

(2023) 08 JH CK 0002

In the Jharkhand High Court

Case No : Latter Patent Appeals No. 446 Of 2019

Food Corporation Of India

APPELLANT

Vs

Kumar Madan Mohan

RESPONDENT

Date of Decision : 04-08-2023

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(s), 10, 31(1), 33, 33A, 33(1), 33(2), 33(2)(b)

Citation : (2023) 08 JH CK 0002

Hon'ble Judges : Shree Chandrashekhar, J;Anubha Rawat Choudhary, J

Bench : Single Bench

Advocate : Nipun Bakshi, Rahul Kumar

Final Decision : Allowed

Judgement

Anubha Rawat Choudhary, J

1. This appeal has been filed against the judgement dated 27.03.2019 passed in W.P. (L) No. 4549 of 2018 whereby the writ petition has been dismissed.

2. In the writ petition, the appellant had challenged the final Award dated 22.12.2017 passed by the Presiding Officer, Central Government Industrial Tribunal No. 1, Dhanbad to the extent it related to the sole respondent who had filed Complaint Case No.1 of 2012 under Section 33-A of the Industrial Disputes Act, 1947 (hereinafter referred to as the "Act"). The appellant had also challenged the order dated 20.09.2016, whereby the domestic enquiry was held to be unfair and the preliminary issue regarding the status of the respondent as 'workman' under the aforesaid Act was also decided against the appellant. The issue regarding the status of the respondent under the aforesaid Act was again decided against the appellant in the final Award though the grounds for the decision are different in the two orders.

3. The foundational undisputed facts are as follows: -

a. The respondent was appointed as Assistant Grade-III Depot on 16.01.1978; promoted to the post of Assistant Grade-II Depot with effect from 13.07.1996 and then promoted to the post of Assistant 2 L.P.A. No. 446 of 2019 Grade-I Depot in District Office, Food Corporation of India, Patna on 02.07.1998.

b. On 08.06.2009, an order was issued by the Area Manager directing the respondent to go to Dumraon to supervise the liquidation of Paddy issued by Depot In-charge PPC Dumraon along with Shri Mishri Hembram, Manager Depot FSD Dighaghar and Shri D. P. Singh, Manager of D.O. FCI, Patna and they were supposed to submit

a report.

c. On 12.07.2011, the respondent was served with article of charges as under:

"Article-I

The aforesaid committee member did not submit any progress/interim/final report or intimate the factual position even after lapses of more than two months compelling the Area Manager, FCI, DO, Patna to issue another order vide no. PAT/V&S/1/2009 Dated 19.08.2009 directing the aforesaid committee members to conduct the same job as assigned by the order dated 08.06.2009.

Thus, the committee members in clear disobedience to the orders of higher authority were found negligent in their duties and failed to assess the gravity of the matter and to act in the desired manner which is detrimental to the interest of the corporation.

Article-II

The above committee member submitted two reports dated 28.08.2009 and dated 28.10.2009 in a very casual manner without supervising the delivery of paddy and its transportation as per direction rather they acted hand in glove with the I/C PPC Dumaraon in suppressing the factual position and the very purpose of their deployment was defeated.

Article-III

As per record, for the above assigned job of supervision of delivery/shifting of paddy, Sri Devendra Prasad Singh, Manager (Stg) and Kumar Madan Mohan Assistant Gr. I (D) stayed at PPC Dumraon for 39 days and 41 days respectively which is abnormal and beyond any justification. Except in the committee reports there was no signature of the committee members in any other document enclosed with the reports to justify their presence in the centre from 13.06.2009 to 28.08.2009. Whereas Sri Devendra Prasad Singh, Manager (Stg) and Kumar Madan Mohan Assistant Gr. I (D) have claimed TA bills for their stay in the centre for 39 days and 41 days respectively.

Sri Mishri Hembram Manager (Depot) another committee member has not claimed any TA Bill for his stay which raises doubt over his presence in the PPC,

Dumraon.

They have submitted false report in connivance with the I/C PPC Dumraon who could misappropriate huge foodgrain stocks at a later stage.”

d. The charges were proved in the domestic enquiry and the respondent was dismissed from service.

e. The respondent filed a complaint under section 33-A of the aforesaid Act before the Industrial Tribunal, interalia, alleging as under:

i. The appellant had not complied with the provision of Section 33 of the aforesaid Act. A ref. case No. 138/97 was pending before the tribunal relating to payment of overtime allowance of the workmen of Bihar Region and the respondent was also concerned and connected with the pending reference case and therefore, before passing order of penalty of dismissal, it was mandatory on the part of the appellant to comply the provision of section 33 of the aforesaid Act.

ii. The domestic enquiry was not fair and proper.

f. A written statement was filed by the appellant interalia opposing the petition by raising following points:

I. The complaint itself was not maintainable under Section 33 A of the aforesaid Act as the condition precedent to invoke the provision of Section 33A was not satisfied. No matter relating to the disciplinary proceeding leading to passing the penalty order of dismissal dated 24.07.2012 was pending before the Tribunal. There was absolutely no relation between the penalty order dated 24.07.2012 and the overtime allowance (OTA) matter under Reference No. 138 of 1997.

II. The respondent had not availed the statutory remedy of appeal and hence the case was not maintainable.

III. A preliminary issue that the respondent was not a workman within the meaning of the aforesaid Act.

g. The parties led evidence and thereafter the said preliminary objection regarding the status of the respondent as ‘workman’ as well as the point of fairness of domestic enquiry was decided against the appellant vide order dated 20.09.2016.

h. The matter proceeded before the learned Industrial Tribunal with another analogous case and following common issues were framed for consideration:

(i) Whether the complainants are workmen under ID Act?

(ii) Whether the instant complaint is maintainable and compliance of section 33 of the ID Act was mandatory on the part of the OP?

(iii) Whether OP is able to prove the charges against the complainant as

mentioned in exhibit W-1 and penalty of dismissal with forfeiture of gratuity is legal and justified?

i. The appellant as well as the respondent led evidences both oral and documentary in support of their case.

j. Two witnesses were examined by the appellant and documents were marked as exhibits M-1 to M-8. The exhibit M-1 was the order dated 08.06.2009; M-2 was the order dated 19.08.2009; M-2/1 was the order as exhibited as M-1; M-3 was the committee report dated 28.08.2009; M-4 was the report dated 28.10.2009; M-5 was the statement dated 08.03.2011 and M-6 was the statement showing the period of stay of the complainant at PPC Dumraon.

k. The workman filed eighteen documents which were also marked as exhibits. W-1 was the charge-sheet dated 12.07.2011; W-2 was the order dated 27.09.2011 regarding appoint of IO; W-3 series was the daily order-sheet drawn during inquiry; W-4 to W-7 were the evidence of PWs during inquiry with the order-sheet. W-8 was the notice dated 22.05.2012; W-9 was the written brief from defence side; W-10 was the IO report alongwith covering letter dated 17.07.2012; W-11 was the reply of the complainant over the IO report; W-12 was the order of dismissal dated 24.07.2012; W-13 was the copies of M forms for issue of paddy; W-14 was the order dated 08.06.2009 directing the complainant to go to Dumoraon; W-15 was the tour diary and TA Bill; W-16 was the evidence of PW 1 during inquiry; W-17 was the copy of FIR lodged by Area Manager Patna against PPC In-charge Dumraon for misappropriation of wheat and rice and; W-18 series were the judgement of Hon'ble Patna High\ Court passed in CWJC, LPA and Apex Court regarding reinstatement of similarly situated three employees.

l. All the issues were decided against the appellant and in favor of the respondent.

m. The appellant filed writ petition challenging the Award as well as the order dated 20.09.2016 by which the aforesaid preliminary issues were decided.

n. The following issues were framed by the learned writ Court for consideration:

“(i) Whether the petitioner is a workman under the meaning of Section 2(s) of the Act?

(ii) Whether a complaint under Section 33A of the Act will lie, amounting to alteration in service condition due to dismissal of the respondents from service.

(iii) Whether Reference No. 138 of 1997 is connected with the interest of the respondents.”

o. All the aforesaid issues before the learned writ Court have been argued before this Court also.

4. The following points arise for consideration by this Court, which are to be

examined within the limited jurisdiction at this stage: -

A. Whether the complaint under section 33-A alleging non-compliance of section 33 of the Act was maintainable?

B. Whether the respondent is a 'workman' under the Act?

C. If the answer to the aforesaid two questions are in positive, then-

i. Whether the domestic enquiry was fair and proper?

ii. Whether the charges against the respondent were proved?

iii. Whether the penalty of dismissal with forfeiture of gratuity is legal and justified?

POINT No. A

Whether the complaint under Section 33-A alleging non-compliance of section 33 of the Act was maintainable?

5. So far as the point regarding maintainability of the complaint before the learned Tribunal is concerned, the findings of the learned Tribunal under point No. 2 in the Award are as follows:

"Point No. 2: -

21. As per Sec. 33 of the ID Act there is clear provision that service condition shall not be altered during the pendency of dispute. In this case a reference no. 138/1997 was pending before this Tribunal over denial of OTA at double the rate since 1984 in respect of entire workmen of Bihar State. Admittedly the complainant are workman and during relevant time he was getting OTA and they will also get OTA at enhanced rate as the case has already been decided in favour of the workman, therefore, they are concerned with the reference as such compliance of Sec. 33 of the ID Act was mandatory on the part of the Management. But they have not complied with the provision. It is not under dispute that the punishment of Dismissal was not directly connected to the term of reference of the said dispute even then compliance of provisions of Sec. 33 (2) (b) was necessary on the part of the OP. The Opp. party was duty bound to obtain approval of the action taken besides payment of one month salary and intimation to the appropriate government but none of the precondition was complied by the Opp. Party, therefore, certainly there is violation of Sec. 33 (2) (b) of the ID Act 1947 and for any such violation there is an express provision made under Section 33 A to file a complaint to the authority with whom the said dispute is pending and accordingly the complainant has filed the said complaint before this Tribunal and as per provision the said complaint has to be adjudicated as a full-fledged reference, therefore, it is held that the instant complaint petition is legally maintainable. A judgement of the Hon'ble Patna High court reported in 2014 IV LLJ page 715 has also been referred by the Opp. Party to show that without filing appeal and review the present complaint petition is not

maintainable but the fact of the said judgement is not at all applicable to the present case as the present complaint petition is not a reference and it is originated due to the violation of sec 33 of the ID Act and there is specific provision to file a complaint petition under sec. 33 A of the ID Act as such not exhausting internal remedy is not a bar for filing the instant complaint. Apart from the above the ID Act is special legislation enacted with a view to provide speedy justice to the poor working class and in ID Act also there is no prohibition that prior to filing appeal and review or exhausting internal remedy the workman cannot take shelter of industrial forum. Moreover provision of FCI Staff Regulation 1971 shall not prevail over the provision of ID Act. In view of the discussion made herein above it is held that the instant complaint petition is fully maintainable and compliance of provision of Sec. 33 (2) (b) of the I.D. Act was mandatory on the part of the Opp. Party."

6. The learned writ Court gave its findings with regards to this point at paragraph Nos. 14 and 15 of its judgement recorded as under:

14. Admittedly, the Respondent has been dismissed from service on the ground of misconduct, but without seeking any approval, as required under Section 33 (2) (b) of the Act, since the mandate of the law is that if a proceeding by way of reference is pending before the Tribunal to which the workman is related, the approval is required to be taken under Section 33 (2) (b) of the Act.

15. A Reference No. 138/1997 was pending for adjudication of the dispute pertaining to denial for payment of OTA at double the rate in respect of the workman, posted in Bihar region. Since the year 1984 and during relevant time, the respondents were getting OTA and therefore, the Tribunal has come to the conclusive finding that the subject matter of the Reference No. 138 of 1997 is related to the respondent also and hence, the requirement of fulfilling the condition, as stipulated under proviso to Section 33 (2) (b) is necessitated.

The only ground taken by the petitioner that the respondents is not a workman, but, since it has been held hereinabove, that the respondent is a workman and he was also getting OTA during the relevant time and now the reference is for getting OTA at double the rate, there is no denial about the fact that the said subject matter of the said reference is somehow related to the respondents and, as such, the dismissal of the petitioner from service will amount to alteration in the service condition for the reason that if the petitioner would be dismissed from service, he would be denying the benefit as adjudicated in the Reference No. 138 of 1997 and therefore, the provision of Section 33 A, which confers power upon the Tribunal to restore the position of ante status quo, so that the Reference, if answered in favour of the workman to which the workman, who has been subjected to alteration in the service condition by dismissal will be entitled to get the benefit of the aforesaid adjudication of the pending Reference and i.e. the purport and intent of the provision of Section 33A.

In view of such legal position, since the petitioner has been held to be workman,

therefore, the requirement under Section 33A of the Act is required to be fulfilled.

The Tribunal after taking into consideration this aspect of the matter has exercised the power conferred under Section 33A and has come to the conclusion that the provision of Section 33 (2) (b) is applicable, as has been held by the Hon'ble Apex Court in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.,- Vs.-Shri Ram Gopal Sharma and others reported in AIR 2002 SC 643 that apart from the condition stipulated under the proviso to Section 33 (2) (b) the fairness of the enquiry and victimization is also to be seen and hence, the Tribunal has proceeded in that direction by testing the fairness of the domestic enquiry vis-à-vis, the victimization part by looking into the charge levelled under the memorandum of charge.

7. In Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma, (2002) 2 SCC 244, the Hon'ble Supreme Court had the occasion to deal with the provision of Section 33 of the Industrial Disputes Act, 1947. In the said case, the Hon'ble Supreme Court has dealt with the object, purpose and nature of amendment in the said Section in the year 1956. Paragraph Nos. 6, 7 and 8 of the aforesaid judgement are quoted as under: -

"6. Answer to the question on which conflicting decisions are rendered, as noticed above, depends on a fair reading and proper interpretation of Section 33(2)(b) of the Act. Prior to the amendment of 1956, the provision contained in Section 33 corresponded to the present Section 33(1) only. The object behind enacting Section 33, as it stood before it was amended in 1956, was to allow continuance of industrial proceedings pending before any authority/court/tribunal prescribed by the Act in a peaceful atmosphere undisturbed by any other industrial dispute. In course of time, it was felt that unamended Section 33 was too stringent for it placed a total ban on the right of the employer to make any alteration in conditions of service or to make any order of discharge or dismissal even in cases where such alteration in conditions of service or passing of an order of dismissal or discharge, was not in any manner connected with the dispute pending before an industrial authority. It appears, therefore, that Section 33 was amended in 1956 permitting the employer to make changes in conditions of service or to discharge or dismiss an employee in relation to matters not connected with the pending industrial dispute. At the same time, it seems to have been felt that there was need to provide some safeguards for a workman who may be discharged or dismissed during the pendency of a dispute on account of some matter unconnected with the dispute. This position is clear by reading the redrafted expanded Section 33 in 1956 containing five sub-sections....."(emphasis supplied)

8. The proviso to amended Section 33 (2) (b) has been explained in paragraph Nos. 7 and 8 of the aforesaid judgement as under:

"7. The proviso expressly and specifically states that no workman shall be discharged or dismissed unless he has been paid wages for one month and an

application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer. It is clear from the proviso to Section 33(2)(b) that the employer may pass an order of dismissal or discharge and at the same time make an application for approval of the action taken by him.

8. A Constitution Bench of this Court in the case of P.H. Kalyani v. Air France, Calcutta referring to Strawboard has observed thus:

"4. The main point which was raised in this appeal is now concluded by the decision of this Court in Straw Board Mfg. Co. Ltd. v. Govind. This Court has held in that case that-

'the proviso to Section 33(2)(b) contemplates the three things mentioned therein, namely, (i) dismissal or discharge, (ii) payment of wages, and (iii) making of an application for approval, to be simultaneous and to be part of the same transaction so that the employer when he takes the action under Section 33(2) by dismissing or discharging an employee, should immediately pay him or offer to pay him wages for one month and also make an application to the tribunal for approval at the same time'.

....."

9. Thus, it is clear from the aforesaid judgement that the employer is entitled to discharge or dismiss an employee, even in relation to matters not connected with the pending industrial dispute, with the condition that the workman has been paid wages for one month and an application has been made by the employer to the authority before whom the proceeding is pending, for approval of the action taken by the employer.

10. In the present case, the cause of action to proceed against the respondent during the pendency of the earlier Reference Case No. 138 of 1997 relating to over time allowance (OTA) was totally unconnected with the earlier dispute, still in view of the proviso to Section 33 (2) (b) of the Act, the 8 L.P.A. No. 446 of 2019 necessary compliance in terms of the said proviso i.e. payment of one month wages and filing of an application seeking approval of the action taken against the respondent to the Tribunal, before whom the earlier proceeding i.e. Reference Case No. 138 of 1997 was pending, was required to be shown. Admittedly, no such steps were taken and thus the appellant violated the provision of Section 33 (2) (b) of the Industrial Disputes Act of 1947.

11. In view of the aforesaid findings, this Court is in complete agreement with the findings of the learned Tribunal as well as the learned writ Court that the complaint under Section 33-A of the Act was maintainable on account of violation of Section 33 of the Act. However, mere violation of Section 33 does not automatically lead to setting aside of the order of dismissal which is evident from the two judgements relied upon by the appellant.

12. Two judgements relied upon by the learned counsel for the appellant in the

context of Sections 33 and 33A of the Act have further explained the said provisions. They are Rajasthan State Road Transport Corporation & Another v. Satya Prakash reported in (2013) 9 SCC 232 and Management of Karur Vysya Bank Limited v. S. Balakrishnan reported in (2016) 12 SCC 221.

13. It has been held in the judgement reported in (2013) 9 SCC 232 (Rajasthan State Road Transport Corporation and Another Vs. Satya Prakash) that Section 33-A has a definite purpose to serve i.e. to provide a direct access to the Tribunal and thereby a speedy relief, instead of seeking the time-consuming procedure of seeking a reference under Section 10 of the Act. In the complaint under Section 33-A, however, the employee will succeed only if he establishes that the misconduct is not proved and not otherwise. Thus, in that complaint the employee will have to prove his case on merits. If he does succeed in so establishing, it will relate back to the date on which the dismissal order was passed by the employer as if it was inoperative. This remedy is independent of the penal consequences which the employer may have to face under Section 31(1) of the Act if prosecuted for the breach of Section 33 of the Industrial Disputes Act, 1947.

14. In "Satya Prakash", the appellant i.e. the employer had not applied for necessary approval as required by proviso to Section 33 (2) (b) of the Act. Consequently, the complaint was filed under Section 33-A of the Act. It has been held that the complaint having been adjudicated like a reference, as required by Section 33-A, and the misconduct was proved, then there was no question to hold that the termination shall still continue to be void and inoperative. The finding will relate back and de jure relationship of the employer and employee will come to an end with effect from the date of dismissal passed by the employer.

15. In the judgement reported in (2016) 12 SCC 221 (Management of Karur Vysya Bank Limited Vs. S. Balakrishnan), the law has been summarized in paragraph 10 as under:

10. Section 33-A of the Act enjoins upon the industrial adjudicator a twin duty. The first is to find out as to whether the employer has contravened the provisions of Section 33 [in the present case by not filing an application seeking approval under Section 33(2)(b) of the Act]. However, a finding on the above question would not be conclusive of the matter and the industrial adjudicator is required to answer the further question as to whether the dismissal or such other punishment as may have been imposed on the workman is justified in law. The issue of sustainability of the punishment imposed naturally has to be decided within the contours of the reference jurisdiction as indicated above. That Section 33-A of the Act enjoins upon the industrial adjudicator the aforesaid twin duties is once again clear from a recent pronouncement of this Court in Rajasthan SRTC v. Satya Prakash, SCC para 23 wherein this Court had the occasion to consider the long line of decisions taking the said view eventually culminating in what had been recorded in para 23 of the decision in Rajasthan SRTC

.....

16. It is clear from the aforesaid judgements that the order of dismissal cannot be set-aside on mere non-compliance of the provision of Section 33 of the Act but the industrial Tribunal/labour Court has to decide the case as if it was a reference under Section 10 of the Act.

17. Thus, it is to be seen as to whether the learned Tribunal has rightly decided the dispute including the issue as to whether the respondent is a 'workman' within the meaning of Section 2(s) of the Act. The scope of enquiry at this stage would be as to whether the Award of the learned tribunal suffers from any perversity and whether the learned writ Court has rightly refused to interfere with the Award.

POINT No. B

Whether the respondent is a 'workman' under the Act?

18. It is an admitted fact that at the relevant point of time the respondent was working as Assistant Grade I (D), 'D' denotes Depot.

19. The aforesaid issue was decided twice. First, as a preliminary issue and second, in the final award by framing the same issue.

20. The findings on this point have been challenged by the appellant by submitting as follows:

a. The learned Tribunal has overlooked vital evidence on record which has made the finding perverse, they are: -

(i) A circular dated 30.10.1996 for job description of depot and depot staff (Exhibit M-1 before CGIT) and (Annexure -6 to the Memo of Appeal).

(ii) Evidence on the point of validity of enquiry O.P.W.-1 containing statement at Para-4 that "the gross salary of Shri Kumar Madan Mohan during the month of July, 2012 was Rs. 55,190/- [Exhibit M-2]

b. The basis of the finding is that Hon'ble Patna High Court has decided that the Assistant Grade-I, Depot is a workman in a judgement rendered in Food Corporation of India vs. Union of India & Ors. reported in 2014 IV LLJ 715.

c. The issue whether any person answers a description of the term 'workman' is a mixed question of law and facts. However, the learned Tribunal has only relied upon assumptions, surmises and decisions completely shutting-out oral and documentary evidence on record which renders the award perverse.

d. The appellant relied upon the judgment of *Burmah Sheel Oil Storage & Distribution Company of India Limited v. The Burma Sheel Management Staff Association & Ors.* reported in 1970 (3) SCC 378 to submit that in this case Depot Supervisors were excluded from the definition of 'workman' for performing supervisory work.

21. The respondent has opposed the aforesaid stand on the following grounds:

I. The respondent has been rightly held to be workman by the learned Tribunal and the writ Court as the nature of work done by the respondent is clerical in nature and even in the Circular dated 30.10.1996 the post of Assistant Grade-I has been described as 'senior post clerical grade'. Performing certain incidental supervisory tasks does not make the Respondent a supervisor.

II. The exclusion prescribed in S. 2(s)(iii) is not applicable to the respondent herein, even though his income is greater than the stipulated amount, as he is not a person employed in supervisory capacity.

III. The finding of the tribunal was based on the judgment passed by the Hon'ble Patna High Court reported in 2014 IV LLJ 715 holding that Assistant Grade I (D) is a 'workman'.

IV. There is no perversity in the findings recorded by the learned Tribunal and upheld by the writ Court.

22. This Court finds that the learned Tribunal had initially taken up the matter regarding validity of the domestic enquiry as well as the preliminary objection raised by the appellant that the respondent was not a workman within the meaning of section 2(s) of the Act of 1947 and decided both the issues together vide order dated 20.09.2016 against the appellant. While deciding the issue as to whether the respondent was a workman, the materials produced by the appellant were completely ignored and primarily the decision of Hon'ble Delhi High Court in W.P. (C) No. 2084 of 1998, wherein it was held that even a 'manager' of the appellant is a 'workman', was taken into account. It is not in dispute that the aforesaid judgement dated 05.08.2011 passed in W.P.(C) No. 2084 of 1988 was set aside by judgement dated 16.07.2015 in L.P.A. No. 697/2012 and the matter was remanded to the Single Judge. The order passed in L.P.A. was challenged before the Hon'ble Supreme Court in S.L.P. (Civil) No. 30357/2015 and the order of remand was maintained. The aforesaid orders have been produced by the learned counsel for the appellant and they are not in dispute.

23. While deciding the preliminary issue and holding that the respondent is a workman, the materials brought on record through witness of the appellant dated 02.06.2016 has been completely ignored. The evidence is on record, which reveals that specific reliance was placed upon the circular dated 30.10.1996 (exhibit M/1) dealing with the distribution of the work amongst the employees of the appellant and also to gross salary of the respondent (exhibit M/2). Para 2 to 5 of the evidence dated 02.06.2016 are as follows:

"2. During the material period, Sri Kumar Madan Mohan was posted in FCI's Patna District Office. A committee of FCI, District Office, Patna comprising S/Sri Devendra Prasad Singh, Manager (D), Mishri Hembram, Manager (D) and Kumar Madan Mohan, AG-I (D), was directed to proceed to PPC, Dumraon for supervising the delivery of procured paddy stocks to the millers and its

transportation to the base depot through the in-charge of PPC, Dumraon. Moreover, the Food Corporation of India has laid down the job description of AG-I (Depot) in its circular dated 03.10.1996 (May be marked exhibit M/1).

3. Assistant Grade-I is to have good knowledge and to exercise judgement and initiative in the application of pertinent regulations, procedures and instructions relating to the subjects detail with, Mode of recruitment of AG-I (Depot) is by way of 100% promotion from the post of AG-II (Depot).

4. The gross salary of Shri Kumar Madan Mohan, during the month of July, 2012, was Rs. 55,190/- as per the Salary Control Register for the year 2012-13. (May be marked exhibit M-2). His basic pay was Rs. 27,350/- in the pay scale of Rs. 11,100/- to Rs. 29,950/-.

5. In view of the role and responsibility of the post of AG I(D) and work assigned to Sri Kumar Madan Mohan as well as in view of his basic salary being Rs. 27,350/-, gross salary Rs. 55,190/-, the complainant is not a 'workman' within the meaning and definition of the Industrial Disputes Act, 1947."

This witness was also cross-examined by the respondent.

24. Thus, the main basis of rejection of the preliminary objection raised by the appellant that the Respondent is not a 'workman' does not survive any-more and the materials brought on record by the appellant at the time of consideration of the preliminary issue directly touching upon the issue as to whether the respondent was workman or not, have been completely ignored by the learned tribunal. The issue was again decided while passing the final award and for this purpose a specific issue was framed.

25. The finding of the learned Tribunal on this point is as under: -

"17.It is an admitted fact that complainant of both the complaint was appointed as Assistant Grade III (D) and thereafter they were promoted to the post of Assistant Grade II (D) and Assistant Grade I (D. Complainant of complain no. 1 of 2012 was Assistant Grade I (D) on the date of his dismissal and the complainant of complaint no. 5 of 2013 was Manager (D) on the date of dismissal being a ST candidate. It is also an admitted fact that Assistant Grade I (D) is category III post in the food Corporation of India and he is not having any power of his own. He has to act as per order of the Area Manager. He is not having administrative, supervisory or managerial power. He cannot take independent decision. His work is to maintain daily receipt and issue register of foodgrain and in fact he is mere a store clerk. There are different types of assistant grade I, II & III. In general cadre they are called Assistant Grade I (General), in QC cadre they are called Technical Assistant, in account cadre they are called Assistant Grade I (A/C) and if they are posted in Regional Office, District Office, Zonal Office and Head quarter then they are called dealing Assistant. In FCI departmental labourers are getting salary & allowance more than 1 lac per month which is almost double the salary of the workman complainant but merely

getting more pay labourers shall not be treated supervisor or Manager as such they are still the workman. Quantum of salary is not a sole criterion until & unless they are having supervisory and Managerial powers. Complainant of complain no. 1/2012 is also not having supervisory or managerial power, he is mere a clerk as such it is held that complainant being as Assistant Gr. I (D) is workman under section 2(s) of the ID Act. The Hon'ble Patna High Court has also held that

Assistant Grade I (D) of FCI is a workman in a judgement reported in 2014 IV LLJ 715."

26. The discussions in para no.18, 19 and 20 of the Award relate to the connected case being Complaint Case No.5 of 2013, with which we are not concerned.

27. This court finds that the learned tribunal while passing the final award decided the issue as to whether the respondent was workman within the meaning of section 2(s) of the Act or not but the aforesaid materials i.e exhibit M-1 and M-2, which were brought on record while deciding the same issue at the preliminary stage itself, were again ignored although the same issue was decided again. The exhibit M-1 and M-2 referred to in the aforesaid the final award are documents different from the documents marked at the decision of the preliminary issues, which is apparent from the description of the documents mentioned in the final award itself. In the final award, exhibit M-1 is the order dated 08.06.2009 and exhibit M-2 is the order dated 19.08.2009.

28. The learned writ court recorded its findings as under:

"11.....

In view of the settled position of law, as laid down by the Hon'ble Apex Court, so far as it relates to the definition of "workman", the nature of duty is to be seen.

In the light of the aforesaid legal position, the factual aspect in this case is with respect as to whether the respondent is a workman or not, the Tribunal has framed issue as point no.(1) as to whether the complainant is the workman under the Industrial Dispute Act, 1947.

It is evident from the detailed discussion made, therein, under the heading point No. (1) that admittedly, the complainant respondent was appointed as Assistant Grade III (D) and thereafter promoted to the post of the Assistant Grade II (D) and Assistant Grade I (D). On the date of dismissal, the complainant-Respondent was Assistant Grade III (D).

It is evident from the Award, as has been annexed by the petitioner that the Assistant Grade I (D) is category III post in the Food Corporation of India and he is not having power of his own. He has to act as per order of the Area Manager. He is not having administrative, supervisory or managerial power. He cannot take independent decision. His work is to maintain daily receipt and issue register of

foodgrain and as such, he is merely a store clerk. In F.C.I., departmental labourers are getting salary and allowance more than one lakh per month which is almost double the salary of the workman complainant but merely getting more pay labourers shall not be treated supervisor or Manager for the reason of the nature of the work as has been laid down in catena of decisions as referred hereinabove.

12. The Tribunal after going across the order of appointment letter, issued in favour of the respondents and taking into consideration their nature of duties, which is evident under administrative authority and he cannot take any independent decision and has held the respondent as workman within the meaning of Section 2 (s) of the Industrial Disputes Act, 1947. This Court is not in disagreement with the aforesaid findings, since the Tribunal has come to the conclusive finding on the basis of the evidence and the documents produced before it and therefore, the said finding suffers from no infirmity, so far as it relates to the status of the respondent as workman."

29. This Court finds that the learned Tribunal has neither taken note of the aforesaid averments /documents on record i.e. exhibit M-1 and M-2 filed at the time of deciding the preliminary issue vide order dated 20.09.2016 holding that the respondent was 'workman' nor has taken note of the aforesaid documents/ exhibits while deciding the same issue again in the final Award.

30. This Court is of the considered view that the learned counsel for the appellant has rightly pointed out that the learned Tribunal has overlooked vital evidence on record as mentioned in para 18 (a) above which has certainly made the finding perverse with regards to the issue as to whether the respondent was a 'workman' or not.

31. This Court is of the considered view that the material which was placed on record by the appellant i.e. circular dated 30.10.1996 (exhibit-M/1 – Annexure-5 to the writ petition and Annexure-6 to the memo of appeal) was not taken note of by the learned writ Court also. On account of the aforesaid facts, the impugned order passed by the learned writ court upholding the finding of the learned tribunal that the respondent was workman within the meaning of section 2(s) of the Act of 1947, cannot be sustained in the eyes of law. The relevant portion of the said circular dealing with Assistant Grade I (D) is quoted as under:

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CLASS	TITLE
Assistant Grade I (Depot)	
Pay	Scale
Rs.	
225-10-235-15-430-20-550/-	

Characteristics of the Class:

This is the senior post clerical grade requiring good knowledge and exercise of

some judgement and initiative in the application of a limited variety of pertinent regulations, procedures and instructions relating to the subjects dealt with. The incumbent when working in the godowns, supervises and guides AG - II (D) and AG-III (D) in attending the godowns, inspecting stocks and in preparing for and currying out loading, unloading, weighting and stacking operations. When posted in District Offices, etc. the incumbents under the immediately general supervision of Assistant Manager / higher officers perform a variety of clerical work including drafting letters, maintaining statistics in registers etc. collecting information from different sections / Depots / Quality Inspectors under the District Office, preparing returns and statements to be submitted by the District Office, posting entries in ledgers, linking and reconciling stock accounts and other related work that may be assigned including duties listed for AG-II(D) and AG-III (D).

The lower range of duties of AGI (D) overlaps with the higher range of duties of AG-II (D).

1. Prepares, checks and reconciles various relevant records like weighment sheet, truck chit, convoy note, delivery memo, work slip, commodity register, stockwise register, daily diary, ban cards, daily, fortnightly and monthly issue and receipt reports, compiles stock accounts, conducts physical verification as per direction of DM/RM or any other authority competent for the purpose and submits them under his signature to the next higher authority.
2. Drafts, letter to Railways, Regional or zonal office CPWD private parties, technical staff etc. regarding matters relating to quality, maintenance of subsidiary cash book, monthly stock position statement and other Reports and Returns.
3. Arranges labour in emergency and obtains approval from District Manager; coordinates and supervises H & T work by contractors.
4. For hiring godowns, contacts parties, calculates storage capacity available and sends proposals for hiring.
5. Maintains close contact with the Railways to avoid wharfage, demurrage etc. arranges dispatch documents in time to consignees.
6. Is responsible for upto 10,000 tonnes of foodgrains and also for the dead stock articles, gunny bags, equipment, etc. in his sheds.
7. In the godowns where he is incharge, is responsible for the custody of keys of the godown and for seating the godown locks, maintaining godown opening and closing registers duly signed daily by him.
8. Prepares shipping claims, Time Sheets and drafts correspondence.
9. When posted in the district Office, collects material from report and returns received from storage Depots/Quality Inspectors etc., enters relevant information in registers and compiles returns and statement.

10. When posted in the District Office, checks stock accounts statement received from storage depots, reconciles the same with the stock accounts maintained in the District Office also checks storage loss/gain statements.

11. Checks storage Bills, Reservation Bills, Harding and Transport Bills of Contractors and enters in relevant registers.

12. Performs other related work as may be assigned to him by his superiors.

Mode of Recruitment : Promotion 100%

Experience : For Promotes, 3 years as AG-II (Depot)

32. So far as the judgement passed by Hon'ble Patna High Court reported in reported in 2014 IV LLJ 715 (supra) which has been relied upon by the learned tribunal while holding that the respondent was a workman within the meaning of section 2(s) of the aforesaid Act is concerned, the same has no bearing on the matter as the petitioners in the said case had directly filed writ petition which was entertained and decided. The issue as to whether the petitioner of the said case was a workman or not was neither in issue nor was decided by the Judgement of Hon'ble Patna High Court.

33. This Court also finds that the aforesaid materials particularly exhibit M-1 has important bearing in the case when seen in the light of the judgement relied upon by the learned counsel for the appellant in the case of *Burmah Sheel Oil Storage & Distribution Company of India Limited v. The Burma Sheel Management Staff Association & Ors.* reported in 1970 (3) SCC 378 where Depot Supervisors were excluded from the definition of 'workman' for performing supervisory work. paragraph 33 to 35 of the aforesaid judgment is quoted as under:

"3. Depot Superintendents

33. With regard to the classification of Depot Superintendents reliance; was placed by the Association on the evidence of G.B. Athalye, and on some decisions in respect of Depot Superintendents of this very Company in other regions. After considering the evidence of Athalye and the Company's witnesses, the Tribunal, as a fact, held that a Depot Superintendent is Incharge of all the stocks at a depot and his principal duty is to see that these stocks are properly received, stored and sent out. These, stocks range in value between Rs 4 lakhs to Rs 6 lakhs. The Tribunal found that a Depot Superintendent has a complement of men working under him, the strength of which may vary from Depot to Depot. On an average, the persons employed are 5 to 7 out of whom 2 would be clerks, 3 to 4 would be workmen and one or two drivers. The Depot Superintendent has to get all the jobs done by these men and he guides them in their work. He is the senior most officer at the Depot. He is not required to have any technical background. He allocates the work to the men working under him and sanctions leave to them. He is empowered to engage casual" labour. He takes a review of the position of the strength prevailing and makes recommendations about the

required strength. Within the area which is served by the Depot, the Depot Superintendent plans and delivers the necessary supply. He can take decision regarding overtime work of the staff subordinate to him. He has to maintain discipline and has to report cases of indiscipline to the Head Office. Sometimes, he is empowered to hold inquiry in cases of indiscipline. Cases of minor indiscipline can be dealt by himself. In addition, the Depot Superintendent functions as Factory Manager under the Factories Act and also under the Shops and Establishments Act. The Depot Superintendent does the merit-rating of the clerks working under him. He also represents the management to some extent before outsiders. He is authorised to spend amounts within prescribed limits on behalf of the Company. He represents the Company and the Depot in dealings with the Railway and Municipal authorities. Of course, while carrying on these duties, he has also to ensure that the stock registers are properly maintained. Where there is a clerk, the actual work of writing is done by the clerk; but, where there is no clerk, the Depot Superintendent may himself have to do all the writing work. The writing work done by the Depot Superintendent cannot be treated to be the substantial and main duty entrusted to him. On the facts enumerated above, it is quite clear that his principal duties are of a supervisory and managerial nature, while the clerical duties are only incidental.

34. Reliance was placed on the decision of the Labour Appellate Tribunal in *Burmah Shell Oil Storage and Distributing Company of India. Ltd., Madras v. Employees* [(1954) 1 LLJ 21]. In that case, it appears that the Depot Superintendent was found to be comparable with a mere store-keeper. The Depot Superintendent, in most cases, was the only person posted at the Depot and, in very few cases, a clerk was given to assist him. It was found that the Depot Superintendent himself had to maintain the correspondence, and was responsible for stock receipt, storage and issue. He had to remain busy most of the time with completing Company's standard forms and returns, and he had no powers of supervision over other members of the staff. On these facts, the Labour Appellate Tribunal held that his job was substantially of that of an intelligent and skilled clerk. This decision was upheld by the Madras High Court in *Burmah Shell Oil Storage and Distributing Company of India, Ltd., Madras v. Labour Appellate Tribunal of India* [(1954) 2 LLJ 155] when the decision of the Labour Appellate Tribunal was challenged by means of a writ. The High Court dismissed the writ petition and upheld the decision of the Labour Appellate Tribunal. These two decisions can be of no help, because the Depot Superintendents, with whom we are concerned, work under very different conditions. They are in charge of large depots and have, on an average, 5 to 7 employees working under them. The amount of clerical work done by them is only a minor part of their duties, while the principal duty is that of working as Manager of the Depot and of supervising the work of the subordinates posted there.

35. As against these cases, there are two decisions of the Labour Appellate Tribunal in *Burmah Shell Oil Storage and Distributing Company of India. Ltd., Madras and Hyderabad Branches v. Workmen* [(1955) 2 LLJ 153], and *Burmah*

Shell Oil Storage and Distributing Co. of India, Ltd., Madras Branch, Mysore and Travancore-Cochin States v. Workmen [(1955) 2 LLJ 228] in which the Labour Appellate Tribunal, after examining the evidence in detail, came to the view that the principal and substantial work done by a Depot Superintendent was administrative or supervisory and that the clerical work done was merely incidental. The facts of these two cases resemble more the facts found by the Tribunal in the case before us. Consequently, the decision given by the Tribunal that Depot Superintendents are employed on managerial or supervisory work and are not workmen is correct, because they all also draw a salary in excess of Rs 500 per mensem."

34. The circular dated 30.10.1996 (exhibit M-1) which admittedly gives the job description of the employees of the appellant is to be seen in the light of the aforesaid judgement. The said document is an admitted document on record and the specific case of the respondent with regard to the same is that even in the circular dated 30.10.1996, the post of Assistant Grade-I has been described as Senior Post Clerk Grade and it has been argued that performing certain incidental supervisory tasks does not make the Respondent a supervisor. In this context, it is relevant to refer to the judgment passed by the Hon'ble Supreme Court in the case of *Burmah Sheel Oil Storage & Distribution Company of India Limited* (supra), wherein whether or not Depot Superintendents of the Oil Company involved in the said case were working on managerial or supervisory capacity has been considered.

35. This Court finds that it is further not in dispute that the respondent was a part of the team to supervise the delivery procured paddy stock and was jointly responsible for submitting a consolidated report to the Area Manager after the liquidation of the entire procured paddy lying at PPC, Dumraon. The assignment of work vide office order dated 08.06.2009 is quoted as under:

"THE FOOD CORPORATION OF INDIA

DISTRICT OFFICE

EXHIBITION ROAD : PATNA

Ref no. PAT/V&S/(1)/2009

Dated 08.06.2009

OFFICE ORDER

In the light of FCI RO Patna's order issued under Ref. No. 4(1179)/2/2009 dated 03.06.2009, a squad consisting of under noted manager/officials is hereby directed in proceed to PPC, Dumraon to supervise the delivery of procured paddy stock to the millers/its transportation through the incharge PPC, Dumraon to the base depot. SL No. Name of officer/officials & designation

1 Sri. Devendra Prasad Singh, Manager (Stg), DO, FCI, Patna

2 Sri Mishri Hembram, Manager (D), FSD Dighaghat

3 Sri Kumar Madan Mohan, AGI (Depot), DO, Patna

The above squad will submit its consolidated report to the undersigned after its liquidation of entire procured paddy as lying at PPC, Dumraon.

Sd/-

(A. Thakur)

Area Manager”

36. Considering the totality of the facts and circumstances of this case and the work assigned to Assistant Grade-I (D), in which the respondent was working at the relevant point of time, through the circular dated 30.10.1996, this Court has no doubt that the appellant was working in the supervisory capacity and was assigned the work of supervision and control over the Assistant Grade-II (D) and Assistant Grade-III (D) while performing their duties. Accordingly, this court is of the considered view that the respondent cannot said to be a workman under Section 2(s) of the aforesaid Act.

37. In view of the finding of this Court that the respondent was not a workman within the meaning of Section 2(s) of the aforesaid Act at the relevant point of time, this Court is of the considered view that the order dated 20.09.2016 deciding the preliminary issue as well as the impugned final award cannot be sustained in the eyes of law and accordingly, they are set-aside.

38. This L.P.A. is allowed.