

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

+ **W.P. (C) No. 1333/2008 & CM 2599/2008 (stay)**

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Reserved on: 30th July, 2012

Decided on: 6th August, 2012

PUSTAK MAHAL PUBLISHERS

..... Petitioner

Through: Mr. Harvinder Singh, Adv.

versus

HARDWARI LAL SHARMA

..... Respondent

Through: Mr. Mahendra Singh, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioner impugnes the award dated 10th July, 2007 passed by the learned Presiding Officer, Labour Court-II holding that the Respondent was a workman and since the termination of his services by the Petitioner was unlawful, he was entitled to reinstatement with 50% back wages, continuity of service and all other benefits.

2. Learned counsel for the Petitioner contends that the Respondent though initially employed as a Clerk on 1st November, 1978 admittedly left the services of the Petitioner and rejoined on 1st September, 1994. In the second stint he was appointed as a Sales Manager and thus he did not fall within the category of “workman” as defined under Section 2(s) of the Industrial Disputes Act, 1947 (in short the ID Act). The learned Trial Court ignored the entire evidence led by the Petitioner to show that the Respondent was working as a Sales Manager and not as a Clerk and erroneously held that

the management had failed to produce any document to establish that the claimant was vested with managerial and supervisory powers. The evidence of the three management witnesses produced during trial and the documents signed by the Respondent and duly admitted by him have also been ignored learned Trial Court wrongly placed the onus of proving that the Respondent was not a workman on the Petitioner contrary to the law laid down by the Supreme Court in *Mukesh K. Tripathi Vs. Senior Divisional Manager LIC & Ors.* 2004 LLR 993; *Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh* (2005) 3 SCC 232 and *Electronics Corporation of India Ltd. Vs. Electronics Corporation of India Services Engineers Union* (2006) 7 SCC 330. Thus, the impugned award requires to be set aside. In the alternative it is prayed that in case this Court comes to the conclusion that the Respondent is a workman, still in view of the fact that admittedly the Respondent was 57 years old when he was examined, had not made any efforts for an alternative employment and was being fed by his children, the relief of reinstatement with back wages should not be granted to the Respondent. The burden to show that he was not gainfully employed despite efforts lay on the Respondent which he has failed to discharge, rather he has admitted that he made no efforts to find the job.

3. Learned counsel for the Respondent relying upon the impugned award states that the onus was on the Petitioner to prove that the Respondent was not a workman as a preliminary objection was taken by the Petitioner. Further, the Respondent has categorically stated that though he was designated as Sales Manager, he was performing the duties of Clerk and in this regard no evidence has been led by the Petitioner to discharge its burden.

Referring to Section 101 of the Evidence Act it is stated that the burden is on the person who pleads the fact. The conduct of the Respondent was very good and that is why he was re-employed, however his services were terminated without any enquiry or show cause notice and thus the termination is illegal. The Respondent is entitled to the relief as awarded by the learned Tribunal.

4. I have heard learned counsel for the parties. The admitted case of the parties is that the Respondent was employed as a Clerk with the Petitioner on 1st November, 1978 where after he left the services and rejoined on 1st September, 1994 on a salary of Rs. 5700/- per month at the post of Sales Manager. On 20th April, 2001 the services of the Respondent were terminated. The Respondent claiming himself to be a workman raised an industrial dispute challenging the termination. The following terms of reference were sent to the learned Industrial Tribunal for adjudication “whether the termination of services of Shri Hardwari Lal Sharma Son of Shri Gokul Chand Sharma by the management is illegal and/ or unjustified and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws/ Government Notifications and to what other relief is he entitled to and what directions are necessary in this respect?”. From the pleadings, the following issues were framed by the learned Tribunal.

- (1.) Whether the claimant is not a “workman” as defined in Section 2(s) of the ID Act, as alleged by the management in its Preliminary Objection No.1 of the WS? If so, to what effect?
- (2) To what relief, if any, is the claimant/ workman entitled against the management in terms of this reference?”

5. The claim of the Respondent was that on 1st September, 1994 though he rejoined the services as Sales Manager but he was made to do the work of a Clerk. The Respondent gave no cause of grievance to the Petitioner and that is why he was made to rejoin on 20th April, 2001. The Respondent was called by the Managing Director of the Petitioner and he was asked to resign from the union and to finish the union. Since the Respondent was an ordinary member of the union and it was beyond his capacity to wind up the union, he refused to do so. On the same day at 2.30 PM the Respondent was given the termination letter which he refused to accept and he was immediately terminated from services. The Respondent has appeared in the witness box and was subjected to cross-examination. As per the cross-examination he admitted that documents Ex.WW1/M1 to WW1/M7 were signed by him as Sales Manager and Ex.WW1/M8 as accountant/ partner. He denied that the sales representatives were working under him. He stated that since the Managing Director instructed him to sign as Sales Manager or partner so he used to sign accordingly. In his cross-examination he further admitted that he was not doing anything those days, was 57 years of age, fed by his children and had not tried to find any job. He admitted that he was getting Rs. 5,700/- as salary of a Manager.

6. The Petitioner in its reply took the preliminary objection that on the date of termination the Respondent was not a workman. They stated that he was a Sales Manager and thus the Tribunal had no jurisdiction to entertain his case. Three witnesses MW1 Amarjit Kaur, Office Superintendent, MW2 Daya Kishan, Hindi Stenographer and MW3 S.K. Tripathi, sales

representative were examined by the management. They all stated that Respondent was working as a Sales Manager. MW1 stated that the Respondent was working as a Sales Manager with the management. MW2 Daya Kishan stated that he was working as a Hindi Stenographer and he used to take dictations from the Respondent only and the Respondent used to give him instructions for typing letters of the different departments of the management. MW3 S.K. Tripathi a sales representative stated that he and other sales representatives were working under the direct control, supervision and direction of the Respondent who was the head of the sales department. He used to send the orders procured by him to the sales department in the head office headed by the Respondent the then Sales Manager for execution. He also reported to the Respondent after returning from the tour. In his cross-examination he stated that the Respondent was the in-charge who used to sign the payment slips on the basis of which they used to get money for various expenses on field, and only when he made entries in the register they would get the money for their expenses. The bills used to be finally passed by the Director. After collecting cash and drafts as per instructions of the Respondent, he used to deposit the same in the cash department, Accounts section. However, he admitted that the Respondent had no authority to appoint or dismiss any employee of the management.

7. Before adverting to the issue whether the Petitioner has placed sufficient evidence on record to show that the Respondent was not a workman, it is necessary to advert to the issue whether the onus to prove that the Respondent was not a workman lay on the Petitioner or not. In *Mukesh*

K. Tripathi Vs. Senior Divisional Manager LIC & Ors. 2004 LLR 993 a three Judge Bench of the Hon'ble Supreme Court held:

37. In case any person raises a contention that his status has been changed from apprentice to a workman, he must plead and prove the requisite facts. In absence of any pleading or proof that either by novation of the contract or by reason of the conduct of the parties, such a change has been brought about, an apprentice cannot be held to be workman.

8. In *Sonepat Cooperative Sugar Mills Ltd. (2005) 3 SCC 232* it was held:

“15. A bare perusal of the aforementioned provision clearly indicates that a person would come within the purview of the said definition if he : (i) is employed in any industry; and (ii) performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work.

16. Thus, a person who performs one or the other jobs mentioned in the aforementioned provisions only would come within the purview of definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regard the dominant nature thereof. With a view to give effect to the expression to do "any manual, unskilled, skilled, technical, operational, clerical or supervisory work", the job of the concerned employee must fall within one or the other category thereof. It would, therefore, not be correct to contend that merely because the employee had not been performing any managerial or supervisory duties, ipso facto he would be a workman.”

9. Further, in *Electronics Corporation of India Ltd. Vs. Electronics Corporation of India Service Engineers Union* (2006) 7 SCC 330 it was held:

“10. We find that the High Court accepted that the onus was on the persons claiming to be workmen to prove that they are workmen as defined in the Act. It came to a peculiar conclusion that since preliminary issue was raised by the employer the onus shifts to it.”

10. In the present case it is the admitted case of the Respondent that initially he was appointed as a Clerk and when he rejoined on 1st September, 1994 he was appointed as Sales Manager. It is the case of the Respondent that though he was appointed as a Sales Manager, however, he continued doing the clerical work and thus he was a workman. Thus, the onus was on the Respondent to prove by leading positive evidence that he was a workman as he continued doing clerical work. In the present case the Respondent has examined only himself and except making statement that he was made to do clerical job no other evidence has been placed on record, whereas the Petitioner has examined three witnesses who have stated that the Respondent was performing managerial functions. The Respondent has been confronted with a number of documents wherein he has signed as Sales Manager. Even the attendance register produced after the year 1994 shows that he was marking his presence as the Sales Manager. The Hon'ble Supreme Court in *Syed Yakoob Vs. K.S. Radhakrishnan and Ors.* AIR 1964 SC 477 laid down the criteria for interference in a writ petition. It was held:

“7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been

frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or Tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected 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 erroneously 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. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art.

226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Syed Ahmed Ishaque : [1955]1SCR1104), Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam : [1958]1SCR1240 , and Kaushalya Devi v. Bachittar Singh : AIR1960SC1168.”

11. Applying these parameters in the present case it is to be noted that the present case is not of insufficiency of evidence. The learned Tribunal grossly erred in relying upon the attendance sheet of the Respondent before 1st September, 1994. The present is a case which requires interference by this Court as the entire material evidence of the Petitioner has been ignored, the evidence of the Respondent which is not relevant i.e. the attendance register prior to 1994 has been looked into and the Tribunal erroneously came to the conclusion that no document or evidence has been produced by the Petitioner to prove its case. A perusal of Ex. WW1/M1 to Ex. WW1/M7 clearly shows that the Respondent after his re-appointment on 1st September, 1994 was working as Sales Manager and he also acted as such. The attendance register Ex. MW1/5 collectively shows the designation of the Respondent as Sales Manager. No evidence whatsoever of any kind has been led by the Respondent to show he was doing clerical work except his own statement as against which the Petitioner has led evidence in the form of MW1 to MW3 to show that the Respondent was performing the supervisory and managerial functions. There is no consideration of the Petitioner’s evidence in the impugned award. Thus, the impugned award is set aside on the first issue itself as the Respondent is not covered under the definition of “workman” under Section 2(s) of the I.D. Act.

12. Petition and application are disposed of accordingly. The amount deposited by the Petitioner in terms of order dated 26th February, 2008, which was ordered to be kept in fixed deposit, be returned to the Petitioner with interest, if any, accrued thereon.

(MUKTA GUPTA)
JUDGE

AUGUST 06, 2012
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