



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5862 OF 2018

Kiran P. Pawar ...Petitioner
Versus
Bata India Ltd. ...Respondent

**WITH
WRIT PETITION NO. 2606 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Mr. Paul Solomon Raja ...Respondent

**WITH
WRIT PETITION NO. 1758 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Kiran P. Pawar ...Respondent

**WITH
WRIT PETITION NO. 2585 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Devan Jagdishchandra Tolia ...Respondent

**WITH
WRIT PETITION NO. 2586 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Sachin Narsayya Nagarkar ...Respondent

**WITH
WRIT PETITION NO. 2587 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Kalyanrao Shankar Shinde ...Respondent

**WITH
WRIT PETITION NO. 2588 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Rajendra Chandrashekhar Deshpande ...Respondent

**WITH
WRIT PETITION NO. 2589 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Madhukar Prabhakar Ingale ...Respondent

**WITH
WRIT PETITION NO. 2590 OF 2018**

M/s. Bata India Ltd. ...Petitioner
Versus
Makrand Borkar ...Respondent

**WITH
WRIT PETITION NO. 5668 OF 2018**

Makarand Borkar ...Petitioner
Versus
Bata India Ltd. ...Respondent

**WITH
WRIT PETITION NO. 8024 OF 2018**

Rajendra Chandrashekhar Deshpande ...Petitioner
Versus
Bata India Ltd. ...Respondent

**WITH
WRIT PETITION NO. 8026 OF 2018**

Deven Jagdishchandra Tolia ...Petitioner
Versus
Bata India Ltd. ...Respondent

**WITH
WRIT PETITION NO. 6953 OF 2018**

Sachin Narsayya Nagarkar ...Petitioner
Versus
Bata India Ltd. ...Respondent

**WITH
WRIT PETITION NO. 5667 OF 2018**

Madhukar Prabhakar Ingle ...Petitioner
Versus
Bata India Ltd. ...Respondent

**WITH
WRIT PETITION NO. 6948 OF 2018**

Kalyanrao Shankar Shinde ...Petitioner
Versus
Bata India Ltd. ...Respondent

JUDGMENT:

THE CHALLENGE

Bata India Ltd. (**Bata**), a familiar name in Indian households, manufacturing footwear for Indians for the last several decades decided to operate its showrooms in Mumbai, Thane and Pune for 7 days in a week in the year 2007 with extended hours to reduce losses. Bata's this decision created a rift between the company and some of its salesmen, who were not willing to work as per roster prepared by Bata. Refusal to work as per roster by its salesperson was treated as misconduct by Bata leading to discontinuation of services of some of its salespersons in the year 2007. The salesmen approached Labour Court by filing complaints under provisions of Section 28(1) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (**MRTU & PULP Act**). Bata questioned the status of such salesman as 'workman' under the Industrial Disputes Act 1947 and consequently as 'employee' under the MRTU & PULP Act. Labour Court has however held those salesmen as workmen under the provisions of Industrial Disputes Act and 'employees' under MRTU & PULP Act and held the complaints to be maintainable. In two sets of complaints, Bata is before this Court challenging findings on preliminary point of status of salesman as workman. In rest of complaints, the Labour Court, while holding

salesman as workman, went into the merits of the termination Orders and has set aside the same directing payment of 50% backwages. Bata has challenged the Labour Court's decision directing reinstatement and 50% backwages whereas the salesmen, on the other hand, are aggrieved by non-grant of 100% backwages and accordingly have filed their own petitions.

2. Thus, Writ Petition Nos. 1815 of 2016 and 2606 of 2018 are filed by Bata challenging the Order of Labour Court on preliminary issue holding the complainants as 'workman' under Section 2(s) of the Industrial Disputes Act, 1947 (**ID Act**) and as 'employee' under Section 3(5) of the MRTU & PULP Act. Bata has unsuccessfully tested the decision of Labour Court before the Industrial Court and its Revision Applications are dismissed. The Orders of Industrial Court dismissing the revision applications are also under challenge in Writ Petition No.1815 of 2016 and Writ Petition No. 2606 of 2018.

3. In respect of 7 Complainants, whose complaints are allowed by Labour Court by setting aside the Order of termination, Bata has filed Writ Petition Nos. 2606/2018, 1758/2018, 2585/ 2018, 2586/2018, 2589/2018, 87/2018, 2588/2018 and 2590/ 2018. In those petitions, Bata has also challenged Orders of the Industrial Court by which its Revision Applications are rejected upholding the Orders passed by the

Labour Court.

4. The Complainants are also aggrieved by the decisions of the Labour Court to the extent of denial of 50% backwages and accordingly they have filed Writ Petition Nos. 5668 of 2018, 8024 of 2018, 8026 of 2018, 6953 of 2018, 5766 of 2018, 1489 of 2018 and 5829 of 2018. In their petitions, the Complainants have also challenged Orders of the Industrial Court rejecting their Revision Petitions and upholding the Orders passed by the Labour Court.

FACTS

5. Having summarized the exact challenge involved in the group of present petitions, it is necessary to narrate few basic facts. Bata is a company incorporated and registered under the provisions of Companies Act 1956 having its registered office at Kolkata. It also has retail shop offices at Mumbai, Thane and Pune. It is engaged in business of manufacturing and sale of shoes and footwear and other allied accessories. It had several manufacturing factories, branch offices and at about 1200 retail shops all over the country at the time of filing of the petitions.

6. In showrooms of Bata, there are various categories of employees such as shop manager, salesman, shop assistant, cashier and repairman, etc. The employees involved in the present petitions were

employed on the position of 'salesman' in various showrooms of Bata. Bata has given detailed description of duties and responsibilities of a salesmen deployed in its retail outlets. Bata sought for permission from Government of Maharashtra to keep its shops open for 07 days in a week and during extended work hours with a view to improve its sales. Accordingly, by Notification dated 02 February 2007, the State Government granted permission to Bata to keep its retail outlets open for 07 days in a week and during extended working hours subject to various conditions. One of the conditions was to give a weekly holiday to each employee and that the shops must be shut by 9:30 pm. Bata accordingly issued notices to the employees employed in the showrooms in November 2007 giving them intimation about the permission granted by the State Government. Bata prepared a duty chart with a view to man its showrooms during the extended hours for keeping them open for 07 days in a week. It appears that some of the salesmen in the showrooms were not willing to accept the sudden change in the working hours. They were also not happy with the idea of not having a designated day as a weekly holiday. Some of the salesmen therefore did not accept the change of duty roster. Bata therefore issued chargesheets to those salesmen who refused to work as per the duty roster. For the charge of failure to report to work as per the assigned duty roster, the salesmen were held guilty and their services were terminated by payment of one months' salary. However, they were offered reinstatement subject to condition of submitting a good conduct bond (undertaking) within a period of 72

hours from receipt of termination letter.

7. The terminated salesmen approached Labour Courts by filing Complaints under Section 28 of the MRTU & PULP Act. The Complaints were resisted by Bata raising a preliminary objection of maintainability on the ground that a salesman employed in its showrooms is not a 'workman' under Section 2(s) of the ID Act. Termination Orders were also justified on merits. In two Complaints, the Labour Court proceeded to answer preliminary point of maintainability against Bata holding that the Complainants are workmen. Bata unsuccessfully challenged Labour Court's decision in revision before the Industrial Court and upon dismissal of its revisions, has filed Writ Petition Nos. 1815 of 2016 and 2606 of 2018. In rest of the cases, the Labour Court not only held the Complainants to be workmen, but proceeded to set aside the termination orders by directing reinstatement with 50% backwages. In respect of Complainants whose complaints are finally decided, two sets of Revision Petitions were filed before Industrial Court both by Bata as well as by the Complainants. While Bata was aggrieved by the entire Orders of the Labour Court, the Complainants on the other hand challenged Orders of the Labour Court to the limited extent of denial of 50% backwages. The Industrial Court however upheld the decisions of the Labour Court by dismissing Revision Applications filed by Bata as well as of Complainants. Accordingly, the present petitions are filed both by Bata as well as employees.

SUBMISSIONS

8. Mr. Talsania, the learned senior advocate would appear on behalf of Bata and submit that Industrial Court has erred in holding the salesmen employed by Bata as 'workmen' under the ID Act and consequently 'employees' under the MRTU & PULP Act. That sales promotion employees constitute a totally different class of persons, who are not covered by definition of the term 'workman' under ID Act. That since the sales promotion employees are not covered by definition of the term 'workman', the legislature has enacted separate enactment by name Sales Promotion Employees (Conditions of Service) Act 1976 (**SPE Act**). That the definition of the term 'employee' under the MRTU & PULP Act came to be amended in the year 1999 by including sales promotion employees under SPE Act in the definition of the term 'employee'. That if sales promotion employees were to be treated as workmen, there was no necessity of including them separately in the definition of the term 'employee'. Mr. Talsania would further submit that the provisions of SPE Act 1976 are at the moment restricted only to the sales promotion employees engaged in the establishment of pharmaceutical industry as no other establishment has been included in the SPE Act 1976. He would therefore submit that the sales promotion employees working in other establishments than pharmaceutical industry are not covered by the definition of the term 'employee' under the MRTU & PULP Act. He would therefore submit that the Labour Court did not have jurisdiction

to entertain the complaints filed by salesmen engaged in retail outlets of Bata.

9. Mr. Talsania would take me through the evidence recorded in some of the complaints to demonstrate that there is an admission of receipt of commission by the complainants. That the duties and responsibilities attached to a salesman are such that they do not perform any manual, unskilled, skilled or technical job. That the work of a salesman engaged in retail outlets of Bata is essentially to promote sale of the products to the customers. That therefore the complainants otherwise cannot be treated as workmen under the provisions of the ID Act.

10. Mr. Talsania would rely upon Judgment of the Apex Court in *H. R. Adyanthaya & Ors. Vs. Sandoz (India) Ltd. & Ors.*, (1994) 5 SCC 737 in support of his contention that the issue with regard to inclusion of sales promotion employees in the definition of 'workman' has finally been decided by the Apex Court and that therefore the complaints filed by salesmen under the provisions of MRTU & PULP Act cannot be entertained. He would also place reliance on the Judgment of the Apex Court in *Miss A. Sundarambal Vs. Government of Goa, Daman and Diu & Ors.*, (1988) 4 SCC 42 in support of his contention that any employee who does not satisfy any of the 4 categories of manual, unskilled, skilled, supervisory, technical or clerical work cannot be treated as a 'workman' under the provisions of the ID Act.

11. So far as the merits of the decisions of Labour and Industrial Courts are concerned, Mr. Talsania would submit that the Complainants committed misconduct, on account of which they were served with memoranda of charge sheet. That the misconduct in not performing duties as per roster is proved and that therefore production of any evidence was not necessary. Alternatively, Mr. Talsania would submit that Bata could have led evidence before the Labour Court, if it was found that the proof of misconduct was not established. He would submit that Bata had given clear offer to the employees to report back to duties even after termination by filing undertaking. That despite such a clear offer, none of the terminated employees came back for work, which is indicative of their lack of interest to work with Bata. That in such circumstances, Industrial Court has erred in setting aside termination and directing reinstatement.

12. Mr. Paranjape, the learned counsel would appear on behalf of some of the employees. He would submit that since sales promotion employees are now covered by definition of the term 'employee' under MRTU & PULP Act, the issue of maintainability of complaints filed by the Complainants has been rendered academic. He would further submit that the Labour Court has come to a specific conclusion that the complainants were not performing work of sales promotion activities, but merely doing work of salesman. That the Labour Court has appreciated

evidence with regard to nature of duties and has arrived at a finding that primary duties of the complainants were manual, unskilled, skilled and clerical. That these findings have been confirmed by the Industrial Court and therefore this Court would be loathe in interfering with the same in exercise of its jurisdiction under Article 227 of the Constitution of India. He would place reliance on the Judgment of Apex Court in *Pepsico India Holding Private Limited Vs. Krishna Kant Pandey*, (2015) 4 SCC 270. Mr. Paranjape would further submit that Bata has failed to establish or demonstrate that nature of duties of complainants was that of sales promotion employees.

13. So far as the merits of the decision of Labour Court are concerned, Mr. Paranjape would submit that Notification dated 02 February 2007 required consent of the concerned employees before placing them on duty on a day of weekly holiday or other holiday. That such consent was never obtained by Bata before effecting any changes in the duty hours of the employees. Therefore, the very basis of issuance of charge-sheet for non-compliance with the terms of Notification dated 02 February 2007 was unfounded. That before changing any service conditions, it was mandatory to issue notices as required under Section 9A of the ID Act and mere issuance of Notification dated 02 February 2007 by the State of Maharashtra would not have any overriding effect over provisions of Section 9A of the Central Act. That the Standing Orders, under which charge-sheet was issued, were admittedly not

certified standing orders as has been held by the Labour Court. That there was never any admission of guilt on the part of complainants at any stage and therefore termination without holding any enquiry was *ex-facie* illegal. That no attempt was made by Bata to prove misconduct before the Labour Court and *Bata* never sought to produce evidence to establish misconduct. That therefore Labour Court has rightly set aside termination of the employees.

14. So far as the issue of backwages is concerned, Mr. Paranjape would submit that Labour Court has erred in granting only 50% backwages when the termination was found to be illegal. He would rely upon Judgment of the Apex Court in *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors*, (2013) 10 SCC 324 in support of his contention that employees are entitled to 100% backwages with consequential benefits and continuity in service consequent to reinstatement.

15. Mr. Arjunwadkar, the learned counsel appearing for employees in Writ Petition Nos.1815 of 2016 and 2060 of 2018 would adopt submissions of Mr. Paranjape. Additionally, he would rely upon Judgment of the Gujarat High Court in *Bata India Ltd. A Company, Calcutta Versus B. H. Nathani*, 1077 (0) AIJ-GJ 223985 in support of his contention that in respect of very same employer, it is held that salesmen

employed by Bata in its retail outlets are 'workman' within the definition of Section 2(s) the ID Act.

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

17. The moot issue involved in the present petition is whether complainants, who are employed as salesmen in various retail outlets of *Bata*, could be treated as workmen under provisions of ID Act and consequently 'employee' under the provisions of the MRTU & PULP Act. Answering this issue would determine jurisdiction of the Labour Court to entertain the complaints filed by the employees. It is the contention of *Bata* that salesmen employed by it at its retail outlets are not covered by definition of the term 'workman' under the Industrial Disputes Act. The term 'workman' is defined under section 2(s) of the Industrial Dispute Act as under :-

2(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 [ten thousand rupees] per mensem or exercise, 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.

18. Thus, every person employed in any industry doing any manual, unskilled, skilled, technical, operational, clerical or supervisory work is treated as a 'workman'. It is the case of *Bata* that salesmen employed at its retail outlets did not perform manual, unskilled, skilled, technical, operational or clerical work. According to *Bata*, the predominant duties of the salesmen are as under :-

- i) Promotion of sales of Company's products in the retail outlets;
- ii) Selling footwear to the customers who visit the shop using his salesmanship skill;
- iii) Canvassing sales of the Company's products;
- iv) To attend to customers who come to the shop to buy footwear by using skill of salesmanship, which essentially consists of greeting and inviting the customers into the shop, asking the customer his need or requirement qua various footwears, physically demonstrating by removing the old footwear and fitting him with the new footwear, explaining to the customer the advantages and usefulness of the particular footwear.

- v) Answering customer's queries with regard to the footwear that he wished to purchase and any specific need the customer may have with regard to use of footwear;
- vi) To persuade the customer to look at other comparable footwear and also explain to him the various varieties of footwear available which the customer can use during different times of the day and for different occasions and ensure that the customer is persuaded to buy the footwear.
- vii) As a salesman he was required to promote the sales by visiting to the institutions, schools, companies, melas and other places.

19. It is thus *Bata's* case that the main role of a salesman involves promotion of its business as a salesman essentially canvasses for sale of *Bata's* products to its customers and also indulges in actual selling of the products in the retail outlets. According to *Bata*, the job of a salesman involves following acts, once a customer approaches him/her in a retail outlet :-

- (i) Acknowledge with a smile within the first ten seconds of entering the stores;
- (ii) Treat with courtesy respect and understanding;
- (iii) Treat as a unique individual;
- (iv) Deal as professional sales person who can solve any issue;
- (v) Provide a quality product or service;
- (vi) Provide value for his money;
- (vii) tell the truth; and
- (viii) Apologise, take quick action and provide a remedy if things

are done wrong or do not measure up to standard.

20. It is contended by Bata that the a salesman need to follow 'Bata Five Steps' as under :-

Step 1: Greeting - smiling and acknowledging them to make them feel comfortable.

Step 2: Ask two Questions - The first question must be general to encourage conversation and the second one must be business related to determine the customer's needs. Both should be open-ended questions.

Step 3: Show Three Articles - consists of showing every customer three articles including one that matches his needs, one that matches his needs plus has added benefits at a higher price and an appropriate bestseller or slow mover as an alternative or as an add-on. When showing the article, the salesman should:

- (i) Seat the customer;
- (ii) Offer to measure his feet;
- (iii) Agree on the customer's needs;
- (iv) Review each feature and benefit of the article to establish value;
- (v) Encourage the customer to try on the product to create a sense of ownership;
- (vi) Check the fit - Bata 7 Point Fit Test;
- (vii) Assume that at least one article is sold;
- (viii) Respect the merchandise and be organized.

Step 4: Add-on and Close - Adding-on is the best service a salesperson can provide. It must be applied consistently to every single customer in order to increase average sale and turnover of

the Company. The salesperson should close the sale by listening for buying signals from the customer and overcoming objections by repeating and reinforcing the benefits of the products.

Step 5: Thank and Invite - The salesperson should thank and invite back both the purchasers and also the non-purchasers who may be the future customer.

21. Thus on the basis of above nature of duties and responsibilities, Bata claims that a salesman can never be a 'workman' under Section 2(s) of the Industrial Disputes Act.

22. Strong reliance is placed by Mr. Talsania on the Constitution Bench Judgment of the Apex Court in *H. R. Adyanthaya & Ors.* (supra). The issue before the Supreme Court was whether a medical representative is workman under Section 2(s) of the ID Act. The Apex Court referred to its earlier Judgment in *May & Baker (India) Ltd. V. Workman*, (1961) 2 LLJ 94 : AIR 1967 SC 678 in which the Apex Court has held that a medical representative of a company who was discharged from service was not a 'workman' under ID Act. The Apex Court has also referred to its decision in *Western India Match Co. Ltd. Vs. Workmen*, AIR 1964 SC 472 in which the issue was whether workmen employed by sales office of a company are entitled to payment of bonus on par with those employed in the factory and considering the nature of work done by those salesmen which involved 75% clerical work, the Apex Court held them to be workmen under the ID Act. The Apex Court also

considered its Judgment in *T. P. Srivastava Vs. National Tobacco Co. of India Ltd.*, (1992) 1 SCC 281 in which a Section Salesman of the company was not held to be workman' under the ID Act. The Apex Court also considered its judgment in *Burmah Shell Case* AIR 1971 SC 922 which involved cases of Sales Engineering Representatives and District Sales Representatives. After considering the various Judgments on the subject, the Constitution Bench in *H.R. Adyanathya and Ors.* (supra) in paragraph nos. 17, 22, 33, 37 and 39 has held as under :-

17. A still later decision of a two-Judge Bench of this Court in *T.P. Srivastava National Tobacco Co. of India Ltd* by referring to the decision in *Burmah Shell* case has also reiterated the law laid down in *May & Baker* case! There the employee concerned was a Section Salesman of the company whose services were terminated w.e.f. 12-7-1973. The Court held that in order to come within the definition of workman under the ID Act the employee had to be employed to do the work of one of the types referred to in the main body of the definition. The Court also referred to the Sales Promotion Employees (Conditions of Service) Act, 1976 and pointed out that the provisions of that Act were not made applicable to the employees of the company. The Court further pointed out that the object of the said Act would show that persons employed for sales promotion normally would not come within the definition of workman under the ID Act. The Court accordingly upheld the decision of the Labour Court that the employee was not a workman within the meaning of the ID Act.

22. In *Burmah Shell* case the workmen involved were Sales Engineering Representatives and District Sales Representatives. The dispute had arisen on 28-10-1967 when the categories of workmen doing supervisory and technical work stood included in the definition of workman. The Court found that the work done by the Sales Engineering Representatives as well as District Sales Representatives was neither clerical nor supervisory nor technical. An effort was made on behalf of the workmen to contend that the work of Sales Engineering Representatives was technical. The Court repelled that contention by pointing out that the amount of technical work that they did was ancillary to the chief work of promoting sales and the mere fact

that they possessed technical knowledge for such purpose, did not make their work technical. The Court also found that advising and removing complaints so as to promote sales remained outside the scope of the technical work. As regards the District Sales Representatives, the argument was that their work was mainly of clerical nature which was negated by the Court by pointing out that the clerical work involved was incidental to their main work of promoting sales. What is necessary further to remember in this case is that the Court relied upon its earlier decision in *May & Baker case*' and pointed out that in order to qualify to be a workman under the ID Act, a person concerned had to satisfy that he fell in any of the four categories of manual, clerical, supervisory or technical workman.

33. It was contended by Shri Sharma, appearing for the workmen that the definition of workman under the ID Act includes all employees except those covered by the four exceptions to the said definition. His second contention was that in any case, the medical representatives perform duties of skilled and technical nature and, therefore, they are workmen within the meaning of the said definition. We are afraid that both these contentions are untenable in the light of the position of law discussed above. The first contention was expressly negated by two three-Judge Benches in *May & Baker* and *Burmah Shell* cases as has been pointed out in detail above. As regards the second contention, it really consists of two sub-contentions, viz., that the medical representatives are engaged in 'skilled' and 'technical' work. As regards the word 'skilled', we are of the view that the connotation of the said word in the context in which it is used, will not include the work of a sales promotion employee such as the medical representative in the present case. That word has to be construed *eiusdem generis* and thus construed. would mean skilled work whether manual or non-manual, which is of a genre of the other types of work mentioned in the definition. 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. Hence the contention that the medical representatives were employed to do skilled work within the meaning of the said definition, has to be rejected. As regards the 'technical' nature of their work, it has been expressly rejected by this Court in *Burmah Shell* case. Hence that contention has also to be rejected.

37. We are afraid that these contentions are not well placed. We have already pointed out as to why the word 'skilled' would not include the kind of work done by the sales promotion employees. For the very

same reason, the word 'operational' would also not include the said work. To hold that everyone who is connected with any operation of manufacturing or sales is a workman would render the categorisation of the different types of work mentioned in the main part of the definition meaningless and redundant. The interpretation suggested would in effect mean that all employees of the establishment other than those expressly excepted in the definition are workmen within the meaning of the said definition. The interpretation was specifically rejected by this Court in *May & Baker, WIMCO2, Burmah Shell and A. Sundarambal* cases. Although such an interpretation was given in *S.K. Verma, Delton Cable and Ciba Geigy* cases the legislature impliedly did not accept the said interpretation as is evident from the fact that instead of amending the definition of 'workman' on the lines interpreted in the said latter cases, the legislature added three specific categories, viz.. unskilled, skilled and operational. The 'unskilled' and 'skilled' were divorced from 'manual' and were made independent categories. If the interpretation suggested was accepted by the legislature, nothing would have been easier than to amend the definition of 'workman' by stating that any person employed in connection with any operation of the establishment other than those specifically excepted is a workman. It must further be remembered that the independent categories of 'unskilled', 'skilled' and 'operational' were added to the main part of the definition after the SPE Act was placed on the statute book. The reliance placed on the aforesaid observation in *Kasturi and Sons* case is, also not correct. In that case the Court was considering the question whether Section 17 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 empowered the authorities specified by it to adjudicate upon the merits of the claim made by a newspaper employee against his employer under any of the provisions of that Act. Section 17 read as follows:

“17. Recovery of money due from an employer- Where any money is due to a newspaper employee from an employer under any of the provisions of this Act, whether by way of compensation, gratuity or wages, the newspaper employee may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government or such authority as the State Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the collector and the collector shall proceed to

recover that amount in the same manner as an arrear of land revenue.”

39. We are, therefore, of the view that the contention raised on behalf of the management in this appeal, viz., since the medical representatives are not workmen within the meaning of the Maharashtra Act the complaint made to the Industrial Court under that Act was not maintainable, has to be accepted. Hence the complaint filed by the appellant-workmen under the Maharashtra Act in the present case was not maintainable and hence it was rightly dismissed by the Industrial Court.

23. By relying on Constitution Bench Judgment in **H. R. Adyanathaya**, Mr. Talsania has strenuously contended that employees engaged in sales promotion activities can never be treated as ‘workman’ under Section 2(s) of the ID Act.

24. Mr. Talsania has also relied on Judgment of the Apex Court in **A. Sundarambal** (supra) in which the Apex Court considered the question as to whether a teacher in the school falls in any of the 4 categories of ‘manual, unskilled, skilled, supervisory, technical or clerical work’. The Court in paragraph No.9 held as under :-

9. We are concerned in this case primarily with the meaning of the words ‘skilled or unskilled, manual, supervisory, technical or clerical work’. If an employee in an industry is not a person engaged in doing work falling in any of these categories, he would not be a workman at all even though he is employed in an industry. The question for consideration before us is whether a teacher in a school falls under any of the four categories, namely, a person doing any skilled or unskilled manual work, supervisory work, technical work or clerical work. If he does not satisfy any one of the above descriptions he would not be a workman even though he is an employee of an industry as settled by

this Court in *May and Baker (India) Ltd. v. Workmen*. In that case this Court had to consider the question whether a person employed by a pharmaceutical firm as a representative (for canvassing orders) whose duties consisted mainly of canvassing orders and any clerical or manual work that he had to do was only incidental to his main work of canvassing could be considered as a workman as defined in the Act. Dealing with the said question Wanchoo, J. (as he then was) observed thus:

A 'workman' was then defined as any person employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward. Therefore, doing manual or clerical work was necessary before a person could be called a workman. This definition came for consideration before industrial tribunals and it was consistently held that the designation of the employee was not of great moment and what was of importance was the nature of his duties. If the nature of the duties is manual or clerical, then the person must be held to be a workman. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be a workman. It has, therefore, to be seen in each case from the nature of the duties whether a person employed is a workman or not under the definition of that word as it existed before the amendment of 1956. The nature of the duties of Mukerjee is not in dispute in this case and the only question therefore is whether looking to the nature of the duties it can be said that Mukerjee was a workman within the meaning of Section 2(s) as it stood at the relevant time. We find from the nature of the duties assigned to Mukerjee that his main work was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he had to work. In the circumstances the tribunal's conclusion that Mukerjee was a workman is incorrect. 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. We therefore set aside the order of the tribunal directing reinstatement of Mukerjee along with other reliefs.

25. Thus, the law now appears to be well settled that employees who are engaged purely on sales promotion activities cannot be treated as 'workman' under Section 2(s) of the ID Act. A reference here must be made to the provisions of SPE Act 1976. The Act has been enacted to regulate certain conditions of service of Sales Promotion Employees in certain establishments. A 'Sales Promotion Employee' is defined under Section 2(d) of the SPE Act 1976 as under :-

2. Definitions -

[(d) "sales promotion employee" means any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sale or business, or both, but does not include any such person -

- (i) who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem; or
- (ii) who is employed or engaged mainly in a managerial or administrative capacity.

26. Thus, any person employed to do work relating to promotion of sales or business or both but who is not engaged in supervisory capacity or any ministerial or administrative capacity, becomes a Sales Promotion Employee. However, the definition of the term sales

promotion employee makes reference to 'establishment'. The word 'establishment' is defined under Section 2(a) of the SPE Act as under :

2. Definitions -

- (a) "establishment" means an establishment engaged in pharmaceutical industry or in any notified industry;

27. Thus, the definition of term Sales Promotion Employee is restricted only to an establishment engaged in pharmaceutical industry. It is common ground that provisions of SPE Act 1976 have not been notified in respect of any other industries. Thus, as of now only a person engaged on the job of promotion of sales or business in a pharmaceutical industry is treated as Sales Promotion Employee under the SPE Act 1976.

28. Mr. Paranjape has relied upon amended definition of term 'employee' under Section 3(5) of the MRTU & PULP Act which reads thus :-

Section 3 : Definitions :

- (5) "employee", in relation to an industry to which the Bombay Act for the time being applies, means an employee as defined in clause (13) of section 3 of the Bombay Act, and in any other case, means a workman as defined in clause (s) of Section 2 of the Central Act, and a sales promotion employee as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976].

29. Thus every Sales Promotion Employee as defined under Section 2(d) of SPE Act 1976 automatically become an 'employee' within the meaning of MRTU & PULP Act and is entitled to file complaint under Section 28 of that Act before Labour Court or Industrial Court. However, since the provisions of SPE Act are admittedly not extended / notified to the establishment of *Bata*, the salesmen of Bata can neither be treated as Sales Promotion Employee under SPE Act 1976 nor 'employee' on that strength under the MRTU & PULP Act. Therefore it is necessary for salesmen of Bata to prove that they are workmen on the strength of nature of duties and responsibilities performed by them.

30. The Constitution Bench in *H. R. Adyanthaya* (supra) dealt with cases of medical representatives. Such medical representatives essentially promote business of industry. On the contrary, duties and responsibilities of a salesman employed in retail outlet cannot be restricted only to sales promotion activities of that outlet. It would be unfair to place salesmen employed in a retail outlet with a medical representatives engaged purely for the purpose of promoting sales of products of a company. A salesman engaged in a retail outlet of *Bata*, in addition to performing duties of promoting sales, also performs multifarious functions including actual sale of products. The Labour Court has considered nature of duties and responsibilities of a salesman engaged in retail outlets of *Bata*. It has taken into consideration the

standing orders and regulations formulated by Bata, under which the duties of a salesman are notified as under:

A. Duties of Salesman / Salesgirl :-

(a) To receive customers politely and smilingly with greetings and offer seat.

(b) To sell company's merchandise and render proper services to customers by taking off old shoes from customers' feet and trying on new ones, examining customer's old shoes and recommending repairs, receiving shoes for repairs and issuing of repair slips, sending shoes for repairing and effecting delivery when received after proceeding, recommending pedicure treatment, if needed.

(c) To make out proper cash memos for the merchandise sold and to receive cash from customers and hand it over to cashier, to pack the merchandise sold and deliver the same along with cash memos to the customers and to maintain proper evidence for repair of shoes.

(d) To maintain the stock he is responsible for, in proper order and cleanliness, to clean show-cases, show-windows, podium and arrange displays entrusted to him, to mark prices on shoes other merchandise whenever required, to help maintaining furniture in good and proper order.

(e) To report Manager on any article falling short of our standard quality or found missing from shop.

(f) To fill daily his record of individual sale (Daily Mirror) every day timely, prepare inventories of stock and furniture and to do such administrative work as may be required of him and also to prepare weekly or fortnightly statement.

(g) To help the Manager in opening and closing the shop and fixing posters and other works as may be deemed to be necessary by the Manager.

(h) To help the Manager in packing and dispatching of goods to Sales Office / respective Retail Chain Office or any other shops or other stations whenever required.

(i) To work on behalf of the Manager as and when required during his absence from the shop in the ordinary course of the day to day work and business. To do all other work necessary and connected with the shop and helping the Manager in all respects to promote sale of the Company's merchandise.

(j) To bring to the notice of the Manager or other superior officer any discrepancy or irregularity found by him in the shop affecting the welfare and reputation of the same and to give suggestions for improvement of business and rectification of such defects.

(k) To receive consignment, control quality of stock and arrange stock on racks and maintain them properly after cleaning.

31. Considering nature of duties assigned to a salesman or salesgirl, it is clear that in addition to merely promoting sale of products, they have to perform various other duties such as preparation of cash memo, packing of mercantile, maintenance of stock, marking of prices, reporting shortage of stock, preparation of inventories of stock and furniture, perform administrative work, to help manager in opening and closing of the shop, to fix posters, to help manager in packing and dispatching goods, to receive consignments, to control quality of stock, to set stock on racks, etc. After considering such nature of duties and responsibilities of salesman employed in retail outlets of *Bata*, it is difficult to hold that they do not perform manual, unskilled, skilled or clerical nature of job or that they are engaged only on the job of promoting sales.

32. Therefore, reliance of Mr. Talsania on Constitution Bench judgment in *H. R. Adyanthaya* (supra) to draw parallel between medical representatives and salesman of *Bata* is clearly misplaced. An employee in a shop, who is branded as 'salesman', who performs multifarious functions cannot be compared with a medical representative or a sales promotion employee whose job is essentially restricted to promoting sales. An employee preparing memos, assisting in opening and shutting of shops, maintaining stock etc cannot be treated as a one engaged solely for promoting sale. The Apex Court judgment in *A. Sundarambal* (supra) deals with issue of treatment of a teacher as workman and therefore the same would have no application to present case. Also, it cannot be held that the Complainants did not perform any manual or clerical work. They maintained stock, prepared cash memos, packed mercantile, assisted in opening and shutting of shops, etc.

33. In my view therefore, the Labour Court has correctly answered issue about status of salesman employed in retail outlets of *Bata* as workman. I do not find any patent error committed by the Labour Court in holding salesmen employed by *Bata* in its retail outlets as workmen within the meaning of Section 2(s) of the ID Act. The Industrial Court has rightly rejected the Revisions filed by the *Bata* on the issue of status of salesmen as workman.

34. Once it is held that salesmen employed by *Bata* are workman within the meaning of Section 2(s) of the I D Act, Writ Petition No.2606 of 2018 and 1815 of 2016, which are filed only challenging finding on preliminary issue, would fail and deserve to be dismissed.

35. In rest of the petitions, the Labour Court, after answering the preliminary issue of status of salesman as workman, has proceeded to determine correctness of termination orders issued by Bata. I have considered findings recorded by Labour and Industrial Courts on merits of termination orders. Admittedly Bata did not lead any evidence in the domestic inquiry to prove the alleged misconduct. *Bata* has taken a stand that termination is effected on account of misconduct committed by the employees in not following duties as per roster prepared by Bata in pursuance of the notification dated 02 February 2007 issued by the Government of Maharashtra permitting Bata to operate its outlets in Mumbai, Thane and Pune for 07 days a week during extended hours. It appears that to prove misconduct, charge-sheets were issued to the employees. However, it is admitted position that no enquiry was held to prove misconduct alleged in the charge-sheets. Mr. Talsania has attempted to canvas that enquiry was not necessary as charge was admitted. I find this submission to be totally misplaced as there is no admission on the part of any of complainants either before the employer or before the Labour Court. The services of the employees are terminated

without holding any enquiry and without offering any opportunity of defence. Therefore, no fault can be found in the orders passed by the Labour Court setting aside their terminations. Mr. Talsania did attempt to canvass before me that Labour Court ought to have given an opportunity to *Bata* to lead evidence to prove misconduct. However, I do not find any application being filed by *Bata* seeking liberty to prove misconduct by adducing evidence before Labour Court. Therefore, I do not find any merit in the contention that *Bata* ought to have been given an opportunity to lead evidence for proof of charge before the Labour Court. The contention is clearly afterthought and merits instant rejection.

36. I therefore do not find any error in the orders passed by Labour Court holding the termination of employees to be illegal. The Industrial Court has rightly rejected the Revisions filed by the *Bata* challenging the relief of reinstatement granted by the Labour Court.

37. Having held that the termination of the employees was illegal, the next issue is about exact relief that could be awarded to the employees. Labour Court has granted reinstatement with 50% backwages. Employees are aggrieved by the denial of 100% backwages and have filed their own Petitions challenging the Orders of the Labour and Industrial Courts denying 100% backwages. The employees were terminated from services on various dates. To illustrate, one of the

Complainants, Mr. Kiran Pawar has been terminated on 09 July 2007. On account of pendency of these petitions, the Complainants have neither been reinstated in service nor paid backwages. By now, substantial period of time has elapsed from the date of termination. The complaints remained pending before the Labour Court for considerable period of about 09 years. So far as the Complainant Shri. Kiran Pawar is concerned, by now period of 16 long years has elapsed. The Complainants are now at advanced ages. To illustrate, Mr. Kiran Pawar's age was described as 37 years as on 16 September 2010 and by now he must be about 50 years. Considering the nature of job of salesman and rapid advancement in the industry, it is not known whether the Complainants would now be in a position to discharge duties as salesman in the retail outlets of Bata effectively. In such circumstance, instead of directing reinstatement and payment of any backwages, in my view ends of justice would meet if the Complainants are awarded lump-sum compensation in the peculiar facts and circumstances of case. Since reinstatement is being denied to the Complainants, there is no question of entertaining the Petitions filed by them for grant of 100% backwages.

38. Next question is about quantification of such lump-sum compensation. The from the pleadings details of appointment, termination and last drawn wages of all Complainants appear to be as under:

Sr No	Writ Petition No.	Name of the employee	Date of Appointment	Termination Date	Last drawn wage
1.	5667/2018	Madhukar Prabhakar Ingle	28.07.1988	05.04.2007	13,600/-
2.	5668/2018	Makarand Borkar	10.02.1994	05.04.2007	20,800/-
3.	6948/2018	Kalyanrao Shankar Shinde	01.09.2001	05.04.2007	13,300/-
4.	6953/2018	Sachin Narsayya Nagakar	29.10.1998	05.04.2007	15,000/-
5.	8026/2018	Deven Jagdishchandra Tolia	28.07.1988	05.04.2007	17,900/-
6.	8024/2018	Rajendra Chandrashekar Despande	24.02.1994	05.04.2007	22,750/-
7.	5862/2018	Kiran R. Pawar	24.02.1994	05.04.2007	15,800/-

Thus different Complainants were drawing different amount of wages. Some of the employees have admitted in their evidence that they have done odd jobs and have earned some remuneration for their survival. To illustrate, Mr. Kiran Pawar admitted that he was earning Rs.2000/- to 3000/- per month by doing petty jobs. Considering the fact that reinstatement is not being granted to them thereby denying an opportunity to the employee to work in future period and to earn wages and also considering the inflationary wage rise during the interregnum, in my view, ends of justice would meet if *Bata* is directed to pay lump-sum compensation of approximately 75% of backwages during last 16 years (determined on the basis of last wages drawn by them) to each of the Complainants in lieu of reinstatement and backwages. The amount of

such lump-sum compensation payable to each Complainant would be as under:

Sr No	Writ Petition No.	Name of the employee	Last drawn wage	75% backwages for 16 years	Amount of Compensation Payable
1.	5667/2018	Madhukar Prabhakar Ingle	13,600/-	19,58,400	19,50,000
2.	5668/2018	Makarand Borkar	20,800/-	29,95,200	30,00,000
3.	6948/2018	Kalyanrao Shankar Shinde	13,300/-	19,15,000	19,50,000
4.	6953/2018	Sachin Narsayya Nagakar	15,000/-	21,60,000	22,00,000
5.	8026/2018	Deven Jagdishchandra Tolia	17,900/-	25,77,600	25,50,000
6.	8024/2018	Rajendra Chandrashekar Despande	22,750/-	32,76,000	33,00,000
7.	5862/2018	Kiran R. Pawar	15,800/-	22,75,200	23,00,000

39. Accordingly, I proceed to dispose of the petitions by modifying the Orders passed by the Labour Court and Industrial Court in terms of following Order:

(i) *Bata* shall pay lump-sum compensation to each of the Complainants in lieu of reinstatement and backwages as under:

Sr No	Writ Petition No.	Name of the Complainant	Amount of Compensation Payable (in Rs.)
1.	5667/2018	Madhukar Prabhakar Ingle	19,50,000/-
2.	5668/2018	Makarand Borkar	30,00,000/-

3.	6948/2018	Kalyanrao Shankar Shinde	19,50,000/-
4.	6953/2018	Sachin Narsayya Nagakar	22,00,000/-
5.	8026/2018	Deven Jagdishchandra Tolia	25,50,000/-
6.	8024/2018	Rajendra Chandrashekar Despande	33,00,000/-
7.	5862/2018	Kiran R. Pawar	23,00,000/-

(ii) The amount of compensation indicated in clause (i) above shall be paid within a period of 4 months from today, failing which *Bata* shall be liable to pay interest @ 8% per annum on amount of compensation from today till the date of actual payment.

(iii) With the above directions, Writ Petitions are **disposed of**. There shall be no orders as to costs.

(iv) Writ Petition Nos.1815 of 2016 and 2606 of 2018, which are filed only challenging finding on preliminary issue, are dismissed.

(v) With the disposal of Writ Petitions nothing survives in the Civil Application and it is also disposed of.

SANDEEP V. MARNE, J.

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