

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

Reserved on 5th September, 2016

Decided on 19th October, 2016

+ LPA 616/2012

HARDWARI LAL SHARMA

..... Appellant

Through Mr.Mahendra Singh, Advocate

versus

PUSTAK MAHAL PUBLISHERS

..... Respondent

Through Mr.Harvinder Singh, Advocate

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CORAM:

HON'BLE MR.JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Hardwari Lal, in this intra court appeal impugns the judgment of learned Single Judge dated 6th August, 2012 passed in WP(C) No.1333/2008 titled as *Pustak Mahal Publishers vs. Hardwari Lal Sharma* whereby the award dated 10th July, 2007 passed by the learned Presiding Officer, Labour Court- II directing reinstatement of appellant with continuity of service and 50% back wages and all other benefits was set aside and the writ petition filed by the respondent-management was allowed.

2. The admitted case of the parties is that the appellant was employed as a clerk with the respondent on 1st November, 1978 whereafter he left the services and rejoined on 1st September, 1994 on

a salary of Rs.5700/- per month on the post of Sales Manager. It is the case of the appellant that though he rejoined the services as Sales Manager but he was made to do clerical work. He gave no cause of grievance to the respondent. On 20th April, 2001 he was called by the Managing Director of the respondent and was asked to resign from the union and to finish the union. Since the appellant was an ordinary member of the union and he could not wind up the union, he refused to do so. On the same day at 2:30 pm, he was given termination letter which he refused to accept and he was immediately terminated from services.

3. The appellant claiming himself to be a workman raised an industrial dispute challenging his termination. Reference was sent by Sh. Narendra Kumar, Secretary Labour, Govt. of NCT, Delhi on 15th October, 2001 vide reference No. F.24(2624)/2001-LAB/22941-45 pertaining to an industrial dispute between the management of M/s Pustak Mahal Publishers and its Manager Sh.Hardwari Lal Sharma in the following terms:-

“Whether the termination of services Sh. Hardwari Lal Sharma s/o Sh. Gokal Chand Sharma by the management is illegal and/or unjustified and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws/Govt. Notifications and to what other relief is he entitled and what directions are necessary in this respect?”

4. Pursuant to the reference, statement of claim was filed by the workman claiming himself to be a clerk although on papers he was shown by the management as a Sales Manager. It was alleged that the termination is absolutely wrong and illegal and in gross violation of

Section 25F and 25N of Industrial Disputes Act, 1947 (hereinafter referred to as the ID Act).

5. The claim of the appellant was resisted by the management inter alia on the ground that claimant was not a workman as defined in Section 2(s) of the ID Act, 1947 and thus he was not covered by the ID Act. It was denied that the claimant was working as a clerk. It was elaborated that he was a Sales Manager and had number of persons working under him. He was discharging duties of supervisory nature. As such, the claim was not maintainable.

6. On the pleadings of the parties, following issues were framed by the Labour Court:-

“(1) Whether the claimant is not a “workman” as defined in Section 2(s) of ID Act, as alleged by the management in its Preliminary Objection No.1 of WS? If so, to what effect?”

“(2) To what relief, if any, is the claimant/workman entitled against the management in terms of this reference?”

7. The appellant reiterated the stand taken by him in the claim petition whereas the management examined three witnesses MW1 Amarjeet Kaur, Office Superintendent; MW2 Sh. Daya Kishan, Hindi Stenographer and MW3 S.K. Tripathi, Sales Representative.

8. Learned Labour Court relied upon the extract from the register of Employment and Remuneration in the year 1978 when the appellant was employed earlier and was shown as a clerk. It was observed that the onus of proving the fact that the appellant was not a workman was upon the management which it failed to prove. As such, the appellant was held to be a workman. Further the termination

was held to be illegal being in contravention of the provisions of Section 25F of the Industrial Disputes Act, as such, the appellant was ordered to be reinstated with continuity of service with 50% back wages and all other benefits.

9. Feeling aggrieved, the management filed the writ petition bearing WP(C) No.1333/2008 titled as ***Pustak Mahal Publishers vs. Hardwari Lal Sharma***. The writ petition was allowed by the Single Judge by holding that the onus of proving the fact that the claimant was not a workman lay upon the claimant as it was for the claimant to prove by leading positive evidence that he was a workman as he continued doing clerical work. By placing reliance on ***Mukesh K. Tripathi vs. Senior Divisional Manager, LIC and Ors.***, 2004 LLR 993; ***Sonipat Cooperative Sugar Mills Ltd. vs. Ajit Singh***, (2005) 3 SCC 232 and ***Electronics Corporation of India Ltd. vs. Electronic Corporation of India Services Engineers Union***, (2006) 7 SCC 330, it was held that except for examining himself and stating that the claimant was made to do clerical job, no other evidence has been placed on record whereas the management examined three witnesses who proved that the claimant was performing managerial functions, as such, the claimant failed to prove that he was a workman. That being so, the impugned award was set aside on the first issue itself as the claimant was not covered under the definition of workman u/s 2(s) of the ID Act.

10. Aggrieved by the said decisions, the present intra court appeal has been preferred by the appellant.

11. The basic submission of learned counsel for the appellant is that although on papers the appellant was appointed as a Sales Manager in the second stint but he was performing the duties of a clerk, therefore, he falls within the category of workman as defined u/s 2(s) of ID Act, 1947. His services were terminated without any inquiry or show cause notice and thus the termination was illegal.

12. Per contra, learned counsel for the respondent contended that the appellant was appointed as a Sales Manager and not as a clerk in the second stint. The evidence produced by the respondent amply proved that he was working as a Sales Manager and was discharging the duties of supervisory nature. Therefore, the appellant was not a workman under the ID Act, 1947 and, as such, the reference was not maintainable. Reliance was placed on *Sonipat Cooperative Sugar Mills* (supra); *Mukesh Kr. Tripathi* (supra) and *H.R. Adyanthaya & Ors. vs. Sandoz India Ltd. & Ors.*, (1994) 5 SCC 373.

13. The question that falls for consideration is whether the appellant was a workman according to the definition of workman u/s 2(s) of the ID Act. The definition under this Section has undergone changes since its first enactment. The definition, as it stood originally when the ID Act came into force w.e.f. 1.4.1947, read as follows:-

“(s) ‘workman’ means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceeding under this Act in relation to an industrial dispute, but does not include any person employed in the naval, military, or air service of the Crown.”

14. The definition was amended by Amending Act 36 of 1956 which came into force from 29th August, 1956 to read as follows :

(s) "workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory technical or clerical 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) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee 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 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."

The change brought about by this Amendment was that the persons employed to do 'supervisory' and 'technical' work were also included in the definition for the first time by this Amendment, although those who were employed in a supervisory capacity were so included in the definition provided their monthly wage did not exceed Rs.500.

The definition of 'workman' was further amended by Amending Act 46 of 1982 which was brought into force w.e.f. 21.8.1984. It read as :

“(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) 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);

(ii) who is employed in the police service or as an officer or other employee 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 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.”

15. A bare perusal of the aforementioned provision clearly indicates that a person would come within the purview of the said definition if he : (i) is employed in any industry; and (ii) performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work.

16. In the light of the amended definition of workman, we may now refer to the decision of Supreme Court on the subject. In ***Sonipat***

Cooperative Sugar Mills Ltd. (supra), the Supreme Court observed as under:-

“16. Thus, a person who performs one or the other jobs mentioned in the aforementioned provisions only would come within the purview of definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regard the dominant nature thereof. With a view to give effect to the expression to do "any manual, unskilled, skilled, technical, operational, clerical or supervisory work", the job of the concerned employee must fall within one or the other category thereof. It would, therefore, not be correct to contend that merely because the employee had not been performing any managerial or supervisory duties, ipso facto he would be a workman.”

17. Again in ***H.R. Adyanthaya*** (supra), it was held :-

“10. It is thus obvious from the decision that the contention on behalf of the workman before the Industrial Tribunal as well as before this Court was that the employee was doing either manual or clerical work, and that not only he had no supervisory duties but he was doing his work under the direction of his superiors and, therefore, he was a workman within the meaning of the definition of workman as it stood then. The dispute in question had arisen prior to 6th January, 1956. The definition of 'workman' at the relevant time included only those persons who were employed to do any skilled or unskilled manual or clerical work. Hence the relevant contention on behalf of the workman which was negatived by this Court. An inference from this decision is also possible, viz., that if the employees' work was mainly manual or clerical, he would have, even as the definition stood then, been covered by it.”

18. In the instant case, it is the admitted case of the appellant that initially he was appointed as a clerk and when he rejoined on 1st September, 1994 he was appointed as Sales Manager. It is, however, the case of the appellant that he was appointed as the Sales Manager but he continued doing the clerical work and thus, he was a workman. Having admitted his appointment in the second stint as a Sales Manager, the onus was on the appellant to prove by leading positive evidence that despite being appointed as sales manager he continued doing clerical work and therefore was a workman. The appellant had examined only himself and except stating that he was made to do clerical job, no other evidence was led by him. In cross-examination, however, he admitted that documents Ex.MW1/M1 to MW1/M7 were signed by him as Sales Manager and Ex.MW1/M8 as accountant/partner. He denied that the sales representatives were working under him. According to him he used to sign as Sales Manager or partner under the instructions of Managing Director, however, his denial in this regard is of no consequence. MW1 Amarjit Kaur, Office Superintendent stated that the appellant was working as a Sales Manager with the Management. MW2-Daya Kishan stated that he was working as Hindi Stenographer and he used to take dictations from the appellant only and the appellant used to give him instructions for typing letters of the different departments of the management. MW3-S.K. Tripathi, a Sales Representative stated that he and other state representative were working under the direct control and supervision and direction of the appellant who was the head of sales department. He used to send the orders procured by him to the sales

department in the head office headed by the appellant, the then Sales Manager for execution. He also reported to the appellant after returning from the tour. In cross-examination he stated that the appellant was the in-charge who used to sign the payment slips on the basis of which they used to get money for various expenses on field, and only when he made entries in the register they would get the money for their expenses. The bills used to be finally passed by the Director. After collecting cash and drafts as per instructions of the appellant, he used to deposit the same in the Cash department/Accounts section. However, he admitted that the appellant had no authority to appoint or dismiss any employee of the management. That *ipso facto* is not sufficient to prove that the appellant was a workman. The Labour Court misdirected itself by placing reliance upon the attendance sheet of the appellant before 1st September, 1994 wherein he was shown as a workman. The said attendance register was absolutely irrelevant. The appellant who was employed as a clerk with the respondent on 1st November, 1978 had left the services and rejoined on 1st September, 1994. Therefore, the evidence from 1st September, 1994 onwards was the only relevant piece of evidence to ascertain as to whether the appellant again joined the respondent as a clerk. The appellant was confronted with number of documents wherein he had signed as Sales Manager. Even the attendance register produced after the year 1994 shows that he was marking his presence as the Sales Manager. Under the circumstances, the appellant failed to lead any concrete evidence to show that he was doing clerical work except his own statement whereas the

management led evidence in the form of MW1 to MW3 to show that the appellant was performing administrative capacity and performing managerial functions. That being so, the appellant was not covered under the definition of workman u/s 2(s) of the ID Act.

19. We do not see any reason to interfere with the impugned order passed by the learned Single Judge. That being so, the appeal is dismissed leaving the parties to bear their own costs.

**SUNITA GUPTA
JUDGE**

**SANJIV KHANNA
JUDGE**

OCTOBER 19, 2016/rs

