
(2007) 10 KL CK 0042
In the High Court Of Kerala
Case No : WP (C) No. 27780 of 2005 (F)

Lupin Limited

APPELLANT

Vs

G. Suresh and Another

RESPONDENT

Date of Decision : 05-10-2007

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Sales Promotion Employees (Conditions of Service) Act, 1976 — Section 2(2), 6, 6(2)

Citation : (2007) 4 ILR (Ker) 435 : (2008) 1 KLJ 68

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : A.M. Shaffique, E.K. Nandakumar, A.K. Jayasankar Nambiar, P. Benny Thomas and Priya Mahesh, for the Appellant; B.N. Shivsankar, for the Respondent

Final Decision : Dismissed

Judgement

S. Siri Jagan, J.—The petitioner in this writ petition is a company registered under the Companies Act 1956, engaged in the business of manufacturing and marketing pharmaceutical products. The first respondent herein was a medical representative working in the petitioner company from 16-7-1986. He was discharged from service on 6-9-2001, against which he raised an industrial dispute, which was referred by the Government of Kerala to the Industrial Tribunal, Alappuzha for adjudication. The same was being adjudicated as I.D. No. 70/2002 by the Tribunal. In the same, the petitioner company raised a preliminary objection that the 1st respondent being neither a sales promotion employee as defined under the Sales Promotion Employees (Conditions of Service) Act, 1976, ("SPECS Act" for short) nor a workman as defined under the Industrial Disputes Act, the reference itself was not maintainable. The tribunal considered the maintainability of the reference as a preliminary issue and passed Ext. P3 preliminary order holding that the reference is maintainable. The said preliminary order is under challenge in this writ petition at the instance of the petitioner - management.

2. Before considering the issues involved, I am constrained to note that the procedure adopted by the Tribunal is against the decisions of this Court as well as that of the Supreme Court in the matter of consideration of industrial disputes by Labour Courts and Industrial Tribunals. This Court and the Supreme Court have time and again held that ordinarily the Industrial Tribunal should not encourage piece-meal adjudication. Of course, while considering the validity of dismissal, discharge and termination of service of a workman as a punishment on the basis of a domestic enquiry, certainly an Industrial Tribunal or a Labour Court is to consider the validity of the enquiry as a preliminary point. However, when the question of maintainability of the reference is raised as an issue, it is not at all necessary to consider the same as a preliminary issue, especially when the consideration of that issue would require ascertainment of facts on evidence, which can be done while considering the issue referred for adjudication after evidence is adduced by both sides in the I.D. Here, the maintainability of the reference was raised as a preliminary issue. That question essentially involved many questions of facts as would be evident from the discussion of the issues involved, in this judgment. Therefore the more appropriate procedure the Industrial Tribunal should have adopted in this case was to consider the entire matter in the final award after taking evidence, instead of considering the maintainability of the reference as a preliminary issue and passing a preliminary order.

2.1. Secondly, the Tribunal did not actually consider the real issue involved in the I.D. The Tribunal went on a tangent to consider the issue as to whether the 1st respondent was a workman as defined under the Industrial Disputes Act, which was not the issue arising in the case in view of Section 6(2) of the SPECS Act although the petitioner management did raise such a contention. The issue arising for consideration was whether the 1st respondent could have validly raised an industrial dispute based on Section 6(2) of the SPECS Act, notwithstanding that he may not be a "workman" under the Industrial Disputes Act. Further, the Tribunal read the decision of the High Court in H.R. Adyanthaya Etc. Etc. v. Sandoz (India) Ltd. Etc. Etc. reported in 1995(1) LLJ 303 wrongly. The Tribunal mistakenly held that a sales promotion employee is a workman as defined in the Industrial Disputes Act which was the opposite of the finding in the Supreme Court Judgment. As such, the Tribunal not only failed to identify the issue arising in the case correctly and misdirected itself in deciding the issue considered by it wrongly.

2.2. Now I shall proceed to consider the real issues actually arising in the industrial dispute. The objection regarding the maintainability of the reference is contained in paragraph 1 of the written statement submitted by the petitioner before the Tribunal, which is produced as Ext. P2 in this writ petition. The said paragraph reads thus:

1. The second party at the outset says and submits that admittedly, the first party was employed as a Medical Representative with the Second Party. The

Second Party says and submits that the present dispute raised by the First Party is totally misconceived and without any jurisdiction inasmuch as the First Party was employed by the Second Party as a Medical Representative. The Second Party says and submits that it has been well settled by a Five Judge Constitution Bench of the Hon"ble Supreme Court of India in the case of H.R. Adyanthaya v. Sandoz (India) Ltd. reported in 1994 II CLR 552 that a Medical Representative is not a "workman" as defined u/s 2(s) of the Industrial Disputes Act. It has further been laid down in the said decision that a Medical Representative does not perform any of the duties as enumerated u/s 2(s) of the Industrial Disputes Act, viz., Manual, unskilled, skilled, technical, operational, clerical or supervisory and hence he is not a "workman" within the definition of Section 2(s) of the Industrial Disputes Act. The Second Party further says and submits that a Medical Representative employed by the Second Party is not even a Sales Promotion Employee as defined under the Sales Promotion Employees (Conditions of Service) Act. 1976. It is submitted that the Medical Representatives employed by the Second Party are engaged in a managerial/ administrative capacity. Furthermore, the Second Party's Medical Representative are highly qualified personnel who are continuously trained by the Second Party in order to be thoroughly aware of the composition of various drugs, medicines etc. which have an effect on the health of the people. They are required to appear daily before various doctors and be in a position to authoritatively explain and disseminate scientific and clinical data on a variety of drugs not only concerning the Second Party's products but also products of the other companies in comparison. The Medical Representatives are also required to contact senior doctors and highly qualified specialists in hospitals (both private and government) various medical institutions and act as the Second Party's representatives in discussing the medicinal value of the products in treating a variety of diseases. The Medical Representatives have to make intelligent presentations before the doctors and highly qualified specialists to impress them and gain their confidence and to be in a position to effectively answer the queries put to them. A Medical Representative is in custody of high value promotional materials and has to exercise his discretion in the use and distribution thereof. It is further submitted that the Medical representatives represent the Second Party in various medical conferences and medical symposiums. Furthermore, promotions to higher managerial positions are effected from the pool of the existing Medical Representatives. It is, therefore, respectfully submitted that the Medical Representatives are totally beyond the purview of the jurisdiction of this Hon"ble Tribunal and the Medical Representatives not being "workmen" as defined u/s 2(s) of the Industrial Disputes Act, the First Party has no locus-standi to raise the present dispute and the same deserves to be dismissed in limine on this ground alone.

(underlining supplied)

3. On a perusal of the pleadings before the Industrial Tribunal, and Section 6(2) of the SPECS Act, the following three issues arise for consideration:

(a) Whether the 1st respondent, a medical representative, employed by the petitioner, is a sales promotion employee as defined under the SPECS Act;

(b) If the 1st respondent is a sales promotion employee, whether it was necessary to find that the first respondent is a workman as defined u/s 2(s) the Industrial Disputes Act, to maintain an industrial dispute before the Industrial Tribunal, in view of Section 6(2) of the SPECS Act,

and

(c) Whether, the 1st respondent-medical representative, was employed in a managerial or supervisory capacity so as to exclude him from the purview of the definition of "sales promotion employee" in view of sub Clause (ii) of Section 2(2) of the SPECS Act.

4. For deciding the first issue, let us see the definition of "sales promotion employee" in Section 2(d) of the SPECS Act. The said definition reads thus:

2. Definitions - In this Act, unless the context otherwise requires,-

xxxxxxx xxxxxxxx xxxxxxxxxxxx (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, draws wages exceeding sixteen hundred rupees per mensem; or

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

5. From the portion extracted hereinbefore from Ext. P2 written statement of the petitioner itself it is abundantly clear that the duties and functions of the 1st respondent involved work relating to promotion of sales or business of the petitioner company. Even otherwise, in Adyanthaya's case (supra) the Supreme Court has held that medical representatives are sales promotion employees. In paragraph 34 of the said decision, the Supreme Court has held as follows:

34. ...As regards the word, "skilled" we are of the view that the connotation of the said word in the context in which it is used, will not include the work of a sales promotion employee such as the medical representative in the present case....

(emphasis supplied)

The above would show that the Supreme Court was also of the opinion that medical representatives are sales promotion employees under the Act. Therefore, as far as the first question is concerned, there is no difficulty at all to hold that the first respondent medical representative is a sales promotion employee as defined under the SPECS Act.

6. The second issue, which is a more challenging one, has to be resolved with reference to Section 6(2) of the SPECS Act, which reads thus:

6. Application of certain Acts to sales promotion employees.-

xxxxxxxxxxxxxxxxxxxxxxxx [(2) 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 purposes 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].

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The very fact that the Legislature thought it necessary to make the provisions of the Industrial Disputes Act applicable to sales promotion employees itself would sufficiently show that but for Section 6, the Industrial Disputes Act as such as not applicable to sales promotion employees under the SPECS Act. That would also indirectly mean that sales promotion employees are not workmen under the Industrial Disputes Act. This has also been so held in *Adyanthaya's* case (cited *supra*) by the Supreme Court.

7. Further, it is not because sales promotion employees are workmen, that the Industrial Disputes Act has been made applicable to them. On the other hand, u/s 6(2), the provisions of the Industrial Disputes Act are made applicable in relation to sales promotion employees, as they apply to or in relation to workmen within the meaning of the Industrial Disputes Act. This definitely means that even though sales promotion employees are not workmen as defined under the Industrial Disputes Act, the provisions of the Industrial Disputes Act as they apply to workmen as defined under the I.D. Act shall apply to sales promotion employees also. Therefore, for applying the Industrial Disputes Act to sales promotion employees, it is not necessary that such sales promotion employees should be workmen as defined under the Industrial Disputes Act at all. This is made further clear by the latter portion of Section 6(2) of the SPECS Act, which makes it further clear that for the purpose of proceedings under the Industrial Disputes Act in relation to industrial disputes, 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. Therefore, I am of the opinion that the language of Section 6(2) of the SPECS Act is clear enough to the effect that for a sales promotion employee as defined under the SPECS Act, to raise an industrial dispute under the Industrial Disputes Act it is not necessary that he should be a workman as defined under the Industrial Disputes Act. All that is necessary is that he should be a sales promotion employee as defined under the SPECS Act, and once it is proved that

he is, he automatically becomes entitled to invoke the provisions of the Industrial Disputes Act as if he was a workman as defined under that Act notwithstanding the fact that he may not answer the definition of "workman" under that Act.

8. The third question involved is as to whether the 1st respondent is engaged mainly in a managerial or administrative capacity so as to exclude 1st respondent from the definition of "sales promotion employee" in view Sub-clause (ii) of Section 2(d). The question as to whether a person is employed in a managerial or administrative capacity is essentially a question of fact which has to be proved by adducing evidence. The petitioner has not considered it necessary to adduce evidence before the Tribunal to prove that the 1st respondent is actually engaged in a managerial or administrative capacity. The question as to whether a person is engaged mainly in a managerial or administrative capacity depends on various facts such as whether he has any managerial or administrative functions, whether he has power to appoint or dismiss employees, whether he has any power to enter into contracts on behalf of the management, whether he has power to sanction or deny leave to employees, whether he can take decisions binding on the management and the like. At least some of these factors should be proved to rope in the petitioner as a managerial or administrative personnel. The petitioner could not succeed in proving that the 1st respondent was engaged mainly in a managerial or administrative capacity in the absence of any evidence in that regard. On the other hand, the duties and functions of the 1st respondent, as enumerated in paragraph 1 of Ext. P2 written statement filed by the petitioner before the Tribunal, do not spell out any managerial or administrative functions exercised by the 1st respondent. On the contrary, those functions enumerated show that he is a sales promotion employee as defined under the SPECS Act. Therefore, I do not find any merit in the third contention also.

9. The petitioner also raises a contention that without amending the Industrial Disputes Act appropriately, by virtue of Section 6(2) of the SPECS Act, the I.D. Act cannot be made applicable to sales promotion employee. Legislation by incorporation is an accepted method of making law. For that it is not necessary to amend the provisions of the incorporated act in order to make the provisions applicable to the legislation which adopts the other law. Instances of such legislation are legion. Therefore, I do not find any merit in that contention also.

10. In view of the above findings, though for different reasons, I uphold the finding of the Industrial Tribunal that the industrial dispute as raised by the 1st respondent is maintainable under the Industrial Disputes Act. Therefore, the writ petition is dismissed.

11. In view of the fact that the industrial dispute is of the year 2002, and more than five years have already elapsed, the Tribunal shall endeavour to pass final award in the industrial dispute at least within six months from the date of receipt of a copy of this judgment.