
(2011) 01 PAT CK 0003
In the Patna High Court
Case No : LPA No. 1430 of 2009

Nalin Sinha, represented by General Secretary, E. Merck Field Staff Union

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Citation : (2011) 01 PAT CK 0003

Final Decision : Dismissed

Judgement

T. Meena Kumari, J.—The present appeal has been filed by the appellant herein against the order passed by the learned Single Judge in C.W.J.C. No. 14035 of 2007 Ed.--Reported in Merck Limited Vs. The State of Bihar and Sri Nalin Sinha represented by General Secretary questioning the award passed by the Labour Court, Patna in Reference Case No. 5 of 2006.

2. It has been contended that the dispute has been referred by the Government to the Labour Court to adjudicate on the issue of transfer of the appellant as a medical representative from Patna to Hissar in the State of Haryana. The Labour Court having gone into the merits of the case passed the award holding that the action of the appellant-respondent is arbitrary in nature and has set aside the transfer order. Aggrieved by the same, respondent-appellant has preferred this writ petition and the learned Single Judge having held that the appellant herein fall under the definition of "Workman" has set aside the award. Accordingly, questioning the same the respondent has preferred the appeal at the first instance itself. The question that would arise for consideration is whether the appellant herein falls under the definition of "Workman", we also had an occasion to go through the judgment rendered by the Apex Court in the case of H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc., we have an occasion to deal with the amendment in Sales Promotion Employees (Condition of Services) Act, 1976 extending the benefit of the provisions of the Industrial Disputes Act, 1947 to the Sales Promotion Employees (Condition of Services) Act, 1976 by Section 6(2) of

the Act. The relevant provisions of Section 2(d) and Section 6(2) of the Act are as follows:--

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

(d) 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, 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.

Explanation.--For the purposes of this clause, the wages per mensem of a person shall be deemed to be the amount equal to thirty times his total wages (whether or not including, or comprising only of, commission) in respect of the continuous period of his service falling within the period of twelve months immediately preceding the date with reference to which the calculation is to be made, divided by the number of days comprising that period of service.

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

3. It has to be seen in the particular facts and circumstances of the case that the appellant is medical representative and the undisputed fact remains that his wages exceeds Rs. 1,600/- per month and he is not a "Workman" who is an employee of M/s Merk Limited doing the work relating to promotion of business. This Court having gone into the law laid down by the Apex Court in the case of H.R. Adyanthaya etc. etc. vs. Sandoz (India) Ltd. etc. etc. (supra), wherein the Hon"ble Supreme Court has held that the "medical representative" will not fall under the definition of "Workman" while dealing with the amendment. Following the same we are of the opinion that the appellant will not fall under the definition of "Workman", but, however, we are of the opinion that the appellant can agitate his rights before the appropriate forum for the relief sought in the writ petition.

4. At this juncture, learned counsel for the appellant has sought the liberty of this Court to withdraw this appeal with a liberty to avail the remedy open to the appellant before the appropriate forum, preferably in the Civil Court agitating his rights against the impugned order of transfer.

5. Taking note of the submissions, we are of the opinion that the liberty can be

granted to the learned counsel for the appellant to withdraw this appeal with a liberty to approach the Civil Court which is an appropriate forum for the relief sought for in this appeal.

6. We also make it clear that if the suit is filed before the appropriate Civil Court, the Civil Court shall dispose of the suit as expeditiously as possible in accordance with law without being influenced by any of the observations made by the learned Single Judge or by this Court in any of the proceedings.

7. With the abovesaid observation, this L.P.A. is dismissed as withdrawn.

As per Mihir Kumar Jha. J.

8. Though in view of the prayer for withdrawal of appeal and the writ application, the main issue involved in this appeal would require no further deliberation but in all fairness to the submissions of Mr. Pandey, learned counsel for the appellant who has made a valiant attempt to distinguish the judgment of the Apex Court in the case of H.R. Adyanthaya (supra) by referring to the provisions of Sales Promotion Employees (Condition of Services) Act, 1976 as amended by Act 43 of 1986, for establishing that the appellant-writ petitioner holding the post of Medical Representative to be "workman", it must be recorded that the appellant-writ petitioner as a matter of fact is not a "workman".

9. At the outset this court in fact had doubt whether the writ petition itself was maintainable under Article 226 of the Constitution of India on the ground that whether the medical representative falls under the definition of "Workman"? A contention however is sought to be raised by the learned counsel for the appellant that the appellant-writ petitioner falls under the definition of "Workman" in view of an amendment by the enactment of the amendment Act in Sales Promotion Employees (Condition of Services) Act, 1976 (hereinafter referred to as the Act).

10. Learned counsel for the appellant was also invited to clear our doubt as with regard to maintainability of the reference proceedings before the Labour Court on the ground that the petitioner, admittedly holding the post of Medical Representative was not a "workman" within the meaning of the Act as had been held by the Apex Court in the case of H.R. Adyanthaya (supra).

11. Mr. Pandey, in order to satisfy us had not only referred to the findings arrived by the learned Single Judge in the impugned judgment holding the appellant-Medical Representative to be a "workman" under the Industrial Disputes Act but had also referred to a judgment of the Division Bench of Rajasthan High Court in the case of M/s Dolphin Laboratories Ltd. vs. Judge, Labour Court, Udaipur and Another reported in 2001 Lab.IC. 2158 to contend that the Rajasthan High Court after considering the case of H.R. Adyanthaya (supra), had held that a medical representative is a "workman" within the meaning of Industrial Disputes Act by referring to the provisions of Sales Promotion Employees (Condition of Services) Act, 1976 as amended by Act 43 of 1986.

12. In my considered opinion the reliance placed by the learned counsel for the appellant on the judgment of the Division Bench of Rajasthan High Court in the case of M/s Dolphin Laboratories Ltd. (supra) is wholly misplaced, inasmuch as, the said Division Bench judgment first of all had only sought to follow an earlier order of the Division Bench of the same High Court in the case of Rajasthan Medical and Sales Representatives Union vs. M/s Industrial Research Institute Private Ltd., reported in 2000 Lab. IC 1963(Raj.), wherein it was held as follows:--

From the bare reading of the definition of sales promotion employees and sub-section (2) of Section 6 it becomes clear that from 6th March, 1976 the provisions of the Industrial Disputes Act became applicable to the medical representatives depending upon their wages upto 6th May, 1987 and without the limitation on their wages thereafter, but subject to capacity in which they were employed or engaged.

(underlining by me for emphasis)

13. As a matter of fact, in both the Division Bench judgments of Rajasthan High Court, there seems to have an apparent omission in referring to and discussing the factual matrix of the Supreme Court judgment in the case of H.R. Adyanthaya (supra).

14. From the reading of the aforesaid two Division Bench judgments of Rajasthan High Court, it also becomes clear that the

law laid down by the Apex Court in H.R. Adyanthaya (supra), was sought to be distinguished on the ground that if amendment in the Act w.e.f. 6.5.1987 was without limitation of wages of the Sales Promotion Employees, the said judgment of the Apex Court only as with regard to medical representative being not a "workman" under the Industrial Disputes Act, hereafter referred to as I.D. Act, was no longer a good law.

15. In my considered view, what has totally escaped the attention of the learned Judges of Rajasthan High Court in both the aforementioned Division Bench Judgments is paragraph no. 8 of the Apex Court judgment in the case of H.R. Adyanthaya (supra) which has to be always read with paragraph no. 7 of the same judgment and for the sake of clarity both of them are quoted hereinbelow:--

7. Hence, S.L.P.(C) No. 15641 of 1983, W.P. No. 5259 of 1980 together with C.A. No. 235 of 1983 and C.A. No. 242 of 1990 will have to be dismissed since in these cases the medical representatives were not governed either by the I.D. Act or the S.P.E. Act at the relevant time. In S.L.P.(C) No. 15641 of 1983 and in W.P. No. 5259 of 1980 connected with C.A No. 235 of 1983, the terminations of the services of the employees complained of were effected on 26th April, 1978 and 9th December, 1977 respectively. It is not the case of the employees involved in these cases that the wages of the concerned employees were less than Rs. 750/-

per mensem (excluding commission) or Rs. 9,000/- per annum (including commission). Hence the S.P.E. Act which came into force on 6th March, 1976 also did not apply to them. In C.A. No. 242 of 1990 the dispute with regard to the bonus for the year 1977-78 to 1979-80 arose on 28th January, 1981. It is again not the case of the appellant-employee that his wages were less than the said amounts and the S.P.E. Act applied to him on that account.

8. All that remains, therefore, is C.A No. 818 of 1992 where the dispute arose out of transfers of the employees concerned effected on 16th February, 1988. The complaint was made to the Industrial Court under the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (the "Maharashtra Act"). There is no doubt that in view of Section-3(18) of the Maharashtra Act the definition of "workman" under that Act would be the same as under the I.D. Act. The definition of "workman" under the I.D. Act will obviously not cover the sales promotion employees within the meaning of S.P.E. Act. It was contended on behalf of the workmen that since the I.D. Act was amended by insertion of the words "skilled" and "Operational" and the S.P.E. Act was amended to make all sales promotion employees, irrespective of their wages, "workmen" w.e.f. 6th May, 1987, it should be held that the definition of "workman" under the I.D. Act covered the sales promotion employees. Hence the Maharashtra Act was applicable to the medical representatives. Reliance was also placed on an observation of this Court in *Kasturi and Sons (Private) Ltd. Vs. N. Salivateeswaran and Another*, which is as follows:--

It is true that Section 3, sub-section (1) of the Act provides for the application of the Industrial Disputes Act, 1947, to or in relation to working journalists subject to sub-section (2); but this provision is in substance intended to make working journalists workmen within the meaning of the main Industrial Disputes Act.

We are afraid that these contentions are not well-placed. We have already pointed out as to why the word "skilled" would not include the kind of work done by the sales promotion employees. For the very same reason, the word "operational" would also not include the said work. To hold that everyone who is connected with any operation of manufacturing or sales is a workman would render the categorization of the different types of work mentioned in the main part of the definition meaningless and redundant. The interpretation suggested would in effect mean that all employees of the establishment other than those expressly excepted in the definition are workmen within the meaning of the said definition. The interpretation was specifically rejected by this Court in *Management of May and Baker (India) Ltd. Vs. Their Workmen*, *Western India Match Co. Ltd. Vs. Their Workmen*, *Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and Others*, Although such an interpretation was given in *S.K. Verma Vs. Mahesh Chandra and Another*, *Ved Prakash Gupta Vs. Delton Cable India (P) Ltd.*, and *Arkal Govind Raj Rao Vs. Ciba Geigy of India Ltd. Bombay*, cases (supra) the legislature impliedly did not accept the said interpretation as is evident from the fact that instead of amending the definition of "workman" on

the lines interpreted in the said latter cases, the legislature added three specific categories, viz., unskilled, skilled and operational. The "unskilled" and "skilled" were divorced from "manual" and were made independent categories. If the interpretation suggested was accepted by the legislature, nothing would have been easier than to amend the definition of "workman" by stating that any person employed in connection with any operation of the establishment other than those specifically excepted is a workman. It must further be remembered that the independent categories of "unskilled" "skilled" and "operational" were added to the main part of the definition after the S.P.E. Act was placed on the statute book. The reliance placed on the aforesaid observation in *Kasturi and Sons (Private) Ltd. Vs. N. Salivateeswaran and Another*, (supra) is also not correct. In that case the court was considering the question whether Section 17 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 empowered the authorities specified by it to adjudicate upon the merits of the claim made by a newspaper employee against his employer under any of the provisions of that Act. Section 17 reads as follows:--

Recovery of money due from an employer.--Where any money is due to a newspaper employee from an employer under any of the provisions of this Act, whether by way of compensation, gratuity or wages, the newspaper employee may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue.

While answering the question in the negative, the Court first observed that it is significant that the State Government or the specific authority mentioned in Section 17 had not been conferred with the normal powers of a Court or a tribunal to hold a formal inquiry. It then proceeded to make the aforesaid observation. It is thus clear that the use of the expression "in substance" in the said context was not so much for holding that the working journalists were workmen within the meaning of I.D. Act but to indicate that since Section 3(1) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act applied the provisions of the I.D. Act to the working journalists for all other purposes, the working journalists were for the purpose workmen within the meaning of the I.D. Act. This is apart from the fact that the construction suggested on behalf of the workmen resting their case on the provisions of Section-6(2) of the S.P.E. Act would be against the rules of interpretation.

We are, therefore, of the view that the contention raised on behalf of the management in this appeal, viz. since the medical representatives are not workmen within the meaning of the Maharashtra Act the complaint made to the Industrial Court under that Act was not maintainable has to be accepted. Hence, the complaint filed by the appellant-workmen under the Maharashtra Act in the present case was not maintainable and hence it was rightly dismissed by the

Industrial Court.

(underlining by me for emphasis)

16. From the reading of the aforementioned extract of judgment, it would be clear that while most of the cases of the medical representatives before the Apex Court were of the period prior to the Act coming-into-force or on the basis of the limits of salary as it existed prior to the amendment in the Act in the Year-1986, but then the Apex Court while dismissing all those cases either on the ground of non-applicability of the Act or on the basis of salary, had also dismissed one case, C.A. No. 818 of 1992, wherein the dispute had arisen out of the transfer of the employee, a medical representative effected on 16.2.1988 i.e., well after the Act was amended w.e.f. 6.5.1987, without limitation and ceiling of the wages of the sales promotion personnel. Thus the following factual analysis made by Division Bench of the Rajasthan High Court in the case of Dolphin Laboratories (supra) in the following terms:--

8. It may be noticed that the dispute which was before Hon"ble the Supreme Court in H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc., (supra) related to the period of termination that has been affected on 26.4.1976 and 9.12.1977 respectively and the employees case was not that they were drawing salary less than the fixed in the Act as prevailing then. It is after explaining the law stood at the relevant time governing the matters relating to medical representatives under the Industrial Disputes Act that the Court found in those cases the appellants before them were not workmen as a medical representative not falling in that category.

does not seem to be correct, inasmuch as, from a simultaneous reading of paragraphs of the judgment of the Apex Court in the case of H.R. Adyanthaya (supra) it is manifest that the Division Bench of Rajasthan High Court in the case of M/s Dolphin Laboratories Ltd. (supra) had failed to take into consideration paragraph-8 of the judgment of the Apex Court and went on to hold just contrary to the reasonings and findings of Apex Court. As a matter of fact, the Apex Court in the case of H.R. Adyanthaya (supra) did not lay down the law of medical representative being not a "workman" only on the basis of limits of salary, rather had gone by the definition of the workman under the I.D. Act as also had closely examined the provisions of the Act before recording the following reasons for holding that the medical representative doing the work of promotion of sales of the product or services of the establishment were not employee doing any skilled work or the technical nature of the work as would be apparent from the following portion of the same judgment of the Apex Court in the case of H.R. Adyanthaya (supra):--

6. It was contended by Shri Sharma appearing for the workmen that the definition of workman under the I.D. Act includes all employees except those covered by the four exceptions to the said definition. His second contention was that in any case, the medical representatives perform duties of skilled and

technical nature and, therefore, they are workmen within the meaning of the said definition. We are afraid that both these contentions are untenable in the light of the position of law discussed above. The first contention was expressly negated by two three-Judge Benches in *Management of May and Baker (India) Ltd. Vs. Their Workmen*, and *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, cases (supra) as has been pointed out in detail above. As regards the second contention, it really consists of two sub-contentions, viz. that the medical representatives are engaged in "skilled" and "technical" work. As regard 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. That word has to be construed *eiusdem generis* and thus construed, would mean skilled work whether, manual or non-manual, which is of a genre of the other types of work mentioned in the definition. The work of promotion of sales of the product or services of the establishment is distinct from and independent of the types of work covered by the said definition. Hence the contention that the medical representatives were employed to do skilled work within the meaning of the said definition, has to be rejected. As regards the "technical" nature of their work, it has been expressly rejected by this Court in *Burmah Shell* case (supra). Hence that contention has also to be rejected.

(underlining by me for emphasis).

17. It has also to be taken into account, that the aforesaid view recorded in the judgment of the Apex Court in the case of *H.R. Adyanthaya* (supra) once again fell for consideration before the Apex Court in the case of *Rhone-Poulenc (India) Ltd. Vs. State of U.P. and Others*, wherein it was held that:--

5. The contention of the learned counsel is that assuming the aforesaid provision is applicable, it still does not extend to deeming fiction to any State enactment including the U.P. Industrial Disputes Act as it is apparent on reading of the section that Sales Promotion Employees, within the meaning of Central enactment of the Industrial Disputes Act, 1947 (14 of 1947) have been treated as "workman". Reliance has been placed by the learned counsel on a Constitution Bench decision of this Court in *H.R. Adyanthaya Vs. Sandoz (India) Ltd.*, etc. etc., The Bench has held that since the Medical representatives are not workmen within the meaning of the Maharashtra Act, the complaint made to the Industrial Court under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 was not maintainable.

18. Thus in the light of the law laid down by the Apex Court, both in the case of *H.R. Adyanthaya* (supra) and *Rhone-Poulenc (India) Ltd.* (supra), it has to be held that a medical representative in view of not performing duties of skilled or technical nature cannot be held as "workman" under I.D. Act. Once I come to the conclusion that the appellant was not a "workman" under the I.D. Act, obviously the reference itself before the Labour Court u/s 10 of the I.D. Act has

to be held wholly without jurisdiction rendering the impugned award a nullity in the eye of law.

19. I must hasten to add here that even if for sake of argument, I accept the submission of the learned counsel for the appellant that the appellant was a workman and was covered by the provisions of the I.D. Act, even then, the findings arrived by the learned Single Judge in respect of the transfer order being neither mala fide nor in contravention of any statutory provisions has to be upheld. The appellant was well circumscribed by the terms and conditions of his appointment which included his transfer to any part of India in relation to performance and discharge of his duties during continuance of his employment in the management company.

20. That being so, this appeal is devoid of any merit and is, accordingly, dismissed as withdrawn.