

(2011) 04 BOM CK 0080

In the Bombay High Court

Case No : Letters Patent Appeal No. 438 of 2004 in Writ Petition No. 2622 of 1995 and Letters Patent Appeal No. 168 of 2005 in Writ Petition No. 3683 of 1995

N.M. Wadia Charitable Trust Hospital

APPELLANT

Vs

Dr. Ashok Vyankatesh Apte
 Dr. Ashok Venkatesh Apte
Vs Shri. V.T. Kore, Shri. R.U. Ingule, Member, Industrial Court
and N.M. Wadia Charitable Hospital

RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 25
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, 9
Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 10, 25F

Citation : (2011) 4 ALLMR 593 : (2011) 3 BomCR 715 : (2011) 131 FLR 217 : (2011) 5 MhLj 444

Hon'ble Judges : P.B. Majmudar, J;A.A. Sayed, J

Bench : Division Bench

Advocate : G.S. Godbole and A.B. Tajana, in LPA No. 438 of 2004, N.D. Buch and S.K. More, instructed by Bina Dholakia, in LPA No. 168 of 2005, for the Appellant; G.S. Godbole and A.B. Tajana for respondent No. 3 in LPA No. 168 of 2005, N.D. Buch and S.K. More, instructed by Bina Dholakia, for respondent in LPA No. 438 of 2004, for the Respondent

Judgement

P.B. Majmudar, J.—Both these Letters Patent Appeals are directed against the judgment and order dated 23rd August, 2004 passed by the learned single Judge in Writ Petition Nos. 2622 of 1995 and 3683 of 1995. By the impugned order, the learned single Judge dismissed both the writ petitions which has given rise to the present appeals by both the contesting parties. For easy reference, N.M. Wadia Charitable Hospital, Solapur is hereinafter referred to as "the Appellant" and Dr. Ashok V. Apte is hereinafter referred to as "the Respondent".

2. The Appellant is a Public Trust registered under the provisions of the Bombay Public Trusts Act, 1950 and runs and manages a charitable hospital at Solapur.

The Respondent was appointed as a full time Paediatric Physician in Category "A" vide appointment order dated 27th February, 1981 with a consolidated monthly salary of Rs. 500/ in the time scale of Rs. 400-20-60040800EB501000. Special allowance at the rate of Rs. 100/ was also paid to the Respondent as per the appointment order. At this stage, it is imperative to incorporate the appointment order issued to the Respondent. The same reads thus:

With reference to your application dated 2881980 and dated 121280, subsequent interview on 21281 with the Selection Committee and your letter dated 23281, you are hereby appointed as a Full time "Paediatric Physician in Category "A" in this institution on the following terms and conditions.

1. Salary: Rs. 500/ p.m. consolidated, in the time scale of Rs. 4002060040800EB501000.
2. Special allowance: Rs. 100/ per month will be given to you.
3. Residential quarters not provided to you.
4. Probation of six months from the date of your appointment, which may be extended according to the discretion of the management.
- 5, Duty hours: 8.30 a.m. To 12.30 p.m. and 4.30 p.m. to 6.30 p.m. All emergencies must be attended at any time, if arises.
6. Provident Fund and gratuity will be applicable as per Provident Fund and Gratuity Act and rules there under, as amended from time to time.
7. Private consulting practice is allowed to you in the afternoon and in the evening, after duty hours. No private Nursing home or attachment to any other institution is allowed to you.
8. Increments: You will be given increment after confirmation, on 1st of August every year, after completion of one year.
9. Leave: According to Hospital Rules and regulations as fixed from time to time. You will not be entitled to paid leave during the probation period.
10. You will be entitled to consulting charges on private cases in paying family blocks, as per rules, on your joining.
11. Termination of service: After confirmation, your services may be terminated by one month's notice on either side, or on payment of one month's salary in lieu of one month's notice. During probation, no notice of termination would be necessary on either side.
12. You will have to participate in teaching and take clinics for the students of Dr. V.M. Medical College, Solapur in liaison with the Head of the Paediatric Department.
13. Your services would be governed by Hospital service rules and regulations

made applicable from time to time.

14. If you commit breach of any of the conditions mentioned above, the hospital has a right to take necessary action against you as deemed fit and claim the damages.

15. You will have to join duty on or after 1st March, 1981.

I agree and accept the terms and conditions of this appointment. Sd/ Dr. Ashok V. Apte Sd/ Dr. M.C. Mehta Chairman.

3. The services of the Respondent were terminated with effect from 18th July, 1987 without paying him retrenchment compensation or wages in lieu of notice which action was challenged by the Respondent by filing a complaint of unfair labour practice being Complaint (ULP) No. 212 of 1987. In the written statement filed by the Appellant, it was stated that the Respondent's services had been terminated in accordance with the Rules applicable and that the complaint was not maintainable under the MRTU & PULP Act, 1971, as the Appellant had not committed any unfair labour practices in discharging the services of the Respondent. The Labour Court, after recording the evidence adduced by both sides, came to the conclusion that since no retrenchment compensation was paid to the Respondent, the order of termination was bad in law. The Labour Court also found that the Respondent had not led any evidence about his income from private practice and that he did not disclose his income from his private practice nor did he disclose the number of his patients. The Labour Court, however, found that since the order of termination was bad in law, 50 per cent back wages on that ground was awarded to the Respondent. Against the order of the Labour Court, two revision applications were filed in the Industrial Court, by the Appellant being Revision (ULP) No. 109 of 1993 and the Respondent, being Revision (ULP) No. 115 of 1993. Both the revision applications filed by the Appellant as well as the Respondent were dismissed by the Industrial Court at Solapur on 20th January, 1995.

4. The said order was challenged by the Appellant in so far as order of reinstatement and granting 50 per cent back wages with continuity of service is concerned. The said petition was numbered as Writ Petition No. 2622 of 1995. The Respondent also challenged the said order as he was denied full back wages. The same was numbered as Writ Petition No. 3683 of 1995. Before the learned single Judge, a point was canvassed for the first time by the Appellant that the Respondent cannot be said to be a workman u/s 2(s) of the Industrial Disputes Act, 1947, hereinafter referred to as "the Act" and, therefore, the complaint was not maintainable. The learned single Judge negatived the said contention on the ground that the said point was not taken before the Labour Court nor in the written statement and, therefore, no issue was framed. The learned single Judge also held that no such contention had been raised in the revision application filed by the Appellant. The learned single Judge observed that the question whether a person is a workman or not is a mixed question of law and fact. The learned

single Judge accordingly upheld the order of the Labour Court and dismissed both the writ petitions which have given rise to these appeals at the instance of the Appellant and the Respondent.

5. Mr. Godbole, the learned Counsel appearing for the Appellant, vehemently submitted that since the Respondent was appointed in the hospital as a doctor, he cannot be described as a workman. Mr. Godbole submits that, though it is true that the said point was not taken specifically in the written statement filed before the Labour Court nor before the Revisional Court, the point of lack of inherent jurisdiction can be raised at any stage of the proceedings. He submits that the question of jurisdiction can be raised even in the execution proceedings. Even if the point is not raised before the first court, a point of jurisdiction can always be taken at any stage and in any proceedings. In order to substantiate his say that the Respondent could not have been described as a workman, the learned Counsel for the Appellant has cited various judgments, to which we shall advert to later on. It is submitted by Mr. Godbole that looking to the averments in the complaint and considering the appointment order itself, it is crystal clear that the Respondent is not a workman as he was a highly professional doctor dealing in Paediatrics subject and that from the record the Court could have come to the conclusion that the Respondent could not be considered as a workman, on the basis of the appointment order issued to him. In any case, submits the counsel, this Court may frame additional issue as to whether the Respondent is a workman or not and may call for the findings from the Labour Court as, according to the learned Counsel, this Court is competent to pass such an order under Order 41 Rule 25 of the CPC Code, 1908.

6. In the alternative it was argued by Mr. Godbole that in any case even if the order of reinstatement is confirmed by this Court on the ground that the point was not taken before the Labour Court and no issue was framed in this behalf, this is not a fit case in which any back wages could have been awarded to the doctor especially in view of the fact that the Labour Court has found that the Respondent had not led any evidence to show that he was not getting sufficient income from his private practice. It is submitted by Mr. Godbole that the Respondent being a highly qualified professional person and when he continued to have full time private practice after his termination, the Respondent is not entitled to have any back wages and the order of the learned single Judge deserves to be set aside.

7. Ms. Buch, learned Counsel appearing for the Respondent, on the other hand, submits that whether the Respondent is a workman or not is a question of fact and the finding of fact can be arrived at by the competent court only on the basis of evidence on record. She further submits that the Appellant has not taken this point in the written statement filed before the Labour Court. Not only that even no arguments were advanced before the Labour Court that the Respondent is not a workman. She further submits that in the revision filed against the order of the Labour Court, no such point was even raised in the revisional memo or even in

the arguments. It is, therefore, submitted that this is not a case in which for the first time in these appeals, this Court may frame an issue as suggested by the learned Counsel for the Appellant and remand the matter especially when the Respondent is more than 70 years of age and now he cannot remember the factual aspect of the matter in view of long passage of time. She further submits that the burden is on the employer to prove as to whether the employee was gainfully employed or not. Since the Appellant has not led any evidence in this behalf, the Respondent is entitled to get full back wages. A preliminary contention was also raised by the learned Counsel for the Respondent that since the learned single Judge has exercised powers under Articles 226 and 227 of the Constitution of India, the appeal is not maintainable.

8. We have heard the learned Counsel appearing for the parties at length and have gone through the judgments cited at the Bar by both sides.

9. So far as the preliminary contention of Ms. Buch is concerned, a Full Bench of this Court has considered the aspect whether an appeal can lie under Clause 15 of the Letters Patent against the decision of a single Judge rendered in a petition invoking Articles 226 and/or 227 of the Constitution of India in the case of *M/s. Advani Oerlikon Ltd. v. Machindra Govind Makasare and Ors.*, decided on 17th March, 2011. In Paragraph 20 it has been observed as under:

20. Upon this discussion, we now proceed to answer the questions formulated in the order of reference:

Re: 1: It is not a correct proposition in law that this Court cannot correct jurisdictional errors or errors resulting in miscarriage of justice committed by authorities which are subordinate to it by invoking powers under Article 226 of the Constitution.

Re: 2: It is not a correct proposition in law that jurisdictional errors or errors resulting in miscarriage of justice committed by subordinate Courts/Tribunals can only be corrected by this Court in exercise of powers under Article 227 of the Constitution. The writ of certiorari can be issued under Article 226 of the Constitution where the subordinate Court or Tribunal commits an error of jurisdiction. Where the subordinate Court or Tribunal acts without jurisdiction or in excess of it or fails to exercise jurisdiction, that error of jurisdiction can be corrected. Moreover when the Court or tribunal has acted illegally or improperly such as in breach of the principles of natural justice the writ of certiorari is available under Article 226.

Re: 3: Where the facts justify the invocation of either Article 226 or Article 227 of the Constitution to correct a jurisdictional error or an error resulting in a miscarriage of justice committed by authorities subordinate to this Court, there is no reason or justification to deprive a party of the right to invoke the constitutional remedy under Article 226 of the Constitution.

Re: 4: It is open to the Court while dealing with a petition filed under Articles

226 and/or 227 of the Constitution or a Letters Patent Appeal under Clause 15 of the Letters Patent arising from the judgment in such a petition to determine whether the facts justify the party in filing the petition under Article 226 and/or 227 of the Constitution.

Re: 5: The cause title, the averments and prayers in the petition can be taken into account while deciding whether the petition is one under Article 226 and/or 227 of the Constitution.

Re: 6: If the Petitioner elects to invoke Article 226 and/or 227 of the Constitution and the facts justify such invocation, a Letters Patent Appeal against the order of the Learned Single Judge would be maintainable even though the Single Judge has purported to exercise jurisdiction only under Article 227 of the Constitution. The fact that the Learned Single Judge has adverted only to the provisions of Article 227 of the Constitution would not bar the maintainability of such an appeal. The true test is whether the facts justify the invocation of Articles 226 and 227 and this has to be determined on the facts of each case having due regard to (i) the nature of the jurisdiction invoked; (ii) the averments contained in the petition; (iii) the reliefs sought; and (iv) the true nature of the principal order passed by the Single Judge. The true nature of the order passed by the Single Judge has to be determined on the basis of the principal character of the relief granted. The fact that an ancillary direction has been issued under Article 227 of the Constitution would not dilute the character of an order as one with reference to Article 226. What has to be ascertained is the true nature of the order passed by the Single Judge and not what provision is mentioned while exercising this power.

Re: 7: Where a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not lawful for the Court to hold that jurisdictional errors or errors resulting in a miscarriage of justice committed by the subordinate Courts or Tribunals can be corrected only by exercising powers under Article 227 (and that the mentioning of Article 226 is redundant), thus depriving the party of a right of appeal under Clause 15 of the Letters Patent.

Re: 8: When a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not open to the Court to hold that Article 226 need not have been invoked, on the ground that Article 227 is clothed with the power to grant the same relief thus depriving the party of a right to elect or choose a remedy.

Re: 9: In a situation where a petition is filed under Article 227 of the Constitution and judgment is rendered in favour of the Petitioner, recourse to an appeal under Clause 15 of the Letters Patent is not barred to the Respondent before the Single Judge merely on the ground that the petition was under Article 227. In *State of Madhya Pradesh v. Visan Kumar Shiv Charanlal* (supra), the appeal before the Division Bench was filed by the Respondent to the proceedings before the Single

Judge in a petition which had been instituted under Article 227. Accepting the submission that a nomenclature is of no consequence and it is the nature of the reliefs sought and the controversy involved which determine which Article is applicable, the Supreme Court held that the appeal before the Division Bench was maintainable. A similar position arose in the decision of the Supreme Court in *M.M.T.C. v. Commissioner of Commercial Tax* (supra). The Division Bench of the High Court had held that since the petition before the Single Judge was under Article 227 of the Constitution, an appeal at the behest of the Respondent to the petition was not maintainable. The Supreme Court held that the High Court was not justified in holding that the Letters Patent Appeal was not maintainable since the High Court did not consider the nature of the controversy and the prayers involved in the Writ Petition.

The Full Bench has also considered the judgment of the Supreme Court on this point in paragraph 15 of the judgment. The same reads thus:

15. In *M/s. Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad*, a complaint filed by the Respondent under the Maharashtra

Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, was dismissed by the Labour Court and the dismissal of the complaint was affirmed in revision by the Industrial Court. A Writ Petition by the Respondent under Articles 226 and 227 of the Constitution was dismissed by a Single Judge. An appeal by the Respondent was entertained by the Division Bench which held that the employer was guilty of unfair labour practices consequent upon which reliefs were granted to the workman in the Letters Patent Appeal. On behalf of the employer, it was sought to be contended before the Supreme Court that the petition filed by the Respondent before the High Court was in substance under Article 227 and that hence, the judgment of the Single Judge could not have been appealed against under Clause 15 of the Letters Patent. The Supreme Court adverted to the averments contained in the petition filed by the workman while invoking Articles 226 and 227 of the Constitution and observed that it was clear that the workman had tried to make out a case for the interference of the High Court seeking an appropriate writ of Certiorari under Article 226 of the Constitution. Noting that the appeal before the Division Bench under Clause 15 of the Letters Patent was maintainable, the Supreme Court held as follows:

Basic averments for invoking such jurisdiction were already pleaded in the Writ Petition for High Court's consideration. It is true, as submitted by learned Counsel for the Appellant, that the order of the learned single judge nowhere stated that the Court was considering the Writ Petition under Article 226 of the Constitution of India. It is equally true that the Learned Single Judge dismissed the Writ Petition by observing that the Courts below had appreciated the contentions and rejected the complaint. But the said observation of the learned single Judge did not necessarily mean that the learned Judge was not inclined to interfere under Article 227 of the Constitution of India only. The said observation equally supports the conclusion that the learned Judge was not inclined to

interfere under Articles 226 and 227. As seen earlier, that he was considering the aforesaid Writ Petition moved under Articles 226 as well as 227 of the Constitution of India. Under these circumstances, it is not possible to agree with the contention of learned Counsel for the Appellant that the learned Single Judge had refused to interfere only under Article 227 of the Constitution of India when he dismissed the Writ Petition of the Respondent.

After advertng to the judgment in Umaji's case, the Supreme Court concluded thus:

It was open to the Respondent to invoke jurisdiction of the High Court both under Articles 226 and 227 of the Constitution of India. Once such jurisdiction was invoked and when his Writ Petition was dismissed on merits, it cannot be said that the learned single Judge had exercised his jurisdiction only under Article 226 (sic) of the Constitution of India. This conclusion directly flows from the relevant averments made in the Writ Petition and the nature of jurisdiction invoked by the Respondent as noted by the learned single Judge in his judgment, as seen earlier. Consequently, it could not be said that Clause 15 of the Letters Patent was not attracted for preferring appeal against the judgment of earned single Judge.

Considering the aforesaid, in our view, Letters Patent Appeal against the order of the learned single Judge is maintainable and even the Respondent has also filed appeal challenging the order of the learned single Judge. We, therefore, negative the preliminary contention raised by the learned Counsel for the Respondent.

10. So far as the main point involved in the matter is concerned, it is no doubt true, as argued by Mr. Godbole, that the Respondent is a highly qualified doctor who was appointed in the Appellant hospital for the purpose of treating the patients and to do any other ancillary work relating to medicine. At this stage reference is required to be made to definition of "workman" u/s 2(s) of the Act. The same provides as under.

"workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person..

11. At this stage we would like to refer to the judgments cited at the Bar by both the sides.

12. Mr. Godbole, learned Counsel appearing for the Appellant, has relied upon the decision of the Supreme Court in the case of Abdulla Bin Ali and Others Vs. Galappa and Others, on the point of jurisdiction. In paragraphs 8 and 9 it has

been observed by the Supreme Court as under:

8. The learned Counsel for the Appellants, Shri R.B. Datar, contended that the trial Court as well as the first appellate Court had decided all the issues involved in the case in favour of the PlaintiffsAppellants and in case we come to the conclusion, as indeed we have come to that the jurisdiction of the Civil Court is not barred, the judgment of the first appellate Court should be confirmed and there is no need to remand the case again to the High Court for deciding it afresh on merits.

9. We are not inclined to accept the contention raised by the counsel for the Appellants. A number of issues were involved in the case and the High Court has decided the case only on the ground of jurisdiction and no other point has been dealt with. It will not be fair to the Respondents to accept the finding of the first appellate court without the same being examined by the High Court.

13. A reference is also made by Mr. Godbole to the decision of the Supreme Court in the case of Most. Rev. P.M.A. Metropolitan and others, etc. etc. Vs. Moran Mar Marthoma and another etc. etc., wherein the Supreme Court has held that u/s 9 of the CPC Code, 1908, plea of absence of jurisdiction can be raised and entertained at any stage.

14. Mr. Godbole also made a reference to the decision of the Supreme Court in the case of Kiran Singh and Others Vs. Chaman Paswan and Others, wherein it is held that a decree passed without jurisdiction is nullity. It was held that when a Court entertains a suit or an appeal over which it has no jurisdiction, such defect cannot be cured by consent of the parties and such decree which is passed without jurisdiction is nullity.

15. Mr. Godbole further relied upon the decision of the Supreme Court in the case of Ahmedabad Municipal Corporation Vs. Virendra Kumar Jayantibhai Patel, . In the aforesaid case, the Respondent, a dental surgeon carrying on his private practice from private clinics also rendered his services to dental clinic run by the Municipal Corporation. The Municipal Corporation decided to fill up the vacant posts of dental surgeons by advertisement. The Respondent was not selected by the Selection Committee as he was found successful in the selection. Thereafter he raised an industrial dispute that he was a workman and having served for a requisite number of years, he was entitled to the benefits of permanent employee in view of an award rendered by the Industrial Tribunal and certain circulars issued by the Corporation. The dispute was referred to the Industrial Tribunal. The same was allowed. Writ Petition was also dismissed.

The Supreme Court in the said judgment held that the High Court erred in refusing to interfere on the ground that the Tribunal's finding was based on evidence. Even the court has found that the circular in question was also not applicable in the said case.

16. Learned Counsel for the Appellant has also relied upon the decision of the

Supreme Court in the case of Heavy Engineering Corporation Ltd. Vs. Presiding Officer, Labour Court and Others, . The said case is also in connection with a doctor and on the basis of evidence on record, the Supreme Court found that even though the doctor, along with his colleagues, was working in shifts but he was working in a supervisory capacity, yet he was not a workman and that there was no necessity to comply with Section 25F of the Act. In the said case, after appreciating the factual aspect and after considering the evidence on record led by both sides, the Court came to the conclusion that the said doctor could not have been regarded as a workman u/s 2(s) of the Act whilst working in a supervisory capacity and that the other persons working under him had to function in the manner directed by the said doctor.

17. Mr. Godbole has also relied upon the decision of the learned single Judge of this Court in the case of M.M. Wadia Charitable Hospital v. Umakant Ramchandra Warerkar (Dr.) 1997 I CLR 240. In the aforesaid case, the concerned Respondent was appointed as a doctor in the Petitioner hospital i.e. the same institution with which we are concerned in these appeals. The learned single Judge of this Court has found that the said doctors were highly qualified people. On the basis of the nature of duties performed by the said doctors, it was held that the said doctors cannot be described as workmen. In paragraph 11 it has been held as under:

11. As stated hereinabove, it is not possible to put any particular case in a strait jacket standard. Ultimately, it will depend on the facts of each case. Applying the above ratio of the judgments of the Supreme Court in various matters from time to time, I am of the view that the Respondent doctors are rendering only professional service to various institutions, in Solapur including the Petitioner hospital. If that is the touchstone of the matter, then there is no relationship between the parties which attracts and which entitles the Respondent doctors in the present case to claim the status of a workman as defined in Section 2(s) of the Industrial Disputes Act, 1947. As stated above, the object of the Act was quite different. The object of the Act is to set up a machinery under which industrial disputes could be resolved. It is the object of the said Act to protect poor sections of the Society. It is to see that employment which is scarce in our country, is duly protected and it was never thought that highly qualified medical doctors, esteemed surgeons or paediatricians would be entitled to claim the protection of a welfare legislation. There are serious anomalies which I have discussed hereinabove. I wish to make it clear, once again, that this judgment is confined only to the facts of this case and I do not wish to express any opinion with regard to doctors employed by Government or in respect of doctors employed by private and industrial undertakings to render services to their employees. As stated hereinabove, with the progress in our daytoday life, the concept of profession stands extended to large number of occupations which earlier may not be the case, but that does not mean that conceptually or otherwise, a professional who renders service to the society in various forms becomes a "workman" u/s 2(s) of the Industrial Disputes Act, 1947. At the cost of repetition, I once again state that in the present case, the

relationship between the patient and doctor is not created at the instance of the hospital. The patient has immense faith and confidence in a particular doctor. The patient has trust and to certain extent, the doctor has a fiduciary duty towards the patient which concept will be totally obliterated if these doctors are treated as workman as defined u/s 2(s) of the Industrial Disputes Act, 1947.

18. Mr. Godbole also made a reference to the decision of the Supreme Court in the case of Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and Others, . In the said case, the Court was concerned with the question as to whether a teacher appointed in an educational school can be said to be a "workman" as defined u/s 2(s) of the Act. It was held that even though school is an industry, teacher appointed in a school cannot be said to be a workman and the dispute cannot be referred under the Act.

19. Reference is also made to the decision of the Supreme Court by Mr. Godbole in the case of H.R. Adyanthaya etc. etc. v. Sandoz (India) Ltd. etc. etc. 1994 II CLR 552. In the said case it is held that a person to be a workman under the Act must be employed to do the work of any of the categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory and it is not enough that he is not covered by either of the four exceptions to the definition. It was further held that the medical representatives are not workmen within the definition of Section 2(s) of the Act. The Supreme Court accordingly confirmed the finding given by the Tribunal.

20. Ms. Buch, learned Counsel appearing for the Respondent, has relied upon the decision of the Supreme Court in the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, . In the said case the Supreme Court has considered the question as to whether in the absence of any pleadings or request by the employer, is it the duty of the Labour Court or Tribunal to call suo motu the employer to adduce additional evidence to justify the penal termination of service of a workman. In the said judgment it is held as under in paragraphs 34 and 35.

34. Having given our most anxious consideration to the question raised before us, and minutely, examining the decision in Cooper Engineering Ltd. Case (supra) to ascertain the ratio as well as the question raised both on precedent and on principle, it is undeniable that there is no duty cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of workman either u/s 10 or under

S. 33 to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman. Cooper Engineering Ltd. (supra) merely specifies the stage at which such opportunity is to be given, if sought. It is both the right and obligation of the employer, if it so chooses, to adduce additional evidence to substantiate the charges of misconduct. It is for the employer to

avail of such opportunity by a specific pleading or by specific request. If such an opportunity is sought in the course of the proceeding the Industrial Tribunal or the Labour Court, as the case may be, should grant the opportunity to lead additional evidence to substantiate the charges. But if no such opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal suo motu to call upon the employer to adduce additional evidence to substantiate the charges.

35. Viewed from this angle, in the present case there was 1 Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, neither a pleading in which any such claim for adducing additional evidence was made, nor any request was made before the Industrial Tribunal till the proceedings were adjourned for making the Award and till the Award was made. The case squarely falls within the ratio of Delhi Cloth and General Mills Co. case (supra). Therefore, the Division Bench of the Calcutta High Court was clearly in error in granting such a nonsought opportunity at the stage of the Letters Patent Appeal.

21. Ms. Buch also placed reliance on the decision of this Court in the case of Seth Jeejeebhoy Dadabhoy Charity Funds and Others Vs. Farokh Noshir Dadachanji, wherein it is held that the burden of proof regarding duties allotted to employee is on the employer to establish.

22. Ms. Buch has also relied on the decision of the Gujarat High Court in the case of P.R.S. Panikar v. Oil and Natural Gas Commission, Dehradun and Anr. 1989 LAB IC 766 wherein it is held that the question of absence of territorial jurisdiction is not a pure question of law but it is a mixed question of law and fact. It is also held that the plea as to jurisdiction cannot be raised for the first time in the letters patent appeal.

23. Ms. Buch also placed reliance on the decision of a single Judge of this Court in the case of Aloysius v. Thomas Cook India Ltd. 2000 II CLR 649. In the said case on the basis of evidence on record, the learned single Judge found that the Petitioner before the Court was engaged mainly in a managerial or administrative capacity but he was assigned the work to look after tourists arriving by airways and their lodging. He was not exercising any managerial or administrative function. All that he was doing was to receive the tourists, make out their bills, verify the bills as received. All these would be checking work of a clerk and not that of a manager or administrative officer.

24. On the question of back wages, the learned Counsel for the Respondent has relied on the decision of the Supreme Court in the case of S.G. Chemicals and Dyes Trading Employees Union v. S.G. Chemicals and Dyes Trading Limited and Anr. 1986 SCC 490. wherein the Supreme Court has held that amounts earned by alternate employment during short period need not be set off and workmen can retain such amounts by way of solatium.

25. Ms. Buch has further relied upon the decision of the Assam High Court in the case of Bengal United Tea Company Ltd. Vs. Ram Labhaya and Others, wherein it

is held that a person who is employed as a Assistant Medical Officer of an estate would be a workman as defined in Section 2(s) of the Act.

26. Reference is also made by the learned Counsel for the Respondent to the decision of the Gujarat High Court in the case of Arun Mills Ltd. v. Dr. Chandraprasad C. Trivedi 1976 (32) FLR Guj. H.C. 323. In the said case, the Division Bench on the basis of evidence found that the doctor was assigned technical work and, therefore, he falls under the category of workman u/s 2(s) of the Act.

27. Reference is also made by the learned Counsel to the decision of the Allahabad High Court in the case of Dr. Surendra Kumar Shukla v. Union of India and Ors. 1986 Lab IC 1516 wherein the Allahabad High Court has taken the view that the work done by Assistant Medical Officer is of technical nature and as such he is a workman u/s 2(s) of the Act.

28. Ms. Buch also made a reference to the decision of the Division Bench of the Calcutta High Court in the case of Dr. P.N. Gulati v. Labour Court, Gorakput and Ors. 1978 II LLJ 46. In the said case it was found that a doctor employed in an industry for rendering medical aid to its employees is a workman and that the Labour Court was quite justified in concluding that the reference made by the State Government was competent. The observations in para 9 of the said judgment read thus:

9. In support of his submission that a doctor employed by an industry is not a workman as defined in the Industrial Disputes Act. Sri J.N. Tiwari relied upon a Division Bench decision of this Court in the case of Spencer and Co. Ltd. Vs. Industrial Tribunal, Bangalore and Another, . In that case the Court considered the definition of the work "workman" contained in S. 2(s) of the Industrial Disputes Act, prior to its being substituted by Act 36/56. The Court pointed out that the word "workman" had been defined thus:

Any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward.

It held that it is only such persons who are employed in an industry to do either manual or clerical work that fall within the ambit of the aforesaid definition. A person engaged by an industry to do some work which is neither manual nor clerical in nature cannot be considered to be a workman within the meaning of the expression as used in the Industrial Disputes Act. Since a doctor is not employed by an industry to do either manual or clerical work, he cannot be considered to be a workman. However, the Parliament, by Act 36 of 1956 substituted a new Section 2(s) and the definition of the word "workman" was varied to certain extent. Relevant portion of substituted section reads thus:

"Workman" means any person (including an apprentice) employed in any industry to do a skilled or unskilled manual, supervisory, technical or clerical work....

According to the changed definition not only person employed in an industry to do manual or clerical work but persons employed for doing supervisory or technical work are also to be considered to be workmen. Of course, the section goes on to provide that if the wages of person employed for doing supervisory work exceed Rs. 500 per month, he will not be considered to be a workman. Even though a doctor is not employed for doing manual or clerical work he certainly is employed for doing work of technical nature. We are therefore of opinion that the decision cited by the learned Counsel has lost validity after amendment made in the Industrial Disputes Act in the year 1956 and that a doctor employed in an industry for rendering medical aid to its employees is a workman. The Labour Court, in our opinion, was quite justified in concluding that in the circumstances the reference made by the State Government was competent.

29. Reference is also made by the learned Counsel for the Respondent to the decision of the Supreme Court in the case of Indian Medical Association Vs. V.P. Shantha and Others, . In the said case the Court was concerned with the provisions of the Consumer Protection Act, 1986 wherein it is held that the services rendered by professionals are also covered under the Act. In our view, this decision has no bearing so far as the issue with which we are concerned.

30. In the present case, it is not in dispute that in the written statement filed before the Labour Court, the hospital had not taken any point of maintainability on the ground that the doctor is not a workman. It is required to be noted that no issue was framed by the Labour Court and no arguments were advanced on this point either before the Labour Court or before the Revisional Court. For the first time this issue was raised before the learned single Judge on behalf of the Appellant to the effect that the Respondent cannot be said to be a workman as he is a professional doctor. In the judgments to which Mr. Godbole relied, in every case when the point was raised from inception, there was an issue and a finding as to whether a person is a workman or not. Even in the matter decided by the learned single Judge in the case of N.M. Wadia Charitable Trust (supra) the learned single Judge has categorically stated that ultimately the aspect as to whether a person is a workman or not depends on the facts and circumstances of the case. Though Mr. Godbole argued that on the basis of the appointment order issued to the Respondent, this Court may come to the conclusion that the Respondent in the instant case is not a workman. However, in our view, when no issue was raised either before the Labour Court or the revisional court on this point nor even any evidence is led by the management, it is not possible for us to accept the said point as to whether Respondent is a workman or not in the writ petitions or in these appeals. It is true that in case of lack of inherent jurisdiction, the Court can consider this point at any point of time and even it can be raised for the first time before this Court in a writ petition.

31. In our view, whether a person is a workman or not is a mixed question of law and fact and unless there is an evidence on this behalf, the Court cannot for the

first time in a writ petition decide the said issue. Mr. Godbole has frankly submitted that it is not his case that a doctor can in no case be said to be a workman. According to him, in the instant case, looking to the averments in the complaint and the appointment order, one can straightway come to the conclusion that the Respondent is not a workman. We are afraid, we cannot jump to such conclusion on the basis of a sketchy material on record especially when no evidence is led and no issue is raised in this behalf. In paragraph 5 of the judgment in the case of M.M. Wadia Charitable Trust (supra), a learned Judge of this Court has held that the Court wants to make it

clear that the decision given in the said case is confined to the facts of the writ petition referred to herein. In the concluding part of paragraph 8, the learned single Judge has also held that there cannot be a strait jacket test or formula in these matters. It will ultimately depend on the facts of each case.

32. In the case of Arun Kumar and Ors. v. Union of India and Ors. (2007) 1 SCC 732 wherein the Supreme Court has considered the question about jurisdictional facts and adjudicatory facts. It may be relevant to quote hereunder the apt observations of the Supreme Court in paragraphs 73, 74, 75 and 84 and the same read thus:

73. It is, therefore, clear that before Section 17(2)(ii) can be invoked or pressed into service and before calculation of concession as per Rule 3 is made, the authority exercising power must come to a positive conclusion that it is a concession. "Concession" in our judgment is, thus a foundational, fundamental or jurisdictional fact.

74. A "jurisdictional fact" is a fact which must exist before a Court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or onexistence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional act no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. In Halsbury's Laws of England, it has been stated:

Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue, but that ruling is not conclusive.

84. From the above decisions, it is clear that existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the

authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

33. In a given case, the ultimate jurisdiction of the Court depends upon the evidence which may be available on record. The jurisdiction of the Court in such a case would depend upon the evidence on record. It, therefore, cannot be said that the Court lacks inherent jurisdiction and in such case the ultimate jurisdiction depends upon the evidence led before the Labour Court.

34. In the Industrial Disputes Act, there is no provision by which the doctors are excluded to approach the Labour Court by asserting their right that the doctors are doing clerical work and that they are workmen. However, ultimately on the basis of evidence on record, the Court can come to the conclusion as to whether it has jurisdiction to give any relief or that such reference is not maintainable. In short, the said question depends upon the availability of evidence on record and on the basis of which ultimately the jurisdiction can be said to be barred or not. In view of the same, we agree with the submission of Mr. Godbole that in case, on the face of it, it is found that the Court has no inherent jurisdiction, at any stage the said point can be taken but in the instant case, as pointed out earlier, it is not even argued by Mr. Godbole that in no case a doctor can be described as a workman nor it requires appreciation of evidence which is totally lacking in our case. We are not in a position to accept the submission of Mr. Godbole in this behalf.

35. Mr. Godbole's next argument is that in any case this Court may frame additional issue as to whether the Respondent is a workman or not and may call for the finding from the Labour Court by keeping the appeal pending as provided under Order 41 Rule 25 of the CPC.

36. It is, however, required to be noted that the Respondent has by this time reached the age of 70 years and considerable time has passed since the Labour Court gave its award. It will not be just and proper now to frame an issue and call for evidence. The Appellant cannot be given any such latitude as they were totally negligent in taking appropriate plea before the Labour Court when the reference was pending. The Appellant cannot be allowed to fill in the lacunae at this stage. As pointed out earlier, not only before the Labour Court but even in revisional court no such point was taken. We see no justifiable ground either to remand the matter or frame an additional issue and call for the findings from the Labour Court in this behalf. Considering the said aspect, it is not possible for us to accept the submission of Mr. Godbole that the complaint was required to be dismissed on the ground that the Labour Court had no jurisdiction in view of what is stated above.

37. So far as the question of back wages is concerned, the Respondent in paragraph 8 of his cross-examination has stated that he was not willing to state as to how many patients in his private practice he was examining per day prior to discharge and after his discharge from the services of the Appellant. He refused to divulge his income from his private practice as well as number of patients though he has stated that he was not an income-tax payer. He has stated in the cross-examination that he worked for more than one hour at that time in his new clinic. In view of the same it is clear that he has also started a new clinic, even though the initial burden is on the employer to prove that the Respondent was gainfully employed. In this case, the Respondent being a professional person, he was expected to disclose his income from his private practice but he has refused to give the same and, therefore, the Labour Court has rightly found that since the Respondent has failed to disclose his income which is in his personal knowledge, he is not entitled to back wages. However, whilst saying so, the learned Judge granted 50 per cent of the back wages in view of the fact that the termination of Respondent is illegal. In our view, when the order of termination is found to be bad in law, Court can pass appropriate order of reinstatement with continuity of service. But so far as the payment of back wages is concerned, different consideration is required to be taken into account. From the facts of the case as pointed out above and especially when the Labour Court itself has found that the Respondent workman was earning more after his termination, in our view, this is not a case in which any order of back wages can be passed in favour of the Respondent. We accordingly set aside the order of the Labour Court which is confirmed by the learned single judge in connection with payment of 50 per cent back wages and we hold that the Respondent is not entitled to any back wages.

38. Since the Respondent is reinstated with continuity of service, there is no question of awarding compensation as compensation can be given in lieu of reinstatement. There is no question of granting back wages by way of compensation on the ground that the order of termination is bad. In case the order of termination is found to be bad, the relief of back wages is not automatic. In a given case instead of reinstatement the Court may award compensation. In the case of Gujarat Agricultural University Vs. All Gujarat Kamdar Karmachari Union, , the Supreme Court has observed as under:

In the matters of termination of a workman in violation of Section 25F of the ID Act, as regards the consequential relief, in the recent judgments, this Court has consistently taken the view that relief by way of reinstatement and back wages is not automatic.

39. In view of what is stated above, LPA No. 438 of 2004 is partly allowed by setting aside the order of payment of back wages. The Respondent is not entitled to any back wages. The order of the Labour Court and the learned single Judge is set aside to the aforesaid extent. LPA No. 168 of 2005 filed by the Respondent is hereby dismissed. Whatever benefits the Respondent doctor is entitled to in view

of his order of reinstatement till he reached the age of superannuation, the Appellant is directed to pay the same by virtue of the order of reinstatement as per the order of the Labour Court within a period of two months from today except any payment towards back wages. There shall be no order as to costs.