

(2024) 07 JH CK 0032

In the Jharkhand High Court

Case No : Writ Petition (L) No. 4378 Of 2019, 924 Of 2022

Tata Asset Management Limited

APPELLANT

Vs

Randhir Kumar Karan & Ors

RESPONDENT

Date of Decision : 18-07-2024

Acts Referred:

Industrial Disputes Act, 1947 — Section 2A, 2(j), 2(s), 2(rr), 25F

Sales Promotion Employees (Conditions Of Service) Act, 1976 — Section 3

Citation : (2024) 07 JH CK 0032

Hon'ble Judges : Anubha Rawat Choudhary, J

Bench : Single Bench

Advocate : Indrajit Sinha, Ankit Vishal, Vishal Kumar

Final Decision : „Dismissed“

Judgement

Anubha Rawat Choudhary, J

1. W.P. (L) No. 4378 of 2019 has been filed for the following reliefs: -

“for issuance of an appropriate writ(s)/order(s)/direction(s) especially in the nature of certiorari for quashing the award dated 8.5.2019 passed in I.D. Case No. 3/2015 by the Ld. Presiding Officer, Sri Lalit Prakash Choudhary, Labour Court, Jamshedpur whereby and whereunder the said court has been pleased to entertain an application preferred by the respondent treating him to be a workman under the Industrial Disputes Act and has set aside the letter dated 19.12.2014 by which the respondent was terminated from service and has further ordered for re-instatement of the respondent with continuity in service.

And/Or

Pass such order or orders as Your Lordships may deem fit and proper for doing conscionable justice to the petitioner.”

2. W.P. (L) No. 924 of 2022 has been filed for the following reliefs: -

"for issuance of an appropriate writ(s)/order(s)/direction(s) especially in the nature of certiorari for setting aside a portion of the Award dated 08.05.2019, passed by Learned Presiding Officer, Sri Lalit Prakash Choubey, Labour Court at Jamshedpur in I.D. Case No. 03 of 2015 (Annexure-7) by which despite holding termination of the petitioner wholly illegal and unjust, the back wages has been completely denied.

And

The petitioner further prays for a direction to pay him full back wages with interest and all consequential benefits from the date of termination till his reinstatement in service.

And/Or

Pass such other or orders as Your Lordships may deem fit and proper for doing conscionable justice to the petitioner."

W.P.(L) No.4378 of 2019 and W.P.(L) No.924 of 2022

3. These two writ petitions arise out of the award passed by the Presiding Officer, Labour Court, Jamshedpur in Industrial Dispute Case No.3 of 2015. Both the management and the employee are aggrieved by the impugned award. The employee has filed WP(L) No. 924 of 2022 challenging the part of the award by which the back wages has been denied and so far as the management is concerned, they have challenged the findings recorded by the learned Labour Court, particularly the finding declaring the employee as a "workman" within the meaning of Section 2(s) of Industrial Disputes Act, 1947.

4. The foundational fact in connection with the present matter is not in dispute.

5. The employee was appointed as Relationship Manager, Work Site Solution, Jamshedpur on probation for six months vide letter dated 07/09.03.2012 and the clauses which have been relied upon by the management are Clauses 16 and 19 of the letter of appointment which are quoted as under:

"16. During your service with us, your employment can be terminated on either side, by giving a Three-month's notice or wages or salary. Prior to that, during your probation period, your employment can be terminated by the organization by giving one week's notice.

19. Please note that your employment can be terminated by the Company, without any notice or any compensation in lieu of such notice, in any of the following events:

a. Any act of dishonesty, disobedience, insubordination, uncivility, intemperance, irregularity in attendance or any other misconduct, or neglect or non-performance or inadequate performance of duties, or incompetence in the discharge of duties on your part;

b. You being adjudged an insolvent or applying to be adjudged an insolvent or

making a composition or arrangement with your creditors, or being held guilty by a competent court of any offence involving moral turpitude;

c. Breach or violation on your part, of the spirit of any of the terms, conditions or stipulations specified herein, including non-observance by you of the Company's rules and regulations and any other administrative requirements in force."

6. The probation period was initially completed on 15.09.2012. However, upon review, the employee was not found suitable. The probation period was extended vide email dated 27.11.2012 by providing one more opportunity to the employee to improve his performance, but his under-performance was reported during the period from April 2012 to March 2013, and ultimately vide order dated 19.12.2014, the employee was terminated, stating to be in terms of the appointment letter by giving notice of one week as per clause 16 as the employee was still on probation.

7. The order of termination was under challenge before the learned Labour Court.

8. The learned counsel for the management has referred to the award and has submitted that following issues were framed:

"(A) Whether the first party (Randhir Kumar Karn) is a workman within the meaning of I.D. Act.

(B) Whether the ground of termination of service by management that the first party was a under former is fully proved and is justified.

(C) Whether the order of termination of service passed is unjust and illegal and, if so, what relief can be given to the workman?"

9. The learned counsel for the management submits that there was a serious dispute in connection with the fact as to whether the employee was a 'Workman' within the meaning of Industrial Disputes Act and such stand was taken even in the written statement. He submits that it was specifically averred in the written statement that the employee was performing managerial work and also supervisory work. The learned counsel submits that the learned Labour Court has clearly recorded that the employee has neither pleaded nor proved any material to show that the employee was a 'Workman' within the meaning of Industrial Disputes Act but the cross-examination of one of the management's witnesses has been taken into consideration to come to a conclusion that the employee was a 'Workman'. The learned counsel submits that certain questions were put to the management witness and those questions were answered in negative and on such basis the learned court recorded a finding that the management witness had admitted in evidence that the 'Workman' was not discharging any managerial or supervisory work, and therefore, it has been held that the employee was a 'Workman' within the meaning of section 2 (s) of Industrial Disputes Act.

10. The learned counsel submits that there is no material on record either from

the side of the employee or from the side of the management as to the nature of work being performed by the employee.

11. He further submits that the law is well settled that a person who asserts a jurisdictional fact has to plead and prove by evidence.

12. The learned counsel submits that merely because the employee was not performing certain nature of work as per the cross examination of the management witness, the same by itself is not sufficient to say that the employee was a 'workman' within the meaning of Industrial Disputes Act. The learned counsel has further submitted that so far as the finding that the employee was not performing any supervisory work is concerned, the same is not based on any material much less the cross examination of the witness as quoted in the impugned award.

13. With regard to the probation period, the learned counsel submits that there is no concept of automatic confirmation of a probationer. Merely because the employee continued beyond the period of probation, the employee could not have been taken to be confirmed followed by consequential orders by the learned Labour Court. He submits that admittedly there was no positive order passed by the management confirming the employee who continued beyond the period of probation.

14. In support of the aforesaid submissions, the learned counsel has relied upon the following judgments:

(i) (2004) 3 SCC 514 (Workmen of Nilgiri Coop. Mkt. society Ltd. Vs. State of T.N. and others) paragraph 19 - with regard to the burden of proof.

(ii) (1994) 2 SCC 323 (M. Venugopal Vs. Divisional Manager, Life Insurance Corporation of India and Another) para 15 to submit that there is no concept of automatic confirmation of a probationer;

(iii) With regard to the meaning of 'workman' under Industrial Disputes Act he has referred to judgement reported in (1992) 1 SCC 281 (T.P. Srivastava VS. M/s National Tobacco Co. of India Ltd); (1994) 5 SCC 737 (H.R.Adyanthaya and others vs. Sandoz (India) Ltd. and others); (2007) 8 SCC 559 (Carona Ltd. Vs. Parvathy Swaminathan & Sons).

(iv) He has further relied upon judgement reported in (1997) 11 SCC 521 (Escorts Limited Vs. Presiding Officer and another) to submit that the employee is governed by the terms and conditions of the letter of appointment.

(v) (2019) 17 SCC 157 (Durgabai Deshmukh Memorial Senior Secondary School and another Vs. J.A.J. Vasu Sena and another) para 45.

15. So far as the other writ petition filed by the employee is concerned, the learned counsel for the management has submitted that there was neither any pleading nor any evidence that the employee remained unemployed after termination of service. He has referred to the statement of the employee as

contained in the convenience compilation and submits that the employee had simply stated in his name and address portion of the statement that he was unemployed, but no such statement has been made on oath in his evidence and accordingly, there is no statement of the employee that he remained unemployed. Therefore, there is no question of grant of any back wages, much less full back wages, to the employee.

16. He submits that the aforesaid submission regarding back wages is without prejudice to his submission that the employee was not a 'Workman' at all within the meaning of section 2 (s) of Industrial Disputes Act. The learned counsel has relied upon the following judgments:

(i) (2018) 18 SCC 299 (Rajasthan State Road Transport Corporation, Jaipur Vs. Phool Chand) para 11 and 12.

(ii) 2024 SCC OnLine SC 492 (Bharti Airtel Limited Vs. A.S. Raghavendra) para 25.

17. The learned counsel appearing on behalf of the employee has submitted that there is no illegality and perversity in the impugned award and considering the scope of writ jurisdiction against award, the findings recorded by the learned court with regard to the relationship of employer and employee does not call for any interference. He has also submitted that the learned court has considered the evidences on record and it is immaterial as to who has produced such evidence. The very fact that the management witness was cross-examined on the nature of work, which was not being performed by the employee, itself indicates that the employee not performing such work would fall within the meaning of 'workman' as defined under Industrial Dispute Act.

18. So far as the finding with regard to probation is concerned, the learned counsel submits that admittedly the employee continued to work beyond the probation period and was terminated only in the year 2014 and therefore the learned court has rightly come to a conclusion that the termination of services of the employee by treating him as probationer was not in accordance with law and consequently the relief by treating the employee as a 'Workman' and a regular employee, has been granted by the learned court. He submits that the learned court has also taken into consideration that the performance of the employee could not be said to be 'not up to mark' as appropriate evidence was led before the court to come to such a conclusion.

19. With regard to the payment of back wages, the learned counsel submits that it was for the management to prove that the employee was engaged elsewhere and there being no evidence to that effect from the side of the management, the learned Court ought to have awarded full back wages to the employee. For this, he has relied upon the judgment passed by the Hon'ble Supreme Court reported in (2013) 10 SCC 324 (Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya) para 38.1, 38.2 and 38.5. The learned counsel has also relied upon the judgements passed in the case of "Mohan lal Vs Management of

M/s Bharat Electronics Ltd.” reported in (1981) 3 SCC 225 para 7 and 8; (1984) 2 SCC 569 (Ved Prakash Gupta Vs. M/s Delton Cable India (P) Ltd. para 12 and (2006) 6 SCC 548 (Anand Regional Coop. Oil Seedsgrowers’ Union Ltd. Vs. Shailesh Kumar Harshadbhai Shah) para 13, 14 & 15.

Findings of this Court.

20. The case of Randhir Kumar Karn (hereinafter referred to as the employee) before the learned Labour Court was that he joined the services of Tata Asset Management Limited (hereinafter referred to as the Management) with effect from 15.03.2012 permanently, continuously and uninterruptedly as Relationship Manager- worksite solutions. The appointment letter was issued on 07th March 2012 and as per Clause 3, there was probation period of only six months, but the employee continued and no confirmation was received and as such, it was clear that the management was satisfied with his work.

21. On 15.12.2014, as per the appraisal he was rated “below expectation” with a comment that he was consistently underperforming. The employee disagreed and objected and without allowing any opportunity he was terminated. It was alleged that letter of termination was issued by an authority who did not have the power as the management had not given him the power through its Board of Directors. It was also alleged that the letter of termination dated 19.12.2014 was violative of Section 25F of Industrial Disputes Act and had been issued without assigning any reason and without notice.

22. The employee raised industrial dispute with the management on 05.01.2015 with a copy to Deputy Labour Commissioner, Jamshedpur who, in turn, issued letter dated 10.01.2015 to the management for comment, but the management did not comment. Another letter was issued on 10.02.2015, but there was no response and ultimately, the employee filed the case before the Court under section 2A of Industrial Disputes Act challenging the order of termination. The employee claimed reinstatement with full back wages.

23. The management filed its written statement [Annexure-5 to W.P.(C) No.4378 of 2019] and has also mentioned that a separate application under Order VII Rule 11 of Code of Civil Procedure was filed seeking dismissal of the case. It was alleged that the Court had no jurisdiction to entertain and try the application under section 2A of the Industrial Disputes Act.

24. Preliminary objection was separately raised vide paragraphs 5 and 6 of the written statement wherein following points were raised-

(a) The employee had deliberately not disclosed the fact about performing of his work which was purely managerial in nature and was not manual or clerical in any manner.

(b) The employee was drawing a salary exceeding Rs. 5 lakhs per annum, therefore, he was not a workman under Section 2(s) of the Industrial Disputes Act.

(c) The employee was working as a relationship manager- worksite solutions in M 01-Grade effective from 15.03.2012 to promote the business of the management company.

(d) A reference was made to the judgment passed by the Hon'ble Supreme Court in the case of "T.P. Srivastava Vs. National Tobacco Co. India Ltd." (Supra) wherein it was held that an employee hired in the capacity of a 'salesman' looking after sales promotion does not qualify as a 'workman' as defined under the Industrial Disputes Act.

(e) It was asserted that the work profile of the employee consisted largely of official work of supervisory and managerial in nature which required application of mind.

(f) In order to bring home the test to determine as to whether the employee is a workman or not, a number of judgments were cited.

(g) It was asserted that the burden of proof that an employee is a workman under the provisions of Section 2(s) of the Industrial Disputes Act lies upon the employee and the judgments were relied upon to submit that the burden lies on a person who asserts the status of a workman under the provisions of section 2(s) of Industrial Disputes Act and he has to establish with reference to dominant nature of his/her duties which is performed and whether such duties fall within one of the stipulated categories under the provisions of section 2(s) of Industrial Disputes Act.

(h) It was asserted that the employee was working as relationship manager and was entrusted with the task of generating business and promoting sales for the company and therefore, he did not qualify the category of workman.

(i) Reliance was also placed on the judgment passed by the Hon'ble Supreme Court in the case of "H.R. Adyanthaya Vs. Sandoz (India) Ltd." (Supra).

(j) Without prejudice to the aforesaid contentions regarding status of the employee and the maintainability of the case under Industrial Dispute Act by asserting that the employee was not a workman, the management also filed chronology of events in paragraph 7 of its written statement inter alia stating that the employee was on probation for a period of six months pursuant to appointment letter dated 07.03.2012 with an annual salary of Rs. 5 lakhs per annum. The probation period completed on 15th September 2012 and the probation was extended by communication through email dated 27.11.2012.

(k) As per the company's procedure, an assessment is required for each financial year. For the period 2012-13, the employee was rated 2.5 which meant that he failed to meet the expectation of the company and needed improvement. The assessment result was duly informed to him vide letter dated 19.07.2013 and the employee time and again failed to meet the expectation and ultimately, he was dismissed vide letter dated 19.12.2014.

(l) After termination, a letter along with cheque bearing no. 278525 drawn on ICICI Bank Limited for an amount of Rs.54,193/-towards full and final settlement was sent vide speed post. A copy of the tracking details and delivery report was furnished and marked as annexure to the written statement. However, a letter dated 13.03.2015 was received by the management on 17.03.2015 stating that no cheque was found in the envelope sent by the management and thereafter, the management stopped payment of the cheque but the employee did not send the cheque for authorization for re-issuance of cheque.

(m) The management again sent letter dated 24.04.2015 to the employee along with a fresh cheque dated 22.04.2015 towards full and final settlement of dues. It was alleged that there was no negligence or fault or shortcoming at the hand of the management.

(n) Separate para-wise reply to the written statement of the employee was also filed denying the allegation and stating the allegation to be false.

25. The following issues were framed by the learned Labour Court: -

“(A) Whether the first party (Randhir Kumar Karn) is a workman within the meaning of I.D. Act.

(B) Whether the ground of termination of service by management that the first party was a under performer is fully proved and is justified.

(C) Whether the order of termination of service passed is unjust and illegal and, if so, what relief can be given to the workman?”

26. While deciding issue no. (A) from paragraph 8 onwards, the learned Labour Court recorded the objection of the management with regards to the maintainability of the case on the ground that the employee being engaged in sales promotion was not a workman within the meaning of Industrial Disputes Act, 1947. The learned Labour Court observed that it is well settled that it is only a “workman” as defined under Industrial Disputes Act, 1947 who can bring his Industrial Dispute in labour court for adjudication and also observed that the word "Workman" as the term "Workman" has been duly and comprehensively defined under the Industrial Act and in this context section 2(s) of Industrial Disputes Act can be referred. The learned Labour Court observed that in a nutshell, any person who is employed in an industry to do any manual, skilled, unskilled, technical, official, clerical work is a workman except that one who is discharging either managerial or administrative work or that the one who is discharging supervisory work and draws a salary above Rs. Ten thousand per mensem. The Court recorded that the fact was that in the proceeding the management had raised the dispute that the employee was not a 'workman' for the reasons that he was discharging the function of sales promotion and therefore, was inherently discharging a 'managing function' and was therefore, not entitled to initiate the industrial dispute. The court also considered the principle of law relating to 'burden of proof' and recorded that the initial 'burden

of proof' of establishing that a 'workman' is a 'workman' is always upon the 'workman' who claims so.

27. Having observed as aforesaid, the learned court reframed the issue as under:
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"It is, therefore, premised on the aforesaid principle, I have to hold whether the workman in question has been able to establish by discharging initial burden that he was a workman in term of section 2(s) of ID Act or not?"

28. The learned Labour Court while considering the issue specifically recorded in paragraph 10 of the impugned award that neither in the pleadings nor in the evidence the employee had produced any material as to the nature of work being performed by the employee while working with the management. Paragraph 10 of the impugned award is quoted as under:

"10. At the very outset of discussing the finding on this issue, I must state that in the entire pleading of the workman, under challenge, there is no pleading as to what kind or the nature of work he was doing. It is also a fact that even during entire examination-in-chief he has also not said or given statement about the nature of work that he was required to perform or was actually performing. Thus, it is, crystal clear that neither in the pleading nor in his evidence, there is any evidence or suggestive facts of nature of work that he performed."

29. Having recorded that the initial burden was on the employee to prove that he was a 'workman' and also having recorded that the employee had neither stated in his pleading nor in his deposition as to the work being performed by the employee, the learned Labour Court proceeded to decide the issue as to whether the employee was a 'workman' only on the basis of paragraph 39 to 43 of the cross examination of the one management witness (Anu Verma) in the following manner:-

" However, when the witness of management, namely, one Anu Verma was being examined as a witness of Management, the workman had cross-examined the witness Anu Verma who has admitted the facts that what work the workman was not doing.

11. It is, therefore, the counter of the workman that the oral evidence having come out from the mouth of management, if taken, and considered in the legal perspective, it would lead to only one possible legal corollary that the workman was a workman as defined under I.D. Act section 2(s).

Furthermore, the workman has highlighted the statement/evidence of management witness Anu Verma for suggesting the court that if the evidence is read would lead to possible inference that he was a workman. The relevant paragraph of her deposition is under:

In paragraph 39, the witness has said

" कामगार के sign से किसी को Payment नहीं होता था।"

Again in paragraph 40 said

"कामगार को किसी कर्मचारी के खिलाफ कोई अनुशासत्मक कार्यवाही करने का अधिकार नहीं था।"

Again in paragraph 41 said

"कामगार को किसी कर्मचारी का छुट्टीapprove करने का अधिकार नहीं था।"

Again in paragraph 42 said

"कामगार को किसी Bill का Voucher को sanction करने का अधिकार नहीं था।"

Again in Paragraph 43 said

"कामगार को किसी कर्मचारी appraisal करने का अधिकार नहीं था।"

12. The aforesaid evidence has come from the mouth of management witness and the contention of the workman is that admitted evidence of management discloses that the workman was not at all discharging any managerial or supervisory work in light of the evidence of management as noted in paragraph 11 of the award.

13. It is further contended by the workman that if the nature of work as indicated in paragraph 11 is excluded from the work of a person, it is only the clerical work that remains left and, therefore, assuming that the workman was discharging the works as not indicated in paragraph 11 of deposition of Anu Verma would only mean that he was discharging clerical work and the same would make the person as a workman as defined under section 2(s) of Industrial Dispute Act.

14. It is true that the workman has not pleaded about his nature of work nor has given any oral or documentary evidence to support the same. However since from the mouth of management evidence, it has come on the record as evidence capable of being used in the proceeding lawfully as an admission that he was not doing any managerial or even supervisory work, therefore, as a legal sequitur and corollary, I must say that the work which might have been done by the first party would fall as an clerical work and indeed fortify the view that he was a workman as defined under section 2(S) of I.D. Act."

30. This Court finds that the entire finding of the learned Labour Court with regard to the status of the employee as 'workman' is based on answer to the five questions as contained in paragraphs 39 to 43 of the deposition as quoted above which were put during the cross-examination of one management witness wherein the witness made five negative statements. In paragraph 39 the management witness stated that the payment to any workman was not made under the signature of the employee ; in paragraph 40 the management witness stated that the employee did not have the authority to take disciplinary action against any workman; in paragraph 41 the management witness stated that the

employee did not have the power to approve leave to any workman; in paragraph 42 the management witness stated that the employee had no power to sanction bill/voucher in favour of any workman and in paragraph 43 the management witness stated that the employee was not doing any appraisal with regard to any workman.

31. Having recorded as aforesaid, the learned Labour took into consideration the submission of the employee made on the basis of aforesaid five negative statements of the management witness that evidence has come from the mouth of management witness which disclosed that the employee was not at all discharging any managerial or supervisory work and the contention of the employee that if the nature of work as indicated in said negative statements are excluded from the work of a person, what remains is only the clerical work which would make the person 'workman' as defined under section 2(s) of Industrial Dispute Act. The learned Court accepted the aforesaid submissions solely based on the said five negative statements made by management witness in cross examination and held that it is true that the employee has not pleaded about his nature of work nor has given any oral or documentary evidence to support the same, however, since from the mouth of management evidence, it has come on the record as evidence capable of being used in the proceeding lawfully as an admission that the employee was not doing any managerial or even supervisory work, therefore, as a legal sequitur and corollary, the work which might have been done by the employee would fall as clerical work and indeed fortify the view that the employee was a workman as defined under section 2(s) of the Industrial Disputes Act.

32. This Court is of the considered view that the aforesaid approach of the learned court is ex-facie not sustainable in the eyes of law and is also perverse on account of following reasons.

33. The learned court assumed, without there being any material on record, that the aforesaid five elements namely,

- i. authority to make payment under the signature,
- ii. authority to take disciplinary action against any workman,
- iii. the authority to approve leave to any workman,
- iv. authority to sanction bill/voucher in favour of any workman, and
- v. the authority of doing any appraisal with regard to any workman

constitute an exhaustive list of managerial or supervisory work and what remains is clerical work and held that since the employee was not performing any of the aforesaid five works, the employee was performing clerical work and hence was a workman. Such approach is ex-facie fallacious and not sustainable in the eyes of law.

34. This Court is of the considered view that in absence of any material brought

on record by the employee with regards to the nature of work performed by the employee, the learned Labour Court had no occasion to examine as to whether the nature of work performed fell under administrative, supervisory, managerial or clerical category. There is no such exhaustive list of administrative/ supervisory/ managerial categories of work. Whether the nature of work performed would fall under one or the other category requires judicial scrutiny on the basis of facts to be brought on record and there is no such straightjacket formula that if an employee is not performing any of the aforesaid five elements of work, he would be out of those performing administrative, supervisory and managerial work and would be covered within the definition of workman as defined under the Industrial Disputes Act, 1947.

In the case of "Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of T.N.", (2004) 3 SCC 514 it has been held as follows with respect to burden of proof :

Burden of proof

47. It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.

48. In N.C. John v. Secy., Thodupuzha Taluk Shop and Commercial Establishment Workers' Union the Kerala High Court held:

The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship.

49. In Swapan Das Gupta v. First Labour Court of W.B. it has been held:

Where a person asserts that he was a workman of the company and it is denied by the company, it is for him to prove the fact. It is not for the company to prove that he was not an employee of the company but of some other person.

50. The question whether the relationship between the parties is one of employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

35. In the judgment passed by the Hon'ble Supreme Court reported in (1970) 3 SCC 378 (Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and others), the matter was arising out of dispute decided by the Industrial Tribunal. On behalf of the management, a preliminary written statement was filed contending that none of the members of the Association was a workman, so the reference was incompetent. The Tribunal gave its finding on the preliminary issue as an interim award which was subject matter of consideration before the Hon'ble Supreme Court. As per the interim award, the members of the association were classified

into various categories and the Hon'ble Supreme Court referred to only 10 such categories which were involved in the case before the Hon'ble Supreme Court out of which, 06 categories were held to be workmen and 04 categories were held to be not workmen. The categories which were held to be workman were:

- (1) Transport Engineer,
- (2) District Engineers,
- (3) Foremen (Chemicals),
- (4) Fuelling Superintendents,
- (5) Chemists,
- (6) Sales Engineering Representatives.

The 04 categories which were held to be not workmen were:

- (1) Blending Supervisors,
- (2) Foremen
- (3) Depot Superintendents,
- (4) District Sales Representatives.

Some of the general features with regard to all was that the lowest basic salary was being drawn by the members of the association was Rs. 535/- per mensem and the highest was Rs. 1500/- per mensem. They were enjoying other allowances.

In order to decide the correctness of the decision of the Tribunal with respect to various categories, the definition of 'workman' in the Industrial Disputes Act as amended in the year 1956 was considered. The Hon'ble Supreme Court observed in paragraph 5 that for an employee in an industry to be workman under the definition, it is manifest that he must be employed to do skilled or unskilled manual work, supervisory work, technical work or clerical work. If the work done by an employee is not of such a nature, he would not be a workman.

The argument advanced on behalf of the Association was also recorded in paragraph 5 of the aforesaid judgment and it was their case that the definition is all comprehensive and contemplates that all persons employed in an industry must necessarily fall in one or the other of the four classes mentioned in the definition of 'workman' under section 2(s) of Industrial Disputes Act and consequently, the Court should proceed on the assumption that every person is a workman but he may be taken out of the definition of workman under 04 exceptions contained in the definition. The two exceptions with which the Hon'ble Supreme Court was concerned were exceptions (iii) and (iv). Under exception (iii), every workman who is employed mainly in a managerial or administrative capacity, goes out of definition of workman, while under exception (iv), persons

who are employees in a supervisory capacity are out of the definition provided they either draw wages exceeding Rs. 500/- per mensem or exercise, either by the nature of the duties attached to the office or by reason of the powers vested in them, functions mainly of a managerial nature. The said submissions of the learned counsel appearing on behalf of the Association was rejected by the Hon'ble Supreme Court by citing following reasons as follows:

6. We are unable to accept this submission. In the case of *May and Baker (India) Ltd. v. Workmen* [(1961) II LLJ 94] this Court had to consider the correctness of a decision of a Tribunal which had held that one Mukerjee, an employee in an industry, was a workman under the Act, because he was not employed in a supervisory capacity. The Court held:

"The Tribunal seems to have been led away by the fact that Mukerjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the Tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore, as Mukerjee was not a workman, his case would not be covered by the Industrial Disputes Act and the Tribunal would have no jurisdiction to order his reinstatement."

In that case, the Court thus held Mukerjee not to be a workman on the ground that his work was neither clerical nor manual which was the nature of the work envisaged in the definition to make an employee a workman. It is true that that decision was given on the definition of "workman" as it stood before the amendment of 1956 when the words "supervisory" and "technical" did not occur in the definition. Mr Chari's submission is that the amendment in 1956 introduced the words "supervisory" and "technical" with the object of making the definition all-comprehensive; but, on the face of it, it cannot be so. If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word "workman" without having to resort to the exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may he be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would he be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously, such an employee would not be a workman, because the work, for which he is employed, is not covered by the four types mentioned in the definition and not because he would be taken out of the definition under one of

the exceptions.

7. The next aspect that has to be taken notice of is that, in practice, quite a large number of employees are employed in industries to do work of more than one of the kinds mentioned in the definition. In cases where an employee is employed to do purely skilled or unskilled manual work, or supervisory work, or technical work, or clerical work, there would be no difficulty in holding him to be a workman under the appropriate classification. Frequently, however, an employee is required to do more than one kind of work. He may be doing manual work as well as supervisory work, or he may be doing clerical work as well as supervisory work. He may be doing technical work as well as clerical work. He may be doing technical work as well as supervisory work. In such cases, it would be necessary to determine under which classification he will fall for the purpose of finding out whether he does or does not go out of the definition of "workman" under the exceptions. The principle is now well settled that, for this purpose, a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other type of work. In the case of *May and Baker India Ltd.*, the Court, in the quotation cited above, noticed the fact that Mukerjee's duties were mainly neither clerical nor manual. The significance attaches to the word "mainly", because Mukerjee's duties did involve some clerical and manual work, yet, he was held not to be a workman."

(emphasis supplied)

The Hon'ble Supreme Court further observed in paragraph 12 of its judgment that the decision of the learned Tribunal with regard to various categories of workmen was to be considered in the light of the principles laid down in the judgment and it was required to be seen as to what was the main or substantial work which the employees were employed to do.

Thereafter, the Hon'ble Supreme Court considered each category of employees and while dealing with Sales Engineering Representatives in paragraphs 25 and 26, the Hon'ble Supreme Court set-aside the decision of the Tribunal and held that Sales Engineering Representatives were not workmen. Paragraphs 25 and 26 of the aforesaid judgment are quoted as under:

"25. The witness on behalf of the Association is K.V. Rajan who filed an affidavit and was also cross-examined. He holds a Diploma in Mechanical and Electrical Engineering and has worked as a Sales Engineering Representative since 1955 at various places. In giving the duties of the Sales Engineering Representative, he first mentioned items of work that the Representative has to do himself. According to him, he has to guide the industrial concerns in use of different grades of fuels and lubricants, and has to give demonstrations and trials of Company's fuels and lubricants in major industrial concerns which are the customers. He says that the manual labour by him consists of demonstrating the method and manner in which the fuels and lubricants should be used and applied. He explains all details with regard to application of fuels and lubricants

to the staff of the customer concerns, and he also attends to the difficulties experienced by the customers in the use of Company's products. He writes to the Divisional Office which, in turn, instructs the Sales Engineering Representative to attend to such complaints of the customers. He also gives technical advice to eliminate the complaints of the customers, and writes down the survey reports and submits them to the Divisional Office. He has to maintain files up-to-date regarding lubrication recommendation shades sent by the Head Office to his Division. Then, in cross-examination, he admitted that the work that he does is for promoting the sales of lubricants and fuel oils, though he added that, in doing so, he uses his technical knowledge.

26. Manmohan Singh, Marketing Services and Planning Manager of the Company, explained that a Sales Engineering Representative is employed primarily to support the sales efforts by providing after sales service and advice to the customers on optimum utilisation of fuels and lubricants. According to him, the principal duty of a Sales Engineering Representative is to provide such service and to guide and supervise the workers employed in customers' plants to ensure efficient use of fuels and lubricants. His duties have been described as complementary to the duties of the District Sales Representative. He, however, did admit that the Sales Engineering Representative has to give demonstrations regarding use of fuels and lubricants, and such demonstrations are conducted by him, though part of the work in the demonstration is done by the workers of the customer concerns. It is true that there is no subordinate personnel attached to him. The Tribunal itself held that the main work to be performed by Sales Engineering Representative is promotion of sales which are canvassed primarily by District Sales Representative. This the Sales Engineering Representative does by giving technical advice, holding demonstrations and suggesting methods for making best use of the products sold. On these facts, the Tribunal, in our opinion, rightly held that the Sales Engineering Representative is not employed on supervisory work; but the Tribunal did not proceed further to examine whether he was employed on any other work of such a type that he could be brought within the definition of a workman. There is no suggestion at all that he was employed on clerical work or manual work. Reliance was placed on the word "technical" used in the definition of a workman. The amount of technical work that a Sales Engineering Representative does is all ancillary to his chief duty of promoting sales and giving advice. As we have held earlier, the mere fact that he is required to have technical knowledge for such a purpose does not make his work technical work. The work of advising and removing complaints so as to promote sales remains outside the scope of technical work. Consequently, the Tribunal's decision that the Sales Engineering Representative is a workman is set aside."

Further, the Hon'ble Supreme Court also considered the category of District Sales Representatives vide paragraph 36 and upheld the decision of the learned Tribunal that they are not workmen. Paragraph 36 of the aforesaid judgment is quoted as under:

"36. The case of the last category viz. District Sales Representatives could not be seriously pressed by Mr Chari before us. He did state that his claim is that they are employed to do clerical work but the facts make it manifest that District Sales Representative, is principally employed for the purpose of promoting sales of the Company. His main work is to do canvassing and obtain orders. In that connection, of course, he has to carry on some correspondence, but that correspondence is incidental to the main work of pushing sales of the Company. In connection with promotion of sales, he has to make recommendations for selection of agents and dealers; extension or curtailment of credit facilities to agents, dealers and customers; investments on capital and revenue in the shape of facilities at Agents' premises or retail outlets and selection of suitable sites for retail outlets to maximise sales and negotiations for terms of new sites. He is, in fact, Company's representative in his district responsible for all matters affecting the Company's interests and, in particular, the profitable sale of all its products. His case was urged primarily on the basis of the argument advanced by Mr Chari that the definition of "workman" is now exhaustive and every employee of an industry must be classed amongst one of the four classes described in the definition of workman. We have already given our reasons for rejecting this submission. The case of District Sales Representative is clearly that of a person who cannot fall within any of the four classes, because his work cannot be held to be either manual, clerical, technical or supervisory. The work of canvassing and promoting sales cannot be included in any of these four classifications. He is, therefore, not a workman at all within the principal part of the definition, and the decision of the Tribunal is correct."

36. The aforesaid discussions and findings with regard to Sales Engineering Representatives and District Sales Representatives in the aforesaid judgement passed in the case of *Burmah Shell* (supra) assume importance in view of the fact that the witness of the management whose cross-examination has been taken into consideration by the learned Tribunal in the present case itself indicates that in paragraph 1 the witness had categorically stated that the employee was a relationship manager – worksite solutions to promote business of the management company and that the employees hired in the capacity of salesman looking after sales promotion do not qualify as workman as defined under Industrial Disputes Act, 1947. It was also stated by the witness that the employee was entrusted with the task of generating business and promoting sales of the management company and did not qualify in the category of workman. The initial 4 paragraphs of the deposition of the management witness are quoted as under:

"1. I say that the applicant was performing the work which was purely managerial in nature and was not manual or clerical in any way. Similarly, the Applicant was drawing salary exceeding of Rs. 5,00,000/- (Rupees Five Lakhs only) per annum therefore was not a workman under Section 2 (s) of the Act. It is to be noted that the Complainant was working as a Relationship Manager-Worksite Solutions in M01-Grade effective from 15-03-2012 to promote the

business of the Respondent company. That an employee hired in the capacity of a "salesman" looking after sales promotion does not qualify as a "workman" as defined under the Industrial Disputes Act, 1947.

2. I say that the dispute in question does not fall within the definition of an "Industrial Dispute" under section 2(k) and Section 2 (s) of the Industrial Disputes Act, 1947 as the Applicant was working as an "Relationship Manager" who was entrusted with task of generating business and promoting sales for the Respondent Company, the nature of the work performed by the Applicant does not qualify in the category of "workman".

3. I say that pursuant to Application & discussion the Applicant Mr. Randhir Kumar Karn was selected for the post of Relationship Manager-Worksite solutions at a Grade M01 and accordingly he was issued an offer letter which was duly accepted by him. Pursuant to accepting the offer the Applicant signed the Acknowledgement, with other Agreement which was given to him at time of his joining. Upon submission of the required documents the Applicant was engaged by the Opposite party vide an appointment letter dated 07.03.2012 as a Relationship Manager-Worksite solutions Grade M01 on Probation period of six months at Jamshedpur office of the Opposite party at an annual salary of Rs. 5,00,000/-(Rupees Five Lakh only) per annum. The Appointment letter along with the other forms and acknowledgment signed by the Applicant is collectively marked as Exhibit OP-1 (Colly)/Ext-M. The Probation period was completed on September 15, 2012 and probation extension communicated to the applicant vide email dated November 27, 2012.

4. I say that as per the Company's procedure an assessment is required to be done of each employee assessing the performance foreach financial year. That on assessment of Applicant's performance for the period 2012-2013, performance index was rated 2.5 which means that he failed to meet expectations of the Company and need improvement. The assessment result was duly informed through a letter dated 19.07.2013 to the Applicant. A copy of the letter is annexed herewith as Exhibit OP-2/ Ext-M/1. I say that the Applicant with best known reasons has not pleaded that the Applicant time and again failed to meet the expectations of the Company and achieve the targets required to justify his position in the Company. Accordingly as per Company's policy the Applicant was dismissed from his services and the same is duly informed to the Applicant vide letter dated December 19, 2014. A copy of the termination letter is annexed herewith as Exhibit OP-3 /Ext- M/2."

37. Thus, this Court finds that though the employee did not adduce any evidence or produce any material with respect to the work being performed by him, but the same management witness whose cross-examination has been taken into consideration to hold that the employee was performing clerical work [only because he was not performing five categories of work] had specifically stated in chief examination that the employee was hired in the capacity of salesman, the employee was performing the work which was purely managerial in nature and

was not manual or clerical in any way , the employee looking after the sales promotion and was working as relationship manager entrusted with the task of generating business and promoting sales for the management company and that, under such circumstances he would not qualify in the category of workman. The evidence of the management witness in paragraphs 1 to 3 remained uncontroverted as the witness was not cross examined on these aspects of the matter. Thus, though the employee did not bring on record the actual work being performed by him, but the management witness had narrated in the evidence about his work that he was working in the capacity of salesman looking after sales promotion and his task was to generate business and promote sales of the management company.

38. This Court finds that the learned Court has selectively used the evidence of the management witness only to the extent of his cross-examination on certain aspects and has completely ignored the statements made by the witness during examination in chief which remained uncontroverted even during cross examination. Selective reading of evidence and ignoring material statements made during examination while arriving at a finding is not permissible in law and such approach adopted by the learned Labour Court makes the award perverse calling for interference in writ jurisdiction.

39. This Court finds that the stand of the management that the employee was performing the work of sales promotion remained uncontroverted. In this context, it would be useful to consider the judgement passed in the case reported in (1994) 5 SCC 737 (supra), dealing with the matter of sales promotion employees in pharmaceutical industry.

40. In the judgment passed by the Hon'ble Supreme Court reported in (1994) 5 SCC 737 (supra), the Hon'ble Supreme Court considered the amendment in the definition of workman from time to time and also considered the earlier judgment of the Hon'ble Supreme Court in the case of *Burmah Shell* (supra) and summarized the legal position arising from the statutory provisions of the various decisions in paragraph 19 of the judgment as follows: -

"Till 29-8-1956 the definition of workman under the ID Act was confined to skilled and unskilled manual or clerical work and did not include the categories of persons who were employed to do 'supervisory' and 'technical' work. The said categories came to be included in the definition w.e.f. 29-8-1956 by virtue of the Amending Act 36 of 1956. It is, further, for the first time that by virtue of the Amending Act 46 of 1982, the categories of workmen employed to do 'operational' work came to be included in the definition. What is more, it is by virtue of this amendment that for the first time those doing non-manual unskilled and skilled work also came to be included in the definition with the result that the persons doing skilled and unskilled work whether manual or otherwise, qualified to become workmen under the ID Act."

41. The Hon'ble Supreme Court considered the various judgments and

certain inconsistent views taken by those judgments and summarised the legal position of law in paragraph 24 of the judgment and held that a person to be a workman under the Industrial Disputes Act must be employed to do the work of any of the categories, i.e. 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. Paragraph 24 of the judgment is quoted as under: -

"24. We thus have three three-Judge Bench decisions which have taken the view that a person to be qualified to be a workman must be doing the work which falls in any of the four categories, viz., manual, clerical, supervisory or technical and two two-Judge Bench decisions which have by referring to one or the other of the said three decisions have reiterated the said law. As against this, we have three three-Judge Bench decisions which have without referring to the decisions in May & Bakerl, WIMCO and Burmah SheIl cases have taken the other view which was expressly negated, viz., if a person does not fall within the four exceptions to the said definition he is a workman within the meaning of the ID Act. These decisions are also based on the facts found in those cases. They have, therefore, to be confined to those facts. Hence the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation."

42. Thereafter, in the said judgement the Hon'ble Supreme Court considered the provisions of Sales Promotion Employees (Conditions of Service) Act, 1976 (hereinafter referred to as the 'SPE Act') which extended the applicability of, inter alia, Industrial Disputes Act , 1947 to sales promotion employees of pharmaceutical industries and also to those industries notified under section 3 of the SPE Act of 1976 . It is nobody's case that the parties are covered by the SPE Act of 1976.

43. The Hon'ble Supreme Court also observed in paragraph 31 of the judgment that the parliament had amended the definition of 'industry' by the Amending Act 46 of 1982 to include within the definition of industry in Section 2(j) of the ID Act, among others, any activity relating to the promotion of sales or business, or both carried on by any establishment but the said amendment had not yet come into force. However, the amendment made by the very same Amending Act of 1982 to the definition of 'workman' in Section 2(s) to include those employed to do 'operational work', and to the definition of 'wages' in Section 2(rr) to include "any commission payable on the promotion of sales or business or both" has come into force w.e.f. 21-8-1984.

44. The Hon'ble Supreme Court in paragraph 33 of the judgment held that the work of promotion of sales of the product or services of the establishment is distinct from and independent of the types of work covered by the said definition of workman under the Industrial Disputes Act and hence rejected the contention

that the medical representative were employed to do skilled work within the meaning of definition of workman under the Industrial Disputes Act and as regards the 'technical' nature of their work, it was expressly rejected by the Hon'ble Supreme Court in the case of *Burmah Shell* (supra).

45. Considering the judgement passed in the case of *Burmah Shell* (supra) read with the judgement reported in (1994) 5 SCC 737 (supra), the finding of the learned Labour Court that the employee was engaged in clerical work and hence a workman, by referring to five activities which the employee was not performing as per cross examination by adopting selective reading of the evidence of management witness (Anu Verma) and totally ignoring the other parts of the evidence as fully explained above, cannot be sustained in the eyes of law being perverse and accordingly the finding of the learned Labour Court with regard to issue no. (A) holding that the employee was a 'workman' within the meaning of section 2(s) of Industrial Disputes Act is set-aside.

46. In the case of "*Sarva Shramik Sangh Vs. Indian Smelting & Refining Co. Ltd.*" reported in (2003) 10 SCC 455, the Hon'ble Supreme Court observed that a jurisdictional fact is one on the existence of which the assumption of jurisdiction by a court, tribunal or authority is dependent. Meaning thereby, in absence of jurisdictional fact having been established, court, tribunal or authority cannot assume jurisdiction to decide a dispute. The portion of the said judgment relevant for the purposes of the present case is quoted as under:

"15...A jurisdictional fact is one on the existence or otherwise of which depends assumption or refusal to assume jurisdiction by a court, tribunal or authority. The said fact has to be established and its existence proved before a court under the Maharashtra Act can assume jurisdiction of a particular case. If the complaint is made prima facie accepting existence of the contractor, in such a case what has to be first established is whether the arrangement or agreement between the complainant and the contractor is sham or bogus. There is an inherent admission in such a situation that patently the arrangement is between the complainant and the contractor and the claim for a new and different relationship itself is a disputed fact. To put it differently, the complainant seeks for a declaration that such arrangement is not a real one but something which is a facade. There is no direct agreement between the complainant and the principal employer and one such is sought to be claimed but not substantiated in accordance with law. The relief in a sense relates to a legal assumption that the hidden agreement or arrangement has to be surfaced..."

47. This Court is of the view that the status of the employee as to whether he was a workman or not, has a serious bearing on the jurisdiction of the learned Labour Court to decide the legality and validity of the termination of the employee. The said issue having been decided in favour of the management, the learned Court loses its jurisdiction to decide the legality and validity of the termination of the employee and accordingly, the award to reinstatement also cannot be sustained which is set-aside. As the order of reinstatement has been

set-aside there is no question of award of back wages as prayed for by the employee in his independent writ petition being W.P. (L) No. 924 of 2022.

48. Consequently, the writ petition filed by the management being W.P. (L) No. 4378 of 2019 is allowed and the writ petition filed by the employee being W.P. (L) No. 924 of 2022 is dismissed.

49. Pending interlocutory application, if any, is dismissed.