

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

Civil Writ Petition No.27578 of 2013 (O&M)
Date of decision: 24.12.2015

HMM Coaches Limited now M/s HMM Infra Limited and others

... Petitioners

Versus

Presiding Officer, Labour Court, Ambala and another

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.R.K.Malik, Sr.Advocate, with
Mr.Vijay Dahiya, Advocate,
for the petitioners.

Mr.B.S.Saini, Advocate,
for respondent No.2.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This order will dispose of the following 7 writ petitions as common questions are involved in all of them which can conveniently be disposed of by a common order. The relevant facts are taken from CWP No.27578 of 2013.

<i>S.No.</i>	<i>Case No.</i>	<i>Particulars</i>
1.	CWP No.27578 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another
2.	CWP No.27580 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another
3.	CWP No.27763 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another
4.	CWP No.27765 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another

<i>S.No.</i>	<i>Case No.</i>	<i>Particulars</i>
5	CWP No.28250 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another
6.	CWP No.28228 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another
7.	CWP No.28229 of 2013	HMM Coaches Limited now M/s HMM Infra Limited v. Presiding Officer, Labour Court, Ambala and another

2. The challenge in this petition is to the award dated May 27, 2013 passed by the Labour Court, Ambala awarding reinstatement in service with continuity and 50% back wages to the claimant respondent and the respondents in the connected petitions. The Labour Court has held that the parties were bound in a relationship of direct employment with the petitioner company. The theory of an intermediary contractor has been disallowed by the Labour Court after appreciating the evidence produced by the parties on record. The Labour Court has observed that the management has not produced the best evidence in its possession which if brought on file may have proved that the workmen had been employed by the contractor. If there was no direct relationship of employment between the management and workmen and the workmen had been brought to work on the premises of the establishment, it was still required to maintain the prescribed registers and records pertaining to contract labour as per the provisions of Contract Labour (Regulation and Abolition) Act, 1970 (in short, “CLRA”). The management being the principal employer was legally bound to maintain a register of contractors as envisaged under Section 29 of the CLRA Act and in terms of rule 73 of the rules framed thereunder. They would have had to produce licenses and registration under CLRA Act while

they were none present or brought on record. The management was required to preserve all the records in original as per rule 79(3) of the rules. Had such records been maintained, the case of the management denying relationship of direct employment could have been considered in the light of that documentary evidence while no such evidence was brought to bear for the consideration of the Labour Court. The authority set up under the Act is vested with powers to call for any information or statistics in relation to the contract labour from the principal employer at any time by an order in writing as per rule 82(1) of the Rules and the persons so called upon to furnish the information are legally bound to produce them in terms of rule 82(2) of the rules.

3. The Labour Court has examined the rules closely and has correctly applied the provisions which are mandatory in nature and in the absence of any direct or corroborative evidence, the withholding of records gives rise to a presumption that the same were deliberately withheld by the management due to the reasons best known to it and if produced would have gone against them. The Labour Court considered the effect of Ex.W6 relied upon by the management being a register of wages paid for the month of July, 2009 to prove that the workman was paid wages by the contractors, namely, M/s Panther Security Services and M/s Unicorn Manpower Agencies. The document Ex.W6 does not append a certificate in the prescribed form as envisaged under rule 72(2) of the rules which was mandatory and in the absence of any such certificate from an authorised representative of the management, would only lend credence to the contention of the workmen that they were employees of the management

and not of the contractors.

4. It appeared to the Labour Court that the name of the contractor was fraudulently inserted by the management on the top of the pages of Ex.W6. The Labour Court also considered the effect of Ex.MW-3/2 and Ex.MW-3/3 being the ESI returns relating to the workmen and these documents could be considered in evidence as proved only by way of producing the declaration forms of the workmen submitted with the application for obtaining registration number of ESI by the employer. The management witness MW3 admitted in his cross-examination that the declaration forms were not in possession of the management, otherwise, they could have easily produced the declaration forms but the management did not do so even when the name of the workmen figured in the ESI returns of the above two exhibits. The Labour Court arrived at the conclusion that there was no evidence available on record to prove that the workmen were engaged through the contractor. Neither were the contractors parties to the reference made by the appropriate Government to test the validity of the termination of the services of the workmen nor were they got impleaded which effort was repelled nor were they produced in the witness box for the truth to be revealed through opportunity of cross-examination. The Labour Court framed as many as 5 issues vide order dated January 20, 2011. The following questions were framed for determination : -

1. Whether the termination of the services of the workman is liable to be set aside being wrong, illegal, null and void etc. and the workman is entitled to reinstatement in service with full back wages and all the benefits including the

continuity of service? OPW.

2. Whether the workman has not come in the court with clean hands and concealed the true and material facts in the court? OPM

3. Whether there is no relationship of master and servant between the parties? OPM

4. Whether the claim statement is not maintainable in the present form? OPM

5. Relief.

5. Interestingly, issue No.3 was deleted vide order dated May 27, 2013 passed by the Labour Court on the statement made by the authorized representative of the management in the Court on May 27, 2013 whereby he withdrew the application dated April 29, 2013. Therefore, the issue with respect to relationship of master and servant between the parties was no longer open for determination and on the other hand was given up. This removes the base of the argument of the management of non-existence of an employment relationship directly between the parties.

6. About two years before issue No.3 was deleted by the Labour Court, the management had filed an application on March 7, 2011 for impleading M/s Panther Security Services, Ambala as a necessary party urging that the workmen were employed by the said contractor. The application was dismissed on April 28, 2011. The management preferred CR No.3453 of 2011 against this order but the revision was dismissed by this Court on May 24, 2011 by passing the following order : -

“Respondent No.1 had raised an industrial dispute, vide Annexure P-2, challenging his termination of services. The dispute was referred to the Labour Court, Ambala vide order dated 14.7.2010 (Annexure P-1). During the pendency

of the dispute, petitioner-management moved an application that M/s Unicorn Manpower Agency, Ambala be impleaded as a party. In the said application, it was averred that in order to decide the reference effectively and properly, it was necessary that M/s Unicorn Manpower Agency, Amabala be impleaded as respondent. Vide the impugned order dated 28.4.2011, the said application was dismissed. Hence, the present petition. Learned counsel for the petitioner has submitted that respondent No.1 was not an employee of the petitioner. The respondent No.1 was the employee with M/s Unicorn Manpower CR No. 3453 of 2011 (O&M) -2-Agency, Ambala and hence, the said agency was a necessary party. After hearing learned counsel for the petitioner, I am of the opinion that the instant petition deserves dismissal. The respondent No.1 had raised the industrial dispute claiming himself to be an employee of the petitioner management. In the written statement, filed by the petitioner before the Labour Court, it has been averred that the respondent No.1 was not an employee of the petitioner-management. A perusal of para 14 of the written statement (Annexure P-3) reveals that it was averred that in case the workman was employed by any contractor, he could not raise the dispute with the management. Thus, in the written statement it has not been specifically pleaded by the petitioner-management that the workman was employed by the contractor M/s Unicorn Manpower Agency, Ambala. The Labour Court will decide the reference on the basis of the evidence led by the parties. The petitioner-management has taken the plea that the workman was not their employee and they can establish the said plea by leading their evidence. Hence, the contractor cannot be said to be a necessary party. No ground for interference is made out. Dismissed.”

7. Eventually, the management was left to fend for itself to prove its case against the workmen by producing evidence or whatever they had to

display. The burden and onus was on the management to dispel the factum of relationship of employer-employee between the parties. Besides, the order passed in the revision has attained finality and cannot be re-opened.

8. In its evidence, the management produced Ex.M25 to Ex.M30 to show that the management had the authority from the Labour department to engage persons through a contractor. Documents Ex.M25 to Ex.M30 did not dispel doubt of the Court as to the principal employer being the direct employer.

9. Mr.Malik learned senior counsel appearing for the petitioner company refers to para. 9 to 11 of the writ petition from where it is argued that the Labour Court has failed to read the evidence produced by the management in its correct perspective. Paragraphs read as follows : -

“9. That the petitioner management produced Certificate of Registration issued by the State of Haryana, under the provisions of Contractor Labour (Regulation and Abolition) Act, 1970, granting permission to the petitioner, to engage contractor, dated 2.6.2008 as Ex.M25 attached as Annexure P.9 and dated 2.7.2009 as Ex.M.28. He stated that they had engaged M/s Panther Security Services and M/s Unicorn Manpower Agency for which they were granted permission Ex.M28, attached as Annexure P.9-A. That M/s Panther Security Services had a Contractor Licence Ex.M29, attached as Annexure P.10 and M/s Unicorn Manpower Agency had a Contractor Licence Ex.M.30, attached as Annexure P.11. As per the documents their contract started only on 1.6.2009.

10. That the witness also stated that persons employed with the Petitioner Company were covered by ESI Act and there was no record of ESI coverage of the respondent and his co-workers, with the Company, and to the contrary, the contractor who was their employer, was deducting ESI contributions from their wages and depositing the same with

the Authority. To show that the respondent and his co-workers, were not employees of the Petitioner, ESI return of the Petitioner was produced as Ex.M.63, and the Employee Provident Fund Return of the Petitioner was produced as Ex.M.64. It is thus clear that they had started working with the contractor only from 1.6.2009.

11. That the petitioner also summoned record from ESI Corporation. MW.2 Vijay, UDC from the office of ESI Corp. produced Ex.MW.3/1, the ESI return of petitioner Company from April, 2008 to March 2010, which does not contain name of the respondent and his co-workers, copy Annexure P.12. He produced ESI return of M/s Panther Security Services as Ex.MW.3/2 for period June 2009 to March 2010, copy Annexure P.13 and ESI return of M/s Unicorn Manpower Agency as Ex.MW.3/3 for period June 2009 to March 2010, copy Annexure P.14. Name of the respondent and his co-workers appears in the said return of the Contractor.”

10. Learned senior counsel argues on the basis of the material placed before the Labour Court, that any reasonable person can reach the conclusion that there was no relationship of employer-employee between the petitioner management and the respondent who was an employee of the registered contractor M/s Panther Security Services. He argues that since the contractor was not a party before the Labour Court, therefore, the registers could not be produced by the management which were in possession of the contractor but he admits that the contractor was not produced or summoned by the management to prove its case. He impresses upon the Court that even M/s Panther Security Services had remitted ESI contributions of the respondent-worker which includes the name of Avtar Singh respondent No.2 though it is admitted that he was working with the petitioner management but through registered contractor and, therefore, the award cannot be

sustained and is liable to be set aside.

11. Learned senior counsel refers to the attendance records of the company for the period from January, 2009 to August, 2009 Ex.M42 to Ex.M47 and the payment of wages record of the workers engaged by the petitioner company from June, 2008 to September, 2009 as Ex.M48 to Ex.M62 and the EPF returns Ex.M64. In all these documents, the name of the respondent does not figure and from where it stands established that there is no direct relationship of employment. He refers to the return filed by the contractors to strengthen its case. He submits that the management possesses valid certificates Ex.M25 to Ex.M28 granting permission to them to engage M/s Panther Security Services and M/s Unicorn Manpower Agencies as labour contractors. The contractor's license issued to M/s Panther Security Services and M/s Unicorn Manpower Agencies have been proved as Ex.M29 and Ex.M30. It is the contention of the learned senior counsel that adverse inference could not be drawn for non-compliance of rules 72 and 73 of the Rules since the record of the contractor was not summoned by the Court and it was incumbent on the court a quo to order its production from the contractors.

12. It is his further contention that the Labour Court wrongly placed reliance on the judgment reported in **Director Fisheries Terminal Division v. Bhikubhai Meghajibhai Chavda**; 2010 (2) RSJ 184 whereas the law declared by the Supreme Court regarding onus to prove the relationship of employer-employee was not considered. He places reliance on the following rulings, namely, **Krishna Bhagya Jal Nigam Limited v.**

Mohd. Rafi; (2006) 9 SCC 697, **Range Forest Officer v. S.T.Hadimani**;

(2002) 3 SCC 25, **State of Haryana v. Ramesh Kumar**; (2008) 11 SCC 435, **Rajasthan State Ganganagar S. Mills Limited v. State**; (2004) 8 SCC 161, **Municipal Corp. Faridabad v. Durga Prasad**; (2008) 5 SCC 171 and **T.T.Public School v. P.O. Labour Court**; 2006 (1) SCT 701.

13. It is from these legal precincts that Mr.Malik commends the view, as repeatedly held, that the initial onus to establish continuous service and having worked for 240 days is upon the workmen and the workmen failed to produce even an iota of evidence of having worked directly with the petitioner-management. He submits that the Labour Court misread Ex.W6 being the wage register produced by the workman which establishes the fact that the respondent's name figures in the wage register of the contractor and no explanation of the same has been furnished by Avtar Singh. Misreading or misconstruing of documentary evidence produced on record is an grave infirmity in the award and for which reasons, the award suffers from a fundamental flaw and error apparent on the face of record which vitiates the proceeding. These are the contentions put forward before the Court for its consideration in judicial review of the award.

14. On the other hand, Mr.B.S.Saini appearing for the respondents has discredited the theory of intermediary contractor between the management and the workers by referring to the pleadings before the Labour Court. He draws the pointed attention of the Court to the written statement dated January 13, 2011 filed on behalf of the management before the Labour Court. There is conspicuous absence of any mention of the contractors, namely M/s Panther Security Services and M/s Unicorn Manpower Agencies therein. Therefore, the story is an afterthought. He cites

the basic law which requires no elaboration that what is not pleaded, is not open to proof. There is merit in this contention as against which Mr. Malik is unable to shrug off. Therefore, when the management pleaded that there was no direct relationship of employer-employee between the parties, it would have to prove each of the cases from the stand point of the management alone. Moreover, M/s Panther Security Services was not a party to the reference. The effort of the management to bring in M/s Unicorn failed with the dismissal of the revision before this Court. The only possible way for the management to have come out of its predicament was to have summoned the contractor as its own witness for them to face cross-examination by the workers so that the truth would be revealed. I have no doubt in my mind that the attempt to introduce the contractors into the picture was clearly an afterthought which was not even the case stated in the claim statement of the petitioner.

15. Even then the Labour Court went into the evidence placed by the management with respect to the contractors but the court has not believed that evidence to be conclusive on the relationship of employer-employee between the management and the workers. This discretion falls in the domain of the Labour Court to assess the evidence and after the evidence has been appreciated, and a view taken, which is plausible and possible on the evidence, interference in the writ jurisdiction would not be called for only to re-appreciate the evidence and come to a different conclusion. The jurisdiction is supervisory and not appellate in Article 226 of the Constitution. At the same time, it also cannot be said with any authority that the Labour Court has overlooked any material evidence and

on the other hand, has duly considered the evidence available on record and returned its findings against the management.

16. Mr.Saini submits that the notice of motion order in this case was interim and *ex parte* and cannot be said to be the expression of final opinion of this Court full hearing at length. Moreover, numerous documents have been placed with the writ petition for the first time and this includes P-11 to P-13. The register maintained under Section 29 of the CLRA Act was not available with the petitioner before the Labour Court. These documents have been brought for the first time on the record of the writ petition which were not before the Labour Court and, therefore, new facts cannot be entertained at this stage to assail the award. Ordinarily, examination of new matter will not be looked into by the writ court in judicial review of an award of a labour court when full opportunity was given to the parties to produce their evidences in support of their respective cases.

17. Mr.Saini submits and rightly so that new material cannot be placed on record which was not examined by the Labour Court and that too when it is not even prima facie conclusive evidence of relationship of employment. He has raised this issue as a preliminary objection in the written statement filed by the respondent worker to the present petition. He points out from that statement that nobody from the management knew or took the plea against the workman that he was an employee of contractor M/s Panther Security Services and, therefore, it is not open in the present proceedings to entertain a request for determination whether the respondent was an employee of M/s Panther Security Services which agency was not even a party to the reference. Besides, if the management was seriously

aggrieved by the reference, it did not take legal recourse against reference No.89 of 2010 and the accompanying identical references in the connected cases.

18. Quite apart from all this, Mr.Saini reiterates that the theory of engagement through the contractors was not articulated in the written statement filed before the Labour Court where there was no mention of M/s Panther Security Services or M/s Unicorn Manpower Agencies and, therefore, an entirely new case cannot be propounded or set up in the writ proceeding. Worse still, the employment relationship or its denial by naming the contractors was also not taken as a legal objection by the management in the written statement at the outset and on the first page if they had a serious case to press. The management cannot take advantage of the statement made by Avtar Singh in his cross-examination admitting that he had no proof that he worked in any month with the management between July 30, 2007 to January 9, 2010 or that he drew any wages from them. The entire cross-examination when read reveals the assertion and the suggestion put to the witness dictates otherwise when he said that it is wrong to state that he was not in the employment with the management. Merely because an order of termination has not been passed is not conclusive of employment relationship or its severance. Respondent denied categorically that he did not work with the contractor named M/s Panther Security Services or that they paid wages to him after deducting provident fund contributions. Therefore, it is not any of his business as to whether his ESI number is 1313739539 or the ESI contributions had been deposited by M/s Panther Security Services. Source of money and its payment to workers is not

conclusive of existence of the intermediary and its relationship with the contract labour.

19. MW1 Sharwan Kumar Arya, Manager for the petitioner company deposed in his cross-examination, after he was recalled, that he joined the management on January 11, 2010 and was not an eye witness of any of the happenings of the factory prior thereto. He stated that his affidavit by way of examination-in-chief was based on record. He admitted that the disputes have arisen between the management and its workers, who were thousands in number, which had led to a settlement dated June 22, 2009 between the disputing parties. He stated that this settlement was made between the management and the representative of the workman due to the pressure exerted on the death of Mam Chand, a worker serving in the establishment. There were as many as eight demands of the union of workers in the demand letter Ex.W1 which led to settlement Ex.W2. It is apparent that the present litigation was born out of strife and unrest amongst the workers to better their deal and conditions of service.

20. This Court has also read the evidence on record with respect to certificate of registration and licenses with the assistance of the counsel. The certificate issued under Section 7(2) of the CLRA Act exhibited on the record of the Labour Court is dated July 2, 2009 and the name of M/s Panther Security Services is mentioned at serial No.3 and M/s Unicorn at Serial No.4 valid up to December, 2009 which permitted engagement of worker strength of 300 each to carry out the work of fabrication and erection. The management is a fabricator of stage carriage coaches running its business from Ambala. The total employment cumulative strength under

the certificate comes to 900 labour which appears to be the total manpower strength of the petitioner-company. Its integral business cannot easily be seen as outsourced and I have no doubt that when Mr.Malik hammers his case in denying employment relationship that there is something inherently weak in the defence set up for the first time during the arguments before this Court based on new matter and on the existing on the file of the court of first instance. When there is not even an iota of unimpeachable evidence on record to come to any other conclusion than the one taken by the Labour Court then there is no gainsaying that the evidence produced leaned in favour of the worker to conclude that there was indeed a direct relationship with the petitioner company. The conclusion was drawn by adverse inference from non-production of best evidence by the management to rebut the relationship of employer-employee.

21. Mr. Saini also points out to his denial affidavit in response to the application filed under Section 17-B of the Industrial Disputes Act, 1947 by the petitioner company that Avtar Singh is present employed elsewhere, namely, with a management by the name and style of M/s S.B.Grains Limited & Adie Broswan Distiller & Bottlers Private Limited at village Jatwar, Naraingarh Road, District Ambala as stated in reply by way of affidavit to the application dated May 4, 2014. In the rejoinder by way of affidavit to the application, the workman has denied the facts stated in the reply to the application as false and incorrect. The management has even filed an additional reply. It is not necessary to go into the question since the main case has been heard for final disposal and an order in the application is not required to be passed and the same be treated as non est. It may be

recorded here that this Court has also read an unverified statement presented by the petitioner company for the consideration of the Court submitted by the learned counsel assisting Mr. Malik with respect to each of the workman and the same is made part of the record.

22. The reasons which weigh with this Court in not interfering with the award are; the absence of pleadings in the written statement filed before the Labour Court where there is not even a mention of M/s Panther Security Services or M/s Unicorn Manpower Agencies. What is not pleaded is not open to proof; new matter cannot be taken into consideration for the first time in the writ proceedings; it was always open to the management to produce the management of M/s Panther Security Services or M/s Unicorn Manpower Agencies as witness for the management and to get their testimonies recorded by giving an opportunity to either side to cross-examine the witnesses produced to prove that the workers were employees of the contractor and not of the management; in the absence of production of best evidence, the Labour Court did not fall in error in drawing an adverse inference against the management and in favour of the workers and lastly certificates of registration and licenses of 2009 are not corroborated by other direct evidence with respect to the 7 workers before this Court in the respective writ petitions and finally there was no occasion for the labour court or this Court while reviewing the work of the tribunal to lift the veil since the story of the contractors coming in the way was disbelieved. There is no third view capable of being taken in absence of clear and cogent evidence available on record. In short, the management could not prove its case against the workers by failing to produce their best evidence. In the

circumstances, it would only be guesswork for this Court to draw a different conclusion from the one lawfully derived by the court below in its judicial discretion based on the preponderance of probabilities, which is the well accepted principle of law in weighing the evidence on the anvil of the court to arrive at its conclusions and to accordingly return findings of fact. The labour court is the first and the last court of fact in its social welfare jurisdiction. Even errors of fact and law are not open to correction which are not fundamental in nature as would vitiate the proceeding and the award.

23. Besides, the findings of fact recorded by the Labour Court after appreciating the evidence on record is not open to interference since this Court does not sit in appeal over these findings and secondly, interference by the writ Court can only be within the parameters laid down by the Supreme Court in cases such as **Satyanarayan Laxminarayan Hegde and Ors. v. Mallikarjun Bhavanappa Tirumale**, (1960) 1 SCR 890, **Syed Yakoob v. K.S. Radhakrishnan**, AIR 1964 SC 477 and **Surya Dev Rai v. Ram Chander Rai**; (2003) 6 SCC 675 explaining the legal position with respect to Articles 226 and 227 of the Constitution of India in the context of tribunals.

24. Lastly, when the core issue No 3 was given up by the management before the labour court, I am then hard pressed to know what remains of the case or the stand of the petitioner. They non-suited themselves by that single action of surrender. The labour court was thus under no bounden duty to return findings thereon or travel into uncharted land. Any discussion on the point has to be read likewise and will be of no moment. When the defence of the management is falsified, all other

defences crumble to the ground and the issue of mandatory compliances of the law in the ID Act including the principle of 240 days and Section 25-F are to read in favour of the respondent workers to justify reinstatement to service of the petitioner company along with the other benefits contained in the award.

25. Having considered the arguments raised by both the sides at length, and having considered the totality of the facts and circumstances of the case I am unable to find any valid ground to interfere with the award passed by the Labour Court, Ambala and would thereby dismiss all the seven petitions.

(RAJIV NARAIN RAINA)
JUDGE

December 24, 2015

Paritosh Kumar