

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1378 OF 2016

Emkay Global Financial Services Ltd.	]	
4 D, Hamam House, Ambalal Doshi Marg, Fort	]..... Petitioner	
Mumbai – 400 023	] (Orig. First Party)	
versus		
Suresh Vrajlal shah	]	
5 C. 304, Parinay C.H.S. Ltd. Asha Nagar,	]..... Respondent	
Kandivali (East), Mumbai 400 101	] (Orig.Second Party)	

Mr. Arshad Shaikh i/by Mr. Anoop Sharma for the Petitioner.
Mr. R D Oak for the Respondent.

CORAM : R. M. SAVANT, J.
DATE : 29th August 2016

ORAL JUDGMENT

1 Rule, considering the nature of the challenge raised, made returnable forthwith and heard.

2 The writ jurisdiction of this Court under Article 226 of the Constitution of India is invoked against the order dated 28/12/2015 passed by the learned Presiding Officer, 8th Labour Court, Mumbai by which order the Reference in question being Reference (IDA) No.526 of 2010 came to be answered in the affirmative and the learned Presiding Officer of the Labour Court resultantly has issued directions to reinstate the workman i.e. the Respondent herein with continuity of service and 50% back wages w.e.f. 01/12/2008 i.e. from the date of termination till the date of his reinstatement.

3 The facts giving rise to the filing of the above Petition can in a nutshell be stated thus :-

 The Respondent herein raised a industrial dispute on account of the termination of his services. The said Industrial Dispute was referred to the 8th Labour Court, Mumbai for adjudication and has been numbered as Reference (IDA) No.526 of 2010. In the statement of claim filed by the Respondent it has been averred by him that he was appointed vide letter dated 01/11/2006 and has joined the establishment of the Petitioner as a clerk and his last drawn monthly salary was Rs.10,000/- . It was his case that on 01/12/2008 he as usual reported for duties but the officer of the Petitioner instructed him that his services are no more required, and hence there was an oral termination of the services of the Respondent w.e.f. 1/12/2008. It was the case of the Respondent that the said termination was without giving any notice, charge-sheet or conducting any domestic inquiry. It was further his case that since he had completed 240 days service in a calender year, it was obligatory on the part of the Petitioner to follow the procedure before terminating his services.

4 The Petitioner herein filed its written statement and raised an issue of the Respondent being not a workman as covered by the term in Section 2(s) of the Industrial Disputes Act. It was also the case of the Petitioner that the

Respondent has abandoned the services. Certain other facts were also pleaded pointing out the actual reason for abandonment of the services by the Respondent.

5 The learned Presiding Officer of the Labour Court on the basis of the pleadings framed issues amongst which was the issue whether the Respondent proves that he is a workman within the meaning of Section 2(s) of the Industrial Disputes Act and whether his services was illegally terminated by the Petitioner. The parties led evidence and the Respondent examined himself in support of his case that he was a workman. The Respondent produced the appointment letter dated 01/11/2006 by which he was appointed by the Petitioner. In so far as the Petitioner is concerned, it also led the evidence of one Mr. Ajay Bhendkale.

6 The learned Presiding Officer of the Labour Court thereafter ventured to adjudicate upon the issues that were framed. In so far as the issue whether the Respondent is a workman is concerned, the learned Presiding Officer of the Labour Court proceeded to consider whether there was employer-employee relationship between the Petitioner and the Respondent. By adverting to the appointment letter as also the emoluments which the Respondent was to be paid and the manner in which the said payment was made to the Respondent, the learned Presiding Officer of the Labour Court

arrived at a conclusion that there was employer-employee relationship between the Petitioner and the Respondent. However, thereafter the learned Presiding Officer by adverting to the case of the Respondent that he was a clerk held that he was carrying out his duties which were manual or clerical in nature. The learned Presiding Officer thereafter proceeded to decide other issues and came to a conclusion that the termination of the Respondent by the Petitioner was by not following the procedure and directed his reinstatement however granted him 50% of the back-wages. As indicated above it is the said judgment and order dated 28/12/2015 which is taken exception to by way of the above Writ Petition.

7 The learned counsel for the Petitioner Shri Arshad Shaikh would seek to assail the manner in which the learned Presiding Officer of the Labour Court has adjudicated upon the issue whether the Respondent was a workman. It was the submission of the learned counsel for the Petitioner that the said issue has not been adjudicated upon by applying the tests laid down in so far as Section 2(s) of the Industrial Disputes Act is concerned. It was the submission of the learned counsel for the Petitioner that by arriving at a conclusion that there was employer-employee relationship between the Petitioner and the Respondent, the learned Presiding Officer has concluded the issue.

8 Per contra, the learned counsel appearing for the Respondent Shri Oka sought to justify the findings recorded in so far as the said issue relating to as to whether the Respondent was a workman but the same was not done with any deal of conviction.

9 Having heard the learned counsel for the parties, in my view, the judgment and order dated 28/12/2015 is required to be quashed and set aside and the matter is required to be relegated back to the 8th Labour Court, Mumbai for a de-novo consideration of the said Reference . As indicated above, the principal issue before the Labour Court was whether the Respondent was a workman within the meaning of Section 2(s) of the Industrial Act. The approach of the Labour Court whilst adjudicating the said issue cannot be said to be an approach which was required to be adopted whilst adjudicating the said issue. In so far as the said issue is concerned, it was not the case of the Petitioner that the Respondent was not working with it. It was the case of the Petitioner that though the Respondent was working with it, he was working as a dealer and therefore was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act. The impugned order passed by the Labour Court discloses that the said issue has not been adjudicated upon by the Labour Court on the touchstone of the tests laid down in so far as Section 2(s) of the Industrial Disputes Act is concerned. The Labour Court ought to have adjudicated the said issue from the stand point of

whether there was any material on record to come to the conclusion that the Respondent fits within the definition as given in Section 2(s) of the Industrial Disputes Act. However, the Labour Court has not done so and has accordingly adjudicated the issue by considering whether there was an employer-employee relationship between the Petitioner and the Respondent and thereafter has hastened to conclude that since the Respondent was appointed as a clerk he was carrying out manual and clerical duties which finding prima facie is sans any evidence. Since the adjudication of the said issue would impinge upon the finding recorded in respect of the other issues and since the issue of whether the Respondent is a workman has not been satisfactorily addressed by the Labour Court, the impugned Award would have to be set aside in its totality.

10 In that view of the matter the impugned judgment and order dated 28/12/2015 is quashed and set aside and the matter is relegated back to the Labour Court for a de-novo consideration of the said Reference. De-novo consideration would mean on the basis of the material which is already on record. Needless to state that this Court has not deemed it appropriate to make any observations as regards the findings on other issues as the Award was required to be set aside on the basis of the finding on the first issue itself as the said issue goes to the root of the matter. On remand the Labour Court to adjudicate upon the Reference in terms of the observations made herein above. Needless to state that the contentions of the parties are kept open. The learned

Presiding Officer of the Labour Court would decide the said Reference on its own merits and in accordance with law uninfluenced by the impugned order as well as the instant order. The above Petition is accordingly allowed. Rule is accordingly made absolute to the aforesaid extent with parties to bear their respective costs of the Petition. The parties to appear before the Labour Court on 26/09/2016.

[R.M.SAVANT, J]