

*CONSTITUTIONAL WRIT*

Present:

The Hon'ble Justice Aniruddha Bose

Judgment On: 03.05.2010

W.P. No. 20051(W) of 2009

With

W.P. No. 20050(W) of 2009

Bharat Chamber of Commerce & Anr.

Vs.

State of West Bengal & Ors.

Points:

**Referee:** Construction of the terms of employment require adjudication on evidence- Whether referee can determine - West Bengal Shops and Establishments Act. 1963 S. 14

Facts:

The respondent no. 3 instituted the proceeding under the 1963 Act independently claiming before the Referee recovery of the amount deducted by the petitioner no. 1 from his salary. The matter was contested before such authority by the petitioner no. 1, and the petitioner no. 1 as well as the respondent no. 3 filed written statement and objection respectively. The petitioner no. 1 had taken a preliminary objection against the maintainability of the application on the ground that the respondent no. 3 had not earned any salary for the period in question as he refused to carry out the lawful and reasonable order of the management and he did not do any work during this period. The case of the petitioner that the respondent no. 3 was not rendering any work during the period for which deduction was made from his wages or salary. It is not in dispute that the respondent no. 3 did not prepare or serve tea or water and on the other hand his case is that terms of his employment did not postulate rendering service of this nature.

Held :

This question requires to be determined on the basis of construction of the terms of employment, which may require adjudication on evidence. This has

to be done by way of making adjudication of the claims of the respective parties. The Referee does not have jurisdiction to determine this question. The Referee has come to a finding that supplying tea and drinking water to the staff members of the petitioner no. 1 was not part of the duty of the respondent no. 3. This is impermissible, and adjudication on this count was beyond the jurisdiction of the Referee. Para-11

Cases Cited:

*M/s Algemene Bank Nederland N. V. Vs. Central Government, Labour Court at Calcutta & Ors.* reported in 1978 LAB I. C. 47

*M/s Gupta Electric Company & Anr. Vs. The Learned Chief Judge Small Causes Court* reported in 1993(II) CHN 168.

Advocate for the Petitioner: Mr. Jayanta Das Gupta

Mr. Balaram Patra

Mr. S. Sharma

Advocate for the State: Mr. Supriyo Basu

Mrs. Jayanti Dhar Quader

Advocate for Respondent no. 3: Mr. Somnath Mukherjee

The Court :

1. Both these writ petitions have been taken up together as they involve adjudication identical points of law and similar questions of facts.
2. The petitioners before me in both the petitions are a trade association and its secretary, and in these proceedings they have challenged the legality of two orders passed by the Referee appointed under the West Bengal Shops and Establishments Act 1963, (1963 Act, in short) on 31 August 2009 in two applications bearing no. 1-P/08 and 18-P/2007. These orders have been passed in a dispute raised by the respondent no. 3, who admittedly is an employee of the petitioner no. 1 with prayer for recovery of wages. In *W. P. No. 20050(W) of 2009*, the dispute is over certain sum of money which the respondent no. 3 claims was

deducted illegally from his salary during certain period between 30 April 2007

and 31 April 2007. In *W.P. No. 20051(W) of 2009*, period involved is between 24

July 2007 and 31 December 2007. The respondent no. 3 has specifically complained to the Referee for non-payment of earned wages and unlawful deduction of earned wages.

3. The origin of the dispute lies in steps taken by the petitioner no. 1, in not paying the salary of the respondent no. 3 for the period between 3 p.m and 5 p.m

on certain specific days, within the period specified above. The respondent no. 3

had been appointed as a peon-cum-bearer on 8 December 1986 by the petitioner

no. 1.

4. The dispute, it appears started on 24 July 2007 when the respondent no. 3 was asked to prepare and serve tea at about 3 p.m. The case of the petitioner no.

1 is that he refused to prepare tea and remained idle. The representative of the

petitioner no. 1 under these circumstances informed him that he would not get

salary for the period he remained idle during the working hours. The same dispute went on between the months of July and December 2007. The stand of

the respondent no. 3 is that it was never his duty as a peon-cum-bearer to serve

tea and it is for this reason he did not prepare or serve tea as required by the concerned officer of the petitioner no. 1. The petitioner no. 1, it appears thereafter issued communications to the respondent no. 3 on a day to day basis

that as he refused to prepare and serve tea to the office staff and he sat idle from

3.00 p.m. To 5.00 p.m. The dates on which the respondent no. 3 was alleged to

have had remained idle was stipulated in such communication. Deduction from

salary of the respondent no. 3 was made on that count. The case of respondent no. 3 has been espoused by a trade union, being the Bharat Chamber of Commerce Welfare Association. The union has raised a dispute with the Labour Commissioner on the aspect of the legality of the action taken on behalf of the petitioner no. 1.

5. The respondent no. 3 instituted the proceeding under the 1963 Act independently claiming before the Referee recovery of the amount deducted by the petitioner no. 1 from his salary. The matter was contested before such authority by the petitioner no. 1, and the petitioner no. 1 as well as the respondent no. 3 filed written statement and objection respectively. The petitioner no. 1 had taken a preliminary objection against the maintainability of the application on the ground that the respondent no. 3 had not earned any salary for the period in question as he refused to carry out the lawful and reasonable order of the management and he did not do any work during this period.

6. The objection of the petitioner no. 1 on preliminary ground of maintainability of such proceeding has been rejected. The referee formulated the question for resolution at the preliminary stage as:-  
*“The first point to be decided by me is whether the instant case filed by the Applicant is actually a case for recovery of unlawfully deducted wages as applied for by the Applicant or is a case of non-entitlement of wages as claimed by the Opposite Party.”*

7. It is the admitted position that if the deduction was made illegally, then the Referee would have jurisdiction to adjudicate the dispute, but if it was a case of non-entitlement of wages, then the Referee would have been without jurisdiction to entertain the claim.

8. Mr. Dasgupta, learned counsel for the petitioners relied on a decision of an Hon'ble Single Judge of this Court in the case of *M/s Algemene Bank Nederland N. V. Vs. Central Government, Labour Court at Calcutta & Ors.* reported in 1978 LAB I. C. 47 in support of his submission that an employee does not become entitled to salary only by being present at his place of work. He has to render service. His further submission is that the Referee can entertain an application under Section 14 of the 1963 Act if it is a case where admittedly unlawful deduction of wages had taken place. In the event the management can demonstrate justification for such deduction, the jurisdiction of a Referee under the said provision of the 1963 Act could not be invoked for directing recovery of the sum deducted by the employer. In such a case, he argued that the matter would have to be resolved by taking recourse to the forum constituted under Industrial Disputes Act or any other appropriate legislation for adjudication on that point. In support of his submissions on this point, he has relied on a decision of an Hon'ble Division Bench of this Court in the case of *M/s Gupta Electric Company & Anr. Vs. The Learned Chief Judge Small Causes Court* reported in 1993(II) CHN 168. In the case of *Gupta Electric Company* (supra), the jurisdiction of the Referee under the said Act was examined and it was held:-  
*“As observed earlier, the learned Referee cannot enter into the disputed question of fact as to whether there has been a wrongful determination and as to whether the claimant has been wrongfully debarred from attending to his work which is outside the domain and/or jurisdiction of the learned Referee inasmuch as serious disputes have been raised with regard thereto.”*

9. The position of law appears to be that if there has been ex-facie illegal deduction of wages, the referee can exercise his or her jurisdiction under Section 14 of the 1963 Act. But if the employer seeks to justify deduction of wages on a

prima facie legitimate ground then it would not be within the jurisdiction of the Referee to issue recovery order.

10. In the present proceeding the case made out by the petitioners is that the respondent no. 3 was not rendering any work during the period for which deduction was made from his wages or salary. It is not in dispute that the respondent no. 3 did not prepare or serve tea or water and on the other hand his case is that terms of his employment did not postulate rendering service of this nature.

11. This question in my view is a dispute which requires to be determined on the basis of construction of the terms of employment, which may require adjudication on evidence. This has to be done by way of making adjudication of the claims of the respective parties. In my opinion, the Referee does not have jurisdiction to determine this question. I find from the orders impugned that the Referee has come to a finding that supplying tea and drinking water to the staff members of the petitioner no. 1 was not part of the duty of the respondent no. 3. This is impermissible, and adjudication on this count was beyond the jurisdiction of the Referee. Under these circumstances both these writ petitions are allowed. The impugned orders dated 31 August 2009 shall stand quashed.

12. I make it clear, however, that I have not addressed the question as to whether the deduction made by the petitioner no. 1 was legitimate or not. That question would have to be decided upon in the forum constituted under the Industrial Disputes Act, 1947, where the case of the respondent no. 3 is already under consideration, being espoused by the association.

13. There shall, however, be no order as to costs.

14. Let an urgent Photostat certified copy if applied for be given to the learned  
Advocates for the parties with necessary formalities as expeditiously as possible.  
(ANIRUDDHA BOSE, J.)