

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

+ **W.P.(C) 6728/2002**

% Judgment reserved on: 21.04.2015
Judgment pronounced on: 06.07.2015

M/S IRCON INTERNATIONAL LTD. Petitioner

Through: Mr.A.P.Nagrath and Mr.P.K.Ghosh,
Advocates.

versus

UNION OF INDIA & ORS. Respondents

Through: None.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. Vide the present writ petition the petitioner has challenged the award of the Labour court dated 15.01.2002 in ID No.170/1993.

2. It is the admitted fact that the respondent was employed by the petitioner initially as a foreman vide appointment letter dated 30.11.1988 and he had performed the work of foreman from 12.12.1988 to 15.05.1989. He thereafter was promoted as Assistant Manager (Brick Kiln) from 16.05.1989 to 15.01.1990 in Bangladesh Project and repatriated to India and posted as Assistant Manager, Stone Ballast Unit under R.M.Mining at Okhla from 16.01.1990 till his dismissal.

3. The contention of the petitioner before the Labour Commissioner was

that he had applied for medical leave from 29.10.1990 to 1.12.1990 through a registered letter and during this period he had received a letter from the petitioner/employer dated 29.10.1990 by which his services were terminated with effect from 27.10.1990. This letter also contained one another letter dated 27.10.1990 which was never received by him earlier to date. His termination alleged to have been done pursuant to para 4 of the appointment letter which empowers the company's to terminate the services of the workman without assigning any reason on service of one month notice or payment of pay and allowances thereof. The workman/respondent had challenged this termination on the ground that in Civil Appeal No.2876/1986, decided on 04.09.1990, the Constitutional Bench of the Supreme Court has held that termination with one month's salary in lieu of notice of permanent employee in government or public undertaking without conferring any opportunity of hearing or holding an enquiry was not justified and against the principles of natural justice and equality. He had contended that his appointment was neither contract appointment nor it was temporary in nature. On his successful completion of the probation period of one year he had become the permanent employee of the company and, therefore, his termination was bad in law and amounted to victimization. On

these facts the workman/respondent had claimed reinstatement with all consequential benefits including back wages.

4. The petitioner/management had challenged the said statement of claim by filing a written statement wherein the petitioner had taken the plea that the workman/respondent was discharging mainly managerial and supervisory duties and thus was not a workman within the meaning of Section 2 (s) of I.D.Act. Emphasis was laid on the power of the petitioner to terminate the services of the workman/respondent in accordance with Ircon Recruitment Rules and full and final duties were offered to the workman/respondent which were refused by him.

5. In the rejoinder, the workman/respondent had stated that although he was designated as Assistant Manager but he was not performing any supervisory or managerial function. He had no staff whose work he could look-after nor had been delegated managerial responsibility over any one of the staff. He was discharging his responsibility single handed and submitted his reports to his superiors. He had relied on the case of ***Development Officer of Calcutta Insurance Ltd.***, (1983) 87 Cal.WN 688 (693) and on 1982 LR 229 (230) Punjab and Haryana High Court and on (1977) 2 LAB LJ 255 and (1977) 2 Lab L.N.517 and has pleaded that the Development

Officer and the doctor who was not discharging any managerial or administrative duties were held to be a workman as defined in the I.D.Act.

6. On these pleadings, learned Labour Court had framed the following issues:

1. Whether the claimant was workman as defined in the I.D.Act? OPW

2. Whether the workman's services were terminated in accordance with the IRCON recruitment rules, if so, its effect? OPM

3. As per terms of reference.

7. On the basis of the evidences recorded by learned Labour Court, it had reached to the conclusion that the claimant was a workman within the meaning of I.D.Act and that his termination was illegal and passed the order of reinstatement of claimant/workman with continuity of services with 50% of back wages.

8. This award has been challenged by the petitioner before this court on the ground that the learned presiding officer has failed to appreciate the evidences on record and has wrongly reached to the conclusion that the claimant was a workman under Section 2 (s) of the I.D.Act. It is submitted that the order of the labour court is against the facts and laws and the

established procedure of law. It is argued that despite the fact that the claimant-respondent No.5 has himself admitted that he was selecting and appointing persons and was also doing the work of planning and execution at site which clearly shows that he was working as Manager, the learned Labour Court has erred in holding that these were not his prime duties. It is further contended that the claimant was the only qualified Manager with the Management for setting up brick fields.

9. The petition has been contested by the respondent. It is denied that the respondent was probationer. It is further contended that the workman had no control over any staff or worker but his work was accessible by the superiors and he was also accountable to his superiors for each and every work and he was not authorised to take any decision even on minor issues. It is contended that the learned presiding officer of the labour court has rightly relied on the law laid down in cases ***S.K.Maini vs. Carona Sahu Co. Ltd.*** (1994)/II LLJ 1153 (SC) and ***Arkal Govind Raj Rao vs. Ciba Geigy of India Ltd.Bombay*** (1985) II LLJ 401 (403) SC: :*MANU/SC/0208/198*.

10. It is submitted that the writ petition has no merit and the same is liable to be dismissed.

11. In the present case, despite the fact that the matter was dismissed in

default on 27.11.2013 and was restored on the no objection on the part of the learned counsel for the respondent on 05.02.2015, when the case was taken up for final arguments on the merit, none on behalf of the respondent had attended the Court proceedings on any dates the matter was posted. From the record, it is also apparent that after the matter was reserved for order on 19.03.2015, it was again re-fixed for summoning the TCR. Even then, none on behalf of the respondent had attended the Court proceedings. Since the matter is old, pertaining to the year 2002, the argument in the matter had been heard on behalf of the petitioner.

12. I have given due consideration to the claim of the respondent filed by him before the Labour Court and also his contentions in the counter-affidavit before this Court and also the case laws relied upon by him in his counter-affidavits and I have also given the due consideration to the arguments, addressed on behalf of the petitioner. TCR has also been summoned and perused.

13. The main argument of the learned counsel for the petitioner is that the learned Labour Court had no jurisdiction to pass an award in this case because respondent was not a 'workman' within the meaning of Section 2(s) of the ID Act and thus, the award is *non est* and this court has jurisdiction to

set aside such an award and has relied on the findings of Supreme Court in the case of **Chiranjilal Shrilal Goenka (deceased) vs. Jasjit Singh** 1993 SCC (2) 507.

14. It is a well settled principle of law that this Court in exercise of its jurisdiction under Article 226 and 227 of the Constitution of India, can set aside an award of the Trial Court if the same has been passed without jurisdiction or exceeding its jurisdiction or where the award has been passed in violation of settled principle of law. In the case of **Chiranjilal Shrilal Goenka** (supra), the Supreme Court has clearly held as under:-

“4. It is settled law that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree made which goes to the root of its jurisdiction or lacks inherent jurisdiction is a *corum non judice*. A decree passed by such a court is a nullity and is *non est*. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by

consent or waiver of the party.”

15. In an earlier case of **Kirloskar Brothers Ltd. vs. The Presiding Officer, Labour Court, Delhi and Anr.** (1976) ILR 1 Delhi 565: MANU/DE/0155/1975, the Supreme Court has held that finding whether a particular employee is a workman when his services are terminated is partly a finding a fact and partly a finding of a question of law and goes to the root of case as the answer to this determine the jurisdiction of the Court. The Court has held as under:-

“19. The finding whether a particular employee is a workman when his services are terminated is partly a finding a fact and partly a finding of a question of law. This is so because the finding has to be based on the particular facts and circumstances of a case on the one hand and the construction to be given to the term "workman" on the other. The question of fact in such circumstances becomes one of jurisdictional fact and the High Court under Articles 226 and 227 is competent to consider the soundness of the finding of fact afresh in so far as it is jurisdictional. Since the definition of workman has to be dilated upon in deciding whether an industrial disputes could be raised in a particular case the question whether the

employee concerned was a workman or not also becomes one relating to jurisdiction. This is settled law and has recently been held to be so by this court in *M/s. Blue Star Ltd. v. N. K. Sharma and others*, C.W. 1259 of 1972, decided on February 22, 1974(9). Therefore, an examination of the evidence of the case will be pertinent to find out whether there is any error committed by the Labour Court which goes to the root of the question, viz., its jurisdiction to entertain and adjudicate upon the dispute referred to it.”

16. From the contentions and counters, it is apparent that the main issue in this case is if the respondent is a ‘workman’ within the meaning of Section 2(s) of the Industrial Disputes Act. Section 2(s) of the Industrial Disputes, to the extent it is relevant, reads as under:-

“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 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) X X X X X X X X X

(ii) X X X X X X X X X

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

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six 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.”

17. In the case of **Burmah Shell Oil Storage and Distribution Company of India Ltd. vs. The Burma Shell Management Staff Association and Others,** AIR 1971 SC 922: MANU/SC/0373/1970, the Supreme Court has clearly held that an employee can be said to be a ‘workman’ if he is employed to do the work of manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. The employees who were not doing any such type of work are outside the scope of the word

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‘workman’ in the meaning of Section 2(s) of the ID Act. The Supreme Court has held as under:-

“8. If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word "workman" having to resort to the exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may be required to do any paper work, nor may he required to have any technical knowledge. He may be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously; such an employee would not be a workman, because the work, for which he is employed, is not covered by the four types

mentioned in the definition and not because he would be taken out of the definition under one of the exceptions.”

18. The Supreme Court has also held that in **Kirloskar Brothers Ltd.** (*supra*) case that the Trial Court should adopt the positive approach and not the negative approach. The Trial Court should see whether the particular employee is a workman and not whether the employee concerned falls within the meaning of exceptions mentioned in Section 2(s) and if he does not fall within the exceptions, then by process of elimination, he is held to be a workman. The Court has clearly held that the Courts are required to see that a person is a workman as opposed to what may be called “non-workman” and not whether he is a workman because he is not a Manager or one employed in an administrative capacity. In this case, the Supreme Court has reiterated the principles laid down in **Burmah Shell Oil Storage and Distribution Company of India Ltd.** (*supra*) and held that to be a workman within the meaning of Section 2(s) under the Industrial Disputes Act, the person must be employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. The Supreme Court has reiterated these principles as under:-

“10. In order to make a reference to

a Labour Court or a Tribunal of an industrial dispute the first point that must engage the attention of the appropriate Government is to decide whether the complaining employee is a "workman". Even if reference is made of a dispute then the Labour Court or the Tribunal must first apply its mind to this problem for unless the employee concerned is a workman the question of adjudication of an industrial disputes does not arise. In my opinion the approach has to be a positive approach and not a negative approach. In other words, what has to be seen is whether the particular employee is a workman and not whether the employee concerned falls within the exceptions mentioned in Section 2(s) and if he does not fall in one of the exceptions then by process of elimination he is held to be a "workman". A social legislation like the Industrial Disputes Act confers certain rights and obligations upon certain categories of persons. Those rights and obligations must be limited to be attracted only in the case of such persons as are covered by the statute. Certain rights are conferred upon a "workman" as defined by Section 2(s) of the Act. Therefore, those rights are available only to persons who can be called workman and not to all those who are not covered

by the exceptions given in Section 2(s). To put in another way what has to be seen is whether a person is a workman as opposed to what may be called "non-workman" and not whether he is a workman because he is not a Manager or one employed in an administrative capacity. It is possible that an employee in a given case may not be employed in managerial and administrative capacity or in supervisory capacity and yet he may not be a workman. If the approach is that every employee is a "workman" but the benefits of raising an industrial dispute is not available to those who are subject to the Army Act, or the Air Force Act or the Navy (Discipline) Act or who is employed in the police service or as an officer or other employee of a prison or who is employed mainly in a managerial or administrative capacity; or 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, then, in my opinion, the approach would be incorrect. The proper approach in law would be to first see whether an employee is a workman and then see whether any of the

exceptions are attracted. Reading the definition of the word "workman" I find that it is necessary that a person must be employed in an industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward. Thus the first thing to find out is whether the employee concerned is employed to do manual or clerical work, be it skilled or unskilled, technical or non-technical. If that be so, then he would be workman even if he is employed in a supervisory capacity lineless by virtue of being employed in supervisory capacity his wages exceed Rs. 500.00 or his duties or powers convert his employment into one mainly of managerial nature. On the other hand if manual or clerical work is only small part of the duties of the person concerned and incidental to his main work, which is not manual or clerical then such a person would not be a workman.

19. It is also a settled principle of law that it is the primary and basic duty of the person concerned, which is material for determining the question whether such a person is a workman or not and any extraneous work done by the employee which are not in tune with his basic duties, such additional duties cannot change the character and status of the person concerned. The

Supreme Court has held in the case of **Arkal Govind Raj Rao** (*supra*) as
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follows:

“7. Where an employee has multifarious duties and a question is raised whether he is a workman or someone other than a workman the Court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basic duties these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of the person. Appreciation of evidence by Labour Court cannot be faulted but it landed itself into an erroneous conclusion by drawing impermissible inference from the evidence and overlooking the primary requirement of the principal and subsidiary duties of the appellant.”

20. It is also the settled principle of law that designation of a workman is not important while determining the question if the person is a workman within the meaning of Section 2(s) of ID Act. It is the duty which an employee performs which brings him within the category of the workman

under Section 2(s) of the ID Act. If the nature of duties are manual, unskilled, skilled, technical, operational, clerical or supervisory, the person is a workman within the meaning of Section 2(s) unless he is excluded by virtue of exceptions under Section 2(s). It is also a settled principle of law that when a question arises that whether a person is a workman or not, the burden is upon the workman to show that the nature of duties performed by him falls within the meaning of Section 2(s) of the ID Act and once he succeeds in proving on record those facts which shows that he is performing manual, unskilled, skilled, technical, operational, clerical or supervisory work, the burden shifts to the employer to disprove this contention.

21. Now, while applying these principles, on the facts of this case, it is apparent that the respondent, who had raised the claim before the industrial tribunal has nowhere disclosed the nature of his duties. He had not mentioned the nature of his duty either in his statement of claim or the rejoinder before the Labour Court. Even in the counter-affidavit before this Court, he has not disclosed the nature of duties he was performing or for which he was employed. His designation, admittedly, at the time of his termination, was that of Assistant Manager. The law puts the burden upon the workman to prove the nature of his primary duties for which he was

engaged and which he has been performing at the time of his termination. In his evidence by way of affidavit before the Labour Court, he had simply stated that he had no staff whose work he was required to look after nor he had been delegated any managerial responsibility over any of the staff. He has deposed that *“I was variously designated but I had never been given any supervisory or managerial function. I had no staff whose work I could look after nor had been delegated managerial responsibility over any one of the staff. I was discharging my responsibilities singlehandedly and submit my reports to my superiors for their direction decision on implementation.”*

22. This statement of the respondent, in no way, discloses the nature of his duties which he was performing. His approach had been negative, when he had stated that he was not given any managerial duties and was having no control over any staff. He has not disclosed that he was performing such duties which fall within the category of manual, unskilled, skilled, technical, operational, clerical or supervisory. Strangely enough, in his cross-examination, he has admitted as under:-

“As Assistant Manager I was assigned the duties such as planning and execution at site and then reporting the matter to the senior officers. I used to

select and appoint the authorities from whom we used to get work done and I was duly authorized by the management to do so. Similar duties were assigned to me while I was posted as Assistant Manager (Stone Blast Unit). ”

23. It is apparent that the respondent No.5-the workman had not produced any evidence before the Labour Court to prove that he was doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work. He, on the other hand, had admitted that he was performing the duties such as “*planning and execution at site*” and also “*had the authority to select and appoint the persons to perform the duties under him*” and that “*similar duties had been assigned to him while he was posted as Assistant Manager (Stone Blast Unit)*”. These admissions clearly show that respondent No.5 had the authority to employ the persons who used to work for him and that he used to do planning and its execution at site. The hierarchy of the institutions are such that everybody has to report to its senior officers and that automatically does not make the employee a workman under Section 2(s) of ID Act if he otherwise does not fall within the definition of workman under Section 2(s) of the ID Act. All these facts were before the Labour

Court, but the Labour Court has wrongly ignored these facts.

24. The respondent has relied on the findings in the case of **S.K. Maini vs. Carona Sahu Co. Ltd.** (1994) II LLJ, 1153(SC), wherein the Supreme Court has held that the designation of employees is not of much importance and what is important is the nature of duties being performed by an employee. These findings, in no way, help the respondent since the respondent was still required to prove that he was engaged to perform the manual, unskilled, skilled, technical, operational, clerical or supervisory work. From the award, it is apparent that the learned Labour Court had put much emphasis on the fact that the management, i.e., the petitioner, had failed in proving that the claimant was performing the duties of managerial and supervisory nature. The Labour Court thus has erred in its approach. The learned Labour Court ought to have first determined if the claimant had been performing the functions which are manual, unskilled, skilled, technical, operational, clerical or supervisory in nature. Labour Court had also ignored the admissions of the claimant to the effect that he had the authority to select and appoint persons and also that he was performing the duties of planning and execution at site. In the absence of the fact that the claimant i.e. the respondent No.5 had not disclosed anywhere his nature of duties which

could fall within the categories manual, unskilled, skilled, technical, operational, clerical or supervisory, the admission of the claimant that he *had the authority to select and appoint persons from whom the management used to take work* and also that he was assigned the duties of planning and execution, clearly shows that the main duties of the workman were of planning and execution and in discharge of those duties, he was also given the authority to appoint persons of his choice. From the above discussion, it is apparent that the learned Labour Court has erred in its finding while reaching to the conclusion that the claimant, i.e., the respondent No.5 was a workman. Since the respondent No.5 was not a workman within the meaning of Section 2(s), the Labour Court had no jurisdiction to return its findings. The award dated 15.01.2002 is *non est* and is hereby set aside.

25. The writ petition is allowed with no order as to costs.

**DEEPA SHARMA
(JUDGE)**

JULY 06, 2015
rb/bg