(1997) 10 BOM CK 0045

In the Bombay High Court

Case No : O.O.C.J. Writ Petition No. 1587 of 1995

U.B.S. Publishers Distributors Ltd. APPELLANT

Vs

Industrial Workers Union and anr RESPONDENT

Date of Decision : 16-10-1997

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(S)

Citation : (1997) 10 BOM CK 0045

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : Shri P.K. Rele, for the Appellant; Shri P.M. Patel, for the Respondent

Judgement

R.M. Lodha, J.—In this writ petition filed under Art. 226 of Constitution of India, the Petitioner takes exception to the order passed by Industrial Tribunal, Bombay on 15.6.1995 whereby the said tribunal held the concerned employees ''workmen'' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947.

2. M/s. U. B. S. Publishers Distributors Limited, the Petitioner is a public limited company registered under the Indian Companies Act, 1956. The company has its head office in New Delhi and branches at Bombay, Bangalore, Madras, Calcutta and Patna and other places. The company is engaged in sales and distribution of books. The Respondent No. 1 Industrial Workers Union is a trade union registered under the Trade Unions Act, 1926. The union represents the workmen of the company establishment in Bombay. The company employs more than 410 workmen all over India and there are about 20 workmen comprising senior assistants, typists,, steno-typists, clerks, drivers, packers, watchman, helpers, etc. in Bombay branch. The company also has supervisory and administrative staff. On 8th January, 1990 the union submitted Charter of Demands on the company establishment as the earlier settlement expired. In the Charter of Demand claim covered certain class of employees who were designated by the company establishment as supervisor and officers. The demand raised by the

union were ultimately referred for adjudication to the Industrial Tribunal. The union filed its Statement of Claim on 14.8.91. An application was filed by the employer establishment that the reference made regarding 15 persons who were not workmen was not maintainable in law. Parties led evidence and by the impugned order dated 15.6.95 the Industrial Tribunal held that the concerned 15 workmen whose names are mentioned in the reference are the workmen within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947.

3. Mr. Rele, the learned counsel appearing for the company establishment contends that the Industrial Tribunal committed serious error in not considering the entire material on record to find out whether the concerned 15 employees were workmen within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947 or not. Mr. Rele strenuously urged that the Industrial Tribunal only considered the aspect that the concerned 15 employees were not covered by either of the four exceptions to the definition of ''workman'' provided under Sec. 2(s) but did not apply its mind nor recorded any finding that these concerned 15 persons Were doing the work of any of the categories mentioned under Sec. 2(s) i.e. manual, unskilled, skilled, technical, operational, clerical or supervisory. According to him the order passed by the Industrial Tribunal is not in conformity with the decision of the Apex Court in H. R. Adyanthaya v. Sandoz (India) Ltd. 1994 2 CLR 552 and, therefore, the order deserves to be set aside and matter needs to be sent back to the Industrial Tribunal for fresh consideration of the question whether the concerned employees were workmen within the meaning of Sec. 2(s) of the Industrial Disputes Act or not.

4. On the other hand, Mr. Patel, the learned counsel appearing for the union would urge that Tribunal applied the correct test and rightly held that the concerned employees were workmen under Sec. 2(s) of the Industrial Disputes Act. According to Mr. Patel from available evidence it was more than clear that the employees were discharging the duties of clerks and were doing clerical job, and, therefore, the finding recorded by the Tribunal does not require any interference in extraordinary jurisdiction under Art. 226 of the Constitution of India.

5. In Sandoz (India) Ltd. the five Judge Bench of the Apex Court reviewed the entire case law the changes in the definition under Sec. 2(s) through amendments from time to time and clarified the legal position by holding that a person to be a workman under the Industrial Disputes Act must be employed to do the work of any of the categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory and it is not enough that he is not covered by either of the four exceptions to the definition. The five judge bench of the Apex Court reiterated the law laid down by it in Management of May and Baker (India) Ltd. Vs. Their Workmen, . The five judge bench held that the view expressed in Western India Match Co. Ltd. Vs. Their Workmen, , Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others, , Miss A. Sundarambal Vs. Government of Goa, Daman

and Diu and Others, and T.P. Srivastava Vs. National Tobacco Co. of India Limited, lays down the correct law while the view expressed by the Division Bench of the Apex Court, in cases such as S.K. Verma Vs. Mahesh Chandra and Another, ,; Ved Prakash Gupta Vs. Delton Cable India (P) Ltd., and Arkal Govind Raj Rao v. Ciba Geigy of India Ltd., Bombay (1985) Supp. 1 SCR 282 was not reflective of correct law. Certain other cases were held by the Apex Court to be based on facts found of those cases and held to be confined to these facts. It is thus clear that to attract the provisions of Sec. 2(s) the employee must show that he performs any of the type of work enumerated in the definition and that he is excluded under the four exceptions as provided in the definition. To decide the status of an employee under Sec. 2(s) to the effect whether he falls within the category of workman, what is required to be seen is the emphasis on the actual work performed by such employee. Predominantly if the employee is discharging the duties of the categories listed in the definition under Sec. 2(s) viz. manual, unskilled, skilled, technical, operational, clerical or supervisory and if he is excluded under the exceptions, obviously such employee is workman. In other words, if the nature of duties actually performed predominantly shows that he discharges duties to do the work of any of the categories listed in Section 2(s) and he is not covered by exceptions of Section 2(s), it would be decisive of the matter that the employee is workman and the designation or salary of the employee would be irrelevant.

6. In the present case, the union in support of its case that the employees fall in the category of workman filed eight affidavits viz. of i) Shivram Bala Madwal, ii) Shivaji Krishna Lohar, iii) Karunakara Dadu Poojary, iv) Ladman Vithal Kumbal, v) Ramchandra Shankar Shigvan, vi) Mrs. Aparna Ashok Tawade, vii) Mrs. Rupa S. Puthran, and viii) Mrs. Nilima P. Warty. All the eight deponents who filed their affidavits have been cross examined by the company establishment. On the other hand, company establishment in support of its case that the concerned employees were not workmen filed affidavit of Jagmohan Singh Sethi who has been cross examined extensively by the union. Shri Shivaji Krishna Lohar, one of the employees in his affidavit has deposed that though his designation is Senior Officer, he is not discharging any administrative, managerial or supervisory power, he is working in the billing department and physically doing typing work to fill up the proforma forms, invoices and stock invoices and he prepares cash memos under the instructions from departmental head. He has deposed that though his designation was changed to that of officer without his consultation there was no change in his duties and he continued to prepare credit notes, physically check up the invoices and give coding as per the instructions from his superior accounts manager. He has deposed that he has been in fact doing clerical work and is required to do the clerical work physically under the instructions of the Accounts Officer and that he did not have any supervisory, managerial or executive or administrative power. Shri Lohar has been cross examined by the employer and from his cross examination his statement made in the affidavit has not been demolished. He has reiterated in the cross

examination that through the day he does the work of checking the bills and he works as per instructions of Accounts Manager. He has denied the suggestion that he gets the work done through clerks and typists. Shri Karunakara Dadu Poojary who is also one of the employees has filed his affidavit stating that he is member of the union and his designation has been changed unilaterally and though he is designated supervisor he is doing the same type of work which he was doing when he joined the service in the year 1984. According to Mr. Poojary he does the work of preparing railway and lorry receipts. He maintains outstanding customer ledger/statement. He is doing the work of maintaining accounts. He is preparing the payment receipts to the parties and customers apart from doing preparation of bank pay slips, bank reconciliation monthly cheque return debit notes, debit and credit general entry, deleting the invoices on collection of payment, arranging post dated cheques, preparing/writing debit note books. He does the aforesaid work under the advise and instructions from accounts manager, administrative manager and the regional director. He has stated that he does not have administrative, managerial or supervisory power. Shri Poojary has also been cross examined by the company establishment and in his cross examination he has denied that he was supervising the work of typists or clerks. He has reiterated in cross examination that whenever inquired from his supervisor he gives report regarding outstanding bills. According to him he works under the Accounts Manager. Shri Ladman Vithal Kubal who is also one of the concerned employee has filed his affidavit and he has stated in his affidavit that his job was to take out books as per the bills prepared by bill section and arrange despatch to the customers by preparing gate passes. In addition thereto he has also to physically take out/give books for package and render physical assistance to the packers in packing books to be despatched. He also does packing of books to be despatched in small packets and if number of books are more he also renders physical assistance for doing necessary package for the purpose of despatch of such books. The said work he has been doing in the establishment for almost 23 years. He does not have any administrative or managerial power nor has he any supervisory power, nobody works under him. He does job under the instructions and advise from Sales Manager. Shri Kubal has been cross examined by the company establishment. In his cross examination he has denied that he was in charge of delivery and sales. He has admitted that it was his duty to ensure that the addresses written on the label of delivery of books are correct. He admits that customer may make complaint to him if there is complaint in delivery of books. Ramchandra Shankar Shigvan deposed in the affidavit that company establishment has unilaterally given him designation of supervisor, senior supervisor and officer but at no point of time he had any supervisory power or any power of administrative or managerial nature. Nobody has been working under him. His work in the company is to handle cash and he physically prepares vouchers regarding the payments made. In addition thereto he has to make entries of paying slips for depositing cash and cheques received from the parties in banks. He has also been preparing receipts towards incoming cash and cheques and also prepares statement of travelling allowance and salary advances paid to the staff. He does the work under the instructions from Accounts Manager and has no power to grant or refuse leave to anybody in the company. He is non-matriculate. Mr. Shigvan has also been cross examined by the company establishment and he has denied the suggestion that he recommends the leave of the employees. He has admitted in cross examination that it was his duty to see that the accounts are correctly maintained and he receives the cash of the sales. He also looks after arrangement of paying salary to the employees. He has categorically stated that it was not his duty to administer the accounts department. Mrs. Aparna Ashok Tawade has also filed her affidavit. She states in her affidavit that her job is to type letters, check/verify and tally the books in accordance with publisher''s invoices, to check arrival of books from company''s Delhi Branch, physical entering of publisher''s invoices in purchase ledger maintained by the company, acknowledging the stock transfer invoices from Delhi office and sending back the stock transfer invoices by physically writing down the STI Nos. on printed receipts, typing/preparing list of books expected to arrive, physical checking/verifying and tallying proforma invoices containing the books already sent to the parties and return after arrival and making necessary entries, physically checking/verifying proforma containing information such as books already sent to the customers, posted to the customers and making necessary entries in the ledger of the books returned from such customers and to make entries of finalized proforma invoices in the ledger, prepare debit notes sent to publishers and filing papers, letters, statements and other documents. This entire job is done by her under the instructions from the Purchase Manager. According to her she does not have any administrative, managerial or supervisory power nor any such power has been delegated by the company to her nor it is implied in the said designation. Mrs. Tawade has been cross examined by company establishment and she has reiterated that she has been throughout working as typist and clerk. She has denied the suggestion that her main work was of administrative nature. Yet another concerned employees Mrs. Rupa S. Putharan has filed her affidavit and she has deposed in her affidavit that she does not have any authority to grant leave or refuse level or to give any instruction to anybody. She has no assistant working under her. She does not do any administrative work nor she has been given any administrative, managerial or supervisory work. She was initially appointed as typist-cum-assistant and since her appointment she has been doing typing work though her designation has been changed from time to time. She carries out all the work on instructions from Sales Manager. After computers have been installed, she has been preparing proforma invoices on computer which is now her routine job. She does not have any independent power. Mrs. Putharan has also been cross examined by the company establishment and in her cross examination she has reiterated that she was doing only work of typing. She has denied the suggestion that she was supervising the work of billing department. She has admitted that in absence of Sr. Sales Executive she was discharging duties of administrative nature. The union also filed affidavit of Mrs. Nilima Warty, one of the concerned employees. In her affidavit she has deposed that she was doing the work of typing of printed order forms to various publishing companies, typing procurement order forms to be sent to the head office at Delhi intimating them to send required quantities of books to Bombay branch to be sold to various customers as per the requirements, filling up by typing or handwriting printed forms known as Bombay/Delhi orders forms in green and white colour prints intimating the Delhi office to send the Bombay office the confirmed orders of parties/customers. In addition to this she is required to do the job of typing letters given to her by Sales Manager. She also does the work of preparation of lists to be sent to different customers and parties mentioning the names of books for their approval. Mrs. Warty has also been cross examined by company establishment and she has reiterated that she was doing only work of typing. She has denied the suggestion that she has any administrative powers in the company. Mr. Jagmohan Singh Sethi, whose affidavit has been filed by the employer in his cross examination has clearly admitted about all the concerned persons that they are doing some clerical work. However, he sought to depose that such work was not dominant work of the employees.

As regards S. K. Lohar, Shri Sethi has deposed in the affidavit that he is required to ensure that the customers codes are properly allotted and marked and the sales invoice/cash memo prepared correctly. He has also to ensure that credit notes are properly and correctly prepared. According to him Shri Lohar has to ensure proper accounting in respect of sales of books and he has to contact parties and attend to their grievances. About Shri K. D. Poojary, in the affidavit Mr. Sethi deposed that his main duties are to analyse customer''s accounts, provide data for computer accounting and reconciliation of customers accounts statements and bank statements. He has to ensure about computer accounting. According to him clerical work which Mr. Poojary is doing is of minor nature and his main duties are not clerical. As regards Mr. Kumal, Mr. Sethi has deposed in affidavit that he is required to ensure delivery of books to the customers in time. He has to arrange for van for delivery and preparation of gate passes. He admits that some of the duties of Mr. Kumal is clerical but, his principal work is administrative and supervisory. About Shri R. S. Shigvan, Shri Sethi in his affidavit states that he is required to receive cash from the customers and make cash payments for expenses and purchases affected and arrange payment of wages to the staff. He is required to, ensure proper inflow and outflow of cash, he is required to attend to the parties for effecting payment. According to him, the clerical work done by Shri Shigvan consists small portion of his main work. In so far as Smt. Tavade is concerned, Mr. Sethi has deposed in his affidavit, that her main work is to ensure timely receipt of books. She is required to do filing of letters, papers, statements and preparation of debit notes but that is not her main work. As regards Smt. Rupa Puthran, Mr. Sethi has deposed in the affidavit that she is required to do some typing work but that is incidental to her main work of ensuring proper preparation of documents in connection with the supply of books. About Mrs. Nilima Warty, Shri Sethi has deposed that she is required to promote sales of the company books and in that connection she is required to do some typing work and that is not her main work. According to him main work of Mrs. Warty is promotional and not clerical. In his cross examination, he has admitted that Mrs. Tavade is required to type list of books. She acknowledges receipt of books and enters in the company''s books. She tallies and verifies the books physically. She enters the receipt in purchase register. She prepares debit notes and sends it to publishers. About S. K. Lohar, in cross examination Mr. Sethi admits that he does the work of correcting and checking the bills of the company and he physically prepared the credit notes. He has admitted that all these employees do typing and clerical work though that is 20% of their overall work. About Mr. Poojary he admits that he is doing preparation of physical aromatic accounts and he also prepares bank pay slips, bank reconciliation, general debit and credit entries, preparing written credit notes. About Nilima Warty he has admitted that she does some typing work and that is part of her duties.

7. From the aforesaid scan and analysis of evidence no doubt is left that the concerned employees have been doing clerical job and that their main work is of clerks though they have been designated as officers and supervisors and the company establishment has sought to show that the clerical job is not their main work, which on the face of the record appears to be far from truth. While sitting in writ jurisdiction ordinarily I would not have gone into details of the evidence, but the necessity of it has arisen since the tribunal failed to examine the evidence at length, which is one of the grievances of the learned counsel for the Petitioner. The tribunal being a fact finding tribunal ought to have taken pains and shifted the evidence meticulously when the question was raised before it that the concerned 15 employees were not workmen under Sec. 2(s) of the Industrial Disputes Act. The non-recording of the specific finding, therefore, by the trial Court regarding eight employees that they fall in one of the categories listed in Sec. 2(s) cannot be said to be fatal when ultimate conclusion reached by the tribunal that these eight employees are workmen under Sec. 2(s) do not seem to be erroneous on the basis of the evidence on record. The tribunal has held that the concerned employee did not fall in any of the exceptions mentioned in Sec. 2(s) but, specific findings was not given that these employees do fall in any of the categories listed in Sec. 2(s) necessitate me to go through the evidence on record and which I have referred to at length before reaching the conclusion that the concerned eight workmen do fall in the category of clerical job listed in Sec. 2(s). From the evidence on record, it is well established that the eight employees do the clerical works and, therefore, are covered in one of the categories listed in Sec. 2(s) and that it is also proved that these employees are not covered by either of the four exceptions to the definition and, therefore, they are workmen. It may be observed that since only eight out of fifteen employees have filed affidavits and they have been cross examined and on the basis of their evidence conclusion has been reached that they are workmen within the meaning of Sec. 2(s), as regards seven persons who have not chosen to file their affidavits showing the nature of duties discharged by them and there is no

evidence absolutely whatsoever regarding the nature of the duties of these seven persons, the reference is held maintainable against the eight employees who have filed affidavits before the tribunal. Out of the seven persons who have not filed affidavit, four persons have resigned after 1.1.90 and their accounts have been settled and, therefore, as regards them even otherwise no grievance can be said to be subsisting.

8. Consequently, writ petition is disposed of by following order :

(i) Out of the 15 employees whose names are shown in the reference, eight employees viz. Mr. S. B. Madwal, Mr. S. K. Lohar, Mr. K. D. Poojary, Mrs. R. S. Puthran, Mr. R. S. Shigvan, Mrs. A. A. Tavade, Mr. L. V. Kumal, Mrs. N. P. Warty are held to be workman and rightly held to be so by the Industrial Tribunal within the meaning of Sec. 2(s) of the Industrial Disputes Act, 1947.

(ii) As regards remaining seven employees who have not filed their affidavits and who have not shown their nature of duties and have not led any evidence, reference is held not maintainable with regard to them.

9. No costs. Certified copy expedited.