

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 711 OF 2008

Shri Naguesh Priolkar, resident of T-8,
Central Mansion, Near State Bank of India,
Sadar, Ponda-Goa.

.... Petitioner

Versus

1. The Manager (Personnel &
Administrative), M/s E. Merck (India)
Limited, Plot No.11/1, Marwasodo,
Usgao, Ponda-Goa.

2. The Presiding Officer, Industrial
Tribunal cum Labour Court-1,
Government of Goa, Panaji-Goa.

.... Respondents

Shri R.G. Ramani, Advocate for the Petitioner.

Shri Girish K. Sardessai with Shri Vijay Palekar and Shri A.
Carvalho, Advocates for the Respondent No.1.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 5th JANUARY, 2017

PRONOUNCED ON: 23rd JANUARY, 2017

JUDGMENT:

By this petition, the petitioner is challenging the award
dated 03.08.2007, passed by the Industrial Tribunal-cum-Labour
Court, Panaji (Tribunal, for short), by which, issue no.1 as to

whether, the petitioner is a 'workman', as defined under Section 2(s) of the Industrial Disputes Act, 1947 (the Act, for short), has been decided in the negative and against the petitioner. As a result of the same, reference being IT No.74/1992, raised by the petitioner, has been dismissed.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That, on 15.12.1982, the petitioner was appointed as a Trainee Junior Production Assistant with the respondent no.1. The petitioner worked as such, in the Vitamin-E Plant of the respondent no.1. The petitioner was promoted as a Supervisor w.e.f 01.06.1991 and continued to work in Vitamin-E Plant, till he was transferred to 'Guaiazulene Plant', in September, 1991. The petitioner was terminated from service w.e.f 08.07.1992. The petitioner raised an industrial dispute, which was referred to the Industrial Tribunal and was registered as IT No.74/1992.

3. The respondent no.1 (party no.2 before the Tribunal), resisted the reference on various grounds, including the

maintainability of the reference. It was contended that at the time of termination of the petitioner, the petitioner was working as Supervisor Grade-I and was drawing wages in excess of Rs.1600/- per month and as such, was not covered within the definition of a 'workman' under Section 2(s) of the Act.

4. The Tribunal framed three issues, out of which, issue no.1, namely, whether the petitioner was a 'workman' under Section 2(s) of the Act was taken up as a preliminary issue. Before the Tribunal, the petitioner examined himself and Shri Vinod Kumar Y. Rane and produced several documents. Respondent no.1 examined Babuli Gaonkar, who was then working as Assistant Production Manager. The Tribunal on appreciation of evidence on record came to the conclusion that the petitioner was not a 'workman', as he was working as a Supervisor and drawing wages in excess of Rs.1600/- per month and thus, stood excluded by clause (iv) of Section (2)(s) of the said Act. In that view of the matter, issue no.1 was answered in the negative and it was held that the reference does not survive.

5. I have heard Shri Ramani, the learned Counsel for the petitioner and Shri Sardessai, the learned Counsel for the respondent no.1. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned award.

6. It is submitted by Shri Ramani, the learned Counsel for the petitioner that when the petitioner was working in Vitamin-E Plant, the petitioner was doing operational work as he was working on machines/reactors carrying on different reactions. It is submitted that the petitioner was doing operational work, which included the charging of raw material either manually or by pumping or by sucking under vacuum, heating the reactors by circulating steam or cooling the reactors by circulating chilled water, thus, maintaining the required temperature in the reactor. It is submitted that the production process was carried on as per the procedure decided by the Production Manager. It is submitted that while carrying on the production process, the Production Assistants were required to fill and sign proformas, which reflected the progress of the production process. It is submitted that in the

'Short Path Distillation Unit' of Vitamin-E Plant, the Production Assistants were required to take reading of the pump speed, temperature of the kettle etc. every half an hour. It is submitted that even, after the transfer of the petitioner to the 'Guaiazulene Plant', the pre-dominant duties of the petitioner continued to be the same as that of a Production Assistant. It is submitted that thus, the petitioner continued to discharge the duties as that of a Production Assistant, even after his promotion as a Supervisor. The learned Counsel has taken me extensively through the oral evidence led by the parties, in order to demonstrate that the duties of the petitioner cannot be said to be of a supervisory nature and the petitioner continued to be a 'workman', even after he was promoted. It is submitted that while deciding as to whether, a person is a workman or not, the designation of the post or the wages drawn are not relevant and it is the pre-dominant nature of duties, which the person was discharging, which decide as to whether the person would be a 'workman'. It is submitted that various factors, relied upon by the Tribunal in para 46 of the impugned award are not sufficient to hold that the petitioner was discharging duties of a supervisory nature. The learned Counsel

has then referred to various circumstances as set out in paras 46(a) to 46(j) of the impugned award. It is submitted that the petitioner was asked to resign from the Union and as such, the said act cannot be said to be a voluntary act of the petitioner. Thus, no reliance could have been placed on the fact that the petitioner had ceased to be a Member of the Union. The learned Counsel has pointed out that there was a settlement arrived at between the management and the Union on 16.04.1991, which was in force for a period of 3½ years. It is submitted that thus, on the date on which the services of the petitioner were terminated, the settlement dated 16.04.1991 was in force and as such, there was no occasion for any other settlement, in which the petitioner could have been excluded. It is submitted that the circumstances, such as monitoring the entire process of production in Vitamin-E Plant and then in 'Guaiazulene Plant', requisitioning of the vehicles for office work are solitary and stray instances, which cannot clothe the petitioner with the duties of a supervisory nature. It is submitted that the petitioner was not requisitioning the raw material from the store and was not recommending any leave to the workmen. It is thus submitted that the various circumstances

as referred to in para 46 of the impugned judgment are not sufficient to arrive at a conclusion that the petitioner was discharging duties of a supervisory nature. He submits that the finding recorded by the Tribunal is perverse and against the weight of the oral and documentary evidence on record, which necessitates interference.

7. On the contrary, it is submitted by Shri Sardessai, the learned Counsel for respondent no. 1 that after the promotion as Supervisor, the petitioner was discharging duties of a supervisory nature and was admittedly, drawing wages in excess of Rs.1,600/- per month, as a result of which, the petitioner ceased to be a 'workman', within the meaning of Section 2(s) of the Act. It is submitted that the burden to establish that the petitioner was a 'workman' lay squarely on the petitioner, which he has failed to discharged.

Reliance in this regard is placed on the decision of this Court in the case of **Somnath Tulshiram Galande Vs. Presiding Officer and Others, 2008(5) Bom.C.R. 865** and **Standard Chartered Bank Vs. Vandana Joshi and Another, 2010 I CLR,**

163 and the decision of the Supreme Court in the case of **Mukesh K. Tripathi Vs. Senior Divisional Manager, LIC and Others, (2004) 8 SCC 387**. It is submitted that an employee can be a workman only if, he is employed to do work of one of those types as referred to in the first part of the definition. Reliance in this regard is placed on the decision of the Supreme Court in the case of **Burmah Shell Oil Storage & Distribution Company of India Ltd. Vs. The Burmah Shell Management Staff Association and Others, 1970 (3) SC 378** and the Constitution Bench decision in the case of **H.R. Adyanthaya and Others Vs. Sandoz (India) Limited and Others, (1994) 5 SCC 737**.

8. The learned Counsel has then referred to various circumstances, relied upon by the Tribunal in para 46 of the impugned award in order to submit that they are sufficient to hold that the petitioner was discharging duties of a supervisory nature. The learned Counsel has relied on the decision of this Court in the case of **German Remedies Ltd. Vs. Michael Gabriel Lopes and Another, 1999 (2) L.L.N. 199**, in order to submit that the fact that the employee was not getting the benefits of

agreement/settlement that were entered into by the Company and the Union, would be indicative of the fact that the employee was not a 'workman'. It is submitted that the petitioner had voluntarily resigned from the membership of the Union after his promotion, had availed of LTC benefits, which were not available to workmen, and were more beneficial than those available to workmen. He was forwarding/recommending leave applications, was incharge of the shift in emergency situation, was issuing exit passes and car requisition slips. It is thus submitted that the Industrial Tribunal after appreciating the oral and documentary evidence on record had reached to a conclusion that the petitioner was not a 'workman' and this finding does not invite any interference.

9. I have carefully considered the rival circumstances and the submissions made. Undisputedly, the petitioner was appointed as a Trainee Junior Production Assistant, in December 1982 and had worked as such, till his promotion as a Supervisor w.e.f 01.06.1991. Admittedly, the petitioner was working in Vitamin-E Plant, which includes, a Trimethyl Hydroquinone Section (TMHQ Section) and Vitamin-E Section, apart from a Short Path Distillation

Unit (SPDU). The petitioner was transferred to 'Guaiazulene Plant' in September, 1991. The production process in the 'Guaiazulene Plant' consists of four steps, Step-I, Step-II, Step-III and Step-IV. Step-III and Step-IV have sub-steps such as, III-A, III-B, III-C, III-D and IV-A, IV-B, IV-C and IV-D. The final product comes at the end of Step IV-D. The sequence of the steps has to be strictly followed. Only after successful completion of Step-I, operation at Step-II can be started and so on. Step IV-D involves final distillation at high temperature and high vacuum, using glass condensers. It has come on record that the Production Assistants work in Step-I, Step-II and Step-III of the 'Guaiazulene Plant' and only Supervisor/s work in Step-IV. At the time of the termination, the petitioner was working in the 'Guaiazulene Plant'. Thus, the status of the petitioner as being a workman or otherwise, has to be decided, with reference to his date of termination, while the petitioner was working in the 'Guaiazulene Plant'. The contention on behalf of the petitioner is that notwithstanding his promotion as a Supervisor, he continued to discharge duties which were similar to the duties as a Production Assistant i.e. prior to his promotion. In this case, there is no dispute that the petitioner was drawing

wages in excess of Rs.1,600/- per month. Thus, the question whether the petitioner was a workman, would necessarily depend upon the nature of the duties performed by him on the date of his termination and if, the duties were of a supervisory nature, the petitioner would stand excluded from being a 'workman'. Before proceeding to refer to the documentary evidence, it would be worthwhile to reproduce Section 2(s) of the Act, which reads thus:

"2.Definitions-In this Act, unless there is anything repugnant in the subject or context,-

.....

(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); 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 [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.]”

10. The Constitution Bench of the Supreme Court in the case of **H.R. Adyanthaya** (supra) has held that a person to be a workman has to fall in one or the other category as stipulated in the main part of Section 2(s) of the Act and it is not enough that he is not covered by either of the four exceptions. It cannot be disputed that the burden to establish that the petitioner was a 'workman' would lie on the petitioner. According to the petitioner, the duties which he was performing were of technical/operational nature and he was not discharging duties of a supervisory nature.

11. The question is whether, even after his promotion as Supervisor, the petitioner continued to discharge duties, predominantly of a Production Assistant or whether, they were supervisory in nature. Before advertng to the evidence in this regard, it would be worthwhile to refer to para 46 of the impugned award, in which the learned Tribunal has relied upon the following circumstances, to hold that the petitioner was not a 'workman':

- (a) the petitioner ceased to be a Member of the Union;
- (b) was not covered by any settlement arrived at between party no.2 and its workmen;
- (c) was monitoring the entire process of the production in Vitamin-E Plant and thereafter, in Guaiazulene Plant of party no.2;
- (d) was examining the quality of the products;
- (e) was taking sample of the products and was forwarding the same to the concerned Department for analysis;
- (f) was requisitioning raw material from the store, which was required for production;
- (g) though he had no authority to grant leave, he was forwarding to higher authority leave applications given by the workmen;
- (h) was requisitioning the vehicles for office work;
- (i) he was signing exit pass;
- (j) he was incharge of the entire factory during the

second and third shifts.

12. Let us first examine the nature of the duties, which is the dominant factor, while deciding whether a person is a 'workman' or not. The petitioner has set out the nature of duties performed by him during his examination in chief, which according to the petitioner, are of manual/technical nature. It has come in his evidence that while he was working in the 'Guaiazulene Plant', he was required to requisition raw material from the store for production. For the said purpose, he was required to fill in requisition slips, which are produced on record at Exhibit W-19. He claimed that he was required to requisition packing material from the store as per the instructions of the Production Executive, which slips are produced on record at Exhibit W-20. He has further stated that he was monitoring the entire process of 'Guaiazulene Plant' from time to time and for that purpose, was required to take samples of the products at different stages. He used to fill in the quality control test slips (Exhibit W-21) and used to send them to the Quality Control Department for analysis. At the end of each shift, the petitioner was writing the detailed shift report, which included the progress of the production process.

These reports are at Exhibit W-22. He then claimed that after his promotion to the supervisory grade, he ceased to be a Member of the Union and he accordingly, tendered his resignation.

At this stage, it would be worthwhile to notice that although, it was claimed during the course of arguments at bar that the petitioner was made to resign from the Union, there is nothing on record to show that the petitioner was either made or forced to resign or to show that the resignation was not voluntary.

He claimed that after his promotion as Supervisor, his membership of the Union was cancelled and the dispute as to his termination was raised by him in his personal capacity and not by the Union. He claims that he was covered under the memorandum of settlement (Exhibit W-6) and after his promotion, he was not covered by any settlement and added that after his promotion, there was no settlement. He further stated that after his promotion, he had not applied for membership of any Union and the settlement terms were not applicable to the employees in the supervisory grade. He then stated that he had applied for Leave Travel Assistance (LTA) on 05.12.1991 and had claimed LTA as per the scheme dated 21.02.1990 (Exhibit 3). He admitted that the

said scheme is applicable to the management staff, while the settlement at Exhibit W-6, was applicable to the workmen. He stated that he applied for LTA as per the scheme at Exhibit 3, which was applicable to the management staff. He further admitted that the LTA under the said scheme (Exhibit 3) is better and superior than the LTA under the settlement (Exhibit 6).

13. In the later part of his evidence, the petitioner states that as per the shift programmes, he was given the responsibility of shift incharge. He further claimed that Mr. Palekar and Mr. Gaonkar were also appointed as shift incharge as per the shift programmes and they were working in the supervisory grade. The other employees, which are mentioned in the shift programmes were working in the workmen category and not in supervisory category. He forwarded the overtime (OT) applications of Mr. Gaunekar and Mr. Dhaimodkar. The applications were finally granted by the Production Manager. He claims that Mr. Gaunekar and Mr. Dhaimodkar were working in the workmen category. He claimed that he has not recommended leave applications at any time, but had only forwarded the same. He then states that he

signed the exit pass dated 09.12.1991 (Exhibit 9), although he denied that he had signed the exit pass on behalf of the Departmental Head. He claimed that he has signed the exit pass in the absence of the Production Executive. He claimed that he has requisitioned the office car vide requisition slip dated 15.01.1992 (Exhibit E-10) and he was appointed as shift incharge for the period from 04.05.1992 to 09.05.1992 and from 14.06.1992 to 20.06.1992. He was appointed as shift incharge by a letter (Exhibit E-11) for the entire factory, while as per the shift programme (Exhibit E-6), he was appointed as a shift incharge for a particular department.

14. In the further part of the evidence, the petitioner claims that the hierarchy in the management cadre was from Supervisor to Production Executive and then from Production Executive to Assistant Production Manager and from Assistant Production Manager to Production Manager. He further claims that in emergency condition such as accident, sickness of an employee, power failure and other problems with production, he was asked to take responsibility. In case of sickness of an employee, he was

required to requisition a car and take him to the hospital. Although, such a situation never arose. He claims that the exit pass is a permission to the workman to leave the place of work, which is issued in case of emergency. He states that he issued the exit pass because the Production Executive was not there. He further stated that writing of the log sheets is neither the work of the Production Assistant nor that of the Operator or that of the Helper. However, he was writing the log sheets (Exhibit W-18), which are not counter signed by the Production Assistant during his tenure. He states that for the period referred to in Exhibit W-18, the Production Assistant/Operator has also written the log sheets for the said period. He admitted that in his shift whenever, the Production Assistant wrote the log sheets, he counter signed the same. Finally, he admitted that neither of the duties referred to in Exhibits 19 to 22, were being performed by him prior to his promotion.

15. A brief reference to the evidence of Mr. Vinod Kumar Rane, who was examined on behalf of the petitioner, would be necessary at this stage. Mr. Vinod Kumar Rane was also

transferred to the 'Guaiazulene Plant', after it was started in July, 1991. He claims that alongwith him other persons, who were transferred were, Production Assistants, Supervisors and Plant Operators. This witness at the relevant time was working as a Plant Operator. He claims that the shift programme was being fixed by the Production Manager or the Production Executive. During the lunch break or tea break, the Supervisor used to relieve them. The 'Guaiazulene Plant' was working in four steps and only the Supervisors were working in the fourth step as the product, which was being manufactured was a new product. He specifically claims that the Supervisor was supervising the other workers. He used to submit the leave applications to the Supervisor, who used to forward the same to the superiors. In the event of non reporting by the reliever, he was required to work over time. The non reporting of the reliever was informed to the Supervisor. He in turn used to approach the Production Manager or the Executive. Sometimes, the Supervisor used to ask them to work from one shift to another, if required. He then claims that "when the work was going on in all the three stages, the Supervisor used to come and see whether the work was done within the parameters". He

also admits that the Supervisors are not the persons working in the worker's category. The Supervisor used to be in full charge of the shift in the second and third shift. In the second and third shifts, the Supervisor decided whether the workman should continue in the next shift on overtime. He submits that whenever, the petitioner was working in the second/third shift, he was deciding the overtime. He further admits that his leave applications dated 27.12.1991, 28.12.1991 and 31.12.1991 were recommended by the petitioner. It is the responsibility of the Supervisor in the second and third shifts to find out whether the Operators, Electricians, Production Assistants do their work properly or not. He further admits that when the petitioner was working in the second/third shift, it was his responsibility to find out whether the Operators, Production Assistants and Helpers were carrying out their work properly or not. He further claims that he has no power to issue exit pass. While working as an Operator, he was not a shift incharge at any time.

16. Mr. Babuli Gaonkar, who was then working as Assistant Production Manager, who was examined on behalf of respondent

no.1 stated that prior to his promotion, the petitioner was covered under the settlement dated 16.04.1991 (Exhibit W-6). He stated that in the supervisory cadre, the petitioner's duties were to requisition the raw material from the store, to arrange for man power by means of overtime as and when required. He further claimed that as a Production Supervisor, he was competent to recommend the leave applications and sign the leave cards (Exhibit 8), in which, the petitioner has recommended leave of the concerned employees. The witness claims that when he was working as a Supervisor, he had recommended the leave of Vinod Kumar Rane and Kushendra Naik. Although, this witness admits in his cross examination that in Vitamin-E Section, the petitioner was doing technical work relating to production of Vitamin-E tablets, we are basically concerned with the duties of the petitioner, while he was working in the 'Guaiazulene Plant', when he claims to have been terminated. He also admitted that the duties, which the petitioner was performing in Vitamin-E Section, prior to his promotion as Supervisor continued to remain the same after his promotion as Supervisor, till he was transferred to the 'Guaiazulene Plant' in September, 1991.

17. It can thus be seen that the duties performed by the petitioner after he was transferred to the 'Guaiazulene Plant', cannot be said to be similar to the duties performed by him when he was working as a Junior Production Assistant.

18. Let us now briefly refer to the circumstances relied upon by the Tribunal in para 46 in the context of the submissions made on behalf of the petitioner. I have already noticed that the petitioner had ceased to be a Member of the Union and although, he claims that he was made to resign, there is nothing in his evidence to suggest that he was either forced to resign or that his resignation was not voluntarily. Insofar as settlement dated 16.04.1992 is concerned, the said settlement was in force for 3½ years and thus, the petitioner was terminated during the currency of the said settlement. The contention on behalf of the petitioner is that there was no occasion for the petitioner being excluded from any other settlement, as no other settlement was arrived at after 16.04.1992, till the termination of the petitioner. It is true that there was no occasion for the petitioner from having being excluded from any settlement, however, at the same time it is

significant to note that the evidence on record suggests that the petitioner was granted benefits, such as LTA as per the scheme, which was applicable to the management staff. The petitioner had himself claimed LTA as per the said scheme. Thus, the petitioner was not governed by the terms of the settlement after his promotion as a Supervisor. It has also come in the evidence that the petitioner was monitoring the entire production process of 'Guaiazulene Plant' and was also taking samples and sending it to the Quality Control Department and was requisitioning raw material from the store. The Tribunal has also come to the conclusion that though, he had no permission to grant leave, he was forwarding the leave applications to the higher Authority. He was requisitioning the car for office work and signing the exit pass and was incharge of the entire process during the second/third shift. The contention on behalf of the petitioner is that these were stray instances, which cannot partake of the nature of the part of the predominant duties of the petitioner. The submission in my considered view cannot be accepted. This is because, the question is about the nature of the power available to the petitioner and not instances of its exercise. It may be that in a given situation, no

occasion may arise for exercise of such a power or the instances for such exercise may be far and few between. The fact that the petitioner did requisition the vehicle and signed the exit pass, would tend to show the nature of his duties, notwithstanding the number of such instances. It has also come on record that in the second/third shift, the petitioner as Supervisor was incharge of the entire factory.

19. In the case of **Union Carbide (India) Ltd. Vs. D. Samuel & Others, 1998 (80) FLR 684**, this Court after taking a survey of various decisions has found that some of the tests laid down are (i) whether the employee has power to direct or oversee the work of the subordinates (ii) has the power to sanction/pass leave or recommend it (iii) whether the employee can examine the quality of the work and whether, such work is performed in satisfactory manner or not (iv) whether the employee has the power of assigning duties and distribution of work.

20. I have carefully gone through the impugned award and I do not find that it suffers from any infirmity, so as to require

interference. The petition is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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