

(2014) 08 GAU CK 0013**Gauhati High Court****Case No:** WP (C) No. 5946 of 2006

Management of Escorts
Construction Equipment Limited

APPELLANT**Vs**

The State of Assam

RESPONDENT**Date of Decision:** Aug. 28, 2014**Acts Referred:**

- Industrial Disputes Act, 1947 - Section 2(s)
- Sales Promotion Employees (conditions Of Service) Act, 1976 - Section 2(d)

Citation: (2014) 143 FLR 401 : (2015) 1 LLJ 7**Hon'ble Judges:** Biplab Kumar Sharma, J**Bench:** Single Bench**Advocate:** L.P. Sharma and S. Chakraborty, Advocate for the Appellant; B.J. Talukdar, State Counsel, Advocate for the Respondent**Final Decision:** Allowed**Judgement**

Biplab Kumar Sharma, J.

Heard Mr. L.P. Sharma, learned counsel along with Mr. S. Chakraborty, learned counsel for the petitioner. Also heard Mr. B.J. Talukdar, learned State Counsel. None has appeared for the respondent No. 4. This writ petition is directed against the award dated 23/05/2006 of the learned Labour Court, Assam, Guwahati in Reference Case No. 13/2001. By the award while answering the issues sent for determination, the learned Labour Court has held that the respondent No. 4 is a workman under the petitioner management and the termination of his service being in violation of the provisions of the Constitution of India, he would be entitled to reinstatement with full back wages.

2. From the materials on record it appears that the petitioner had raised a preliminary objection on maintainability of the reference on the ground that the respondent No. 4 is not a workman within the definition of the Industrial Disputes

Act, 1947. Although the said application was entertained but no preliminary issue was framed and eventually on conclusion of the evidence the impugned award was passed, inter alia, holding that the respondent No. 4 being a workman, there was violation of the provisions of the Industrial Disputes Act entitling him reinstatement in service with full back wages.

3. Coming to the facts of the case as it appears, the petitioner was first appointed on 02/08/1996 as Assistant Manager (Sales)(M-2) with the salary of Rs. 2,250/- with normal increment and other allowances including Car/Motor Cycle/Scooter allowances. As per the order of appointment, he was also entitled to LTC, Medical Facility, Gratuity, Provident Fund etc. His service was terminated by letter dated 06/01/1999 w.e.f. 18/12/1998 on the ground that he failed to report for duty at Faridabad, his new place of posting and instead he sent a fax message dated 13/11/1998 to the management with the request to promote him to M-3 grade. Along with the said termination order, the management also sent a draft for Rs. 8,414.37 being the amount towards full and final settlement.

4. Being aggrieved by such termination of service, the respondent No. 4 approached the Government raising a dispute on the basis of which the following reference was made to the Labour Court.

"a) Whether the Management of Escort Construction Equipment Limited is justified in terminating the service of its employee Shri S.S. Rahman ?

b) If not, whether Shri S.S. Rahman should be reinstated with full back wages or given any other relief in lieu thereof?"

5. On receipt of the notice from the learned Labour Court, parties entered appearance and filed their written statement including additional written statement. In the written statement, one of the pleas raised by the management was that the petitioner being in the Managerial cadre was not a workman and thus the reference was not maintainable. In the additional written statement filed by the respondent No. 4, the following statement was made :-

"In paragraphs 7 and 8 it is said that the workman set up a network of dealership for the sale of company products, that it is he who fixed dealers commission, and incentive and supervised and monitored the sale. It is further said that his duties are both administrative and marketing. There is no duty allotment chart in place defining the duties of the workman. No infrastructure is provided to carry on the duties. He is the sole man in the area. There was no opportunity for the workman to fix dealers commission and incentives. The correspondences are handiwork of higher management level. He is only the signature lender. After signing the correspondence his duty was to dispatch them to the addresses. In paragraph 8 the management has agreed that everything is done in the Head Office."

6. During trial, the management examined two witnesses as MW-1 and MW-2. On the other hand, the respondent No. 4 examined himself as WW-1.

7. Dealing with the issue relating to the reference being not maintainable, the respondent No. 4 being not a workman, the learned Labour Court has dealt with the same in paragraphs 10 to 16. Referring to the definition of the term "workman" as defined u/s 2(s) of the Industrial Disputes Act, 1947 and also referring to the decision referred to in the said paragraphs of the award, the learned Labour Court after observing that to arrive at a decision as to whether the respondent No. 4 was a workman or not, the same would require analysis of his works. However, with the said observation and without analyzing the works that was involved with the respondent No. 4, the learned Labour Court came to the abrupt conclusion in paragraph 15 of the award that the respondent No. 4 was a workman. For a ready reference, paragraph 15 of the award is quoted below :-

"15. It is also an admitted fact that Sayed Sajidur Rahman was a lone employee of the Company stationed at Guwahati and he had to perform all sorts of works representing the Company. As he was a single employee of the Company, I hold that he had no supervisory works but had to work for the promotion of sales of Company and in connection of promotion of sales of the Company he represented the Company and wrote various letters to dealers and consumers etc. Thus being the position, I hold that the duties entrusted to Sayed Sajidur Rahman does not come within the purview of Supervisory and Managerial works. What he did was purely technical and sometimes he had to demonstrate the dealers about the user of the machineries. This demonstration also does not come within the purview of definition of a teacher.

8. Mr. L.P. Sharma, learned counsel for the petitioner submits that as per the own admission of the respondent No. 4, he was holding the post in the Managerial cadre and was not a workman. Referring to the duties of the respondent No. 4 which he used to perform Mr. L.P. Sharma, learned counsel for the petitioner submits that the nature of the work performed by the respondent No. 4 would clearly indicate that he was not a workman. Finally referring to the above quoted findings of the learned Labour Court he submits that there being no discussion of evidence on records towards arriving at the finding that the respondent No. 4 was a workman, such finding is liable to be interfered with.

9. When the petitioner responded to the employment notice to the post of Sales Manager he in his application submitted his bio-data including the work experience as follows :-

10. As indicated in the said bio-data, the respondent No. 4 is a Bachelor of Engineering (Mechanical) degree, which he obtained from Assam Engineering College under Gauhati University in the year 1993. In the evidence adduced by the respondent No. 4 in the form of an affidavit, he made the following statement in

respect of the works which he used to perform.

"22. I say that the designation of Assistant Manager Sales (M-2) is a misnomer. In actual practice I do not go out for promoting sales of equipments produced by the company. My primary duty is to demonstrate operations of various equipments sold to customers. A graduate in Mechanical Engineering, was not required to promote sale by advertisement or otherwise. For sale promotion an ordinary non-engineering personnel is enough. A graduate Mechanical Engineer is not needed and in fact I am not authorized to sale of equipments. My duties are never defined expressly.

I have no authority to negotiate prices of equipments with the parties. I am not authorized to operate company bank accounts. I have no disciplinary powers. Sometimes, I used to collect payment from dealers and transmit it to the management. I used to prepare accounts on direction for submission to the Management. The best part of my time is spent on demonstration of operations of equipments and attend to their mechanical defects and imparting training to customers technicians on sale matter which is not my prime job, I act instructions of higher-ups."

11. Section 2(s) of the Industrial Disputes Act, 1947, defines the term Workman which reads as follows :-

"[(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 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, function mainly of a managerial nature.]"

12. The learned Labour Court while passing the award based the same on the presumption that since the respondent NO. 4 was the lone employee of the

Company stationed at Guwahati, he had to perform all sorts of work representing the company. It has also been held that since he was the lone employee he had no supervisory work, but had to work for the promotion of sales of the Company and in connection of promotion of sales of the Company he represented the Company and wrote various letters to the dealers and consumers etc. If that be so, he was a sales promotion employee within the definition of Section 2(d) of the Sales Promotion Employees (Conditions of Service) Act, 1976. As per the said definition, sales promotion employee means any person by whatever name called (including an apprentice) employee or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, but does not include any such person-(i) who, being employee or engaged in any supervisory capacity, draws wages exceeding one thousand six hundred Rupees per mensem, or (ii) who is employed or engaged mainly in a Managerial or Administrative capacity. Similarly, as per the definition of the term workman, the same does not include any such person who is employed mainly in a Managerial or Administrative capacity and also who being employed in a supervisory capacity, draws wages exceeding One Thousand Six Hundred Rupees per mensem.

13. In the instant case, it is in the evidence that the salary of the respondent No. 4 was indicated in the order of appointment as Rs. 2250/-, used to draw more than Rs. 1600/-. That apart there is nothing to indicate that the respondent No. 4 had performed any such duties which can be said to be in the capacity of a workman. As per the own admission of the respondent No. 4, he used to perform Managerial functions.

14. The learned Labour Court while passing the impugned award not only did answer the preliminary issue raised by the management, but also while answering the same in the final award did not take into account the relevant facts including the evidence available on record. There is absolutely no reference to the evidence in the impugned award.

15. For all the aforesaid reasons I am of the considered opinion that the impugned award dated 30/05/2006 passed by the learned Labour Court, Assam, Guwahati in Reference Case No. 13/2001 is not sustainable in law and accordingly the same stands interfered with.

16. Writ petition is allowed. There shall be no order as to costs.