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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3362 OF 2013

The Chief Officer,
Nandurbar Municipal Council,
Nandurbar, District Nandurbar.

...PETITIONER

-VERSUS-

1 Shri Bhagwan Ramdas Patel,
Age : 63 years, Occ : Nil,
R/o 110, Chitte Nagar, Taloda Road,
Dhule, Tq. & Dist.Dhule.

2 The Director,
Municipal Council Directorate of
Administration, Building of Government
Transport Service, Sarpochkhanwala Marg,
Worli, Mumbai.

....RESPONDENTS

...

Mr.Girase Amarjitsing B., Advocate for the Petitioner.
Mr.Mr.Dhongade Suresh D., Advocate for Respondent No.1.
Mr.S.M.Jadhav, AGP, for Respondent No.2.

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CORAM: RAVINDRA V. GHUGE, J.
DATE :- 20th July, 2015

Oral Judgment:

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 After hearing the learned Advocates on 26.08.2014, I had
passed the following order:-

- “1. This Court by its order dated 26-02-2014, without going into the merits of the challenge posed by the petitioner; including the question as to whether the respondent is a workman under Section 2 (s) of the Industrial Dispute Act, 1947, permitted the petitioner to make a proper representation. Similar representations made by similarly situated Doctors have been entertained by the respondent/ State. Six months' time was granted for the State to take a decision on the representation.
2. The respondent submits that he has forwarded a representation dated 04-06-2014 jointly with the petitioner to the State Government for its decision. As such, the six months period for decision on the representation shall be computed from the date on which representation has been made. The petitioner submits that he has also individually filed a representation on 04-06-2014.
3. The State Government, therefore, shall have to take a decision pursuant to the order dated 26.02.2014 on the representations noted above, within a period of six months from the date of the representation.
4. Stand over to 19.12.2014. Interim relief to continue.”

3 On 23.06.2015, after recording the statement of Shri Girase, learned Advocate for the Petitioner/ Municipal Corporation, the following order was passed:-

- “1. By orders of this Court dated 26.08.2014, the respondents were permitted to make a representation to the State Government viz-a-viz their claims for pay scale. Mr.Girase, learned Advocate indicates from the communication dated 25.08.2014 addressed to the respondents that their representation has been rejected on the ground that respondent No.1 is not an employee of the State Government.
2. At the request of the learned Advocates for the respondents, stand over to 01.07.2015 for further consideration. Interim relief to continue till then.”

4 Shri Dhongade, learned Advocate for Respondent No.1, submits that Respondent No.1/Dr.Bhagwan Ramdas Patel has now retired on attaining the age of superannuation on 01.02.2009.

5 I have considered the rival contentions canvassed by the learned Advocates. The issue is as to whether, the Industrial Court has rightly dealt with the aspect of status of Respondent No.1.

6 Shri Dhongade submits that by communication dated 19.04.2010, the Petitioner Corporation has treated similarly situated doctors equally by according appropriate pay scales to those doctors. Respondent No.1 herein is a similarly situated doctor and the Petitioner Corporation is, therefore, under an obligation to treat him equally in the light of the Government Resolution dated 28.12.1998 r/w Government Resolution dated 20.07.2001.

7 Shri Dhongade further submits that the Minister for Urban Development, State of Maharashtra, by communication dated 28.11.1995 had directed the Directorate of Municipal Administration to ensure that the pay scales of the doctors mentioned therein be revised. Respondent No.1 was one of the Applicants and his name is reflected in the said order.

Yet, the Petitioner Municipal Corporation is not giving Respondent No.1 the benefits of the said Government decision.

8 Shri Girase, learned Advocate, submits that Respondent No.1 had approached the Industrial Court by filing Complaint (ULP) No.13/2009. Without touching the merits of the contentions of Respondent No.1 and unless the Industrial Court concludes, not on a mere statement, but on the basis of the documentary and oral evidence, that Respondent No.1 is a workman under Section 2(s) of the Industrial Disputes Act, 1947 r/w Section 3(5) of the MRTU & PULP Act, 1971, the complaint would not be maintainable.

9 Shri Girase draws my attention to paragraph 7 of the impugned judgment of the Industrial Court dated 27.02.2012 by which the complaint was allowed. He submits that the conclusion that Respondent No.1 is workman is not based on any material placed before the Industrial Court, but on the mere statement made by Respondent No.1 who is the original Complainant that he is workman. He, therefore, prays that the petition be allowed and the matter deserves to be remanded back for considering the aspect as to whether, the complaint is tenable. In the event, the complaint is tenable after concluding that Respondent No.1/ Complainant is workman, all the contentions raised by Shri Dhongade

could be gone into.

10 It is trite law that neither the salary structuring nor designation nor on a mere statement, can the Labour Court or Industrial Court conclude as regards the status of a workman. The learned Division Bench of this Court in the case of *Chandrashekhar Chintaman Vaidya v/s National Organic Chemical* reported in **2010 (II) CLR 121** : [Letters Patent Appeal No.130/2009 in Writ Petition No.4980/2008 decided on 26.02.2010 (Nagpur Bench)], has laid down the tests which are to be applied while deciding the status of a workman. It would be apposite to reproduce paragraphs 11 and 36 of the said judgment as under:-

“11. *Learned Advocates for the parties have placed reliance on various citations. The Judgments along with purpose for which those are relied are as follows:-*

[A] *Appellant's citations and propositions :-*

[1] *Hussain Mithu Mhasvadkar Vs. Bombay Iron & Steel Labour Board & another [(2001) 7 SCC 394].*

Proposition :-

Primary duties of an employee, purpose, aim and object of the employment, i.e., predominant nature of duties performed by person claiming to be a workman under Section 2 (s) of the Industrial Disputes Act, will be the true test to find out the status as a workman.

[2] *Mukand Ltd. Vs. Mukand Staff & Officers' Association [2004 AIR SCW 3731].*

Proposition :-

The question of class to which the employees belong is

to be decided not on the basis of grade in which they were placed, but on the basis of their duties, responsibilities and powers as laid down in Section 2 (s) of the Industrial Disputes Act.

- [3] *D. P. Maheshwari Vs. Delhi Administration & ors. [(1983) 4 SCC 293].*

Proposition :-

Occasional entrustment of supervisory managerial or administrative work will not take a person mainly discharging clerical duties out of purview of Section 2(s) of the Industrial Disputes Act.

On facts of the case, Hon'ble Supreme Court had interfered with the judgment of High Court where the judgment was rendered without dealing with the crux of the matter involved.

- [4] *Malabar Industrial Co. Ltd. Vs. Industrial Tribunal, Trivandrum. [AIR 1958 Kerala 202 (V.45 C 74)].*

Proposition :-

Whether the employee concerned is a workman being a jurisdictional fact and issue, it can be scrutinized in proceedings under Article 226 of Constitution of India.

Main feature, pith and substance of his employment must be manual or clerical before the definition of “workman” under section 2(s) is attracted.

- [5] *S.K. Maini Vs. M/s. Carona Sahu Co. Ltd. & ors. [(1994) 3 SCC 510].*

Proposition :-

Predominant nature of work is to be seen, and entrustment of some supervisory or other work, which is incidentally done – only a fraction of his entire work, will bring the employee within the purview of definition of the “workman” under section 2(s) of the Industrial Disputes Act.

- [6] *Standard Chartered Bank Vs. Andhra Bank Financial Services Ltd. & ors.* [(2006) 6 SCC 94].

Proposition :-

When entire evidence has come on record, burden of proof, whether it shifts etc., becomes immaterial.

Moreover, this judgment does not render any direct guidance on the facts of the case.

- [7] *State of Punjab Vs. M/s. Modern Cultivators* [AIR 1965 SC 17 (V.52 C 4)].

Proposition :-

Failure to produce documents would lead to only conclusion that if produced, those would have gone against the party who has withheld the documents and hence adverse inference against such party is liable to be drawn.

- [8] *Badat & Co., Bombay Vs. East India Trading Co.* [AIR 1964 SC 538 (V 51 C 68)].

This judgment is not relevant. Hence, it is not referred.

- [B] *Respondent's citations and the Propositions therein :-*

1. *Somnath Tulshiram Galande v/s Presiding Officer, IInd Labour Court, Pune and others.* [2008 I CLR 656].

Proposition :-

Onus to prove that the claimant is a workman and to prove the test to satisfy all essential ingredients lies on one who claims said status. Unless proof of such a fact is emerging from evidence, it cannot be held that he is a workman.

2. *Sonepat Co-operative Sugar Mills Ltd. Vs. Ajit Singh* [(2005) 3 SCC 232].

Proposition :-

A person, principally a workman, should be employed in an industry, and must be performing manual, skilled, unskilled, technical, operational, clerical or supervisory work and merely because the employee has not been performing any managerial or supervisory duties, ipso facto he would become a workman.

3. *Northcote Nursing Home Pvt. Ltd. Bombay & another Vs. Zarine H. Rahina (Dr.) (Mrs.) and another*[(2005) 3 SCC 232].

Proposition :-

Burden of proving that a person is a workman lies on the person who claims to be a workman.

4. *H.R.Adyanthaya etc.etc. Vs. Sandoz (India) Ltd. Etc. etc.*[1994 II CLR 552].

Proposition :-

Even if it is proved that the complainant does not do any managerial or supervisory work, unless it is proved that he does work of the nature of manual, supervisory, technical and clerical, he does not become a workman under Section 2(s) of the Industrial Disputes Act.

5. *Mukund Staff & Officers' Association Vs. Mukund Ltd.* [2007 III CLR 296].

Proposition :-

The burden to prove that a person is a workman lies on the workman. The basic rule that who approaches the Court should prove the case is not departed in any of the provisions of Industrial Disputes Act.

6. *Electronics Corporation of India Ltd. Vs. Electronics Corporation of India Services Engineers Union*[2006 III CLR 704],
7. *Bank of Baroda Vs. Ghemarbai Harjibhai Rabari*

[2005 II CLR 279], and

8. *Arvind Anand Gaikwad Vs. Uni Abex Alloy Products Ltd. & ors. [1988 I CLR 26].*

Proposition :-

The onus of proof was on the workman, though the employer had raised a dispute about his status.”

- “36. *The law as to basic test as to facts to be proved for holding a person to be a workman under Section 2(s) of the Industrial Disputes Act can be said to be settled and can be summarized as follows:-*
- (a) The person does menial, ministerial or clerical work.*
 - (b) If any of the parts of his duties involves any sort of supervision, which is on the material and not on the men.*
 - (c) The predominant nature of duties discharged by the person i.e. the part of supervisory duties, if any, is not predominant.*
 - (d) What is seen to be is not the designation and/or nomenclature, but performance of duties.”*

11 Considering the above laid down tests, I do not find that the Industrial Court has scrutinized the status of Respondent No.1/ Complainant in accordance with law. The conclusions of the Industrial Court in paragraphs 7 read thus:-

- “7. *It is the case of the Respondents that the Complainant is not “workman” as he was working as the Head of the Department. In this respect it is important to note that, it is the case of the Complainant that the nature of his duties is technical, therefore, he is “workman” as defined under the I.D. Act. In this respect it is not*

the case of the Respondents that the work of the Complainant is not of technical nature nor there is any material on record showing that the Complainant is discharging duties of supervisory or managerial nature. Therefore, the submission of Respondents that the Complainant is not “workman” is without any substance. Under such circumstances it is liable to be inclined to consider the Complainant as a “Workman” as defined under the I.D. Act therefore, his complaint is tenable. Hence, Issue No.(1) is liable to be answered in the affirmative.”

12 I am unable to agree with the said conclusions which are not based on any material before the Industrial Court, but are based on the statement of the Respondent No.1/ Complainant and in view of the Employer having not placed the job profile of the Complainant before the Industrial Court. Had the Petitioner Corporation placed before the Industrial Court sufficient material to indicate the nature of duties and scope of functions of Respondent No.1, the Industrial Court would have been better equipped and assisted in deciding the complaint.

13 However, the fact remains that until the Complainant is held to be workman, the Industrial Court or Labour Court would not be empowered to exercise its jurisdiction.

14 In the light of the above, I am left with no option, but to quash the impugned judgment of the Industrial Court and remand the

matter back to the Industrial Court for permitting the litigating sides to lead proper evidence on the aspect of the status of the Complainant. Nevertheless, Respondent No.1/ Complainant needs to be compensated for having suffered the rigours of litigation and on account of the Petitioner herein having neglected the said proceedings.

15 The Writ Petition is, therefore, partly allowed. The impugned judgment and order dated 27.02.2012 delivered by the Industrial Court in Complaint (ULP) No.13/2009 is quashed and set aside. The said complaint is remitted back to the Industrial Court for permitting the Petitioner as well as Respondent No.1 to lead evidence in support of their contentions.

16 Needless to state, if the Industrial Court concludes that Respondent No.1/ Complainant is a workman, it may then proceed to consider the grievances put forth by the Complainant and the grievances voiced by Shri Dhongade which have been recorded herein above.

17 In the event, the Industrial Court concludes that Respondent No.1/ Complainant is not workman, it is not expected to touch the merits of the complaint.

18 Since Respondent No.1 is a retired employee and is made to suffer the rigours of litigation, the Petitioner Corporation is directed to deposit Rs.10,000/- (Rupees Ten Thousand) in the Industrial Court within FOUR WEEKS from today as a pre-condition for recording of it's documentary and oral evidence. The said amount on being deposited, shall be withdrawn by the original Complainant without conditions.

19 It is expected that the Industrial Court shall decide the said complaint as expeditiously as possible and preferably on or before 05th March, 2016.

20 The litigating sides shall render cooperation to the Industrial Court and shall refrain from seeking adjournments on unreasonable and frivolous grounds.

21 All contentions of the litigating sides are kept open including the grievance of the original Complainant that his representation has been rejected by the Government.

22 Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)