

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO. 483 OF 2013

Arun Ramchandra Hublikar,
4, Guruvaibhav Co-op. Housing Society,
Rambag Colony, Paud Road,
Kothrud, Pune – 411 038.

... Petitioner

v/s

Cummins Diesel Sales & Service (I) Ltd.,
(Now renamed as Cummins India Ltdl.
Distribution Business Unit)
35A/1/2, Erandawane, Pune – 411 038.

... Respondent

Mr.Arun R. Hublikar – petitioner in person.

Mr.D.J. Bhanage along with Mayur Joglekar for the respondent.

***CORAM: N.M. JAMDAR, J.
DATED : 17 DECEMBER 2015***

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. Respondent waives service.

2. The Petitioner challenges the order passed by the Labour Court, Pune, dated 16 August 2011, disposing of the Reference (IDA) No.363 of 2003 filed by the Petitioner holding that the Petitioner is not a Workman.

3. The Petitioner was appointed on 2 May 1985 in the services of M/s.Cummins India Ltd. as a Trainee Service Engineer. The Petitioner holds a diploma in Mechanical and Automobile

Engineering. On 2 May 1986, the Petitioner was confirmed in service as a Service Engineer. On 10 December 1987, the Respondent issued a policy guideline restructuring the employees of the Respondent. The Service Engineers, Senior Service Engineers, were re-designated as a Manager. The Petitioner was placed in Category D-110. A letter was issued to the Petitioner on 28 November 1987 stating that the Respondent was considering rationalization and streamlining of service conditions and all the managers operating in management cadre of the Company will be governed by new service conditions from 1 October 1987. The new service conditions were to supersede all previous conditions. An agreement was entered into between the Petitioner and the Respondent on 10 December 1987. In the agreement, it was stated that the Petitioner was appointed on 2 May 1985 and the Respondent desires to designate him as a Manager. In this agreement space was provided for specifying the type of manager which was left blank. In the agreement it was stated that the designation and responsibilities will be informed to the Petitioner by a separate letter in due course. The agreement provided for general details as regard the conduct and discipline and certain other service conditions.

4. On 30 June 1993, position job profile in respect of Manager Field Services, the post held by the Petitioner, was released. For the Field Manager, the qualification was specified as : Graduate/diploma in mechanical/electrical/automobile

engineering with two years company training as a trainee service engineer. The general description of responsibilities was, to render service support for Cummins engines in field, to diagnose, analyze and rectify the problems of engines, to give feedback in the failures to the superiors, to monitor new products as per instructions and give a feedback. Skill Level was specified as, general awareness and basic skills, user/training skills, technical skills. General common skills were also specified i.e. leadership, delegation planning, execution, cross functional activity and as a trainer/counsellor/guide, related technology, diagnosing technology, time management, etc. Specific skills were described as, co-ordination between dealers/customers, packing and preservation. The Petitioner accordingly carried out the work of servicing and maintenance of diesel engine as Manager Field Services. On 1 June 1992, the Petitioner was transferred to Baroda. On 26 October 1993, the Petitioner worked on deputation and returned to Baroda on 1 March 1994. A change in structure was brought about by the Respondent wherein the Petitioner was placed in grade, M-9, in which grade the Petitioner continued. Thereafter, certain differences arose between the parties and the Petitioner was terminated from service on 6 September 1998.

5. The Petitioner raised an industrial dispute demanding his reinstatement with continuity of service and full back wages. The dispute was referred to the Labour Court, Pune, for adjudication. Parties filed their respective pleadings. On 4 November 2005, the Labour Court passed an order of 'No cross' against the Respondent.

Thereafter, the order was recalled. The Petitioner filed certain additional documents in response to what was stated by the Respondent in the cross-examination. By order dated 10 May 2006, the Labour Court allowed the application. This order was challenged by the Respondent in Writ Petition No.6707 of 2006 which was dismissed by this Court on 21 March 2007. On 18 August 2011, the Labour Court heard the parties on preliminary issue and held that the Petitioner was not a workman under Section 2(s) of the Industrial Disputes Act, 1947 and answered the Reference accordingly. This order has been challenged by the Petitioner in the present writ petition.

6. I have heard the Petitioner in person and Mr.D.J.Bhanage, learned counsel for the Respondent. Both parties have placed on record compilation of documents and various decisions. The petitioner in person has filed his written notes of arguments and has also addressed the Court. I have considered the rival submissions.

7. The short question that arises is, whether the Petitioner is a 'workman' as defined under Section 2(s) of the Industrial Disputes Act. For that purpose, firstly, the definition of 'workman' will have to be noticed. Section 2(s) of the Industrial Disputes Act defines workman under :

'Sec. 2(s): 'workman' means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory 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 disputes, 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 the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950, or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employees 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 Ten thousand 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.'

8. The workman has been defined as any person employed in any industry to do manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. This section, however, excludes four categories including the one who is employed mainly in managerial or administrative capacity.

9. Thus, it has to be established by the person claiming himself to be a 'workman' that he is employed to do unskilled, skilled, technical or operational, clerical or supervisory work. After this threshold is crossed, the second question arises is, whether he is employed mainly in managerial or administrative capacity. The phrase used in Section 2(s)(iii) i.e. "mainly" postulates that there

should be predominant activity of managerial and administrative in nature and not merely an ancillary management or administrative capacity.

10. In the decision in the case of ***M.Visveswaraya Industrial Research & Development Centre, Mumbai v/s Dilip Madhavrao Vaidya***,¹, a review of the earlier case law as regard Section 2(s) has been taken as under :

'5. To ascertain whether a person is a workman or not, under Section 2(s), there is a two stage enquiry. First, whether a person is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Once that is established, the second is, whether he falls within the four exceptions laid down i.e. working in air force, army, police, or whether he is working in managerial, administrative capacity or he is employed in supervisory capacity drawing wages exceeding the sum specified.

6. The Apex Court in the case of ***H.R.Adyanthaya v/s Sandoz (India) Ltd.***, reported in **1994 II C.L.R. 552**, took a review of the various amendments to Section 2(s) and the earlier decisions and summarized the position of law as regard the definition of 'workman' as under :-

*“We thus have three three-judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories; viz., manual, clerical, supervisory or technical and two two-judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-judge Bench decisions which have without referring to the decisions in **May & Baker**, **WIMCO** and **Burmah Shell** cases (supra) have taken the other*

1. 2014 III C.L.R. 232

view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the I.D.Act. These decisions are also based on the facts found in those cases. Hence 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. We reiterate the said interpretation.”

7. Thus, before an enquiry where a person falls in four exceptions to the definition is considered, it has to be established that he falls in the first part of Section 2(s) of the I.D.Act i.e. he is doing manual, unskilled, skilled, technical, operational, clerical or supervisory work. The initial burden to show that a person falls in the first part of Section 2(s) is upon a person who has asserted that he is a workman. Once that threshold is crossed, then the burden would shift on the person disputing the status as a workman to show that such person falls within the four exceptions.

8. To decide whether a person falls in the manual, unskilled, skilled, technical, operations, clerical or supervisory category, all the relevant circumstances have to be considered together. It is settled law that mere designation is not enough and overall nature of duties and responsibilities performed and the dominant nature of the work to be performed by the person has to be taken into consideration. The Division Bench of this Court in the case of **Vandana Joshi v/s Standard Chartered Bank Ltd.**, reported in **2010 III C.L.R. 901**, has reiterated this principle.

11. Therefore, the first enquiry is, whether the Petitioner was appointed on skilled, technical, or operational capacity. The Petitioner in his statement of claim has asserted that he was appointed as a Trainee Service Engineer on probation. He was qualified, experienced in technology of diesel engine. According to

him, even though he was designated as Manager, he was performing of the duties of a workman. He asserted that his designation was changed to take him out of the purview of the labour law, but in essence he continued to do technical work. In the affidavit of evidence filed by the Petitioner, he gave details of the different kinds of jobs he was doing with his own hands. He has stated that he has worked on different models of engines as a Trainee Engineer. In the training, he did dismantling of each engine and assembling the entire engine. He took training of assembling of engines, technology to fill fuel pump, etc. He asserted that he was confirmed in service after due training. He used to send the spare parts which had failed during warranty period which were sent by different dealers. He used to examine the spare parts. He used to remove the parts, write the name of the part number, quantity and label the same. He stated that he used to personally go and bring parts from the factory and hand over for dispatch. It was also asserted that, along with the bills, he used to attend the problems on the engine. For that purpose he was given a tool box. He stated that, they were around 500 service engineers who were termed as managers. He had further deposed that, when a new engine was developed, he was sent for training. He was continuously assigned the job of overhauling 'B' series engine and used to repair the same. He used to also work on the drilling rig. In his deposition, he also gave details of the work carried out by him at Baroda where he used to travel by State Transport bus 80 kilometers away. He used to attend the problems on the engine

and resolve technical difficulties. The Petitioner thereafter has deposed that, after he was transferred back to Pune, he was sent to Chennai and again he carried out work of technical nature on heavy engines with his own hands along with the helper and technical support. It is stated by him that he used to repair the engine and complete the daily target of engine dispatch. He categorically asserted that he never did managerial or supervisory duties and was reporting to the seniors as a service engineer. The Petitioner also placed on record the documents in support of his case. Thus, as far as the Petitioner is concerned, he had adequately deposed and pleaded that his work was of technical and skilled nature.

12. To appreciate the nature of the work carried out by the Petitioner, the activities carried out by the Respondent Company also need to be noticed. The preamble to the service rules shows that the Respondent was established some time in the year 1952. Kirloskar Cummins Limited purchased the shareholding in 1962. It has collaboration with various foreign companies. Its activity include manufacture of industrial combustion engines and components with its modern manufacturing facilities. The engines manufactured by the Respondent are used for various applications, such as, automotive, earthmoving, mining, locomotive, marine, power generation, etc. The Respondent is distributor and service organizer for the machines manufactured and renders after sale service through seven regional offices, 16 area officers and 83

dealers all over the country. The engines manufactured are supplied all over the world and Respondent has well equipped service training and centers at Pune to cater to the needs of the customers. Therefore, the predominant activity of the Respondent is itself of dealing in various heavy and complex machinery for which large work forces having expert technical knowledge.

13. Further, on the aspect as to whether the Petitioner was doing the work of technical and skilled nature, the answer is conclusively by the witness of the Respondent itself. The Respondent examined one Ajit R. Mahabal who was working as a Maintenance and Administrative Executive. Mr. Mahabal joined the Respondent as a Trainee Service Engineer in the year 1980 and he was promoted as Area Service Manager. He deposed that the Petitioner was his colleague and that the Petitioner was working as Manager Field Services. Various questions were put to Mr. Mahabal as regard the post and nature of duties performed by the Manager Field Services. He admitted that between 2 May 1985 to 30 April 1986, the Petitioner had carried out the work of troubleshooting on the engines. Though Mr. Mahabal stated that the Petitioner was not personally doing the job of dismantling the machines and it was done by the technicians available, he admitted that no document to that effect have been produced. He also admitted that separate letter informing the Petitioner on duties and responsibilities was not produced on record. He further admitted that there is no mention as to how many workers or subordinate staff would work

under the Petitioner. Mr.Mahabal also admitted that every manager, as per the manual, is to be given tools kit. According to Mr.Mahabal, after 10 December 1987, on successfully completing training period of Trainee Service Engineer, the Petitioner was posted as a Manager Field Service. He also admitted that diesel engine No.KV-16 was so big that at a time 2-3 technicians were used to work on it. He admitted that the Manager Field Services was concerned with diagnostic techniques, product familiarization and PC uses etc. The Manager Field Services was not entitled to first class AC train fare, air fare except in case of emergency. It was a part of the duty of Manager Field Services to check the performance of diesel engines at the customer side. Mr.Mahabal also stated that it was also the duty of the Manager, Field Services to visit the original equipment manufacturer and inspect the performance of engine and rectify the defects. He also admitted that the Respondent used to provide blue colour apron, safety shoes and washing soap to all Manager, Field services.

14. From these assertions by the Petitioner and admissions of the witness of the Respondent, a conclusion has to be drawn that the predominant work done by the Petitioner was of technical and skilled nature. He was appointed as Manager Field Services after completion of his training as a Service Engineer and continued to carry out technical work as narrated above. The activities by the Respondent itself involve a work force of technical nature and the complexity of engines produced by them require a high level expert

in technical nature. Therefore, the Petitioner successfully crossed the threshold of demonstrating that he was employed to perform the work of skilled and technical nature.

15. Turning to the second aspect of the case as to whether the Petitioner falls in the exclusion clause of the definition. It is a settled position of law, as reiterated in the decision in **Hindustan Motors v/s Lakshmiah**² that, to find out whether a person was performing the work of supervisory or managerial nature, the dominant purpose of the employment should be taken into consideration, and ancillary duties performed by him should be rejected. Keeping this dicta in mind, the case pleaded by the Respondent to bring the Petitioner outside the purview of the definition of workman will have to be noticed.

16. In the written statement filed by the Respondent, it is stated by the Respondent that the Petitioner was discharging extremely responsible, intellectual, administrative and managerial functions as a Manager, Field Service. According to the Respondent, the Petitioner was a professional expert in the technology of diesel engines and was independently handling the the technical aspects, dealing independently with customers and with top management and was participating in decision making process. It was asserted that the Petitioner was responsible for the entire management of work and parts mounting, painting, etc., and was responsible for proper material planning and supervising. It was stated that he

2. (2002) II LLJ 134 (Madras)

was responsible for supervising the work of minimum two mechanics/operators and employees engaged for Fork Lifting driving and use to recommend leave and benefits of the employees working under him. It was also asserted that he used to interact with supervisors of the labour contractor. On these basic pleadings, it was contended by the Respondent that the Petitioner was doing managerial duties.

17. As regard the sanctioning of leave and recommending benefits of the employees working under him, Mr.Bhanage, after taking time to ascertain the position, admitted that there is no documentary evidence produced in that regard. He also admitted that there is no evidence regarding interacting with supervisor of labour contractor. These were the specific factual assertions to contend that the Petitioner was working in managerial capacity. The Respondent has completely failed to substantiate this factual assertion. If this was not the truth, it ought not to have asserted in the first place. It lends credence to the grievance of the Petitioner that only to remove the workman from the ambit of labour laws that the Respondent has indulged in assigning nomenclature of a Manager to the technical staff. Even if it is to be accepted that the Petitioner was interacting with the customers, the witness of the Respondent has clarified that this liasioning was only for technical aspect. No documents are shown as to how the Petitioner was managing the staff working under him, therefore there is no substance in the assertion that he was responsible for the entire managerial functions of the department. That he was in-charge

and responsible for technical work, does not mean that he was doing managerial functions. Even assuming some part of his work was managerial, it is yet not the dominant work performed by him.

18. Mr.Bhanage placed heavy reliance on two facets, firstly, according to him, the Petitioner himself has admitted in various correspondence that he was doing intellectual work contributing to decision making process at highest level. Learned counsel for the Respondent has placed reliance upon the letters dated 1 April 1994, 21 April 1995, 2 October 1995, 14 October 1995, 4 January 1996, 15 July 1996 and 16 December 1996. Relying on these letters, he submitted that the Petitioner had made various suggestions in respect of the products, possibility of improvement and various other managerial functions. He also relied upon the assertion of the Petitioner that he was doing intellectual work in the Company and in fact was entitled to be promoted and appointed in the highest level of management. Mr.Bhanage also placed reliance on the essays written by the Petitioner, and that he had sought to patent various engines on which he had worked.

19. Firstly, most of the letters written by the Petitioner have gone unanswered. Two letters have been shown by Mr.Bhanage which only humors the Petitioner's suggestion and state that in any case the customer can always contact the service centre. Most of the inputs by the Petitioner are unilateral. Not a single minutes of any high level meeting where the Petitioner has participated is placed on record. By merely because he made unilateral suggestions,

does not mean that the Petitioner was permitted to participate in the decision making process. In any case, most of these representations are of technical nature and how to better design the machines. Considering the complexity of the machines, high level of technical knowledge is expected and merely because high level of technical knowledge is exhibited, it does not mean that the person performs a managerial function. Reliance by the learned counsel for the Respondent in the case of *M. Visvesvaraya* (supra), to contend that a person with an intellectual input and doing creative work would not be a 'workman' is misplaced as in the said case the workman had failed to cross the first threshold itself of showing that he was doing the work of clerical nature. Thereafter, the labour Court has misdirected itself and has reached a perverse finding merely on the basis of unilateral communications of the Petitioner.

20. No independent evidence is produced by the Respondent to show that the Petitioner in fact participated in decision making process, except the representations of the Petitioner. The letters relied upon by Mr.Bhanage do not indicate so. Therefore, merely relying on these letters, it cannot be said that the Petitioner was doing the work of managerial nature. Even assuming he was doing some managerial functions, it will still not take him out of the purview of the definition of 'workman' as the managerial function has to be dominant nature of duties.

21. The second argument advanced by Mr.Bhanage is that, the bio-data of the Petitioner will indicate that the Petitioner in the past was doing the work of managerial nature. He relied on the statement made by the Petitioner that he was working with one B.U. Bhandari Associates as Assistant Work Manager. The bio-data is annexed to the application for appointment. What was the nature of duties performed by the Petitioner with the Respondent cannot be determined with reference to the duties performed by him with his past employer. Even otherwise, all that the Petitioner has stated that he worked with M/s.B.U. Bhandari as Assistant Work Manager for eight months wherein he completed training on a particular vehicle and dealt with customers assessing defects of technical nature, etc. Even this bio-data shows that all along the Petitioner was doing the work of technical nature. Therefore, even this contention raised by Mr.Bhanage cannot be accepted.

22. Mr.Bhanage then submitted that the scope of writ jurisdiction is limited and re-appreciation of facts is not permissible. He relied upon the decision in the case of *Indian Overseas Bank v/s I.O.B. Staff Canteen Workers' Union & anr.*³. The scope of Articles 226 and 227 is well settled. It is true that, interference in pure questions of fact and re-appreciation of evidence is not generally permitted, but if it is found that the basic tests laid down to ascertain whether a person is a 'workman' or not, on the basis of the evidence available, has been lost sight for by the labour Court,

3. 2004) 4 SCC 245.

then such conclusion will lead to perversity and it is equally settled that a perverse approach can be corrected by the Court under Articles 226 and 227 of the Constitution of India. In the present case, the Labour Court has confused between two stages and the determination. The Labour Court has mainly relied upon the unilateral representations to hold that the Petitioner was working in a managerial capacity. Rest of the admissions and the evidence which is mentioned above has been omitted from consideration. Non-consideration of material evidence and drawing incorrect legal inference from the from the material available, itself leads to error of law and perversity. Therefore, the contention raised by Mr.Bhanage cannot be accepted.

23. The Petitioner in person submitted that, inspite of the directions of the High Court, the Respondent did not produce certain documents and adverse inference be drawn. Mr. Bhanage strongly objected to this submission. In any case, it is needless to enter into that controversy as the Petitioner is entitled to succeed on the points stated above.

24. In short, the Petitioner has proved that he was employed to do skilled and technical work, which fact has been clearly borne out from the cross-examination of the witness of the Respondent itself. There is absolutely no cogent documentary material placed on record by the Respondent to demonstrate that the Petitioner was working in Managerial capacity except the representations of the

Petitioner stated as above. It is inconceivable that the organization such as the Respondent would not have specific assignment of duties and documentary evidence. The schedule of duties relied upon are totally vague. As per the agreement, the duties were to be informed later but they were never informed. The failure to discharge the burden of proving its own assertion indicates that this stand was taken by the Respondent only to deprive the petitioner access to the remedy of industrial adjudication. The Reference which was instituted in the year 2003 was dismissed on the preliminary issue by the Labour Court without considering the above mentioned aspects, consequence of which is that inspite of being terminated from service in the year 1998, the case of the Petitioner is yet to begin on merit. This state of affairs is only because of the frivolous stand taken by the Respondent that the Petitioner is not a 'workman'.

25. The petition therefore will have to be allowed. Accordingly, Rule is made absolute by quashing and setting aside the Award dated 16 August 2011 and the Reference (IDA) No.363 of 2003 stands restored to the file of the Labour Court, Pune. The Labour Court, Pune, shall dispose of the Reference within a period of one year from today.

26. Parties shall appear before the Labour Court, Pune, on 25 January 2016.

27. Considering the facts and circumstances narrated above, it will be a failure of justice if costs are not imposed on the Respondent. Accordingly, the Respondent shall pay cost of Rs.25,000/- to the Petitioner within a period of four weeks from today.

(N. M. JAMDAR, J.)