

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 02.05.2017

CWP No.13520 of 2014 (O&M)

M/s Mahadeva Textiles ...Petitioner

Vs.

Suresh Kumar & another ...Respondents

CWP No.13521 of 2014 (O&M)

M/s Mahadeva Textiles ...Petitioner

Vs.

Ram Chander & another ...Respondents

CWP No.13531 of 2014 (O&M)

M/s Mahadeva Textiles ...Petitioner

Vs.

Mohd. Sabir Hussain & another ...Respondents

CWP No.13550 of 2014 (O&M)

M/s Mahadeva Textiles ...Petitioner

Vs.

Sunil Kumar & another ...Respondents

CWP No.13576 of 2014 (O&M)

M/s Mahadeva Textiles ...Petitioner

Vs.

Munna Lal & another ...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Harkesh Manuja, Advocate, for the petitioner(s).

Mr. H.P.S.Ghuman, Advocate, for respondent No.1-workmen.

RAJIV NARAIN RAINA, J.

1. This order will dispose of abovementioned five writ petitions, which arise out of the proceedings before the Industrial Tribunal -cum- Labour Court, Panipat under Section 2A read with Section 10 (1) of the Industrial Disputes Act, 1947 (for short 'the Act'), as common questions of law and fact are involved in them, which can conveniently be decided by a common order.

2. The appropriate Government had made reference between the respective workmen and M/s Mahadeva Textile, C/o Tilakraj, Proprietor, S/o Shri Chhabildass Industries, Village Ugra Kheri Mod, Sonali Road, Panipat. Reference was; whether the termination of services of workmen was legal and justified or not? If not so, to what relief they are entitled?

3. The demand notice in Ref. No.302 of 2007 (CWP No.13520 of 2014) is dated 18.10.2006. The disputes arose because of en bloc removal from service on 28.08.2006 without following procedure. Conciliation failed and the appropriate Government referred the disputes by separate references to be determined by the Labour Court, Panipat. Before the Industrial Tribunal -cum- Labour Court, Panipat, the workmen assailed the termination order(s) as illegal, while the petitioner – management refuted the claim and defended the orders. In the trial, the parties led their respective oral and documentary evidence in support of their respective stands.

4. The reference was made in 2007 and has been answered on 17.01.2014. The workmen asserted that the respondent had violated the

provisions of Sections 25-F and 25-G of the Act and they claimed reinstatement with continuity of service and full back wages. The management resisted on *locus standi* asserting that the relationship of employer-employee between the parties did not exist. If they had never worked with the respondent, then the question of termination of services does not arise and the claim statement should be dismissed. In this regard, the first issue framed was: whether there exists a relationship of master and servant between the parties. The onus on the issue was rightly placed on the workmen. The management was not responsible in the making of parties by the Labour Department at the time of making reference, as they were not heard nor was hearing them enjoined by law. The written statement was filed by M/s Mahadeva Textiles. The Labour Court has noticed that the summons was sent to the respondent by the Court from time to time. There were summon on record dated 04.12.2013, which bears the signature of one witness Ramchander informing the process server that Mahadeva Textiles is not in existence.

5. The Labour Court thought that the statement of Ramchander should have been recorded by the petitioner-respondent to corroborate the fact of non-existence of firm. The Labour Court reasoned that even if such statement had come on record, it would be beyond pleadings. Summons was again sent in September, 2013 which was received by someone called Vishal on behalf of Mahadeva Textiles. The Labour Court thought this proves that there was a concealment of facts to some extent by the respondent since there appeared to be a note of Vishal, whether the firm existed or not. The Labour Court again reasoned that the respondent was “making attempts to make the workmen feel helpless in the absence of any evidence with them”.

6. Thereby, the crux of the case as projected by H.P.S.Ghuman appearing for the respondents is that in the circumstances and status of deflected summons, the workmen did their best to summon the record, which was never brought by the respondent forcing the Court to draw adverse inference against the petitioners.

7. The Labour Court read the testimony of MW-1, wherein it was deposed by the witness that his factory ran 12 Power-loom machines. This reflected that the respondent establishment is involved in textile activity, as claimed by the workmen. The Labour Court reasoned that the claimants - respondents did not disclose the name of some other textile, if any, in their pleadings. Therefore, the court concluded that it is clearly established on record that the applicant had worked with the respondent – M/s Mahadeva Textiles. The son of the respondent before the labour court appeared as witness for the management and deposed he is not the owner of the establishment, but he was son of Shri Tilakraj S/o Shri Chhabildass, the alleged owner of M/s Mahadeva Textiles. The *munadi* was ordered by Court in the name of M/s Mahadeva Textile against which respondent appeared in the Court. The Labour Court reasoned in Para.13 & 14 of the award as follows:

“13. The stand taken by the respondent is that Mahadeva Textile does not exist in eyes of law, but this stand beyond pleadings. In the written statement filed before this court, the person who had filed written statement is M/s Mahadeva Textile. Here in the present case, the workman has initially filed case against the firm M/s Mahadeva Textile C/o shri Tilakraj Prop. S/o Shri Chhabildas Inds. and claimed his wages and reinstatement against the Prop. of said firm. Against this claim statement a written statement came on record on behalf of Mahadeva Textile wherein the bare plea was taken that there exists no relationship between claimant and the respondent but there was no stand in that written

statement regarding the existence of the firm in some other name than Mahadeva Textile. Thereafter, during the course of evidence the respondent all of sudden cross-examined off the workman to the effect that there was no existence of Mahadeva Textile. This subsequent stand taken by the respondent was beyond pleadings. The summons were being sent to the respondent by this court from time to time. There is a summon on record dated 04.12.2013 which bears the signature of one witness Ramchander and there is a report that Mahadeva textile is not in existence. In that very case, the statement of this Ramchander witness should have got recorded by the respondent to corroborate the fact of non-existence of firm. However, this evidence would also have been beyond pleadings. Then the summons were again sent of this court in September, 20-13 which was received by some Vishal on behalf of Mahadeva Textile which proves that there was a concealment of facts to some extent by the respondent and attempts were being made by the respondent to make the workman feel helpless in the absence of any evidence with him. The workman endeavored his best to summon the record which was never brought by the respondent forcing this court to draw adverse inference against the respondent. Moreover, MW1 has stated that under his factory 12 Power-loom Machines are running. It clearly reflects that the respondent establishment is a textile establishment as claimed by the workman. Besides this, the respondent did not disclose the name of some other textile establishment, if any, in the written statement. Therefore, it is clearly established on record the applicant had worked with the respondent M/s Mahadeva Textile. In case, the son of respondent who appeared before this court is not the owner of the establishment, but he was son of Shri Tilakraj S/o Shri Chhabildass, the alleged owner of M/s Mahadeva Textile. The Munadi was issued by court in name of M/s Mahadeva Textile against which respondent appeared in the court.

14. Now, the crucial question that is to be seen is whether the workman had worked with the respondent and had completed the continuous service of 240 days in the preceding year of his termination so as to attract the mischief

of Section 25-F of the I.D.Act. To prove his case, the workman summoned WW2 namely Shri Tushar Kalra who was directed to bring the summoned record pertaining to the workman. The Court had given several opportunities and directed the witness to bring complete summoned record, but he has failed to bring the same. He has not brought the record related to the workman regarding salary an attendance during the period from November 1996 to 28.08.2006 because the same was not available with him. Summoned witnesses WW2 should brought the record of those workers who are working on the post of Bunkar/Karigar because MW1 has admitted during his cross-examination that Bunkar/Karigar are working with their factory on daily wages basis. Thus, under the facts and circumstances this Court is left with no option except to draw an adverse inference for not producing the summoned record and it will be deemed that the management has violated the provisions of Section 25-F of the Industrial Disputes Act...”

8. The question which begs an answer is that that even if the factory existed, were the claimants there ex-employees? There is no direct evidence in the case to clearly link the two sides to the dispute.

9. Before going forward with the discussion, I may note the first reaction of the Court at the time of issuing notice of motion on July 16, 2014, after hearing Mr. Manuja where learned coordinate bench recorded the following reasons for calling the other side by notice:-

“Counsel contends that in the demand notice under Section 2-A of the Industrial Disputes Act, 1947 (in short 'the Act'), which was later treated as a claim petition, there was no averment that the workman had worked for 240 days. The relationship was specifically denied in the reply and the workman in his replication stated that the workman was maintaining diaries marking his presence. The Labour Court framed an issue that there existed a relationship of master and servant between the parties and the onus of the said issue was on the workman. Apart from examining himself, nothing was

shown to demonstrate the relationship of employer-employee and neither the alleged diaries were produced to show that the workman had been working from 1997 to 2006. Reliance is also placed upon judgment of the Apex Court in *Manager, Reserve Bank of India, Bangalore vs. S. Mani and others, (2005) 5 SCC 100* to submit that even in the evidence, the factum of having worked for 240 days was not deposed and in the cross, a specific question was put whether there was any proof regarding the job and the workman had countered the same that he had no pay slip. It is further submitted that the adverse inference which has been drawn against the management is on account of non-production of record which was summoned, which was the attendance and salary register of the workman. It was the categorical stand in the statement of the proprietor of the concern that the workman was not employed and, therefore, the record was not brought. A wrong adverse inference was drawn against the management.

Notice of motion for 21.11.2014.

Notice re: stay also.”

10. There can be no doubt that the burden of proof was on the workmen to discharge since the onus was placed on them on issue No.1, the only material issue involved for trial. Needless to say, if the issue is decided against the management and it is established by legal evidence that the workmen were indeed employed by them, then it will follow a priori that the termination is illegal because that was the only defence taken by M/s Mahadeva Textiles situated at Village Ugra Kheri turn, Sanoli Road, Panipat that the master-servant relationship did not exist between the parties.

11. Mr. Manuja focuses on an application filed by Suresh (1st respondent in CWP No.13520 of 2014) stating as follows:

“2. That the applicant wants to examine the following witnesses in his evidence:-

- (i) The accountant/Record Keeper of M/s Mahadeva Textile, Industry situated at Village Ugra Kheri turn, Sanoli Road, Panipat

alongwith record of Suresh S/o Sh. Bhartu Ram
 R/o Village Raja Kheri of attendance and salary
 register record since the period of November,
 1997 to 28.08.2006.”

12. Identical applications were filed in all the connected cases.

13. Mr. Manuja argues that the request was specific by name to the effect that the Accountant / Record Keeper of M/s Mahadeva Textile should be summoned along with record of attendance and salary register of Suresh from November, 1997 to 28.08.2006. The request in the application was not for management to produce the entire record of not only the claimants, but other employees as well. It is contended in law that no party can prove the negative by evidence and to successfully shift the onus on the defendant.

14. It has come in evidence of MW-1 Tushar Kalra son of Tilak Raj Kalra that the firm does not keep record of daily wage workers in their concern. He stated that Tilak Raj son of Chhabil Dass was his father, but he was not the owner of the firm. The management had only four employees on their list of workers from whose salaries provident fund is deducted. In 2005, 2006 & 2007, provident fund of 6-7 employees used to be deducted. These years are on approximation, the witness deposed. The Labour Court noticed the decision of this Court in Punjab State Forest Development Nigam Ltd. Vs. Presiding Officer, Labour Court, Amritsar & another, 2010 (1) SCT 667 ruling that it is the duty of the management to maintain records of service of workman i.e. muster roll and destruction of these records could not be done without following proper procedure and during pendency of case in relation to the claim of workman. Thereafter, the learned Labour Court has noticed several judgments on merits regarding effect of completion of 240 days and compliance of Section 25F of the Act, which are

mandatory in nature and non-compliance renders retrenchment of an employee a nullity.

15. The entire discussion on the spinal issue, as to whether there exists master and servant relationship was discussed in Paras.13 & 14 (part) which portion is extracted and quoted in the preceding paragraph 7. There is no doubt that there was no compulsion to produce record other than what was specifically summoned. But the labour court thought the summoned witness WW-2 should have brought the record of those workers who are working on the post of Bunkar/Karigar because MW1 had admitted during his cross-examination that Bunkar/Karigar are working with their factory on daily wage basis. The Court has drawn an adverse inference for not producing the summoned record and it is deemed that the management has violated the provisions of Section 25-F of the Act.

16. There is absolutely no doubt that when Suresh appeared as WW1, as his own witness, he categorically stated in the cross-examination that he had no proof regarding doing job in M/s Mahadeva Textile. He stated candidly that 'even I have no pay slip'. If this was the position of complete absence of legal evidence connecting the claimants to M/s Mahadeva Textiles, then the inference drawn by the Labour Court would not stand on firm legs.

17. It is very easy to draw an adverse inference, but adverse inferences have also to be drawn from the facts or missing links connecting one material fact with another material fact to compose a probable and dependable picture and proof at least some oral or documentary evidence must exist on record produced to properly shift the onus on the management to produce the particularized rest which when withheld can the court draw adverse inference. Thus, Mr. Manuja contends that the contents of the

application fail to elicit as they not pointedly asked for or demanded in any of the applications for summoning record. Management was only called upon to produce record “...of attendance and salary register record since the period of November, 1997 to 28.08.2006.” If the relationship of employment was seriously disputed and hotly contested the application as drafted was of no help to the claimants and for the labour court to come via adverse inference.

18. After all the period of service claimed by the reference seekers was not small. It falls within 1997 to 2006 as claimed by Suresh & others. Nine years of service is enough to generate some positive evidence of employment for the respondent workmen to base their claim and on whom the burden of proof was to successfully shift the onus compelling management to produce the rest of the record since the application was made name-wise. Their request in the application for production of record dated 07.03.2011 did not cast burden or an obligation or duty on the management to produce anything except the record of Suresh & other applicants by name. To which the response of the management was, even before the application was filed at the time when the written statement was filed by the petitioner that the claimants were not their employees.

19. The Labour Court has not considered this vital aspect i.e. of the character of the application and its request for production of record by examining witnesses of the petitioner i.e. Accountant/Record Keeper. There is no evidence on record that management had engaged an Accountant/Record Keeper to be summoned along with record of Suresh & others for the period from 1997 to 2006. There was no such pleading by the claimants. Had they worked for years as claimed then surely they would know the names of the Accountant/Record Keeper. In this situation, the best

evidence would have been production by a co-employee or other witness who may have seen Suresh etc. working for any of the periods falling between 1997 to 2006. No such person was produced or summoned. Merely because the factory was running and Bunkars/Karigars were working in the factory was not inferential evidence that the present workmen must have worked with the management as assumed by the labour court. This was an erroneous approach in law adopted in the reasoning to make the award.

20. The Labour Court does not record as to whether conciliation proceedings were held. If conciliation proceedings were held and there was a break down in conciliation then the Court could have summoned the failure record from the Labour Department to examine the stand of the respective parties in the conciliation proceedings which may have revealed something to depend on. Even the workmen could have summoned the report in sealed cover for the Labour Court to see, but they did not do so. I find no direct or contemporaneous evidence to safely conclude on the basis of an adverse inference that there was master – servant relationship between the parties. Adverse inference cannot be read as wild goose hunting as was done by the Labour Court. Neither am I prepared to base my order on the basis of suspicion of employment as the labour court appears to have by inference that workers must have worked with the management and management was actively concealing facts from the Court.

21. If the management committed violations of the law in failing to maintain record required by different labour legislation including the Factories Act, 1948 etc., then it is for the authorities under those Acts to take action. The Labour Court has not noticed any legal provision under which a small textile business run by a few hands admittedly not more than 10 workers, then the management may even be out of the purview of the

Factories Act employing less than 10 workers in a factory. The Factories Act, 1948 requires at least 10 workers to qualify as a 'factory'. There is no evidence of employment strength exceeding 10. This also leads to the conclusion that a wild inference should not be drawn in this case only to give relief to the workmen, who went to Court without legal evidence.

22. Much that I have tried to cull out relief for the workmen in some way or the other, I find no way out when faced with the sketchy reasons in Paras.13 & 14 (part) of the award and absence of direct evidence connecting them with the petitioner in the totality of facts and circumstances of the case. Thus, I have no option, but to allow these petitions and set aside the impugned awards. It is ordered accordingly.

02.05.2017
Vimal

[RAJIV NARAIN RAINA]
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>No</i>