

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: July 14, 2015*
Judgment Delivered on: July 16, 2015

+ **LPA 35/2015**

ASIM CHOWDHURY Appellant
Represented by: Mr.S.Mukherjee, Advocate

versus

M/S. SWAGATAM TOURS AND
TRAVELS (P) LTD. Respondent
Represented by: Mr.Vijay Jaiswal, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The appropriate Government made a reference on July 21, 1995 to the Labour Court, which reads as under:-

“Whether the services of Shri Asim Chowdhury have been terminated illegally and/or unjustifiably by the Management, and if so, to what relief is he entitled and what directions are necessary in this respect?”

2. The Management referred to in the reference : the respondent, is M/s Swagatam Tours and Travels (P) Ltd.

3. As per the Statement of Claim filed by Asim, he pleaded that he was employed as a driver on November 16, 1992 and that his last drawn wage was ₹1000/- (Rupees One Thousand only) per month. He joined the New Delhi General Mazdur Union which raised a demand of he being not paid minimum wage, and angered by said act of his, the Management illegally terminated his services on January 07, 1994, without any notice pay or

retrenchment compensation. He pleaded that in spite of a demand notice dated January 27, 1994, in which he called upon the Management to reinstate him in service, he was not reinstated in service and hence his claim for being reinstated in service with full wages.

4. Responding to the claim filed by Asim, Swagatam pleaded that there was no relationship of employer and workman. It was pleaded that Asim was a driver with a partnership firm M/s Varun Travels having place of business 180-B, Ahinsa Vihar, Sector-9, Rohini. It was pleaded that under the circumstances, the question of Swagatam illegally terminating his services on January 07, 1994 does not arise.

5. On the pleadings of the parties, on September 09, 1997, following three issues were settled:-

“1. Whether the there exist relationship of employer and employee between the parties?”

2. Whether the workman was employed as driver with a partnership firm M/s Varun Travels as alleged in preliminary objection in W.S.?”

3. To what relief, if any, is the workman entitled against the Management in terms of this reference?”

6. Asim examined himself as his own witness as WW-1, and by way of examination-in-chief filed an affidavit WW-1/1A on December 15, 1997, in which he proved only two documents as Ex.WW-1/1 and WW-1/2. The former being a demand notice dated January 27, 1994, and the later being an acknowledgment card. The record of the learned Labour Court would show that he had filed a list of documents enclosing therewith six documents which he, on his own, exhibited as WW-1/1, WW-1/2, WW-1/3, WW-1/4, WW-1/5 and WW-1/6. The demand notice dated January 27, 1994 is the

first document which on the list of documents he has marked as WW-1/1 and the A.D. card which he has referred to in his affidavit by way of evidence as WW-1/2 has been marked by him as WW-1/2. Photocopy of a postal receipt has been marked by him on the list of documents as WW-1/3, photocopy of a receipt dated May 18, 1993 stated to be in lieu of advance received by him from Swagatam, has been marked on the list of documents as WW-1/1, photocopy of another receipt dated May 13, 1993 has been marked as WW-1/5 and photocopy of a letter addressed to the Management as WW-1/6. But we find no reference by him in his affidavit by way of evidence to Ex.WW-1/3 to Ex.WW-1/6, and thus it is obvious that the said documents have not been proved by Asim before the learned Labour Court.

7. The Management examined its Assistant Manager (Accounts) Shri Sanjiv Mehra, as its sole witness : MW-1. In his affidavit MW-1/1A, tendered towards examination-in-chief he deposed that Asim was never ever given employment by the company and that the salary-cum-attendance register, PF register, bonus register and attendance register for the year 1992-1993 and 1993-1994 did not contain his name. He proved only three of the four registers as MW-1/1 to MW-1/3. The three registers are the attendance register, PF register and the bonus register. It is apparent that the salary-cum-attendance register was not proved. Referring to a receipt dated May 18, 1993, he deposed that it was advance given by the Management to Asim, on his request, because he was required to go out of station with the customers of the Management from the office of the Management. He deposed that Swagatam was having business dealings with M/s Varun Travels which used to provide taxies to the Management of Swagatam as and when asked to do so. In another words, the receipt dated May 18, 1993 issued by Swagatam to Asim was explained as money paid

to Asim, who as a driver with M/s Varun Travels came with a taxi to take Swagatam's customers outside Delhi.

8. Mr.Sanjiv Mehra was cross-examined and we find that he was never confronted by Asim or his lawyer with documents marked as WW-1/3 to WW-1/6 on the list of documents filed by Asim.

9. In the light of the aforesaid evidence led by the parties, vide award dated April 01, 2006, the learned Labour Court held that the Management has failed to prove that Asim was employed as a driver by M/s Varun Travels, but at the same time, Asim failed to prove employer - employee relationship. In the award, the learned Labour Court has held that through his affidavit by way of evidence, Asim has proved the documents Ex.WW-1/1 to Ex.WW-1/5, but we find said recording of fact by the learned Labour Court to be incorrect, because we find that in his affidavit by way of evidence Asim has only proved two documents as Ex.WW-1/1 and Ex.WW-1/2.

10. The result is that on issue No.1, the finding returned is that there was no employer - employee relationship proved by Asim with Swagatam. On issue No.2, the finding returned is that the Management has failed to prove Asim being employed as a driver with M/s Varun Travels. In view of the decision on issue No.1, issue No.3 has been decided against Asim.

11. Aggrieved by the award Asim filed a writ petition in this Court which has been dismissed by the learned Single Judge vide impugned order dated November 25, 2014, holding that whether Asim was employed as a driver by Swagatam was a question of fact and that in view of the evidence led the decision against Asim cannot be interdicted by the Court by re-appreciating the evidence.

12. Arguing the appeal, Shri Shamit Mukherjee, learned counsel for Asim urged that once the Labour Court came to the conclusion that the Management of Swagatam has failed to establish its positive case that Asim was employed as a driver by Ms/ Varun Travels, the inevitable conclusion has to be, the finding that Asim was employed by Swagatam. The extended limb of the argument was that the learned Labour Court misread the evidentiary value of the two receipts, Ex.WW-1/4 and Ex.WW-1/5, one of which was positively admitted by the witness of the Management as having been issued by the Management.

13. The first contention advanced on behalf of the appellant by his learned counsel is fallacious for the reason it is settled law that if employer - employee relationship is disputed, the onus of establishing the relationship is on the employee. If for some reasons, the employer pleads that the employee was the employee of somebody else but fails to prove said assertion, it does not mean that the assertion by the employee to the contrary must be held to be proved by default.

14. On the second contention urged, as we have noted hereinabove, Asim has not proved Ex.WW-1/4 and Ex.WW-1/5, but since there is a reference by the witness of the Management in his deposition to the receipt Ex.WW-1/4, which is dated May 18, 1993, we consider the evidentiary value thereof on the issue of what weightage it would have to establish the employer-employee relationship; an exercise which we find not carried out either by the learned Labour Court or by the learned Single Judge.

15. But, before that, a word needs to be spoken on evidence led before the Labour Court being required to be looked into by a Writ Court.

16. We are repeatedly coming across matters where learned Single Judges are brushing aside contentions advanced by either the workman or the

Management by holding that a Writ Court cannot look into the evidence led before the Industrial Fora.

17. Whereas a finding of fact arrived at by an Industrial Fora, after taking note of all relevant evidence, sans a look at it being perverse, cannot be gone into by a Writ Court on re-appreciating the evidence, an argument that a material evidence has not even been noted and hence not considered by the Industrial Fora, would enjoin upon the Writ Court to deal with the argument, and while doing so, to take note of the evidence which has not been even noted by the Industrial Fora and thereafter discuss its relevance. It found to be relevant, its impact on the finding of fact arrived at by the Industrial Fora has to be gone into. It is trite that an Industrial Fora is obliged to consider all relevant evidence and any omission to do so would amount to an irregularity in the exercise of its power by the Industrial Fora and hence liable to be corrected by a Writ Court.

18. Reverting back to the evidentiary worth of the receipt in question, and since the other receipt dated May 13, 1993 is also in somewhat similar language, we take note of the fact that as per the witness of the Management the receipt was obtained, when money was paid to Asim when he came with a taxi of M/s Varun Travels to ferry customers of Swagatam. During cross-examination this testimony of the witness was not even challenged. No suggestion has been given to the witness that his deposition concerning the receipt, which explains the receipt, is incorrect. Thus, the uncontroverted testimony of the witness which explains the receipt having gone unchallenged has to be accepted. The same would be true for the receipt dated May 13, 1993 for the reason the witness was not confronted with the said receipt; and we highlighted that in his affidavit by way of evidence, the witness has made no mention of the said receipt. Thus, in view of the

evidence led, factoring in the evidentiary worth of the two receipts, we reached the same conclusion as was arrived at by the learned Labour Court and in particular for the reason the witness of the Management proved the PF register, bonus register and attendance register of Swagatam for the year 1992-1993 and 1993-1994 as Ex.MW-1/1 to Ex.MW-1/3 and deposed that Asim's name was not entered in any register. No suggestion has been given to the witness that the registers were incorrectly maintained. The correctness of the registers have not been challenged. Thus, evidentiary weightage to the three registers would have to be given. The evidentiary weightage would be that the contents of the register are correct. Since Asim's name is not entered in any of the three registers it would be evidence that Asim was never engaged as a driver by Swagatam in the year 1992-1993 and 1993-1994. Asim's claim of having worked as a driver with effect from November 16, 1992 till January 07, 1994 would thus stand disproved by the said registers.

19. The appeal is dismissed, but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 16, 2015
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