

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3130 OF 2015

RAJIV HOTEL PRIVATE LIMITED, DHULE AND ANOTHER
VERSUS
SHANKAR BHIMAJI MEHTA

...
Advocate for Petitioners : Shri Kulkarni Mukul S.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 20th August, 2016

Per Court:

1 The Petitioners are aggrieved by the judgment of the Industrial Court dated 12.01.2015 by which Revision (ULP) No.8/2014 filed by the Respondent has been partly allowed.

2 This Court had issued notice on 24.03.2015 and had also permitted the Petitioners to serve the Respondent by private mode of service. The notice issued by this Court on 24.03.2015 was not served on the Respondent for more than one year. Therefore, by order dated 02.08.2016, this Court permitted the Petitioners to have the notice published in Marathi daily "Lokmat", Dhule edition. A copy of the paper publication is placed on record and as such, the Respondent has been

served.

3 Despite the above, the Respondent has not entered an
appearance either through an Advocate or in person.

4 It is in the above backdrop that I have heard Shri Kulkarni,
learned Advocate for the Petitioners.

5 The Respondent has preferred Complaint (ULP) No.17/2012
which is pending adjudication before the Labour Court at Dhule under
Section 28(1) of the MRTU & PULP Act, 1971. In the complaint, the
Respondent has averred that he was appointed as a Marketing Manager
w.e.f. 18.11.1998 and the nature of his duties was of looking after the day
to day functioning of the hotel. It is consistently stated in the complaint
that the Respondent is working as a Marketing Manager and was orally
appointed. It is also averred that he was orally terminated from service on
24.02.2012.

6 The Petitioners have filed their Written Statement opposing
the complaint and stated that the Respondent was engaged purely on
commission basis. He was never appointed in the services of the
Petitioners. He was a free lancer and besides receiving commission for the

work of marketing of the business of the hotel, he had his own independent business activities.

7 Shri Kulkarni submits that an application for seeking framing of issues as to whether, the Employer-Employee relationship exists between the Petitioners and the Respondent and as to whether, the Respondent is a “workman” under Section 2(s) of the Industrial Disputes Act, 1947, is pending.

8 The Respondent preferred an application Exhibit U/5 dated 08.08.2012 claiming production of 10 documents listed in the said application. By the order dated 06.08.2013, the Labour Court has rejected the said application Exhibit U/5 on the ground that the Respondent has to prove the factum of employment and he has not produced any document along with his complaint and that the documents prayed for are not relevant to the matter since the Employee has to prove that he is in employment of the Employer.

9 By the impugned judgment dated 12.01.2015, the Industrial Court allowed the revision petition filed by the Respondent and has directed the production of the documents at Sr.Nos.2 to 7, 9 and 10.

10 Shri Kulkarni has strenuously submitted that as the Respondent was engaged on commission basis, he was never an Employee of the Petitioners. He was paid commission for the work of marketing done by him for promoting the business of the Petitioner hotel. From August, 2001 to December, 2002, he was working in the Water Park at Aurangabad and from January, 2003 he again started performing the work of marketing. From August, 2008 till November, 2008, he was working in Hotel Manas. He had also started the business of manufacturing and selling kitchen trolleys and interior decoration material. His visiting card and emails are available and that would indicate that he was never an employee of the Petitioners.

11 Shri Kulkarni submits that unless the documents are germane to the cause of action and are necessary for assisting the Court, a direction to produce the documents could not be sustained. However, the documents which are not relevant to the cause of action and would not in any way assist the Court in adjudicating upon the matter, would not be relevant and the production of such documents, therefore, cannot be ordered.

12 He has relied upon the judgment of the Division Bench of this Court in the matter of *the 20th Century Fox Corporation India Private*

Limited vs. F.H.Lala, 1975 Mh.L.J. 273 : 1974 (2) LLJ 156 (Bom) and *Mackinnon Mackenzie & Company Limited vs. William Nativity Pereira*, 1999 (2) Mh.L.J. 609 : 1999(2) Bom.C.R. 636.

13 This Court in the *Mackinnon Mackenzie (supra)*, by placing reliance upon the earlier judgment in the 20th *Century Fox Corporation (supra)*, has observed in paragraphs 35 and 36 as under:-

- “35. Ordinarily if the management is relying on the documentary evidence in support of its allegation and if they are not produced, it will prove to be vital. However, in the instant case it was not the management but the workman who wanted certain documents to be produced. He, therefore, gave an application also in the trial Court where the management did respond by inviting the workman and his advocate to give and inspect the document. On the day of the visit, no document could be shown as according to the management the documents were not available. The management, therefore, filed an application in the trial Court requesting that they be exonerated of the application sic obligation undertaking by them of showing the documents. To this there was a reply Exh.U-42 filed by the workman.
36. However, the fact remains that no order ever was passed by the trial Court for production of document. It is in this connection, reliance is placed on 1974 (II) LLJ 156 in the case of (20th *Century Fox Corp. (India) Pvt.Ltd. v. F.H.Lala and others*). The case is relied on by the management. It is with regard to the relevance of the document and after referring to the powers of the Industrial Court, the Division Bench of this Court also referred to Order IX, Rule 22 CPC and held that the parties who seek document has to satisfy and make out a case that they are relevant and necessary. The provisions of discovery and inspection as provided

in the code or as provided in the rules under I.D.B. Act are not meant for fishing enquiry. They are meant for furthering the cause of justice and therefore the document sought has to have some connection with the matter on hand especially when document are not satisfied and vague and general request is made. Obviously, the management cannot be faulted for non production of document. In any case it has to be established that the documents are either in possession or power of the parties who is called upon to produce the same. In absence thereof, non production cannot be held against the management. The aforesaid judgment, therefore, squarely applies to the facts of the present case.”

14 I do find that the issue as to whether, there was Employer-Employee relationship between the Petitioners and the Respondent, is ex-facie visible. Even if it is finally concluded that the Respondent was an employee of the Petitioners, the issue as to whether, he is a workman or not, will have to be decided by the Labour Court based on the tests laid down by the Division Bench of this Court in the matter of *Chandrashekhar Chintaman Vaidya v/s National Organic Chemical*, **2010 (II) CLR 121** : [Letters Patent Appeal No.130/2009 in Writ Petition No.4980/2008 decided on 26.02.2010 (Nagpur Bench)].

15 The issue, therefore, would be as to whether, the documents as are directed by the Industrial Court to be produced, would have any bearing on the cause of action and whether, they would assist the Labour

Court in properly adjudicating upon the complaint.

16 The Petitioners' hotel at issue is a registered establishment under the Maharashtra Shops and Establishments Act (erstwhile the Bombay Shops and Establishments Act, 1948). The documents in the industrial establishments or commercial establishments have to be preserved for a period of about five years. Rule 20 of the Maharashtra Shops and Establishments Rules, 1961 mandates such establishments to maintain and preserve certain documents. Rule 20(1) thereof specifically provides that the registers and records relating to any year shall be preserved for a period of two years after the last entry is made therein. Keeping these provisions in view, it is a matter of circumspection as to which is the last entry made by the Petitioners in any of its records which are required to be maintained under the Maharashtra Shops and Establishments Rules, 1961 (for short "the Rules, 1961"). So also, certain documents by such establishments have to be necessarily maintained under Rule 27 of the Maharashtra Minimum Wages Rules, 1963 (for short "the Rules, 1963").

17 Considering the grounds raised in the petition and the vehement submissions of Shri Kulkarni, the fact remains that if the case of the Petitioners is that the Respondent was never its employee and was

working on commission basis, it would surely be advantageous for the Petitioners to produce the documents so as to disprove the claim of the Respondent that he was appointed by the Petitioners in their employment and that he was an employee of the Petitioners. As such, the direction of the Industrial Court to produce the documents cannot be faulted.

18 Even if it is presumed that the last entry made by the Petitioner in its records to be maintained under the Rules, 1961 and the Rules, 1963 was of the year 2012 i.e. on the date of the purported oral termination of the Respondent, such documents as may be relevant to be produced would be at least from January, 2010. If the last entry is made in recent times, the said document will have to be maintained for two years pursuant to the last entry. Considering these peculiar facts of the case, I find that the documents could be produced for a period of four years preceding the date of the application Exhibit U/5 as the complaint was filed in 2012.

19 The issue, therefore, remains as to which of the documents demanded by the Respondent deserve to be produced. The document at Sr.Nos.1 and 8 have been refused by the Industrial Court. The documents at Sr.Nos.2 to 7, 9 and 10 are directed to be produced.

20 It, therefore, needs to be considered as to which of the documents could be said to be relevant for the reason that they would be pieces of evidence indicating the work done by the Respondent with the Petitioners. In the face of the contentions that the Respondent was only a commission agent of the Petitioners, the records which deserve to be produced would, therefore, indicate the presence of the name of the Respondent and that would be a piece of evidence to establish whether, he was in employment and was performing what duties.

21 In the above backdrop, I find that the document at Sr.No.2 indicating the attendance records of the employees of the Petitioners for a period of two years prior to the date of the application Exhibit U/5 deserves to be produced. The documents at Sr.No.3 pertaining to the years 1991 to 2001 are not expected to be preserved and hence, the direction of the Industrial Court to produce the documents at Sr.No.3 is set aside. For similar reasons, the document at Sr.No.4 does not deserve to be produced and hence, the direction of the Industrial Court to that effect is set aside. The document at Sr.No.5, which pertains to the payment register which is expected to be preserved under Rule 27 of the Rules, 1963, therefore, deserves to be produced.

22 The Respondent has demanded the record pertaining to the

payment of commission to him from February, 1999 to July, 2009. No doubt, this record, if reflects the name of the Respondent, would indicate that he was engaged on commission basis and that would support the case of the Petitioners. As such, the documents at Sr.No.6 deserve to be produced at least for a period of five years preceding the date of the purported oral termination with liberty to the Petitioners to produce the record even prior thereto as far as it is available since it would indicate the commission paid by the Petitioners to the Respondent. Considering the above, the direction to produce the document at Sr.No.7, stands merged in the direction with regard to the document at Sr.No.6.

23 The document at Sr.No.9 would indicate the record of the employees maintained by the Petitioners irrespective of their status/positions and in the event, the name of the Respondent appears in the said document, it would assist the Labour Court in deciding the complaint. The document at Sr.No.9, therefore, deserves to be produced.

24 The document at Sr.No.10 is with regard to the various appointment orders issued to other employees of the Petitioners which has no bearing on the case of the Respondent. The direction of the Industrial Court to produce the document at Sr.No.10 is set aside.

25 As a result, this Writ Petition is partly allowed. The impugned judgment of the Industrial Court dated 12.01.2015 is modified in the light of the directions set out herein above.

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(RAVINDRA V. GHUGE, J.)