
(1999) 04 PAT CK 0058
In the Patna High Court
Case No : C.W.J.C. No. 5001 of 1995

Gautam Banerjee

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 12-04-1999

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1999) 2 BLJR 1110

Hon'ble Judges : Sachchidanand Jha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sachchidanand Jha, J.—These two writ petitions arising out of a common order of the Labour Court and involving the same disputed have been heard together and are disposed of by this common judgment.

2. The petitioners in both the case filed complaints u/s 26(2) of the Bihar Shops and Establishments Act ("BSE Act", for short) challenging separate but identical orders of termination of services. The Labour Court acting as the Authority under the Act has dismissed the complaints as not maintainable holding that in view of the provisions of the Sales Promotion Employees (Conditions of Services) Act, 1976 ("SPE Act", for short), the petitioners may seek their remedy under the Industrial Disputes Act, 1947 ("ID Act", for short). The facts of the case, briefly stated and so far as relevant, are as follows:

3. "Tata Pharma", a division of the Lakme Limited having its registered office at Bombay, is engaged in the manufacture and sale of pharmaceuticals all over the Country. Gautam Banerjee, the petitioner of C.W.J.C. No. 5001 of 1995, joined the Tata Pharma as a Medical Representative on the salary of Rs. 675 per month on 16.8.83. He was promoted as Junior Field Officer and, later, Senior Field Officer. The post of Senior Field Officer was re-designated as Area Field Manager. From the post of Area Field Manager he was promoted to the post of Regional

Sales Manager, on remuneration of Rs. 2,700 on 1.1.91. On 24.12.92, he was asked to resign from the service. The petitioner, instead, made representation. His representation was rejected on 31.12.92 and on 4.1.93, his services were terminated. At the relevant time, he was getting salary of Rs. 3,000/- per month. According to the petitioner during the entire period of his service, his performance had been excellent and it was in recognition of his satisfactory service that he was granted promotions. He filed complaint challenging the order of termination and seeking reinstatement u/s 26(2) of the BSE Act which was registered as BSE Case No. 4/93 before the Labour Court, Patna. The Respondent-Management filed show cause challenging, inter alia, the maintainability of the case. By the impugned order dated 22.5.95 the complaint was dismissed.

4. More or less similar are the facts of C.W.J.C. No. 5013 of 1995. The petitioner of that case, namely, Pankaj Saran joined the Tata Pharma as a trainee Medical Representative on a monthly stipend of Rs. 800/- on 15.10.86. He was confirmed on the post with effect from 1.9.87. In April 1990, he was promoted as Area Field Manager which post he held until termination of his services on 31.12.92. He filed the complaint, which was registered as BSE case No. 5/93, seeking similar relief. On similar ground that the complaint was held not maintainable by common order dated 22.5.95, his complaint was dismissed.

5. As will appear from the pleadings of the parties and the impugned order, the respondents in their show cause did not controvert the factual aspects of the case with regard to the appointment/promotion and salary of the petitioners. They have also to a large extent, admitted the nature of duties performed by the petitioners as claimed by them in their complaints. According to the respondents, however, even as per the petitioners' case the provisions of the BSE Act were not applicable as the petitioners were not "employees" with the meaning of Section 2(4) of that Act; rather, as they were performing duties of Supervisor/ Managerial nature, they fall within the definition of "Employer" u/s 2(5) of that Act and therefore, the complaint was not maintainable under the Act. The respondents stated that the services of the petitioners were totally unsatisfactory and no longer were required in the interest of the company. However, in order to avoid any stigma to them they were initially asked to resign from the service; it was only when they declined to do so, their services were terminated.

6. A significant feature of the case is that although in the show cause, while dealing with the petitioners, case regarding non-offer of notice pay and compensation at the time of termination of their services, the respondents stated that while tendering the impugned order of termination, the complainants were asked to collect the notice pay and compensation besides, other dues, if any, but they deliberately evaded such payment, at the time of argument the respondents conceded that if the complaints are held to be maintainable, on account of non-compliance of the provisions of Section 26(1) of the BSE Act regarding payment of notice pay and compensation, the petitioners would be entitled to the relief of

reinstatement. This stand was reiterated by the Counsel for the respondents even before this Court. The complaints having been dismissed as not maintainable, the only point which thus arises for decision is whether the complaints were maintainable under the BSE Act.

7. The point involves decision on the question whether the petitioners were sales promotion employees within the meaning of Section 2(d) of the SPE Act. If they qualify to be called "Sales Promotion Employees" as defined in the said Act, in view of the provisions of Section 6 of that Act, the petitioners have to be relegated to the remedy provided under the I.D. Act.

8. The contention of Mr. Subhro Sanyal, learned Counsel for the petitioners, however, is that in view of the decision of the Supreme Court in *H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc.*, the petitioners cannot be called "workmen" within the meaning of the I.D. Act and therefore, the remedy provided to dismissed workmen under that Act is not available to them. I am afraid, the Submission is based on misreading of the judgment.

9. After tracing the history of legislation as regards the definition of the term "workman" u/s 2(s) of the I.D. Act and noticing the provisions of SPE Act, their Lordships held in no uncertain terms that on and from 6.3.76, the provisions of the I.D. Act, become applicable to the medical representatives, depending upon their wages up to 6.5.87, and without the limitation on their wages thereafter, excepting those employed or engaged in the Supervisory capacity drawing wages exceeding Rs. 1,600/- per month and those employed and engaged mainly in Managerial or administrative capacity. The question, therefore, as to whether the petitioners can be called "workmen" within the meaning of the I.D. Act is, therefore, not relevant. Section 6 of the SPE Act makes the I.D. Act, besides other Acts, applicable to the medical representatives. The question as to whether the medical representatives fall within the ambit of Section 2(s) of the I.D. Act, no doubt, was answered in the negative on the ground that unless the person concerned is employed to do any of the categories of work mentioned in the main body of the Section, namely, manual, unskilled, skilled, technical, operational, etc. he cannot be said to be "workman" and since medical representatives do not do any such work mentioned therein, they cannot be called "workmen". It may sound contradiction in terms that while they cannot be called workmen within the meaning of the I.D. Act, they have still to be relegated to the remedy provided under that Act. This, however, is the mandate of Section 6(2) of the SPE Act, which runs as follows:

The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall apply to, or in relation to sales promotion employees as they apply to, or in relation to workmen" within the meaning of that Act and for the purpose of any proceeding under that Act in relation to an industrial dispute, a sales promotion employee shall be deemed to include a Sales Promotion Employee who has been dismissed, discharged or retrenched, in connection with, or as a consequence of, that dispute or whose dismissal, discharge or

retrenchment had led to that dispute.

10. It is well settled that special provisions exclude the general provisions on the subject. As noticed in paragraph 30 of the judgment in the Adyanthaya's case, the SPE Act, was enacted in order to have separate legislation for governing the conditions of services of the sales promotion employees. That, is why although the Petitions Committee of the Rajya Sabha had recommended amendment of the term "workmen" in the I.D. Act to get over the earlier decision of the Supreme Court in Management of May and Baker (India) Ltd. Vs. Their Workmen, , which had held that medical representatives are not "workmen" within the meaning of Section 2(s) of the I.D. Act, the Parliament decided to have a separate enactment for the sales promotion employees instead of amending the I.D. Act.

11. The most question for consideration in my opinion, therefore, is whether the petitioners can be called "Sales Promotion Employees" with the meaning of Section 2 (d) of the SPE Act or not. It would be relevant at this stage to notice the definition of the term as hereunder.

Section 2(d), as it originally stood, read as follows:

Sales Promotion Employees" means any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, and-

(i) who draws wages (being wages, not including any commission) not exceeding seven hundred and fifty rupees per mensem; or

(ii) who had drawn wages (being wages, including commission) or commission only, in either case, not exceeding nine thousand rupees in the aggregate in the twelve month immediately preceding the months in which this Act applies to such establishment and continues to draw such wages or commission in the aggregate, not exceeding the amount aforesaid in a year, but does not include any such person who is employed or engaged mainly in a managerial or administrative capacity.

The definition was amended by the Sales Promotion Employees (Conditions of Services) Amendment Act (Act No. 48 of 1996). The following definition of the term was substituted in place of the earlier one:

(d) "Sales promotion employee" means any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, but does not include any such person-

(i) who, being employed or engaged in a supervisory capacity, drawas wages exceeding sixteen hundred rupees per mensem; or

(ii) who is employed or engaged mainly in a managerial or administrative capacity.

Explanation....

12. From the impound order it appears that there was some controversy between the parties as to the status of the petitioners in the context of the aforesaid provisions. The Labour Court has relied on the averments made in the petitions of complaint in coming to the conclusion that the petitioners were engaged for promoting the sales and business of the Company. It would be useful to quote the relevant averments as hereunder:

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32 : That it is stated that despite re-designation or promotion the Job requirements of the Complainant remained work in field. His duty continued to pertain to sales and maintaining sales figures as also assume collection of Invoices and Bills from Dealers. The complainant was obliged to accompany Medical Sales Representatives on their visits to Doctors according to the strategy of the Company and explain to them products of the Company by reference to the folders given by the Company. The complainant was also obliged to visit retail outlets and to find out average sales of the products of the Company especially in the specific reference to Doctors who were prescribing products of the company. This he was obliged to report to his Superior officers for the benefit of the Company, periodically briefing sessions are held by the Company through higher officers and at briefing sessions the Regional Sales Manager participates along with Medical Sales Representatives and Regional Sales Manager has no power to conduct the meeting or do the briefing. He was also obliged to keep in contact with Dealers and Stockists to ensure that price of products indented by them was paid for and he was also obliged to chase disposal by posting sales of medicines which are about to expire as per date mentioned in the labels so that no expired medicines were left with Stockists.

33 : That the complainant had no independent right or authority to take decision and his decision did not bind the Company. The complainant had no authority to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees nor had the responsibility to direct them or to adjust their grievances or effectively to recommend such action and or never required the use of independent judgment. The complainant had no power to assign duties and distribute work of the Company. The substantial duty of the complainant was to project and endeavour to sell the products of the company with sufficient hard work and enthusiasm so that the objective is achieved and checking and forwarding to the superior authorities the routine matters relating to the sales of the products of the Company. The complainant has to perform clerical work like writing letters.

34 : That the complainant was not working in a supervisory/Managerial capacity in the Tata Pharma.

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21 : That it is stated that despite re-designation of promotion this job requirements of the complainant remained work in field. His duty continued to pertain to sales and maintaining sales figures as also ensure collection of Invoices and Bills from Dealers. The complainant was obliged to accompany Medical Sales Representatives on their visits to Doctors according to the strategy of the Company and explain to them products of the Company by reference to the folders given by the Company. The complainant was also obliged to visit retail outlets and to find out average sales of the products of the Company especially in the specific reference to Doctors who were prescribing products of the Company.

22 : The complainant had no power to assign duties and distribute work of the Company. The substantial duty of the complainant was to project and endeavour to sell the products of the Company with sufficient hard work and enthusiasm so that the superior authorities the routine matters relating to the sales of the products o the Company. The complainant, has to perform clerical work like writing letters.

23 : That the complainant was not working in a supervisory/managerial capacity in the Tata Pharma. In fact he remained a field worker, and, had to call on doctors and stockists by himself.

13. In view of the above clear averments there can be no doubt that the petitioners were employed for doing work related to promotion of sales or business of the products of the respondent, company. The contention of Mr. Sanyal on behalf of the petitioners, however, was that they were really performing supervisory duty. This submission was made obviously to bring the cases of the petitioners within the ambit of the exception to the definition of "Sales Promotion Employees" because those who are employed or engaged in supervisory capacity getting salary of more than 1600 rupees per month come in the excepted category and cannot be called sales promotion employee. The submission in my opinion is an argument of desperation. In view of the clear averments contained in different paragraphs quoted above and, if I may say so, in view of the clear admission in paragraphs 34 and 23 respectively of the petitions of complaint to the effect that the petitioners were not working in a supervisory or managerial capacity in the Tata Pharma clinches the issue in favour of the respondents. Once it is held that the petitioners were sales promotion employees, in view of the specific provision of Section 6(2) of the SPE Act, they were required to seek their remedy under the I.D. Act itself.

14. Mr. Sanyal relied on the proviso to Sub-section (1) of Section 11-A of the SPE Act to contend that where the provisions of any other law are more favourable to the employees covered by the SPE Act, the Act will not be applicable. The contention is wholly misconceived. The misconception is apparent from a bare reading of the sub-section which means as under:

11-A. Effect of laws and agreements inconsistent with this Act. - (1) The

provisions of this Act or of any rule made thereunder shall have effect, notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement, settlement or contract of service, whether made before or after the coming into force of this Act;

Provided that where under any such law, award, agreement, settlement, or contract of service, a sales promotion employee is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the sales promotion employee shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he is entitled to receive benefits in respect of other matters under this Act.

It would appear that while the main provision gives over-riding effect to the provisions of the SPE Act and the Rules framed thereunder over any other law or terms of the award, agreement, settlement or contract of service, the proviso says that if such law, award, agreement, etc. is more beneficial than the SPE Act, the employee will continue to be entitled to those benefits notwithstanding the provisions of the Act. It would appear that what the proviso protects is "benefits" accruing from such law, award, agreement, etc. There is difference between "benefit" and remedy". Remedy in the context means "forum" before which the benefit can be sought. Benefit refers to conditions of service. It may be in the shape of wages, leave or the like. The issue in the present case, does not relate to "benefits" it relates in "forum". Even if forum was in issue, the petitioners have a remedy under the I.D. Act which by virtue of the provisions of Section 6 of the SPE Act, they are required to avail. The efficacy of the proceedings under the I.D. Act arising out of dismissal from employment cannot be doubted for a moment. In any view, efficacy of proceeding under the I.D. Act is no less than BSE Act.

15. The Labour Court has gone into the questions as to whether de hors the provisions of the SPE Act the petitioners can maintain their complaints as "employees" within the meaning of Section 2(4) of the BSE Act and answered the same against them. In coming to adverse conclusion, it has relied on the provisions of Section 4(2) read with Entry 5 of the Schedule of the BSE Act. Section 4(2) of the Act provides that notwithstanding contained in the Act, the provisions specified in the third column of the Schedule shall not apply to the establishment, employees and other persons referred to in the corresponding entry in the second column. Entry 5 refers to "person occupying positions of managerial or supervisory character in an establishment employing more than five persons provided that not more than 10 per centum of the total number of employees in an establishment shall be so exempted." The Labour Court upon consideration of the documents brought on record by the respondents has come to the conclusion that the petitioners were discharging functions of supervisory nature and that the total number of employees being 39, they came amongst the first four according to their seniority and, therefore, are covered by the said

entry. I am not inclined to go behind this finding of fact in writ jurisdiction.

16. The Labour Court has, in fact, observed and, rightly, that the petitioners find themselves placed on the horns of a dilemma on their own pleadings. If they take the stand that they were not engaged in supervisory capacity and are therefore "employees" u/s 2(4) of the BSE Act, in view of the provisions of Section 4(2) of the SPE Act, they would have to be relegated to the remedy under the I.D. Act. If on the other hand, they take the stand that they were engaged in supervisory capacity, they would stand excluded from the category of "employees" u/s 2(4) of the BSE Act, in view of the provisions of Sections 4(2) read with Schedule of that Act.

17. In the above premises, I am inclined to agree with the Labour Court that the petitions of complaint u/s 26(2) of the BSE Act were not maintainable. I, thus, do not find any merit in these writ petitions which are accordingly, dismissed. There will be no order as to cost.