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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9323 OF 2014

DFS India Pvt.Ltd	.. Petitioner
Vs.	
Louis Kharat	.. Respondent

WITH
WRIT PETITION NO. 9324 OF 2014

DFS India Pvt.Ltd	.. Petitioner
Vs.	
Pravin Kantilal Sonawane	.. Respondent

Mr.Sudhir Talsania, Senior Advocate a/w Mr.R.V.Paranjape,
Advocates for the Petitioner.
Mr.A.K.Jalisatgi, Advocate for Respondents.

CORAM : R.G.KETKAR, J.
RESERVED ON : 17th February, 2015
PRONOUNCED ON : 25th February, 2015

P.C. :

. Heard Mr.Sudhir Talsania, learned Senior Counsel for the petitioner and Mr.A.K.Jalisatgi, learned Counsel for the respondents in both the petitions at length. Rule. Mr.Jalisatgi waives service for the respondents. At the request and by consent of the parties, rule is made returnable forthwith and the petitions are taken up for final hearing.

2. By these petitions under Articles 226 & 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 09/05/2013 passed by the learned Judge, 7th Labour

Court, Mumbai as also the judgment and order dated 05/07/2014 passed by the learned President, Industrial Court, Maharashtra, Mumbai in Revision Applications. By these orders, the Courts below decided the preliminary issues and held that the respondents are the workmen within the meaning of section 2(s) of the Industrial Disputes Act, 1947 (for short 'I.D.Act') and that the State Government is appropriate government as contemplated by section 2(a) of the I.D.Act for the petitioner herein. Since the common questions of law and facts are arise in these petitions, the same can conveniently be disposed of by this common judgment. For appreciating the controversy between the parties, facts from Writ Petition No. 9323 of 2014 are taken into consideration.

3. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of operating and running duty free shops exclusively in International Airports in India which is under control and supervision of Airports Authority of India (for short 'A.A.I.'). The respondent-Louis Kharat was initially appointed as a Helper. He was confirmed in the services with effect from 18/12/2008. His designation was changed from Helper to Sales Assistant with effect from 01/07/2010.

4. The respondent filed complaint under section 28 read with Items 1(a), (b), (d), (f) & (g) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair

Labour Practices Act, 1971 (for short 'M.R.T.U. & P.U.L.P. Act') contending interalia that his termination letter dated 17/06/2011 is illegal and for declaration that the petitioner has engaged in unfair labour practices under Items 1(a), (b), (d), (f) & (g) of Schedule IV of the 'M.R.T.U. & P.U.L.P. Act and for directing the petitioner to reinstate the respondent in the service with continuity of service with full back wages and attendant benefits with arrears of salary with interest @ 18% per annum.

5. It is the case of the respondent that his duties were to attend the customers. The customers used to bring the items to the counter. The cashier used to prepare the bills. After the cashier prepared the bill, he used to pack the goods purchased by the customer. He used to deliver the goods purchased by the customer. It is his case that the petitioner is covered under the M.R.T.U. & P.U.L.P. Act. The petitioner filed written statement interalia contending that the complaint instituted by the respondent is not maintainable on the ground that he is not an employee within the meaning of section 3(5) of 'M.R.T.U. & P.U.L.P. Act as he is not a workman as contemplated by section 2(s) of the I.D.Act. The respondent being Sales Assistant, his nature of duties are predominantly of canvassing the sale of the goods/products to the customers who are visiting the shop of the petitioner located at International Airport. Since the respondent was working

predominantly as Sales Assistant and performing the duties of canvassing for sales of products stocked by the company, he does not fall within the inclusive category of definition of 'workman' as given in section 2(s) of the I.D.Act. It was further contended that the respondent was working in area located in International Airport. The petitioner is engaged in the business of running duty free shops which are exclusively located in the International Airport, which is under supervision and control of Airport Authorities and as such, the Central Government is the appropriate government for the petitioner undertaking. It was submitted that since the Central Government is the appropriate government, the provisions of the 'M.R.T.U. & P.U.L.P. Act are not applicable and hence, the Labour Court has no jurisdiction to entertain and try the complaint.

The Labour Court framed preliminary issues as follows.

1. Whether complainant is a 'workman' within the meaning of section 2(s) of the I.D.Act and employee under section 3(5) of the 'M.R.T.U. & P.U.L.P. Act ?
2. Whether State Government is Appropriate Government for the respondent ?

6. The parties led oral as well as documentary evidence. The Labour Court held that respondent is a workman within the meaning of section 2(s) of the I.D.Act and an employee as contemplated by section 3(5) of the 'M.R.T.U. & P.U.L.P. Act and that the State Government is the appropriate government. The petitioner preferred Revision Application. After considering the material on

record, the Revision Application was dismissed by the Industrial Court. It is against these orders, the petitioner has instituted the present petitions.

7. In support of these petitions, Mr. Talsania submitted that the Courts below committed serious error in answering the preliminary issues against the petitioner and in favour of the respondent. He submitted that having regard to the nature of the duties performed by the respondent, he is sales promotion employee and consequently, is not a workman. He submitted that sales promotion employees are not workmen. He invited my attention to the duty list at page 54 laying down i) major responsibilities ii) customer services excellence iii) health & safety iv) general v) knowledge, skills and experience. He submitted that the respondent has given details of his duties in paragraph 2 of the complaint.

8. He also invited my attention to affidavit in examination-in-chief of the respondent on preliminary issues wherein he has stated about the duties performed by him. He submitted that perusal of these duties will clearly show that respondent is sales promotion employee. When he was confronted with duty list in cross examination, he deposed that he does not know what were the duties of 'Sales Associates' of the petitioner company during the period of his service with the petitioner company. He invited my attention to paragraph 2 of the affidavit by way of examination-in-chief of

Mr.Pratik Madaye working as a Talent Management Manager of the petitioner company wherein he has stated that Sales Assistants are required to know the technical details of all the products which are being sold to the customers. The Sales Assistants are required to explain the details of difference between the various brands of a product so as to make it convenient for the customer to purchase the appropriate item of his choice. In short, the Sales Assistants have to actively promote the product and are sales promotion employees. He also invited my attention to paragraph 11 of the cross examination of Mr.Pratik Madaye. He further submitted that the Courts below did not record any finding as to whether the respondent is doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work and that he does not fall in the excluded category under section 2(s) of the I.D.Act.

9. Mr.Talsania further submitted that the Courts below did not consider the documents produced on record by the petitioner while holding that the State Government is the appropriate government. He, therefore, submitted that the petitions require consideration. In support of his submission, he relied upon following decisions in the cases of

- i) *T.P.Srivastava Vs. M/s.National Tobacco Co.of India Limited* , (1992) 1 Supreme Court Cases 281 to contend that respondent was employed to do canvassing and promoting sales

for the company. His duties could not be termed as manual, skilled, unskilled, or clerical in nature.

ii) *H.R.Adyanthaya Vs. Sandoz (India) Ltd., (1994) 5 Supreme Court Cases 737* and in particular paragraphs 24, 33 & 36 to contend the position in law as it obtains today is that a person to be a workman under the I.D.Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition and that the words 'manual', 'unskilled', 'skilled', 'technical', 'operational', 'clerical' or 'supervisory' are to be construed ejusdem generis.

iii) *M.G.Bhide Vs. Britannia Industries Ltd., 2005 III CLR 307* and in particular paragraph 12 to contend that the workman must conform to the requirements laid down in section 2(s) of the I.D.Act.

iv) *Vandana Joshi D/o. Mr.K.D.Joshi, Thane Vs. Standard Chartered Bank Ltd., 2010 III CLR 901* and in particular, paragraph 9 thereof to contend that whether a person is a workman or not has to be decided on the basis of the overall nature of the duties and responsibilities performed and the dominant nature of work that is performed by an employee.

10. On the other hand, Mr.Jalisatgi supported the impugned orders. He submitted that the Courts below, after appreciating the evidence on record, have concurrently held that the respondent is a

workman and that appropriate government is the State Government. He submitted that respondent was initially employed as a Helper and subsequently, his designation was changed from Helper to Sales Assistant. Perusal of paragraph 2 of the complaint shows the nature of the duties performed by the respondent. He also invited my attention to affidavit in examination-in-chief of the respondent setting out the nature of the duties as also paragraph 8 of the cross examination of Mr.Pratik Madaye. He submitted that even in the duty list, status of the respondent is shown as non-managerial. The duty list was not given to the respondent. His signature was not obtained. He, therefore, submitted that no case is made out for invocation of powers under Articles 226 & 227 of the Constitution of India.

11. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have answered the preliminary issues in favour of the respondent and against the petitioner. The Courts below held that the respondent is a workman and that the appropriate government in relation to the petitioner is the State government and not the Central Government. Perusal of the cross examination of Mr.Pratik Madaye shows that he admitted that respondent joined as a Helper in the petitioner company. He deposed that it is not correct to say that when the respondent was promoted, job description was given to him. He could not say without record

whether letter of description of job was given to the respondent or not. In paragraph 11, he deposed that Sales Assistant has to report to the Team Leader. The Team Leader is a Sales Supervisor post. The Sales Assistant used to prepare the bill. He was not aware whether there was an acknowledgement of taking duty list by the respondent. He admitted that there is a column in duty list for signature of the employee. The difference between the Sales Assistant and the Sales Associates is in terms of seniority and pay grade salary and some difference of job responsibilities. The Sales Associates is higher grade than the Sales Assistant.

12. In the affidavit in examination-in-chief, the respondent denied that he was canvassing the sale of the goods or products to the customer. Perusal of the cross examination of respondent does not indicate that he was confronted with this statement made in examination-in-chief. Perusal of the cross examination of the respondent shows that he denied that whatever duties shown in the complaint as well as documents were false and that the duties mentioned by the petitioner company in the written statement as well as in documents were his duties. After considering the material on record, the Labour Court observed in paragraph 13 as under:

“Considering the argument of advocates advanced on behalf of the complainant and respondents it is very much clear in this case that, the complainant was working as a Helper and his designation was changed as a Sales Assistant. The evidence on record shows that, promotion of sales of products is a job of Sales

Associates and preparation of bills is also a job of Sales Associates as per the evidence of company's witness in cross examination. It is also very much clear that, there is a difference in grade of Sales Associates and Sales Assistants. The post of Sales Associates is a higher grade having different job like liabilities. Further it is clear that, Sales Associates has to report to Team Leader and Team Leader post is supervisory post. Therefore, considering the evidence on record and nature of duties mentioned by the complainant in his complaint as well as deposed in his evidence complainant's post of Sales Assistants can not be treated as managerial posts as he has not any power to take any own decision to bind the company. As well as he has no any duty of supervisory in subordinates nor he has any power to sanction leave of subordinates. Considering this criteria I am of the clear view that, the complainant is a workman and he can not be treated as an employee on managerial post. Hence, I conclude that, complainant is a "workman" within the meaning of Section 2(s) of the Industrial Disputes Act and "employee" under section 3(5) of the M.R.T.U. and P.L.U.P. Act. Hence, I answer issue No. 1 accordingly.

13. The said finding was confirmed by the Industrial Court. The Industrial Court also noted that respondent deposed in cross examination that he is 12th standard and that he has no power to take any decision which will bind the company. He has no power of supervision over subordinates. He has no power to sanction leave of the subordinates. The Industrial Court, therefore, held that respondent is a 'workman' within the meaning of section 2(s) of the I.D.Act and an 'employee' under section 2(5) of the M.R.T.U and P.U.L.P Act.

14. Mr.Talsania submitted that the respondents is a Sales Promotion Employee and is therefore not a workman. He further submitted that the Courts below did not record any finding as to whether the respondent is doing any manual, unskilled, skilled,

technical, operational, clerical or supervisory work and that he does not fall in the excluded category. I do not find any merit in this submission. It is no doubt true that the Courts below did not record any specific finding in these terms. At the same time, the Courts below discussed the evidence on record and held that respondent is a workman. In the light of the evidence on record as also findings recorded by the Courts below, the reliance placed by Mr. Talsania on the decisions of i) **T.P.Srivastava** (*supra*) ii) **H.R.Adyanthaya** (*supra*) iii) **M.G.Bhide** (*supra*) iv) **Vandana Joshi** (*supra*) does not advance the case of the petitioner. I, therefore, do not find that the Courts below committed any error in holding that respondent is a workman.

15. That brings me to the next question whether in relation to the petitioner, the State Government or the Central Government is appropriate authority as contemplated by section 2(a) of the I.D. Act. Section 2(a)(i) of the I.D Act reads as under :

2. Definitions :- In this Act, unless there is anything repugnant in the subject or context,
 (a) " appropriate Government" means--
 (i) in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government, or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government or in relation to an industrial dispute concerning (a Dock Labour Board established under section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 or (the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956), or the Employees' State Insurance Corporation established under S.3 of the Employees' State Insurance Act, 1948 (34 of

1948), or the Board of Trustees constituted under Section 3-A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948, or the Central Board of Trustees and the State Boards of Trustees constituted under Section 5A and Section 5B, respectively, of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporations Act, 1956 or (the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956(1 of 1956) or the Deposit Insurance and Credit Guarantee Corporation established under Section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961, or the Central Warehousing Corporation established under Section 3 of the Warehousing Corporations Act, 1962 (58 of 1962), or the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963 (52 of 1963), or the Food Corporation of India established under Section 3, or a Board of Management established for two or more contiguous States under Section 16, of the Food Corporations Act, 1964 (37 of 1964), or (the Airports Authority of India constituted under Section 3 of the Airports Authority of India Act, 1994 (55 of 1994), or a Regional Rural Bank established under Section 3 of the Regional Rural Banks Act, 1976 (21 of 1976), or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Corporation of India Limited), or (the Banking Service Commission established, under Section 3 of the Banking Service Commission Act, 1975, or)(an air transport service, or) (a banking or an insurance company), a mine, an oil-field), (a, Cantonment Board), or a (major port, any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or any corporation, not being a corporation referred to in this clause, established by or under any law made by Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government, the Central Government) and

16. Perusal of the order of the Labour Court and in particular, paragraphs 14 to 17 shows that the Labour Court dealt with the aspect

of appropriate government. In paragraph 14, the Labour Court referred to i) Copy of Duty Free Operations Licence Agreement executed between Mumbai International Air Port Private Limited and DFS Venture, Singapur Private Limited below list Exhibit C-6 at serial No.2; ii) Regulatory Objectives and Philosophy in Economic Regulation of Airports and Air Navigation Services at Exhibit C-15; iii) Agreement between Airports Authority of India and Mumbai International Airport Pvt.Ltd for Mumbai Airport at Exhibit C-19. In paragraph 15, the submissions on behalf of the petitioner company that 'Non-Aeronautical Service' includes duty free sales in the shop of the respondent company and as per Schedule 6 of Exhibit 19 in part II serial No. 14 is clearly mentioned was recorded. The Labour Court also considered the decisions in the cases of i) *General Employees Association Vs. Union of India*, **1992 I LLJ 242**; ii) *MESCO Airlines Ltd. Vs. Abhay Meheshwari* **2007 I LLJ 176**; and iii) *Tulsidas Khimji Vs. Jeejeebhoy (E)* **1961 I LLJ 42**. The submissions and the judgments were dealt with by observing that considering the facts of the reported rulings, facts of the present case are rather than different. In my opinion, the Labour Court did not discuss the documents produced by the petitioner as referred in paragraph 14 of the order. The Labour Court also did not deal with the submissions in paragraphs 15 & 16.

17. As far as the Industrial Court is concerned, this aspect was dealt with in paragraphs 19 to 22. In paragraph 19, the Industrial

Court reproduced definition of the 'appropriate government' in section 2(a) of the I.D.Act. In paragraph 20, submissions advanced on behalf of the petitioner was noted. In paragraph 21, the Industrial Court reproduced paragraphs 16 & 17 of the Labour Court's judgment. In paragraph 22, the Industrial Court observed that 'in my considered view, after going through the aforesaid findings, it clearly indicates that the trial Court has considered the evidence as well as the law on the particular issue, scanned and analyzed the same with judicious mind and arrived to a correct conclusion that merely because the establishment is situated within the Airport Authority's premises, it does not mean that the Central Government is the appropriate government as far as the applicant company's stores is concerned'.

18. In my opinion, the Industrial Court has not independently considered the evidence on record and in particular, the documents relied by the petitioner.

19. In view thereof, findings recorded by the Courts below on the question of appropriate government are liable to be set aside and the matters are required to be remitted to the Labour Court for deciding the said issue afresh on the basis of the evidence on record. The Labour Court will deal with the documents & submissions and thereafter record findings. In the result, petitions partly succeed. The finding recorded by the Courts below that respondents are workmen is upheld. The Labour Court will decide afresh the issue as to whether

the State Government or the Central Government is appropriate government on the basis of the evidence on record. All the contentions of the parties in that regard are expressly kept open.

20. Rule is made partly absolute in the aforesaid terms. In the circumstances of the case, however, there shall be no order as to costs.

(R.G.KETKAR, J.)