

**(2007) 04 DEL CK 0006**

**In the Delhi High Court**

**Case No : Writ Petition (Civil) No. 7023 of 2003**

Shri Muralidharan K.

APPELLANT

Vs

The Management of Circle Freight Intl. (India) P. Ltd.

RESPONDENT

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**Date of Decision : 30-04-2007**

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 2, 2(4)

**Citation :** (2007) 96 DRJ 14 : (2007) 2 ILR Delhi 312 : (2007) 3 LLJ 953

**Hon'ble Judges :** Gita Mittal, J

**Bench :** Single Bench

**Advocate :** M.L. Khattar, for the Appellant; Suhail Dutt, M.K.S. Menon and L. Anand Singh, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Gita Mittal, J.—This writ petition has been filed by the petitioner assailing an industrial award dated 3rd January, 2003 of the industrial adjudicator answering the reference made to it against the petitioner-workman.

2. There is no dispute to the material facts essential for adjudicating upon the subject matter of the present case and the same are briefly noticed hereafter.

3. The petitioner was appointed as an Operations Supervisor with effect from 1st July, 1986 by the respondent No. 1 pursuant to a letter dated 1st July, 1986 on probation for a period of six months from the date of his joining. The duties of the petitioner in this letter of appointment clearly stipulated that the petitioner was responsible for the following duties;

7. You will be responsible for:

(a) issuing delivery orders and sending out arrival notices.

(b) maintaining registers on day to day basis.

(c) handling of consolidations (sorting out cargo and transshipping the same

promptly)

(d) maintaining good relationship between the customer and CFI.

(e) answering telephone calls politely.

(f) you will complete all documents on charges collect, MAWB and HAWB and hand them over to the Finance Manager for remittances to be sent back to origin station.

(g) you will be in charge of the billing on regular basis.

(h) you will sport a tie during working hours.

(i) no overtime will be paid.

4. The appointment was at an initial remuneration of Rs. 2150/- Confirmation of his services was effected by a communication of 1st January, 1987. The respondent No. 1 has placed reliance on the clause in this letter wherein the petitioner was notified that his services could be terminated by one month's notice from either side or if the company so elects, termination could be effected at any time giving one month's salary in lieu of such notice. There is also no dispute that the last drawn salary of the petitioner was Rs. 3630/- per month and that during the course of his employment, the petitioner was sent to the United States of America and Philippines for training in the international operational procedure in the freight forwarding industry in August, 1987, March, 1988 and June, 1989. Sometime in the year 1989 there was controversy with regard to accounting of the cash which had been withdrawn from the company in its Delhi office. According to the respondent No. 1, advances taken from the company in lieu of expenses to be incurred for the work of custom clearance were not settled or accounted for. On the allegation that in February, 1988, the petitioner had taken Rs. 20,000/- from the company in lieu of expenses for works done but vouchers in regard thereto were falsified, a memo/notice dated 27th June, 1989 (Exhibit W3) was given to the petitioner to which he replied by a letter of 6th July, 1981(Exhibit W4). According to the respondent No. 1, an investigation was made and an Explanation was called from the petitioner in the presence of senior officers of the company. As no Explanation was given, his services were terminated by a letter dated 23rd September, 1989.

5. The petitioner has disputed any such enquiry by the respondent No. 1. Aggrieved by such termination, the petitioner invoked the jurisdiction of the appropriate government under the Industrial Disputes Act, 1947. By an order bearing reference No. F24(2226)/90-Lab dated 6th July, 1990 the following dispute was referred for adjudication to the industrial tribunal:

Whether the termination of service of Shri Muralidharan K. is legal and/or justified and if not to what relief is he entitled and what directions are necessary in this respect

6. The petitioner assailed the termination on grounds of malice and also urged

that the termination of the services without service of a charge sheet or notice or enquiry, was wholly illegal and that he had been penalised for earning the wrath of his officer. The petitioner claimed entitlement to reinstatement with full back wages and continuity of service. He also urged that his demands vide letter dated 3rd October, 1989 was wrongfully rejected by the respondent.

7. The respondent No. 1 objected to the maintainability of the reference on the ground that the petitioner was appointed as an operational supervisor but the respondent No. 1 treated him as an employee of the managerial cadre and for this purpose alone the workman has been sent to the foreign countries to educate him on international operational procedures. The petitioner was drawing as a salary in excess of Rs. 4200/- per month, more than the statutorily prescribed limit, and that he was functioning in managerial capacity as an operations manager. On these pleas, it was urged that the petitioner was outside the purview of the definition of workman as stipulated u/s 2(s) of the Industrial Disputes Act, 1947. On merits the action of termination of service was defended on the plea that the petitioner had defrauded the company by falsifying expense vouchers and that his services were terminated after a prior enquiry, without there being any personal bias.

8. In view of the specific challenge made by the petitioner on the ground that the industrial adjudicator has failed to decide the issues which were framed by it, it becomes necessary to notice the issues which were framed in the adjudication.

9. On 8th February, 1991, the industrial adjudicator framed the following issues:

1. Is Shri K. Muralidharan not workman as alleged in Section 2(s) of I.D. Act?
2. Did the management hold a legal and valid enquiry against Shri K. Muralidharan according to principles of natural justice?
3. As per terms of reference.

10. Thereafter, in accordance with law, the industrial adjudicator proceeded to examine issue No. 2 as a preliminary issue. Inasmuch as the validity of the claimed enquiry was required to be proved, the onus of proof thereon, was placed on the respondent No. 1. The respondent No. 1 failed to lead any evidence on this issue despite several opportunities and consequently its evidence on the issue was closed. Finally by an order passed on 26th August, 1996, the industrial adjudicator returned a finding against the respondent No. 1 on the issue of the legality and validity of the enquiry.

11. The respondent No. 1 thereafter sought leave to adduce evidence with regard to the alleged misconduct of the petitioner. This request was granted by the industrial tribunal by an order passed on 12th December, 1997 when the following additional issue was framed:

Whether the workman committed the alleged misconduct? OPM

12. The petitioner examined himself in support of his case while the respondent

led the evidence of Mr. Mahesh Kumar Malik in support of its case. On a consideration of the evidence led before him, the industrial adjudicator by the award dated 3rd January, 2003 held against the petitioner on both issues and as such answered the reference against the workman.

13. The present writ petition has been filed primarily on the ground that the award of the industrial adjudicator is based on no evidence. It is secondly urged, that having held against the respondent No. 1 on issue No. 2 by the order dated 26th August, 1996, it was not open to the learned industrial adjudicator to reconsider the same and answer the same in favor of the respondent No. 1 in the award. It has further been urged that the industrial adjudicator failed to answer the fourth additional issue which had been framed on 12th December, 1997 and for this reason as well the award was not sustainable.

14. The petitioner has contended that so far as the finding of the industrial adjudicator to the effect that the petitioner was not a workman was concerned, the same was based on no evidence and was legally incorrect inasmuch as the nomenclature of a post would not determine as to whether the petitioner was covered under the definition of workman or not but it was the nature of duties which was being performed by the petitioner which has to be considered.

15. Mr. Suhail Dutt, Learned Counsel for the respondent No. 1 has however contended that the award is liable to be sustained and that it is not open to this Court to examine the findings of fact which have been returned by the industrial adjudicator. It has been submitted that the award is based on the cross examination of the workman himself, and that the respondent No. 1 had adequately established the misconduct of the workman and for this reason the award was liable to be sustained.

16. I have heard Learned Counsel for the parties at length and have also carefully perused the record. I find that the industrial adjudicator had decided the issue No. 2 relating to the legality and validity of the enquiry claimed to have been conducted by the respondent No. 1. Issue No. 2 specifically required the management to prove that it had held a legal and valid enquiry against the petitioner according to principles of natural justice. This issue had been clearly held against the respondent No. 1 by the order dated 26th August, 1997 which finding had not been assailed by the respondent No. 1 in any proceedings. The findings thus returned on this issue had attained finality and were binding in the adjudication proceedings and the parties.

17. So far as the additional issue framed on 12th December, 1997 is concerned, I find that this issue does not even find a mention in the industrial award made on 3rd January, 2003. By this additional issue framed on 12th December, 1997, the onus to prove that the workman had committed the alleged misconduct was clearly and unequivocally cast on the management. The respondent No. 1 filed the affidavit of Mr. Mahesh Malik, its Area Manager by way of evidence. Shri Mahesh Kumar Malik was cross examined by the petitioner when he stated that

he was employed with the management only since 1st June, 1998 and that he had never dealt with the workman. He based his knowledge of the case mainly on the basis of the record.

18. Inasmuch as the grievance before this Court is that the Award is based on no evidence, it is necessary to examine this aspect of the case. Mr. Khattar, Learned Counsel for the petitioner has painstakingly taken me through the record to point out that the allegations against the petitioner were not crystallized by the respondents in the various communications addressed to him and that the respondent No. 1 was not even sure as to the exact charges against the petitioner. In the cross examination, Mr. Mahesh Kumar Malik, management's witness No. 1 has stated that a charge sheet was issued to the petitioner and one Shri A.P. Shukla for defalcation of Rs. 34000/-. He denied the suggestion that no enquiry was conducted against the workman while admitting that the workman had filed a reply to the charge sheet. In his affidavit he has deposed on oath that defalcation of Rs. 34000/- was found to have been done by Shri Muralidharan, the petitioner for which enquiries had been done and that Shri Muralidharan was supported by Shri A.P. Shukla in this regard. He has further stated that the petitioner had given false and fictitious vouchers to the tune of approximately Rs. 24000/- in February, 1988 and that when an Explanation was demanded from the petitioner no Explanation was rendered.

19. Perusal of the record however would show that these allegations are certainly not supported by the correspondence which has been placed on record. Exhibit W3 is the circular dated 27th June, 1989 addressed to five officers of the respondent No. 1 including Shri A.P. Shukla, Shri K. Muralidharan, Shri K.K. Mukherjee, Shri T.S. Rammurthy and Shri Ashok Sharma that a shortage of "approximately Rs. 21000/-" in the cash box of the respondent No. 1 has been revealed while the exact quantum has not been ascertained. It was further stated that no conclusive liability has been fixed and opinion of these persons was solicited as to how the cash shortage has arisen. Another memorandum dated 10th July, 1989 was addressed by the respondent No. 1 to four officers submitting that from a report of Hoshan Netarwala's report, it appeared that Rs. 21000/- was missing. It was urged herein that "the company cannot employ employees who have control in the office of both financial and administrative management and have funds missing. If this happens again, I am afraid the company will have no choice but to take personal action against you individually."

The respondent No. 1 has itself placed vouchers purportedly signed by the petitioner before the court and it has been pointed out by Mr. Khattar, Learned Counsel for the petitioner that they were all duly settled amounts in the accounts of the respondent No. 1.

20. The respondents have proved the reply dated 6th July, 1989 by the petitioner as Exhibit M6 on record. This reply deserves to be considered in extenso and reads thus:

I refer to you IOM dated 27/6/89 copy received by me on the 1st July, 1989 re: defalcation of cash

In this connection I would like to enlighten the following:

1. As and when I took IOU for making official payments such as custom duty, demurrage or any other expenses relating to operation, customs clearance etc. it was totally against records (token of receipts i.e. IOU). After completion of the respective jobs, expenses were submitted to accounts and taken back IOUs. In no circumstances money was taken without IOU for cashier's accounting.
2. Account of IOUs maintained by accounts (KKM) was finally passed on to Mr. Anoop Sharma (as instructed) by Dan for my IOUs settlement) and my final IOU settlement was accepted and confirmed by Mr. Sharma as per xerox attached.
3. Any shortage in cash-box if noticed, you may take necessary steps to prove it in black and white; you can expect my full cooperation as I mentioned to you during your last visit.

Further it may also be added that whatsoever may be the person entrusted with the company cash transaction must be held responsible for any shortage in his possession as is prevalent everywhere.

21. It is noteworthy that both the circulars dated 27th June, 1989 were in the nature of a general circular to all employees and did not level any specific charges against any person nor was it in the nature of a charge sheet served upon the petitioner. The memo dated 10th July, 1989 were addressed to other officers including Mr. Anoop Sharma and the petitioner. These communications were thereafter followed only with a letter dated 23rd September, 1989 wherein it was alleged that the year 1987 a sum of Rs. 34376.61 was defalcated and that investigation reveal that advances given by the company were not settled in entirety for an extended period of time. In addition it was stated that an amount of Rs. 25355.85 was advanced in the petitioner's name which has not been settled; and further, that the petitioner has falsified vouchers totalling Rs. 20788.90 in the month of February, 1988. On this basis it was urged that the petitioner's actions were not compatible with the corporate policy and that in view of the gross abuse of the corporate funds, the management had lost confidence in the petitioner's ability and had no option but to terminate the petitioner's services and to call upon the petitioner to make good these losses.

22. I have noticed above that the industrial adjudicator had arrived at a finding that the respondents had not held a legally valid enquiry in compliance with the principles of natural justice against the petitioner.

Before this Court also, nothing could be pointed out wherein the allegations made in the letter of termination dated 23rd September, 1989 were ever communicated to the petitioner prior thereto. There is certainly variation of the amounts in the various communications.

23. In any case, in view of the order dated 12th December, 1997 passed by the industrial adjudicator, the respondent No. 1 was required to prove as a matter of fact that the petitioner had committed the alleged misconduct. Bald allegations unsupported by details of accounting or documentation would not further the case of the respondent No. 1 or establish misconduct on the part of the petitioner. The industrial adjudicator has held that the petitioner has failed to give Explanation to the allegations against him without any credible evidence on this aspect. No material has been placed before the industrial adjudicator in its evidence by the respondent No. 1 which could have established that the petitioner had committed the misconduct. In the light of the foregoing, it has to be held that this finding is not supported by the evidence which has been led before the industrial adjudicator.

24. Furthermore, in the findings returned in the award dated 3rd January, 2003, the industrial adjudicator has observed that the management has claimed that a fair and proper enquiry was conducted in the case and notice was issued to the workman; the workman did not reply and this led to a presumption of misconduct submitted by him. On these facts, the issue No. 2 was decided against the workman and in favor of the management. Certainly these observations and findings are not supported by the record. The industrial adjudicator has also not considered the order dated 26th August, 1996 which was to the contrary. In any case, the order dated 26th August, 1996 having become final, it was certainly not open to the industrial adjudicator to re-decide an issue which stood decided. At the same time the industrial adjudicator has failed to return any finding on the additional issue which was made on 12th December, 1997. For this reason alone the award would not be sustainable.

25. The petitioner has also assailed the findings returned by the industrial adjudicator on issue No. 1. The industrial adjudicator has held that the workman was sent abroad thrice during the course of his employment; that he was assisted by another person for the work of custom clearance and freight forwarding and that he had also once issued a letter signing as manager. The industrial adjudicator has relied on the statement of the workman that he had joined the respondent No. 1 because he had better prospects than the post of imports in-charge held by him with Jina & Company, his earlier employer. It was also noticed that the petitioner was confirmed as "Operation Supervisor" and that his remuneration was Rs. 3630/- which exceeded Rs. 1600/-. On these facts, it was held that the workman was not a workman for the reason that he was a supervisor and issue No. 1 framed in this behalf was decided against the workman.

26. On a consideration of the record and the applicable law, in my view this finding is also not legally sustainable. The mere fact that the post on which the petitioner was appointed was designated as Operation Supervisor does not mean that the petitioner was appointed to a post which was supervisory in nature. The fact that the petitioner was sent abroad for training would also not by itself in

any manner indicate that the petitioner was employed in managerial capacity. Mr. Khattar, Learned Counsel for the petitioner has urged that the petitioner was handling the cargo operations and Therefore it was the airlines which sent him abroad for training and that the respondent No. 1 did not incur any cost or liability on this. I find force in the submissions of Learned Counsel for the petitioner that from a bare perusal of the duties of the petitioner as set out in the letter of appointment noticed in para 3 above, there is no element of management or supervision therein. There is nothing in the evidence of the respondent No. 1 or in the cross examination of the petitioner to indicate that he was supervising or managing any staff of the respondent No. 1.

27. It is well settled that neither the appellation to the post to which an employee is stated to be employed nor the salary which he is being paid would decide the issue as to whether a person is covered within the definition of "workman" as given in Section 2(s) of the Industrial Disputes Act, 1947. It has been repeatedly emphasised by the Apex Court and the high courts that the expression "industry, workman and industrial disputes" etc are not to be interpreted so as to whittle down the object of the enactment. Disputes between employees and the management are not to be excluded from the operation of the enactment Act by giving narrow and restricted meaning to the expressions contained in the Act. Taking a pragmatic approach, the Apex Court has repeatedly held that the courts have to look beyond glorified designations and names assigned to posts by managements and examine the nature of duties to discover what precisely what duties the employee is performing.

28. In S.K. Verma Vs. Mahesh Chandra and Another, the court considered the appointment letter of the employee and noticed that though appointed as a "Development officer" the employee had no authority to bind the corporation in any way and that his principal duty appeared to be to organise and develop the business of the corporation in the area allotted to him and for that purpose to recruit active and reliable agents and to train them to canvass new business and to render post sales services to policy holders. He was expected to assist and inspire the agent and had no authority to appoint agents or take disciplinary action or supervise the work of agents, though he was required to train them and assist them. There was no sub ordinate staff working under the Development Officer and consequently it was held that the employee was not engaged in administrative or managerial work. In this behalf reference can also usefully be made to the Division Bench pronouncement of this Court reported at Management of Bharatkala Kendra Pvt. Ltd. Vs. R.K. Baweja and Another,

29. My attention has also been drawn to the pronouncement in the dispute between Ananda Bazar Patrika (P) Ltd. Vs. The Workmen, In this case, the Apex Court had laid down the principles which would be followed in deciding a question as to whether a person is employed in a supervisory capacity or is doing clerical work. It was held that if a person is mainly doing supervisory work but incidentally, or, for a fraction of time also does some clerical work, it would have

to be held that he is employed in supervisory capacity and conversely if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk, into one in supervisory capacity. From the consideration of the duties being rendered by the petitioner in the case, the court was of the view that because the employee was the senior most clerk doing the work of maintaining and writing cash books and preparing various returns, he was given a small amount of control over the other clerks working in his section which were minor duties of the supervisory nature, would not convert his office of senior clerk into that of a supervisor.

30. So far as the consideration of the nature of functions is concerned, managerial, supervisory or administrative function would require that a person who is so employed, controls the working of others. Merely because the person who does some work and gets assistance for doing that work would not be sufficient by itself to describe or hold that the person was working in a managerial or administrative capacity. A person who has to thus only supervise those who are helping him in doing the work he has to perform, is also not working as a supervisor. A supervisor is a person who is watching the work being done by others to see that it is being done properly. *Mathur Aviation Vs. Lt. Governor, and Others*,

31. In the instant case, the respondent No. 1's principal ground of challenge to the petitioner not being covered under the definition of workman is the quantum of wages being drawn by him. It has been contended that the statutory limit so far as ascertaining the criterion of employment of the petitioner is concerned at the relevant time was Rs. 1600/- and that the petitioner was drawing wages more than Rs. 1600/- for which reason by virtue of Section 2s(4) of the Industrial Disputes Act, he was not entitled to invoke the jurisdiction of the industrial adjudicator under the Industrial Disputes Act. This issue has been considered in several binding precedents. In the judgment reported at *In Re: Shree Madhav Mills Ltd.*, it was held that though the claimant was drawing wages exceeding the statutory limit but was not employed in a supervisory capacity, he would fall within the definition of workmen u/s 2s of the Industrial Disputes Act, 1947.

32. Mr. Suhail Dutt, Learned Counsel for the respondent No. 1 has asserted that the petitioner has admitted that he signed a letter as manager and this admission by itself justifies the finding returned in the award. This admission cannot be read in isolation ignoring the complete evidence of the petitioner. I find that the petitioner has clarified that he so signed because Mr. A.P. Shukla, the manager was not available. This statement cannot be ignored and would explain why the petitioner so signed. It was certainly not because the petitioner was working as a manager. The respondent also does not contend that the petitioner was a manager. For this reason there is no admission that the petitioner was working in a managerial capacity with the respondent No. 1.

33. In the light of these well settled binding principles laid down in various judicial pronouncements noticed hereinabove, it has to be held that the petitioner was employed as a workman and was not engaged in any supervisory or managerial functions or capacity. The finding of the industrial adjudicator is contrary to the settled principles of law noticed hereinabove. It would appear that the industrial adjudicator has been persuaded to hold against the petitioner because of the appellation of the post in which he was engaged and the sole fact that he had thrice been abroad to take training. Such finding has been rendered without consideration of the capacity in which the petitioner was engaged or sent abroad or the usual nature of his duties and is contrary to law.

34. Before this Court, the respondents have urged that the respondent No. 1 had lost confidence in the petitioner and consequently looked at from any angle the petitioner cannot be granted relief in his favor. Reliance has been placed by Mr. Suhail Dutt Learned Counsel for the respondent on the pronouncement of the Apex Court in (1977) 1 SCC 146 Ruby General Insurance Co. Ltd. Vs. Shri P.P. Chopra, between Francis Klein and Co. (P) Ltd. Vs. Their Workmen and Another, . to urge that in view of the loss of confidence between the petitioner and the respondent No. 1, the petitioner could not be reinstated into the services of the respondent No. 1.

35. This submission is opposed by the petitioner on the plea that this was never the case of the respondent No. 1 before the industrial adjudicator. I find that there is nothing on record to support these submissions made by the respondents before this Court.

36. There is no dispute that the industrial adjudicator has failed to decide the additional issue framed on 12th December, 1987. It was submitted by Mr. Dutt, Learned Counsel for the respondent No. 1 that the services of the petitioner stood validly terminated and that the petitioner is carrying on a business in partnership, though under the cover, shield and name of his wife as partner, and that in view of the pronouncement of the Apex Court reported in Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, Allahabad Jal Sansthan v. Daya Shankar Rai and Anr. (2002) 6 SC 41 M.P. State Electricity Board Vs. Smt. Jarina Bee, the petitioner would in any case be not entitled to back wages even if his services were to be restored.

37. I find that these submissions have never been made before the learned industrial adjudicator and no finding in this behalf has been returned on any of these aspects. There is nothing before this Court to indicate that these issues were even considered by the industrial adjudicator.

38. The services of the petitioner were terminated as back as on 23rd September, 1989 and the matter remained pending before the industrial adjudicator for almost 13 years till 3rd January, 2003 when the award was made. Normally, for reasons of expediency, this Court may have considered these issues. However I find that these questions require that the evidence placed by

the parties on record to be considered and findings returned on purely factual issues. I do not deem it in the interest of justice or appropriate to decide on these submissions which would be best left for consideration and adjudication to the statutory authority on whom such jurisdiction has been bestowed.

39. In view of the foregoing discussion, I hereby set aside and quash the findings of the industrial adjudicator on issue No. 1 and issue No. 2 as returned in the industrial award dated 3rd January, 2003. So far as the findings on issue No. 2 are concerned, it is held that the order dated 26th August, 1996 has finally adjudicated thereon and would bind the parties. Inasmuch as the industrial adjudicator has failed to decide the issue framed on 12th December, 1997, I hereby remand the matter for fresh consideration on this issue and the relief, if any, to be found admissible to the petitioner in accordance with law based on the material already placed on record by the parties. In view of the period which has elapsed since the termination of the services of the petitioner, it is expected that the industrial adjudicator will dispose of this matter within six months of the receipt of this judgment and the record from this Court.

40. It is made clear that nothing herein contained is an expression of opinion on the contentions of the respondent No. 1 based on the plea that there was loss of confidence of the respondent No. 1 in the petitioner and consequently termination based thereon was valid and proper or the alternative argument raised that the petitioner would not be entitled to back wages

This petition is allowed in the above terms.