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

+ **Date of Decision: 31.01.2013**

% **W.P.(C) 2615/2011 and C.M. No.5588/2011**

MODERN FOOD INDUSTRIES (I) LTD

..... Petitioner

Through: Mr. Sandeep Prabhakar, Mr.Amit
Kumar & Ms. Prerna Mehta,
Advocates.

versus

LALJEE YADAV AND ORS

..... Respondents

Through: Mr. Sanjoy Ghose, Advocate for
respondents No.1 & 2.
Mr. Mithilesh Kumar Mishra &
Mr.H.S. Sachdeva, Advocates for
respondent No.3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (ORAL)

1. The petitioner management has preferred the present writ petition to assail the award dated 10.09.2010 passed by the Labour Court-XII, Karkardooma Courts, Delhi in I.D. No.1499/04/99, whereby the Labour Court has answered the reference made to it by the Appropriate Government in favour of the respondent workmen and against the petitioner management. The following reference was made by the Appropriate Government on 03.11.2000 to the Labour Court:

“Whether the services of S/Sh. Krishna Kumar Laljee Yadav & Sanjay Kr. Pandey have been terminated illegally and/or unjustifiably by the management, and if so, to what relief are they entitled and what directions are necessary in this respect?”

2. The claim of the respondent workmen was that they were employed by the petitioner as Salesmen since 10.03.1997 on monthly salary of Rs.1,500/- plus conveyance allowance of Rs.500/- each. They claimed that the petitioner was engaged in the manufacture of bread, fruitcake, etc. They claimed that their services were terminated on 20.11.1997 (Krishan Kumar), 01.03.1998 (Laljee Yadav) and 01.06.1998 (Sanjay Kumar Pandey) without notice and without communicating any reason. They alleged breach of Sections 25-F, 25-G, 25-H and 25-N of the Industrial Disputes Act, 1947 (the Act). Despite their demand notice, the dispute could not be resolved before the Labour Commissioner or in conciliation proceedings and, therefore, they sought the aforesaid reference to the Labour Court.

3. The petitioner management raised a preliminary objection to the effect that the respondents were not covered under the definition of ‘workman’ and, therefore, they had no right to invoke the provisions of the Act. The petitioner challenged the maintainability of the reference before the Labour Court. It was further alleged by the petitioner that the respondent workmen had also applied for appointment as Distributors and these applications were also accepted and they were appointed as Distributors on terms & conditions which also show that they were not ‘workman’ of the petitioner management. The petitioner claimed that the respondents had been appointed for a period of three months as ‘Salesman’

against temporary posts for sales promotion purpose on salary-cum-incentive basis.

4. On 21.04.2004, the issues were framed and the first issue was – whether there existed the relationship of employer and employee between the parties. The second issue was in terms of reference. Evidence was led by the parties on affidavits and the witnesses were cross-examined. The Labour Court held that the respondents were ‘workman’. It was also held that the workmen had not accepted the Distributorship Agreement by complying with the terms thereof. On that basis, the Labour Court invoked the other provisions of the Act and granted lump-sum compensation of Rs.40,000/- each in lieu of the respondents’ claim for reinstatement, back wages, compensation, etc. along with interest @ 9% per annum. However, no relief was granted in respect of Krishan Kumar on the ground that he had failed to establish that he had worked for 240 days in the year preceding his termination.

5. The submission of learned counsel for the petitioner is that the case of the respondent workmen in their statement of claim was that they were appointed by the management against the “permanent post of salesman”. It was not their case that though they were designated as ‘Salesman’, they were performing any other manual, unskilled, skilled, technical, operational, clerical or supervisory work which could bring them within the definition of the expression ‘workman’ as defined in Section 2(s) of the Act.

6. The submission of learned counsel for the petitioner is that at the relevant time ‘Salesman’ was not covered by the definition of ‘workman’ as

defined under the Act. He submits that in their written statement/reply, the very first preliminary objection taken by the petitioner was that the applicants are not covered under the definition of 'workman' and that they have no right to apply to the Labour Court under the Act and, as such, the referenced is not maintainable.

7. The petitioner had also pleaded in paragraph 2 of the preliminary objections that the applicants/workmen had been appointed for a period of three months for sales promotion of the products of the management.

8. Learned counsel submits that the respondents not having pleaded in their statement of claim that though their appointment was as 'Salesman' for development of the business of sale of bread, the same was a camouflage, and they had been appointed primarily to carry out manual, or unskilled, or skilled, or technical, or operational, or clerical or supervisory work. He submits that this being the position, the respondents were precluded from claiming that they are covered by the definition of the expression 'workman' and the Labour Court was also precluded from proceeding to examine whether the respondents were 'workman' or not. He submits that, in any event, the petitioner had led evidence to show that payment of varying amounts, month after month, had been made to the respondents for the services rendered by them, depended upon the sales made by them.

9. In support of his submission, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court in ***H.R. Adyanthaya Vs. Sandoz (India) Ltd.***, AIR 1994 SC 2608, a Constitution Bench judgment of the Supreme Court. The Constitution Bench was constituted in view of

the conflict of opinion arising from the earlier decisions of the Supreme Court in *May and Baker (India) Ltd. Vs. Their Workmen*, (1961) @ Lab LJ94: AIR 1967 SC 678 and two other decisions on the one hand, and *S.K. Verma Vs. Mahesh Chandra*, (1983) 3 SCR 799 : AIR 1984 SC 1462, on the other hand. Whereas the three-Judge Bench of the Supreme Court in *May and Baker* (supra) had held that a medical representative of a Pharmaceutical company was not ‘workman’, in *S.K. Verma* (supra) the Supreme Court had taken a diametrically opposite view but without reference to the earlier decisions in *May and Baker* (supra), *Western Indian Match Co. Ltd. Vs. Their Workmen*, AIR 1964 SC 472, and *Burmah Shell Oil Storage & Distribution Co. Of India Vs. Burmah Shell Management Staff Association*, (1971) 2 SCR 758. The Supreme Court after considering the earlier decisions observed that the position as it obtained when the Court was considering *H.R. Adyanthaya* (supra) was that for a person to be a ‘workman’ under the Act, he/she must be employed to do the work of any of the categories, namely manual, unskilled, skilled, technical, operational, clerical or supervisory. It was not enough that he is not covered by either of the four exceptions to the definition. The Supreme Court reiterated the said interpretation of the law in *H.R. Adyanthaya* (supra). It was held that a ‘Salesman’ engaged in the promotion of sales of the employer cannot be said to fall in any of the aforesaid categories to qualify as a ‘workman’.

10. Learned counsel for the petitioner has also referred to the decision of the Supreme Court in *Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. & Anr.*, 1979 AIR 1652, wherein the Supreme Court had observed that the rules of fairplay demand that where a party seeks to establish a contention

which, if proved, would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. There is no question of proving something which is not pleaded. He submits that it was for the respondent workmen to plead that though they were engaged as ‘salesman’ for sales promotion, they were actually not Salesmen, and were rendering service as ‘workman’ within the definition of the said expression contained in the Act. Since there was no such pleading made by them, there was no question of their being permitted to lead evidence to the contrary, or the Labour Court considering the said submission of the respondents. He further submits that the petitioner’s evidence brought on record before the Labour Court establishes the fact that they were, indeed, engaged in the activity of sales promotion. The incidental rendering of manual labour, i.e., of lifting the bread crates etc. would not deviate from the primary responsibility discharged by the respondents as ‘salesman’.

11. Learned counsel for the petitioner submits that it is only after issuance of the notification dated 31.01.2011 published on 01.02.2011 under the Sales Promotion Employees (Conditions of Service) Act, 1976, that sales promotion employees employed in, *inter alia*, biscuits and confectionaries industry, have been classified as ‘workman’ under the Act. The Sales Promotion Employees (Conditions of Service) Act, 1976 earlier did not cover such employees engaged in the industry being run by the petitioner.

12. Mr. Ghosh, learned counsel for the respondent had defended the impugned award insofar as it holds that the respondents were ‘workman’ within the meaning of the Act. He, firstly, submits that the petitioner did not even seek the framing of a specific issue on the said aspect. If the petitioner

was so serious about the preliminary objections raised by it, the petitioner ought to have sought an issue on its plea – i.e. whether, or not, the respondents were ‘salesmen’ or ‘workmen’. He further submits that the evidence brought on record by the respondents clearly shows that their nomenclature as Salesman was inconsequential since they were, in fact, performing manual labour. They were engaged in delivering the products of the employer at various locations. They were not acting independently. They did not even have their independent conveyance. They did not exercise any independent control or supervision over the other workmen of the employer.

13. Mr. Ghosh submits that a ‘Salesman’ is not the same as a ‘Sales Promotion Executive’. The nature of duties of the two are distinct. A ‘Salesman’ only carries on the sales activities for the employer, whereas a ‘Sales Promotion Executive’ solicits prospective clients and customers. He further submits that the issue whether, or not, the relationship of employer and employee existed between the parties is separate & distinct from the issue whether the respondents were workmen. He submits that the appropriate government made the reference after application of mind to the issue whether the respondents were workmen, or not. The fact that the reference was made itself shows that the respondents were treated as ‘workmen’. If it was the contention of the petitioner that the respondents were not ‘workmen’, it was for the petitioner to have specifically sought an issue. Not having done so, it is not open to the petitioner to now claim that the respondents were not ‘workman’ within the meaning of Section 2(s) of the Act, or that this aspect could not have been gone into by the Labour

Court.

14. He also relies on the evidence led by the respondents before the Labour Court to submit that the respondents are workmen. He submits that the finding of fact returned by the Labour Court in this regard should not be interfered with in writ jurisdiction, particularly, when the said finding cannot be said to be perverse or contrary to the evidence brought on record.

Discussion

15. The reference made by the Appropriate Government is only to the effect whether the service of the respondent workman was illegally and/or unjustifiably terminated by the management and, if so, to what relief they are entitled and what directions are necessary in that respect. That is the basic dispute between the parties. When the Labour Court examines the reference, the same is done on the basis of the pleadings of the parties. In their pleadings, it was for the parties to raise their submissions of fact & law. The respondent workmen had of their own stated in their statement of claim that they are working with the management on permanent post of 'Salesman'. They had also placed reliance on their letters of appointment as Salesman. The said letters of appointment, inter alia, stated as follows:

"Sub:-APPOINTMENT OF SALESMAN ON TEMPORARY BASIS FOR DEVELOPMENT OF SALE OF BREAD

Sir,

With reference to the interview held on 21&22.02.97 for the appointment of Salesman on purely temporary basis for the development of sale of bread. We are pleased to appoint you as Salesman purely on temporary basis at Delhi unit on the

following terms and conditions:

- a) You will be paid a consolidated amount of Rs.1,500/- (Rupees one thousand five hundred only) per month for Rs.500/- as conveyance allowance during the period.*
- b) Necessary deductions on account of E.S.I. at the rate of 1.75% and Provident Fund at the rate of 10% as prevalent from the above amount will be made by the Company.*
- c) 10 days leave on pro-rate basis in year will be admissible to you.*

Your area of operation i.e. route and base sale target will also be fixed as per our requirement. The route can be changed at any time without any prior notice by the Management.

This appointment of Salesman is purely on temporary basis for the period of three months w.e.f. date of joining. This can be terminated by either part after giving a notice of seven days only. During this period no other payment/perquisites except the above shall be payable to you.

In case of any dispute/misunderstanding, the decision of the Sr. General Manager of the Delhi Bread Unit-I of Modern Food Industries (I) Limited, shall be final and binding.

This appointment will not confer any right of him for regular appointment under the Company.” (emphasis supplied)

16. From the aforesaid, it would be seen that the letters of appointment were for appointment of ‘Salesman’ “*for development of sale of bread*”. The appointment letters did not merely say that the appointment was being made for “sale of bread”. This important aspect in these letters of appointment has repeatedly been emphasized in the subject as well as in the opening paragraphs of the letters. Though, the remuneration payable was not correlated to the sales turnover achieved by the efforts of the workmen, and

the respondents were entitled to be paid a fixed remuneration of Rs.1,500/- per month and Rs. 500/- as conveyance allowance that, in my view, would not make a difference to the nature of duties required to be performed by the respondents. The fixation of the “*base sale target*” shows that ‘salesmen’ were expected to scout for and solicit customers so as to achieve the targets set by the management. If the case of the respondents was that, though they were designated as ‘Salesman’ for development of sale of bread they were, in fact, performing manual labour as delivery men, it was for them to say so in their statement of claim. However, that was not the case set up by the respondents.

17. The petitioner, on the other hand, at the earliest opportunity made their stand clear by stating that the respondents were not ‘workmen’ covered by the definition of ‘workman’ under the Act; they have no right to apply to the Labour Court under the Act, and; the reference is not maintainable. The petitioner also stated that the respondents were employed as ‘Salesman’ for a period of three months for sales promotion of the products of the management. Pertinently, in the rejoinder filed by the respondent workmen, they did not dispute the aforesaid stand of the petitioner. The rejoinder is short and cryptic, and relevant part of the rejoinder filed by the respondent workmen reads as follows:

“Para 1 to 5 of the reply are wrong and denied hence not acceptable to the workmen. If the management feels that the Govt. of NCT of Delhi while making the reference misused its powers then the management can file writ in the High Court. Govt. of NCT of Delhi is not a party before the Labour Court. Other facts are related to the present dispute in which the Hon’ble Court has to seek if the lock out by the Management is

legal and justified. Thus the management is taking false ground to justify its illegal acts and the workmen need not comment on those false grounds, in as much as illegal acts are not justifiable.

REPLY PARAWISE

Paras 1 to 11 of the reply are wrong and hence not acceptable to the workmen. Date of appointment, designation and salary as given in the claim are correct. So far as other contents are concerned the contents of reply to preliminary objection and that of the statement of claim are referred to. Workmen are unemployed since the date of their termination of services and are ready to resume their duties. In reply to the rest of the contents the reply to the preliminary objections is referred to. Other facts are matter of record, evidence and arguments and hence need no reply.”

18. It is on the basis of the aforesaid pleadings that the issues were framed by the Labour Court. The first issue being: whether the relationship of employee and employer existed between the parties. Though the submission of learned counsel for the respondents is that the said issue is not the same as the issue: whether the respondents were ‘workmen’ or not, I am of the view that the issue: whether the respondents were ‘workmen’ or not, is a narrower issue and is covered by the larger issue: whether the relationship of employer and employee existed between the parties. Since the respondents had not sought any issue to claim that, though they were designated as ‘Salesmen’ for promotion of sale of bread, they were ‘workmen’ under the Act, it was not necessary for the petitioner to have sought a specific issue in that respect. The case of the petitioner was pitched even higher, since, according to the petitioner, the respondents were not even the employees of the petitioner, let alone ‘workman’. According to the petitioner, the

appointment of the respondents was as ‘Salesman’ for a term of three months whereafter they had entered into agreements to act as Distributors under specified terms & conditions. According to the petitioner, the respondents upon being appointed as Distributors ceased to function even as ‘Salesman’ for promotion of sale of bread. The Labour Court has, however, not accepted the petitioner’s submission that the respondents were functioning as Distributors under the Distributorship Agreement. The reasoning for the same is that the said agreements were never put into operation as the respondents had not made payment of the amounts due to be paid under those agreements.

19. Even if this finding of the Labour Court (that the respondents did not become distributors) were to be accepted, and one were to proceed on the basis that the respondents did not become Distributors of the petitioner, the smaller issue, viz. whether the respondents were ‘workmen’, or not, was still required to be adjudicated. The Labour Court has, in fact, proceeded to adjudicate the said issue. Therefore, it cannot be said that the petitioner failed to raise the issue about the respondents not being ‘workmen’ and, therefore, they are precluded from urging that the respondents were not ‘workmen’. In fact, the position is to the contrary, as noticed above. Though the petitioner had raised the issue with regard to the respondents not being ‘workmen’ in their preliminary objections, the respondents have not dealt with the same in their rejoinder. They had not pleaded that they were ‘workmen’ and not ‘salesman’ engaged for promotion of sale of bread, or that their designation as ‘Salesman’ for promotion of sale of bread was incorrect or misleading.

20. The submission of Mr. Ghosh that there is a distinction between a ‘Salesman’ and a ‘Sales Promotion Executive’, and that a ‘Salesman’ merely carries on sales, whereas the Sales Promotion Executive solicits clients and customers, though appears to be correct, in my view, has not much relevance in the facts of this case. The respondents not having made any pleading or set up a case contrary to their own appointment letters, could not have been heard to say that they were not ‘salesman’ engaged for development of sale of bread. The evidence led by the respondents to the effect that they used to perform the task of loading and unloading and also maintaining accounts with regard to supply of crates to the hospital and to prepare the sale & purchase documents and provide the same to the concerned officers, can only be understood as activities performed by the respondents incidental to the main function of development of sale of bread by them. Moreover, the respondents could not have led evidence beyond their own pleadings. They could not have been heard to say that they are not ‘Salesman’ engaged in the business of sale of bread, but engaged only for the purpose of selling and supplying the bread to various purchasers/consumers as delivery men. Pertinently, their appointment was not as “Deliveryman” but as “Salesman” for development of sale of bread with targets fixed by the management. A mere delivery man would not be concerned about the targets/turnover. He would simply deliver the goods as per the instructions of the management or the customer. This also clearly shows that the respondents were not mere deliverymen but ‘salesmen’. What the respondents sought to establish in their evidence before the Labour Court was that they were Deliveryman – a case never set up by them in their pleadings.

21. Mr. Ghosh has placed reliance on the judgment of this Court in *Management of Messers Roneo Vickers India Limited Vs. Lt. Governor of Delhi & Others*, 53 (1994) DLT 785, in support of his submission that since the Labour Court has held, on the basis of the evidence led before it, that the respondents fall within the definition of the term ‘workman’, this Court would not re-appreciate the evidence and arrive at a different conclusion in a petition under Article 226 of the Constitution of India. In my view, this case does not advance the cause of the respondents for two reasons. Firstly, the approach of the Labour Court itself is flawed. The real issue is with regard to examination of a case never set up by the respondents in their pleadings and in their evidence. It is well-settled that a party cannot set up a different case in his evidence from the one set up in his pleadings. If that is done, it is for the concerned Court not to permit that to succeed. However, in the present case the approach of the Labour Court is erroneous, since the Labour Court permitted the respondents to lead evidence and to show that they were performing manual functions, though, that was not the pleading made by them in their statement of claim, and even in their rejoinder, they did not specifically deal with or deny the defence of the petitioner management. The decision of the Supreme Court in *Shankar Chakravarti* (supra) is attracted in the facts of this case. Secondly, where the finding of fact is not founded upon the relevant evidence or is contrary to the evidence, or arrived at by taking into consideration irrelevant materials, this Court is not powerless to interfere with such a finding in writ proceedings. For the same reason, reliance placed on *Berger Paints India Limited Vs. Chandrakant N Raut*, 2000 LawSuit (BOM) 909, appears to be misplaced.

22. The submission of Mr. Ghosh that the reference made by the appropriate government did not raise the issue whether the respondents were ‘workmen’ or ‘salesmen’, and thus the said issue stood concluded in favour of the respondents needs only to be stated to be rejected. The reference was sought by the workmen. If they desired to raise an issue/dispute regarding their status – as being workmen and not being salesmen, it was for them to seek the reference accordingly. In any event, when the appropriate government makes the reference, it does not make any adjudication of any issue. It is not an adjudicatory exercise that the appropriate government undertakes while making the reference.

23. The decision of the Supreme Court in *M.R. Adyanthaya* (supra), in my view, squarely applies to the facts of the present case. In that case, the question for consideration before the Supreme Court was whether medical sale representatives were covered under the definition of workmen under the Act. The Supreme Court referred to and relied upon its earlier decision in *May & Baker* (supra) and *Burma Shell* (supra), wherein it was observed that the main work of medical sale representatives was that of canvassing sales and that any clerical or manual or technical or supervisory work that they had to do viz. carrying out correspondences; making recommendations for selection of agents & dealers; extension or curtailment of credit facilities to agents/dealers/customers etc.- was incidental & ancillary to the said main work. In view of the said observations, the Supreme Court rejected the contention that medical representatives are engaged in the “skilled” and “technical” work. The court observed that medical sales representatives do not perform duties of skilled and technical nature and, therefore, they are not

‘workmen’. The connotation of the word “skilled”, in the context in which it is used, will not include the work of a sales promotion employee such as the medical representative. That word has to be construed *ejusdem generis* and thus construed, would mean skilled work whether manual or non-manual, which is of a genre of the other types of work mentioned in the definition. The work of promotion of sales of the product or services of the establishment is distinct from, and independent of the types of work covered under the said definition. The respondents, in the present case, too, as aforementioned, have been appointed as salesman for the development of sales of bread. Their main work was to promote the sale of bread and achieve the base target set by the management. Any manual work viz. lifting the bread and delivering the same was merely ancillary and incidental to the main work of sale of bread. The said incidental work would not, as taken note of the Supreme Court, bring the respondents within the ambit of the other types of work forming a part of the definition of ‘workman’.

24. For the aforesaid reasons, in my view, the impugned award cannot be sustained and is, accordingly, set aside. However, it is made clear that this decision would not impact the case of Krishan Kumar, who was Claimant No.1 before the Labour Court, since in his writ petition W.P.(C.) No.7445/2011, he has settled his disputes with the management. The Rule is made absolute. Parties are left to bear their own Costs.

VIPIN SANGHI, J

JANUARY 31, 2013

BSR