

(2010) 02 BOM CK 0133

Bombay High Court (Nagpur Bench)

Case No: Letters Patent Appeal No. 130 of 2009 in Writ Petition No. 4980 of 2008

Chandrashekhar
Chintaman Vaidya

APPELLANT

Vs

National Organic
Chemical Industries
Ltd.

RESPONDENT

Date of Decision: Feb. 26, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Evidence Act, 1872 - Section 106
- Industrial Disputes Act, 1947 - Section 2
- Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 - Section 28, 30(2)

Citation: (2010) 4 BomCR 31 : (2010) 126 FLR 289 : (2011) 1 LLJ 200 : (2010) 3 MhLj 434

Hon'ble Judges: P.B. Varale, J; A.H. Joshi, J

Bench: Division Bench

Advocate: Siddhesh Kotwal and A.C. Dharmadhikari, for the Appellant; R.B. Puranik, for the Respondent

Final Decision: Allowed

Judgement

A.H. Joshi, J.

Admit. Learned Adv. Mr. R.B. Puranik waives service for respondent sole.

Taken up for final hearing by consent.

Facts

2. The appellant/complainant had filed a complaint before Labour Court u/s 28 read Item 1 of Scheduled IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair

Labour Practices Act, 1971, against alleged illegal termination by order dated 14th April, 2003, which was in the nature of dismissal on account of misconduct.

The appellant is hereinafter referred to as "complainant."

3. In the complaint, he had set up a plea that he was a workman under provisions of Section 2(s) of the Industrial Disputes Act, though his appointment was as a Supervisor.

The employer denied the plea and raised a Preliminary Objection as to the status of the complainant to be a workman.

4. The complainant examined himself and produced certain documents and sought production of documents from the employer. He has denied having done any managerial duties, and stated that he was doing the work of clerical nature and scrutiny of supplies received pursuant to orders placed by superiors. The employer did not lead any evidence, also did not produce the documents which complainant had sought from the employer. The respondent even did not file affidavit about existence, or otherwise, of documents sought to be produced and reasons towards failure or inability to produce those.

5. The case has proceeded on a common belief that the burden of proof to prove the fact that complainant is a workman was on the complainant. Labour Court, Industrial Court and Single Judge of this Court have recorded the finding that the workman / complainant has failed in proving his status, and, therefore, employer had nothing to prove by way of rebuttal.

6. Having failed in all Courts, the complainant is before this Court by way of present Letters Patent Appeal.

7. Heard learned Advs. Mr. Siddhesh Kotwal with Mr. A.C. Dharmadhikari for the appellant and learned Adv. Mr. R.B. Puranik for the respondent.

8. Perused the record annexed to the appeal. Appellant had produced, at the time of hearing, the copy of orders passed by Labour Court on the application for direction for production of documents filed by complainant, so also copy of cross-examination of the complainant, which documents were not the part of paper-book.

Appellant's Submissions

9. Submission of the appellant is that the findings of all Courts are based on totally erroneous test of facts required to be proved.

According to appellant:

[a] Courts were required to see "what are predominant duties of the complainant," however, Courts got misdirected on the nomenclature of the post on which the complainant was appointed.

[b] Courts also got misdirected due to six documents which, in fact, did not prove predominant duties discharged and work performed by the complainant.

Respondent's Submissions

10. The respondent has strongly denied that primary burden of proof was discharged by the complainant and, therefore, that the onus did not shift. It is then urged that the admissions of complainant were sufficiently destructive of his claim, and, therefore, the appeal was meritless and deserves dismissal.

11. Learned Advocates for the parties have placed reliance on various citations. The Judgments along with purpose for which those are relied are as follows:

[A] Appellant's citations and propositions:

[1] [Hussan Mithu Mhasvadkar Vs. Bombay Iron and Steel Labour Board and Another, .](#)

Proposition:

Primary duties of an employee, purpose, aim and object of the employment, i.e., predominant nature of duties performed by person claiming to be a workman u/s 2(s) of the Industrial Disputes Act, will be the true test to find out the status as a workman.

[2] Mukand Ltd. v. Mukand Staff & Officers" Association 2004 AIR SCW 3731.

Proposition:

The question of class to which the employees belong is to be decided not on the basis of grade in which they were placed, but on the basis of their duties, responsibilities and powers as laid down in Section 2(s) of the Industrial Disputes Act.

[3] [D.P. Maheshwari Vs. Delhi Administration and Others, .](#)

Proposition:

Occasional entrustment of supervisory, managerial or administrative work will not take a person mainly discharging clerical duties out of purview of Section 2(s) of the Industrial Disputes Act.

On facts of the case, Hon"ble Supreme Court had interfered with the Judgment of High Court where the Judgment was rendered without dealing with the crux of the matter involved.

[4] [Malabar Industrial Co. Ltd. Vs. Industrial Tribunal, Trivandrum, .](#)

Proposition:

Whether the employee concerned is a workman being a jurisdictional fact and issue, it can be scrutinized in proceedings under Article 226 of Constitution of India.

Main feature, pith and substance of his employment must be manual or clerical before the definition of "workman" u/s 2(s) is attracted.

[5] [S.K. Maini Vs. M/s. Carona Sahu Company Limited and others](#), .

Proposition:

Predominant nature of work is to be seen, and entrustment of some supervisory or other work, which is incidentally done - only a fraction of his entire work, will bring the employee within the purview of definition of the "workman" u/s 2(s) of the Industrial Disputes Act.

[6] [Standard Chartered Bank Vs. Andhra Bank Financial Services Ltd. and Others](#), .

Proposition:

When entire evidence has come on record, burden of proof, whether it shifts etc., becomes immaterial.

Moreover, this judgment does not render any direct guidance on the facts of the case.

[7] [State of Punjab Vs. Modern Cultivators, Ladwa](#), .

Proposition:

Failure to produce documents would lead to only conclusion that if produced, those would have gone against the party who has withheld the documents and hence adverse inference against such party is liable to be drawn.

[8] [Badat and Co. Vs. East India Trading Co.](#), .

This judgment is not relevant. Hence it is not referred.

[B] Respondent's citations and the Propositions therein:

1. Somnath Tulshiram Galande v. Presiding Officer, IInd Labour Court, Pune and Ors. 2008 I CLR 656.

Proposition:

Onus to prove that the claimant is a workman and to prove the test to satisfy all essential ingredients lies on one who claims said status. Unless proof of such a fact is emerging from evidence, it cannot be held that he is a workman.

2. [Management of Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh](#), .

Proposition:

A person, principally a workman, should be employed in an industry, and must be performing manual, skilled, unskilled, technical, operational, clerical or supervisory work and merely because the employee has not been performing any managerial or supervisory duties, ipso facto he would become a workman.

3. [Management of Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh, .](#)

Proposition:

Burden of proving that a person is a workman lies on the person who claims to be a workman.

4. H.R. Adyanthaya etc. etc. v. Sandoz (India) Ltd. Etc. etc. 1994 II CLR 552.

Proposition:

Even if it is proved that the complainant does not do any managerial or supervisory work, unless it is proved that he does work of the nature of manual, supervisory, technical and clerical, he does not become a workman u/s 2(s) of the Industrial Disputes Act.

5. Mukund Staff & Officers" Association v. Mukund Ltd. 2007 III CLR 296.

Proposition:

The burden to prove that a person is a workman lies on the workman. The basic rule that who approaches the Court should prove the case is not departed in any of the provisions of Industrial Disputes Act.

6. Electronics Corporation of India Ltd. v. Electronics Corporation of India Services Engineers Union 2006 III CLR 704,

7. Bank of Baroda v. Ghemarbhai Harjibhai Rabari 2005 II CLR 279, and

8. Arvind Anand Gaikwad v. Uni Abex Alloy Products Ltd. and Ors. 1988 I CLR 26.

Proposition:

The onus of proof was on the workman, though the employer had raised a dispute about his status.

12. In order to appreciate the facts and points involved, it is necessary to have a look at the pleadings, facts and evidence.

THE PLEADINGS

13. Relevant pleading/averment, which is crucial to the issue as to whether the appellant is a Workman, is contained in Para 1 of the complaint, which is quoted for ready reference:

1. The complainant as appointed by the Respondent on 17.8.1988 and he was confirmed on 1.9.1989 by letter dtd. 31.8.1989. The complainant was appointed in purchase Department. He was being given work not more than a clerk. No work was given to him in managerial or administrative capacity. His job was to scrutinize the purchase orders, which were signed by the controlling officer and later on he was to post it manually.

[Quoted from page No. 51 of the Appeal paper-book].

14. The respondent-employer had filed reply to application u/s 30(2) of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act for interim relief, however, had not filed a Written Statement to the Complaint.

The employer had adopted the reply to the application for interim relief as Written Statement.

15. Application for interim relief is at page 55 of the appeal paper book. This application does not contain factual averments. It contains a statement that the contents of the complaint be treated as part and parcel of this application, and based on those pleadings on which the complainant had prayed for interim relief.

16. In Para 5 of the reply to the application for interim relief, the employer has dealt with the aspect of status of the complainant as a workman, which reads as follows:

5] It is submitted that the complainant has filed the complaint before this Hon"ble court, wherein he himself submitted that he was appointed as a purchase supervisor initially by the N.A. According to the N.A. the complainant was part of managerial staff therefore, he would not be a workman as per the definition u/s 2(s) of Industrial Disputes Act, 1947.

Moreover the complainant exercises his direction in the best interest of the Non Applicant Company; the complainant had been drawing salary exceeding Rs. 1600/-.

It is submitted that the complainant being managerial staff [i.e., Managerial cadre] was not getting the benefits of agreement of settlement carried out by the company with the union.

Thus Section 2 Clause [S] would clearly bring the case of complainant out of the purview of the I.D. Act.

It is submitted the complainant enjoyed certain special privilege and benefit, which benefit is not available to non-supervisory staff.

Therefore it is crystal clear from the above facts that the present complainant was employed in supervisory capacity.

The complaint of the complainant is not all maintainable in the eye of law and so also is not within the jurisdiction of this Hon"ble court, therefore, this Court has no jurisdiction to entertain or to decide the complaint of the complainant and hence on this count also the complaint of the complainant deserves to be dismissed.

[Quoted from page No. 60 of the Appeal paper-book. Sub-paragraphing is done for convenience of reference].

17. The employer"s pleading that the complainant is not a workman is in summary based on following points:

[1] complainant was appointed as a supervisor;

[2] his salary was Rs. 1600/-;

[3] he was not given benefit of Agreement entered with workers, as he was for all times treated as Managerial Staff;

[4] he was enjoying certain "special privileges and benefits", which are not available to non-supervisory staff, and

[5] he was performing supervisory and managerial duties.

As to production of Documents

18. The complainant had filed an application dated 2nd July, 2005 seeking production of documents from the employer. The Labour Court had passed order on the said application and directed production of documents, and in the alternative to file an affidavit, if the documents called by the complainant cannot be filed.

Admittedly, the employer has not produced the documents sought for and ordered. The employer has not filed affidavit to bring on record a fact that these or such documents do not exist or for explaining and stating any reasons as to why the documents cannot be produced.

Complainant"s Evidence

19. In order to prove the claim, the appellant has led his own evidence by way of affidavit.

In para 1 of the Affidavit, complainant has stated as regards his working. Relevant portion is quoted below for ready reference:

1. ...I was working in the Purchase Department.

My work is of clerical nature. I was not at all entrusted with any managerial or Administrative powers.

I have never supervised the work of any worker or no subordinate working under me.

The job entrusted to me was of entirely clerical nature.

I have to scrutinize the purchase order and enter into the register and took the follow-up the purchase order which are signed by the controlling officer, as such my nature of duties were of clerical nature only, even though I was appointed in the supervisory cadre but I was not doing any work of supervisory nature.

[Quoted from page No. 78 of the Appeal paper-book. Sub-paragraphing is done for convenience of reading].

20. The complainant was cross-examined. In the cross-examination, he has admitted that:

[a] He was not getting the benefits which the workers who were party to agreement with the employer were getting.

[b] The Supervisors are managerial staff.

[c] He had signed gate passes for non-supervisory employees, which are Exhs. 34 and 35.

[d] He has signed as auditee the audit reports [Exhs.40 and 41].

Employer"s Evidence

21. Respondent-employer filed documentary evidence which was got proved in the cross-examination of the complainant, but did not lead any oral evidence.

The Judgments of Labour Court & Industrial Court

22. The learned Judge of the Labour Court by Judgment and Order dated 2nd August, 2008 held that the complainant was not a workman and hence dismissed the complaint.

The Labour Court did not address on other issues, namely Issue Nos. 2 to 4 which pertained to legality of termination, and the relief sought.

23. The Judgment of the Labour Court was maintained by the Industrial Court by its Judgment and Order dated 26th June, 2008 in Revision [ULP] No. 116 of 2006, and by learned Single Judge in Writ Petition No. 4980 of 2008. Aggrieved by all the three orders, the appellant is before this Court.

24. Judgments impugned were read over to us by both parties, and we have ourselves read and discretely scrutinized all three judgments.

The Writ Petition before Single Judge of this Court

It is seen that learned Single Judge of this Court has taken a brief resume of challenge as argued, i.e., burden of proof, which was the sole point of thrust.

25. In the background of said submission about burden of proof urged with emphasis, it appears that Single Judge has omitted to enter in the arena of scrutinizing the facts and testing the jurisdictional facts and findings thereon.

26. The moot question involved in the case, in fact, and requiring analysis, is as to whether predominant nature of duties of complainant is proved?

This question really got side tracked while learned Single Judge heard and decided the case.

27. On consideration of Judgment impugned, what emerges is that learned Single Judge has not exerted on the scrutiny of jurisdictional facts as to the complainant's status and the predominant duties performed by him.

28. This Court has, therefore, to see what Industrial Court has done. The learned Industrial Court also addressed itself on taking summary look of the findings, confirmed those, without addressing on predominant nature of duties.

29. It is, thus, evident that all three Courts got themselves misdirected on the real yardstick.

Therefore, this Court has to examine whether evidence brought on record by the complainant proves the predominant nature of duties.

30. It is, therefore, necessary and useful to advert to the findings recorded by Labour Court.

The points on which the learned Judge of Labour Court held that the complainant is not a workman are seen discussed in paragraph No. 14 to 21 of judgment.

Discussion on fact-finding by Labour Court and its analysis

31. It would be sufficient to cull out and note down the points on which the learned Judge of the Labour Court held that from the evidence on record brought by the complainant, as to how he has failed to prove that he is not a workman. These points are as follows:

[a] Complainant's name appears in the Attendance-cum-Wage Register maintained by Company which is separate for supervisors.

[b] In the Show-cause-Notice/letter dated 27th March, 2001 [Exh.38] addressed to the complainant, he is shown as Supervisor.

[c] The complainant admits that he has issued Gate Passes to persons categorized as Non-supervisory staff which at Exhs.34 and 35. The complainant had signed these Gate Passes in the capacity of Head of the Department.

[d] Complainant signed Delivery Challans-cum-Gate Passes as Head of the Department, as can be seen from said Exhs.34 and 35.

[e] Audit Reports [Exhs.40 and 41 are signed by complainant in the capacity as an audited .

[f] Complainant was not a member of Union of the workers, and the category of non-supervisory staff alone could have become members.

[g] Complainant has not explained as to why he did not become a member of Union.

[h] In the background of a long duration of complainant's designation as a Supervisor, it was necessary for him to prove that he was doing a clerical job, which he has not proved.

[i] Complainant has admitted in cross-examination that the allowance called "DQ" payable quarterly to all workers is not paid to the managerial staff.

32. When this appeal was argued, it was a common ground that the questions, which were to be considered and decided by the Labour Court, were:

[a] Whether the status of complainant being a workman was proved on legal evidence, if any brought by the complainant?, And,

[b] Whether the facts, if any, proved by the complainant were disproved by the evidence brought by the employer?

33. At the cost of repetition, it needs to be referred that in the evidence led by the complainant, he has deposed in specific terms that:

[a] He was doing the clerical work.

[b] He was not entrusted or invested with managerial and administrative powers.

[c] He has never supervised the work of any other worker or subordinate to him.

[d] He used to do the work of scrutinizing the purchase orders and make entries thereof into the register.

[e] He used to follow up purchases ordered by his controlling officer.

[f] Except the nomenclature as a supervisor, he had no supervisory duties.

34. It is apparent that the cross-examination does not aim at "predominance of duties." The cross-examination also does not aim at isolating any ministerial, menial or clerical portion of the work of complainant to be marginally available or extremely low in volume or magnitude and main work to be that of supervisor or Manager.

35. As it is noted earlier, the employer's thrust of bringing the complainant outside the purview of status of workman and fitting him within the cadre of manager or supervisor is based on:

[i] Pleading that complainant was appointed as a Supervisor, and performed managerial duty.

[ii] That, since he was not part of the persons who were beneficiaries of benefits gained by the workmen being party to the settlement entered between the Management and the workmen.

[iii] The complainant did not perform any work which was clerical in nature and was actually a supervisor and performed managerial powers and functions.

36. The law as to basic test as to facts to be proved for holding a person to be a workman u/s 2(s) of the Industrial Disputes Act can be said to be settled, and can be summarized as follows:

[a] The person does menial, ministerial or clerical work.

[b] If any of the parts of his duties involves any sort of supervision, which is on the material and not on the men.

[c] The predominant nature of duties discharged by the person, i.e., the part of supervisory duties, if any, is not predominant.

[d] What is seen to be is not the designation and/or nomenclature, but performance of duties.

37. This Court has, therefore, to see through the aspects as to what was the duty performed by the complainant referred to in each of the paras of the Judgment of the Labour Court, which are classified below:

38. Now this Court finds that what the Labour Court has done is to see the evidence of the workman in totally one-sided manner, namely the Labour Court has scrutinized the evidence not to search as to what are the predominant duties, but to search what appears from the documents produced by the respondent.

39. The questions, which really go to the root of case without which the question as to whether the appellant is a "workman", cannot be decided, can be formulated as follows:

[a] What is the quality and volume of evidence, or of proof of facts required to be brought by a person claiming to be a workman to discharge the burden of proof, and to have the onus of proof shifted on the employer who denies jurisdiction of the Court on account of the factual status of the complainant urging that he is not the workman?

[b] While the provisions of Indian Evidence Act do not apply in totality to the proceedings and the process of hearing and decision before the Tribunals/Courts under Industrial & Labour Laws, is it not the basic rule that facts are to be proved by legal evidence?

[c] Whether the basic doctrine incorporated in Section 106 of Evidence Act applies to the adjudication under Labour Laws, though the provisions of Evidence Act have not been made applicable?

Of proof of fact as to nature of duties or work performed.

40. It is also well settled as to what is required to be done by a party is to prove a fact.

A party is required to bring on record the proof of crucial facts on the basis of which existence or non-existence of a fact should be regarded as in existence or not in existence. If he succeeds qualitatively in leading to formation of opinion about existence of fact propounded, and in reversing the burden and letting the opponent to disprove what was proved by the party pleading a particular story.

41. Upon such reversal of burden, additional facts which are exclusively within power and control of party denying the fact propounded by a claimant is to be brought by the opposite party.

42. As it is seen on record, the workman has proved various facts as to nature of duties, namely he has asserted what exact work he was doing. He has also asserted that he was not entrusted with managerial or administrative duties. He has also proved that alleged supervisory function was an isolated and solitary instance.

43. In the contrast with what evidence was brought by the workman, now it was the turn of the management to disprove what the workman had proved.

44. The employer could have produced, had it possessed record of such other evidence within its possession and control to prove its specific plea, namely that the predominant nature of duties of the workman was managerial, though some of the works done by the complainant may have been ministerial, clerical etc.

45. It would be useful to advert to what Management has proved. Management has brought on record in all six documents [Exhibits 32 to 35 and 39 to 41], which are referred

to in cross-examination of the workman.

46. It is pertinent to note that in the long span of more than five years" service, documents relied upon by the Management pertaining to nature of work, according to management, are [1] Attendance Sheet, [2] Authorization Slip, and [3] Pay Slip, which pertain to year 2003. The period, during which the complainant was appointed and has been serving, is from 17th August, 1988.

47. Had the complainant been working in supervisory capacity, it would be shocking to believe that he has signed only four documents referred to in paras 14 to 23, which are Exhs.32, 33, 34, 35, 39, 40 and 41 only.

Stray suggestions as to few documents filed by the Management do not amount to proving predominance of work.

48. Even on construing and interpreting each and every document in favour of the management, it would not be possible to reach a conclusion that these six documents are liable to be described as "stray pieces of evidence" in the background of long five years" service of the appellant. This evidence does not lead to suggest that nature of predominant duties of complainant was that of managerial and administrative, much less to prove said positively raised plea of the Management that the complainant was not a workman.

49. It was quite open to the Management-employer to have brought evidence of those subordinates who were supervised by the appellant, and superiors to depose as to who amongst that class, the appellant had supervised, in the entire hierarchy in employment.

The hierarchy could have been proved by the employer which would have thrown adequate light on the status and nature of duties of the appellant and made his position vivid the way Management-employer considers it to be.

50. As to points noted in foregoing Paras, this Court holds that proof of facts as to nature of duties done by the complainant rose to adequate height and sufficient degree to hold that the predominant nature of duties of complainant was proved to be clerical in nature. It was also proved by him that he does not perform any managerial functions, and supervisory duty, if any, done by him was microscopic in extent and magnitude.

51. This Court holds that extent of evidence or proof required to be brought by complainant was to be of such extent that the onus of proof shall be shifted - reversed to the employer. This burden was discharged by the complainant satisfactorily. The employer has brought stray pieces of evidence, and failed to bring substantive evidence. Best evidence in its possession was withheld/not produced in spite of order.

The employer had, therefore, to suffer the adverse inference that had said evidence been produced, it would have gone against the employer.

52. Though provisions of Evidence Act have not been made applicable, application thereof is not even excluded. In this background, it would be useful for this Court to seek appropriate guidance from the provisions of Evidence Act as to the basic test of proof, disproof, burden of proof and duty to prove special knowledge, as is found by this Court in following reported judgments:

[1] [Kanpur Electricity Supply Co. Ltd. Vs. Shamim Mirza](#), and

[2] [Sub-Divisional Engineer, Irrigation Project, Investigation Sub Division No. 1 Vs. Sarang Marotrao Gurnule](#), .

53. These judgments were brought to notice of Advocates for parties on the last date of hearing and they have nothing to address on these citations.

54. This Court finds from assessment and appreciation of evidence done by the Labour Court in para Nos. 14 to 23 of its Judgment, what is seen is that what dominated the mind of the Labour Court is the designation of the complainant. Second factor, which has gone hand in hand with the first aspect of designation, is the documents where the complainant was described as Supervisor, or has signed the documents as Head of the Department. This Court, therefore, holds on Points [a], [b] and [c] in para 39 in favour of the complainant/appellant.

55. The result that follows is that the findings of Labour Court and Industrial Court, as confirmed by learned Single Judge, are based on erroneous foundation, namely nomenclature of the post than predominant nature of duties.

56. The Judgments and orders impugned based on the findings referred and discussed above deserve to be reversed, and are hereby set aside. This Court answers Issue No. 1 as framed by Labour Court in favour of complainant, holding that he is a workman within the compass of the term as defined u/s 2(s) of the Industrial Disputes Act.

57. The complaint is remanded to the Labour Court for hearing and disposal on remaining issues within three months from the date of receipt of the order of this Court. Parties are directed to appear before the Labour Court on 22nd March, 2010.

58. In the result, the appeal succeeds. Rule is made absolute in terms of Paras 55, 56 and 57.

59. The costs of appellant are quantified at Rs. 5000-00 [rupees five thousand only], which be paid by the respondent by depositing the same in this Court within one month with liberty to Advocate for appellant to withdraw it. Respondent shall bear own costs.