

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURIDICITION

**WRIT PETITION NO. 2896 OF 2006**

M/s. Saraf Weaving & Spinning Mills Limited  
Hirji Govindji Compound  
Nilgiri Estate  
Sewree, Mumbai-400 015.

.....Petitioner

V/s.

1. Mohamed Usman  
Bihari Masjid, Baiganwadi  
Govandi, Mumbai-400 043.

2. Presiding Officer  
III Labour Court, New Admn. Bldg,  
Bandra (E), Mumbai-400 051.

3. State of Maharashtra  
To be served on Secretary,  
Labour, Industries and Energy Dept,  
Mantralaya, Mumbai.

.....Respondents

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Mr. V.P. Vaidya, Advocate for the petitioner.

Ms. Rita Joshi a/w. Mr. Swapnil Kamble, Advocate for the  
respondents.

**CORAM :- SMT. R.P. SONDURBALDOTA, J.**

**DATED :- 10<sup>th</sup> JULY, 2015.**

**JUDGMENT :**

1. This petition is directed against the order dated 24<sup>th</sup> May, 2005 by which the Labour Court allowed the Reference made at the instance of the respondent and has directed the petitioner to reinstate the respondent with full backwages and continuity of service.

2. The petitioner is a registered Company, at the relevant time engaged in the manufacture of readymade garments. It used to employ tailors on piece rate basis. Respondent no.1, who had been employed by it, raised an industrial dispute alleging that his services had been orally terminated w.e.f. 17<sup>th</sup> November, 1993. On failure of conciliation, the dispute came to be referred to the Labour Court for adjudication.

3. In his statement of claim dated 25<sup>th</sup> April, 1997 respondent no.1 claimed that he was working with the petitioner as a Tailor for the last over 5 ½ years and his last drawn wages were Rs.3,000/- per month. His services came to be terminated orally and illegally by the Management w.e.f. 17<sup>th</sup> November, 1993. There was neither any notice given of termination nor any compensation paid to him.

4. The petitioner filed its written statement contending that, respondent no.1 was employed by it as a temporary/causal Tailor on piece rate basis in the month of August, 1993. He remained absent on and from 15<sup>th</sup> November, 1993 without leave or

permission. According to the petitioner, because respondent no.1 was gainfully employed elsewhere, he was not reporting to the duty. Thus, according to the petitioner, respondent no.1 had infact abandoned the services and there was no termination of his services. When the petitioner received notice of conciliation proceedings, it had by its letter dated 23<sup>rd</sup> December, 1993, informed the Assistant Commissioner of Labour that, respondent no.1 was remaining absent without leave or permission and by the same letter, had offered that he should report for work. Respondent no.1 did not report for work but continued to agitate the dispute of his alleged illegal termination. The petitioner denied in its written statement that, respondent no.1 was working with it for 5 1/2 years and was drawing wages of Rs.3,000/- per month. It denied that, there was any oral termination of the services. It alleges that respondent no.1 had not given his residential address at the time of joining the employment with the petitioner. Therefore, neither any notice nor chargesheet could be sent to his residential address. It further averred in the written statement that, as and when, respondent no.1 reported for duty, he would be served with the chargesheet for the act of misconduct committed by him i.e. remaining absent without prior permission of the Management w.e.f. 15<sup>th</sup> November, 1993.

5. The petitioner amended the written statement in the year 2001 to bring the fact of the closure of its manufacturing activity on record. At para-4(a) and 4(b) of the written statement, the petitioner states that it has closed down its entire manufacturing activities permanently and surrendered the premises, where the manufacturing activities were conducted. All the employees from the manufacturing unit had accepted the fact of closure and the legal

dues paid to them on closure. Since then, there is no manufacturing activity conducted by the petitioner and the closure is genuine and real closure.

6. During the course of the proceedings, respondent no.1 had, in the month of November, 2001, filed an application seeking direction to the petitioner to produce documents, being its Balance Sheet, Profit & Loss Account, Muster Rolls and Wage Registers. The petitioner filed a reply to the application stating that the Company had closed down its manufacturing activities from 1997 and as such the documents were not available for production before the Court. Despite the reply, the Labour Court passed an order directing the petitioner to produce the documents.

7. Respondent no.1 examined himself in support of his claim, in which he stated for the first time that, he was employed with the petitioner as a Tailor since 1988. He deposed that, his last drawn wages was of Rs.3,000/- per month and his services were illegally terminated w.e.f. 17<sup>th</sup> November, 1993. He also claimed for the first time in his affidavit of examination-in-chief that, he had worked for more than 240 days in every year of his service and that while his services were terminated, workers junior to him were retained in the employment of the petitioner. He denied that, letter dated 23<sup>rd</sup> December, 1994 was sent by the petitioner to the Assistant Commissioner of Labour. He also denied that, the petitioner has closed down its manufacturing activities. In his cross-examination, however, respondent no.1 admitted that whenever any employees were employed by the petitioner, they were paid on piece rate basis.

He also admitted that, he has no proof to show that his salary was Rs.3,000/- per month. Though, he claimed that he had documentary evidence to show that he was employed in the year 1988 did not produce any document of his employment since the year 1988.

8. The petitioner examined a Master working with it, who deposed that respondent no.1 was employed as temporary/causal tailor on/or from 1<sup>st</sup> August, 1993 and was paid salary on the basis of piece rate. He deposed that, respondent no.1 had remained absent without leave or permission from 15<sup>th</sup> November, 1993 till the date of closure of the Company on 26<sup>th</sup> July, 1997 and thus committed misconduct. He referred to the letter dated 23<sup>rd</sup> December, 1993 addressed to the Assistant Commissioner of Labour by the petitioner and produced a copy of the same. As regards the closure, the evidence of the witness is that the petitioner had not renewed its license for the factory and had received letter dated 25<sup>th</sup> September, 2000 stating so. It had also received a letter from the Factory Inspector dated 6<sup>th</sup> January, 2000 to that effect. The Factory Inspector had then cancelled the name of the petitioner from the register maintained under The Factories Act. The witness next produced copy of the notice dated 26<sup>th</sup> July, 1997 by which the employees in the manufacturing unit were informed that due to uneconomical working, the petitioner had closed down its entire manufacturing activity w.e.f. 26<sup>th</sup> July, 1997. After that, all the workers, including the witness himself, had collected their legal dues on account of closure. In his cross-examination, the witness stated that, he was appointed by the petitioner in the year 1992 and he was working with it until the closure in the year 1997. He was working as

a Checking Master and used to get the clothes stitched by the workers. He also used to check the products readied by the workmen. In the year 1992, there were about 60 to 65 employees working in the company, who were getting wages on piece rate basis and they were temporary workers. The scheme of Provident Fund and the scheme of ESI was not made applicable to the tailors because they were not working continuously for more than two to three months and they were doing work in other establishments also.

9. The five issues raised by the Labour Court for its consideration in the Award, read as follows :-

“1. Whether workman prove that he was permanent employee of first party?

2. Whether first party proves that workman was temporary employee ?

3. Whether workman is entitled for relief as sought ?

4. What order ?”

Additional Issue :

“1. Whether the first party proves that it has closed its activities ?”

. It answered Issues no.1 and 3 in the affirmative and Issue no.2 and additional issue in the negative to grant the Award in favour of respondent no.1.

10. Mr. Vaidya, the learned Advocate appearing for the petitioner submits that, the findings of the Labour Court that, respondent no.1 is a permanent worker and that there was no closure

of the manufacturing activity of the petitioner are perverse. The first finding is not based on any material on record and the second finding is by ignoring the material on record. He also submits that, the Labour Court erred in ignoring the letter dated 23<sup>rd</sup> December, 1993 written by the petitioner to the Assistant Commissioner of Labour calling upon respondent no.1 to resume duties.

11. It is already seen above that, the statement of claim filed by respondent no.1 merely claimed that he was working with the petitioner as a tailor for about 5 ½ years on the salary of Rs.3,000/- per month. This claim was improved upon, in his affidavit of examination-in-chief, where respondent no.1 stated for the first time that, he was employed with the petitioner since the year 1988 and further claimed that, in his employment for 5 ½ years, he had worked for more than 240 days in every year of service. Thus, his evidence in examination-in-chief on facts is beyond the pleadings. In any case, he admitted in cross-examination that, whenever any employee was employed by the petitioner, he was paid on piece rate basis, but had volunteered further that, after some months, the wages of the employees were fixed by the petitioner. It was not his evidence that, his own salary had been so fixed by the petitioner. Though, he claimed that, he can produce documentary evidence to show that, he was employed in the year 1988 he did not produce any evidence. As against this, the evidence of the witness of the petitioner is that, he was appointed/working with the petitioner since the year 1992 and continued till the year 1997 as a cutting Master. He used to cut the cloth and give to the tailors for stitching. He used to check the clothes prepared by the workmen. This would

mean that, the witness was infact in regular contact with the tailors working in the manufacturing unit of the petitioner. He deposed that the petitioner, who was employed on 1<sup>st</sup> August, 1993 was paid salary on piece rate basis and he had remained absent without prior permission from 15<sup>th</sup> November, 1993.

12. At para-9 of the impugned Award, the Labour Court has discussed the evidence on Issues no.1 and 2 i.e. about nature of the employment of respondent no.1. The Learned Judge has not even touched upon the evidence of respondent no.1 and has found fault with the evidence of the witness of the petitioner. He refers to the admission by the witness that, he was not given an appointment letter and that he was not working in the administration section. The witness could not recollect the names of 60 to 65 employees working with the petitioner in the year 1992. The witness had admitted that, he did not see any record to verify that respondent no.1 was appointed on 1<sup>st</sup> August, 1993. The next admission referred to in the paragraph is that, no documents had been filed on record to show that the tailors were not doing work for more than 2 to 3 months and that he was not aware of the workers working with the petitioner prior to his employment. The Learned Judge next noted that the witness had not produced any proof to show that, he was working with the petitioner since the year 1992 and that the witness had not seen the Muster Roll of the petitioner. This appreciation of the evidence by the learned Labour Judge is patently selective and arbitrary. He is seen to have concentrated only on the admissions given by the witness of the petitioner on the tertiary facts and ignored his evidence on the material facts. Based on the so-called admissions given by the witness of the petitioner on the most

irrelevant facts, the Labour Court has arrived at the conclusion that the witness is not a creditworthy witness. He has also ignored the entire evidence of respondent no.1.

13. At para-10 of the impugned Award, the Learned Judge refers to the application filed by respondent no.1 on 4<sup>th</sup> September, 2001 and the direction given by the Court thereon for production of wage-cum-muster roll for the period June, 1988 to November, 1993 and draws an adverse inference that the petitioner had deliberately avoided to produce the documents. Non-production of the documents by the petitioner cannot by itself lead to establishment of the fact that, respondent no.1 was in continuous service of the petitioner since 1988 and his services were terminated on 17<sup>th</sup> November, 1993 without following due process of law. The only adverse inference, if at all the same could be drawn, was if the documents were to be produced by the petitioner, the same would not have supported his case. But the question is whether in the facts of the case such adverse inference could in fact have been drawn. When the petitioner was directed by the order passed on the application of the respondent, it had already made it clear that the documents were not available with it and had stated a plausible reason therefor. It had pointed out that its manufacturing unit was closed in the year 1997. All the documents that respondent no.1 desired to be produced were concerning the manufacturing unit. The application had been filed by respondent no.1 in the year 2001. It is the case and evidence of the petitioner that after closing the manufacturing unit, it had also surrendered the tenancy in respect of the premises from where the manufacturing unit was being run. In the circumstances, the documents were not maintained and hence

not available for production. There is nothing on record to indicate that the documents were in fact in the custody of the petitioner and it had deliberately not produced the same. As has been rightly submitted by Mr. Vaidya, an adverse inference for non-production of documents can be drawn against a person only if the documents are proved to be in the custody of the person. Section 114 of the Evidence Act read with illustration (g) states that the Court may presume the evidence that could be and is not produced would, if produced, be unfavourable to the person who withholds it. Unless it was established by evidence that the said documents were in custody of the petitioner, there could be no inference drawn adverse to the petitioner. Besides, such adverse inference cannot replace the requirement of the substantive evidence to prove a fact. An adverse inference can have only corroborative value. Admittedly, respondent no.1 had no evidence with him to establish that he was employed with the petitioner in the year 1988 and had worked on regular wages for a period of 240 days in each year. In the circumstances, the finding of the Labour Court on issues no.1 and 2 is clearly perverse as not supported by the material on record.

14. As regards the additional issue, respondent no.1 stated in his evidence that the petitioner has not closed down its establishment as alleged and it is still functioning. Mr. Vaidya points out that it has never been the case of the petitioner that its establishment is completely closed down. The petitioner has only closed down its manufacturing unit. A suggestion to that effect was put to respondent no.1 in his cross-examination and he denied the same. He further stated that he was not aware whether the place of manufacturing is sold and the licence surrendered by the petitioner.

The witness of the petitioner deposed that the petitioner did not get the factory permit renewed and had closed down its manufacturing activity. It had received letter dtd. 6<sup>th</sup> January 2000 from the Factory Inspector to that effect. The Factory Inspector also cancelled name of the petitioner from the register maintained under the Factories Act. The witness produced the letters received from the Factory Inspector in evidence. He also deposed that notice of closure dtd. 26<sup>th</sup> July, 1979 was published by the Petitioner stating that the petitioner was closing down its manufacturing activities on account of uneconomical working conditions permanently with effect from that day and called upon the workers to collect their legal dues arising out of the closure. Accordingly all the workers including the witness himself collected their legal dues. The witness produced copy of notice dtd. 26<sup>th</sup> July, 1997. There is no cross-examination whatsoever on this evidence of the witness. In any case, the deposition of the witness along with the documents of notice, the correspondence from the Factory Inspector establishes that the petitioners manufacturing unit was closed down on 26<sup>th</sup> July, 1997. Unfortunately, this evidence is ignored by the learned Labour Judge. Therefore, the finding on this issue is perverse.

15. Mr. Vaidya, next submits that, the learned Labour Judge had erred in ignoring the letter dtd. 23<sup>rd</sup> December, 1993, written by the Petitioner to the Assistant Commissioner of Labour calling upon respondent no.1 to resume duties. Relying upon the decision of this court in Sonal Garments vs. Trimbak Shankar Karve, reported in 2002 III CLR, page 488, he submits that when the employer takes up the defence of abandonment of service by the workman and gave an unconditional offer to reinstate the workman if that unconditional

offer is not accepted, there can be no award for reinstatement. The record establishes that the petitioner, by its letter dtd. 23<sup>rd</sup> December, 1993 addressed to the Assistant Commissioner of Labour had, during the course of conciliation proceedings called upon respondent no.1 to resume duties. Since this opportunity was not taken by respondent no.1, he would not be entitled to the award of reinstatement.

16. For all the above reasons, the order impugned in the petition cannot be sustained. The petition is therefore allowed and the rule is made absolute in terms of prayers clause (a) and (b). Mr. Vaidya points out that the petitioner has deposited the amount of Rs.1,32,000/- being the wages calculated by the petitioner until the date of closure of the manufacturing unit on 26<sup>th</sup> July, 1997 in this court, pursuant to the order dtd. 12<sup>th</sup> December, 2006. The petitioner is at liberty to withdraw the amount together with the interest accrued thereon, if any.

(Smt. R.P. SondurBaldota, J.)