
(1989) 06 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 6026 of 1987

Bombay Dyeing and Manufacturing Company Ltd.

APPELLANT

Vs

R.A. Bidoo and another

RESPONDENT

Date of Decision : 19-06-1989

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1989) 2 BomCR 367 : (1989) 91 BOMLR 219 : (1989) 59 FLR 441 : (1990) 1 LLJ 98

Hon'ble Judges : S.W. Puranik, J; R.A. Jahagirdar, J

Bench : Division Bench

Judgement

Jahagirdar, J.—This petition under Articles 226 and 227 of the Constitution of India raises a question relating to the interpretation of the word "employee" to be found in Section 3(13) of the Bombay Industrial Relations Act. The circumstances in which this question arises ought to be stated.

2. The first respondent, hereinafter referred to as "the respondent", joined the petitioner company, hereinafter referred to as "the company", as a Camera Operator on 1st of October 1968. The respondent was promoted to the post of Departmental Assistant and ten years later in the year 1978 he was further promoted to the post of Junior Assistant Master. Above him, there are two more posts, namely those of Senior Master and Engraving Master. Thus the respondent occupied a middle position in the hierarchy in this department which is called the Screen Making Department. On 28th of January 1982. His services were terminated with immediate effect on tendering him salary for one month in lieu of notice. The salary which was offered to him was Rs. 2,157.92. This is the consolidated salary, which included the dearness allowance. Elsewhere in evidence it is noticed that the basic salary of the respondent was Rs. 1,200 per month.

3. After his approach letter u/s 42(4) of the Bombay Industrial Relations Act, hereinafter referred to as "the BIR Act" was not responded to by the company,

the respondent filed an application in the 6th Labour Court at Bombay u/s 79 read with Section 78 of the BIR Act. That was Application (BIR) No. 220 of 1982. In that application he asked for the quashing of the order of termination of his services and for reinstatement with full back wages. It should be noted that the services of the respondent were terminated by the company without assigning any reason, let alone after holding an inquiry into any act of misconduct or otherwise. In fact there is no allegation to be found in the material before us that the respondent had committed any act of misconduct which could be visited with the penalty of discharge or dismissal under the service conditions governing the respondent.

4. The company resisted the said application practically on the sole ground that the respondent was not an employee within the meaning of that term to be found in Section 3(13) of the BIR Act. In particular, it was contended on behalf of the company that the respondent was a person employed in a supervisory or in a technical capacity drawing basic pay, excluding allowances, exceeding Rs. 1,000 per month. That the respondent was drawing a basic pay exceeding Rs. 1,000 per month is an admitted position and it has been mentioned by us earlier. The question before the Labour Court was whether the respondent was a person employed in a supervisory or a technical capacity. If he was so employed and since his basic salary was above Rs. 1,000 per month, then naturally he would be excluded from the definition of "employee". Since an employee alone could file an application u/s 79 read with Section 78 of the BIR Act, after giving a notice u/s 42(4) of the said Act, an application filed by a person other than an employee would have to be dismissed.

5. In support of his case of unlawful dismissal by the company, the respondent examined himself. By way of rebuttal, the company examined one Gokuldas S. Kallapur who was, at the time when he gave evidence, the head of the section in which the respondent was working at the time of the termination of his services.

6. The Labour Court, by an elaborate and exhaustive judgment delivered on 24th of April 1986, held that the respondent could not be regarded as being employed in a supervisory capacity because all that the evidence of the respondent suggested was that he was looking after the machines and not the men. The Labour Court also held that the respondent was not employed in a technical capacity despite the fact that the evidence suggested, to some extent, that the respondent had taken trial of fresh incumbents to advise the management of their suitability, and taken trial of new chemicals and graphite films to advise the management of their suitability, and also that he had operated camera, the Lucop machine, the enlarger and contact printing cabinet. The fact that the respondent was a member of an association of technicians working in the company was held to be of no consequence by the Labour Court. The respondent himself has described the nature of the work performed by him as the preparation of negatives on printing contact camera, preparation of big size film on Lucop stop and repeat machines, reduction and enlargement of designs or

tracings on camera and developing, fixing, drying and washing of films. These duties which have been deposed to by the company's witness as well as by the respondent, were held to be not sufficient in nature and of that quality which could impress upon the work done by the respondent, the character of technical work. So holding, the Labour Court allowed the respondent's application. But only partly. The Labour Court directed the reinstatement of the respondent with continuity of service. However thinking that in the meantime the respondent must have fruitfully occupied himself somewhere, the Labour Court awarded only 50% of the back wages.

7. Against this order of the Labour Court, the company preferred an appeal, being Appeal (IC) No. 62 of 1986. The respondent was also naturally, aggrieved by the refusal of the Labour Court to award full back wages - a rule in all orders of reinstatement. Hence he also preferred an appeal, being Appeal (IC) No. 65 of 1986. For obvious reasons, both the appeals were heard together disposed of by the Industrial Court by its judgment and order dated 18th of September 1987. The Industrial Court noticed, and in our opinion rightly, that the burden of proving that the respondent was not an employee though employed by the company, was squarely on the company. The Industrial Court concurred with the view taken by the Labour Court below it that company had not discharged its burden. The company had not discharged its burden in proving that the respondent was employed in a supervisory capacity; the company has also not discharged its burden in proving that the respondent was employed in a technical capacity. Consistent with the practice of an appeal Court where it concurs with the reasons and the findings given by the Court below it, the Industrial Court did not deal with the material as exhaustively as it has been done by the Labour Court. But we are satisfied that it has done full justice to the material on record and to the submissions made on behalf of both the parties. Not only that, the Industrial Court referred to the relevant case law on the subject and has, in our opinion, drawn the correct conclusions from the same. Consequently, the appeal preferred by the company was dismissed while the appeal preferred by the respondent was directed to be reinstated with full back wages. It is against this order of the Industrial Court that the company has preferred this petition.

8. Mr. Shrikrishna, the learned Advocate, appears in support of the petition while Mr. C. U. Singh, the learned Advocate, appears for the respondent. Mr. Shrikrishna has taken us through the judgments of both the Courts below and also the annexures to this petition, which contain the depositions of the witnesses examined on behalf of the parties. The first question is whether it is possible to hold that the respondent was employed with the company in a supervisory capacity. We have, with the assistance of the Advocates, gone through the entire material and we have no hesitation in agreeing with the finding of the two Courts below that the respondent could not be said to have been employed in a supervisory capacity. As the Labour Court has rightly pointed out, "Supervision of a plant or machine does not make that work supervisory within the meaning of Section 3(13)." The word "supervisor", though it has

become a part of the English language, means a person who oversees the work of others. It means "overseer". A person can be said to be a supervisor if there are persons working under him, over whose work he has to keep a watch. He is that person who examines and keeps a watch over the work of his subordinates and, if they err in any way, corrects them. It is his duty to see that the work in an industrial unit is done in accordance with a manual, if there is one, or in accordance with the usual procedure. It is not his function to bring about any innovation; it is not his function to take any managerial decisions, but it is his duty to see that the persons over whom he is supposed to be a supervisor is the fact that there are certain persons working under him. If a person is doing any work which does not require him to look after or inspect or examine the work of persons who are subordinate to him or working under him, that person can never be said to be a supervisor. In other words, the supervision is necessarily by reference to the persons working under a supervisor.

9. Supervision as correctly understood does not extend to supervision of plant or machinery. A person may check whether a machine is working properly or not, but that does not by any stretch of imagination make him a supervisor. He is only finding out whether the machine is in working condition and if it is not in a working condition, to see that it is put in a working condition. This cannot be called supervision at all. To repeat, "supervision" means, supervision over men and not over machines. The evidence in the instant case, does not show in the slightest degree that the respondent had any subordinate below him over whom he could or did exercise supervisory powers. The concurrent finding of the two Courts below, therefore, that the respondent was not a supervisor, is unassailable and Mr. Shrikrishna was not able to show how that finding is erroneous.

10. The question now is whether the respondent was employed in a technical capacity. Both the Courts below have held that there is no evidence to show what exactly was the nature of the work for which the respondent was employed or what exactly was the nature of the work which he was doing at the time of the termination of his services. We have already mentioned briefly the type of work which the respondent was doing. The question is whether that is enough to impress upon the type of work performed by the respondent with the character of technical nature. The Courts below have said "no" and, naturally, we have to test whether the said finding is correct. Mr. Shrikrishna, however, does not seem to be handicapped by the absence of evidence in this regard. He heavily relied upon what he called the admissions given by the respondent in his cross-examination. We will naturally examine those admissions also.

11. But before we do that, it would be appropriate to refer to and analyse the definition of the term "employee" contained in the BIR Act. In so far as it is necessary for the purpose of this petition, the said definition reads as follows :-

"employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes -

a) b) but does not include - i) a person employed in a managerial, administrative, supervisory or technical capacity drawing basic pay (excluding allowances) exceeding one thousand rupees per month"

Prior to 1953, the words "manual or clerical" were to be found after the word "unskilled" in the above definition. In other words, then an "employee" meant "any person employed to do any skilled or unskilled manual or clerical work ...". The words "manual or clerical" were deleted by Bombay Act 63 of 1953. The proviso of exclusion, which begins with the words "but does not include", was inserted by the same Amending Act of 1953. But after 1965, the words "drawing basic pay (excluding allowances)" were introduced in place of the other words. The words "one thousand rupees per month" were also introduced by Maharashtra Act 47 of 1977 in place of the words "five hundred and fifty rupees per month". As things stand today, therefore, if a person is employed in a technical capacity drawing a basic pay (excluding allowances) exceeding one thousand rupees per month he would cease to be an employee.

12. At this stage, we may as well refer to and dispose of an argument advanced by Mr. Singh that the word "skilled" does not include "technical". Persons employed in a technical should be excluded from the "skilled" employees as contained in the main part of definition. If this argument is accepted, it would mean that there are three types of employees, namely (i) unskilled (ii) skilled and (iii) technical. The argument is unacceptable to us. The question of excluding someone does not arise unless that person is included in the main part of the definition. If a technical person is not included either in the skilled or unskilled category as mentioned in the opening part of the definition, it was not necessary for the Legislature to exclude him by mentioning that the definition does not include the said person. The question of specifying such a person, namely a person employed in a technical capacity drawing a particular salary, also would not have arisen if that person had not been included in the earlier part of the definition. In our opinion, a person employed in any of the four categories mentioned in the exclusion clause must necessarily be held to be included in either an unskilled category or in a skilled category of employees. For obvious reasons, we hold that a person employed in a technical capacity must be deemed to be included in the category of skilled employees. In other words, the skilled employees form a larger class, of which persons employed in a technical capacity form a part.

13. Incidentally it should be noted that the definition of "workman" to be found in Section 2(s) of the Industrial Disputes Act is materially so different from the definition of "employee" contained in the BIR Act that it does not afford any assistance in understanding the definition of "employee" contained in the BIR Act. In *Vilas Gangaram v. S. D. Rane*, 1982 II LLJ 123 the definition of the term "employee" contained in the BIR Act was examined in great details and it was held that the said term "employee" in Section 3(13) is not confined only to persons engaged in manual work, but it also takes in its import persons doing

clerical work. "In the substantive part of the definition the term "employee" is defined in generic terms. It includes any person employed to do any skilled or unskilled work for hire or reward. The words and expressions used in this definition clause are all comprehensive. The word "any" means each and every or all" (p.131).

14. It would not be inappropriate to first gather the meaning of the word "technical" from the standard dictionaries in English. Shorter Oxford English Dictionary, Third Edition, defines "skill", among others, as "practical knowledge in combination with ability, cleverness, expertness." Correspondingly the word "skilled" is shown to mean "of persons : possessed of skill or knowledge; properly trained or experienced". Skilled work is that work which requires or shows skill. The meaning of the word "technical", in so far as it is relevant for our purposes has been given by the said dictionary as follows :-

"Belonging or relating to an art or arts; appropriate or peculiar to or characteristic of a particular art, science, profession, or occupation."

From these meanings given in the Shorter Oxford English Dictionary, it can be said that skilled work is some work which requires expertise or special knowledge about the work which is to be performed. Technical work requires a training or knowledge or expertise of a particular art or science to which that work pertains. It is not difficult to infer from this that a person engaged in a technical capacity must have some knowledge imparted to him or must have acquired some knowledge either by training or by experience to do that particular work. A person who has not been so trained or who has not so acquired the knowledge naturally cannot perform, at least satisfactorily, the work to which he has been assigned. The work "technical" embraces within itself not only the expertise and competence of a person, but also knowledge and experience relating to the particular work which may be said to be technical work.

15. Black's Law Dictionary, 5th Edition, gives the meaning of "skill" in a somewhat larger sense, mentioning that it means "practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity". The word "technical" has been defined to mean "belonging or peculiar to an art or profession".

16. In *Murugalli Estate v. Industrial Tribunal, Madras*, 1964 II LLJ 164 a learned Single Judge of the Madras High Court pointed out that one must find out the nature of the work from the purpose for which a particular person is employed. It is not the nomenclature of the employment, but what the main functions or duties that are discharged by the person concerned that determine the nature of the work performed by that person or the capacity in which that person is employed.

17. The facts of *Marshal Braganza Vs. S.R. Samant*, Presiding Officer, First Labour Court and Another, disclose the case of a cameraman in motion picture

industry. The respondent in the present case is also a person dealing with camera but in a different manner and in a different industry. Marshal Braganza (supra) vividly shows when a person can be said to be employed in a technical capacity. It must, however, be remembered with caution that in Marshal Braganza's case (supra) the definition of "workman" under the Industrial Disputes Act was being analysed. The facts disclosed that the cameraman has to produce the necessary effect on the screen, interpreting the ideas of the director and following the script. "The camera follows a character, dollying ahead or following in profile. The idea aimed at by the cameraman is that the audience should never be aware of the camera moving" (pp. 195-196). Obviously the cameraman depends upon special training and technical knowledge. He achieves his aim by his imaginative faculty as well. Functions like camera angles, lighting, composition, long, medium, close-up, etc., shots would be technical and not merely the work of an artist. It was also pointed out that the nature of the work of a cameraman indicates that for the successful creation of reality, he depends upon the display of his imagination and the exercise of artistic faculty and the application of technical knowledge as distinguished from manual dexterity. We may add that if a person merely applies manual dexterity, he may be a skilled person, but not necessarily a technical person.

18. Fortunately for us, there is a judgment of the Supreme Court discussing the meaning of the word "technical" and that is in *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, . Here again, the discussion was with reference to the definition of "workmen" u/s 2(s) of the Industrial Disputes Act and further the discussion was with reference to the different types of work of the supervisor and a person employed in a technical capacity. However, there is guidance available in this judgment to understand the meaning of the word "technical". In paragraph 15 of the said judgment, the Supreme Court mentions that "there is a clear distinction between technical work and manual work. Similarly there is a distinction between employments which are substantially for manual duties, and employments where the principal duties are supervisory or of other type, though incidentally supervisory some manual work." The Supreme Court said (p.600) :

"Even though the law in India is different from that in England, the views expressed by Branson, J., in *Appeal of Gardner; In re Mascheck; In re Tyrrel*, (1938) I All. E.R. 20 are helpful, because, there also, the nature of the work had to be examined to see whether it was manual work. As examples of duties different from manual labour, though incidentally involving manual work, he mentioned cases where a worker (a) is mainly occupied in clerical or accounting work or (b) is mainly occupied in supervising the work of others, or (c) is mainly occupied in managing a business or a department, or (d) is mainly engaged in salesmanship, or (e) if the successful execution of his work depends mainly upon the display of taste or imagination or the exercise of some special mental or artistic faculty or the application of scientific knowledge as distinguished from manual dexterity"

19. Another illustration given by Branson, J. was recalled by the Supreme Court and it was in the following words (p.600) :

"If one finds a man employed because he has the artistic faculties which will enable him to produce something wanted in the shape of a creation of his own, then obviously although it involves a good deal of manual labour, he is employed in order that the employer may get the benefit of his creative faculty."

This last mentioned illustration, said the Supreme Court very appropriately applies to the case of a person employed to do technical work. It was mentioned that the work of such a person depends upon special mental training work. It was technical knowledge. If a person is employed because he possesses such faculties and they enable him to produce something as a creation of his own, then it can be said that that person is employed on technical work, even though, in carrying out that work, even though, in a lot of manual labour. What has been said in *Burmah Shell's case* (supra) has been approvingly cited in *Pabbojan Tea Co. v. Labour Court, Assam 1977 Lab. I.C. 721*.

20. In our opinion, what has been examined by us so far should be sufficient for the purpose of understanding the meaning of "employment in technical capacity". A person can be said to be employed in a technical capacity if he is, in the first place, skilled person. He must have enough dexterity to discharge the work assigned to him with speed and accuracy. He must also have a skill, but that skill is not a general skill like that of a weaver who is in charge of several looms in a textile unit. Such a weaver is skillful enough to look after several looms at one time and if something goes wrong he is able to attend to and mend the same. But he is not employing any knowledge or art in which he has been trained or in which he had some education, formal or otherwise. In the case of a person employed in a technical capacity, the application of a knowledge of a particular craft or work is the distinguishing feature. With the assistance of the knowledge he possesses, a person employed in a technical capacity is able to bring about a result which could not be brought about by a person, howsoever skilled, who is to perform routine, repetitive work. A person employed in a technical capacity has to use his judgment and has to find out whether a particular work can be done in one manner or another and then he does that work in the manner in which he thinks it is better done. The work which results from the labours of such a person necessarily bears, at least in some small measure, the imprint of his personality and the knowledge of the person who does that work. It is not necessary that the work that such a person does must be inventive, but it must necessarily be a work the contours of which are not pre-determined before that work is actually performed by the person employed in a technical capacity. Indication of this is available from the facts of *Marshall Braganza's case* (supra). That case, in our opinion, very vividly describes the work of a person employed in a technical capacity.

21. Bearing this in mind, We have gone through the evidence in this case. We have been unable to find any material which could suggest with a reasonable

degree of certainty that the respondent was employed in a technical capacity either when he joined the company initially or at the time when his services were terminated. It is true that the respondent is a camera operator. But every camera operator is not necessarily a person employed in a technical capacity. A camera operator, as the one who was the subject of the decision in Marshal Braganza's case (supra), would naturally be a person engaged in a technical capacity. In the present case, unfortunately, there is not only no evidence to suggest that the respondent was engaged in a technical capacity, but there is, in fact, no evidence to show the nature of the work which was performed by the respondent. A camera operator may be operating a camera along certain lines which may be laid down for him. For example, if the camera is already mounted in a particular manner and all that the camera operator has to do is to adjust the same and take pictures, taking care to see that the film is not under-exposed or over-exposed, then that work cannot be called technical. In any case, such a work does not require any particular imagination or judgment on the part of the person who is operating the camera. If such a camera operator did not have the authority to produce a result which was not laid down by his employers, then the question of the application of any technical knowledge or special knowledge, which he may be possessing, would not arise. Therefore, even if such a person possesses any technical knowledge or expertise, the work done by him could not be said to be of technical nature as correctly understood. However, as we have said earlier, there is not only no evidence to show that the respondent's work was of technical nature, but there is, in fact, no evidence to show what the nature of his work was.

22. We may briefly refer to some of the duties performed by the respondent on which the company relied to show that he was doing technical work. Mr. Kallapur, examined on behalf of the company, has stated that the respondent used to take trial of fresh incumbents and to advise about their suitability, but as Mr. Singh has rightly pointed out, the hiring of incumbents was not a regular affair and merely because the respondent, being the senior person, tested the suitability of the new recruits, it cannot be said, and it has not been said, that it was a part of the respondent's regular duty. Similarly, testing of materials was not of such a regular nature as to impress upon the work such as the preparation of negatives on printing contact cabinet or camera, preparation of big size film on Lucop stop and repeat machine, reduction and enlargement of designs and/tracings on camera and developing, fixing, drying and washing of films was done in his section. None of these can be said to be technical in the sense we have understood it, requiring the application of any special knowledge which would result in the creation of a work peculiar to the talent of the respondent. Incidentally it may be noted that Kallapur was really not competent to depose to the work performed by the respondent because he was not in the employment of the company during the period from 1979 to 1984. The respondent's services were terminated in the year 1982, which means that Mr. Kallapur was not in the employment of the company when the services of the respondent were

terminated.

23. Prior to 1979, Mr. Kallapur was working as Engraving Master in the same department. It is not made clear as to whether in that capacity he knew the work in the section in which the respondent was working. But the following to be found in the very opening part of the cross-examination of Mr. Kallapur should be sufficient to destroy his entire evidence :-

"I do not have personal knowledge as to what duties were being performed by Shri Bidoo (the respondent) when his services were terminated. I have also no personal knowledge as to what duties were being performed by other technical and supervisory staff when services of Shri Bidoo were terminated."

24. Mr. Shrikrishna, therefore, had to fall back upon what he regarded as the admissions given by the respondent in his cross-examination. They are to be found in paragraph 8 of his deposition. The respondent has accepted the suggestion that no person can certify that a computerised machine was repaired properly unless he is technically qualified or experienced. He also accepted the further suggestion that the camera operator has to decide whether the half tone negatives are done properly, whether the exposure is proper or not, or whether the developing is proper or not. For such a job, technical experience is required.

25. From these admissions, Mr. Shrikrishna wants us to infer that the respondent did have technical knowledge and he applied the same in the performance of his duties because earlier it has come in evidence that the respondent did certify that a computerised machine was working properly, when called upon to do so. He has also stated that the camera operator had to determine the suitability of the films. We are, however, reluctant to give a finding on the basis of these so-called admissions that the respondent was employed in a technical capacity because there is no evidence at all before us giving details of the nature of the work performed by the respondent. What has been mentioned by the respondent may be by way of opinion about himself. Indeed, it is doubtful whether he could have admitted that he was employed in the technical capacity because it is not brought out that he understood the real meaning of the word "technical". In fact the respondent has denied in his cross-examination that he was working either as a technical worker or technical employee. It is, therefore, impossible for us to hold from the so-called admissions that the respondent was employed in a technical capacity.

26. We are also of the opinion that the fact that some of the concessions and the perquisites, which are normally given to persons employed in a technical capacity, were given to the respondent is not relevant or material in holding that he was employed in a technical capacity. It may be, the employers thought that the respondent was a technician and he should be given certain concessions or perquisites. It may also be that those concessions or perquisites were given to him because of the nature of the work which the respondent was doing rather than the capacity in which he was employed. Similarly, the fact that the

respondent is a member of the association of technicians in the company is not of such crucial importance as to hold that the respondent is a person employed in a technical capacity. In any case, in the absence of basic material relating to the nature of the work performed by the respondent, it has not been possible for us to differ with the concurrent finding given by the two Courts below that the respondent, in the instant case, is not a person employed in a technical capacity.

27. In the result, the petition fails. Rule is accordingly discharged with costs.