IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5290 OF 2019

Siemens Ltd.
Plot No. A-1/2, Five Star
MIDC, Shendra, Aurangabad,
Through its Manager-HR .. Petitioner

Versus

Shendra Siemens Kamgar/Karmachari
Sanghatana, C/o Shri Chandrakant
Mohan, Sarode, Sant Dnyaneshwar
Nagar, House No. 70/1, Hudco,
N-9, M-2, Aurangabad,
Through Secretary. .. Respondent

Shri Sudhir Talsania, Senior Advocate i/by Shri Y. R. Marlapalle, Advocate for the Petitioner.
Shri B. R. Kaware, Advocate for the Respondent/Sole.

CORAM : SANDEEP V. MARNE, J.
DATE : 14TH NOVEMBER, 2022.

ORAL JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. By this petition, Petitioner challenges award dated 02nd November, 2018 passed by the Industrial Tribunal, Aurangabad in Reference (IT) No. 08 of 2014. By that award, the Industrial Tribunal has held that more than 100 employees in workman category were working in petitioner company and that therefore,

provisions of Chapter VB of the Industrial Disputes Act (for short "I. D. Act") are applicable. The Industrial Tribunal has therefore declared that closure notice dated 27th September, 2014 is illegal and consequently the termination of the employees has been set aside. Petitioner is directed to pay wages to the members of the respondent union from the date of closure with continuity of service.

3. It was Petitioner's case before the Tribunal that it had employed only 99 employees in the workman category and that therefore, due to lesser strength than 100 employees, the company was not required to seek prior permission for closure under the provisions of Section 25-O of the I. D. Act. Petitioner contended that it had complied with the provisions of Section 25FF and 25-FFF of the I. D. Act. On the other hand, it was the case of the respondent before the Tribunal that the company had more than 100 employees in workmen category and, therefore, closure in absence of prior permission mandated U/Sec. 25-O of the I. D. Act rendered the same *ab-initio void*. Therefore, the issue before the Tribunal was whether the company had 100 employees in workman category or not.

4. Respondent union presented names of 8-9 additional employees claiming them to be in workman category. It was Petitioner's contention they were either not falling in the workman category and some of them were engaged through contractor. Evidence was led by both the sides. The Tribunal has

arrived at a conclusion that petitioner had employed more than 100 workmen thereby necessitating prior permission U/Sec. 25-O of the I. D. Act for closure. By recording these findings, the reference has been allowed.

5. Appearing for the petitioner, Mr. Talsania, the learned senior advocate would submit that the burden of proving that 8-9 additional employees were falling in workman category rested solely on the shoulders of the respondent union and that they have failed to discharge the burden. Inviting my attention to various findings recorded in the impugned award, Mr. Talsnia would contend that the Tribunal put entire burden of disproving the contention of the respondent union on petitioner. He would submit that for the alleged failure of petitioner to rebut the contentions of the respondent union, the Tribunal has proceeded to draw an inference that some of the said 09 employees fall within workmn category. In support of his contention, Mr. Talsania would rely upon judgment of the Apex Court in the case of **Ganga Kisan Sahkari Chini Mills Ltd. Vs. Jaivir Singh** reported in *2007 III CLR 840* and the decision of this Court in the case of **Vandana Joshi Vs. Standard Chartered Bank Ltd.** reported in ***2011(1) LJ Soft 54***.

6. Per contra, Mr. Kaware, the learned counsel appearing for the respondent union opposes the petition and supports the award of the Tribunal. He would submit that the respondent union sufficiently discharged the burden of proving that the

additional employees fall in the category of workman. Inviting my attention to the evidence of the management witness, Mr. Kaware would content that there was an admission to the effect that some of the employees were working on the post of Operator. He also invites my attention to the evidence of Mr. Pravin Vasant Patil, witness examined by the respondent union, to prove that several employees were working as operators, who were deliberately excluded from the list of total employees in the petitioner company. Mr. Kaware would seek to accuse Petitioner for withholding documents relating to all employees. Inviting my attention to various findings recorded by the Tribunal, Mr. Kaware would contend that after considering the evidence on record, the Tribunal has arrived at a correct finding that petitioner had more than 100 employees in workman category. He would therefore urge that no interference is called for in the impugned award passed by the Tribunal.

7. Rival contentions of the parties now fall for my consideration.

8. Perusal of the award passed by the Industrial Tribunal would indicate that it has mainly relied upon evidence of Mr. Pravin V. Patil, witness examined by the respondent union, for the purpose of arriving at a finding that some of the additional employees in workman category were also employed by the petitioner. The following findings recorded by the Tribunal in this regard are relevant.

> "He has denied that Mohan Jawale was working as a Lezor Cutter Operator. Further, he has denied that Mitesh Pimpale was working as a Assembler. But he has stated that he was working in Assembly Deptt. As an Operator. Further, Mr. Abhishek Mishra is working in Maintenance Deptt. He has no knowledge about nature of work of Mr. Abhishek Mishra. Further, Yogesh Tikekar was working in Fixture Maintenance Deptt. He has denied that all above said employees were in the employee category. Further Mr. Pravin Kulkarni has not disclosed the designation and duties performed by above said employees. Due to working in Maintenance Deptt., Assembly Deptt. And Fixture Maintenance Deptt. As an Operator, it should be presumed that they came within the category of 'workmen' or 'employee'."
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> "**But the 1st party has not produced documentary evidence in respect of nature of duties of Mohan Jawale, Mitesh Pimpale, Abhishek Mishra, Yogesh Tikekar and Vijay Kalyani**. Further, from the evidence of Mr. Kulkarni it is crystal clear that the said persons were working as the operator. Therefore, it should be presumed that those persons were direct employees/workmen of the 1st party."
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> *(emphasis supplied)*

9. The above findings recorded by the Industrial Tribunal would indicate that the Tribunal has sought to shift the burden of disproving that the concerned persons were employed as workman on petitioner. On account of Petitioner's failure to prove that they were not working as operators, a presumption is raised that they fall within workman category.

10. Further findings recorded by the Tribunal in para No. 20 of the award are as under :

> "20. The sum and substance in the above said reported

> decision is that only the designation is not important. But it is necessary to consider actual work performed by the person. In the present case the name of Mohan Jawale, is shown in the administrative staff, as Jr. Executive production. **But the 1st party has not disclosed his nature of duties.** Further other employees namely Mitesh Pimpale, Abhishek Mishra, Yogesh Tikekar and Vijay Kalyani were working as the operator. Further from the evidence of Mr. Pravin Patil it appears that above said workmen are not member of the union. Hence in my view while considering the strength of the workmen above said person should be added. **Therefore said person being working as the operator, they should be deemed as the workmen**. Hence the ratio laid down in the above said decision is helpful to the 2nd party workman."
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> *(emphasis supplied)*

11. The Tribunal further proceeded to hold in para No. 25 of the award as under :

> "But, according to me the 2nd party has proved that in the 1st party company more than 100 workmen were working from September, 2013 till the issuance of closure notice i.e. September, 2014. Hence, in my view the provisions of Chapter-VB of I. D. Act is applicable to the 1st party Company. In the present case the 2nd party has proved that more than 100 workmen were working in the 1st party company. **By way of rebuttal the 1st party has not adduced sufficient evidence to come to the conclusion that only 99 workmen were working**."
>
> *(emphasis supplied)*

12. Perusal of the above findings would make it apparently clear that the Tribunal has proceeded to treat some of the alleged employees as workman essentially on account of failure of the petitioner to lead evidence to prove to the contrary. This, in my

opinion appears to be completely contrary to the settled position of law that the burden of proving that a person is a workman rests squarely on the shoulders of a person who makes such an allegation. In this regard reliance of Mr. Talsania on the decision of the Apex Court in the case of **Ganga Kisan Sahkari Chini Mills Ltd.** (supra) is apposite. In para No. 37 of the judgment, the Apex Court has held as under :

> 37. In case any person raises a contention that his status has been changed from apprentice to a workman, he must plead and prove the requisite facts. In absence of any pleading or proof that either by novation of the contract or by reason of the conduct of the parties, such a change has been brought about, an apprentice cannot be held to be workman.

13. The decision in **Ganga Kisan Sahkari Chini Mills Ltd.** (supra) has been followed by this Court in the case of Vandanda Joshi (supra), in which it is held as under :

> "The Supreme Court in Ganga Kisan Sahkari Chini Mills Ltd.'s case (supra) held that the conclusion of the High Court that the burden of proof lies on the employer to establish the nature of appointment is contrary to law. The ratio of the above decisions of the Supreme Court makes it abundantly clear that it is for the appellant to prove that she is a workman within the meaning of section 2(s) of the Industrial Disputes Act, 1947 with reference to the dominant nature of her duties."

14. In the light of above exposition of law, it was incumbent upon the Tribunal to examine whether the Respondent Union was in a position to prove that any additional employees in workman category was employed by Petitioner at the time of its

closure. Instead of doing so, the Tribunal appears to have recorded findings in favour of the Respondent union of account of Petitioner's failure to establish to the contrary. In my opinion, therefore an error has crept in the impugned award on account of the Tribunal shifting the burden of disproving that additional persons were not employed in the capacity of workman on the shoulders of the petitioner. The impugned award is therefore liable to be set aside. However since Respondent union has raised a plea of inability on their part to prove engagement of 100 employees in workman category due to non-disclosure of documents, the Reference deserves to be remitted to the Tribunal so as to give one more opportunity to the Respondent Union. This shall however not be construed to mean that I have recorded any finding to the effect that there is nondisclosure on the part of Petitioner. All points in this regard are left open. Therefore, while remanding the proceedings back to the Tribunal, I deem it appropriate to give an opportunity to the respondent union as well as to petitioner to lead additional evidence in support of their respective contentions. The Tribunal may consider such additional evidence in addition to the evidence which is already appearing on record for the purpose of determining whether the respondent union is in a position to prove that more than 99 employees were employed by the petitioner in capacity as workmen.

15. I am informed that the petitioner company has restarted its operations and had offered reemployment to 53 members of

the respondent union. Mr. Kaware disputes this position and submits that only 42 members of the respondent union are offered such reemployment. Mr. Kaware, further submits that such re-engagement is in the nature of fresh appointment. Mr. Talsania would submit that out of 53 members of the respondent union, 24 have accepted the re-engagement, whereas 29 members have refused the offer. The Industrial Tribunal may consider this position also while deciding the reference afresh. I therefore proceed to pass following order.

O R D E R

A. The award dated 02nd November, 2018 passed by the Industrial Tribunal, Aurangabad in Reference (IT) No. 08 of 2014 is set aside and the Reference is remitted back to the Tribunal and restored on its file for decision afresh by granting an opportunity to the Respondent Union to prove that the Petitioner had engaged more than 100 employees in workman category.

B. Both parties shall have an opportunity to lead additional evidence, if they so desire.

C. All contentions on merits of the matter are left open. The Industrial Tribunal, Aurangabad shall decide the reference without being influenced by any of the observations made in this order as expeditiously as possible and preferably within a period of six (06) months from today.

E. Rule is made absolute in above terms. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]

bsb/Nov. 22