
(2012) 03 KAR CK 0115

Karnataka High Court

Case No: Writ Petition No.752 of 2007 (L - RES)

Sri. Chandrasekhara
Sharma

APPELLANT

Vs

C. Krishnaiah Chetty
Jewellers Private
Limited Jewellers

RESPONDENT

Date of Decision: March 7, 2012

Acts Referred:

- Industrial Disputes Act, 1947 - Section 10 (1) (c), 2 (b), 2 (oo) (bb), 2 (s)
- Sales Promotion Employees (conditions of Service) Act, 1976 - Section 1 (4), 1 (5)

Hon'ble Judges: Aravind Kumar, J

Bench: Single Bench

Advocate: M. Subrahmanya Bhat, for M/S. Subbarao and Co, for the Appellant; S.N. Murthy and Associates, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Aravind Kumar

1. Petitioner is calling in question the award dated 26.05.2006 made in reference No.38/99 by second Additional Labour Court, Bangalore, (Annexure-Q) and seeks for declaration that petitioner is entitled for the relief of reinstatement and consequential benefits. Heard Sri. Narayan Bhat, learned Counsel appearing for petitioner and Sri. S.N. Murthy, learned senior counsel appearing for respondent. Perused the impugned order as also the Annexures appended to the petition.

2. Petitioner was appointed in the respondent company as a counter salesman in the year 1995 and was asked to undergo training and said period of training was extended from time to time upto 19.03.1996 and thereafter with effect from 20.03.1996 it was converted

as probationary period upto 19.09.1996 and it was extended from time to time till 19.09.1998 and salary was also increased from time to time. Petitioner was informed by respondent that his probationary services are no longer required with effect from the close of 8th September, 1998 and petitioner was paid a sum of Rs. 9,351.25 in full and final settlement of accounts. Petitioner was also informed that this action was in accordance with section 2(oo)(bb) of Industrial Disputes Act. Aggrieved by the said action petitioner raised a dispute before the Labour Commissioner cum Conciliation Officer, Bangalore Division-3 and the "appropriate Government" referred the dispute under clause (c) of Sub-section (1) of Section 10 of Industrial Disputes Act, 1947 for adjudication. In the meanwhile petitioner had submitted a representation to the respondents requesting payment of wages on par with other salesman and in this regard also petitioner had raised a dispute before the Labour Commissioner cum Conciliation Officer, Bangalore Division-3 and when same was pending for consideration petitioner was informed that his services are no longer required from the close of 08.09.1998 as referred to supra. On reference being made by the appropriate Government by order dated 16.03.1999 relating to termination of the petitioner said reference came to be registered by Labour Court and notices were issued to the parties and petitioner filed his claim statement seeking reinstatement to his original post, payment of back wages and other consequential benefits like continuity of service, leave etc. Respondent -management filed its counter statement denying the contents of the claim statement except to the extent admitted by it on facts. On the basis of the pleadings of the parties and in view of the specific stand taken by the respondent-management that petitioner is not a workman as defined u/s 2(s) of the Industrial Disputes Act, following additional issue came to be formulated by the Labour Court for its adjudication:

Whether the first party is a workman "under Industrial Disputes Act?

3. Though respondent-management insisted on this issue being treated as a preliminary issue, Labour Court did not accede to the same and as such evidence on merits came to be recorded and petitioner-management examined one witness as MW-1 and got produced 14 documents and they were got marked as Ex-M-1 to M-14 and workman got himself examined as WW-1 and he got produced 13 documents and got it marked as Ex-W-1 to W-13. However the Labour Court took up only the additional issue for its adjudication and answered the same in the negative and rejected the reference. The Labour Court after considering the evidence held that in view of special creativity of the workman involved in his discharge of work and in view of the law laid down by the Hon"ble Apex Court in the case of [Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others](#), and the Judgment of this Court in Sri. B.S. Kurup Vs National Bicycle Corporation of India Ltd., and others reported in 1995 LLR 906 held that petitioner-workman does not fall within the definition of section 2(s) of Industrial Disputes Act and on this ground reference came to be rejected.

4. It is the contention of Mr. Narayana Bhat that the termination order dated 08.09.1998 at Annexure-K itself would go to show that the services of the petitioner came to be terminated by the respondent-management in exercise of their power u/s 2(oo)(bb) of the Industrial Disputes Act and period of appointment of petitioner was not for a fixed period and as such the Labour Court fell in error in holding that petitioner is not a workman as defined u/s 2(s) of the Industrial Disputes Act. He would contend that nature of work which petitioner was discharging was as a counter salesman initially as a trainee and thereafter as a probationer and was paid wages, his work was supervised by his supervisor, he was required to mark his attendance, submit leave application to the Director and he was required to reach the target every month and all these would go to show that petitioner was accountable to the respondent to discharge his duties. He would contend that the Labour Court erred in not considering the evidence adduced by petitioner to prove that he is workman and that there is master and servant relationship between him and respondent. He would elaborate his submission to contend that Labour Court has mainly relied on the evidence of witness examined on behalf of management and as such conclusion arrived at by Labour Court is erroneous. He would contend that only when a demand was made by petitioner for wages being paid on par with similarly placed employees and when petitioner approached Labour Officer for said relief termination order came to be issued. On these grounds he seeks for setting aside the award of the Labour Court and prays for remitting the matter back to the Labour Court for adjudication on other issues. In support of his submission he had relied upon the Judgment of Apex Court in the case of [SPIC Pharmaceuticals Division Vs. Authority Under Section 48\(1\) of A.P. and Another](#) .

5. Per contra, Sri. S.N. Murthy, learned counsel appearing for respondent would support the award passed by the Labour Court and submits that petitioner is not a workman as defined u/s 2(s) of the Industrial Disputes Act and he was working as a salesman and his duty was to answer all queries of the customers raised in respect of the jewellery like weight, cost, fashion, suitability to the customer etc., and he contends it is the art of the salesman and was designated as "Sales Advisor" and not a mere salesman and as petitioner is not a "workman" as defined under Industrial Disputes Act. He would elaborate his submission by contending business of selling jewellery needs very high degree of salesmanship and fresh recruits are trained for a period of two years or even more and that number of salesman are given extensive theoretical and practical training which was extended to the petitioner herein also and as such he possessed the creativity and tact to motivate the customer to purchase the jewellery and the Labour Court has taken into consideration the evidence placed by respective parties which would go to show that petitioner was not a mere salesman but having certain amount of creativity and thus applying the principles enunciated in *Burmahshell's* case and *Kurup's* case, Labour Court has rightly held that petitioner is not a workman as defined u/s 2(s) of the Industrial Disputes Act and prays for dismissal of the writ petition. In support of his submission he has relied upon the following Judgments:

(i) 1971 Lab IC 699

(ii) AIR 1991 SC 2294

6. He would further submit that even otherwise petitioner was a probationer and termination was brought by efflux of time and it falls u/s 2 (oo)(bb) of Industrial Disputes Act and as such it is not a retrenchment as alleged. On these grounds he supports the Award of the Labour Court and prays for dismissal of the petition.

7. In reply Sri.Narayana Bhat, learned Counsel appearing for petitioner contends that even if petitioner is considered as salesman, the provisions of the Sales Promotion Employees (Conditions of Service) Act, 1976 would be applicable wherein the provisions of Industrial Disputes Act is held to be applicable in relation to sales promotion employees vide Section 6 and as such even if it is construed that petitioner is a salesman even then the provisions of Industrial Disputes Act would apply and as such Labour Court was not justified in answering that the petitioner does not come within the purview of Section 2(s) of Industrial Disputes Act. Sri. S.N. Murthy in reply to this argument would contend that said enactment was the result of a Judgment pronounced by Hon"ble Apex Court in May and Baker (India) Ltd., Vs Their Workmen (1961) 2 LLJ 94 and the statement and object of reasons reflects that it covers only pharmaceutical industry and the Central Government is empowered to bring any other establishment within the purview of the Act by issuance of notification in the Official Gazette by specifying the industry and admittedly such notification has not been issued to the industry in question and as such the said Act is inapplicable.

8. Having heard the learned advocates appearing for parties, I am of the considered view that following points arise for consideration:

(i) Whether the provisions of Sales Promotion Employees (Conditions of Service) Act, 1976 is attracted to the facts on hand?

(ii) Whether the Labour Court was correct in holding that petitioner is not a workman as defined u/s 2(s) of the Industrial Disputes Act, 1947?

(iii) What order?

BRIEF BACKGROUND OF THE CASE:-

9. Petitioner was appointed on 31.07.1995 for the post of "COUNTER SALESMAN" for a period of six months as trainee and said training period was extended upto 19.03.1996 and thereafter with effect from 20.03.1996 it was converted to probation period upto 19.09.1996 initially and thereafter upto 19.03.1997 and extended from time to time upto 19.09.1998. It is not in dispute that on 04.08.1998 as per Ex-W-7 petitioner submitted a representation to the Executive Director of the respondent seeking for payment of salary on par with other employees who were carrying on similar nature of work and same

having not been considered, petitioner moved the Labour-cum-conciliation Officer by representation dated 17.08.1998 (Ex-W-10) and on the basis of the said representation the Labour and Conciliation Officer has issued notice dated 09.09.1998 (Ex-W-11) to the respondent-management. The respondent-management by letter dated 08.09.98 informed the petitioner that his services are no longer required from the close of 8th September, 1998. These facts as borne out by records are not in dispute.

10. On such letter dated 08.09.98 (Ex.W-11) being issued to the petitioner, he moved the appropriate Government for making a reference contending that it was illegal termination and for reinstatement with all other consequential benefits. Accordingly the appropriate Government by order dated 16.03.1999 referred the dispute by exercising its power u/s 10(1)(c) of the Industrial Disputes Act to the II Additional Labour Court, Bangalore for adjudication. As noticed earlier, Labour Court though framed an additional issue as to whether the petitioner is a "workman" as defined u/s 2(b) of Industrial Disputes Act, 1947 it recorded the evidence of parties on merits after turning down the request of the management to determine the additional issue as a preliminary issue and after recording of evidence on merits, it determined only the additional issue by answering it in the negative. These are undisputed facts. Now let me turn my attention to answer the points formulated hereinabove.

RE: POINT NO.1:

11. A perusal of the pleadings namely claim statement and counter statement would not disclose that there was any plea raised by either of the parties with regard to applicability or otherwise of the provisions of the Sales Promotion Employees (Conditions of Service) Act. 1976 (hereinafter referred to as "Sales Act" for brevity). However, in view of such a plea now having been raised, same is considered by me so as to put a quietus on this issue. It is noticed that u/s 1(4) of the Sales Act applicability has been enumerated as under:

(4) It shall apply in the first instance to every establishment engaged in pharmaceutical industry.

(5) The Central Government may by notification in the Official Gazette, apply the provisions of this Act, with effect from such date as may be specified in the notification to any other establishment engaged in any notified industry.

Notified Industry as per section 2(b) means an industry declared as such u/s 3. Section 3 of the said Act, empowers the Central Government to declare certain industries to be notified industries.

Section 6 specifies that certain other Acts would also be applicable to sales promotion employees and it includes Workmen's Compensation Act. 1923.

Industrial Disputes Act, 1947, Minimum Wages Act, 1948, Maternity Benefit Act, 1961, Payment of Bonus Act, 1965 and Payment of Gratuity Act, 1972. For the Sales Act to be applicable to an industry the Central Government in exercise of its power under sub-section (5) of section 1 has to notify the industry as a "Notified Industry" as defined u/s 2(b). In the absence of such notification published in the Official Gazette it cannot be said that provisions of Sales Act would be applicable to the "sales promotion employees" engaged in all the industries or the industry in question. It is not the case of the petitioner in the instant case that such a notification has been issued by the Central Government by bringing the jewellery manufacturing and selling industries within the purview of the said Act by issuance of such a notification. Hence, it cannot be held that provisions of the said Act would be applicable to the petitioner. Accordingly Point No. 1 formulated hereinabove is answered by holding that the provisions of Sales Promotion Employees (Conditions and Service) Act, 1976 is inapplicable in so far as respondent industry is concerned.

RE: POINT NO.2:-

12. In order to answer this point it would be necessary to extract the definition of workman as defined u/s 2(s) of the Industrial Disputes Act, 1947.

2(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. The Labour Court while answering the issue in the negative has relied upon two judgments i.e., *Burmahshell* and *B.S. Kurup*. The principles enunciated by their Lordships is extracted herein below:

4. In order to decide whether the decision of the Tribunal with respect to the various categories is correct, it is necessary to consider the definition of "workmen" in the Act as

amended by Industrial Disputes Amendment Act 36 of 1956. That definition is reproduced below.

2(s) "Workman" means xxx managerial nature.

For an employee in an industry to be a workman under this definition, it is manifest that he must be employed to do "skilled or unskilled manual work, supervisory work, technical work or clerical work. If the work done by an employee is not of such a nature, he would not be a workman. Mr. Chari on behalf of the Association, however, put forward the argument that this definition is all comprehensive and contemplates that all persons employed in an industry must necessarily fall in one or the other of the four classes mentioned above and consequently, the Court should proceed on the assumption that every person is a workman; but he may be taken out of the definition of workman" under the four exceptions contained in the definition. The two exceptions with which we are primarily concerned are exceptions (iii) and (iv). Under exception (iii), even a workman, who is employed mainly in a managerial or administrative capacity, goes out of the definition of "workman", while under exception (iv), persons, who are employed in a supervisory capacity, go out of the definition, provided they either draw wages exceeding Rs.500/- per mensem or exercise, by the nature of the duties attached to the office or by reason of the powers vested in them, functions mainly of a managerial nature.

5. We are unable to accept, this submission. In the case of May and Baker (India) Ltd. v. Their Workmen (1961 (2) Lab. LJ 94= (AIR 1967 SCC 678), this Court had to consider the correctness of a decision of a Tribunal which had held that one, Mukerjee, an employee in an industry, was a workman under the Act because he was not employed in a supervisory capacity. The Court held :-

The Tribunal seems to have been led away by the fact that Mukerjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore, as Mukerjee was not a workman, his case would not be covered by the Industrial Disputes Act and the tribunal would have no jurisdiction to order his reinstatement.

In that case, the Court thus held Mukerjee not to be a workman on the ground that his work was neither clerical nor manual which was the nature of the work envisaged in the definition to make an employee, a workman. It is true that that decision was given on the definition of "workman" as it stood before the amendment of 1956 when the words "supervisory" and "technical" did not occur in the definition. Mr. Chart's submission is that the amendments in 1956 introduced the words "supervisory" and "technical" with the object of making the definition all-comprehensive" but, on the face of it, it cannot be so. If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and

a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word "workman" without having to resort to the exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may he be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would he be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously; such an employee would not be a workman, because the work, for which he is employed is not covered by the four types mentioned in the definition and not because he would be taken out of the, definition under one of the exceptions.

14. Sri. S.N. Murthy, learned Senior counsel has relied upon the Judgment of Hon"ble Apex Court in the case of Sh. T.P. Srivastava Vs M/s. National Tobacco Company of India Limited where under it has been held as follows by relying upon Burmahshell's case :

3. In order to come within the definition of workman under the Industrial Disputes Act as it stood in the year 1973 when the appellant's service was terminated, the employee has to be under the employment to do the work of one of the types of work referred to in the section i.e. manual, skilled and/or clerical in nature. The finding of the Tribunal on the nature of the work is a finding on a question of fact and it is also borne out by the document produced before the Labour Court. It is seen from the facts found that the appellant was employed to do canvassing and promoting sales for the company. The duties involve the suggesting of ways and means to improve the sales, a study of the type or status of the public to whom the product has to reach and a study of the market condition. He was also required to suggest about the publicity in markets and melas, advertisements including the need for posters, holders and cinema slides. These duties do require the imaginative and creative mind which could not be termed as either manual, skilled, unskilled or clerical in nature. The supervising work of the other local salesmen was part of his work considered by the Tribunal as only incidental to his main work of canvassing and promotion in the area of his operation. Such a person cannot be termed as a workman is also the ratio of the decision of this Court.

A reading of definition clause 2(s) of Industrial Disputes Act and Judgments referred to above, it would emerge that an employee in order to come within the said definition will have to necessarily carry out one of the types of work referred to in the section itself namely either manual, skilled or unskilled, technical. operational, clerical or supervisory work.

15. In Burmahshell's case, it was held that if the work of employee is not of such nature as enumerated herein above he would not be a workman. It was observed that if a person

employed in canvassing sales for an industry as such would not be carrying such work of the four types of work as envisaged u/s 2(s) and he would fall outside the definition.

16. In T.P. Srivatsava's case referred to supra it was noticed that employee therein was employed to do canvassing and promoting sales for the company and his duties involve suggesting ways and means to improve the sales and it was held that these duties do require imaginative or creative mind which cannot be termed either manual, skilled, unskilled or clerical in nature. In this back ground, it was held that employees involved in these two cases who were promoting sales were outside the definition of workman.

17. Now turning my attention to the evidence tendered by the parties before Labour Court i.e., oral as well as documentary evidence the following would emerge:

(i) The order of appointment dated 31.07.1995 which was marked as Ex-W-9 would go to show that petitioner's application for appointment was considered for the post of COUNTER SALESMAN and was selected as a trainee. The mode in which the training would be given and the type of training that would be given is not specified. From time to time the training period was extended undisputedly till 19.09.1998 as evidenced from Ex-W-6.

(ii) Petitioner herein sought for payment of salary from the management requesting to pay the same salary that was being paid to other employees who were discharging the same duties as that of the petitioner and in pursuance thereof representation was submitted to the Labour Officer to advise the management to pay equal remuneration vide letters dated 04.08.98 and 17.08.98 Ex-W-7 and W-10 respectively.

(iii) As per notice dated 09.09.98 issued by the Labour and Conciliation Officer which came to be marked as Ex-W-11 management was called upon to reply to the said representation of petitioner.

(iv) On 08.09.98 petitioner's services was held to be no longer required by treating the same as termination u/s 2(oo)(bb) of the Industrial Disputes Act by the Management.

(v) At paragraph 4 of his examination-in-chief petitioner has stated that he used to be entrusted with the jewellery from his superior till the end of the day and used to return the unsold jewellery at the end of the day and he was not having discretion to reduce the marked price of the jewellery slightly at the request of the customer and he had to take the permission of the superior and he has also stated he was not exercising any managerial functions and no employee was working under him and he was carrying out the work as per the instructions of his immediate superior.

(vi) In his cross examination he admits that he was discharging the duties of counter salesman. To a suggestion that he has spent more time in the diamond counter sales, he has denied this fact. He also admits that counter salesman advise the customers that a particular design or shape suits them well. There is further admission that a salesman by

his art of projecting the jewellery can certainly increase the sale of jewellery and other items and has admitted the suggestion that creativity of the salesman is involved in designing a jewellery according to the test and requirement of each customer.

18. The Labour Court by taking into consideration the above admission and the fact that customers come with a specific design of jewellery to be bought by them the counter salesman would assist the customer according to their taste, liking and prepare a design and after approval of design by the customer, they take order for preparation of the jewellery, as the basis for arriving at a conclusion that petitioner was not a mere salesman and he required to have certain amount of creativity he would not fall under the purview of section 2(s) of the Industrial Disputes Act.

19. A conjoint reading of the provision namely section 2(s), the Judgments of the Hon"ble Apex Court and the evidence on record and the facts along with the rival contentions when examined it is noticed that even an apprentice employed in an industry to do any manual, unskilled, skilled, technical operation, clerical for hire or reward, whether in terms of employment either expressly or impliedly would be a workman. The exclusion is provided under sub-clause (i) to (iv) of Section 2(s). Clause (i) relates to the Air force Act, Army Act and Navy Act. Clause (ii) refers to the personnel employed in the Police service or as an officer or other employee of a prison. Clause (iii) refers to employees of managerial and administrative capacity and clause (iv) refers to those personnel employed in a supervisory capacity, drawing wages exceeding `10,000/- (from 15.09.2010 and earlier to the same it was `6,000/-) which includes mainly functions of managerial in nature. Thus, the substantial nature of employment is the test which requires to be applied.

20. It is to be noticed that Industrial Disputes Act came into force with effect from 01.04.1947. It was amended by amending Act 36 of 1956 which came into force from 29.08.1956. It was further amended by amending Act 46 of 1982 with effect from 21.08.1984 and the word "workman" as defined u/s 2(s) has undergone changes in these amendments and they are extracted in the comparative table herein below:

AS DEFINED IN
1947 ACT

AS DEFINED UNDER 1956 ACT

AS DEFINED
UNDER 1982
ACT

"[s] "workman" means any person employed (including an apprentice) in any industry or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceeding under this Act in relation to an industrial dispute, a workman is charged during that dispute, but does not include any person employed in the naval, military, or air service of the Crown."

"[s] "workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical 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

"[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 Army Act, 1950, or the Airforce Act, 1950 or the Navy (Discipline) Act, 1934;

Or

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

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

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 sic hundred rupees

or

(iv) who being employed in a supervisory capacity, draws wages exceeding Five hundred 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.

exercise, 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."

21. It is to be further noticed that by amending Act 46 of 1982 there was a change brought in the definition of "Wages" u/s 2(rr) of the Industrial Disputes Act and for the first time the following was included in the said definition:

(rr) "Wages" xxx

(i) such allowances xxx

(ii) the value of xxx

(iii) and travelling concession:

(iv) any commission payable on the promotion of sales or business or both but does not include

(a) any bonus;

(b) any contribution xxx

(c) any gratuity xxx

Simultaneously the definition of Industry" as found in Section 2(j)

2(j) "industry" means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not,

(i) any capital has been invested for the purpose of carrying on such activity; or

(ii) such activity is carried on with a motive to make any gain or profit, and includes-

(a) any activity of the Dock Labour Board established u/s 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948);

(b) any activity relating to the promotion of sales or business or both carried on by an establishment,

but does not include

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation. For the purposes of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of section 2 of the Plantation Labour Act, 1951 (69 of 1951); or

(2) hospitals or dispensaries; or

(3) educational, scientific, research or training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(7) any domestic service; or

(8) any activity being a profession practised by an individual or body of individuals, if the number of persons employed, by the individual or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten;

22. For an employee in an industry to be a workman under the definition clause he must fall under the four categories as defined therein namely (i) he must be employed to do skilled or unskilled manual work; (ii) supervisory work; (iii) technical work; (iv) clerical work. At this juncture it would necessary to find out as to whether the petitioner herein would fall in either of these categories so as to hold that he would fall within the definition or outside the definition. The Hon"ble Supreme Court in *Burmahshell's* case has held as under:

Para 5 We are unable to xxx exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may he be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would he be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously, such an employee would not be a workman, because the work, for which he is employed, is not covered by the four types mentioned in the definition and not because he would be taken out of the definition under one of the exceptions.

23. In the said case, the contention on behalf of the workman before the Industrial Tribunal as well as before Apex Court was that the employee was doing either manual or clerical work, and that not only he had no supervisory duties but he was doing his work under the direction of his superiors and therefore he was a workman within the meaning of the definition of workman as it stood then. The said contention was negated.

24. The Hon"ble Apex Court in the case of H.R.Adyanthaya Vs Sandoz (India) Ltd. etc., etc., has taken into consideration the judgment of May and Baker and Burmahshell and has held as follows:

25. What is further necessary to remember is that in none of the aforesaid decisions which we have discussed above, the word "operational" or the words "skilled" and "unskilled" independently of "manual" fell for consideration as the amendment under which they were introduced came into operation for the first time w.e.f. August 21, 1984 and the dispute involved in the aforesaid decisions were of the prior dates.

32. It also appears that the Parliament has amended the definition of "industry" by the Amending Act 46 of 1982 to include, in the definition of industry in Section 2 (j) of the ID Act, among others, any activity relating to the promotion of sales or business, or both carried on by any establishment. However, that amendment has not yet come into force. But the amendment made by the very same Amending Act of 1982 to the definition of "workman" in Section 2(s) to include those employed to do "operational work" and to the definition of "wages in Section 2(rr) to include "any commission payable on the promotion of sales or business or both" has come into force w.e.f. August 21, 1984

25. Thus, the type of work that is carried on by an individual would be the deciding factor either to bring within the definition or to hold that he would be outside the definition. Whether an employee answers the description of a workman or not has to be determined on the basis of conclusive evidence available on record. The test one must employ is what was the primary, basic or dominant nature of duties for winch the person whose status is under consideration was employed for. A few extra duties carried out by a employee would hardly be relevant for determining his status. In this background the evidence available on record requires to be examined. The evidence on record would go to show that the petitioner herein was carrying on mainly salesman work and in discharge of said duties he was also giving certain advice to customers regarding suitability or

otherwise about the jewellery being sold which even if construed as technical work namely evaluating different types of diamonds it was on account of specialised training having been imparted to him to effectively carry out salesman work. In fact, at the time of entering into service, he was not having any such technical qualification and it is not the case of management that at the entry level itself, he was possessing any technical know how about jewelleries, diamonds, etc. If a person acquires expertise over a period either on account of carrying out such work on day to day basis or if an individual has been imparted with some training, on this aspect, such a person cannot be excluded from the purview of being construed as workman. For purposes of illustration, a Sales Boy/Girl working at a Petrol Station, if they were to advise the customers to fill their vehicles with "High Octane" instead of the regular petrol by informing them that vehicle would be in a healthy condition or the mileage it would fetch to be more, such advice cannot be construed as a technical advice so as to take them out of the purview of definition of "workman". Likewise, a person working in a grocery shop were to advise a customer either with reference to a particular grocery or item by suggesting what would be the best that can be bought depending upon the customer that also would not take them out of the purview of workman and bring them within the scope of "Sales Advisor". For that matter sales includes advice. Any advice given cannot be construed that it was in the capacity of "Advisor". In that view of the matter the work carried on by petitioner cannot be construed as a work of "sales advisor" only so as to exclude him from the purview of the definition of workman. In view of the discussion made hereinabove, I am of the considered view that Tribunal fell into serious error by answering the issue in the negative. Accordingly Point No.2 formulated herein above is answered in the negative and in favour of the petitioner.

RE: POINT NO.3:

26. In view of point no.2 having been answered in favour of the petitioner and the Labour Court having not answered other issues on merit, it would be appropriate to remit the matter to the Labour Court for disposal on merits.

In the result following order is passed:

ORDER

1. Writ petition is allowed.
2. Award dated 26.05.2006 in Reference No. 38/99 passed by Presiding Officer, II Additional Labour Court, Bangalore, Annexure-Q is hereby set aside.
3. Matter is remitted to Labour Court for adjudication and disposal of the reference on merits.
4. Rule made absolute. No costs.