

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

RESERVED ON: 15.12.2022
DELIVERED ON:23.12.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

F.M.A. NO. 2276 OF 2016

WITH

F.M.A. NO. 1388 OF 2014

SUMANTO BANERJEE

VERSUS

RANBAXY LABORATORIES LIMITED & OTHERS

WITH

RANBAXY LABORATORIES LIMITED & OTHERS

VERSUS

THE STATE OF WEST BENGAL & OTHERS

Appearance:-

Mr. Supriyo Bose, Advocate.

Mr. Soma Roy Chowdhury, Advocate.

.....For the Appellant
(in FMA No. 2276 of 2016)

&

Respondent No. 3 in
(FMA No. 1388 of 2014)

Mr. Soumya Majumdar, Advocate.
Ms. Victor Chatterjee, Advocate.

.....For the Appellant
(in FMA No. 1388 of 2014)

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. These appeals have been preferred against the order dated 08.10.2013 in WP No. 10138 (W) of 2011. The said writ petition was filed by the management of Ranbaxy Laboratories Limited presently known as Sun Pharmaceuticals Industries Limited. The challenge in the said writ petition was to an award passed by the second Labour Court, Calcutta in Case No. 21 of 2005 filed under Section 10(1B)(d) of the Industrial Disputes Act, 1947 (the Act). The said dispute was raised by the employee Mr. Sumanto Banerjee challenging the order of termination passed by the management dated 09.07.2005. The Labour Court by award dated 28.04.2011 held the order of termination to be bad in law, set aside the same and directed reinstatement of the workmen however restricted the back wages only to 50%. The writ petitioner, who shall herein after referred to as management, being aggrieved by such award challenged the same by filing the said writ petition. The employee appears to have been satisfied with the award and no challenge was made by him, though 50% of the back wages was denied. The learned Single Bench by the impugned order allowed the writ petition in part while affirming the award of the Labour Court directing reinstatement of the workmen set aside that portion of the award which granted 50% back wages to the workmen. Thus, the management being aggrieved by the order passed by the learned Single Bench in confirming the award passed by the Labour

Court directing reinstatement has filed the appeal in FMA No. 1388 of 2014 and the employee being aggrieved by the denial of 50% back wages has filed the appeal in FMA No. 2276 of 2016. Since both the appellants are aggrieved by the order passed in the writ petition the appeals were heard together and are being disposed of by this common judgment and order.

2. We have heard Mr. Soumya Majumder assisted by Mr. Victor Chatterjee, the learned advocate appearing for the management and Mr. Supriyo Bose assisted by Ms. Sona Roy Chowdhury, learned advocate appearing for the employee/ workman.
3. The employee was appointed as medical service representative by the management by letter of appointment dated 08.11.1993. The letter of appointment mentioned about the nature of duties and responsibilities of the workman apart from the scale of pay and other allowances and other conditions of service. It is not disputed by the management that the employee was sincere in the discharge of his duties and was termed as a star performer. By letter dated 27.09.2002, the management in appreciation of his good performance promoted him as the District Manager with effect from 01.10.2002. The said promotion order also contained the details of the revised salary allowances and other conditions of service. The employee also signed a confidentiality agreement dated 01.10.2002. According to the management, the employee was on unauthorized leave for 58 days. By letter dated 18.05.2005, he was informed by the management that it has been decided to re-designate him as a Uro Executive with immediate effect and he will operate from Gauhati as his head-quarters, he was given 10 days joining time to take up the new assignment. Subsequently by

communication dated June 02, 2005, he was informed that he was transferred from Calcutta to Gauhati as Uro Executive and 10 days joining time was given to him to take up the new assignment. The employee was advised to report to Gauhati not later than 13.06.2005 for further instructions, he was warned that in the event of failing to report to Gauhati, it would be assumed that he is not interested to serve the management and that he has abandoned the job on his own accord and his name will be struck off the rolls of the company without further reference to him. It is a matter of fact that he did not join duty at Gauhati. The management by letter dated 28.06.2005 extended date for joining duty at Gauhati till 04.07.2005. The said letter also contained a similar warning as contained in the letter dated 2nd June, 2005. According to the management, the employee was unauthorisedly absent and it disobeyed the order of transfer and owing to such reasons, by letter dated 04.07.2005, he was informed by the management that it has been decided to terminate his services with immediate effect as per the terms and conditions of his employment vide letter dated 27.09.2005 and he is being paid one month's salary in lieu of the notice period, he was advised to hand over the company's property to the regional manager at Gauhati and obtain no-dues certificate from the stockiest and send the same to the branch officer to enable them to settle the full and final accounts. The employee raised industrial dispute which commenced with the conciliation proceedings. However, the conciliation failed and certificate was issued by the conciliation officer. It is thereafter the workman raised the industrial dispute under Section 10(1B)(d) of the Act. The Labour Court framed the following four issues for consideration:-

- (i) Whether the application under Section 10(1B)(d) of the Act is maintainable under the Rules and the Act?
- (ii) Whether the applicant is a workman under Section 2(s) of the Act?
- (iii) Does the Labour Court have territorial jurisdiction over the matter?
- (iv) Whether the termination of service of the applicant by the company is justified? If so, to what relief is the applicant entitled to?

4. In the claim petition filed by the workman, he had contended that his job profile is basically that of salesman/sales worker he has no authority to bind the medical representatives of the company in any manner as he was employed to do the canvassing and promoting sales of the products of the management and the company had posted him as District Manager with a design to keep the post out of the purview of trade union or the Industrial Disputes Act by using the word “manager” which is meaningless in the context of his job profile. It is further stated that he does not do any managerial work, he has to work with six other medical representatives jointly in the different territories assigned to them by the management. He can neither appoint any person or dismiss any person nor take any disciplinary action against any person. The job is only to inspire the sales person to work to achieve sales target as set out by the management. Even for allotment of promotional materials, he has no decision making power thereby he does not play any part in strategic planning both in corporate as well as regional level. That he was a implementer of the company’s policies and has no decision making powers in any official matter of the management rather he is supposed to carry out the chartered activities by the management along with other medical representatives and therefore he

has no administrative control over any of the medical representatives. Further it was contended that he does not have any power to sanction leave of the medical representatives nor he approves their leave nor he is empowered to impose any pay cut on the medical representative. Therefore, the nomenclature “manager” is nothing but a decoration. It was further stated that he had been discharging his official duties with utmost sincerity and diligence but unfortunately he sustained fracture in his ankle in the CN Baghbazar which had rendered him incapable of doing his duties for 58 days from 26.02.2005 to 24.04.2005, he resumed duty on 25.04.2005 after availing medical leave for the days of absence and submitted leave application form to the management on 25.04.2005 and at that point of time, the trouble started, he was restrained to join his duties after the completion of the medical leave. Various other instances have been referred to by the workman to justify his case that he was not permitted to join the duty and carry on his activities as a sales promotion personnel. While so on 18.05.2005, a letter was given transferring him from Calcutta to Gauhati as Uro Executive which is a downgraded position with lesser salary and emoluments. By letter dated 25.05.2005 in response to the order of transfer stated it was stated that it is a degradation from the existing category of the job having lesser remuneration which will prejudice him financially as well as socially. By another letter dated 02.06.2005 received on 04.06.2005 the management directed him to join duty in Gauhati for which the workman sent a reply dated 06.06.2005 reiterating the contention raised by him in the earlier letter. However once again the time for joining at Gauhati was extended up till 04.07.2005 for which a reply was sent. While so the

termination letter was served on 09.07.2005. Further it was contended that the termination of his employment was illegal and arbitrary and in violation of the basic principles of law, no show cause notice or charge sheet had been served on him and no disciplinary proceedings were drawn against him nor he was compensated for his wrongful termination from service. With the above pleadings, prayer was made to pass an award of reinstatement in the management with the same status and payment of his entire back wages including consequential benefits payable to him.

5. The management filed their written statement contending that the employee is not a workman within the meaning of Section 2(s) of the Act, he was promoted as the District Manager and was discharging duties of supervisory nature and he is not entitled to invoke the provisions of the Section 10(1B)(d) of the Act. Since the employee is not a workman the Labour Court has no jurisdiction to adjudicate the matter. It was further contended that the post of District Manager is administrative and managerial post, he is required to plan and execute the policy of the company for the purpose of achieving the sales target, he approves the expenses statement of medical service representatives, he used issue charge sheet/show cause notice to the medical sales representatives and his job is to inspire the sales person to the work to achieve the sales target and therefore it is a managerial post. The employee had remained absent from duty, the absence was unauthorised and the allegations that he sustained fracture was denied. With regard to the transfer to Gauhati as Uro Executive, it was stated that such order was passed as per exigency of business of the company and the contention that he had been downgraded

was denied. Further it was stated that in-spite of time having been extended to join Gauhati, the workmen failed to obey the orders of the management which amounts to insubordination. Therefore, the management prayed for dismissal of the claim petition.

6. The workmen filed a reply statement by placing reliance on the Industrial Disputes (West Bengal Amendment Act, 1986) (West Bengal Act 33 of 1986) by which in Section 2 of the Principal Act in clause (s) after the words “or supervisory work” the words “or any work for the promotion of sales” was inserted. Therefore, it was contended that the nature of duties discharged by him will clearly show that he is a workman. Further it was reiterated that he only implements the company’s policies, he has no authority to apprise the medical sales representatives, he has no authority to sanction leave or approve the expenses, or issue charge sheet or show cause notice. Further the management did not pay one month’s salary. The employee examined himself as the PW1 and he was cross examined by the management and on the side of the management, the personal manager was examined as OPW1 who was also cross examined. The Labour Court on going through the oral and documentary evidence held that the nature of duties discharged by the employee was essentially involving sales promotion and therefore would fall within the definition of Section 2(s) of the Act. With regard to the jurisdiction of the Labour Court, it was held that it had jurisdiction to adjudicate the dispute. With regard to the back wages, the Labour Court held that the workman has not pleaded that he was without any employment after the termination of his services and that the initial burden is on him to show that he was not gainfully employed. After making

such an observation, the Labour Court pointed out that the workman had been employed in the management for more than 12 years and considering the facts that he was a permanent employee and the management had downgraded his post with lesser wages, the Labour Court held that award of 50% back wages will meet the ends of justice. Accordingly, the Labour Court held that the workman is entitled to reinstatement in service with 50% back wages with effect from 04.07.2005 till the actual reinstatement in service.

7. The learned Single Bench had held that the management did not produce any evidence to show that he was working as a manager and that he was not a person who is entitled to sanction leave and but the power only to recommend leave and to recommend expenses claimed and he was not the final authority discharging managerial functions. Further the learned Single Bench held that there has been violation of Section 25F of the Act and therefore the order of termination was vitiated. Further the learned Single Bench held that since the cause of action arose wholly in Calcutta, the Labour Court had jurisdiction to adjudicate the dispute. With regard to the award of 50% back wages, the learned Single Bench held that the workmen did not produce any evidence that he was not gainfully employed after termination from service and in the absence of any evidence, the workman is not entitled to any back wages.

8. Mr. Majumdar learned advocate appearing for the management submitted that the learned Single Bench applied the wrong test by holding that the testimony of the workmen who was examined as PW1 was not challenged in the cross examination and applying such a negative test was incorrect. Further the court misconstrued the appraisal forms of the medical

sales representatives. Further the learned Single Bench laid much emphasis on the deposition of OPW1 wherein he had referred to the applicant as the workman without appreciating with such expression was obviously for the purpose of identifying the case and did not amount to admission of the status of the applicant. Further it was contended that the learned Single Bench wrongly shifted the onus of proof as regards the status of the workman and erroneously held that it is for the management to show that he was attached to an office with supervisory and managerial duties. Further merely because the provisions of workman compensation act were made applicable, it will not make the applicant a workman as the definition of workman is different from the one given in the Industrial Disputes Act. Further the learned Single Bench failed to appreciate the documents which were exhibited which clearly showed that he had discharged the duties and functions of managerial in nature. Further the learned Single Bench failed to consider that the workman cannot approve the expenses of medical representatives cannot make the appraisal of medical representatives and cannot recommend leave of medical representatives. Thus, the learned Single Bench ought to have appreciated the totality of the evidence on record in a proper perspective and having not done so the conclusion arrived is perverse. The learned advocate placed reliance on the decision of the Hon'ble Supreme Court in **Mukesh K Tripathi Versus Senior Divisional Manager, LIC and Others** ¹ for the proposition that a workman within the meaning of Section 2(s) of the Act must not only establish that he is not covered by the provisions of the apprentice Act but must further establish that he is

¹ (2004) 8 SCC 387

employed in the establishment for the purpose of doing any work contemplated in the definition. Reliance was placed on the decision of the Hon'ble Supreme Court in **Sonepat Cooperative Sugar Mills Limited Versus Ajit Singh** ² for the proposition that the job of the employee concerned must fall within one or other category as contained in Section 2(s) of the Act and the issue had to be decided based on the evidence placed by the management before the Labour Court. With regard to the effect of not cross examining PW1 on certain issues, reliance was placed on the decision of the Hon'ble Division Bench of this Court in **A.E.G. Carapiet Versus A.Y. Derderian** ³ and referred to paragraph 4 of the said decision. With regard to the proposition that payment of back wages is discretionary reliance was placed on the decision of the Hon'ble Supreme Court in **U.P. State Brassware Corporation Limited and Another Versus Uday Narain Pandey** ⁴. With the above submission, learned advocate prayed for allowing the appeal and setting aside the award passed by the Labour Court in its entirety.

9. Mr. Bose learned advocate appearing for the workman contended that the Labour Court had carefully considered the oral and documentary evidence placed before it and rightly concluded that the workman was not discharging any managerial or administrative work and he was engaged in sales promotion and would be covered within the definition of workman as amended by the West Bengal Amendment Act. It is further submitted that the Labour Court had jurisdiction to adjudicate the dispute as entire cause

² (2005) 3 SCC 232

³ (1960) SCC Online Calcutta Page 44 (DB)

⁴ (2006) 1 SCC 479

of action arose in Calcutta as held by the Labour Court and affirmed by the learned writ court. It is further submitted that the order of termination is vitiated on account of violation of Section 25F of the Act. It is further submitted that the allegation of in subordination made by the management is not tenable as the workman soon after receiving the order of transfer by re-designating his post as Uro Executive submitted an appeal dated 25.05.2005 for re consideration of the decision transferring and re-designating him as Uro Executive. In the said appeal the workmen pointed out that his re-designation as Uro Executive is a demotion and the same has been done without assigning any reasons whatsoever and such demotion has resulted in reduction of his pay package. Apart from that, the personal difficulties faced by the workmen were also mentioned in the said appeal. Subsequently after receiving the letter of the management dated 2nd June, 2005, the workman submitted another representation on 06.06.2005 praying that the order of transfer and re-designation may be withdrawn and that he has no intention to abandon his job as all along he has been star performer as the District Manager and would like to continue his performance. By referring to the appeal petitions, Mr. Bose would contend that it is not a case of in-subordination and it had been clearly stated that he has no intention to abandon the job and requested the management for re-consideration of the order of transfer and re-designation. Though the appeal petitions were received by the management they were not acted upon nor the workman was informed as to why the order of transfer and re-designation cannot be withdrawn or modified. Therefore, it is submitted that considering the evidence available on record, the Labour Court rightly

directed re-instatement of the workmen but however restricted the back wages to 50% which portion of the award the writ petitioner has not challenged and however the learned Writ Court has set aside the same without considering the factual position and more importantly that denial of 50% of back wages itself is a sufficient punishment for the workman and denial of the entire back wages is harsh. Mr. Bose also placed reliance on the decision in the case of **Mukesh Tripathi** and **Sonepat Cooperative Sugar Mills** to support the contention that the Labour Court and the learned Single Bench rightly held that the workman would squarely fall within the definition of Section 2(s) of the Act. Reliance was also placed on the decision of the Hon'ble Supreme Court in **Hindustan Tin Works Private Limited Versus Its Employees** ⁵, **National Insurance Company Private Limited Versus Jugal Kishore and Others** ⁶. With the above submissions learned advocate prayed for sustaining the award passed by the Labour Court.

10. The question as to whether an employee is a “workman” as defined under Section 2(s) of the Act has to be determined with reference to his principal nature of duties and functions. Such question has to be determined with reference to the facts and circumstances of the case and the materials on record. It is not possible to lay down any strait jacket formula which can be determinative of the real nature of duties and functions being performed by an employee in all cases. In any case, where an employee is employed to do any type of work enumerated in the definition

⁵ (1979) 2 SCC 80

⁶ AIR 1988 SC 719

of “workman”, there is hardly any difficulty in treating him as a “workman” under the appropriate classification. The designation of an employee is not of much importance and what is important is the nature of duties performed by him. The determinative factor is the main duties of the concerned employee and not some work incidentally done. In other words, what is in substance, the work which employee does or what is in substance, he is employed to do. Thus, the Court must ascertain what are the primary and basic duties of the employee concerned and if he is incidentally asked to do some work, may not be necessarily in tune with basic duties, these additional duties cannot change the character and status of the employee concerned. In other words, the dominant purpose of employment must be first taken in to consideration and the gloss of some additional duties must be rejected while determining the status and character of an employee. Therefore a distinction has to be made between the principal work of an employee and the actual duties involved in doing the principal work. Thus, in determining the status of the employee, his designation is not decisive, but the nature of duties and functions assigned to such employee. The question whether the employee is a workman or not, is not a pure question of law, it is mixed question of facts and law. The Labour Court first has to address itself to the various duties assigned to the employee and then come to a conclusion of law as to whether, in the light of the duties assigned to him the employee would be a workman or not. The findings on the issue can be interfered with only if it is shown to be vitiated by error of law on the face of the record, that is manifest error or obvious error or where any other

ground warranting issue of a writ of certiorari, such as perversity, lack of jurisdiction or violation of the principles of natural justice.

11. The Hon'ble Supreme Court in ***Burmah Shell Oil Storage and Distribution Co. of India Ltd. Versus Burmah Shell Management Staff Association***⁷, while summing up the principles, held that a person who is doing manual, clerical and technical work will come within definition of "workman" if incidentally he does some supervisory work also. In determining as to whether certain categories of employees would fall in the definition of workman or not or in order to exclude a man from the definition of industry, the employee has specifically to plead and prove the fact that the employee concerned worked mainly and principally in supervisory capacity or in managerial or administrative capacity and was drawing wages exceeding Rs. 1600/-
12. Sub-Clause (iii) of Section 2(s) of the Act excludes the persons working in "Managerial or administrative capacity" from the purview of the definition of "Workman", even though they may satisfy other ingredients of the definition. The Act does not define "Managerial or Administrative capacity" and they are to be interpreted in their ordinary sense. The mere designation by which a person is designated is not conclusive of his status as a Manager, the Labour Court is required to consider the nature of duties assigned to the person concerned. In order to take an employee only of the definition of a "workman", it is necessary to show that he is employed, in fact and substance, mainly in a managerial or administrative capacity, due emphasis being applied to the word "mainly".

⁷ (1970) 2 LLJ 590 (SC)

13. In **Management of Chem Crown (India) Ltd. Versus PO, Additional Labour Court**⁸ it was held that an employee designated as Manager (Research and development) and entrusted with the job of promoting and projecting company's image etc. was held to be a "workman". In **Dolphin laboratories Ltd. Versus Labour Court**⁹, it was held, Medical Representatives who answer to the definition of "sales promotion employees" within the meaning of Section 2(d) read with Section 6(2) of the Sales Promotion Employees (Conditions of Services) Act, 1976, fall within the definition of "Workman" under Section 2(s) of the ID Act except when they are engaged in supervisory or managerial or administrative capacity. This would mean that the employee should be empowered to take independent decisions and authorised to act within the limits of his authority without sanction of his superior officers.
14. Bearing the above legal principle in mind, we are required to consider as to whether the employee in the case on hand would answer to the definition of "workman" under Section 2(s) of the Act. The workman examined himself as PW1. In the chief examination the workman had stated about his duties and functions in the post of District Manager that he had to visit different medical practitioners with his team for the purpose of sales promotion. The team would visit different chemist shops for receiving orders and they would visit the stockists for placing the orders and in turn stockists cater the orders to the chemists. It has been stated that he had no authority to control his teammates; he had no authority to take action

⁸ (2000) 2 LLJ 410 (Mad)

⁹ (2001) 2 LLJ 559 (Raj.) (DB)

against any absentee teammate; he is not empowered to participate in company's decision making policy; he is not empowered to sanction leave of his teammates and that he performed the work in the territory of Andaman and Nicobar Island every alternate month and he has assigned duties singly for sales promotion in the territory of Andaman and Nicobar and in the company this type of duties are assigned to sales representatives as well as District Managers. The workman has also spoken about sustaining a fracture of his ankle on 26.02.2005, as a result of which he could not join duty for 58 days and on 25.04.2005 he submitted the medical papers and resumed duties and though he was allowed to join, he was informed that his services were transferred as URO Executive at Gauhati , North-East Region and against this transfer/ re-designation order he preferred an appeal by letter dated 25.05.2005 and followed by another appeal dated 06.06.2005 which were all delivered to the appropriate officer of the management. Further, PW1 has stated that for the purpose of sales promotion, he had to undergo field work and scope of duty and the nature of duties to be discharged by him is not mentioned in his appointment letter. Further, he had stated that managerial duties are assigned from the designation of the Regional Manager and that he had no authority to initiate any disciplinary action against any team member and only the Regional Manager is empowered to take disciplinary action against any of that team members and the job performance is also assessed and supervised by the Regional Manager. Further, he has stated on 4th July, 2005 his services were terminated and the letter of termination did not assign any reason whatsoever, the management did not pay any compensation for such

sudden termination, no show-cause notice was issued nor any charge-sheet was served on him prior to termination and the management did not pay his terminal benefits. With regard to the jurisdictional aspect the workman stated that he received the appointment letter from Calcutta office and served at Calcutta office till his termination and a letter of termination was received by him in Calcutta. PW1 further had stated about how the tour programme is drawn and that the Regional Manager used to approve the tour programme and after obtaining his approval their team worked jointly to achieve the sales according to the tour programme. In the cross-examination, no suggestion was put to PW1 with regard to his evidence regarding his nature of duties and responsibilities discharged by him but the cross-examination was only on the appraisal forms filled by him in respect of the Medical Representatives. In the cross-examination with regard to the leave applications of the Medical Representatives, the PW1 has stated that he recommended such applications. On the side of the management the Personal Manager was examined as OPW1. In the cross-examination, OPW1 has admitted that the entitlements and terminal dues of the workman has not been given because he did not comply with Paragraph 2 of the termination letter by which he was directed to hand over the company's property to the Regional Manager, Gauhati. It is submitted by Mr. Bose that question of handing over of any property does not arise as the workman did not report in the Gauhati office. OPW1 has further admitted that the management did not issue any charge-sheet against the workman before issuing the termination letter. Further, he has stated that they did not initiate or institute any disciplinary proceedings against the workman. The

other aspects with regard to non production of document to show that the District Manager supervises the job of Medical Sales Representatives, OPW1 has merely denied the suggestion by stating that it is “not a fact”. Similar such replies have been given in the cross-examination on certain other aspects. Further, OPW1 has admitted that the company did not produce any documentary evidence to show that the workman had taken any disciplinary action during his service tenure against a co-employee. Further, he has admitted that no document was filed by the company to show that the workman has power to dismiss an employee. In the further cross-examination OPW1 had stated that the next promotion post after medical service representative is District Manager. From the above, it is clear that the statement given by PW1, with regard to the nature of the duties and functions assigned to him in the post of District Manager remains unassailed as there was no cross-examination on the said aspect. Mr. Mazumder placed reliance on the decision in **A.E.G. Carapiet**. In the said decision, it has been held that whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that testimony given could not be disputed at all. This decision would lend support to our reasoning that the management having not disputed or rebutted the evidence of PW1, it should be taken that the said portion of evidence could not be disputed by the management. The workman’s specific case is that though his designation was District Manager, that job profile was Sales Promotion which would squarely fall within the amendment made to Section 2(s) of the Act by way of West Bengal Amendment. The evidence of PW1 was clear and

cogent which remained unassailed. Thus, the burden of proof was on the management to show through oral or documentary evidence or both that the work profile of a District Manager was managerial and administrative and there was a world of difference between the nature of duties exercised by the District Manager, nature of duties and functions discharged by a Medical Representative was distinct and different from that of the duties and functions discharged by a District Manager. The documents which were pressed into service by the management are employee's performance appraisal report, recommending leave and recommendation for payment of bills. The evidence of PW1 is that he is not the authority who will be entitled to appraise the performance of a Medical Service Representative and it is only the Regional Manager. This evidence has remained unassailed. That apart, on perusal of the said document exhibited as P4, we find that the reviewing authorities are the Regional Manager and Sales Manager/ GMS and the workman was only an appraiser. Thus the said document does not show that the workman was the final authority insofar as the appraisal of the performance of the service of the Medical Representatives. With regard to the sanction of leave, it is seen from the sample of document marked as Exhibit P5 that the workman has only recommended the leave and it is the Regional office which has got power to sanction leave. Therefore, this document also does not in any manner show that the primary duties of workman were either administrative or managerial. Further, from the fortnightly expense report, it is seen that there was no prior approval of the expenses and the workman only recommended those expenses to be approved. Thus, these documents exhibited on the side of the management

does in no manner assist the case of the management to take the workman outside the purview of the definition of “workman” under Section 2(s) more particularly, as amended by the West Bengal Amendment Act. On perusal of the award passed by the Labour Court, we find that the Labour Court has analyzed evidence and held that the job profile clearly shows that the employee was a workman and not discharging any managerial or administrative work. The law on the subject which had been culled out above shows that the test to be applied is what is the predominant nature of the duties and functions of an employee which will be the determinative factor as to whether he is a workman or not. Further, it has been held that mere designation of a person is not conclusive of his status as a Manager and the Labour Court has to come to a conclusion based on evidence available before it, which in our view had been rightly done by the Labour Court in the case on hand. Therefore, the learned Writ Court rightly approved the award passed by the Labour Court on the said aspect. The workman’s case is that he could not report for duty for 58 days as he sustained a fracture in his ankle. There is a vague denial made by the management denying the very medical condition of the workman which is a palpable lie as could be seen from various email communications wherein the concerned officers of the management have wished him speedy recovery. Therefore, the absence of 58 days could not have been treated as unauthorized. That apart, after the completion of the medical leave, he reported for duty on 25.04.2005 along with the requisite medical certificates and submitted the requisite forms which were accepted and he was allowed to join and thereafter only the order of transfer-cum- re-designation had

been served on the workman. Therefore, the management cannot state that the absence of the workman was unauthorized.

15. The next aspect is whether re-designation as Uro-Executive and consequent transfer to Gauhati was justified and whether it tantamounts to a demotion. It is specific case of the workman that the post of Uro-Executive is the post which is below than the post of District Manager and that he was downgraded in a most arbitrary manner and as a result of such down gradation, it has affected him financially as the salary that he would be receiving as Uro-Executive will be lesser than the salary payable to the post of District Manager. This evidence remained unassailed. Nothing prevented the management from producing record to show that the pay and allowance for both the posts were identical. No such attempt was made by the management which will go to show that the case as pleaded by the workmen is correct and acceptable to the management. The performance of the workmen has not been in doubt and this is evident from the letter dated 27.09.2002 by which the management stated that in appreciation of his good performance he is promoted as District Manager with effect from 01.10.2002. Therefore, the manner in which the workmen discharged his duties and functions is not disputed by the management and it has been appreciated. Therefore, the transfer to Gauhati is punitive. The management has not taken any specific stand as to why a star performer should be shifted to Gauhati in a downgraded post. The bald averment of the management in their written statement is that it was done as per the exigency of business of the company. To say the least this is absolutely a

vague averment and remained unsubstantiated which will lead us to the conclusion that the transfer was punitive and with a view to victimize the workman for reasons best known to the management. Having held that the employee was a workman, it is the mandatory that the management adheres to the procedure under Section 25F of the Act. It is not in dispute that the management did not comply with the provisions of Section 25F of the Act. If that is so, the order of termination is a nullity and the consequences would be that the workman has to be re-instated with back wages. Thus, we are of the clear view that the finding rendered by the Labour Court on the correctness of the order of termination is proper and valid and rightly upheld by the learned writ court.

16. The next aspect to be considered is whether the Labour Court was justified in restricting the back wages to 50% and whether the learned writ court was justified in totally denying the back wages. In ***Bhuvnesh Kumar Dwivedi Versus Hindalco Industries Limited*** ¹⁰, the Hon'ble Supreme Court referred to the decision in ***General Manager, Haryana Roadways Versus Rudhan Singh*** ¹¹ wherein it was held that there is no rule of thumb that in every case where the Industrial Tribunal gives a finding, the termination of service was in violation of the Section 25F of the Act entire back wages should be awarded. A host of factors like the manner and selection and appointment etc., the nature of appointment, any special qualifications required for the job and similar matters should be weighed and balanced in taking the decision regarding award of back wages. It was

¹⁰ (2004) 11 SC 85

¹¹ (2005) 5 SCC 591

further held that one of the important factors which has to be taken into consideration, is the length of service which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position, to get another employment. In **Deepali Gundu Surwase Versus Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Others** ¹², it was held that merely because the workman did not aver in his plaint of not being employed is not seen sufficient since the burden of proof that the workmen is gainfully employed post termination of his services is on the management and accordingly directed grant of full back wages. In **J.K. Synthetics Limited Versus K.P. Agrawal and Another** ¹³ in **Kendriya Vidyalaya Sangathan Versus S.C. Sharma** ¹⁴, it was held by the Hon'ble Supreme Court that when the question of determining the entitlement of person to back wages is concerned the employee has to show that he was not gainfully employed. The initial burden is on him. After he places materials in that regard, the employee can bring on record materials to controvert the claim. In **J.K. Synthetics Limited Versus K.P. Agrawal and Another** ¹⁵ it was held that even if the court finds it necessary to award back wages, the question will be whether back wages should be award fully or only partially would depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of an alternate employment

¹² (2013) 10 SCC 324

¹³ (2007) 2 SCC 433

¹⁴ (2005) 2 SCC 363

¹⁵ (2007) 2 SCC 433

or business is a relevant factor to be taken note of while awarding the back wages. Further it has been held that there is no precise formula which can be laid down as to under what circumstances, payment of entire back wages should be allowed and it depends upon the facts and circumstances of each case. However, award of back wages is not automatic and it should not be granted mechanically only because on technical ground or otherwise the order of termination was found to be illegal and while granting relief application of mind on the part of the industrial court is imperative.

17. Bearing in mind the above legal principles, if we consider the reasoning given by the tribunal, it is seen that the tribunal noticed that the workman nowhere in his written statement has pleaded that he is out of employment after the termination from services. Further the learned tribunal has noted that nowhere in his evidence he has stated that he is unemployed after termination. After having noted this undisputed factual position, learned tribunal has referred to the decision of the Hon'ble Supreme Court in ***U.P. State Brassware Corporation Limited and Another Versus Uday Narain Pandey***¹⁶ wherein the Hon'ble Supreme Court took note of the decision in ***Kendriya Vidyalaya Sangathan*** and directed payment of 25% of back wages though in the said case the employee was a daily wage earner. After noting the observations on the Hon'ble Supreme Court the Labour Court examined the facts leading to the termination of the workman. The Labour Court noted that the workman was employed in the management for more than 12 years and 7 months and he was a permanent employee of the company, it noted that the management

¹⁶ (2006) 108 FLR 201 (UP)

had lowered down his post with lesser wages by way of re-designation and transfer, he was asked to report in a lower category than the post held by him. However, the Labour Court failed to take into consideration the two appeal petitions given by the management requesting for re-consideration of the re-designation cum transfer order. The management's stand is that the after the receipt of the representation the time for joining at Gauhati was extended. However, there is not a whisper from the management as to whether the representation was accepted or did not merit consideration. The specific averments made by the workman that he has been transferred by downgrading his post remained uncontroverted. Ultimately, the Labour Court awarded 50% back wages. The learned writ court taking note of the factual position that the workman has not pleaded and proved that he was out of employment denied back wages in its entirety. As mentioned earlier, the learned writ court was exercising jurisdiction under Article 226 of the Constitution of India and the scope of judicial review has now been well settled by catena of decisions of the Hon'ble Supreme Court.

18. At this juncture, it may be beneficial to refer to the decision in **Syed Yakoob Versus K.S. Radhakrishnan and Others** ¹⁷

The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari Under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of

¹⁷ AIR 1964 SC 47

jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts Under Article 226 to issue a writ of certiorari can be legitimately exercised.

19. In **Sawarn Singh and Others Versus State of Punjab** ¹⁸ the Hon'ble Supreme Court reiterated the limitations of jurisdiction indicated **Sayed Yacoob** in the following terms:

¹⁸ (1976) 2 SCC 868

“13. In regard to a finding of fact recorded by an inferior tribunal, a writ of certiorari can be issued only if in recording such a finding, the tribunal has acted on evidence which is legally inadmissible, or has refused to admit admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice”

20. In **Harjinder Singh Versus Punjab State Warehousing Corporation**¹⁹, it was held that while exercising jurisdiction under Article 226 and/or 227 of the Constitution of India, the High Courts are duty bound to keep in mind that the industrial disputes act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goal set out in the preamble of the Constitution and provisions can be read in part 4 thereof in general and Articles 38, 39(a)(b),43 and 43A in particular which mandate that the state should secure the social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of materials resources of the company to sub serve the common goal and also ensure that the workers get their dues. The learned writ court in our view has not pointed out as to how and under what manner there was an any error of law which was apparent on the face of the award. Further the learned writ court has not recorded any finding that the Labour Court had erroneously refused to admit admissible and material evidence or had

¹⁹ (2010) 3 SCC 192

erroneously admitted inadmissible evidence which has influenced the impugned findings. Further, the learned writ court has not made any observation that the finding of fact rendered by the Labour Court is based on no evidence. By now it is well settled that adequacy and sufficiency of evidence laid down on a point and the inference of the fact to be drawn from the said findings are within the exclusive jurisdiction of the Labour Court and the said points cannot be agitated before the learned writ court. The Labour Court has assigned reasons as to why it was convinced to grant 50% back wages to the workman. The workman was a permanent employee, had worked with the management for more than 12 years and 7 months, he was a star performer which was recognized by the management in writing and there is no adverse material was produced by the management against the workman. Thus, the Labour Court having held that the termination was illegal and also taking note of the fact that the workman did not specifically plead and prove that he had no employment after termination, restricted the back wages to be 50%. In our view, the exercise of the jurisdiction by the tribunal cannot be faulted not to be termed to be perverse. Therefore, the learned writ court erred in setting aside that portion of the award.

21. In the result, FMA No. 1388 of 2014 is dismissed and FMA No. 2276 of 2016 is allowed and the award of Labour Court stands restored. The management is directed to re-instate the workman in Kolkata with continuity of service and pay 50% back wages from the date of termination till the date of re-instatement after adjusting the amount paid as last drawn wages under Section 17B of the Act during the pendency of the proceedings

before this Court. This, order and direction shall be complied by the management within a period of three weeks from the date of receipt of the server copy of this order.

(T.S. SIVAGNANAM, J.)

I agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – PRAMITA/SACHIN)