CASE NO.:
Appeal (civil) 8453-54 of 2002

PETITIONER:
Mangt.of M/s Sonepat Coop.Sugar Mills Ltd.

RESPONDENT:
Ajit Singh

DATE OF JUDGMENT: 14/02/2005

BENCH:
N. Santosh Hegde & S.B. Sinha

JUDGMENT:
JUDGMENT
W I T H

CIVIL APPEAL NO.8455 OF 2002

S.B. SINHA, J :

These appeals are directed against the judgments and orders dated 04.09.2001 in L.P.A. Nos. 1311 of 1991 and 1356 of 1991 and 7.3.2002 in L.P.A. No. 1356 of 1991 passed by the High Court of Punjab and Haryana.

INTRODUCTORY FACT:
The Respondent herein was appointed by the Appellant in the post of Legal Assistant; the qualification wherefor was degree in law with a practicing licence. The nature of his duties was to prepare written statements and notices, recording enquiry proceedings, giving opinions to the Management, drafting, filling the pleadings and representing the Appellant in all types of cases, viz., civil, labour and arbitration references independently. He was also conducting departmental enquiries against the workmen employed in the industrial undertaking of the Appellant. He was placed on probation. While he was serving the Appellant in the said capacity, allegedly a decision was taken to abolish the said post pursuant to the recommendations of the Federation of Cooperative Sugar Mills Ltd., as a result whereof his services were dispensed with.

An industrial dispute was raised by the Respondent which was eventually referred to the Labour Court by the Appropriate Government for adjudication as regard the question as to whether the termination of his services was justified.

LABOUR COURT:
A contention was raised by the Appellant herein before the Labour Court that having regard to the nature of duties performed by the Respondent, he would not be a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 (for short, 'the Act'). The Labour Court having regard to the rival contentions framed the following issues :

"1. Whether the applicant does not fall under the definition of workman;

2. Whether the termination of services of the workman is proper, justified and in order? If not, to what relief he is entitled?"

The question as to whether the Respondent was a workman or not was taken up as a preliminary issue and by an order dated 24.9.1982, the Labour Court opined that the job performed by the Respondent was of 'legal clerical nature' and, thus, he would be a 'workman' within the meaning of

the provisions of the Act. In its award dated 13.11.1984, the Labour Court came to the conclusion that the Respondent, having been retrenched from services by the Appellant without complying with the provisions of Section 25F of the Act, should be directed to be reinstated with continuity of service and 50% back wages.

HIGH COURT PROCEEDINGS:

Aggrieved by and dissatisfied with the said award, both the Appellant and the Respondent filed writ petitions before the Punjab and Haryana High Court. A learned Single Judge of the said court by a judgment and order dated 30.8.1991, while upholding the finding of the Labour Court to the effect that the Respondent was a workman; upon consideration of the fact that he had since been practising as an advocate and was appointed as an Additional District Attorney in the year 1985, awarded an amount calculated at 50% back wages from the date of termination to the date of award, namely, 13th November, 1984 by way of compensation in lieu of his reinstatement in service.

The Respondent filed two Letters Patent Appeals against the said judgment. The Appellant, however, did not prefer any appeal there-against.

A Division Bench of the High Court by a judgment dated 4.9.2001, set aside the judgment of the learned Single Judge and restored the award of reinstatement passed by the Labour Court but rejected the contention of the Respondent that he was entitled to full back wages. It was, however, directed that the Respondent would be free to avail remedy under Section 33-C(2) of the Act for payment of wages for the period between the date of the award and the date of physical reinstatement.

In the said inter-court appeals, allegedly the name of the counsel for the Appellant had not been shown on the date of hearing and as such it was not represented. The Appellant preferred two Special Leave Petitions being Special Leave Petition (Civil) Nos. 4493 and 4494 of 2002 against the said judgment. However, on an application filed by the learned counsel appearing on behalf of the Appellant, the said Letters Patent Appeals were restored and by reason of an order dated 7.3.2002, the earlier directions issued on 4.9.2001 were sustained. In its judgment dated 7.3.2002, the Division Bench merely noticed the submissions made on behalf of the Appellant herein but otherwise the tenor of both the judgments is similar.

SUBMISSIONS:

Mr. Uday U. Lalit, learned Senior Counsel appearing on behalf of the Appellant, assailing the judgment of the High Court would submit that having regard to the nature of duties performed by the Respondent herein, he could not be held to be a workman within the meaning of Section 2(s) of the Act.

The learned counsel would contend that the fact that the Respondent was a practicising advocate and even after joining services, sought for non-practicising allowance, would clearly go to show that his job was akin to that of a practicising lawyer. The learned counsel would urge that the Labour Court, the learned Single Judge as also the Division Bench of the High Court committed a manifest error in holding that the Respondent was a workman on the premise that he was neither a Manager nor a Supervisor. Such an approach, Mr. Lalit, would argue, is contrary to the well-settled principles of law as regard interpretation of Section 2(s) of the said Act. According to the learned counsel, having regard to the fact that the decision of this Court in S.K. Verma vs. Mahesh Chandra and Another [(1983) 4 SCC 214] whereupon the Division Bench placed strong reliance and other decisions following the same having been held to have been rendered per incuriam by a Constitution Bench of this Court in H.R. Adyanthaya and Others vs. Sandoz (India) Ltd. and Others [(1994) 5 SCC 737], the impugned judgment cannot be sustained.

Mr. Lalit would submit that although the Appellant had not preferred

any appeal against the judgment and order passed by the learned Single Judge, having regard to the fact that the said finding of the High Court had been rendered without jurisdiction and in any event, the question that would fall for consideration before this Court on the admitted fact being a pure question of law, the principle of res judicata shall have no application in the instant case. Strong reliance in this behalf was placed on Mathura Prasad Bajoo Jaiswal and Others vs, Dossibai N.B. Jeejeebhoy [(1970) 1 SCC 613]

Mr. Ajay Siwach, learned counsel appearing on behalf of the Respondent, on the other hand, would contend that the Labour Court in its interim order dated 24.09.1982 while determining the preliminary issue had arrived at a finding that the Respondent was a workman as he had not been performing the duties in a supervisory or managerial capacity, as he had been mainly doing the job of a legal clerical nature which having been upheld by the learned Single Judge as well as the Division Bench of the High Court, the impugned judgments should not be interfered with. The learned counsel would contend that in any event as the Appellant has not preferred any appeal against the judgment of the learned Single Judge, the same had attained finality and, thus, this Court should not permit the Appellant to raise the contention there-against as to whether the Respondent is a workman or not. Reliance in this behalf has been placed on K.K. John vs. State of Goa [(2003) 8 SCC 193].

DETERMINATION:
Workman:

Section 2(s) of the Act reads as under :
"(s) "Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature,."

A bare perusal of the aforementioned provision clearly indicates that a person would come within the purview of the said definition if he : (i) is employed in any industry; and (ii) performs any manual, unskilled, skilled, technical, operational, clerical or supervisory work.

Thus, a person who performs one or the other jobs mentioned in the

aforementioned provisions only would come within the purview of definition of workman. The job of a clerk ordinarily implies stereotype work without power of control or dignity or initiative or creativeness. The question as to whether the employee has been performing a clerical work or not is required to be determined upon arriving at a finding as regard the dominant nature thereof. With a view to give effect to the expression to do "any manual, unskilled, skilled, technical, operational, clerical or supervisory work", the job of the concerned employee must fall within one or the other category thereof. It would, therefore, not be correct to contend that merely because the employee had not been performing any managerial or supervisory duties, ipso facto he would be a workman.

In Miss A. Sundarambal vs. Government of Goa, Daman and Dieu and Others [(1988) 4 SCC 42], teachers serving in an educational institution being not found to be performing any duty within the aforementioned category has been held not to be workmen. Similarly, an advertising manager, a chemist employed in a sugar mill, gate sergeant in charge of watch and ward staff in a tannery, a welfare officer in a commercial educational institution have also not been held to be workmen. The Respondent had not been performing any stereotype job. His job involved creativity. He not only used to render legal opinions on a subject but also used to draft pleadings on behalf of the Appellant as also represent it before various courts/authorities. He would also discharge a quasi-judicial functions as an Enquiry Officer in departmental enquiries against the workmen. Such a job, in our considered opinion, would not make him a workman.

In S.K. Verma (supra), this Court without taking into consideration the earlier binding precedents and in particular the decision of May & Baker (India) Ltd. vs. Workmen [AIR 1967 SC 678] arrived at a conclusion that an employee who does not perform any supervisory or managerial nature of duties, would be a workman. S.K. Verma (supra) was held to have been rendered per incuriam by a Constitution Bench of this Court in H.R. Adyanthaya (supra).

The question came up for consideration recently before this Court in Mukesh K. Tripathi vs. Senior Divisional Manager, LIC and Others [(2004) 8 SCC 387], wherein it was held :

"Once the ratio of May and Baker (supra) and other decisions following the same had been reiterated despite observations made to the effect that S.K. Verma (supra) and other decisions following the same were rendered on the facts of that case, we are of the opinion that this Court had approved the reasonings of May and Baker (supra) and subsequent decisions in preference to S.K. Verma (supra).

The Constitution Bench further took notice of the subsequent amendment in the definition of 'workman' and held that even the Legislature impliedly did not accept the said interpretation of this Court in S.K. Verma (supra) and other decisions.

It may be true, as has been submitted by Ms. Jaisingh, that S.K. Verma (supra) has not been expressly overruled in H.R. Adyanthaya (supra) but once the said decision has been held to have been rendered per incuriam, it cannot be said to have laid down a good law. This Court is bound by the decision of the Constitution Bench.

This court opined :

"The definition of 'workman' as contained in Section 2(s) of the Industrial Disputes Act, 1947 includes an apprentice, but a 'workman' defined under the Industrial Disputes Act, 1947 must conform to the requirements laid down therein meaning thereby, inter alia, that he must be working in one or the other capacities mentioned therein and not otherwise.

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A 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 must not only establish that he is not covered by the provisions of the Apprentices Act but must further establish that he is employed in the establishment for the purpose of doing any work contemplated in the definition. Even in a case where a period of apprenticeship is extended, a further written contract carrying out such intention need not be executed. But in a case where a person is allowed to continue without extending the period of apprenticeship either expressly or by necessary implication and regular work is taken from him, he may become a workman. A person who claims himself to be an apprentice has certain rights and obligations under the statute."

The said decision has been followed by this Court in U.P. State Electricity Board vs. Shiv Mohan Singh and Another [(2004) 8 SCC 402].

It is now trite that the issue as to whether an employee answers the description of a workman or not has to be determined on the basis of a conclusive evidence. The said question, thus, would require full consideration of all aspects of the matter.

The jurisdiction of the Industrial Court to make an award in the dispute would depend upon a finding as to whether the concerned employee is a workman or not. When such an issue is raised, the same being a jurisdictional one, the findings of the Labour Court in that behalf would be subject to judicial review.

The High Court furthermore applied wrong legal tests in following S.K. Verma (supra) in upholding the views of the Labour Court which itself approached the matter from a wrong angle. The Labour Court as also the High Court also posed a wrong question unto themselves and, thus, misdirected themselves in law.

In Cholan Roadways Limited Vs. G. Thirugnanasambandam [2004 (10) SCALE 578], this Court held:

"34\005In the instant case the Presiding Officer, Industrial Tribunal as also the learned Single Judge and the Division Bench of the High Court misdirected themselves in law insofar as they failed to pose unto themselves correct questions. It is now well-settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of Res ipsa loquitur which was relevant for the purpose of this case and, thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not garmane for determining the issue, namely, the passengers of

the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the correct standard of proof in relation to a domestic enquiry, which in "preponderance of probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out."

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In this view of the matter, the impugned award and the judgments are not legally sustainable.

RES-JUDICATA

It is true that the Appellant did not challenge the judgment of the learned Single Judge. The learned Judge in support of his judgment relied upon an earlier decision of the High Court in Rajesh Garg vs. Management of Punjab State Tube-well Corporation Limited and Another [1984 (3) SLR 397] but failed to consider the question having regard to the pronouncements of this Court including H.R. Adyanthaya (supra). Rajesh Garg (supra) was rendered following S.K. Verma (supra), which being not a good law could not have been the basis therefor.

The principle of res judicata belongs to the domain of procedure. When the decision relates to the jurisdiction of a court to try an earlier proceedings, the principle of res judicata would not come into play. [See Mathura Prasad Bajoo Jaiswal (supra)].

An identical question came up for consideration before this Court in Ashok Leyland Ltd. vs. State of Tamil Nadu and Another [(2004) 3 SCC 1] wherein it was observed :

"The principle of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppel, waiver or res judicata\005"

It would, therefore, be not correct to contend that the decision of the learned Single Judge attained finality and, thus, the principle of res judicata shall be attracted in the instant case.

Reliance placed by the learned counsel on K.K. John (supra) is misplaced. In that case a part of the award was remitted by the court in exercise of its jurisdiction under Section 16 of the Arbitration Act, 1940. Rejecting a contention that by reason of such remittance the entire award becomes void in terms of sub-section (3) of Section 16, it was held :

"In the present case, we find that the entire award was not remitted to the arbitrator. The arbitrator was only required to give determination on two points, and, therefore, sub-section (3) is not applicable in the present case. Parliament advisedly has restricted sub-section (3) of Section 16 of the Act to an award which would mean the whole award or a part of it. The valid part of the award always remains enforceable in a court of law. What can be held to be void is that part of the award which has not been made a rule of court by sustaining the objections raised with regard thereto inter alia on the ground that the same suffers from an error apparent on the face of the record or for any other reason; in the event the arbitrator or umpire fails to reconsider it and submit his decision within the time fixed therefor by the court. In other words, the word "award" within the meaning of sub-section (3) would also include a part of the award,

which has been the subject-matter of the order of remission by the competent court. In any view of the matter, the applicability of sub \026section (3) of Section 16 of the Act, in the facts and circumstances of the present case, does not arise inasmuch as the matter is still pending before the arbitrator\005"

Furthermore, we are of the opinion that the law operating in the field must be stated with precision and clarity and in that view of the matter also it was necessary for us to deal with the legal question raised by Mr. Lalit.

CONCLUSION:

For the reasons aforementioned, the impugned judgments of the Labour Court and the High Court cannot be upheld. They are set aside accordingly. However, in the facts and circumstances of this case and particularly in view of the fact that the Appellant was agreeable to pay 50% back wages to the Respondent, as directed by the learned Single Judge and further having regard to the fact that a substantial portion thereof is said to have already been paid, we would direct the Appellant to pay the balance amount, if any, to the Respondent in terms thereof within eight weeks from today.

The appeals are allowed with the aforementioned directions. In the facts and circumstances of the case, there shall be no order as to costs.