

AFR

Neutral Citation No. - 2023:AHC-LKO:84852

Court No. - 6

Case :- WRIT - C No. - 1002593 of 2011

Petitioner :- M/S Pepsico India Holdings Pvt. Ltd. And Ors.

Respondent :- Suresh Chandra Yadav And Ors.

Counsel for Petitioner :- Vikas Singh

Counsel for Respondent :- C.S.C., Amar Nath Tripathi, Manoj Kumar Sahu

Hon'ble Rajnish Kumar,J.

1. Heard Shri Vikas Singh, learned counsel for the petitioners, Shri Amar Nath Tripathi, learned counsel for respondent no.1. Learned Standing Counsel is present for State-respondents.
2. By means of the present writ petition under Article 226 of the Constitution of India the petitioners have approached this Court assailing the award dated 26.08.2011 published on notice board on 01.12.2010 passed by the Presiding Officer, Industrial Tribunal (2), U.P. Lucknow (here-in-after referred as the Tribunal) / respondent no.2.
3. The brief facts of the case, for adjudication of the present controversy, are that the respondent no.1 was appointed on the post of Service Engineer by the petitioners on 01.04.1998. His services were terminated. The conciliation proceedings were held between the petitioners and the respondent no.1, in Case No.249 of 2001 but on account of failure of the conciliation proceedings, reference was made by the Deputy Labour Commissioner, Lucknow Region, Lucknow / respondent no.3 to decide as to whether the termination of the service of the respondent no.1 from the post of Service Engineer w.e.f. 05.06.2001 was right or not and if not, to what relief the respondent no.1 was entitled from the

petitioners. In pursuance to the reference made by the respondent no.3, Adjudication Case No.304 of 2001 was registered before the respondent no.2. The respondent no.2, after the written statements and the rejoinder affidavits filed by the petitioners and the respondent no.1 and the evidence by the parties, passed the award on 26.08.2010, which was published on 01.12.2010. Being aggrieved by the same, instant petition has been filed, challenging the same.

4. Learned counsel for the petitioners submitted that the Government has power to refer the dispute under Section 4(K) of the Industrial Disputes Act, 1947 (here-in-after referred to as the Act 1947) and not the Deputy Labour Commissioner, Lucknow Region, Lucknow. He further submitted that the respondent no.1 is not a workman as he was appointed under the supervisory capacity and discharging the duties as such. Learned counsel for the petitioners had also submitted that the respondent no.1 has not disclosed his duties. The duties of respondent no.1 were disclosed by the petitioners in their written statement, which were not specifically denied, rather they were admitted in his evidence by the respondent no.1. The duties of the respondent no.1 discloses that his work was supervisory in nature, therefore he was not a workman, thus he could not have been held a workman.
5. He further submitted that the services of the respondent no.1 were terminated by means of the order dated 16.07.2001 in accordance with the appointment order with immediate effect with three months salary in lieu of notice, which was communicated to the respondent no.1, therefore, even if, he could have been held a workman, the order of termination was made in terms of the appointment order, therefore there was no illegality or error in it. But without considering it, the Tribunal has recorded a finding

that the services of the respondent no.1 were terminated on 05.06.2001.

6. He further submitted that the Tribunal has recorded an erroneous and perverse finding that the termination order had not been sent, whereas once a document regarding service i.e. acknowledgment is exhibited, no such finding could have been recorded. He further submitted that the evidence can be adduced only in regard to the pleadings and if the pleadings have not been made, neither any evidence can be adduced in regard to the same nor any evidence adduced against the pleadings can be read but the Tribunal recorded a finding of forged document without any pleadings. He further submitted that there is no pleading that the salary was paid only up to 31.05.2001.
7. On the basis of above, learned counsel for the petitioners submitted that the impugned award dated 26.04.2010 is not sustainable in the eyes of law and liable to be quashed.
8. Learned counsel for the petitioners relied on **Jaspal Kaur Cheema Vs. M/S. Industrial Trade Links and Others etc.; 2017 (8) SCC 592/ 2017 Law Suit SC 658, C. Gupta Vs. Glaxosmithklin Pharmaceutical Ltd; 2007 (114) FLR 585, Rajneesh Khajuria Vs. Wockhardt Ltd. and Another; (2020) 3 SCC 86, Sultan Suleman Qureshi Vs. Mrs. Anisa Rafiq Charolia and Others; 2016 SCC OnLine Bom 9798, Aktiebolaget Volvo Vs. R. Venkatachalam; 2009 LawSuit (Del) 1395, General Manager, Electrical Rengali Hydro Electric Project, Orissa and Others Vs. Giridhari Sahu and Others; (2009) 10 SCC 695 and National Textile Corp.Ltd Vs. Nareshkumar Badrikumar Jagad & Others; 2011 (29) LCD 793.**
9. Learned counsel for the respondent no.1 submitted that the reference was rightly made in accordance with law by the Deputy

Labour Commissioner, Lucknow Region, Lucknow because the powers were delegated by the Government to him vide Government Notification No.251 (HI) / XXXVI-2-155 (SM) dated 29.08.1990 issued by the Shram Anubhag-2, which is referred in the reference itself, therefore the submission of learned counsel for the petitioners is not sustainable and liable to be rejected.

10. He further submitted that the respondent no.1 was appointed on 01.04.1998 on the post of Service Engineer as workman and his services were confirmed on 01.01.1999. As per appointment letter three months notice was required for termination of services but the service of the respondent no.1 was terminated orally on 05.06.2001 and thereafter he was not allowed to work, therefore a notice dated 07.06.2001 was given by the respondent no.1 but no reply to the same was given by the petitioners. The alleged duties disclosed in the written statement by the petitioners have not been proved by the petitioners by any cogent evidence. The respondent no.1 denied the duties and it has been admitted by the witness of the petitioners that the duties are not in the appointment order. The witness has also admitted that he has not seen the duties in any rule. Further submission of learned counsel for the respondent no.1 was that the duties of the petitioners were technical and the petitioner was a workman, therefore the benefit of sub-section (iv) of Section-2 (z) of the Act 1947 is not available to the petitioners.
11. He further submitted that the reference was made with regard to termination of services w.e.f. 05.06.2001 and in the written statement filed in June, 2002 it was not pleaded that the services of the respondent no.1 were terminated vide letter dated 16.07.2001 and it was disclosed in the subsequent objection filed on 21st August, 2006, but neither the reference was got amended or challenged on this ground nor the subsequent objection could

have been considered because only an application in the nature of a claim, counter claim, complaint and/ or written statement are part of 'pleadings' as per Rule 2(b) of the Industrial Tribunal and Labour Court Rules, 1967. In regard to it learned counsel for the petitioners pointed out that in June, 2002 only preliminary objection was filed, keeping reserved the right of filing written statement and accordingly the written statement was filed subsequently, therefore the contention of learned counsel for the respondent no.1 is misconceived and not tenable in the eyes of law.

12. He further submitted that the documents are filed after filing of the pleadings, so no pleadings are required on the documents and the contents of the documents / exhibits are to be proved by evidence. Since the petitioners have failed to prove the service of the alleged order and the acknowledgment, therefore, the finding in this regard does not suffer from any illegality or error.
13. He further submitted that it has been admitted by the witness of the petitioners that no proof of the work / duties of the Service Engineer has been filed by him. He also submitted that the duties of the respondent no.1 as Service Engineer were not supervisory in nature and the petitioners have also failed to prove the same, therefore, there is no illegality or error in the impugned award and the writ petition has been filed on misconceived and baseless grounds, which is liable to be dismissed with cost.
14. Learned counsel for the respondent no.1 relied on **State of U.P. and Another Vs. Labour Court, Varanasi and Another; 2005 (106) FLR 506, C. Gupta Vs. Glaxo Smith Klin Pharmaceutical Ltd; 2007 (114) FLR 585, M/S U.P. State Sugar Corporation Ltd. Vs. The Deputy Labour Commissioner, Meerut and Others; 1990(60) FLR 97, M/S**

Star Paper Mills Ltd. Vs. Labour Court, Dehradun and Others; 2005 (105) FLR 479, Anand Regional Cooperative Oil Seeds Growers Union Ltd Vs. Shailesh Kumar Harshad Bhai Shah; 2006 (111) FLR 581, M/S Pepsico India Holdings Pvt. Ltd. Vs. Krishna Kant Pandey; 2015 (144) FLR 607, Armed Forces Ex-Officers Multi Services Cooperative Society Ltd. Vs. Rashtriya Majdoor Sangh (INTUC), 2022 (175) FLR 544 and Uttar Pradesh State Road Transport Cooperation and Another Vs. Shri Rizwan Nabi Siddiqui and Others; 2022 (40) LCD 205.

15. I have considered the submissions of learned counsel for the parties, pleadings and documents on record of the instant case .
16. The respondent no.1 was appointed on the post of Service Engineer on 01.04.1998. His services were confirmed on 01.01.1999. As per confirmation letter the services with the company may be terminated at any time by either party by giving three months notice or three months salary in lieu thereof. As claimed by the respondent no.1, he was not allowed to work w.e.f. 05.06.2001, therefore his services were terminated w.e.f the said date. He gave a notice dated 07.06.2001 but no reply was given by the petitioners. The conciliation proceedings were held between the petitioners and the respondent no.1, but on account of failure of the same, a reference was made on 27.10.2001 by the Deputy Labour Commissioner, Lucknow Region, Lucknow to the Tribunal to decide as to whether the termination of the services of the respondent no.1 from the post of Service Engineer w.e.f. 05.06.2001 was valid or not and if not, to what relief the respondent no.1 was entitled from the employers i.e. the petitioners and under which head with the details. After receipt of the reference, the notices were issued to the parties by the Tribunal. The petitioners and the respondent no.1 appeared before

the Tribunal and written statements / additional written statements and rejoinder affidavits were filed by the parties and the documentary evidences were filed by the parties. Thereafter, the respondent no.1 got himself examined in oral evidence as WW1. The petitioners produced Shri Manoj Kumar Dwivedi as SW1 in evidence. After considering the pleadings of the parties, evidence and affording opportunity of hearing, the Tribunal found that two points arose for determination; (1) whether Suresh Chandra Yadav is a workman as defined under Section 2(z) of the Act 1947 and (2) whether the services of the Suresh Chandra Yadav were terminated on 07.06.2001 as alleged by the workman or on 16.07.2001 as alleged by the employers and in either cases its effect.

17. The reference was made by the Deputy Labour Commissioner, Lucknow Region, Lucknow by means of the order dated 27-10-2001 referring therein that the reference is being made under the delegated powers of the Government by means of the notification no. 25/3 (H.I.) 36-2-155 (S.M.)/90, dated 29.8.1990 of Government of U.P., Shram Anubhag-2, a copy of the said notification has been produced by learned Counsel for the respondent no. 1. The notification has been issued stating therein that in exercise of the power under Section 11-A of the U.P. Industrial disputes Act, 1947 (U.P. Act No.28 of 1947), the Governor is pleased to direct that the powers exercisable by the State Government under Section 4-K of the said Act in relation to disputes regarding dismissal, retrenchment or termination of services of an individual workman as contemplated under Section 2-A of the said Act shall be exercisable also by the officers mentioned in column 2, within the area mentioned against their names in column 3 of the schedule given in the said notification.

18. The Column no.2 of the aforesaid notification provides the name of the officer and Column 3 jurisdiction. Sr. No.15 of the list provides Deputy Labour Commissioner, Lucknow Region, Lucknow in column 2 and Lucknow, Bahraich, Barabanki, Gonda and Sultanpur districts in Column 3. The instant case relates to Lucknow district, as such it is covered under Sl. No.15 of the notification. Therefore this court is of the view that reference was rightly made by the Deputy Labour Commissioner, Lucknow Region, Lucknow in accordance with law and within its jurisdiction and there is no illegality or error in it.
19. A coordinate bench of this Court also considered the issue in the case of **State of U.P. and Another Vs. Labour Court, Varanasi and Another (Supra)** and held that Section 11-A of the Act empowers the Government to delegate any of its powers under the Act to subordinate officers and the State Government has delegated its power under the said provision for making a reference under Section 4(K) of the Act vide Government Notification No.251 (HI) / XXXVI-2-155 (SM) dated 29.08.1990 issued by the Shram Anubhag-2. Thus, the argument of the learned counsel for the petitioners that the reference is without jurisdiction has no force and is hereby repelled.
20. The next argument of learned counsel for the petitioner was that the respondent no.1 is not a workman. To consider this issue, the definition of workman as given in Section 2(z) of the U.P. Industrial Disputes Act would be relevant, which is reproduced as under:-

"2(z) 'Workman' means any person (including apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a

consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -

(i) who is subject to any Army Act, 1950 or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

21. From bare reading of the aforesaid definition it is apparent that the designation of the person is not material for determination of point as to whether he is workman or not and it is to be determined on the basis of work being done by him. The respondent no.1 was appointed by means of the order dated 01.04.1998 by the General Manager (Human Resources) of M/S Pepsi Cola India (Marketing Company) on the post of Service Engineer on 01.04.1998 on probation for a period of six months. His services were confirmed on 01.01.1999.

22. The contention of learned counsel for the petitioners is that since the respondent no.1 was working in supervisory capacity and drawing salary more than Rs.500 per month, therefore he can not be treated to be a workman under the exception clause (iv) of Section 2(z). On the other hand, learned counsel for the respondent no.1 submitted that the respondent no.1 was neither assigned the supervisory duty nor he was working in supervisory capacity and his work as Service Engineer was only manual work, therefore, he has rightly been treated as workman by the Tribunal.

23. The material placed on record and the evidence adduced before the Tribunal discloses that the duties of the petitioner were neither mentioned in his appointment order nor any documentary

evidence has been brought on record to show the duties and responsibilities of the respondent no.1 as Service Engineer. It was only in written statement filed by the Pepsico India Holdings Pvt. Ltd. (paper no.25-A) that the duties and responsibilities of ex-service Engineer were disclosed. The written statement contained in annexure no.8 to this petition mentions that just before the termination Mr. Suresh Chandra Yadav was designated as Service Engineer and performing the duties at Lucknow Warehouse of the company which were purely of supervisory nature and out of the said duties, the few are as under:-

*"Installation of m/c in proper manner after Tech Survey
Supervise and guidance to assemble m/cs at ware house
before installation
Ensure weekly 4 p.m. / month / machine
4 Sanitation /annum/machine
Allocation of Tech and PMX coordinator for P. M./B. D./
Sanitation
Ensure to attend all the B/D within one hour of receiving
complaint.
Personally attend Major B/D.
Spare inventory management
Ensure quality of service by conducting at least 10
random checks /annum/ outlets.
A better system for controlling the noof complaints and
minimize response time by checking work order on a
weekly basis.
Develop healthy relation with customer by visiting at
least 10 times all the outlets/annum.
Developing PMX/VISI Tech for better service result.
Developing at least 5 local vendor for general Spares of
F.PM/cs to minimize cost and ensure quality spares."*

24. In view of above, the respondent no.1 was designated as Service Engineer just before the termination but the date has not been disclosed. Even otherwise so far as the duties and responsibilities as disclosed above are concerned, they have not been proved by any cogent evidence. The petitioners have sought to prove the duties by adducing the evidence of EW-1/Manoj Kumar Dwivedi, who has stated that he was working on the post of Service Engineer prior to respondent no.1, who had worked with him for about ten days. The work which was being done by him, was

being done by the respondent no.1. He has further stated that he was doing the works as disclosed in paragraph-1 of paper no.25-A as Service Engineer. He has stated in his cross examination that the aforesaid duties were neither in his appointment order nor in the appointment order of the respondent no.1. His information of the aforesaid duties and responsibilities is oral. Though he stated that there is Employees Service Rules but he has not stated that the said duties and responsibilities are mentioned in those Service Rules and any such service Rule has also not been brought on record. The perusal of the statement of Shri Manoj Kumar Dwivedi indicates that he no where states that the duties and responsibilities of respondent no.1 were supervisory in nature. On the other hand, the respondent no.1 had appeared as DW-1 and he has categorically stated in his statement that his work was services of PMX, maintenance, installation, pull outs, breakdown, attendance etc. In the cross examination nothing could be extracted by the petitioners to prove any contrary work being done by the respondent no.1 or the said work and duties were of supervisory nature.

25. In view of above, it is apparent that neither there was any mention in the appointment letter of the petitioners regarding works, duties and responsibilities of his post of Service Engineer nor any documentary proof such as Service Rules or any Circular etc. has been brought on record to prove the duties and responsibilities of the respondent no.1 as Service Engineer, therefore the petitioners have failed to prove that the respondent no.1 was working in supervisory capacity, therefore he was not a workman. Thus the petitioners are not entitled for any benefit of Sub-section (iv) of Section 2(z) of the U.P. Industrial Disputes Act. Even otherwise, the said provision is not applicable in case the person is employed to do the technical work and not working in supervisory capacity

or managerial, thus this Court is of the view that the findings recorded in this regard by the Tribunal does not suffer from any illegality or error.

26. The Hon'ble Supreme Court, in the case of **Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh; (2005) 3 SCC 232**, has held that the jurisdiction of the Industrial Court to make an award in the dispute would depend upon a finding as to whether the concerned employee is a workman or not. When such an issue is raised, the same being a jurisdictional one, the findings of the Labour Court in that behalf would be subject to judicial review.
27. A coordinate Bench of this Court, in the case of **U.P. State Sugar Corporation Ltd. Vs. The Deputy Labour Commissioner, Meerut And Others, 1990(60) FLR 97**, has held that if a person alleged to be working in supervisory category but did not allocate job to the workman, and has no power to sanction leave to any of the workmen working under him nor did he exercise any disciplinary control over the workmen, his duties cannot be said to be of supervisory nature. In the present case, the petitioners have failed to prove any such duties of supervisory nature being entered upon the respondent no.1.
28. A coordinate Bench of this Court, in the case of **M/S Star Paper Mills Ltd. Vs. Labour Court Dehradun and Others; 2005 (105) FLR 479**, has held that the submission of counsel for the petitioners that since the respondent No. 4 was recipient of more than Rs. 6000/- as wages, he is not a workman within the meaning of Section 2(z) of the U.P. Industrial Disputes Act, 1947 cannot be accepted and is irrelevant in view of his nature of work which was not supervisory. Similar is the case here in, in which the petitioners have failed to prove any such duties of the respondent no.1 of supervisory in nature.

29. The Hon'ble Supreme Court, in the case of **Anand Regional Cooprative Oil Seeds Growers Union Ltd Vs. Shailesh Kumar Harshad Bhai Shah; 2006 (111) FLR 581**, has held that for determining the question as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations. In the present case the petitioners have failed to prove the same. The relevant paragraphs 13 to 16 of the judgment of Hon'ble Supreme Court are extracted here-in-below:-

"13. For determining the question as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations.

14. Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration. An undue importance need not be given for the designation of an employee, or the name assigned to, the class to which he belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised. Being incharge of the section alone and that too it being a small one and relating to quality control would not answer the test.

15. The precise question came up for consideration in Ananda Bazar Patrika (P) Ltd. v. Workmen [(1970) 3 SCC 248] wherein it was held:

"The question, whether a person is employed in a supervisory capacity or on clerical work, in our opinion, depends upon whether the main and principal duties carried out by him are those of a supervisory character, or of a nature carried out by a clerk. If a person is mainly doing supervisory work, but, incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and, conversely, if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity"

16. A person indisputably carries on supervisory work if he has power of control or supervision in regard to recruitment, promotion, etc. The work involves exercise of tact and independence."

30. Adverting to the question as to whether the respondent no.1 was terminated on 05.06.2001 as alleged by him or on 16.07.2001 as alleged by the petitioners, this Court finds that the respondent no.1 has alleged that he was orally terminated on 05.06.2001, therefore he had given a notice dated 07.06.2001 but no reply was given. On the other hand, the petitioners have submitted that the services of the respondent no.1 were terminated by means of the letter dated 16.07.2001. The respondent no.1 has denied the receipt of the said letter. Though it has been sought to be proved by filing a photo copy of the acknowledgment and adducing the evidence of SW-1/ Shri Manoj Kumar Dwivedi, who proved the signature of Shri Man Mohan Kalsi, General Manager (H.R.) on the photo copy of the letter. He further stated that this letter was sent by registered post to the respondent no.1. Though he tried to prove the acknowledgment but he has nowhere stated that acknowledgment bears the signature of the respondent no.1. He could also not have proved the same because he himself has stated in his statement that he does not recognize the signatures of the respondent no.1, whereas if the respondent no.1 had worked with him for about ten days and he had handed over the charge to the respondent no.1, he must have known to the signatures of the respondent no.1. Therefore, this Court is of the view that the learned Tribunal has rightly recorded the findings that the petitioners have failed to prove the service of the termination order dated 16.07.2001 on the respondent no.1. The Tribunal has made observation in regard to the signatures made on the acknowledgment on the ground that the same is in Hindi, whereas respondent no.1 has signed all the pleadings in English, therefore it seems to be forged. This Court is of the view that merely because the findings have been recorded by the Tribunal on the

basis of the document before it, the judgment passed by the Tribunal will not vitiate on this alone.

31. The respondent no.1 had brought on record the pay slips from the months of January, 2001 to May, 2001 to show that he was paid salary only upto 31.05.2001 but no contrary evidence has been brought on record to show that the respondent no.1 was paid any salary after 31.05.2001, whereas his services are said to be terminated by means of the letter dated 16.07.2001, therefore it is apparent that the petitioners had orally terminated the respondent no.1 on 05.06.2001 and after receipt of the notice from the respondent no.1, they prepared the termination letter dated 16.07.2001, the service of which could not be proved by the petitioners. Even otherwise, it is apparent from the fact that while filing the preliminary objection in June, 2002 this plea was not taken that the petitioners services have been terminated by means of the letter dated 16.07.2001 and even the reference was not got amended or challenged on this ground. This plea has been taken only in the objection filed on 21.08.2006.

32. The contention of learned counsel for the respondent no.1 that since this plea of termination by means of letter dated 16.07.2001 and it's service was not taken in the written statement filed in June, 2002, therefore any subsequent plea in any other objection could not have been considered in view of Rule 2(b) of the Industrial Tribunal and Labour Court Rules of Procedure, 1967 is concerned, the same is misconceived and not tenable because while filing the preliminary objection in June, 2002 the right for filing the written statement was kept reserved, if the preliminary objection is rejected, therefore it can not be said that the written statement filed subsequently could not have been considered and the learned Tribunal has also made a point for determination considering the same and decided it. However, it is to be seen that

the plea which would have been taken at the first instance in the preliminary objection was not taken, therefore this itself creates doubt about its veracity and being ante-dated or prepared, particularly in the facts and circumstances of the case, in which it and its service could also not be proved by cogent evidence and the findings of the Tribunal in this regard does not suffer from any illegality or error.

33. The Hon'ble Supreme Court, in the case of **Jaspal Kaur Cheema vs M/S. Industrial Trade Links and Others etc.; 2017 (8) SCC 592/ 2017 Law Suit SC 658**, has held that the failure to make specific denial amounts to an admission. However in the present case the respondent no.1 has specifically denied the work and duties and service of order which also could not be proved by the petitioners by cogent evidence.
34. Learned counsels for the petitioner as well as the respondent no.1 have relied on the **C. Gupta vs Glaxo Smith Klin Pharmaceutical Limited; 2007 (114) FLR 585**. Learned counsel for the petitioners on the ground that termination by means of the letter dated 16.07.2001 was made in terms of the appointment order, therefore the petitioner can not be directed to be reinstated but the petitioner has sought to prove the issuance of termination letter by acknowledgment of the registered post but the same could not be proved as discussed above and finding recorded by the Tribunal, therefore the petitioners are not entitled to any benefit from it. It is also noticed that in the said judgment, the Hon'ble Supreme Court has held that the nomenclature is really not of any consequence and whether a particular employee comes within the definition of workman has to be decided factually with reference to various factual aspects and the petitioner has failed to prove that the work and duties of the respondent no.1 were supervisory in nature. It has also been held that considering the

nature of work which is technical in nature the appellant was a workman. The relevant paragraph 16 is extracted here-in-below:-

"16. The amendment of the expression 'workman' under Section 2(s) clearly brought the appellant within the ambit of the said expression. The amendment was made on 21.8.1984 and reference on 29.9.1995. According to him, the date of reference is material, even if it is conceded for the sake of argument but not accepted that the un-amended provisions apply, yet considering the nature of the work which is technical in nature the appellant was a workman. Further, it was not manual as has been held by the High Court. Finally, it was submitted that while exercising jurisdiction under Article 142 of the Constitution, the forum is really of no consequence, if the termination is held to be bad. The relief could be moulded under Article 142 of the Constitution."

35. The Hon'ble Supreme Court in, the case of **Rajneesh Khajuria vs Wockhardt Ltd. and Another; (2020) 3 SCC 86**, has held that the order was issued, as deposed by the employer witness and even if, the employee has managed not to receive the same, the termination order does not become fake or in-genuine. This Court is of the view that the petitioners are not entitled for any benefit of it also and it is distinguishable on the facts of the present case because in the present case the petitioners have failed to take the plea of termination letter dated 16.07.2001 at the first instance, while filing the objection in June, 2002 and this plea was taken in the written statement filed on 21st August, 2006 and also failed to challenge the reference made with regard to the termination w.e.f. 05.06.2001, which itself creates issuance of the order on 16.07.2001 suspicious, particularly when it could not be proved by cogent evidence as discussed by the Tribunal and also discussed here-in-above.

36. Learned counsel for the petitioner relied on the coordinate Bench judgment of the High Court of Bombay in the case of **Sultan Suleman Qureshi Vs, Mrs. Anisa Rafiq Charolia and Others; 2016 SCC OnLine Bom 9798**, in which it has been held that once the documents are marked as Exhibit, they cannot be de-exhibited. However, this Court is of the view that mere production and

marking of a document as an exhibit by the court can not be held to be due prove of its contents without admissible evidence and so long as an original document is in existence, its contents must be proved by primary evidence and it is only when the primary evidence is lost, the secondary evidence can be allowed. The petitioners have sought to prove the document by filing a photo copy but the original was not filed and it was not the case that it has been lost, therefore this Court is of the view that the petitioners have failed to prove in accordance with law by cogent evidence. The Hon'ble Supreme Court, in the case of **Neeraj Dutta vs State (Govt.Of N.C.T.Of Delhi); (2023) 4 SCC 731** has held that an exhibit by the Court must be proved by primary evidence or by secondary evidence and the primary evidence is the best evidence and only if the primary evidence is lost, in the interest of justice, the secondary evidence must be allowed. It has also been held that facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, or ill will need not be proved by direct testimony and it may be proved inferentially from conduct, surrounding circumstances, etc., therefore this Court is of the view that the Tribunal has rightly recorded the findings considering the same. The relevant paragraphs 55 and 60 of the aforesaid judgment of the Hon'ble Supreme Court are extracted here-in-below:-

55. Documentary evidences, on the other hand, are to be proved by the production of the documents themselves or, in their absence, by secondary evidence under Section 65 of the Act. Further, facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, or ill will need not be proved by direct testimony. It may be proved inferentially from conduct, surrounding circumstances, etc. (See Sections 8 and 14 of the Evidence Act.)

60. Section 61 deals with proof of contents of documents which is by either primary or by secondary evidence. When a document is produced as primary evidence, it will have to be proved in the manner laid down in Sections 67 to 73 of the Evidence Act. Mere production and marking of a document as an exhibit by the court cannot be held to be due proof of its contents. Its execution has to be proved by admissible evidence. On the other hand, when a document is produced and admitted by the opposite party and is marked as an exhibit by the court, the contents of the document must be proved either by the production of the original

document i.e. primary evidence or by copies of the same as per Section 65 as secondary evidence. So long as an original document is in existence and is available, its contents must be proved by primary evidence. It is only when the primary evidence is lost, in the interest of justice, the secondary evidence must be allowed. Primary evidence is the best evidence and it affords the greatest certainty of the fact in question. Thus, when a particular fact is to be established by production of documentary evidence, there is no scope for leading oral evidence. What is to be produced is the primary evidence i.e. document itself. It is only when the absence of the primary source has been satisfactorily explained that secondary evidence is permissible to prove the contents of documents. Secondary evidence, therefore, should not be accepted without a sufficient reason being given for non-production of the original."

37. In view of the aforesaid judgment of the Hon'ble Supreme Court the petitioners are not entitled for any benefit of a coordinate Bench judgment of the High Court of Delhi, relied by learned counsel for the petitioners, in the case of **Aktiebolaget Volvo Vs. R. Venkatachalam; 2009 LawSuit (Del) 1395**, in which the placing of the photo copy of the documents on record has been held to be permissible.
38. Learned counsel for the petitioners, relying on the judgment of Hon'ble Supreme Court in the case of **General Manager, Electrical Rengali Hydro Electric Project, Orissa and Others Vs. Giridhari Sahu and Others; (2009) 10 SCC 695**, had submitted that since there was no pleadings in regard to the acknowledgment being fake and the work and denial of duties disclosed by the petitioners in their written statement, therefore no reply could have been given and evidence adduced on the said point, whereas the respondent no.1 has specifically denied the work and duties disclosed by the petitioners and the petitioners have also failed to prove the work and duties as disclosed by them rather the respondent no.1 has proved the work and duties by his evidence, which could not have been said to be supervisory and nothing could be extracted by the petitioners in the cross-examination to dispute the same.
39. So far as the pleadings in regard to the documents filed after filing of the pleadings are concerned, no other pleading was

required and in case the same could not be proved, the inference drawn by the Tribunal can not vitiate the award in view of paragraph 55 of the case of Hon'ble Supreme Court in the case of **Neeraj Dutta vs State (Govt.Of N.C.T.Of Delhi) (Supra)** . Thus, the petitioners are also not entitled for any benefit of the case relied by him of the Hon'ble Supreme Court, in the case of **National Textile Corp.Ltd vs Nareshkumar Badrikumar Jagad & Others; 2011 (29) LCD 793**, which is distinguishable on the facts and circumstances of the present case.

40. Learned counsel for the respondent no.1, relying on **U.P.S.R.T.C. and Another Vs. Sri Rizwan Nabi Siddiqui and Others; 2022 (40) LCD 205**, passed by this Bench, submits that the Tribunal has rightly allowed the full back wages in absence of proof of any gainful employment undertaken elsewhere by the employee after his removal from service. In the present case, the respondent no.1 has pleaded that after termination of his services he tried to search employment elsewhere but he could not get the same and he also deposed to that effect in his statement also as WW-1 that निकाले जाने के बाद नौकरी का प्रयास किया, किंतु नहीं मिली and the petitioners have not cross-examined on the said point and they have also not pleaded in their written statement or rejoinder affidavit that respondent no.1 was employed elsewhere. It has also not been alleged in the statement of EW-1 that he has been employed elsewhere. Therefore, this Court does not find any illegality or error in the award in granting the back wages and this finding of fact can not be interfered by this Court.

41. The Hon'ble Supreme Court, in the case of **Armed forces Ex-Officers Multi Services Cooperative Society Ltd. Vs. Rashtriya Majdoor Sangh (INTUC); 2022 (175) FLR 544**, has held that whether an employee was gainfully employed was also a question

of fact which was properly answered by the Tribunal and upheld by the High Court and decline to interfere in the same.

42. The Hon'ble Supreme Court, in the case of **M/S Pepsico India Holdings Pvt. Ltd. Vs. Krishna Kant Pandey; 2015 (144) FLR 607**, has held that it is well settled that the High Court in the guise of exercising its jurisdiction normally should not convert itself into a court of appeal. The relevant paragraph 12 is extracted here-in-below:-

"12. Considering the entire facts of the case and the findings recorded by the Labour Court, prima facie we are of the view that the High Court has exceeded in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India in interfering with the finding of facts recorded by the Labour Court. It is well settled that the High Court in the guise of exercising its jurisdiction normally should not interfere under Article 227 of the Constitution and convert itself into a court of appeal."

43. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that the Tribunal has rightly and in accordance with law passed the impugned award on the basis of the pleadings, material on record and evidence adduced before it, recording cogent findings by passing reasoned and speaking order, which does not call for any interference by this Court. The petition is misconceived and lacks merit.

44. The petition is, accordingly, **dismissed**. No order as to costs.

(Rajnish Kumar, J.)

Order Date :-22.12.2023
Haseen U.