of a special assistant. The duties of the special assistant had been enumerated in the bipartite settlement of the bank entered into on 7th September,

1984. In its affidavit in reply the factum of the nature of the job performed by the special assistant covered by the bipartite settlement was not

denied by the bank. Further, from the application of leave submitted on 16th August, 1984 it appeared that he had made such an application to the

officer in charge of the securities department meaning thereby that he could not apply for leave to the Manager. From the letter dated 14th

November, 1984 written by the manager to the said respondent directing him to report for duty it is apparent that he was subordinate to the

manager and could not have performed the duties of Manager. Analysing the evidence and relying on the documents annexed it was submitted that

the nature of the duties and work performed were clerical. Had the documents asked for by the bank been produced it would have revealed that

the workman actually wrote the documents. He had no financial power to sanction. He signed as manager though not designated as manager which

merely meant checking of signatures. The learned Tribunal while passing its award had considered the terms of employment in extenso and the

duties performed by the said respondent. The Tribunal came to a finding that the management had failed to produce any document showing that it

had ever prescribed performance of any supervisory cum managerial nature of job and held that the respondent No. 3 was completely subordinate

to the manager of the bank. The Tribunal had considered the case of the management in the context of non-mentioning of prescribed duties as

supervisor cum manager in terms of employment and the evidence of witness of the management, Amit Kumar Ghosh an interested witness.

According to the appellant, the learned Tribunal had considered the evidence of the management's witness in the context of admission with regard

to the job of the respondent being subordinate to the traders. It was submitted that the Tribunal rightly drew adverse inference against the bank for

not disclosing the papers of MIS department after promotion lying in the custody of the bank. Submission was made that in the facts and

circumstances the award of the learned Tribunal was just and proper since it had considered the factum of the signature put in by the respondent in

the name of the manager and had also considered the bipartite settlement. The nature of duties performed by him is the decisive test to determine

his status. So far termination is concerned it was effected without any enquiry. Reliance was placed on the judgments of the Supreme Court

reported in Sadhu Ram Vs. Delhi Transport Corporation, , Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association and

Another, and Sonpath Co-operative Sugar Mills Ltd. v. Ajit Singh, reported in (2005) SCC 232 and the judgment of the High Courts in Guest

Keen Williams v. Assistant Labour Commissioner, Govt. of West Bengal, reported in 1986 LAB I.C. 1668, Rallis India Ltd. Vs. State of West

Bengal and Others, and Sunita B. Vatsaraj v. Karnataka Bank Ltd. and Anr. reported in 1999 (1) CLR 1156 in support of his contentions.

14. The learned advocates of the respective parties had filed their written notes of arguments which are on record.

15. The question which falls for consideration is whether the learned Tribunal was justified in holding that the said respondent was a "workman" u/s

2(s) of the Act and the action of the appellant in terminating the services of the said respondent was bad and illegal. To answer the question we

have to refer to the documents which were before the learned Tribunal which is not disputed by the parties and also in the form of annexures in the

paper books filed before this Court.

16. It is a fact that on 26th July, 1969 the respondent was appointed as a clerical staff. The relevant portion of the letter issued by the appellant to

the respondent requesting him to accept the terms is extracted hereunder:-

Sri Chhabi Ghosh

...

...

...

...

Your medical and concerning reports have been found satisfactory and we confirm your employment in this Bank with effect from 21st January

1969 on the following terms:

1. Your starting salary will be Rs. 154 per month basic and your terms of service will be as described in the Desai Award, subsequently amended

in the Bipartite Settlement and as may be amended in any future supplementary agreement or agreements reached.

2. The Bank will not be responsible for payment of tax on your salary.

3. You will on probation of a month to months basis for a period of six months which may be extended by a further three months. At any time

during this period or at the end of this period we have the right to dispense with your services without notice and without assigning any reason.

4. If you are confirmed you will be transferred to the permanent staff and will qualify to join the Bank's provident fund.

5. You may be required to serve at any of the Branches or Agencies of the Bank in Calcutta or Greater Calcutta and Howrah.

6. Your hours of duty within the limits laid down by the awards before mentioned, will be as directed by the Management and may be adjusted to

suit the requirements of the Bank.

7. Please let us have your written acceptance of the above terms on the duplicate copy of this letter. Please also sign our usual Declaration of

Secrecy form which is attached.

Yours faithfully.

Sd/- Chhabi Ghosh Sig. Illegible

Manager

(Emphasis supplied)

17. The respondent continued to carry out the duties of a clerical staff till 1st November, 1977 when pursuant to an order dated 17th October,

1977 he was promoted to the rank of Staff Officer -I Stage - I. The relevant portion of the said order dated 17th October, 1977 is as under:-

We are pleased to advise you that you have been promoted to the rank of Staff Officer I, Stage I, with effect from 1st November 1977. You will

be on probation for a period of six months and if your performance during this period is satisfactory you will be confirmed. Your seniority will

however date from the time of promotion to probationary rank.

You will receive a starting salary as under:-

- Basic Rs. 7,500 p.a.

- Dearness Allowance 10,656
- House Rent Allowance 3,600
- Leave Travel Assistance 1,500

Total: 23.316 p.a.

We enclose for your information a copy of the scale of pay applicable to the category of Staff Officer I.

As advised to you your retirement age shall be the last day of the month during which you will attain 57th birthday.

In due course you will be required to sign a service agreement and also an agreement covering terms of service. In the meantime we shall be

obliged if you will return the duplicate copy of this letter duly signed in token of your acceptance of the appointment.

Yours faithfully,

Sd/-

Manager

(Emphasis supplied)

18. Thereafter, on 16th June, 1978 an agreement was entered into between the Mercantile bank and the said respondent whereby the parties

agreed to certain terms and conditions. The relevant terms of the said agreement is as under:

2. The duties of the Employee shall be such as may be from time to time prescribed by or on behalf of the Bank by the Manager India, or any

officer authorized by him in that behalf, and the Employee shall carry out observe and perform all such orders directions and Instructions as may be

from time given to him by or on behalf of the Bank by any of the officers aforesaid and conform to and observe all" such orders rules and

regulations as may be from time to time prescribed by or on behalf of the Bank.

3...

4. The remuneration of the Employee shall be salary and allowances at such rate as may be from time to time fixed by the Manager India of the

Bank having regard to the nature of the duties required to be performed by the Employee. Such salary shall be payable monthly on the last day of

each month.

The other service conditions shall be governed by the rules and regulations of the Bank in connection therewith from time to time in force.

5. ...

6. ...

7. In case the Employee shall at any time quit or leave the service of the Bank before the proper termination of his engagement under this

Agreement without the leave of the Local Manager for the time being of the Bank at the place where the Employee may be engaged then unless

such absence shall have been occasioned by illness necessitating the suspension of his duties under a medical certificate he shall pay to the Bank as

and by way of agreed and liquidated ascertained damages and not by way of penalty a sum equal to one year's salary.

8. ...

9. If the Employee commits a breach of any of the terms of conditions of this Agreement or if he shall neglect or refuse to obey the reasonable

orders or instructions of him.

STAFF OFFICERS

Terms of Service of Staff Officers

Agreement

The Bank's Standard Agreement executed by the Staff Officer will constitute the basic legal contract of employment between the Bank and the

Staff Officer.

RULES AND REGULATIONS

Pursuant to the Agreement and in amplification of certain terms thereof, the undermentioned Service Rules presently in force are tabulated below.

(Emphasis supplied)

19. Now it has to be examined whether the learned Tribunal while passing the award considered the agreement entered into in its proper

perspective and the documents which were there on record as exhibits. The learned Tribunal in paragraph 17 of the award held that from the

terms of the appointment of the concerned workman"" ""no where from the same it will appear that he was ever directed to discharge any duties of

managerial nature. Rather, he was directed as per nature of the contract of employment to work under the manager and perform his duties in

accordance with the orders and directions of the manager. It is not the case of either of the parties that the concerned workman was ever

appointed as a manager. The signature office of the bank be used to do specified jobs under the instruction of the officer-in-charge of the

department concerned and when he was in a branch, he used to work under the instruction of the respective branch managers. The documents

showing the nature of the work assigned to the concerned workman at the relevant time being very much in the possession of the bank and these

having been withheld, I find no reason to disbelieve the workman in the matter that he discharging clerical nature of duties even inspite of his

promotion as staff officer."" The learned Tribunal while interpreting the agreement overlooked the vital fact that the said respondent was under an

obligation to perform the duties prescribed by or on behalf of the bank by the Manager India and not manager as held in its award, be it branch

manager or manager in its ordinary sense. Paragraph 2 of the said agreement also reveals that the working conditions of the respondent shall not be

governed by any award or bipartite settlement which was in marked departure from the service conditions enumerated in the letter appointing the

respondent in the clerical grade on 26th July, 1969. Needless to mention the said paragraph also reveals that after the agreement dated 16th June,

1978 the respondent was supposed to perform all such orders, directions and instructions as may be given by the Manager India and as an officer

he had to observe all rules and regulations as may be from time to time prescribed by or on behalf of the bank which goes to demonstrate that the

service conditions of respondent were not covered either under the Desai award or any bipartite settlement as envisaged in the letter dated 26th

July. 1969.

20. The learned Tribunal in paragraph 16 of its award held that it had no reason to disbelieve that the concerned workman was discharging duties

of clerical nature even after his promotion as Staff Officer, since the documents have been withheld by the bank. However, the question is did the

learned Tribunal go into those documents which were already on record being marked as exhibits. Let us turn to some of those documents which

have been annexed to the Paper Book to examine the fact whether the respondent was in the management cadre. The exhibits at pages 429 to 431

reveal that the respondent put in his signature as "Manager". The documents from pages 432 to 438 signed on various dates by the respondent

admitting new accounts show that he had the authority to admit new accounts, a job not of the clerk but of the management. Similarly the

respondent was an authorized signatory in the various pay orders copies of which have been annexed from pages 439 to 447 showing that he

acted in his managerial capacity. The debit vouchers and the credit vouchers from pages 448 to 474 of the Paper Book which were before the

Tribunal demonstrate that the learned Tribunal while passing its award did not take these documents into consideration which it ought to have

taken. A two vital documents which deserve to be noted are the letters dated 21st March, 1983 and the letter dated 26th May, 1983 issued by

the appellant bank to the Chief Manager, Bank of India and the Chartered Bank enclosing specimen signatures of all the officers, authorized to sign

on behalf of the appellant bank. The specimen signature of the respondent appears at page 557 of the Paper Book. An officer authorized to sign

on behalf of the bank cannot certainly be in the clerical grade. Further a perusal of an exhibit M6(Page 498 of the Paper - Book) reveals the

inherent cadre classification of the respondent and one Amit Ghosh. It shows that being in the supervisory managerial cadre he had prepared the

"memorandum" regarding the said local staff Amit Kumar Ghosh - a document the Tribunal ought to have interpreted but totally ignored. In short,

these documents reveal that the respondent was in the supervisory-cum-administrative-cum-managerial cadre. Thus, the finding of the Tribunal that

the respondent was directed as per nature of the contract of employment to work under the manager and performed his duties in accordance with

the orders and directions of the manager is perverse since it is not supported by evidence already on record - the agreement dated 16th June,

1978 and the annexures from pages 429 to 559 of the Paper Book.

21. It shall not be out of place to mention that the said respondent on 16th June 1979 gave a written undertaking which is as under:-

I,

Having executed the Bank's Standard Agreement applicable to Staff Officers and having read and understood the Terms of Service and Rules and

Regulations unequivocally accept employment with Mercantile Bank Limited on the terms thereof and also agree to be bound by them in all

respects.

Chhabi Ghosh 16-6-78

Signature Date

(Emphasis supplied)

22. It appears that pursuant to the agreement dated 16th June, 1978 the service conditions of the respondent underwent a radical change. Some of

the higher benefits enjoyed by the respondent pursuant to the acceptance of terms and rules are noted below :-

Loans:

a) available to be considered for a Hongkong be a limit of Rs. 100.00 on the Bank's standard terms prescribed hereunder has been in the bank's

employment for less than eight years.

b) As staff officer who has already availed of the facility in his/ her previous clerical rank may be granted and Increase equal in some to the

difference between Rs. 1,00,000/- and the previous housing loan limit I advance taken....

c) Staff officers may also be granted the following further borrowing facilities on the bank's standard terms prescribed therefor: -

Category Limits including

availment in clerical rank

Vehicle Loans-Scooters/

Motor Cycles Rs. 6,000/-

Motor Cars Rs.16,000/-

Domestic Equipment loans Rs.20,000/-

....

Leave.

A Staff Officer will be entitled to 30 days" paid leave in each calendar year to his/her service. Staff Officers must take a minimum of two weeks

leave in a year. Leave may be accumulated if this is considered necessary or expedient but this must be first sanctioned in writing by the main

branch manager. Promotees from clerks will not be allowed to carry over their leave accumulated up to the date of promotion to the staff officer

rank for any period in excess of 30 days.

The remaining or whole of such accumulated leave will however be required to be encashed on the basis of the last drawn monthly emoluments in

the clerical rank applied pro-rata per day.

....

Bonus

Staff Officers will be entitled to an annual bonus or exgratia payment, if and when declared, and on terms which will be advised by the Manager

India, on the authority of the Board of Directors of the bank.

...

...

General

As members of the bank management Staff Officers : may not directly or indirectly become members of or be interested or involved in any of the

Bank Employees Unions- are not eligible to receive over time payment, will not accept gifts either in cash or goods were this conflicts with the

interest the bank and the decision of the Manager India, in this regard shall be final and binding.

(Emphasis supplied)

23. Let it be examined whether the respondent as a Staff Officer availed himself of the facilities extended to him after 15th June 1978. It appears

that on 2nd January, 1981 (page 508 of the Paper Book) he had applied for housing loan and the same was sanctioned within the limit enjoyed by

an officer. Similarly on 5th February, 1979 (page 512 of the Paper Book) he applied for sanction of a loan of Rs. 10,000/- for purchasing a car, a

facility not enjoyed in the clerical grade. He admittedly availed of the same is clear from his deposition before the Tribunal.

24. Being in the official grade that the respondent was not entitled to overtime, as specifically contended by the appellant, is borne out from the

deposition before the Tribunal by the respondent that ""as a staff officer I used to work more than the scheduled period of work but I was not paid

overtime for the same."" (page 359 of the Paper Book) It is hardly believable that the respondent gave up this monetary facility if he was really

entitled to. In fact, he was not, as he was already an officer not entitled to overtime wages.

25. Moreover, after his appointment as a Staff Officer the service conditions and the status enjoyed by the respondent underwent a distinct and

noticeable change. In fact he was well aware of the same when during cross-examination he deposed as under :-

I was working as Staff Officer with effect from November 1977 and my service was terminated with effect from 1.12.1984. The Bipartite

Settlements governed the workmen only and not the Staff Officers. It is a fact that no benefits accrued to me out of Bipartite Settlements. I have

not lodged any complaint to any authority that I did not get the benefits of the Bipartite Settlements.

26. It is clear from the agreement the dated 16th June, 1978 and the various facilities enjoyed that pursuant to his appointment as a Staff Officer he

was not entitled to any benefit under the bipartite settlements enjoyed since July, 1969 pursuant to the terms of appointment as contained in the

letter dated 26th July, 1969, as the break in his status was complete. It is not a question of lodging any complaint. Further a perusal of the leave

entitlements shows that the promotees from the clerical rank were not allowed to carry over their leave accumulated up to the date of promotion to

the post of Staff Officer for any period in excess of thirty days. The remaining or whole of such accumulated leave was to have been encashed on

the basis of the last drawn monthly emoluments in the clerical rank. Thus, looking at the benefits admittedly enjoyed by the respondent we find that

on 16th June, 1978 as soon as he entered into an agreement there was a break with the past services, that is, services in the clerical cadre. Further

as a Staff Officer he enjoyed the benefit of annual bonus or exgratia payment which is distinctly different from bonus paid to a workman under the

Payment of Bonus Act. 1965.

27. It is now well settled that jurisdiction under Article 226 of the Constitution of India is truly wide and for that very reason discretion has to be

exercised with great circumspection. The High Court cannot function as an appellate court over the Tribunals constituted under special legislations

resolving disputes of a kind qualitatively different from ordinary civil disputes and cannot reassess evidence. Sadhu Ram v. Delhi Transport

Corporation (supra). Since the Tribunal is competent to decide facts interference with the findings of fact is impermissible. But whether

jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for writ of certiorari

- Raza Textile (supra). A finding based on no evidence is an error of law apparent on the face of the record Kaushalya Devi(supra) If the quasi

judicial authority or in the instant case if the Tribunal decides the jurisdictional fact erroneously by ignoring the materials which are on record and

comes to an erroneous finding, the High Court should certainly intervene by issuing appropriate writs since it makes the order or the award

perverse meaning thereby it was against the weight of evidence. However, we hasten to add that appreciation of documentary evidence or

affidavits cannot be undertaken under the writ jurisdiction. The Supreme Court in Syed Yakoob (supra) held that "...An error of law which is

apparent on the face of the record can be correct by a writ but not an error of fact, however, grave it may appear to be. In regard to a finding of

fact recorded by the Tribunal a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had refused to admit

admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a

finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari".... (paragraph 7).

Thereafter, the Supreme Court went on to hold that "In our opinion, it is neither possible nor desirable to attempt either to define or to describe

adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an

impugned error is an error of law and an error of law which is apparent on the face of the record must always depend on the fact and

circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened.

(paragraph 8). Since the principles of law are well settled, we need not refer to the other judgments referred to by the learned Advocates for the

respective parties.

28. In the instant case though number of exhibits as already noted were on record, yet the learned Tribunal ignored or did not consider the same at

all while passing the award under challenge. The award was, thus, perverse since it was not based on facts - the documents already on record. For

that very reason we had to delve into those documents which were not at all considered by the learned Tribunal in arriving at its findings since there

is no straight jacket formula to determine -whether a person is a workman or not. This exercise, as already noted in this judgment, had to be

undertaken to find out the reality. Inasmuch as the fact whether the respondent was a workman or not is a jurisdictional fact. This question goes to

the root of the jurisdiction of the learned Tribunal. The question of determination of jurisdictional fact is an exception to the rule. The High Court in

exercise of writ jurisdiction can go into such questions. That apart some of the evidence which were on record were not at all considered. Non--

consideration of material evidence on which the question might turn is definitely a perversity with regard to which the jurisdiction under Article 226

can be resorted to.

29. The learned single Judge while passing the judgment and order under appeal did not consider these aspects as discussed in this judgment.

30. So far as the question of natural justice is concerned, we are of the view that such a question need not be gone into in this case, since we have

held the respondent to be an officer and not a workman. If he is not a workman, he cannot raise an industrial dispute, nor the learned Tribunal can

assume jurisdiction. The award being without jurisdiction, it is not necessary to go into the question of merit within the scope of this appeal.

However, this shall not prevent the respondent from seeking appropriate relief before the appropriate forum.

31. In the result, the appeal succeeds and is allowed. The award dated 20th November, 1999 passed By the learned Central Government

Industrial Tribunal, Calcutta in Tribunal Reference Case No. 14/1991 is set aside and quashed. The judgment and the order dated 27th March,

2002 in W.P. 948 of 2000 is also set aside.

No order as to costs.

Urgent xerox certified copy of this judgment be given to the appearing parties, if applied for, on priority basis.

D.K. Seth, J.

32. I agree.