
(2010) 03 AHC CK 0239
In the Allahabad High Court
Case No : Writ C No. 68844 of 2009

Pfizer Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Constitution of India, 1950 — Article 142
Employees State Insurance Act, 1948 — Section 2(9)
Sales Promotion Employees (Conditions of Service) Act, 1976 — Section 2, 6(2)
Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 4K

Citation : (2010) 125 FLR 350 : (2010) 4 LLJ 104 : (2010) 2 UPLBEC 1410

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

Prakash Krishna, J.—The petitioner, a pharmaceutical concern, having been merged with another company Parke-Davis (India) Ltd., by means of the present petition, has questioned the legality and validity of the award passed in adjudication case No. 33 of 2000 by the Industrial Tribunal(1), U.P. Allahabad in favour of its employee Shailendra Nath Vajpae, the respondent No. 3 herein.

2. Indisputably, the respondent No. 3 was promoted/appointed as "Area Sales Manager" in pursuance of the appointment letter dated February 12, 1997 w.e.f. January 1, 1997 on monthly consolidated salary of Rs. 7,700/- plus other benefits and subject to the other conditions enumerated therein. He was appointed on probation. His services were terminated in terms of clause 16 of contract of employment dated February 12, 1997 and for the reasons mentioned in various company's letters, referred therein, with immediate effect. The State Government, on April 28, 2000, in exercise of power u/s 4-K of U.P. Industrial Disputes Act 1947, referred the dispute for adjudication to the Industrial Tribunal to the effect- whether the termination of the services of the respondent No. 3 on September 10, 1998 is proper and/or illegal and if it is so, to what relief the said respondent is entitled.

3. The Industrial Tribunal, by the impugned award, negated the contention of the petitioner that the respondent No. 3 is not a "workman" within the meaning of Section 2(s) of Industrial Disputes Act as he was not holding a supervisory post and had no authority to take disciplinary action against the persons working under him. It also rejected the contention of the petitioner that since the respondent No. 3 was a probationer, his services could have been terminated in pursuance of the appointment letter, on the ground that the order terminating the service on account of unsatisfactory work, is stigmatic. A regular enquiry and opportunity of hearing before the termination is must. The further finding recorded is that having it found that the work of respondent No. 3 was not satisfactory, the petitioner should have reverted him to the original post on which he was confirmed. By the impugned award, after setting aside the termination order dated September 10, 1998, holding it to be illegal, the Tribunal directed the petitioner to treat the respondent No. 3 in service with continuity and also ordered the payment of back wages in its entirety.

4. Learned Counsel for the petitioner in support of the writ petition, submits that the respondent No. 3 is not a "workman" within the meaning of Section 2(s) of Industrial Disputes Act in view of exception Clause (iv) in particular, and that he being a probationer and having it found that his work is not satisfactory, there is no illegality in passing the disputed termination order. The other contention raised is that in any case, the respondent No. 3 has failed to prove that he was not gainfully employed during the interregnum period i.e. from the date of termination till the date of passing of the award, therefore, the Tribunal committed illegality in awarding the back wages. The burden to prove that the respondent No. 3 was not gainfully engaged during this period was on him and the said burden has not been discharged.

5. In contra, the learned Counsel for the respondent No. 3, on the other hand, submits that looking to the nature of work and duty, the respondent No. 3 falls within the definition of "workman" under the said Act. The learned Counsel for the respondent No. 3 placed reliance upon the definition of "Sales Promotion Employees" as contained in Section 2(d) of Sales Promotion Employees (Conditions of Service) Act, 1976 (hereinafter referred to as "1976 Act") read with Section 6(2) of the said Act. Further submission is that the respondent No. 3 was not employed or engaged in a supervisory capacity and, therefore, he should be treated as "Sales Promotion Employee" and, therefore, is entitled to get the desired relief by invoking the provisions of U.P. Industrial Disputes Act in the light of Section 6(2) of 1976 Act.

6. Having noticed the respective submissions of the learned Counsel for the parties, the principal question which falls for consideration is whether the respondent No. 3 is a "workman" within the meaning of Section 2(s) of Industrial Disputes Act. To answer the above question, it is necessary to examine the nature and duty of the respondent No. 3. The submission of the petitioner is that the respondent No. 3 was working in a supervisory capacity and, therefore, he

falls within the exception clause. It was further submitted that in any case, he was a part of the Management and was discharging duty in administrative capacity.

7. There appears to be no dispute that the respondent No. 3 entered into service of the company as "Sales Promotion Employee". He was promoted/appointed as "Area Sales Manager" in pursuance of the appointment letter dated February 12, 1997 and was working as such in that capacity at the relevant point of time when the dispute arose. In the said appointment letter, it is mentioned that "he is being promoted to the position of Area Sales Manager-PPD in Managerial Cadre of the Company..." It further recites that he is placed in "Management Grade M-5". The case of the petitioner is that there were five Medical Service Representatives who were directly reporting to the respondent No. 3. They were- (1) Gaurav Pratap (2) Krishna Singh (3) A.K. Dubey (4) Rajnish Arora and (5) Sandeep Shukla. The job of the respondent No. 3 was to supervise and monitor daily field work of these Medical Service Representatives, approve their tour plans and get them in day to day working. These Medical Service Representatives had no office except that they had to report to the respondent No. 3 on daily basis who was to continuously allot and supervise their work. The respondent No. 3, being Area Sales Manager, had authority to recommend and approve the leave of these Medical Service Representatives and had power to call explanation from them. The job requirement of Area Sales Manager, as per the advertisement, in response to which the respondent No. 3 was appointed, was to have a constant track record in sales, should have excellence in inter personal and team building skills, strong leadership qualities and effective man management skills. Learned Counsel for the petitioner referred various reports written by the respondent No. 3 with regard to the Medical Service Representatives working with him, pointing out their deficiencies in working and advising them to improve their working. Particular reference was made to the letter dated June 24, 1998 addressed to Krishna Singh asking him to give explanation why the instruction given to him by the respondent No. 3 was not followed. The said letter reads as follows:

...Since last so many months I am observing that you handover orders on closing day at about 6 p.m. Last month I had clearly asked you to hand over orders till 4" O clock only. On June closing again you" have not followed my instructions.

Kindly explain why it is happening on regular basis....

On the same lines, the another letter is dated June 24, 1998, addressed to Sandeep Shukla giving him certain suggestions for smooth selling in his territory. The letter dated June 9, 1968 (Exhibit E-28) is a letter addressed to R.N. Sharma by the respondent No. 3 wherein an explanation has been called with the remark "why disciplinary action should not be taken against him". The other letter, being Exhibit E-29, is written by the respondent No. 3 to Ashok Dubey asking him to give explanation for not following the instructions given by him to reach Varanasi. The submission of the petitioner is that the respondent No. 3 was working in a supervisory capacity over five Medical Service Representatives

working under him. He was responsible to look after their work and to make necessary recommendations for their promotion, working, disciplinary action, leave etc. These documents were placed for consideration before the Industrial Tribunal. The respondent No. 3 has not denied these letters and has come out with a case that the Medical Service Representatives were not reporting to him, nor he was supposed to monitor their field work as their tour plans were approved by the DRSM and not by him. He had no power to approve the leave of Medical Service Representatives nor he took any disciplinary action against them as all these functions were performed by the Regional Sales Manager.

8. The parties also produced oral evidence. The respondent No. 3 in his oral deposition states that he was getting a sum of Rs. 33,325/- as monthly salary in addition to the commission. He further states that he had no authority to take any disciplinary action against the Medical Service Representatives who were working with him. He had no power to grant leave to any of them. In the cross examination, he states that the status and designation of Medical Service Representatives was not equal to him but they were also not subordinate to him. Exhibit 22 to 25- the letters written by the respondent No. 3 to the Medical Service Representatives, copies whereof were endorsed to the Regional Sales Manager, were confronted to him. In reply, the respondent No. 3 states that he had no authority to call explanation from Medical Service Representatives and he had written all these letters under pressure of Sri N.K. Rao, Regional Sales Manager and other officers. He has not denied the contents of these letters nor he has come out with a case that these letters have not been written by him. These letters have been tried to be explained by him on the ground that they were written under pressure. All these letters were written at different times.

9. In the award, the Tribunal, without recording any finding as to whether the explanation given by the respondent No. 3 that these letters were written under pressure or not, proceeded in the matter on the footing that the respondent No. 3 was not working in managerial or administrative capacity as his work was to promote the sale of the company. It also considered oral deposition of Sri A.S. Trihan (Director Sales) who stated that the respondent no. 3 had only power to recommend the applications for leave. He had no power to initiate disciplinary action, but could make recommendation only. There being no evidence that the respondent No. 3 sanctioned leave or initiated disciplinary action against any of the Medical Service Representatives, the respondent No. 3 was not working in administrative or managerial capacity, holds the Tribunal.

10. The question is whether the said approach of the Tribunal, on the facts of the present case, is justified or is legally tenable and can be allowed to stand.

11. Admittedly, the respondent No. 3 was appointed as Area Sales Manager through the appointment letter dated February 12, 1997. The said appointment letter recites that he is: being promoted to the post of "Area Sales Manager in the Management Cadre of the Company". It further recites that he is placed in "Management Grade M-5". Its clause 9(A) entitles him to join Parke-Davis

(India) Ltd. Management (Staff) Superannuation Scheme, the Gratuity Scheme for the Employees in Management Cadre and Group Hospitalization and Surgical Insurance Policy, applicable to the Management Staff in accordance with the Rules of these Schemes. The appointment letter itself, in the absence of anything to the contrary, shows that the respondent No. 3 was appointed in managerial capacity. The said appointment letter has been accepted by the respondent No. with his wide open eyes. Even if it is accepted that he had no right to grant leave to the Medical Service Representatives or to initiate disciplinary action against them, the fact remains that the disciplinary action, promotion etc. of them were dependant and subject to the recommendations made by him. The said capacity cannot be disputed and is fully established from various documents, referred to above, which are on the record. The explanation that these letters were written under pressure is only a defence for the sake of defence. The Tribunal has misdirected itself and has not taken into consideration the appointment letter of the respondent No. 3 coupled with the other documents written by him (Exhibit 22 to 25), referred to above, in right earnest.

12. At this stage, the contention of the learned Counsel for the respondent No. 3 is that the definition of "workman" as given under the U.P. Industrial Disputes Act is not at all relevant and if the respondent No. 3 is treated as "Sales Promotion Employee" within the meaning of 1976 Act read with Section 6(2) thereof, the award of the Tribunal, impugned in the present writ petition, treating him as a "workman" is perfectly justified.

13. The question whether the Medical Representatives are "workman" within the meaning of U.P. Industrial Disputes Act, 1947 has been subject matter of consideration before the Apex Court from time to time. The earliest one is Management of May and Baker (India) Ltd. Vs. Their Workmen, The said case arose under unamended definition of "workman" as contained under Industrial Disputes Act. The Apex Court found on the basis of undisputed nature of duty of such employees that the main work was that of "canvassing sales". Any clerical or manual work that he had to do was incidental to the said main work and could not take more than a small fraction of time for which he had to work. It may be noted that in the above case the dispute had arisen prior to January 6, 1956. The definition of "workman" at the relevant point of time included only those persons who were employed to do any skilled or unskilled manual or clerical work, as a result thereof, the persons engaged in sales promotion do not come within the purview of definition of "workman" under the Industrial Disputes Act and as such, they had no protection regarding security of their employment and other benefits under that Act. A demand was raised by such Medical Representatives to make necessary amendment in the Industrial Disputes Act. The Central Government considered it fit and proper to enact another "Act" namely Sales Promotion Employees (Conditions of Service) Act 1976, instead. The aforesaid Act has been enacted with a view and object to protect the interest of the Medical Representatives engaged in sales promotion. Section 2(d) of the 1976 Act defines "Sales Promotion Employees" in the following manner, as substituted

by Act 48 of 1986 w.e.f. May 6, 1987:

2(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.

14. The amended provision came up for consideration before the Supreme Court and it has been held in *H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc.*, that by the said amendment, among the other, the definition of "sales promotion employees" was extended so as to include "sales promotion employees" without a ceiling on their wages except those employed or engaged in a supervisory capacity drawing wages exceeding Rs. 1,600/- per mensem and those employed or engaged mainly in managerial or administrative capacity. After taking into consideration Section 6(2) of 1976 Act, it observed that on and from May 6, 1976, the provisions of Industrial Disputes Act became applicable to the Medical Representatives depending upon their wages upto May 6, 1987 and without limitation of their wages thereafter and upon the capacity in which they were employed or engaged. In the said case, after making an analysis of various amendments made in the definition of "workman" as contained in Industrial Disputes Act as also taking into consideration the provisions of 1976 Act, it has been held that Medical Representatives do not fall within the definition of "workman" under the Industrial Disputes Act. The relevant portion is extracted below:

...It was contended by Shri Sharma, appearing for the workmen that the definition of workman under the ID 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 negatived by two three-Judge Benches in *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, 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 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. That word has to be construed ejusdem generis and thus construed, would mean skilled work

whether manual or non-manual, which is of genre of the other types of work mentioned in the definition. The work of promotion of sales of the product of 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....

15. The above decision is a Constitution Bench decision and, in my considered view, fully covers the issue.

16. The submission of the learned Counsel for the respondent No. 3 that in view of the observation made just above paragraph -9 of the judgement, the matter is alive, has got no substance. The observations therein have been made by the Apex Court in exercise of powers under Article 142 of the Constitution of India. It may be noted that all the writ petitions except C.A. No. 818/1992 were dismissed by the Apex Court. In the said appeal, as is apparent, the contention of the Management that since the Medical Representatives are not workmen within the meaning of Maharashtra Act, the complaint made to the Industrial Tribunal under that Act was not maintainable, was accepted. Further directions were issued to make the reference under Industrial Disputes Act.

17. Learned Counsel for the respondent No. 3 also referred *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, wherein the definition of "Industry" has been interpreted by the Apex Court. How; the said decision is applicable to the controversy involved herein is difficult to understand.

18. Reference was also made to *Lupin Ltd., v. G. Suresh and Anr.* : (2008) 1 K.L.J. 68 : (2008) 1 LLN 628 (Kar.). In that case, the writ petition was filed raising an objection regarding maintainability of reference before the Industrial Tribunal. The contention was that a Medical Representative does not perform any of the duties as enumerated u/s 2(s) of Industrial Disputes Act viz. Manual, skilled, unskilled, technical, operational, clerical or supervisory and hence he is not a workman. Repelling the said contention, it was held that the language of Section 6(2) of 1976 Act is clear to the effect that for a "Sale Promotion Employee", as defined therein, to raise an industrial dispute under the Industrial Disputes Act, it is not necessary that he should be a workman as defined under Industrial Disputes Act. What is necessary is that he should be a "Sales Promotion Employee", as defined under the said Act, and once it is proved that he answers the description of Sales Promotion Employee, he is entitled to invoke the provisions of 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.

19. Then, reliance was placed on *Ripu Daman Bhanot Vs. The Presiding Officer, Labour Court and Others*, wherein it has been held that a reference u/s 6(2) of

1976 Act is maintainable. The said decision has hardly any application to the controversy involved herein.

20. In the relied upon cases by the contesting respondent, the Courts have considered and interpreted the judgement of the Apex Court in the case of H.R. Adyanthaya v. Sandoz (India) Ltd. (supra). The relied upon decisions proceeded on the footing of the observations made by the Apex Court in connection with Civil Appeal No. 811/1992. As I have already held that those observations were made by the Apex Court in exercise of its power under Article 142 of the Constitution of India, a power which is not available to the High Court. The observations made by the Apex Court with reference to Article 142 of the Constitution of India cannot be held to be a ratio decidendi. It is not necessary to dilate on this issue any further.

21. The other cases relied upon are Pankaj Sharan and Gautam Banerjee Vs. The State of Bihar and Others and Gautam Banerjee v. State of Bihar and Ors. C.W.J.C. No. 5001/1995 with C.W.J.C. No. 5013/1995, decided on April 12, 1999. These cases were u/s 6(2) of Bihar Shops and Establishment Act. The complaint filed by the workman under the aforesaid Act was dismissed by the Labour Court on the ground that the workman should have the remedy under the Industrial Disputes Act. The complaints were rejected by the Labour Court and the High Court as well.

22. Even otherwise also, the Area Sales Manager falls under the excepted category of "Sales Promotion Employee" being in supervisory capacity, as discussed hereinbelow.

23. The nature and duty performed by the respondent No. 3 was of supervisory capacity and admittedly he was drawing wages exceeding Rs. 1,600/- per mensem and, therefore, he falls under the exception category of "Sales Promotion Employees", being u/s 2(d)(i) of 1976 Act. Even if he may not be having the administrative capacity, but he could at least recommend the initiation of disciplinary proceedings against the Medical Service Representative working with him. His nature of work was to supervise them. The respondent No. 3 was required to give day to day instructions and guide them to promote the sale of products of the company. He was required to have a constant track record in sales.

24. In Black's Law Dictionary Fifth Edition the words "Manage", "Management", "Supervise" and "Supervision" have been defined as follows:

Manage - To control and direct, to administer, to take charge of. To conduct; to carry on the concerns of a business or establishment. Generally applied to affairs that are somewhat complicated and that involve skill and judgement.

Management - Government, control, superintendence, physical or manual handling or guidance; act of managing by direction or regulation, or administration, as management of family, or of household, or of servants, or of

great enterprises, or of great affairs.

Supervise - To have general oversight over, to superintend or to inspect.

Supervision - An act of occupation of supervising; inspection.

In Oxford Advanced Learner's Dictionary New 7th Edition, the words "Manage", "Management", "Supervise" and "Supervision" have been defined as follows:

Manage - to succeed in doing sth, especially sth difficult: In spite of his disappointment, he managed a weak smile, to be able to solve your problems, deal with a difficult situation, etc., to control or be in charge of a business, a team, an organization etc., to manage a factory/bank/hotel/soccer team, to manage a department/project.

Management - the act of running and controlling a business or similar organization....

Supervise - to be incharge of sb/sth and make sure that everything is done correctly, safely etc.

Supervision - Very young children should not be left to play without supervision.

In Law Lexicon by Justice Y.V. Chandrachud 1997 Edition, the words "Manage", "Management", "Supervise" and "Supervision" have been defined as follows:

Manage - To control according to law; to direct; govern; administer; to conduct; carry on; to direct the concerns of to have under control and direction.

Management - Management is defined as government, control, superintendence, physical or manual handling or guidance, the act of managing by direction or regulation, or administration; as the management of a family, or of a household, or of servants, or of great enterprises, or of great affairs.

Supervise - The word "supervise" covers manual work coupled with a power of inspection and superintendence of the manual work of others.

Supervision - "Webster says "supervision" means to oversee for direction to superintend, to inspect.

25. The Apex Court in All India Reserve Bank Employees Association Vs. Reserve Bank of India, has held that supervise and its derivatives are not words of precise import and must often be construed in the light of the context, for, unless controlled, they cover an easily simple oversight and direction as manual work coupled with a power of inspection and superintendence of the manual work of others.

26. In C.E.S.C. Limited and Others Vs. Subhash Chandra Bose and Others, the Supreme Court while interpreting the word "supervision" has held that in the ordinary dictionary sense, "to supervise" means to direct or oversee the performance or operation of an activity and to oversee it, watch over and direct.

It is work under eye and gaze of someone who can immediately direct a corrective and tender advice. In the textual sense "supervision" of the principal employer or his agent is on "work" at the places envisaged and the word "work" can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all times and at each and every step of the work. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinize the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would be supervision for the purposes of Section 2(9) of the Employees State Insurance Act 1948.

27. The Apex Court in *R. Dalmia Vs. The Commissioner of Income Tax, New Delhi*, while interpreting the word "manage" observed that "Manage" means "to control, to guide, to administer, to conduct or direct affairs, carry on business" (Shorter Oxford Dictionary, Webster New Word Dictionary). Management includes the act of managing by direction or regulation, or administration or control or superintendence.

28. The Apex Court in *Lloyds Bank Ltd., New Delhi Vs. Panna Lal Gupta and Others*, a case under Industrial Disputes Act, with reference to original definition of "workman" as contained in Section 2(s) made the following observations at p. 24:

...It was always a matter of determining what the primary duties of an employee were- did he do clerical or manual work; if the answer was in the affirmative, he was a workman; were his duties of a supervisory nature; if the answer was in the affirmative, he was not a workman. In considering the latter aspect of the problem industrial adjudication generally took the view that the supervisor or officer should occupy a position of command or decision and should be authorized to act in certain matters within the limits of his authority without the sanction of the manager or other supervisors. Take the case of checking inspectors with which the Industrial Tribunal was concerned in *A.R. Natraja Ayyar and Ors. v. Trichy-Srirangam Transport Company Ltd.* 1955 I LLJ 608 (IT-Mad). The checking inspector had to check the conductors and drivers and to verify if they were doing their duties properly. In that behalf he had to send his daily check report to the office. It was urged on behalf of the checking inspector that he was not in absolute control of any group of workers and that the report which he made had to be submitted to his superiors for final orders. Even so it was held that the general nature of the duties indicated that the checking inspector belonged to the cadre of the supervisory staff. Similarly in the *United Commercial Bank, Ltd. v. L.S. Seth* 1954 II LLJ 457 (All) it was held that the chief cashier of a banking company who was responsible for all the acts of commission and omission of the employees of the cash department, and under whose control and supervision the work of the cash department was done by the employees of the

said department, was not a workman since he belonged to the cadre of the supervisory staff. To the same effect is the decision of the Labour Appellate Tribunal in the case of the Burmah-Shell Oil Storage and Distributing Company of India, Ltd., Madras v. Their Employees 1954-I-LLJ-21 (LKO):

"To be an officer", it was held, an employee must occupy a position of command and direction and should be authorized to act without the sanction of the manager or other supervisors. The name or the designation of the employee is not a determining test....

29. The Apex Court in the case of Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others, , has examined the nature of supervisory management and held that the Transport Engineers work in a supervisory capacity. The principle laid down therein may be applicable to the case of Area Sales Manager also. He has to take effective steps to promote the sales of products of the Company in the market by taking necessary steps to keep a watch on the working of the Medical Service Representatives attached to him and working under his supervision and control. It is his job to supervise and monitor daily field work of these Medical Service Representatives. It hardly matters whether a Area Sales Manager is "final authority" to grant/sanction leave or to take disciplinary action or to approve their tour programmes. The fact remains that these Medical Service Representatives are required to report on day to day basis to the "Area Sales Manager" and who, in turn, reports to his superiors. The authority of the "Area Sales Manager", the respondent No. 3, to recommend the leave applications and initiate disciplinary action and to keep constant watch on the daily working of the Medical Service Representatives attached with him, do show that the respondent No. 3 was employed or engaged in supervisory capacity under 1976 Act. The use of different words namely supervisory capacity, managerial or administrative capacity show a distinction in between them. A person employed or engaged in a supervisory capacity drawing wages exceeding Rs. 1,600/- per mensem is excluded from the definition of "Sales Promotion Employees" while a person employed or engaged mainly in a managerial or administrative capacity irrespective of his wages is also excluded from the definition of "Sales Promotion Employees". Therefore, a person who has been engaged mainly in a managerial or administrative capacity is excluded from the definition of "Sales Promotion Employees" irrespective of his wages which is not so in the case of persons engaged in supervisory capacity.

30. In Anand Regional Co-op. Oil Seedsgrowers Union Ltd. Vs. Shaileshkumar Harshadbhai Shah, a decision relied upon by both the parties, it has been held that for determining a question as to whether a person employed in an Industry is a "workman" or not; not only nature of job performed by him, but also terms of appointment in the job performance are relevant considerations. Supervision contemplates direction and control. An undue importance need not be given for the designation of an employee or the name assigned to the class to which he

belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work was required to be supervised. Being in charge of the Section alone and that too a small one and relating to quality control would not answer the test. It has been held that supervision work involves exercise of "tact and independence".

31. In my considered view, "tact and independence" are the key words to judge the nature of work performed by an employee. It was not denied or disputed by the respondent No. 3, either before the Tribunal or before this Court, that he had with him the Medical Service Representatives who were not of the same rank and designation. They were reporting about the work and conduct to him being Medical Service Representatives. The letters (Exhibit 22 to 25) written by him do show that the engagement of respondent No. 3 involves initiation of disciplinary proceedings etc. and as such he had supervision and control over the Medical Service Representatives. It, therefore, follows that the respondent No. 3 falls in the exception category i. e. Section 2(d)(1) of 1976 Act, being employed in supervisory capacity.

32. The second point which falls for consideration is whether the Industrial Tribunal was justified in setting aside the termination order notwithstanding the fact that the respondent No. 3 was a probationer whose work was not found satisfactory by the employer. It is no longer in dispute that the respondent No. 3 was appointed through the letter dated February 12, 1997 on probation of six months. Clause -13 of the said appointment letter shows that it must be clearly understood that the probation period will be assumed to have been extended until such time the employee is confirmed as "Area Sales Manager". In other words, unless there is confirmation, the employee shall be deemed to be continued on "probation". This is not the case of the respondent No. 3 herein that he was a confirmed employee. The termination order recites that in pursuance of clause 16 of the contract of appointment dated February 12, 1997 and for the reasons stated in the Company's letters, referred therein, his services stand terminated with immediate effect. The petitioner by means of its letters dated January 5, 1998, February 16, 1998 and March 10, 1998 brought to the notice of the respondent No. 3 regarding his deficiencies and gave him guidelines to improve his working. In reply dated March 26, 1998, the respondent No. 3 assured to the petitioner to improve his working. Learned Counsel for the petitioner submits that the Management through its letters dated January 5, 1998, February 16, 1998 and March 10, 1998 brought to the notice of the respondent No. 3 about his deficiencies and casualness which shows that there was no improvement in the working of the respondent; No. 3. When he failed to improve his working, ultimately the impugned termination order was passed.

33. The question arises whether such an, order of termination relating to a probationer" can be called to be stigmatic. The Industrial Tribunal by placing

reliance upon a judgement in V.P. Ahuja Vs. State of Punjab and Others, , has held that the order is stigmatic.

34. In the case of V.P. Ahuja v. State of Punjab and Ors. (supra), in the termination order it was mentioned that the employee has failed in performance of his duties administratively and technically. In this background it was held to be stigmatic. In the case on hand, no such words find place in the termination order.

35. In a recent decision of Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others, the Apex Court, following its earlier decision, has held that it is the duty of the employer to inform the employee about his deficiencies from time to time so that the employee may improve himself. On the facts of that case it was found that every time attention was drawn to the employee to his deficiencies and was repeatedly advised to improve his behaviour conduct and discharge of work failing which the removal of the employee by an innocuous order of termination has been held to be a simple order of termination and not punishment for misconduct. In that case the words like "perverted mind", "dishonest", "duffer" "having no capacity to work" used by the employer in its letters were held to be non stigmatic. Reliance was placed upon a judgment given in Allahabad Bank Officers Association and another Vs. Allahabad Bank and others, wherein it was held that the expressions like "want of application", "lack of potential" and "found not dependable" used in relation to the work of employee would not be sufficient to attract the charge that they are stigmatic. Having regard to the above, the order of the Tribunal holding otherwise cannot be allowed to stand. Even it has been found by the Tribunal that from the facts it is proved that the work of the respondent No. 3 as Area Sales Manager was unsatisfactory. The Tribunal opined that instead of terminating his services as Area Sales Manager, he should have been reverted back to the post of Medical Service Representative.

36. Learned Counsel for the respondent has placed reliance upon a judgement of the Apex Court in the case of Anil Kumar Soni Vs. The Managing Director, Punjab Financial Corporation and another, It was a case where a permanent employee was appointed by direct recruitment and he was promoted to the higher post and during probation period in higher post his work was not found satisfactory. His services were terminated while on probation. He was not allowed to work on the original lower post on the ground that the said post has been abolished. The Apex Court has held that it would be against all canons of justice that confirmed employee of the Corporation though allowed to compete for a new cadre post by direct recruitment but having not been confirmed on such post is not allowed to claim his right even on the lower post on which he had permanent lien to continue. It would be a travesty of justice to throw the person on the streets after a period of service of nine years with the employer.

37. In the case on hand, it is not the case of the petitioner that there is no post of "Sales Promotion Employee", the post on which the contesting respondent No. 3 was originally appointed. In paragraph-7 of the writ petition it has been stated

that the respondent No. 3 Shailendra Nath Vajpaee had entered into the services of the Company as "Sales Promotion Employee". This being so, the respondent No. 3 was entitled to be reverted to the post of "Sales Promotion Employee", on which post he had worked with entire satisfaction of the employer Company. The ratio laid down by the Apex Court in the above case is fully applicable to the facts of the present case. Learned Counsel for the petitioner could not place any material before this Court to take a different view of the matter. Therefore, the impugned order of termination cannot be justified and the respondent No. 3 should have been reverted to his original post i.e. the post of "Sales Promotion Employee" or to an equivalent post instead.

38. Now the question remains with regard to award of back wages.

The Industrial Tribunal has awarded the: entire back wages and in this regard has preferred to rely on the testimony of the employee that he was not engaged or employed anywhere after termination of his services. No evidence was led by the petitioner employer to show that the respondent employee was engaged elsewhere.

39. Reliance was placed upon a judgement of the Apex Court in *Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma*, wherein it has been held that onus lay upon the employee to prove that he was not gainfully employed during the intermittent period. In this case the Apex Court referred its earlier judgement in the case of *P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar* AIR 2001 SC 479 : (2001) 2 SCC 54 : 2001 I LLJ 546 , wherein a fault was found in the judgement of the High Court enhancing the back wages to 100% which was restricted to 60% by the Labour Court on the ground that it is not for the High Court to enter into factual aspects of the matter and there is an understanding limitation on the High Court to that effect. Payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no strait-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety. The decisions given in the cases of *Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya* and *Another, Indian Railway Construction Co. Ltd. Vs. Ajay Kumar*, and *M.P. State Electricity Board Vs. Smt. Jarina Bee*, have been referred.

40. Another case relied upon by the petitioner is *U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey*, wherein the Apex Court confined the back wages to 25% of total back wages. It has been held therein that it is for the workman to establish that he was not gainfully employed during the said period.

41. In contra, the learned Counsel for the respondent No. 3 has referred *Harjinder Singh Vs. Punjab State Warehousing Corporation*, wherein it has been observed that there has been a visible shift in the Courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberlisation are fast becoming the *raison d'etre* of the judicial process and an impression has been created that the

constitutional Courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large numbers of cases like the above one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by the Supreme Court in three decades.

42. Taking into consideration the entire facts and circumstances of the present case, judicial pronouncements referred by the learned Counsel for the parties, the fact that the litigation had been pending before the Tribunal for about 11 years and the fact that the work of respondent No. 3 was not found satisfactory and there was no improvement in his working in spite of several opportunities given to him, the interest of justice will be subserved by awarding 50% of the total back wages which would have been admissible to him as "Sales Promotion Employee".

In nutshell the conclusions are as follows:

1. The respondent No. 3, being "Area Sales Manager" does not fall within the definition of "workman" as given either under U.P. Industrial Disputes Act or under 1976 Act. He was engaged in the capacity of supervisor.
2. The order of termination is not stigmatic and it does not amount to punishment. The respondent No. 3 was a probationer and there was no improvement in his working.
3. The order of termination is bad for the reason that the respondent No. 3 was working on a higher post of "Area Sales Manager" on probation and if his work was not found satisfactory he should have been reverted back to the original post i.e. "Sales Promotion Employee" or to an equivalent post.
4. The respondent No. 3 is entitled to get 50% of the salary admissible to "Sales Promotion Employee" for the interregnum period i.e. from the date of termination to the date of his joining, as back wages.

In view of the above, the writ petition succeeds and is allowed in part. The award of the Labour Court stands modified in the light of the judgement of this Court.

No order as to costs.