

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 304 OF 2019

M/s. Taj SATS Air Catering, Goa Unit,
Registered under the Companies Act,
1956, with its registered office at Plot
No. 215, Opp. Naval Stores Depot,
Dabolim, Goa 403801, Represented by
its Authorised Representative Shri
Prakash Shirlekar, s/o. Mr. Ramnath
Shirlekar, aged 57 years, Unit Head.

...Petitioner

V e r s u s

1. Mr. Mankayil Poullose Jose, major of
age, Mankayil House, Kaippator,
Kalady, P. O. 683 574,
Presently/Temporarily residing at
C/o.Alex Abraham, Susheela
Apartment, Phase 2 B, Flat No. 710,
Near Goa Shipyard, Vasco da Gama,
Goa.

2. Hon'ble Presiding Officer, Industrial
Tribunal cum Labour Court,
Government of Goa, Shram Shakti
Bhavan, Patto, Panaji, Goa.

...Respondents

Mr. G. K. Sardessai, Advocate *with Ms. S. Bangera, Advocate
for the Petitioner.*

Mr. Bhargav Khandeparkar, Advocate *for Respondent no.1.*

CORAM : MANISH PITALE, J
Reserved on: 21st December 2021
Pronounced on: 4th January 2022

JUDGMENT

1. Heard.
2. Rule, returnable forthwith. Heard finally with the consent of the learned Counsel appearing for the rival parties. Learned Counsel appearing for Respondent no.1 waives notice. The respondent no.2 is a formal party.
3. The Petitioner before this Court is the Management and the Respondent no.1 is the employee.
4. This Petition arises out of an order dated 25.10.2018, passed by the Industrial Tribunal and Labour Court, whereby on an application filed by Respondent no.1 under Section 2-A(2) of the Industrial Disputes Act 1947,(for short, *the said Act*), it has been held that the Respondent no.1 is a workman within the meaning of Section 2(s) of the aforesaid Act. It was further held that the charges of misconduct levelled against the Respondent are not proved to the satisfaction of the Tribunal. The further issues framed by the Tribunal pertaining to the entitlement of the Respondent towards reinstatement in service and full back wages and whether the termination of service of the Respondent can be said to be justified, are yet to be decided by the Tribunal. But, the Petitioner has approached this Court to challenge the impugned order, because it is asserted on behalf of the Petitioner that the Tribunal could not have exercised jurisdiction in the matter, since the Respondent no.1 cannot be said to be a workman as defined under Section 2(s) of the aforesaid Act and that, therefore, the entire proceedings leading to

the impugned order are without jurisdiction. The issue raised on behalf of the Petitioner goes to the very root of the matter.

5. The Respondent no.1 was appointed to the post of Engineering Co-ordinator by appointment order dated 15.03.2009 issued by the Petitioner. In the order, the list of duties was not specified, and instead, it was stated that the Respondent shall perform such duties as may be assigned by the Petitioner and its Officers. A show-cause notice was issued to the Respondent alleging that he had caused wilful damage to the property of the Petitioner. The Respondent submitted his reply, but the same was not found to be satisfactory and the Petitioner, on 30.08.2016, issued a communication to the Respondent levelling charges of misconduct, which read as follows:

“i. Wilful damage to or loss of employer’s property.

ii. Wilful insubordination or disobedience whether alone or in combination with others to any lawful and reasonable order of a Superior.

iii. Any acts of subversive of discipline.

iv. Any acts of threats directly or indirectly by way of mails, sms. etc.”

6. On the basis of the aforesaid charges, an inquiry was conducted wherein the Petitioner, as well as Respondent no.1,

examined witnesses, and eventually an inquiry report was prepared by the Inquiry Officer. In the inquiry report dated 20.09.2016, it was found that the charges levelled against Respondent no.1 were proved. After following the procedure of issuing notice to Respondent no.1, by order dated 15.11.2016, the Petitioner terminated the services of Respondent no.1.

7. The said action of the Petitioner in terminating the services of the Respondent no.1 became subject matter of challenge before the Tribunal in the aforesaid complaint filed by Respondent no.1. According to Respondent no.1, the termination of his services was illegal. The Petitioner filed its written statement opposing the said complaint while rejoinder affidavit was filed on behalf of the Respondent and upon completion of pleadings, the Tribunal framed issues, which read as follows:

“1. Whether the Applicant proves that he is a ‘Workman’ within the meaning of Section 2(s) of the Industrial Disputes Act?

2. Whether the Applicant proves that the enquiry held against him is unfair and improper?

3. Whether the charges levelled against the Applicant are proved by acceptable evidence to the satisfaction of the Tribunal?

4. *Whether the Applicant proves that he is entitled for reinstatement in services with full back wages from the date of dismissal?*

5. *Whether the Opponent proves that the termination of the Applicant is legal, just and bona-fide?*

6. *What Relief? What Order?"*

8. Issue nos. 1, 2 and 3 were ordered to be treated as preliminary issues and evidence was led concerning the said issues. After considering the oral and documentary evidence of the rival parties on the said three preliminary issues, the Tribunal passed the impugned order dated 25.10.2018, holding that Respondent no.1 was indeed a workman under Section 2(s) of the aforesaid Act and that the charges of misconduct levelled against him were not proved to the satisfaction of the Tribunal. As noted above, the Petitioner has challenged the aforesaid order by contending that Respondent no.1 is not a workman and that, therefore, the Tribunal could not have entertained the complaint filed by the Respondent.

9. Mr. G. K. Sardessai, the learned Counsel appearing for the Petitioner, submitted that a perusal of the appointment order dated 15.03.2009, demonstrates that the Respondent was appointed as an Engineering Co-ordinator and that he was required to perform the duties assigned by the Petitioner-Company and its Officers. It was submitted that although in the complaint filed before the Tribunal, the Respondent claimed that the nature of works assigned to him

were menial jobs as instructed by the Unit Manager of the Petitioner-Company, which included repair works, the Respondent no.1 failed to lead evidence on record to demonstrate that the dominant nature of the work assigned and performed by him was of such a menial nature. It was emphasized that on the other hand, the Petitioner had placed on record oral and documentary evidence to demonstrate that Respondent no.1, as the Engineering Co-ordinator was given the task of getting works done from technicians and persons engaged on contract for performing certain repair works. It was further submitted that there was positive evidence led on behalf of the Petitioner to show that the Respondent No.1 was performing the duties of even the Chief Engineer in his absence and this included considering quotations and issuing work orders for various works. It was further brought to the notice of this Court that there was documentary evidence to show that the Respondent no. 1 prepared the shift schedule of work to be carried out by the technicians and that he also signed on the leave cards of employees, indicating that he was performing managerial and supervisory duties. It was further submitted that the Respondent no.1 failed to produce on record any positive evidence in support of his contention that he was merely performing menial works and that he was a workman along with other technicians engaged by the Petitioner-Company. The learned Counsel appearing for the Petitioner relied upon the judgments of the Hon'ble Supreme Court in the cases of *H.R. Adyanthaya vs Sandoz (India) Ltd.*¹, *Mukesh K. Tripathi vs. Senior Divisional Manager, LIC & Ors.*², *Somnath*

¹ (1994) 5 SCC 737

² (2004) 8 SCC 387

*Tulshiram Galande vs. Presiding Officer, IInd Labour Court*³ and judgment of this Court in the case of *Standard Chartered Bank vs. Vandana Joshi & anr.*⁴

10. On the other hand, Mr. B. Khandeparkar, learned Counsel appearing for the Respondent no. 1, submitted that the Tribunal was justified in holding that the Respondent was indeed a workman as defined under Section 2(s) of the aforesaid Act. It was submitted that the test of dominant nature of work performed by the Respondent no.1 was correctly applied by the Tribunal to hold that the Respondent no.1 was indeed a workman. The learned Counsel specifically relied upon oral and documentary evidence on record to contend that the Petitioner had assigned the works of menial nature to the Respondent no.1, including repair works in the establishment of the Petitioner, thereby demonstrating that he clearly fell within the definition of Workman under Section 2(s) of the aforesaid Act. Attention of this Court was invited to statements made in cross-examination by the witnesses examined by the Petitioner and also the explanation given by the Respondent no.1 when he was cross-examined on behalf of the Petitioner before the Tribunal. It was submitted that merely because some additional work was assigned to the Respondent no.1, it would not mean that he ceased to be a workman. On the basis of the evidence on record, it was submitted that wherever signatures of the Respondent no.1 were found on documents that were supposed to be signed by the Chief Engineer, the same were signed for the Chief Engineer only on the instructions of the Unit Manager of the Petitioner. The learned

³ 2008(5) Bom CR 865

⁴ 2010 (1) CLR 163

counsel appearing for the Respondent no.1 placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Ved Prakash Gupta vs. M/s. Delton Cable India (P) Ltd.*,⁵ and judgment of this Court in the case of *Shri Aloysius Nunes vs M/s. Thomas Cook India Ltd.*⁶.

11. The learned Counsel appearing for the rival parties also made submissions on other aspects of the matter i.e. the findings rendered by the Tribunal that the charges of misconduct were not proved by the Petitioner to the satisfaction of the Tribunal but, since the occasion to consider the said contentions would arise only if this Court agrees with the finding of the Tribunal on the first aspect of the matter pertaining to the Respondent no.1 being workman, this Court has considered the contentions raised in respect of the aforesaid first aspect of the matter, on the basis of the material available on record. The finding on the said aspect goes to the very root of the matter and the very maintainability of the proceedings initiated by the Respondent no.1 before the Tribunal.

12. In order to consider the rival contentions raised on behalf of the parties, with respect to the question as to whether the Respondent no.1 is covered under the definition of 'workman', it would be necessary to refer to Section 2(s) of the aforesaid Act, which reads as follows:

“Section 2(s) - ” *workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled,*

⁵ 2000 3 Mh.L.J. 404

⁶ (1984) 2 SCC 569

technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person--

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.”

13. There can be no doubt about the fact that when the Respondent no.1 approached the Tribunal on the basis that he was a

workman as defined under the above-quoted provision, the burden was certainly upon him to prove the said fact. In order to prove his claim of being workman, the Respondent no.1 was expected to place on record pleadings and evidence to support such an assertion. The Petitioner was entitled to place on record pleadings and evidence to counter the aforesaid assertion and, therefore, it becomes necessary to consider as to whether the Tribunal properly appreciated the pleadings and evidence on record to reach findings in favour of the Respondent no.1 on the aforesaid aspect of the matter.

14. A perusal of the complaint filed by the Respondent before the Tribunal shows that he specifically pleaded in his complaint as follows:

“4. The nature of work assigned to the Party no.1 over the course of his employment has included repairing of tube-lights, repairing of air-conditioners, clearing blockage in the water drainage including toilet drainage, minor assignments of painting the building walls, cleaning LPG burners and all such other menial work as instructed by the Unit Manager.”

15. In response, the Petitioner stated in its written statement that the Respondent no.1 was not performing menial works as claimed by him but as an Engineering Co-ordinator, he was performing the following duties :

- “1) Notify shift schedules of subordinate employees.*
- 2) Purchasing material required through purchase dept in his Engineering Department for day to day maintenance.*
- 3) Certify the material received from the third parties.*
- 4) Inviting quotations from third parties, scrutinize and compare the quotations and finalise the same in consultation with the Executive Team.*
- 5) Issue of work orders to the outside parties.*
- 6) Supervision and Certification of completion of jobs.*
- 7) Recommendations and sanctioning of leave of his subordinates, sanctioning of compensatory offs of his subordinate employees etc.*
- 8) Supervision of work of Contract workers.*
- 9) Certification of Job orders as Engineering in charge for making payment of the bills of third party.*

and such other supervisory and administrative duties as is necessary to ensure the proper maintenance of the Engineering Department.”

16. The parties led oral and documentary evidence in support of their respective stands taken in the pleadings before the Tribunal. The Respondent no.1 filed his affidavit in evidence and in the cross-examination, he conceded that he was an Electrical Diploma holder and that he had indeed signed documents during the course of his work suggesting repairs to be carried out by outsourcing of the work. On being confronted with a number of documents showing that he had signed for the Chief Engineer, which included acceptance of quotations of parties and issuance of all work orders, the Respondent no.1 stated that he was merely signing for the Chief Engineer as the post of Chief Engineer was vacant and that he was instructed by the Unit Manager to put his signature on such documents. It was further stated in cross-examination that he had no decision-making power while signing such documents. On being specifically asked as to whether there was any document to show that the Unit Manager had directed him to sign in place of the Chief Engineer, the Respondent no.1 conceded that there were only verbal directions and that he had no document in that regard. The Respondent no.1 gave the same explanation even when he certified that repair works were done and that the equipment in question was in good condition.

17. As regards signatures of Respondent no.1 on leave cards and shift schedules, the Respondent no.1 stated in cross-examination that these were documents on which he signed on the directions of

Unit Manager and that he had no supervisory or administrative role to play. He further stated that he was the senior most and the only permanent staff in the Engineering Department and that therefore, his signature was appended for the Chief Engineer.

18. On the other hand, the Petitioner examined its witnesses to support its contention that the Respondent no.1 was performing such duties as would demonstrate that he was not a workman. The witness examined on behalf of the Petitioner reiterated the nature of duties of the Respondent no.1 as Engineering Co-ordinator, which were stated in the written statement filed before the Tribunal. In the cross-examination, the witness of the Petitioner stated that Engineering Associates had to do technical and clerical works as per the instructions of the Engineering Co-ordinator. But he further stated that he could not comment as to whether the Respondent no.1 as an Engineering Co-ordinator was also personally doing the work that was being performed by the Engineering Associates.

19. The learned Counsel appearing for the Respondent no.1 placed much emphasis on certain e-mails placed on record before the Tribunal and he claimed that the contents of the said e-mails demonstrated that the Respondent was indeed performing menial works of repair personally, thereby indicating that he was indeed a workman.

20. A perusal of the impugned order passed by the Tribunal shows that on the basis of the material on record, findings were recorded in favour of the Respondent no.1 on the basis that there did not appear to be any decision-making power with the

Respondent no.1 and that he was assigned additional duties which he performed as per the instructions of the Unit Manager. It was found that the Respondent no.1 was substantially performing skilled, technical or menial duties as per directions and that since the nature of the work was neither managerial nor supervisory, the Respondent was clearly covered under the definition of workman under Section 2(s) of the aforesaid Act.

21. The judgments relied upon by the rival parties indicate that the Court or Tribunal must ascertain the dominant nature of work or duty performed by the employee to reach a finding on the question as to whether such an employee is covered under the definition of workman under Section 2(s) of the aforesaid Act. It needs to be examined on the basis of the evidence available on record, not only as to whether the dominant nature of the duties performed by the Respondent no.1 could be said to be supervisory, administrative or managerial in nature but, further as to whether the Respondent no.1 had placed on record material to support his assertion that he was merely performing menial works of repair, that could be covered under the expression ‘*unskilled*’ or ‘*skilled*’ or ‘*manual work*’. It is clear from the law laid down by the Supreme Court in various judgments, including *H.R. Adyanthaya vs Sandoz (India) Ltd* (supra) and *Mukesh K. Tripathi vs. Senior Divisional Manager, LIC* (supra), as also judgement of this Court in *Standard Chartered Bank vs. Vandana Joshi* (supra) that nomenclature of the post on which the employee is appointed cannot be a deciding factor, but it has to be ascertained as to what can be said to be the dominant nature of the work and duties assigned and performed by the

Respondent no.1. It needs to be examined whether the duties could be said to be merely clerical or stereotypical in nature.

22. A perusal of the above-quoted portion of the written statement filed on behalf of the Petitioner before the Tribunal shows that the nature of duties alleged to be assigned to the Respondent no.1 were not merely the performance of clerical or stereotypical duties, but various supervisory duties were alleged to be assigned and performed by the Respondent no.1. The above-quoted nature of duties was also stated in the affidavit in evidence of the witnesses before the Tribunal. This included the duties of purchasing material, inviting quotations and issuing work orders, certification of jobs completed from outsourced technicians, and certifying job orders for making payment of bills. In support of the said assertion made on behalf of the Petitioner, a number of documents were placed on record showing that the Respondent no.1 indeed signed for Chief Engineer on such documents. The Respondent no.1 had signed in his individual capacity some other documents in the nature of shift schedules and sanction of leaves, as also compensatory leaves of sub-ordinate employees. When confronted with such documents, the only explanation given by the Respondent no.1 was that such signatures were appended on the documents merely on the instructions of the Unit Manager. The said explanation is found to be tenuous in the face of the nature of documents and the role that can be attributed to the Respondent no.1, in the backdrop of the specific pleadings of the Petitioner as regards the nature of duties assigned to Respondent no.1.

23. In this regard, it appears that the Tribunal committed an error in relying upon the position of law laid down in the case of *Shri Aloysius Nunes vs M/s. Thomas Cook India Ltd.* (supra) and similarly the learned Counsel appearing for the Respondent no.1 erroneously relied upon the Judgment of the Supreme Court in the case of *Ved Prakash Gupta vs. M/s. Delton Cable India (P) Ltd* (supra). This becomes clear from subsequent Judgments of the Hon'ble Supreme Court in the Constitution Bench in the case of *H.R. Adyanthaya vs Sandoz (India) Ltd* (supra) and the judgment in the case of *Mukesh K. Tripathi vs. Senior Divisional Manager, LIC* (supra). In these judgments, it has been found that the judgment in the case of *Ved Prakash Gupta vs. M/s. Delton Cable India (P) Ltd.* (supra) was rendered without noticing earlier binding precedents and in the absence of specific findings that the employees therein were doing clerical work. It was held that the employee would have to make good his case of being covered under the definition of 'workman' by showing that the dominant nature of his duties concerned skilled or unskilled, manual or clerical work on the basis of positive evidence.

24. In the case of *Standard Chartered Bank vs. Vandana Joshi* (supra), this Court held that in an organizational structure, the employee is subject to checks and balances in the course of the decision-making process and merely because an employee happens to be sub-ordinate to another in the organizational structure, that in itself, would not be an indicator of the employee being a workman.

25. In the present case, there was sufficient material on record to indicate that the Respondent no.1 was indeed performing duties that

were not merely clerical or stereotypical work, but he was very much involved in the decision-making process considering quotations, issuing work orders, and getting work done from technicians of the Petitioner-Company or from outsourced technicians. Merely because work was being done for the Petitioner through outsourced technicians, it would not accrue to the benefit of the Respondent no.1.

26. In the case of Somnath *Tulshiram Galande vs. Presiding Officer* (supra), this Court held that the employee could not be said to be a workman because he was performing multifarious duties and most of his duties were supervisory and managerial in nature. The evidence recorded in the present case itself also indicates that various duties were assigned to the Respondent no.1 and that most of them were supervisory and managerial in nature. Even otherwise, it was for the Respondent no.1 in this backdrop to prove with positive evidence that the dominant nature of duties that were being performed by him were skilled, unskilled, manual, or clerical. In this regard, the Respondent no.1 heavily relied upon e-mails exchanged between him and the Unit Manager of the Petitioner. A perusal of the same shows that the Unit Manager sent e-mails to the Respondent no.1 to get diverse works done, which in some cases, were of urgent nature. The nature of such e-mails gives the impression that the Respondent no.1 was responsible for getting such works done from technicians of the Petitioner-Company or from outsourced technicians/workers. The dominant nature of the duties being performed by the Respondent no.1 was supervisory and managerial rather than merely performing menial works. As against this, the Respondent no.1 failed to produce positive

evidence in support of his contention that he was doing menial work of repairs as claimed in his complaint.

27. As per the law laid down by the Supreme Court in the Constitution Bench in the case of *H.R. Adyanthaya vs Sandoz (India) Ltd* (supra) and *Mukesh K. Tripathi vs. Senior Divisional Manager, LIC* (supra), the Respondent failed to discharge the burden of proving that the dominant nature of his duties was skilled, unskilled, manual or clerical work. Therefore, it is found that the Tribunal erred in holding that the Respondent no.1 was covered under the definition of ‘workman’ as per Section 2(s) of the aforesaid Act.

28. Once this Court comes to the conclusion that the Respondent was not a workman within the meaning of Section 2(s) of the Act, it becomes clear that the Tribunal had no jurisdiction to entertain the complaint filed by him. This aspect goes to the very root of the matter and indicates a palpable jurisdictional error committed by the Tribunal in the present case.

29. Hence, the Petition deserves to be allowed and the impugned order passed by the Tribunal deserves to be set aside.

30. Accordingly, the Writ Petition is allowed. The impugned order is quashed and set aside and the complaint filed by the Respondent no.1 is dismissed.

31. Rule is made absolute in above terms.

MANISH PITALE, J.

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