

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 594 OF 2020

Nayana Kothari

..Petitioner

Vs.

M/s.M. Fabrikant and Sons Inc.

...Respondent

Mr. Ramesh D. Bhat, for the Petitioner.

Mr.S.C.Naidu with Mr. Aniketh Poojari, Mr.Pradeep Kumar & Mr.T.R.Yadav, for the Respondent.

CORAM : G.S. KULKARNI, J.

DATE : JANUARY 16, 2023

ORAL JUDGMENT:

1. Heard Mr.Bhat, learned Counsel for the petitioner and Mr.Naidu, learned Counsel for the respondent.

2. This petition assails an award dated 28 September 2018 passed by the Industrial Tribunal, Maharashtra at Mumbai, whereby a reference (IT) No.12 of 2012 has been decided in terms of the following award:-

“AWARD

- i) Reference (IT) No.12 of 2012 partly answered in the Affirmative.
- ii) It is held and declared that the persons namely (I) Smt. Nayana Kothari, (ii) Mr.D.B.Fernandes, (iii) Mrs. Leonara D’Souza, (iv) Mr.Ketan Raval are not the workman defined

under Section 2(s) of the ID Act,1947.

iii) It is held and declared that, the resignation dated 31/07/2006 submitted by concerned workmen were not purely voluntary but those resignations were as per suggestion of First Party due to compelling circumstances.

iv) In the result, concerned 48 workmen involved in present Reference except four viz. (i) Smt.Nayana Kothari (ii) Mr.D.B.Fernandes, (iii) Mrs.Leonara D'souza (iv) Mr.Ketan Raval shall be entitled for retrenchment compensation as per Section 35-F of the Industrial Disputes Act,1947, considering their initial date of joining and last date of employment i.e. 31/07/2006.

(v) The First party shall pay retrenchment compensation granted above to 48 workmen within two months from the date of publication of award.

(vi) Award be sent to the Appropriate Government for its publication.”

3. The grievance of the petitioner is in regard to the operative paragraphs (ii) and (iv) of the Award. At the outset, it is required to be observed that four employees namely Smt.Nayana Kothari, Mr. D.B. Fernandes, Mrs. Leonara D'souza and Mr.Ketan Raval were part of a group of 52 workmen who had sought reference of dispute to Industrial Tribunal. The reference as made by the appropriate Government under Section 12(5) of the Industrial Disputes Act,1947 (for short “**the ID Act**”) to be adjudicated, was “as to whether the said workers shall be reinstated with full back wages and continuity of service with effect from 1 July 2007 with the respondent”. It is the case of the respondent that the respondent has a parent company incorporated in United State of America and had a liaison establishment in India where the concerned workmen were granted employment. It appears to be not in dispute that there were liquidation proceedings against the respondent

before the United States Bankruptcy Court. On 12 May 2008 an order was passed, referred as “Order confirming joint plan of liquidation under Chapter 11 of the Bankruptcy Code” by the United States Bankruptcy Court, Southern District of New York. Accordingly the respondent company was taken into liquidation. After the said order, the respondent, in good faith, decided to settle the dues in respect of the workmen employed in its Indian establishment. Consequent to which the Reserve Bank of India by its letter dated 11 March 2013 granted a conditional approval for winding up of the liaison office (Indian office) subject to the compliance of conditions as stipulated and clearance of all taxes of the Government of India.

4. It appears to be not in dispute that out of 52 workers who had raised the disputes, by the impugned award, 48 of such workmen were granted all their dues in the nature of a retrenchment compensation, as per the provisions of Section 25-F of the ID Act. The dispute in so far as the present proceedings are concerned, is only in respect of the petitioner who is one of the four employees who have been held not entitled for a retrenchment compensation, on the ground that they were not ‘workman’ under the provisions of Section 2(s) of the ID Act, more particularly for the reason that they were working in “supervisory capacity” as ‘Assortment Head’ and received emolument to the tune of Rs. 32,500/- to Rs.46,500/- per month.

5. Respondent had appeared in the reference and objected to the maintainability of the claims as made by these four employees, contending that they were not workmen and were in fact working as heads and were performing supervisory duties.

6. It appears from the record that only the petitioner – Nayana Kothari asserted that she was not discharging duties in the supervisory capacity and she was discharging all duties as workmen within the meaning of Section 2(s) of the ID Act. Admittedly, Mr. D.B. Fernandes, Mrs. Leonara D'souza and Mr.Ketan Raval did not step into the witness box and did not lead any evidence that they were discharging the duties of workman and not of the post of a supervisor.

7. Mr.Bhat, learned Counsel appearing for the petitioner has drawn Court's attention to the evidence and also to the observations as made by the Industrial Tribunal in the impugned award. His contention is that the nomenclature of the post would not be relevant and what was relevant was the nature of the duties being discharged by the petitioner. His submission is that the nature of the duties as discharged by the petitioner were certainly not supervisory which according to him, was clearly seen from the evidence of the petitioner. Mr.Bhat contends that the duties as discharged by the petitioner were primarily to distribute diamonds to the sorters. In such context he has drawn the Court's

attention to the cross examination of the petitioner by the respondent-employer, wherein according to Mr.Bhat, she had stated that to approve the diamonds, the supervisors allotted the diamonds to the assorters for sorting and such work of sorting was undertaken with the help of scientific tools viz. Microdigital weighing, eye glassers, twizzer, standing loop plants, table lamps etc. Accordingly, he submits that the nature of the work was such that, certainly it was required to be accepted by the Industrial Tribunal, that such work as done by the petitioner was in no manner, work of a supervisory nature.

8. Mr.Bhat thereafter has drawn Court's attention to the observations as made by the Industrial Tribunal and more particularly, paragraph 47 of the impugned Award, to contend that these observations ought not to be accepted, when the Industrial Tribunal has observed that neither the petitioner nor the respondent had produced any document to show as to what type of work these five employees were performing. According to Mr.Bhat, the evidence namely oral deposition of the parties was not appreciated by the tribunal and a finding not based on evidence, is in fact recorded. It is his submission that from such evidence it is clear that that petitioner was discharging duties of workman and not working as a "Supervisor". Mr.Bhat's contention is that perusal of the impugned order shows that the tribunal although has referred to the deposition of the petitioner wherein it was categorically stated by her that although the

petitioner's designation was stated as "Assortment Head", her correct designation was Diamond Approver, and the respondent with malafide intention had claimed that she was a Supervisor which was not proved. According to Mr.Bhat, in the impugned award the tribunal has referred in detail, what was the nature of the work as could be revealed from the evidence, and such materials were sufficient for the tribunal to come to a conclusion that 48 employees were workmen and entitled for retrenchment compensation. In support of his contention Mr Bhat has placed reliance on the decision of the Supreme Court in "*Anand Regional Co-op. Oil Seedsgrowers' Union Ltd. Vs. Shaileshkumar Harshadbhai Shah*"[(2006)6 SCC 548]", wherein the Supreme Court has held that supervision contemplates direction and control. Mr. Bhat submits that in the present case there is nothing on record to indicate that there was any supervision, direction and control as exercised by the petitioner.

9. On the other hand, Mr.Naidu, learned Counsel for the respondent would submit that the tribunal has recorded a finding of fact. He submits that the view taken by the tribunal is accordingly, a possible view, and hence, there is no perversity in the findings recorded by tribunal and no interference in the impugned award is called for applying the principles of law laid down by the Supreme Court in "*Syed Yakoob vs K.S. Radhakrishnan & Others, AIR 1964 SC 477*" and recently

followed in the decision of the Supreme Court in “*Union of India & Ors. Vs. P. Gunasekaran*, [(2015)2 SCC 610”.

10. Mr.Naidu would submit that the dispute being raised at the behest of the four employees is certainly an afterthought as the petitioner and the other co-employees were aware about the liquidation proceedings. The respondent had gone into liquidation in the year 2008, as also these employees had resigned and received gratuity allowance with interest and thereafter, such claim for retrenchment compensation has been made. It is his submission that the findings as arrived at by the Industrial Tribunal are not beyond the record but are of such nature which clearly demonstrate, that the petitioner and the other employees were discharging the supervisory duties and receiving salary of Rs. 32,500/- to Rs.46,500/- per month as ‘Assortment Head’ and whereas the ‘Assorters’ workmen as defined under Section 2(s) of the ID Act were receiving salary of Rs.12,000/- to Rs.15,000/- per month. Mr. Naidu has drawn the Court’s attention on the admissions of the petitioner in the evidence, who, according to him, was the only person who had entered the witness box. He submits that such admissions are contained in the affidavit in lieu of examination-in-chief of the petitioner wherein she has categorically stated that the material which was purchased, was handed over to her, which she used to distribute amongst a group of workmen for assortment and grading. She stated that after flutes were prepared

by them, she was checking whether the flutes contained exact number and size of diamonds as per requirement of the parent company. She had also stated that if the number of stones were less or more, she used to return till flutes to the concerned workmen for adding or removing the stones as may be. She had stated that she has no authority to appoint any person in the employment of the company, as also she had no authority to grant any increment or take any disciplinary action against any workman. She also stated that she had no power even to grant leave to any workman. Mr.Naidu submits that certainly the petitioner had described the work, she was performing which was clearly of a supervisory nature and there was no room for her to assert that she was discharging duties as workman. Mr.Naidu has placed reliance on the observations as made by the Industrial Tribunal in paragraph 48 to contend that such observations cannot be in any manner held to be perverse.

11. Having heard learned Counsel for the parties and having perused the record and the impugned award, in my opinion, it clearly appears that the respondent's parent company in New York had suffered liquidation in the year 2008. It also appears that the concerned workmen who are 52 in number under the reference in question were aware about such proceedings which were initiated consequent to the said order passed by the United State Court in the year 2008. The

reference in question was sought to be made by invoking Section 12 of the ID Act by approaching the appropriate forum.

12. The issue in the present proceedings as noted above is limited ‘ as to whether the four employees were “workmen” within the meaning of Section 2(s) of the ID Act.’ The case of the respondent is specific that the work which was assigned to these employees was supervisory in nature. In making such submission, in the context of the definition of “workman”, Mr.Naidu on behalf of the respondent has also relied on the admitted salary of Rs. 32,500/- to Rs.46,500/- per month received by the four employees. In these circumstances, whether these four employees would at all fall within the definition of ‘workman’ under Section 2(s) of the ID Act, is what is required to be considered. It would be appropriate to note Section 2(s) of the ID Act which defines ‘workman’. Section 2(s) reads thus:-

“**Section 2 Definitions-** In this Act, unless there is anything repugnant in the subject or context,-

... ..

(s) “**workman**” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, Clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the

Army Act 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

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

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

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

13. In the facts of the present case, it is quite clear that there are two sets of employees, who are working on the establishment of the respondent. Firstly, those employees who were designated as assorters and who are receiving emoluments/salary of Rs.12,000/- to Rs.15,000/- per month and the second relevant category being the Assortment Head’, namely, those employees of the petitioner receiving salary of Rs.32,500/- to Rs.46,500/- per month.

14. It is seen from the evidence of the petitioner that the duties being discharged by the petitioner were certainly not the duties that of a workman. The duties of the assorter had come on record. It appears from the deposition of the petitioner that definitely there was an element of supervision as exercised by the petitioner and other co-employees. The other co-employees did not step into the witness box to assert their contention that they worked as workman. What has been stated is that the petitioner is also pursuing the case of other three employees. However, no independent assertion or any independent

evidence in support of such case was led by them. In regard to the observations as made by the Industrial Tribunal that these employees were discharging duties as supervisor, it would also be useful to refer to paragraph 48 of the impugned award wherein the nature of such duties has been examined on the basis of the evidence on record, which has been succinctly described by the Industrial Court in paragraphs 48 and 52 of the impugned Award which read thus:

48) Needless to say that, out of 5 concerned employees, against whom the First Party challenged status of workmen, no any other workman examined by the Second Party except Smt. Nayana Kothari. So considering admission of there designation as Assorter head, wages drawn by them it can be adduced that, the nature of duties which Smt. Nayana Kothari was performing they were also performing similar duties. If perused affidavit of witness at Exh. UW-2 to UW-6, though they have not deposed with regards to status of 5 employees, but during the cross examination, the witness at Exh.UW-2 admits that she was working as a sorter and diamond was being provided by Smt. Leonara madam, head of the witness. Further, she admits that Smt.Leonara, Smt.Nayana Kothari, D.B.Fernandes and Ketan Rawal were working as heads. Further she admits that, the duty of the heads was to supervise while giving diamonds for sorting and collecting back. Further, it was the duty of head to see whether diamonds properly sorted and completed in other respects. The witness at Exh UW-4 also in her cross examination, admits that, Mrs.Leonara D'Souza was supervising assorting work and she was head of assorting department. Further, she admits that, Nayana Kothari, Ketan Rawal and D.B.Fernandis were also Assortment head and in that capacity they were allotting works and supervising the workers. These witnesses are represented by Smt.Nayana Kothari and they are admitting that, they were working under the control and supervision of assortment head and assortment head was distributing diamonds for sorting. Therefore, deposition of these witnesses cannot be overlooked as they are also from the group of 52 workmen.

... ..

52. Carefully this Tribunal have gone through the judgments relied by both the parties. With due respect, this Tribunal takes an opportunity to state herein that, the ratio of these authorities is that merely not having power to grant or recommend the leave or to take a disciplinary action, it cannot be said that the person employed in particular category whose responsibility to look the affairs of

subordinate employees and to check the correctness of their work and to reject their work and direct to rectify the mistake is not a workman. Therefore, the authorities relied by First Party shall be applicable in its favour. Of course, the authorities relied by Second Party made much aware to this Tribunal how the status of a workman is required to be decided on the basis of actual nature of work performed by employee and not merely on the basis of designation or wages. Hence, while concluding findings on this issue, this Tribunal comes to the conclusion that, the Second Party failed to prove that, (I) Smt.Nayana Kothari, (ii) Mr.D.B.Fernandes (iii) Mrs.Leonara D'souza, (iv) Mr.Ketan Raval are workmen defined under Section 2(s) of the Industrial Disputes Act,1947. Therefore, findings on this Issue answered in the **Negative.**"

15. Considering the above findings as recorded by the Industrial Tribunal, I am in agreement with Mr.Naidu when he relies on the decision of the Supreme Court in ***Union of India & Ors. Vs. P Gunasekaran*** (supra), that the view taken by the Industrial Court is possible view. In paragraph 11 of the said decision, the Supreme Court has laid down the test in regard to the issues which would fall outside the purview of the High Court's jurisdiction under 226/227 of the Constitution. The Supreme Court has clearly held that in exercise of jurisdiction under Articles 226 and 227 of the Constitution, the Court cannot (i) re-appreciate the evidence; (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law; (iii) go into the adequacy of the evidence; (iv) go into the reliability of the evidence; (v) interfere, if there be some legal evidence on which findings can be based; (vi) correct the error of fact however grave it may appear to be; and (vii) go into the proportionality of punishment unless it shocks its conscience. In paragraph 23 of the said decision, the

Supreme Court reaffirmed the position as set out in the celebrated decision in *Syed Yakoob Vs. K.S.Radhakrishnan*.(supra). In my opinion, the present case is certainly a case wherein, bearing in mind the above well settled parameters of interference, there is no scope for interference in the impugned award as passed by the Industrial Tribunal.

16. Insofar as Mr.Bhat's contention relying on the decision of the Supreme Court in '*Anand Regional Co-op. Oil Seedsgrowers' Union Ltd. Vs. Shaileshkumar Harshadbhai Shah*' (2006) 6 SCC 548 is concerned, true it is that the supervision would contemplate direction and control as held by the Supreme Court and further while determining the nature of the work performed by an employee, and that the designation of an employee, or the name assigned to the category/class to which he belongs, ought not to be of any importance in deciding the nature of the work and what is required to be examined is as to what are the primary duties being performed by the employee in question, and for such purpose, it needs to be proved that the person was working in supervisory capacity and there were some persons working under the employee whose work is to supervise. In my opinion, the decision reiterates the well settled principles of law, however considering the facts and the evidence as brought on record by the parties, coupled with the nature of pay-scale enjoyed by the petitioner and other companion three workers, it does not satisfy such test as laid down by the Supreme

Court. It cannot be said that the petitioner was not discharging supervisory functions and thus, she fell well within the meaning of the term 'workman' as defined under Section 2(s) of the ID Act.

17. In the light of the above discussion, I find no perversity whatsoever in the findings recorded by the Industrial Tribunal. No interference is called for. The petition is accordingly rejected. No costs.

[G.S. KULKARNI, J.]