



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2579 OF 2017**

Mr. Jobi Joseph

}...Petitioner

V/S.

1. M/s. Cadbury India Ltd.
2. Mr. Rajesh Ramanathan

}...Respondents

Mr. Sanjay Singhvi, Senior Advocate with Mr. Rahil Fazelbhoy,
for the Petitioner.

Mr. Dhananjay J. Bhanage, *for Respondents.*

CORAM : SANDEEP V. MARNE, J.

Reserved On : 12 April 2024.

Pronounced On: 26 April 2024.

JUDGMENT :

1) By this petition, filed under Article 227 of the Constitution of India, the Petitioner challenges the Order dated 1 April 2014 passed by the Labour Court, Mumbai in Complaint (ULP) No. 225 of 2012. By the impugned Order, the Labour Court has held that Petitioner is not an 'employee' within the meaning of Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (**MRTU &**

PULP Act) and that therefore the Complaint filed by him challenging his termination is not maintainable. The Order of the Labour Court has been upheld by the Industrial Court by dismissing Revision Application (ULP) No. 96 of 2014 filed by Petitioner.

2) Cadbury India Ltd. (**Cadbury**) India's premier confectionery and sweet maker, which is also a global leader in manufacturing of chocolates, and other allied products has established wide distribution network in various parts of the country. It has appointed various Regional Distributors (**RD**). Such RDs, employ staff of their own for the purpose of marketing and supply of products of Cadbury to wholesalers and retail stores.

3) Petitioner joined the services of Cadbury on 17 June 2004 on the post of Sales Officer and was confirmed in service on 1 April 2005. He was subsequently promoted to the post of Senior Sales Executive on 1 November 2011 and was drawing gross salary of Rs.58,891/- per month at the relevant time.

4) According to Petitioner, though he was designated as Senior Sales Executive, he performed various field jobs relating to sell and marketing of products of Cadbury in the retail and wholesale outlets, through Cadbury's RDs. That he was not involved in supervisory, administrative or managerial nature of work. That no employee of Cadbury was employed under Petitioner and that he independently worked and reported to his

superior officers. Petitioner therefore claimed that he is a 'workman' as defined under Section 2(s) of the Industrial Disputes Act, 1947 (**I.D. Act**) and consequently an 'employee' as defined under Section 3(5) of the MRTU & PULP Act. Though Petitioner mainly sought to press his status as 'workman' under ID Act before the Labour Court while giving a hint of his role as 'Sales Promotion Employee', his main thrust in the Petition is about his status as 'Sales Promotion Employee' within the meaning of Sales Promotion Employees (Conditions of Service), Act 1976 (**SPE Act**).

5) By letter dated 4 June 2012 issued by Cadbury, Petitioner was informed of certain irregularities in his area while opening of new outlets in February and March 2012 and was accordingly withdrawn from that area. According to Petitioner, he was not called for participation in any enquiry or was given any new assignment. He was assigned the work of door-to-door services and was assigned to perform miscellaneous jobs such as visiting shops in slum areas for booking of orders. By letter dated 1 October 2012, his services were terminated. Petitioner states that termination was without following the statutory provisions, in absence of show cause notice or any enquiry.

6) Petitioner therefore filed Complaint (ULP) No. 225 of 2012 in the Labour Court, Mumbai challenging the termination letter dated 1 October 2012 and prayed for reinstatement with continuity, backwages and all consequential benefits w.e.f. 1 October 2012. He also sought compensation of Rs. 1,00,000/-.

Petitioner also filed application seeking interim relief. Respondent-Cadbury appeared in the complaint and filed Affidavit opposing application for interim relief and also raised preliminary objection about maintainability of the Complaint contending that Petitioner was not an 'employee' within the meaning of Section 3(5) of the MRTU & PULP Act.

7) On account of preliminary objection raised by Cadbury, the Labour Court framed preliminary issue and parties led evidence on that issue. After considering the pleadings, documents and evidence on record, the Labour Court proceeded to pass Order dated 1 April 2014 on preliminary issue and held that Petitioner's Complaint is not maintainable as he was not an 'employee' within the meaning of MRTU & PULP Act. Petitioner unsuccessfully challenged Order dated 1 April 2014 of the Labour Court before the Industrial Court by filing Revision Application No. 96 of 2014. The Industrial Court proceeded to dismiss the Revision filed by him by Judgment and Order dated 1 March 2016. Aggrieved by the decisions of the Labour and the Industrial Courts, Petitioner has filed the present petition. By order dated 18 June 2018, this Court has issued Rule in the present petition.

8) Mr. Singhvi, the learned senior advocate appearing for Petitioner, would submit that the Labour Court has erred in holding that Petitioner is not an employee within the meaning of Section 3(5) of the MRTU & PULP Act. He would take me through the definition of the term '*employee*' under Section 3(5)

of the MRTU & PULP Act and would submit that in addition to 'workman' defined under Section 2(s) of the I.D. Act, a '*sales promotion employee*' as defined under Section-2(d) of the SPE Act, is also an '*employee*' within the meaning of Section 3(5) of the MRTU & PULP Act. He would then take me through the definition of the term '*sales promotion employee*' under Section 2(d) of the SPE Act. Mr. Singhvi would submit that even if a person fails to establish that he is not a '*workman*' within the meaning of Section 2(s) of the I.D. Act but establishes that he is a '*sales promotion employee*' within the meaning of Section 2(d) of the SPE Act, he still becomes an '*employee*' within the meaning of Section 3(5) of the MRTU & PULP Act.

9) Mr. Singhvi would further submit that the Petitioner established before the Labour Court that he is a workman within the meaning of Section 2(s) of the I.D. Act. He would take me through the nature of duties performed by the Petitioner as well as the evidence produced on record to indicate as to how Petitioner performed clerical, manual, skilled and unskilled work and clearly qualified to be a Workman. Without prejudice, Mr. Singhvi would submit that even if a Petitioner is not held to be a workman within the meaning of Section 2(s) of the I.D. Act, he must certainly prove before the Labour Court that he is a '*Sales Promotion employee*' within the meaning of Section 2(d) of the SPE Act. That Petitioner was employed for work related to promotion of sales and business. That Petitioner was not engaged in supervisory capacity. That the Industrial Court has ultimately held that Petitioner was not engaged in

managerial or administrative capacity. That both the Courts have erred in holding that Petitioner was engaged in supervisory capacity.

10) Mr. Singhvi would submit that the findings recorded by the Labour and Industrial Courts about Petitioner's engagement in supervisory capacity are perverse and the same are contrary to the evidence on record. That Cadbury could not prove that Petitioner supervises even a single employee employed by Cadbury. That supervision was sought to be established by Cadbury is over employees of distributors. That it has come on record that '*Purple Champions*' were engaged by the Distributors and that they are not employees of Cadbury. That mere assistance given by Petitioner to such *Purple Champions* employed by Distributors cannot and does not mean that Petitioner supervised any of the employees of Cadbury. That therefore the findings recorded by the Labour and the Industrial Courts that Petitioner was engaged in supervisory capacity are perverse.

11) Mr. Singhvi would further submit that Petitioner himself used to look after sales of products of *Cadbury*. That several duties performed by Petitioner included direct interaction with retail outlets. That he used to personally verify whether equipment of *Cadbury* such as V.C. Coolers were installed at appropriate locations of merchandisers. That the duties performed by Petitioner clearly indicate that he was engaged in direct sales activity of products of *Cadbury* in the

area assigned to him. That Petitioner never decided any sales targets, which were always decided by the other higher officials in *Cadbury*. That therefore the Labour and the Industrial Courts have erroneously held that Petitioner worked in supervisory capacity. Mr. Singhvi would further submit that Petitioner clearly established before the Labour Court that he is an 'employee' within the meaning of Section 3(5) of the MRTU & PULP Act and that the complaint filed before the Labour Court is clearly maintainable. Mr. Singhvi would further submit that in the event of this Court arriving at the conclusion that Petitioner is an 'employee' within the meaning of Section 3(5) of the MRTU & PULP Act, this Court may directly decide his grievance about termination since neither any enquiry was conducted nor provisions of I.D. Act were followed while terminating the services of the Petitioner. That since substantial period of time has lapsed, this Court may grant the relief of reinstatement and backwages rather than making Petitioner to undergo another series of litigation for deciding the merits of his termination.

12) *Per-contra*, Mr. Bhanage the learned counsel appearing for the Respondent-*Cadbury* would oppose the petition and support the concurrent findings recorded by the Labour and the Industrial Courts. According to Mr. Bhanage, there is no reason for this Court to interfere in well-reasoned orders of the Labour and the Industrial Courts, which have concurrently held after appreciating the evidence on record that Petitioner is not an 'employee' within the meaning of Section 3(5) of the MRTU & PULP Act. That findings recorded by the

Labour and the Industrial Courts, do not suffer from the vice of perversity and that therefore there is no reason for this Court to interfere in such concurrent findings. In support, Mr. Bhanage would rely upon the judgment of the Apex Court in ***Syed Yakoob V/s. K.S. Radhakrishnan and Ors***¹.

13) Mr. Bhanage would take me through various documents produced on record to demonstrate as to how Petitioner was repeatedly involved in intellectual and policy work. That Petitioner was never responsible for direct sales of products of *Cadbury*. That he was essentially supervising the activity of sales of *Cadbury's* products. That persons whom he was supervising is irrelevant for the purpose of determining the supervisory nature of work. That the real test is whether he was supervising the activity of sales or not. That even though *Purple Champions* were employees of Distributors, Petitioner undoubtedly supervised their work, who were carrying out actual activities of sales and canvassing of products. That therefore supervisory nature of work of Petitioner was clearly established. That SPE Act makes a marked difference between a 'salesman' and a 'sales supervisor'. That SPE Act applies to 'salesman' and not to a 'supervisor'. That, Petitioner in the present case was undoubtedly a 'sales supervisor'. That he fixed targets for sale of products in the areas assigned to him. That he was assigned team for carrying out the activities of sales. That he took decision to shut distribution business of one of the distributors. That he gave instructions from time to time to

¹ AIR 1964 SC 477.

various personnel for managing the activities of sales. That he participated in policy decisions relating to sales of products of *Cadbury*. Mr. Bhanage would therefore submit that supervisory nature of functions performed by the Petitioner was clearly and conclusively proved before the Labour Court. That Petitioner drew substantial salary of Rs.58,891/- and was handling a team of *Purple Champions*. He therefore can, by no stretch of imagination, be treated as a 'workman' or 'employee'. In support of his contentions, Mr. Bhanage has relied upon the following judgments:

- i. ***Management of M/s. May and Baker (India) Ltd V/s. Their Workman².***
- ii. ***Burmah Shell Oil Storage and Distribution Company of India Ltd. V/s. The Burma Shell Management Staff Association and others³.***
- iii. ***Sh. T. P. Srivastava V/s. M/s. National Tobacco Co. of India Ltd.⁴***
- iv. ***H.R. Adyanthaya and Others V/s. Sandoz (India) Ltd. and others⁵.***
- v. ***Inthru Noronha V/s. Colgate Palmolive (India) Ltd. and others⁶.***
- vi. ***Standard Chartered Bank V/s. Vandana Joshi and another⁷.***

14) Rival contentions of the parties now fall for my consideration.

² AIR 1967 SC 678.

³ 1970 (3) SCC 378.

⁴ AIR 1991 SC 2294.

⁵ (1994) 5 SCC 737.

⁶ 2005(2) Mh.L.J. 884.

⁷ 2010(2) Mh.L.J. 22.

15) Before adverting to the main issue involved in the petition about Petitioner's status as '*employee*' within the meaning of Section 3(5) of the MRTU & PULP Act, it would be first necessary to understand who exactly fall in definition of the term '*employee*' under the MRTU & PULP Act. Section 3(5) of the MRTU & PULP Act, defines an '*employee*' as under :

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.

16) Thus, under Section 3(5) of the MRTU & PULP Act, three types of persons are to be treated as '*employees*' viz.

- (i) an employee as defined under Section 3(13) of the Bombay Industrial Relations Act, 1946; or
- (ii) a '*workman*' defined under Section 2(s) of the I.D. Act; and
- (iii) a '*sales promotion employee*' as defined under Section 2(d) of the SPE Act.

17) The definition of the term '*employee*' under Section 3(5) of the MRTU & PULP Act would show that even if a person does not fit into the definition of the term '*workman*' under Section 2(s) of the I.D. Act, but can demonstrate that he is a

'sales promotion employee' within the meaning of SPE Act, he becomes an *'employee'* under the MRTU & PULP Act. Thus a person can demonstrate that he is either a *'workman'* or a *'sales promotion employee'* or both, with a view to satisfy his status as *'employee'* under Section 3(5) of the MRTU & PULP Act.

18) Perusal of the Order dated 1 April 2014 passed by the Labour Court would indicate that the Labour Court has not considered this fine distinction between a *'workman'* and *'sales promotion employee'*. It appears that the enquiry before Labour Court revolved around Petitioner's status as *'workman'* within the meaning of Section 2(s) of the I.D. Act. The order of the Labour Court indicates that it has not even reproduced definition of the term *'employee'* under Section 3(5) of the MRTU & PULP Act and has mechanically proceeded to examine whether Petitioner was fitting into definition of the term *'workman'* under Section 2(s) of the I.D. Act. It must be observed that this folly committed by the Labour Court is possibly attributable to the pleadings in Petitioner's complaint. Though it is strenuously contended before me by Mr. Singhvi that Petitioner is a *'sales promotion employee'* under Section 2(d) of the SPE Act and therefore an *'employee'*, no such pleadings are to be found in the complaint lodged by Petitioner before the Labour Court. On the contrary, Petitioner pleaded before the Labour Court that he was a *'workman'* under Section 2(s) of the I.D. Act and therefore an *'employee'* under Section 3(5) of the MRTU & PULP Act. The relevant pleadings in this regard in the complaint are as under:

The Complainant therefore states that though he is designated as "Sr. Sales Executive" he is only deals with confectionary/ sweets items and not with the personal employed by the respondent no.1 herein. It is therefore submitted that he is "Workman" as defined in Section 2(s) of the Industrial Disputes Act, 1947 and thus as "Employee" as defined in Section 3(5) of the MRTU & PULP Act, 1971. It is therefore submitted that the complaint filed by the complainant herein is well maintainable in facts and in law. It is made crystal clear by way of catena of judgments of the Apex Court that the nature of duties performed by the employee is having direct bearing on the designation and the designation alone will not give him the mental/ status unless he performs such duties.

19) There is no averment in the entire complaint that Petitioner was a '*sales promotion employee*' within the meaning of Section 2(d) of the SPE Act. However submission made on behalf of Petitioner is recorded in Para 13 of Labour Court's judgment that he is a sales promotion employee governed by SPE Act. Though the contention is recorded, the same is not decided by the Labour Court by adverting to the provisions of SPE Act.

20) The definition of the term '*employee*' under Section 3(5) of the MRTU & PULP Act came to be amended by Maharashtra Act-22 of 1999 w.e.f. 20 April 1999 by adding '*sales promotion employee*' in the definition of the term '*employee*'. Thus, as on the date of filing of the complaint by Petitioner, every '*sales promotion employee*' as defined under SPE Act automatically became an '*employee*' within the meaning of Section 3(5) of the MRTU & PULP Act. However, though Petitioner was engaged in the activities of sale of products of *Cadbury*, it appears that he

did not raise a plea before the Labour Court that he is a '*sales promotion employee*' and instead attempted to prove that he is a '*workman*' under Section 2(s) of the I.D. Act.

21) It must be noted here that SPE Act was enacted in the year 1976 possibly in order to govern set of employees engaged in promotion of sale of products and business of establishment, who were not falling within the definition of the term '*workman*' under the I.D. Act. One of the objectives behind enacting SPE Act was to apply the provisions of the I.D. Act to such class of employees engaged in promotion of sales or business of an establishment. This is because Section 6 of the SPE Act provides that the provisions of the I.D. Act shall apply to Sales Promotion Employees as they apply to or in relation to '*workman*' within the meaning of I.D. Act. Since SPE Act extends protection available to a '*workman*' under the I.D. Act to Sales Promotion Employees, it is clear that those sales promotion employees were not fitting into the definition of the term '*workman*'. Thus, though Sales Promotion Employees were extended benefits under the I.D. Act, they were unable to maintain a complaint under the MRTU & PULP Act, as they were not '*workman*' within the meaning of Section 2(s) of the I.D. Act. To redress this analogous position, definition of the term '*employee*' under Section 3(5) of the MRTU & PULP Act came to be amended and even a *Sales Promotion Employee* came to be included within the definition of the term '*employee*' under Section 3(5) of the MRTU & PULP Act so as to enable them to maintain a complaint under the MRTU & PULP Act.

22) Thus, the legal position appears to be that though a Sales Promotion Employee does not fit into the definition of the term 'workman', he is still treated as an 'employee' under the MRTU & PULP Act. The combination of provisions of SPE Act and MRTU & PULP act grants twin benefits of protection under the I.D. Act as well as under the MRTU & PULP Act to Sales Promotion Employees. This is the broad statutory framework and interplay between the provisions of the I.D. Act, SPE Act and MRTU & PULP Act.

23) The above statutory framework has been considered by this Court in ***Kiran P. Pawar vs. Bata India Ltd.***, 2023 SCC (Bom) 13, wherein this Court has observed in Para 29 as under:

29. Thus every sales promotion employee as defined under Section 2(d) of the 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.

24) SPE Act was made applicable in the first instance to every establishment engaged in pharmaceutical industry. However, under section 1(5) of the SPE Act, the Central Government can apply provisions of the Act to any other establishments engaged

in notified industry by issuing a Notification in the Official Gazette. Section 3 empowers the Central Government to declare certain industries to be notified industries. Sections 1 and 3 of SPC Act provide thus:

1. Short title, extent, commencement and application.

(1) This Act may be called the Sales Promotion Employees (Conditions of Service) Act, 1976.

(2) It extends to the whole of India.

(3) It shall come into force on such date¹as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States.

(4) It shall apply in the first instance to every establishment engaged in pharmaceutical industry.

(5) The Central Government may, by notification in the Official Gazette, apply the provisions of this Act, with effect from such date as may be specified in the notification, to any other establishment engaged in any notified industry.

3. Power of Central Government to declare certain industries to be notified industries:-

The Central Government may, having regard to the nature of any industry (not being pharmaceutical industry), the number of employees employed in such industry to do any work relating to promotion of sales or business or both, the conditions of service of such employees and such other factors which, in the opinion of the Central Government, are relevant, declare such industry to be a notified industry for the purposes of this Act.

25) It appears that in exercise of powers under Section 3 of the SPE Act, the Central Government has issued Notification dated 31 January 2011, notifying that the provisions of the SPE Act shall apply to various industries including the industries of '*Biscuits and Confectioneries*'. The Notification reads thus:

GAZETTE OF INDIA, EXTRAORDINARY,
PART II, SECTION 3(1), DATED 31ST JANUARY 2011
MINISTRY OF LABOUR & EMPLOYMENT
(Coordination Section)
NOTIFICATION

New Delhi, dated 31 January 2011

S.C. 217 (E):- In exercise of the powers conferred by Section 3 of the Sales Promotion Employees (Conditions of Service) Act, 1976 (11 of 1976), the Central Government, having regard to the nature of the industry, the number of employees employed in such industry to do any work relating to promotion of sales or business or both, the conditions of service of such employees and such other factors which in its opinion relevant, hereby declare the following industries to be notified for the purposes of the said Act, with effect from the date of publication of this notification in the Official Gazette, namely:-

1. Cosmetics, soaps, household cleaners and disinfectants
2. Readymade garments
3. Soft drink manufacturing industries
4. Biscuits and confectioneries
5. Ayurvedic, Unani and Homeopathic Medicines
6. Automobiles including accessories and spare parts
7. Surgical equipments, artificial prosthesis and diagnostics
8. Electronics, computers including accessories and spares
9. Electrical appliances
10. Paints and varnishes

(F.No.Z-200251301201 0-Coord.)
K.M.Gupta, Economic Advisor

26) Thus, it appears that since '*biscuits and confectioneries*' industry is notified under Section 3 of SPE Act, the Act would

apply to *Cadbury*. Mr. Bhanage has not seriously disputed this position.

27) The next issue for consideration is whether Petitioner fits into the definition of the term '*sales promotion employee*' within the meaning of SPE Act. There is no dispute to the position that Petitioner performed work relating to promotion of sales or business of *Cadbury*. The only dispute is whether he was engaged in supervisory, managerial or administrative capacity. The Industrial Court has held in para-17 as under :

17. There was Manager's comment as "Very good distribution and EBD for Jobi". None of these clauses of letters are in dispute till date. So I have no hesitation to observe that the applicant was answerable to the authority of the respondents. **So, he cannot be said to be a person in management or administration**, but at the same time there were other persons, who are referred as RD & PC in the team.

(emphasis supplied)

28) Thus, the Industrial Court has held that Petitioner cannot be said to be a person in management or administration. Thus, the controversy is now restricted to Petitioner's employment or engagement in supervisory capacity. It is Mr. Bhanage's contention that Petitioner was employed in supervisory capacity and that therefore he does not fit into the definition of the term '*sales promotion employee*'. On the contrary, it is the contention of Mr. Singhvi that Petitioner was engaged directly in sale of products of *Cadbury* and that he did not supervise any of the employees of *Cadbury* and that therefore he cannot be treated to have been employed in supervisory capacity. Petitioner pleaded

in his Complaint that he performed following duties as Senior Sales Executive during the course of his employment with Cadbury.

- i) I am given monthly and yearly sales targets and I have to follow this on daily basis.
- ii) Visit and sell company's products to retail and wholesale outlets.
- iii) I book suitable window display, spaces in the shops for products promotion.
- iv) Visit eligible outlets in the market and make contacts with shopkeepers to keep company visi-coolers to assure sales promotion, sales growth and optimum quality of the product as per guidance.
- v) We have to achieve 38% sales growth in all big groceries, 31% growth in small groceries and 32% sales growth in all chemist shops in our respective areas. (company changes the statistics every year.)
- vi) I am assigned the job of finding and opening of new outlets in the market every year as directed.
- vii) We have to ensure medium and small size wholesalers are growing by 35% on last year sales basis. We have to check all company suggested products are invoicing to these wholesalers and achieve 60% MSS (Must Sell Sku's).
- viii) I have to verify whether all our distributor's godown are kept spic and span and airconditioned wherever required The air-conditioned godown have to be strictly maintained at a specific temperature 24x7. We also check their delivery vehicles are properly maintained to ensure our product quality. This I have to do with specification as directed by the company.
- ix) I have to maintain all display outlets properly and see to it that these outlets are getting 80% display score as per company rules. Every month company send auditors to these outlets to cross check.
- x) I have to achieve given value sales growth over last year as targeted by the company value wherever company deployed visi-coolers and SMDs(sheet metal dispenser).
- xi) Make possible without giving the shopkeeper any display incentives and have relation with the shopkeeper to get additional space to display our products.

- xii) I have to ensure minimum damage stocks comes back from market, no write-offs and no goods return from distributor to Company. On every three month time we have to take 'All Clear Certificate' from distributor and have to submit in Company office.
- xiii) To ensure customer satisfaction we follow up daily with the shopkeepers in the market and see to it that they follow the FIFO (First In First Out).
- xiv) In our daily visit in the market I fill up Cadbury stocks in Company's visi-cooler as well as dispensers at retailer point and see to it there are no competitive products are kept in the same etc.

29) *Cadbury* led evidence of Mr. Abdul Gafur Sakir Khan, employed as Salesman in Gopaldas Corporation. He gave evidence about the nature of duties performed by him as Salesman of Gopaldas Corporation, which was the Distributor of *Cadbury* in the designated area. He deposed that Petitioner was employed as a Sales Officer in Masjid Bunder area for management of sale of products of *Cadbury*. That he used to supervise the salesmen of Gopaldas Corporation and earlier of Shifa Marketing. That such salesmen were also referred to as '*Purple Champions*'. That they used to submit reports of their sales to Petitioner every evening. That Petitioner used to guide them with regard to performance of their duties. That Petitioner used to fix targets every month or week. That the salesman used to visit various retail shops and the work was controlled and supervised by Petitioner. That Petitioner used to give instructions about quality of products as well as priority to be given to a particular wholesaler and retail outlets. That Petitioner used to guide the shop owners for exhibition of products of *Cadbury* at particular location in the shop and used to negotiate with the

shop owners for exhibition of products of *Cadbury* and that the shop owners used to get incentives as per the recommendations of Petitioner. That Petitioner used to recommend the place in the shop for installation of Visi Coolers and used to ensure that the Visi Coolers were correctly installed in the shop.

30) *Cadbury* also led evidence of Mohammed Faizal, Senior Area Sales Manager employed by *Cadbury* and who was Petitioner's supervisory officer. Mr. Mohammed Faizal deposed before the Labour Court that *Cadbury* products were being distributed through two distributors namely, Gopaldas Corporation and Shifa Marketing in Masjid Bunder area. That Petitioner used to explain various schemes launched by *Cadbury* for promotion of sales of its products to the salesmen and guide them in conveying the same to the wholesalers and retailers. That salesmen are responsible for display of products of *Cadbury* in the outlets. That after receiving reports from salesmen about availability of appropriate space in the outlet for display of *Cadbury's* products, Petitioner used to discuss and negotiate with shop owners for display of such products. That Petitioner used to visit the customers to ensure that the salesmen had visited their establishments and products were delivered on time and as per the requirement. He further deposed that all the salesmen used to report to Petitioner about sales, delivery, payments etc. That Petitioner did not do or perform any manual, skilled or unskilled, technical, operational or clerical work. That the duties pleaded in para-3(c) of the complaint were not personally performed by the Petitioner. In the cross-examination,

some suggestions were given and some admissions are sought to be extracted from the witnesses particularly from Mr. Mohammed Faizal about lack of authority for Petitioner to finalise schemes or to take policy decisions.

31) I have also gone through the evidence of Petitioner. Though he has stated in the Complaint and repeated in his Affidavit-of-Evidence that his duties included '*Visit and sell company's products to retail and wholesale outlets*', it has come in evidence that the work of taking orders used to be performed by the salesmen/purple champions of Distributors, who used to take orders on Palmtops and follow up for payment. That they used to report about defaulting shopkeepers to Petitioner. It has also come in evidence *Cadbury* used to introduce schemes for providing incentives to retailers and that Petitioner used to educate and explain those schemes to salesmen of Distributors, who in turn used to inform the retailers about such incentive schemes. Thus there is no evidence on record to show that Petitioner personally used to visit retailers for booking orders. That job was done by the salesmen of the distributor.

32) I have also gone through the various documents placed on record, which were also relied upon by *Cadbury* to prove supervisory nature of duties by Petitioner. The email correspondence placed on record would indicate that Petitioner

had given various instructions/requests to Mr. Mohammed Faizal for imparting of training to Purple Champions, for deduction of amounts from distributors, communicating income targets for various months, etc. The documents relating to performance review of the Petitioner are also placed on record to show that Petitioner was handling the team. That he was setting goals etc. In one of the performance reviews pertaining to the year 2011, Petitioner has sought credit for taking initiative for closure of distributorship of Shifa Marketing. He has stated that *“so I decided to close his business in the month of March and in the month of May. I closed him swiftly”*. It is contended by Mr. Bhanage that Petitioner thus took a policy decision of closing distributorship of major distributors. Reliance is also placed on email dated 8 January 2013, which was written in relation to damaged stock lying with some of the retail outlets. It was contended in the email that some of the big wholesalers in Masjid Bunder were not reimbursed despite sending damaged goods to Shifa Marketing. In the email, Petitioner suggested that to solve the issue of damaged goods, he instructed Gopaldas (distributor) to clear damaged stock from the market and stated that *Cadbury* will have to reimburse the amount to Gopaldas in respect of damaged stock. According to Mr. Bhanage, these are policy decisions taken by the Petitioner.

33) After considering the documents and evidence on record, I am of the view that Petitioner himself was not selling or canvassing the sale of products of *Cadbury*. *Cadbury* had employed the concept of appointing distributors who used to

employ their own employees for the purpose of promoting sales of products of *Cadbury*. Thus, the Purple Champions/salesmen of distributors were actually responsible for promotion of sale of *Cadbury's* products at retail and wholesale outlets. Such salesmen/Purple Champions, visited various establishments, retailers/wholesalers collected orders and ensured distribution. What Petitioner essentially did was to supervise the activities of salesmen/purple champions of distributors. There is ample evidence on record to show that Petitioner's main role was to ensure that targeted sales are achieved through salesmen appointed by the distributors. He used to guide such salesmen to ensure targeted sales. His occasional visit to the shops/outlets either to negotiate display of products or for installation of Visi Coolers did not mean that his predominant duty was to carry out direct sales activities of products of *Cadbury*. Those activities were actually carried out by salesmen/Purple Champions of *Cadbury* and Petitioner mainly supervised them.

34) In my view, for taking activities of a person outside the scope of supervisory capacity, it is necessary to prove that such person is engaged in direct activities of canvassing the products or business to the customers or retailers. In ***Burmah Shell*** (supra), the Apex Court has considered the nature of duties performed by District Sales Representatives and Sales Engineering Representatives. Before discussing the findings recorded by the Apex Court in *Burmah Shell*, it must be clarified that the duties of various category of staff is considered by the Apex Court for determining their status as 'workman' and not as

‘sales promotion employee’. However the discussion is useful for limited purpose of understanding the supervisory nature of duties and role of sales promotion employee in canvassing company’s products:

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

plaints so as to promote sales remains outside the scope of technical work. Consequently, the Tribunal's decision that the Sales Engineering Representative is a workman is set aside.

This extract is taken from *Burmah Shell Oil Storage and Distribution Co. of India Ltd. v. Burma Shell Management Staff Assn.*, (1970) 3 SCC 378 at page 400

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

(emphasis supplied)

35) Thus as held in ***Burmah Shell***, it is only when a person is involved in canvassing and obtain orders by holding demonstration or suggesting the best use of the product, etc that such person can be held to be not engaged in supervisory capacity. In the present case, there is no evidence to suggest that the primary duty of Petitioner was to canvass the products of *Cadbury* either to customers or to wholesalers/retailers.

36) In ***T. P. Srivastava***, the Apex Court has considered the distinction between 'canvassing and promoting sales for the company' and 'supervising salesmen'. It is held in Para 3 as under:

3. In order to come within the definition of workman under the Industrial Disputes Act as it stood in the year 1973 when the appellant's service was terminated, the employee has to be under the employment to do the work of one of the types of work referred to in the section i.e. manual, skilled and/or clerical in nature. The finding of the Tribunal on the nature of the work is a finding on a question of fact and it is also borne out by the document produced before the Labour Court. **It is seen from the facts found that the appellant was employed to do canvassing and promoting sales for the company. The duties involve the suggesting of ways and means to improve the sales, a study of the type or status of the public to whom the product has to reach and a study of the market condition. He was also required to suggest about the publicity in markets and melas, advertisements including the need for posters, holders and cinema slides.** These duties do require the imaginative and creative mind which could not be termed as either manual, skilled, unskilled or clerical in nature. **The supervising work of the other local salesmen was part of his work considered by the Tribunal as only incidental to his main work of canvassing and promotion in the area of his operation.** Such a person cannot be termed as a workman is also the ratio of the

decision of this Court in *Burmah Shell Oil Storage and Distribution Company v. Burmah Shell Management Staff Assn.* [(1970) 3 SCC 378 : AIR 1971 SC 922 : (1970) 2 LLJ 590] , *D.S. Nagaraj v. Labour Officer, Kurnool* [(1972) 42 FJR 440 (AP)] , *J & J Dechane Distributors v. State of Kerala* [(1974) 2 LLJ 9 (Ker)] . We may also refer to the subsequent passing of the Sales Promotion Employees (Conditions of Service) Act, 1976. This Act defines “sales promotion employees” as meaning a person employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business or both. This Act is to apply in the first instance to every establishment engaged in pharmaceuticals industry. It enables the Central Government by notification to apply the provisions to any other establishment engaged in any notified industry. If an industry is notified under this Act then the provisions of the Industrial Disputes Act, 1947 would also be attracted to these types of workmen. This is a subsequent enactment and it is not applicable to the termination in the instant case which was long prior to the enactment of this Act. Further no notification under this Act bringing the provisions to the employees like that of the company has been made under the provisions of this Act. The object of this enactment and the employees covered by the enactment also go to show that persons employed for sales promotion normally would not come within the definition of workmen under the Industrial Disputes Act.

37) Thus in ***T. P. Shrivastava*** the main duties of the Appellant therein was to do canvassing and promoting sales for the company and the job of supervising the salesmen was only part of or incidental to the main work of canvassing and promotion in the area of his operations. Conversely, in the present case, the main duty of Petitioner appears to be to supervise the salesmen / purple champions of the Regional Distributors and occasionally he was paying visits to the stores for negotiating the place of display of Cadbury’s products, or for installation of Visi Coolers.

Thus the main job of Petitioner was to supervise the activities of sales performed by the salesmen of Regional Distributors and activities of interactions with the retailers and wholesalers was incidental to his main supervisory duties.

38) It is sought to be contended by Mr. Singhvi that supervision by Petitioner of employees of distributors does not mean that Petitioner was employed in supervisory capacity. I am unable to agree. What is relevant under Section 2(d) of the SPE Act is that a person should not be '*employed or engaged in a supervisory capacity*'. So what is important is '*employment/engagement in supervisory capacity*'. The words used under Section 2(d) are not '*employment/engagement as a supervisor*'. What is relevant is the '*capacity*' in which the engagement is made. The nature of duties performed by a person would determine whether his employment is in supervisory capacity and not to determine whom he supervises, which is irrelevant. If Petitioner was to himself perform the activity of promotion of sales or business of *Cadbury*, he would fit into the definition of the term '*sales promotion employee*'. However, in the present case, he was merely supervising other salesmen, who were carrying out the activities of sales and promotion of *Cadbury's* products. Therefore, even though Petitioner was supervising salesmen employed by distributor, the same would not mean that his role was not that of supervisory capacity. In a given organisation, it may happen that a Manager or Supervisor may have to supervise the activities of either contract workers or transporters. However, merely because he supervises activities of persons who

are not direct employees of an establishment, it does not and cannot mean that he ceases to be employed in supervisory capacity. Therefore, the real test for determining supervisory nature of duties is not whether persons on whom supervision is exercised are employees of establishment or not, but the nature of duties attached to the job. After considering the evidence on record, I am fully convinced that Petitioner performed supervisory nature of duties while working as Senior Sales Executive with *Cadbury*. In my view, therefore Petitioner does not fit into the definition of the term '*Sales Promotion Employee*' within the meaning of Section 2(d) of the SPE Act.

39) So far as status of Petitioner as '*workman*' under Section 2(s) of the I.D. Act is concerned, both Labour as well as Industrial Court have concurrently held that apart from performing supervisory nature of duties, Petitioner did not himself perform any manual, skilled, unskilled or clerical work. Since he drew gross salary of Rs.58,800/- per month, his employment in supervisory capacity put him outside the purview of definition of the term '*workman*' under Section 2(s) of the I.D. Act.

40) I am therefore of the view that Petitioner was neither a '*workman*' within the meaning of Section 2(s) of the I.D. Act nor a '*sales promotion employee*' within the meaning of Section 2(d) of the SPE Act. Therefore, Petitioner was not an '*employee*' within the meaning of Section 3(5) of the MRTU & PULP Act and

his complaint filed before the Labour Court was clearly not maintainable.

41) Mr. Bhanage has relied upon several judgments in support of the contention that Petitioner does not fit into the definition of the term '*workman*'. However, as observed above, even if a person is not a '*workman*', but proves that he is a '*Sales Promotion Employee*', he would still be covered under the definition of the term '*employee*' within the meaning of Section 3(5) of the MRTU & PULP Act. Infact, though the sheet anchor of Mr. Bhanage is judgment of this Court in **Standard Chartered Bank** (supra) in my view, the said judgment is also of limited relevance to the present case as the issue involved before this Court was whether the Respondent therein was '*workman*' within the meaning of Section 2(s) of the I.D. Act. In the present case, Petitioner has also attempted to demonstrate that he is a '*Sales Promotion Employee*' within the meaning of Section 2(d) of SPE Act. To that extent, rest of the judgments relied upon by Mr. Bhanage are of little assistance for determining the issue at hand. His reliance on judgment of the Apex Court in **Syed Yakoob** would be relevant to the extent of concurrent findings recorded by the Labour and the Industrial Court on the issue of Petitioner's status as '*workman*' within the meaning of Section 2(s) of the I.D. Act. Following the judgment in **Syed Yakoob** (supra), this Court is not inclined to interfere in concurrent findings of facts recorded on the issue of Petitioner's status not being that of a '*Workman*' under Section 2(s) of the I.D. Act.

42) Considering the overall conspectus of the case, I am unable to trace any patent error in the orders passed by the Labour and the Industrial Court. Those Orders are unexceptionable. The Writ Petition accordingly fails. The Writ Petition is dismissed with no order as to costs. Rule is discharged.

SANDEEP V. MARNE, J.