IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1822 OF 2017

M/s. Carona Ltd.
(Old Name:M/s. Carona Sahu Co. Ltd.)
A company incorporated under the
Companies Act having its regd. Off.
at: New Udyog Mandir Compound,
Mogul Lane, Mahim,
Mumbai – 400 016. … Petitioner

Vs.

1. **Anand Manjunath Rao**
(alias B. Ananda)
An adult Indian inhabitant,
Having his address at:
Manjunatha Nilaya, At Post: Kandlur,
Taluka: Kundapura, Dist.: Udupi,
Karnataka State,

and another address at:
172/5744, Kannamwar Nagar,
Vikhroli (East), Mumbai – 400 083.

2. **The State of Maharashtra**
(through the Government Pleader
Bombay High Court, Mumbai) … Respondents

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Mr. Dinesh Kumar Seth i/b. Mr. Mehul Rathod for the Petitioner.
Mr. N. M. Ganguli a/w Ms. Karuna Yadav for Respondent No.1.
Mr. B. V. Samant, AGP for Respondent No.2-State.

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CORAM : S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : NOVEMBER 15, 2017.

ORAL JUDGMENT (PER S.C. DHARMADHIKARI, J.) :

1. When Writ Petition No.931 of 2013 was called out on the earlier occasion, attention of this Court was invited to the pendency of Writ Petition No.1822 of 2017 before the learned Single Judge. Hence, on 8th June, 2017, in Writ Petition No.931 of 2013, a Division Bench passed the following order:

> *“. The learned counsel for Respondent No.4 submits that recovery certificate of which the execution is sought in this Writ Petition has already been stayed by the learned Single Judge in Writ Petition No. 1822 of 2017. In the circumstances, we adjourn the matter enabling the Petitioner to file an appropriate application before the Hon'ble Chief Justice on administrative side for clubbing both the matters and to be listed before the appropriate Bench.”*

2. After this order, the Registry moved a submission for clubbing the Appellate Side Writ Petition No.1822 of 2017 alongwith Original Side Writ Petition No.931 of 2013 and obtained directions of the Hon'ble the Chief Justice. Thus, the Appellate Side Writ Petition No.1822 of 2017 was directed to be heard and tagged with Original Side Writ Petition No.931 of 2013.

3. It is common ground that in Writ Petition No.931 of 2013, the successful workman Anand Manjunath Rao had sought implementation and enforcement of two recovery certificates dated 13th January, 2012 and 23rd July, 2014. He sought a direction to the Collector, Bombay City to recover the amount directed to be paid by the Labour Court on 26th December, 2003 in Complaint (ULP) No. 115 of 1987 as arrears of Land Revenue. The complaint of Unfair Labour Practice was allowed and the Labour Court made an award directing payment of wages and other benefits to the complainant workman from the date of termination till 31st July, 2002, on which date he would have ordinarily retired from services on attaining the age of superannuation of 58 years.

4. It is also conceded that a Revision Application challenging the above order of the Labour Court was dismissed by the Industrial Court on 20th November, 2008. On dismissal of that Revision Application No. 173 of 2006 by the aforesaid order, the workmen expected that the recovery certificates would be enforced and executed and recovery would be effected in accordance with law. The inaction of the machinery, and

particularly under the Maharashtra Land Revenue Code, 1966, compelled the workman to move Writ Petition No.931 of 2013 seeking directions to the Collector.

5. When that Writ Petition was pending in this Court, it was informed that the employer M/s. Carona Limited has filed Writ Petition No.1822 of 2017 challenging the order of the Labour Court and that of the Industrial Court. That Petition was before a learned Single Judge of this Court. It was admitted and an interim order was passed. On request of the workman, the Registry drew up a submission and sought the aforesaid direction from the Hon'ble the Chief Justice for clubbing and which has been granted.

6. It is in these circumstances that Writ Petition No.1822 of 2017 has been placed before us.

7. We have, with the consent of both sides, heard this Writ Petition finally.

8. In this Writ Petition, the order of the Labour Court and that of the Industrial Court is challenged on several grounds.

9. To appreciate that challenge, few facts are required to be stated.

10. The respondent workman approached the Labour Court by pointing out that he was in the employment of the employer M/s. Carona Sahu Company Limited (for short, "the employer") as Clerk since 9th April, 1963. He was promoted and re-designated up to the post of District Manager. His services were terminated on 27th February, 1987. He, therefore, filed a complaint alleging unfair labour practice. That complaint was filed invoking Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, "MRTU & PULP Act"). The complainant in the complaint, copy of which is annexed to this paper book at pages 122 to 136, alleged that the employer is engaged in the business of manufacture and sale of footwear of various kinds and types and other allied businesses. It had a factory at Bombay and sales depots (shops) in Bombay and elsewhere throughout the country. The employer also gets its products manufactured through contractors. The sales

organization is divided into various regions and further sub-divided into districts in which the sales depots (shops) are situated. The employer employs about 5000 employees in its various establishments including the factory and 350 retail shops.

11. The complainant joined the services as Clerk in the general office of the employer at its head office. He was confirmed in the post of Clerk with effect from 16th October, 1963. He worked sincerely and diligently and by dint of his hard work and sincerity, he earned promotion to the higher posts besides increments. The increments were provided in the post held by the complainant. In or about 1977, he was selected to the post of Retail Controller after a written test and personal interview. He was appointed as Retail Controller with effect from 9th May, 1977. He says that at the time of appointment, he was required to execute an agreement and which sets out the terms and conditions of his appointment. The complainant workman says that the agreement also provided for the method of dealing with a situation when the employer alleged any misconduct. Since the clauses in that agreement are being relied upon by the employer, we would refer to them during

the course of noting down the submissions of the employer's Advocate.

12. It is stated that the agreement was executed and duly signed on 15th June, 1977.

13. Then, the material averment in the complaint is that as a Retail Controller and later as District Manager, the workman was required to visit various shops within a district displaying the material in the shop, check the stock of material therein, take an inventory of the same and submit a report to the Regional Manager and the Marketing Manager. The complainant workman alleged that this work was clerical, technical, skilled and manual. The workman was not required to do any supervisory, administrative and managerial work. He worked under the supervision and control of the Regional Manager and the Marketing Manager.

14. The complaint proceeds to state that the definition of the term “workman” as appearing in Section 2 Clause (s) of the Industrial Disputes Act, 1947 (for short, “ID Act”) is bodily

incorporated as a definition of the term “employee” appearing in the MRTU & PULP Act.

15. The workman alleges that his record was throughout clean and unblemished. His last drawn wages were Rs. 4,000/- approximately, inclusive of all allowances, benefits and perquisites etc. His last posting was in Bombay District.

16. On 27th February, 1987, the Chief Executive of the employer called the complainant workman and told him that the management has decided to terminate his services. To avoid any unpleasantness arising out of the termination, he should resign from the services. The complainant workman was shocked and surprised at this decision. He told the Chief Executive Officer that reasons for such termination should be supplied. The Chief Executive allegedly informed him that the management was not satisfied with his work and it was decided to terminate his services. No more details were provided. It is also alleged that even the Marketing Manager called upon the complainant workman to tender his resignation or face termination. It is

therefore alleged that after rendering blemish-less and meritorious service for all these years and even earning promotion, he could not have been dis-continued in this manner.

17. The complainant says that he was not allowed to attend office on 2nd March, 1987 and 3rd March, 1987. Two days prior to these days were holidays.

18. It is in these circumstances and by alleging that neither any notice of termination was served, nor compensation or other legal dues were offered and that no agreement, much less a unilateral power derived therefrom would enable the management to do away with his services.

19. These are, therefore, unfair labour practices falling under Clauses (a), (b), (d) and (f) of Item 1 of Schedule IV of the MRTU & PULP Act, 1971. The complainant incorporated the usual averments in his complaint and prayed that the employer be directed to reinstate him in service with continuity and full back wages so also other benefits, facilities under the contract of employment with effect from 27th February, 1987.

20. This complaint was filed on 22nd May, 1987. List of documents on which the complainant relied was also submitted.

21. On being served with a copy of this complaint, the employer filed a written statement. In the written statement, a preliminary objection was raised. The preliminary objection and in the very words of the employer runs as follows:

"The complainant was employed as District Manager by the employer. He is not a 'workman' within the meaning of Section 3 Clause (5) of the MRTU & PULP Act read with Section 2(s) of the Industrial Disputes Act, 1947. Hence, the Labour Court has no jurisdiction to entertain and try it. Incidentally, we must state that the complaint was filed in the 7th Labour Court at Bombay and was numbered as Complaint (ULP) No. 115 of 1987".

The employer elaborated this preliminary objection by contending that the complainant, at the time of his termination, was employed in the position of District Manager. As a District Manager, he was predominantly performing supervisory, managerial and administrative functions and was drawing wages exceeding Rs.1,600/- per month. Hence, he does not fall within the definition of the term "workman" as appearing in Section 2 Clause (s) of the ID Act and consequently, Section 3(5) of the MRTU & PULP Act. The employer relied on a job description and which, according to it, explains the functions, duties and responsibilities of District Manager. There were agreed terms. It is then alleged that the nature of his duties was predominantly supervisory, requiring exercise of direction and control over the working of various retail shops falling within the Bombay District, of which the complainant workman was responsible as "District Manager."

22. Then, the written statement contains a without prejudice case as far as merits are concerned.

23. Once again, while dealing with paragraph 3(a) of the complaint, and reiterating the preliminary objection, the company urged that it has a network of retail shops throughout the country and for administrative purposes the shops are divided into three regions, Southern, Northern and Central, including Western. Each

region has a Regional Manager. The Regional Manager is assisted by District Managers. Each region has about five to six districts and each district is headed by a District Manager. A District Manager controls over 15/20 shops falling in his district. A retail shop is headed by a Shop Manager who is assisted by Salesmen and helpers. The number of these employees depends on the size and turnover of the shops. The total number of employees employed by the company, including the personnel in retail shops is approximately 3900 and not 5000 as alleged by the complainant. Similarly, the total number of retail shops all over India is not 350 but 309. It is agreed that the employer is a public limited company registered under the Indian Companies Act, 1956. Then, the functions are highlighted and it is urged that it is false to suggest that the complainant was doing clerical, technical, skilled and manual work. He was carrying out supervisory duties. He was also entrusted with the administrative and managerial functions. The precise case and as set out by the employer in paragraph 10 of the written statement is that, as a District Manager, the complainant workman had the authority to effect transfers of Shop Managers, Salesmen, Helpers and also recommend promotions, fresh appointments, confirmation of shop employees falling in his District and sanction of leave etc. He had the authority of taking a decision to reduce the sale price of various footwear up to the value of Rs.300/- depending upon the condition of such footwear, workout the programme for Shop Managers, seek explanation when the working results fall short of the working programmes. He can test check the inventories, including cash in the shops falling in his district. This would establish, together with the relevant documents that the employer company sought to rely upon at the time of hearing, that the complainant was exercising supervision on Shop Managers and other shop staff employed in the shops falling in his district and that his duties were supervisory, administrative and managerial in nature. Therefore, commensurate with the salary drawn by him, he cannot be termed as a 'workman'.

24. It is on such pleadings of both sides that the Labour Court drew up the issues. We are not concerned with the interim proceedings in the Labour Court. What we have on record is a detailed judgment delivered. We have also the principal issue for

consideration and that is, whether the complainant is workman under the provisions of the MRTU & PULP Act, 1977. The Labour Court has returned a positive finding in favour of the workman on this issue.

25. That finding was returned by the Labour Court after appreciation and appraisal of the oral and documentary evidence on record. The Labour Court referred to the deposition of the workman (Exhibit U-14) and the deposition of the employer's witnesses, namely Ismail Rasulbhai (Exhibit C-19) and Raghavan (Exhibit C-21). The Labour Court also had before it the detailed oral arguments by both sides.

26. The Labour Court arrived at the conclusion that though the company/employer before it relied upon the agreement and the oral and documentary evidence, what emerges therefrom is that the duties of the workman were to visit retail shops for taking display of stocks in the window, to take full financial inventory, inventory of stock and submit report to the superior, the Regional Manager. The inventory report running into 100 pages to be

submitted personally, was to enable the calculation of stocks i.e. sale and stock and the value, namely, sale and stock figures. This report has to be submitted minimum three times in a year. He was also submitting alongwith the inventory report, the shop's staff working programme, stock transport report and requirement of shop's stock report to the Regional Manager.

27. The complainant, during the course of his deposition, was put searching questions in cross-examination by the employer's Advocate. However, the Labour Court came to the conclusion that an admission of the complainant workman in the cross-examination that he was looking after managerial and administrative functions of each shop under him is not conclusive. That has to be read together with the deposition of the witness Ismail Rasulbhai of the management, which shows that the complainant workman was not performing any supervisory, leave alone, managerial and administrative functions. He did not have the powers to make transfers. At best, he was suggesting the transfers. He was only recommending leave for the employees. He was not empowered to grant leave. He did not, thus, have control

over his subordinates. Once the evidence denotes that there is no power of selection of the servant, no power to determine wages or to increase or decrease the same, no power to control the method of doing the work of Shop Managers, Salesmen, Peons etc, then, although termed as District Manager, the workman was performing work purely of clerical nature.

28. As far as the documentary evidence, though the complainant workman admitted his signature on the documents filed at Exhibit "C-8", but a closer scrutiny of these documents, and particularly at serial nos. 1 to 4, 13, 17, 21, 27 and 28, shows that they are transfer orders. But these orders are not under the authority, power and control of the workman. These orders are issued by the management only on some suggestions. The final authority rests with the management. The Control Reports at serial nos. 5, 11 and 15, though written by the complainant workman, these are nothing but submissions to the Manager. There is a note put up for the Manager to determine the urgent requirement in relation to the shop. This would also denote that the complainant was doing clerical work.

29. It is in these circumstances that the learned Judge of the Labour Court, relying upon the contents of the document (Exhibit “C-8”) (checking of stock and submission of report to higher level officials) held that the complainant has proved that he is a workman. The management has not been able to establish and prove to the contrary. Further, the decision of the Hon'ble Supreme Court, and heavily relied upon equally before us, in the case of ***S.K. Maini Vs. M/s. Carona Sahu Company Limited and Others***, reported in ***(1994) 3 SCC 510*** is distinguishable on facts.

30. On issue no.2, there was absolutely no dispute and once the termination was without complying with Section 25F of the ID Act (no notice, no inquiry, no compensation), then, it is unlawful and amounts to unfair labour practice within the meaning of afore-referred Items of the MRTU & PULP Act, 1971, particularly its Schedule IV.

31. On 26th December, 2003, the complaint was thus allowed with the operative order and directions noted above.

32. Aggrieved and dissatisfied with this order, the employer preferred a Revision Application (ULP) No.173 of 2006.

33. The Industrial Court, Maharashtra, at Mumbai, heard both sides on the Revision Application, perused the record and by assigning reasons, agreed with the Labour Court. The Revision Application was dismissed on 20th November,2008.

34. Then, what we find are some interesting developments. Till 2nd February, 2017, the employer never contemplated challenging these orders by filing a Writ Petition under Articles 226 and 227 of the Constitution of India.

35. The Writ Petition was filed challenging these orders after the employer became aware that there is a recovery certificate issued by the VIIIth Labour Court in Application (IDA) No.415 of 2004 involving S.33C(2) of the ID Act. The Application was allowed on 26th July, 2010 (Annexure "C" of Writ Petition No.1822 of 2017). The recovery certificate is sought to be enforced and executed.

36. In paragraph 25 of the memorandum of the Writ Petition, the company alleges as under:

> *"25. The Petitioner humbly submits that there has been a considerable delay in filing the present Writ Petition as during the time that the Impugned Revision Order was passed, the Petitioner had been declared a Sick Industrial Undertaking under the SICA Act and was registered with the Hon'ble BIFR under Registration No.74/1998. The Petitioner states that it was putting all its resources into working for the restructuring of itself until the time that its Appeal before the Hon'ble AAIFR was finally rejected on 24.09.2015. The Petitioner further states that besides the above, it was evicted from its previous office and consequently its operations were disrupted and moreover, many of its records were lost. The Petitioner states that due to the above reasons, it could not file the present Writ Petition expeditiously. The Petitioner states that however, recently the Respondent filed a Writ Petition before this Hon'ble Court whereby at the ad-interim stage, this Hon'ble Court was pleased to direct the Collector to attach the assets of the Petitioner. The Petitioner states that it is struggling to survive and the said ad-interim Order has brought it on the verge of being closed. Therefore, the Petitioner had no other option but to move this Hon'ble Court and highlight the fraud played by the Respondent in obtaining the Impugned Orders by falsely portraying himself as a "Workman" despite, on the face of it, being of Managerial Cadre. The Petitioner states that the present matter is a fit and proper matter wherein this Hon'ble Court is required to exercise its inherent powers u/s. 151 r/w. 141 of the CPC and quash the said illegal Impugned Orders exercising its Supervisory powers u/A.227 of the Constitution of India. In view of the above circumstances, the Petitioner profusely apologizes to this Hon'ble Court for approaching it now and seeks its kind indulgence to intervene in the present matter and take a liberal approach especially in view of the fraud played upon the judicial system by the present Respondent."*

37. It is therefore claimed that the petitioner can approach this Court in its writ jurisdiction and seek quashing and setting aside of the orders of the Courts below.

38. The other averment made in paragraph 28 of the Petition is that there is a gross fraud played upon the judicial system by the respondent and the respondent, in a *malafide* manner, obtained some further orders, in the sense, seeking enforcement and execution of the recovery certificate.

39. On such a Petition being filed and mentioned before the learned Single Judge, the following order came to be passed on 8th March, 2017:

> *"1. Heard the learned counsel for the parties.*
>
> *2 By this petition under Article 227 of the Constitution of India, the Petitioner challenges the order dated 26.12.2003 passed by 8th Labour Court, Mumbai and order dated 20.11.2008 passed by Industrial Court, Maharashtra at Mumbai in Revision Application (ULP) No.173 of 2006.*
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> *3 The learned counsel for the petitioner submits that both the Courts below erred in coming to the conclusion that the respondent on the date of filing of complaint was workman as defined under section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the said Act"). He submits that initially the respondent was appointed as a Clerk on 19.10.1963. Thereafter he was promoted as Retail Controller on 18.04.1977 and thereafter, on 01.05.1982 as District Manager.*
>
> *4 The learned counsel for the petitioner submits that though they placed on record copy of agreement on 15.06.1977 showing the dues of respondent, both the courts failed to consider the same. He submits that bare*

reading of the agreement shows that the respondent was working in Managerial capacity with them. Hence, complaint filed by him itself was not maintainable.

5 On the other hand, the learned counsel for the respondent vehemently opposed the present Writ Petition. He submits that though the order passed by Labour Court on 26.12.2003, petitioner failed and neglected to comply the same. He submits that even they obtained certificate for recovery of their wages as a land revenue but the concerned authority collector failed and neglected to comply with the same. Hence, the respondent preferred Writ Petition No.931 of 2013 on the original side before this court. He submits that Division Bench of this court by order dated 3.3.2017 directed Tahsildar to take appropriate steps for recovery of the said amount. He submits that as per the said Recovery Certificate as on today more than 30.38 lacs is due and payable by the petitioner.

6 It is to be noted that the agreement dated 15.06.1977 prima facie, shows that on the date of filing of complaint, respondent was not covered by section 2(s) of the said Act. Apart from that, both the courts failed to consider the agreement dated 15.06.1977. Bare reading of the said agreement shows that the respondent on the date of filing of complaint was working in a managerial capacity. Considering these facts, I am satisfied that the petitioner has made out a case for admission of the present Writ Petition and interim order.

7 It is to be noted that as on today, the petitioner's property is already attached by the Tahsildar for recovery of their dues. Apart from that, as per the contention of the learned counsel for the respondent, a sum of Rs.30,30,000/- is due and payable by the petitioners as on today. Considering these facts, following order is passed:

a) Admit.

b) Operation and implementation of the impugned order dated 26.12.2003 passed by 8th Labour

Court, Mumbai, order dated 20.11.2008 passed by Industrial Court, Maharashtra at Mumbai in Revision Application (ULP) No.173 of 2006 and recovery certificates dated 13.1.2012 in Application (IDA) No.415 of 2004 and 23.7.2014 in Misc. Application PGA/C.A./R/1 of 2014 is stayed till the hearing and final disposal of the present Writ Petition on condition that petitioner to deposit sum of Rs.10,00,000/- in the Registry of this court within 6 weeks from today, failing which interim relief shall stand vacated without referring back to the court.

c) Attachment levied by the Tahsildar on petitioner's property to continue till the hearing and final disposal of Writ Petition.

d) If amount is not deposited within stipulated time as stated hereinabove, respondent is entitled to execute the Recovery Certificate according to law.

e) If amount is deposited within stipulated time as stated hereinabove, Registry is directed to invest the said amount in fixed deposit of any nationalised bank initially for a period of one year and same be continued till further orders.

f) Liberty granted to the respondent if they so desire to prefer appropriate application for withdrawal of the said amount and that application be decided on its own merits"

40. In the light of this Writ Petition and the interim order noted above, we thought it fit that we should first dispose of this Writ Petition by a final judgment and order and thereafter, we can take up the workman's Petition seeking enforcement and execution of the orders passed by the Labour Court and the Industrial Court.

41. Mr. Seth appearing for the petitioner submits that the impugned orders are vitiated by an error of law apparent on the face of record. He would submit that the findings recorded by the Courts below are perverse.

42. In elaborating these two submissions, Mr. Seth would invite our attention to the agreement, copy of which is on record of the Trial Court and equally, is an annexure to the Writ Petition. Mr. Seth would submit that the initial appointment of the workman is as Clerk. Thereafter, on 18th April, 1977, he was promoted as Retail Controller with effect from 1st May, 1977. There were agreed terms and conditions even with regard to this promoted post. Then, it is submitted that on 30th November, 1977, the workman was confirmed in the post of Retail Controller. On 15th June, 1977, there was an agreement which was executed by the employer and the employee recording that the employee has been promoted and is serving as Retail Controller of Madras Circle with Head Quarters at Madras or in such other circles as the company from time to time may direct. The learned counsel places reliance

on clause (4) of this agreement to submit that this would indicate that the employee enjoyed very wide powers. He had power to allow or not to allow any credit to be given by the Shop Managers to anyone in respect of sales from the shops/retail agencies under the control/supervision of the employee and he had taken upon himself this responsibility or liability to make good the amount of credit when called upon.

43. Then, it is urged that there are other clauses and particularly enabling the employee to visit and control each shop in his Circle. Our attention has been invited to clauses (8) and (10) in that behalf to submit that if this agreement is read as a whole in the backdrop of the pay-scale of the employee, it would be evident that he cannot be termed as a workman.

44. Our attention has also been invited to the definition of the term “workman” as appearing in Section 2 Clause (s) of the ID Act, 1947. It is in these circumstances that the counsel would submit that without adverting to the agreement and appreciating its true nature, both the Courts below have granted the relief.

That relief could not have been granted once the complaint itself was not maintainable. Mr. Seth would submit that the Labour Court has no jurisdiction to entertain and try the complaint under the MRTU & PULP Act once the definition of the term "workman" as appearing in the ID Act stands incorporated in Section 3 Clause (5) of the MRTU & PULP Act. That Section defines the term "employee". Thus, according to him, the terms "employee" and "workman" would convey the same meaning in law.

45. Mr. Seth has invited our attention to the deposition of the witnesses and particularly the admissions in the cross-examination of the employee/workman to submit that these admissions clinch the issue. According to him, there is no scope then for the Courts below to hold otherwise.

46. Thus, the principal attack of the employer is on the finding on the point of jurisdiction. It is submitted that if this finding is *ex facie* erroneous and illegal, then it should not be sustained. Even at this stage, this Court can consider the matter and from a purely legal angle. In the backdrop of these materials on record, it is

submitted that the employer has discharged the burden cast upon it to establish and prove that the employee is not a workman. He enjoys the same powers as have been found by the Supreme Court in the case of ***S.K. Maini*** (supra). Therefore, the argument is that this Court should reverse these concurrent findings and proceed to dismiss the complaint.

47. Reliance is placed upon the judgment of the Hon'ble Supreme Court in the case of ***S.K. Maini*** (supra). Then, our attention has also been invited to the order of the Trial Court where the Trial Court, according to Mr. Seth, though referring to the admissions, has completely misread them. Once the record indicates that the employer had relied upon several documents and which would indicate that the employee enjoyed the powers which specifically exclude a person from the category of workman, then all the more, this Court should quash and set aside the impugned orders and allow the Petition.

48. Mr. N. M. Ganguli, learned Advocate appearing for the employee, would submit that there is no merit in the Writ

Petition. The Writ Petition is a pure afterthought. Once this Court is seized of Writ Petition No. 931 of 2013 and that Writ Petition is on the board of this Court from 21st April, 2014, on which date notice was issued to all the respondents, all that was informed was that a Reference has been made to the Board for Industrial and Financial Reconstruction (BIFR) under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). Those proceedings are pending. Therefore, this Court was persuaded to grant an adjournment but this Court restrained the employer from disposing of its properties. Thereafter, the employer went on seeking time and to file affidavits. This was clear attempt to defeat the execution and enforcement of the recovery certificate. On 19th October, 2016, this Court recorded that despite two recovery certificates issued by the Assistant Commissioner of Labour, Mumbai, under Section 33-C(1) of the ID Act, 1947, the amount is not paid to the employee. All that the employer argued was that it is a sick company and there were proceedings before the BIFR. It was conceded that they were ultimately rejected. An Appeal was preferred, but even that could not succeed and eventually, the matter was carried to the High Court at Delhi. This Court directed respondent no.4, namely the employer, to file an affidavit.

49. Then, on 4th January, 2017, Mr. Ganguli would submit that, there was an order passed by this Court and recording all the developments, particularly the attempts of the employer to deal with or dispose of the properties. It is in these circumstances, this Court passed a detailed order and followed it up on 9th February, 2017 and 3rd March, 2017.

50. It is during pendency of such a comprehensive Petition that this Court was informed of filing of a Writ Petition by the employer belatedly to challenge the order of the Labour Court and that of the Industrial Court. Mr. Ganguli would therefore submit that the Writ Petition itself is instituted *malafide* and to get over the binding recovery certificate and all steps in furtherance thereof.

51. Apart from highlighting the conduct of the employer, Mr. Ganguli would submit that there is no merit in the Writ Petition. This is an attempt to request this Court to re-appreciate and re-appraise the factual materials based on which the concurrent

findings are recorded. Mr. Ganguli would submit that the true test is not the nomenclature attached to a post. The true and decisive, so also conclusive test is the nature of duties assigned and whether there are materials to indicate that such duties have been actually performed. Thus, Mr. Ganguli would submit that the definition of the term "workman" in Section 2(s) of the ID Act has to be considered bearing in mind the subject or context and unless there is anything repugnant in the subject or context, the workman means a person 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 crucial according to Mr. Ganguli, in Section 2(s) is that for the purposes of any proceeding under the ID Act in relation to the 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 the dispute. The exclusionary portion would exclude such person who, and for our purpose, is employed mainly in a managerial or administrative capacity, or who has been employed in a supervisory capacity and draws wages 10,000/- now (prior to the amendment it was a sum of Rs.1600/-) per month 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. Mr. Ganguli would submit that therefore, the true test is that even if an employer states that he has employed a person in a supervisory capacity and he draws wages exceeding the sum specified, but whether he draws the salary 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. Therefore, the findings will have to be rendered in the facts and circumstances of each case that the nature of duties attached to the office or by the powers vesting in the person, he has performed functions mainly of a managerial nature. Thus, either a person is employed in a supervisory capacity and he draws the wages specified, or exercises 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.

52. Mr. Ganguli therefore emphasizes that there are findings of fact which have been recorded by the Courts below. These findings have been recorded after the whole evidence has been appreciated and appraised. It is in the light of these very principles which have been referred by him above that the findings are recorded. Thus, they are consistent with the materials placed on record and equally the legal provisions. Hence, he would submit that there is no merit in this Petition. Once these findings are not perverse or vitiated by any error of law apparent on the face of record, no interference is permissible in writ jurisdiction. Mr. Ganguli submits that by merely relying on the agreement between the employer and the employee and reduced into writing, the employer cannot succeed. He must demonstrate and prove that the employee indeed performed the functions which are outlined in Section 2 Clause (s) or acted in supervisory capacity. Once the findings of fact are otherwise, then reliance on this agreement is of no avail. Looked at from any angle, he submits that the Writ Petition be dismissed.

53. For properly appreciating these contentions, first we would make a reference to the definition of the term "workman" in Section 2 Clause (s) of the ID Act.

54. In the MRTU & PULP Act, the word "employee" is defined in Section 3 Clause (5) as under :

> *"3(5) "employee", in relation to an industry to which the Bombay Act for the time being applies, means an employee as defined in clause (13) of section 3 of the Bombay Act, and in any other case, means a workman as defined in clause (s) of Section 2 of the Central Act, and a sales promotion employee as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976."*

55. Thus, in relation to an industry to which the Bombay Industrial Relations Act, 1946 applies, the definition would be as available or set out in Clause (13) of Section 3 of that Act and in any other case, means a workman as defined in Clause (s) of Section 2 of the Central Act. The term "Central Act" is defined in Section 3(2) of the MRTU & PULP Act to mean the "Industrial Disputes Act, 1947.

56. Hence, there is no dispute that we would have to look to this definition in the Central Act for the purpose of the present case.

57. Since heavy reliance is placed on the decision in the case of ***S. K. Maini*** (supra), we would refer to the said judgment in somewhat details.

58. The said Maini approached the Hon'ble Supreme Court of India challenging a judgment and order dated 27th August, 1992 of the Division Bench of the Punjab and Haryana High Court dismissing in limine the Letters Patent Appeal No. 935 of 1992. That Letters Patent Appeal was preferred against a judgment dated 11th August, 1992 of the learned Single Judge of that High Court in Civil Writ Petition No. 4410 of 1986. The employer M/s. Carona Sahu had approached the Punjab and Haryana High Court by filing Civil Writ Petition to challenge the award of the Labour Court, Jalandhar dated 21st April, 1986 in Reference No. 389 of 1981. By that award M/s. Carona Sahu was directed to reinstate Maini with full back wages in its service. It was that award which was set aside by the Punjab and Haryana High Court and hence, the aggrieved Maini approached to the Supreme Court. His case was, he was working as the Shop Manager/In-charge of M/s.

Carona Sahu. On an allegation of misconduct, a domestic inquiry was instituted and by order dated March 12, 1981, the services of Mr. Maini were terminated. At his instance, the Government of Punjab referred the dispute for adjudication to the Labour Court, Jalandhar. Before that Labour Court, a preliminary objection was raised by M/s. Carona Sahu to its maintainability urging that Mr. Maini was not a workman within the definition of this term as appearing in Section 2(s) of the ID Act. He was a Shop Manager/In-charge of the shop. He had been discharging mainly managerial and administrative functions and had been supervising the work of the other employees subordinate to him for running the shop and even if he was a Supervisor at the relevant time, he was drawing salary of more than Rs.500/- per month. The Labour Court came to the conclusion that although Mr. Maini was Shop Manager/In-charge, his duties were mainly clerical. He had no independent authority to appoint or discharge the employees and to charge-sheet them. His functions could not be held to be mainly supervisory or managerial. Therefore, Mr. Maini was a workman. Before the Punjab and Haryana High Court, the argument was that the learned Judge of the Labour Court misdirected himself in law and has completely overlooked the materials placed before him.

59. The Punjab and Haryana High Court perused the whole record and arrived at the above conclusion.

60. Pertinently, when the matter reached the Supreme Court, in paragraph 9 of the Judgment of the Supreme Court of India, it is held as under:

> *"9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that whether or not an employee is a workman under Section 2(s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organisations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it. In this connection, reference may be made to the decision of this Court in Burmah Shell Oil Storage and*

> *Distribution Co. of India Ltd. v. Burmah Shell Management Staff Assn. In All India Reserve Bank Employees' Assn. v. Reserve Bank of India it has been held by this Court that the word 'supervise' and its derivatives are not words of precise import and must often be construed in the light of context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of the manual work of others. It has been rightly contended by both the learned counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the employee concerned and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of 'workman' as defined in Section 2(s) of the Industrial Disputes Act."*

61. Thus, the Hon'ble Supreme Court holds that this question, and particularly whether an employee is a workman or not, will have to be decided with reference to the principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on recored and it is not possible to lay down any straight jacket formula which can decide the dispute. Thus, the real nature of the

duties and functions being performed would be a matter differing from case to case. It is in these circumstances that we are of the opinion that as far as ***Maini's*** case was concerned, there were materials. Those materials are referred in paragraph 11 of the judgment. Thus, the Hon'ble Supreme Court concludes that if the principal function is of supervisory nature, the concerned employee will not be a workman only if he draws a particular quantum of salary at the relevant time as indicated in the Section. In that case, Maini was Manager/In-charge of the shop. He was made responsible and liable to make good such amount of credit where such sale on the credit had been made by him or by any other member of the staff in employment under him with or without his knowledge. Under the terms and conditions of service, he was asked to take charge of the shop to which his service was transferred. He was thus responsible for the loss suffered by the company due to deterioration of the quality of the stock or any part thereof and loss of any other articles lying in the shop. The argument that he himself was required to do some works of clerical nature would not be relevant for, in ***Maini's*** case, the Court found from the record that by and large Maini being In-charge and Manager of the shop, had been principally discharging the administrative and managerial work. It is thus, not the designation or the nomenclature but the nature of the duties which are required to be performed and found to have been performed. The Supreme Court found that within the authority indicated, Mr. Maini was authorized to take decisions in the matter of temporary appointments. He could take all reasonable steps incidental to the proper running of the shop. Precisely for this reason, Mr. Maini signed the statutory forms as an employer. The Supreme Court cautioned that an employee discharging managerial duties and functions may not, as a matter of course, be invested with the power of appointment and discharge of other employees. It is not unlikely that in big set up such power is not invested to a local manager but such power is given to some superior officer also in the management cadre at divisional or regional level. Mr. Seth has emphasized this aspect before us and to submit that in the present case as well, the employee before us was performing such functions and on par with Maini.

62. It is to ascertain the correctness of this submission that we have perused the Writ Petition No. 1822 of 2017 and all annexures thereto. The learned Judge to whom the complaint was made over was aware of all the decisions and the tests. The argument on Issue no. (1) was that although the employee is designated as District Manager, he was not doing any managerial or administrative work. No supervisory duties were assigned to him. The employee in his examination-in-chief stated that the work which was performed was to visit retail shops for checking display of stocks in the shop window. Though styled as District Manager, all that he was doing was taking physical inventory and submitting report of the stock to the Supervisor and Manager. He was doing the calculation of stock. A suggestion was given to the employee in his cross-examination that it was his duty to go around all the shops, inspect them and he was suggesting transfers of the workmen under him. This suggestion was expressly denied. Equally, it was reiterated that the 53 documents filed at the list Exhibit "C(a)" may bear his signature but he has never sent any letter. These letters were prepared after discussion with the Regional Manager. The workman expressly denied the

suggestion that he was entitled to reduce the price of damaged shoes. He has also denied the suggestion that he was playing any crucial or vital role, much less a predominant one. He may recommend certain persons for transfer but he had never been vested with any power to transfer them or to take any decision which would bind the employer.

63. The employer however relied upon another statement in the cross-examination of the employee where he stated that he was supervising the work of the Shop Manager working under him and that he was looking after the management and administration of each shop.

64. Against this, the employee invited attention of the Labour Court to the admission in the cross-examination of the employer's witness Ismail Rasulbhai. He expressly admitted that the employee had come to the shop to check the stock. He had done the work of checking the stock with the help of others. Though the employee was suggesting the names for transfer, it was for the management to accept the suggestions. It was for the management to sanction the leave of the employees or not.

65. Thus, the admission was at best the employee had some recommendatory power. He could not sanction any leave, much less transfer any employee. He could make suggestion or recommendation but that was not binding on the management. Eventually, it was the employer's prerogative.

66. Based on this material, the Trial Court considered the argument of the employer that the employee was initially appointed as a Clerk, then, promoted as a Retail Controller and the post was re-designated as District Manager. He got salary of Rs.4,000/-. Hence, he does not fall within the definition of 'workman' under Section 2(s) of the ID Act.

67. The argument was that if the duty list, the agreement and its clauses are perused, it would be evident that there are numerous documents which would indicate that there are signatures of the workman appearing thereon. There is also a report which is signed by him. There are also certain remarks which have been entered. Once there is a signature appended as a District Manager, that would indicate that the powers of District Manager were vesting with this workman. It is in these circumstances that

reliance was placed on certain documents and the judgment in the case of ***Maini*** (supra).

68. The Trial Court was not oblivious of this definition or the requirements that are set out in law so as to term a particular person as workman or not. The entire documentary and oral evidence has been appreciated by the Trial Court. The Trial Court came to the conclusion that the agreement signed by the parties would not be conclusive. The conclusive and decisive test would be the one laid down in several judgments of the Supreme Court. It is clear that for deciding whether a person is employed in a supervisory capacity or for clerical duties, the Court would find out from the materials on record whether he is mainly doing supervisory work but incidentally or for some time is assigned clerical duties. Then, he would have to be held as being employed in a supervisory capacity. Conversely, if the main work done is of clerical nature, the mere fact that some supervisory duties were also carried out incidentally will not make him a person employed in supervisory capacity.

69. It is in these circumstances and when the clear case of the employer in the written statement and particularly para 10 thereof was sought to be proved, that the Trial Court relied on the crucial admissions in the evidence of Ismail Rasulbhai. He has very clearly admitted and as above. The burden on the management was not discharged at all. No power to supervise, no power to sanction leave or transfer, no power to direct performance of duties, no deduction from price or sanction credit are all matters duly considered and appreciation of materials in a overall manner.

70. Then, the complainant-employee's version was also adverted to and the Trial Court came to the conclusion that though several suggestions were given to him, the management could not, beyond giving such suggestions, produce any material which would completely destroy the admission of its own witness. Thus, suggestions being given to the employee will not establish and prove a positive case which the management was required to prove. It is in these circumstances that the Labour Court found from the record that the employee had no right to take any disciplinary action. Though designated as District Manager, he

was doing work of clerical nature. He only came to the shop to check the stock. He had no powers, much less he had not exercised any powers which would make him a District Manager consistent with the clauses in the agreement relied upon. It is in these circumstances that throughout he merely made certain suggestions/recommendations, forwarded reports to the management. All his reports of stock checking etc. were verified and scrutinized. In these circumstances, it was held that the employee cannot be said to be excluded from the definition.

71. We do not find that the reasons assigned by the Trial Court on Issue no. (2) are vitiated by any errors of law apparent on the face of the record or perversity.

72. The true test is set out and referred in the case of ***Maini*** itself. Unlike Maini, this employee was not empowered to replace or suspend any employee, transfer him, far from being in-charge of the shop. Though designated as Retail Controller/District Manager, his duties were not of managerial nature. The employee was performing purely routine clerical duties.

73. Hence, we find that the judgment in ***Maini's*** case is of no assistance to the employer. We do not think that Mr. Seth was right in urging that the Trial Court, as also the Revisional Court have misdirected themselves in law and their findings and conclusions are perverse.

74. As far as merits are concerned, there was absolutely no dispute that his services were done away without holding any inquiry and giving no compensation demanded and required to be paid in law. To our mind, therefore, this is not a case where we can re-appreciate and re-appraise the same factual findings and arrive at a different conclusion.

75. All the more, when a Revision Petition was filed by the employer challenging this judgment and award of the Labour Court. In the Revisional order as well, the Industrial Court has referred to the case set up by both sides and the issues arising therefrom and concluded by assigning cogent and satisfactory reasons that the Labour Court has considered the matter by applying the correct test and from the proper perspective. The

employee was performing clerical and technical duties. The duties were not in supervisory capacity or managerial or administrative in nature. In paragraphs 7 and 8 of the order of the Revisional Court, it has been held that there is no patent error as the Labour Court had applied the correct test. The Industrial Court could not have exercised revisional powers conferred by Section 44 of the MRTU & PULP Act to overturn or reverse such judgment.

76. We also agree that in our limited jurisdiction, the same factual materials cannot be re-appraised or re-appreciated as if we are an appellate Court. We are not vested with such powers, and therefore, we are of the opinion that the findings of fact are binding on the employer.

77. We find, equally, merit in the argument of Mr. Ganguli that the Petition is a clear afterthought. Mr. Ganguli is right in inviting our attention to the order of the 8th Labour Court, Mumbai, in Application (IDA) No. 415 of 2004. A copy of this order is annexed at page 87 of the paper book in Writ Petition No. 1822 of 2017.

78. That was an Application filed for recovery. Section 33-C(2) of the ID Act was invoked by the employee because the order of the Labour Court, as confirmed by the Industrial Court, was not complied with. A recovery certificate was sought and at that time, the amount recoverable was demanded as Rs.20,59,545/-.

79. Pertinently, in such proceeding, the employer filed a written statement contending that the Application is not maintainable. There is no proper adjudication. The workman was not entitled to Dearness Allowance in terms of the Circular dated 26th June, 1983. It was denied that he is entitled to the sum of Rs.20,59,545/-. All that was argued was that there is a Reference pending under Section 22 and hence, under Section 22(1) of the SICA, the Labour Court cannot proceed. In fact, the company was not to become viable in future and the BIFR recommended its winding up. The AAIFR was approached and that time it was stated that the Application before the Labour Court should not proceed.

80. The Labour Court, on these pleadings, framed the necessary issues. One of the issue was, whether the Application is not maintainable in view of the bar of Section 22(1) of SICA. After adverting to the legal provisions and the judgments in the field, the Court held that there is no bar and particularly in Section 22(1) of the SICA. Pertinently, in these proceedings as well, the employer did not assert its right to challenge the order of the Labour Court and the Industrial Court. That was staring at him at least from the year 2003 and later-on from 2008. Even after this order dated 26th July, 2010, no steps were taken to file a Writ Petition. It is only when the employee brought to the notice of this Court the inaction of the Collector and the State Revenue machinery in assisting him to recover the amount under the recovery certificate that it dawned on the employer that it must institute a Writ Petition. That is how, purely to stall the recovery, the instant Writ Petition was filed after more than fourteen years of the award of the Labour Court and good nine years from the order of the Industrial Court in Revision. Thus, this is a clear afterthought. The attempt is also lacking in *bonafides*.

81. This is one more ground which enables us not to interfere in writ jurisdiction.

82. As a result of the above discussion, the Writ Petition fails. Rule is discharged, but there will be no order as to costs.

83. At this stage, Mr. Seth submits that this Court had admitted this Writ Petition and it was pending on its file at least from 3rd February, 2017. On 10th February, 2017 and 8th March, 2017, an interim order was made and particularly on terms.

84. Our attention is invited to paragraph no. 7 of the order passed by the learned Single Judge on this Writ Petition on 8th March, 2017. The paragraph no.7 reads thus:

> *"7 It is to be noted that as on today, the petitioner's property is already attached by the Tahsildar for recovery of their dues. Apart from that, as per the contention of the learned counsel for the respondent, a sum of Rs.30,30,000/- is due and payable by the petitioners as on today. Considering these facts, following order is passed:*
>
> *a) Admit.*
>
> *b) Operation and implementation of the impugned order dated 26.12.2003 passed by 8th Labour Court, Mumbai, order dated 20.11.2008 passed by Industrial Court,*

Maharashtra at Mumbai in Revision Application (ULP) No.173 of 2006 and recovery certificates dated 13.1.2012 in Application (IDA) No.415 of 2004 and 23.7.2014 in Misc. Application PGA/C.A./R/1 of 2014 is stayed till the hearing and final disposal of the present Writ Petition on condition that petitioner to deposit sum of Rs.10,00,000/- in the Registry of this court within 6 weeks from today, failing which interim relief shall stand vacated without referring back to the court.

c) Attachment levied by the Tahsildar on petitioner's property to continue till the hearing and final disposal of Writ Petition.

d) If amount is not deposited within stipulated time as stated hereinabove, respondent is entitled to execute the Recovery Certificate according to law.

e) If amount is deposited within stipulated time as stated hereinabove, Registry is directed to invest the said amount in fixed deposit of any nationalised bank initially for a period of one year and same be continued till further orders.

f) Liberty granted to the respondent if they so desire to prefer appropriate application for withdrawal of the said amount and that application be decided on its own merits"

85. Mr. Ganguli would submit that once we have dismissed the Petition and confirmed the concurrent findings of fact, they are not vitiated in law, then, there is no warrant to continue this interim order purely to enable the employer to delay the matters.

86. We see much substance in the contentions of Mr. Ganguli. The employer has not come forward to pay the sum crystallized under the recovery certificates in full. Even today, Mr. Seth has no instructions to make any statement that the employer would deposit the balance amount under the recovery certificates in this Court or pay the same to the employee.

87. In the circumstances, the request for continuing this interim order is refused.

(SMT. BHARATI H. DANGRE, J.) **(S. C. DHARMADHIKARI, J.)**