

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO.804 OF 2010**

Shri Damodar Mangueshkar

Represented by,

Cidade de Goa Hotel Employees Union,

Vaiguinim Beach,

Dona Paula – Goa.

...Petitioner

Versus

1. M/s Cidade de Goa,

Vainguinim Beach,

Dona Paula, Goa.

2. M/s Fomento Resorts Pvt. Ltd.,

Vainguinim Beach,

Dona Paula, Goa.

3. Presiding Officer,

Labour Court-II, Govt. of Goa,

Panaji-Goa.

... Respondents

Mr. Shivraj Gaonkar, Advocate for the Petitioner.

**Coram: M. S. SONAK, J**

**Reserved on: 4<sup>th</sup> February 2021**

**Pronounced on: 5<sup>th</sup> February 2021**

**JUDGMENT**

Heard Mr. Shivraj Gaonkar for the petitioner. The respondents though served, neither appeared through any representative nor any Advocate. Since the petition concerns the dues payable to a workman and has been pending since the year 2010, it is not possible to adjourn the matter any further.

2. The challenge in this petition is to the award dated 26.05.2010 made by the Labour Court-II, Government of Goa at Panaji in Case No. Ref. IT/92/07 holding that the petitioner herein was not a workman as defined in section 2(s) of the Industrial Disputes Act, 1947 (said Act), and therefore, the reference was not maintainable.

3. Mr. Gaonkar, learned counsel for the petitioner at the outset pointed out that the Labour Court was not justified in deciding only the preliminary objection raised on behalf of the respondents (employer). He submits that the Labour Court in the matter of this nature, was duty-bound to decide all the issues which arose in the matter.

4. Mr. Gaonkar submits that in any case, the impugned Judgment and Order is vitiated by perversity and contains errors apparent on the face of the record. He submits that mere nomenclature as “*accounts supervisor*” can never be conclusive in determining whether the petitioner was indeed a workman or not. He submits that detailed pleadings as also evidence about the nature of duties discharged by the petitioner have been completely ignored by the Labour Court. He points out that even the admissions in the evidence of Zarine Lobo, Human Resources Executive of the employer have been ignored. He submits that there is overwhelming evidence on record that establishes that the petitioner was indeed a workman and all such evidence has been ignored by the Labour Court. He relies on *Food Corporation of India Workers' Union vs Food Corporation of India and another*<sup>1</sup>, *The*

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<sup>1</sup> (1996) 9 SCC 439

*Workmen and others vs M/s Hindustan Lever Ltd.*<sup>2</sup>, *Harjinder Singh vs Punjab State Warehousing Corporation*<sup>3</sup>, *Ved Prakash Gupta vs M/s Delton Cable India (P) Ltd.*<sup>4</sup>, *Shankar Chakravarti vs Britannia Biscuit Co. Ltd. and another*<sup>5</sup>, *Chandrashekhar Chintaman Vaidya vs National Organic Chemical Industries Ltd., Akola*<sup>6</sup>, *Shaukat Adam Malim vs Kokan Mercantile Co-operative Bank, Ltd. and others*<sup>7</sup> in support of his submissions.

5. Since the respondents were not represented, with the assistance of Mr. Gaonkar, I have gone through the entire record as well as the impugned Judgment and Award. The contentions raised on behalf of the employer before the Labour Court are taken as the contentions now raised before me on behalf of the employer.

6. Normally, in matters of this nature, the Labour Court, should endeavor to dispose of all the issues which arise before it rather than to decide the matter based only on the preliminary objection raised on behalf of the employer. Particularly in this matter, the Labour Court, ought to have adopted this approach because the entire claim of the petitioner was for an amount of ₹40,000/- or thereabouts, which the petitioner had claimed was unauthorizedly deducted from the salary and other emoluments payable to him. In fact, there were admissions in the

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<sup>2</sup> (1984) 1 SCC 728

<sup>3</sup> (2010) 3 SCC 192

<sup>4</sup> (1984) 2 SCC 569

<sup>5</sup> (1979) 3 SCC 371

<sup>6</sup> 2010 3 Mah L.J. 434

<sup>7</sup> 2002 (4) L.L.N. 798

evidence of Zarine Lobo that no enquiry was ever conducted against the petitioner before proceeding to deduct this amount from the salary and other emoluments payable to the petitioner. Therefore, nothing prevented the Labour Court from deciding both the preliminary objection as well as the merits of the case in a matter of this nature. The employer cannot be permitted to tire out the workmen in this manner. Since the Labour Court failed to decide the issue on merits, even if the Labour Court is now reversed, the matter will have to go back to the Labour Court for a decision on merits. The dispute is pending since 2007 and at least in a matter of this nature, the Labour Court was duty-bound to decide all the issues together rather than decide the same piecemeal.

7. Now coming to the merits, there is no dispute that at the time when the dispute arose, the petitioner was designated as “*accounts supervisor*” or “*front office supervisor*”. Based *inter alia*, on such nomenclature, the Labour Court has held that the petitioner was not a workman within the meaning of section 2(s) of the said Act.

8. According to me, such nomenclature or designation is not conclusive for determining whether the person is a workman or not for purposes of section 2(s) of the said Act. The nature of duties discharged by a person is usually a determining factor. In *Chandrashekhar Chintaman Vaidya* (supra), the Division Bench of this Court has held that the mere designation of a person was not conclusive in determining whether such person was a workman or not under section 2(s) of the said

Act. It was held that the predominant nature of the duties of a person as well as the powers wielded by him can form the basis for determining whether such person was a workman or not. Therefore, in such cases, the Labour Court or the Tribunal has to focus on the primary and predominant duties of the person and not go by mere nomenclature or even occasional entrustment of supervisory, managerial or administrative work. The Division Bench has also held that where the entire evidence has come on record, the issue of burden of proof becomes irrelevant and the Labour Court or the Tribunal is bound to take into account the material on record in determining whether the person was a workman or not.

9. In *Shaukat Adam Malim* (supra), learned Single Judge of this Court Justice Dr. D.Y. Chandrachud as His Lordship then was, reversed the award of the Labour Court which had held that a manager of a Co-operative Bank was not a workman or rather not an employee for Bombay Industrial Relations Act, 1946. Learned Single Judge has held that it is a well-settled principle of law that the question as to whether a person is an employee within the meaning of S.3(13) of the Bombay Industrial Relations Act, 1946, has to be determined with reference to the principal nature of the duties and functions performed by the person engaged. This has been the well-settled position of law and has been reiterated in the judgment of the Supreme Court in *S.K. Maini v. Carona Sahu Company, Ltd.* and others reported in 1994 (2) L.L.N. 450. The Supreme Court held that in determining the question as to whether a person is a workman (the Supreme Court was there

considering the case under S. 2(s) of the Industrial Disputes Act, 1947) regard would have to be had to the facts and circumstances of each case and the material on record and it would not be possible to lay down a strait-jacketed formula that would govern all cases. The Court noted that given the complexity of the industrial or commercial organization, employees are often required to discharge more than one kind of work and it is then necessary to determine the classification into which the employee falls for testing whether he does or does not fall within the meaning of the expression “*workman*.” The designation of an employee, it was held by the Supreme Court, is not of much importance and what is important is the nature of duties being performed. The determinant factor, according to the judgment consists of the main duties performed by the employee and not work incidentally done. In that context the Supreme Court held in paragraph 9 as follows :

*“... In other words, what is, in substance, the work which an employee does of what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisor 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 work. Conversely, If 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 supervisor work, the employee will come within the purview of workman as defined in S. 2(s) of the Industrial Disputes Act.”*

10. The Labour Court, in making the impugned order, has failed to apply the aforesaid principles and this is a sufficient ground for interfering with the impugned Award. The Labour Court has observed

that the petitioner failed to plead and also state on oath the preliminary and basic nature of his duties which he was performing as a supervisor at the relevant time. This is an error apparent on the face of the record because the petitioner has pleaded and even proved the basic nature of his duties. However, such pleadings as well as the evidence has been ignored by the Labour Court or only superficially evaluated by the Labour Court in making the impugned Award.

11. The petitioner, in his statement of claim, has pleaded the following in paragraphs 2, 3, and 4:-

*“2. The Party I submits that since his joining he was doing the work of clerks though he was designated as Account Supervisor.*

*3. The Party I submits that the work was assigned to him daily by his superior and as per his instruction he was doing the work.*

*4. The Party I submits that he was not the sanctioning authority of any leave of the any workmen working in his department.”*

12. Mr. Gaonkar pointed out that in terms of the rules applicable to the Labour Courts, that even a rejoinder is to be regarded as a pleading. The petitioner, in his rejoinder, has not only reiterated that he was discharging merely clerical duties but has also further elaborated upon the nature of duties predominantly discharged by him. The petitioner pointed out that no supervisory powers were vested in him and he had neither any powers to sanction leave nor to recommend award, or promotion, or increment. He pointed out that he had no

power whatsoever to initiate proceedings against any workmen.

13. The petitioner also explained in paragraph 3 of the rejoinder the genesis of his designation as a supervisor but pointed out that his nature of work was only clerical and after the petitioner completes his part of the work, the relevant papers invariably go to the officer to verify and check the bills prepared by the front office. He pleaded that thereafter the papers go to the auditors, who again verify the correctness of the bills raised and prepared by the clerical staff like the petitioner in the front office. It is only after this entire process is complete that the bills are certified or finalized. The petitioner, therefore, pleaded that his duties of preparing bills were mainly clerical in nature and therefore, he was a workman under section 2(s) of the said Act.

14. Despite such clear and categorical pleadings, the Labour Court, has held that the petitioner failed to plead or state on oath the basic nature of his duties which he was performing at the relevant time. This is a case of failure to read the pleadings on record.

15. The petitioner, in this case, has examined himself and deposed as to the predominant nature of the duties discharged by him at the relevant time. In the cross-examination, no dent whatsoever has been made to the deposition of the petitioner. There are hardly one or two suggestions on the aspect of the nature of duties performed by the petitioner at the relevant time. Therefore, the Labour Court, in this case, was not at all justified in holding that the petitioner has neither pleaded

nor proved the basic nature of his duties. If the cross-examination is perused, then, one gets the impression that there was no serious challenge to the nature of duties as pleaded and even proved by the petitioner. The Labour Court, for no good reason, has completely ignored this evidence on record and concluded that the petitioner failed to establish that he was a workman under section 2(s) of the said Act.

16. Incidentally, the Labour Court has also held that the employer has also failed to prove that the petitioner was primarily and substantially performing duties of managerial, administrative, and supervisory nature. However, the Labour Court, despite the record of such categorical finding has chosen to non-suit the petitioner on the spacious plea and the burden of proof was upon the petitioner to establish that he was a workman under section 2(s) of the said Act and the petitioner, has failed to discharge this burden. The petitioner, in this case, had discharged the burden of establishing that he was a workman under section 2(s) of the said Act.

17. In any case, as was held by the Division Bench of this Court in *Chandrashekhhar Chintaman Vaidya* (supra), once the evidence was brought on record by the workman, it was for the management to disprove what the workman had proved. Based upon the deposition of the petitioner, in this case, the onus had shifted on the employer. The employer, as was rightly observed by the Labour Court, failed to discharge this onus and prove that the petitioner was primarily and substantially performing duties that were managerial, administrative, or

supervisory in nature. Besides, as was held by the Hon'ble Supreme Court in *Standard Chartered Bank vs Andhra Bank*<sup>8</sup>, when the entire evidence has come on record, the burden of proof and where the onus shifts, becomes irrelevant. Since the impugned Award in the present case does not adhere to all such principles, the same is required to be set aside.

18. In this case, the sole witness on behalf of the employer Ms. Zarine Lobo, Human Resources Executive from the Personnel department of the employer, failed to depose to the precise nature of the duties which were being discharged by the petitioner at the relevant time. In fact, she admitted having signed the memorandum of settlement dated 23.12.2004 (Exhibit W/13) on behalf of the management with the workers union. She admitted that this settlement arrived under section 18(1) r/w section 2(p) of the said Act between the management and the petitioner union in the matter of charter of demands dated 30.07.2003. To the suggestion that benefits of the said settlement were not extended to officers and supervisors having managerial powers, she stated that the settlement was extended to the supervisors but not to the officers. She also admitted that the supervisors to whom the benefits of the said settlement were extended were workmen under section 2(s) of the said Act.

19. Now there is evidence on record that the petitioner was extended the benefit of the settlement, even though his designation was that of a supervisor. According to me, apart from the evidence tendered

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<sup>8</sup> 2006 (6) SCC 94

on record by the petitioner, this admission on the part of the sole witness examined by the employer was sufficient to conclude that the petitioner was indeed a workman under section 2(s) of the said Act. The Labour Court, however, misdirected itself in holding that such admission does not create any estoppel against the law. This was not at all a case of any party seeking to create any estoppel against the law. The issue involved concerns the nature of duties performed by the petitioner and in that context, the admission on the part of Zarine Lobo that benefits of the settlement were extended to supervisors who were not discharging managerial functions, was a factual admission made on behalf of the employer. The employer was clearly bound by such an admission and the Labour Court, could not have discarded this admission on the specious plea that there can be no estoppel against the law.

20. In *Hindustan Lever Ltd.* (supra), an agreement on the part of the employer and the union not to question the status of the workmen in dispute, as regards any settlement was held to be binding on the employer. The Hon'ble Apex Court did not permit the employer to renege and thereafter question the status of the persons in the dispute or allege that such persons were not workmen. The Hon'ble Supreme Court observed that if solemn agreements proposed by the employer and readily acceded to by the workmen and holding the fort for over a quarter of a century are crudely disowned compelling the workmen to knock at the door of the apex court for removing the road-block in the access to justice set up by preliminary objection of technical nature, industrial peace, and harmony chanted by the employer would not be

merely an empty *mantra* but a futile exercise of chasing a mirage and unfortunately that is the situation here.

21. In this case, the Labour Court, also failed to apply the principles laid down in *Food Corporation of India Workers' Union* (supra) where the Hon'ble Supreme Court has made the following observations on the approach to be adopted by the Industrial Tribunals.

*“The approach made by the Tribunal, even in the matter of marshalling or considering the material placed before it, seems to be wrong for the following reasons. The Tribunal was apparently of the view, that there should be “evidence” to prove the facts, as per the provisions of the Evidence Act. It is not so. The Tribunal is not a court. There should be only 'material' and not evidence as required by the Evidence Act. It appears that a good many witnesses were examined by another member who was the predecessor of the member, who delivered the final award. The Tribunal has stated that the evidence of the petitioner (workman) is not “duly proved”, “legally proved” or proved “beyond reasonable doubt”. This approach was also wrong. The only question was whether on weighing the probabilities, the material placed by the petitioner was acceptable or rendered probable.”*

22. In *Llyods Bank Ltd. vs Panna Lal Gupta; 1961 (2) MLJ 18 (SC)*, the Hon'ble Supreme Court held that to conclude that a person is working in a supervisory capacity, it is necessary to prove that there were at least some persons working under him whose work he is required to supervise. The mere fact that a person is in charge of a section would not make him a supervisor if there is nobody else in the section whose work is to be supervised. A person cannot be said to be

working in a supervisory capacity merely because he has to supervise a person who helps him in doing the work which he himself is to perform. For instance, a clerk who has been assisted by a peon cannot be said to be working in a supervisory capacity. In this case, the Hon'ble Supreme Court held that the work of an auditor performing the duties of checking of accounts which is purely mechanical in nature did not involve any supervisory function.

23. In the present case, the evidence on record indicates that the petitioner was mainly involved in the preparation of bills after ascertaining the services availed by the guests at the hotel. Even the bills prepared by the petitioner were invariably examined and verified by at least two tiers of officers and auditors before they could be actually issued by the petitioner to the guests for collection of payments. There is absolutely no evidence on record that the petitioner was supervising the work of any other employees or that he was vested with any power to sanction leave, recommend promotion, or increments. In fact, the petitioner had led positive evidence that he lacked any such powers. This, coupled with the fact that the employer failed to establish that the petitioner was discharging any administrative, managerial or supervisory function as observed by the Labour Court itself, was more than sufficient to conclude that the petitioner was indeed a workman under section 2(s) of the said Act.

24. This is a case where the findings of the Labour Court are vitiated by perversity in as much as the overwhelming pleadings, as well

as the evidence on record, has been completely ignored by the Labour Court. The Labour Court failed to take into account the admissions on the part of the employer's witness by misdirecting itself in law. The impugned Award has errors apparent on the face of the record. The legal position that mere designation of a person is quite irrelevant or that the issue of burden of proof fades into irrelevancy once both parties have led their evidence in the matter has also been missed by the Labour Court. The impugned award is contrary to the decisions of this Court as well as the Hon'ble Supreme Court.

25. For all these reasons, the impugned award is liable to be set aside and is hereby set aside. The Case No. Ref. IT/92/07 is restored on the file of the Labour Court and the Labour Court is directed to dispose of the reference as expeditiously as possible and in any case within three months from the date of filing of the authenticated copy of this judgment and order.

26. The parties to appear before the Labour Court on 22<sup>nd</sup> February 2021 at 10.30 a.m. and file an authenticated copy of this order.

27. In case the Respondents do not appear before the Labour Court on the above date, the Labour Court may issue a notice to fix an early date for the appearance of the Respondent-employer.

28. Now that the evidence has already been led by both the parties even on the merits of the dispute, the period of three months for

disposal of the reference which was made in the year 2007 is deemed sufficient. The Labour Court to therefore make all efforts to dispose of the reference within this period. Both the parties to cooperate with the Labour Court and not seek any unnecessary adjournments.

29. The employer, in this matter has succeeded in postponing the adjudication on merits by over ten years. Therefore, the respondent shall pay the cost of ₹10,000/- to the Petitioner within four weeks from today. The Labour Court to ensure that such costs are paid by the employer.

30. The Rule is made absolute in the aforesaid terms.

31. All concerned to act based on the authenticated copy of this order.

**M. S. SONAK, J.**

jfd/-