

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition No.4238 of 2006

General Secretary, Chhattisgarh Chemical Mill Mazdoor Sangh,
Tulsipur, Distt. Rajnandgaon (C.G.)

---- Petitioner

Versus

1. Employer, Chhattisgarh Distillery, Kumhari, Distt. Durg (C.G.)

2. State Industrial Court, Chhattisgarh, D.K.S. Bhawan, Raipur (C.G.)

---- Respondents

For Petitioner: Ms. Reena Singh, Advocate on behalf of Miss
Sharmila Singhai, Advocate.

For Respondent No.1: Mr. Alok Kumar Sinha, Mr. Abhishek Sinha and
Mr. Praveen N. Surange, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

09/08/2018

1. In order to resolve the industrial dispute existing between the parties herein, the appropriate Government in exercise of power conferred under Section 51(1)(a) of the Chhattisgarh Industrial Relations Act, 1960 (for short, 'the CGIR Act') referred the said industrial dispute for adjudication to the Industrial Court and the terms of reference were subsequently amended by order dated 27/31-7-1995. On reference, the Industrial Court by its award dated 29-11-2005 finally adjudicated the dispute holding that termination of 76 employees as shown in the attached list along with the award is illegal and unjustified and directed them to be reinstated along with 50% back-wages. That part of the award has been complied with by respondent No.1 Management, but the petitioner Union has filed this writ petition questioning that remaining 1075 employees of

the said Union are also entitled for reinstatement along with back-wages stating inter alia that the award passed declining to grant reinstatement and back-wages to those employees is unsustainable and bad in law, as there is a clinching and uncontroverted evidence on record to hold that they are also entitled for reinstatement along with back-wages, but the Industrial Court has failed to see that the employer was under an obligation to maintain statutory records under the provisions of the Chhattisgarh Industrial Employment (Standing Orders) Act, 1961; the Factory Act; the EPF Act; and other provisions of the Industrial law, and if the employer failed to produce the record, the Court ought to have drawn adverse inference against the employer. It has further been pleaded that the Industrial Court has committed legal error in drawing adverse inference against the petitioner on the ground that under Section 27 of the CGIR Act, parties to the industrial reference can act and appear as a representative of the employee for the purpose of leading evidence and as such, the award passed declining reinstatement to remaining employees is unjustified and bad in law and deserves to be set aside.

2. Return has been filed by respondent No.1 strongly opposing the averments made in the writ petition stating inter alia that the petitioner has failed to lead any evidence to establish that the remaining employees are also entitled for reinstatement and that each of them have worked for 240 days in one calendar year preceding the date of alleged termination for establishing the violation of Section 25-F of the Industrial Disputes Act, 1947, as such, they were not the employees of respondent No.1 /

Management and there is not an iota of evidence to hold that they have worked with respondent No.1 Management, even 76 employees have been reinstated as per the admission made by respondent No.1 Management who has come fairly giving the list of more than 800 employees that they have worked with the respondent Management, however, on the basis of evidence and material available on record, 76 employees have been reinstated along with back-wages. It is a case of no evidence, as neither the remaining employees had entered into witness box nor any office-bearer of the petitioner Association has entered into witness box to prove that they were precisely the employees of respondent No.1 Management and they have worked for 240 days in one calendar year preceding the date of alleged termination, as such, it is a case where there is no evidence with regard to the aforesaid employees and it has rightly been held by the Industrial Court that they are not entitled for reinstatement along with back-wages.

3. Rejoinder has been filed controverting the averments made in the return.
4. Miss Sharmila Singhai, learned counsel appearing for the petitioner – Association, would submit that respondent No.1 Management / employer was obliged to maintain statutory records under the provisions of the Chhattisgarh Industrial Employment (Standing Orders) Act, 1961; the Factory Act; the EPF Act; and other provisions of the Industrial law, but has failed to produce the record, therefore, advance inference ought to have been drawn against respondent No.1, whereas it has been drawn against the petitioner for non-examination of office-bearers of the petitioner Association

under Section 27 of the CGIR Act. Number of documents have been filed by the petitioner Association, but they have not been allowed to be exhibited and it has been held that there is no evidence on record to hold that remaining employees have worked for 240 days in one calendar year preceding the alleged date of termination and to prove that they were not the employees working with respondent No.1 Management as such, the main part of the award in not granting reinstatement with back-wages to 1075 employees deserves to be quashed and they be directed to be reinstated along with back-wages.

5. Mr. Alok Kumar Sinha, learned counsel appearing for respondent No.1, vehemently opposing the submissions made by learned counsel for the petitioner, would submit that it is a case where no evidence was led by the respondent Management to prove that the employees of the petitioner Association were in fact the employees of respondent No.1 Management and even no evidence was led by the employees personally by examining themselves before the Industrial Court. Even no office-bearer of the petitioner Association who is authorised under Section 27 of the CGIR Act has been examined to prove that the listed employees as shown in the reference were the employees of respondent No.1 Management and they have worked for 240 days in one calendar year preceding the alleged date of termination for which they are entitled for reinstatement with back-wages as such, the Industrial Court has rightly held that they are not entitled for reinstatement along with back-wages. He would further submit that it is fairness on the part of respondent No.1 / Management on the basis of admission and

documents filed that 76 employees have been reinstated along with back-wages by respondent No.1 Management which is also apparent from the fact that immediately thereafter, that part of the award has been complied with and they have been reinstated by payment of back-wages which has been directed to be paid by the Industrial Court, as such, this is a case of no evidence and the Industrial Court has held that the remaining employees are not entitled to be reinstated and, therefore, no interference is called for in exercise of jurisdiction under Article 226 / 227 of the Constitution of India as such, the writ petition deserves to be dismissed along with costs.

6. I have heard learned counsel for the parties and considered the rival submissions made herein-above and gone through the record with utmost circumspection.
7. The appropriate Government in exercise of power conferred under Section 51(1)(a) of the CGIR Act referred the following three disputes to the Industrial Court for adjudication which state as under: -

TERMS OF REFERENCE DT. 25.2.93

ISSUES

1. Whether there is justification for revision of wages and allowances? If yes then what should be the scheme for wages, Dearness allowance and other allowances and what direction should be given to the employer.
2. Whether there is justification for 15 days casual leave 10 days festival leave 30 days, medical leave? If yes then what direction should be given to the employer?
3. Whether termination of the employees as shown in the schedules is just & proper. If not then what direction should

be given to the employer.

Thereafter, by order dated 31-7-1995, additional reference was made adding three more disputes which state as under: -

Amended additional schedule of 807 workers, their case to be decided along with earlier referred workers dt. 24.5.95

Amendment order dt. 27/31.7.95

4. Whether there is justification for grant of interim relief till decision of the dispute to the employees removed from service as mentioned in enclosed list along with reference No.3? If yes what direction should be given to the employer in this respect?

(In addition to the above mentioned terms of reference, on the basis of pleadings of parties, following issues were also framed)

5. Whether in view of legal objections of the second party this reference is incompetent?

6. Relief & cost.

8. The reference was answered by award dated 16-10-1999 granting reinstatement and 66% back-wages which was challenged by respondent No.1 by filing writ petition before the High Court of Madhya Pradesh in W.P.No.5064/1999 (Chhattisgarh Distillery v. General Secretary, Chhattisgarh Chemical Mill Majdoor Sangh and others) which was disposed of by this Court on 7-7-2005 by setting aside the entire award and remanding the matter for fresh consideration on merits to the Industrial Court. Being aggrieved and dissatisfied with the order dated 7-7-2005 passed by the Division Bench of this Court, the petitioner herein and another Union namely Chemical Majdoor Union, Rasmada, filed a special leave to appeal before the Supreme Court and the Supreme Court

disposed of the special leave to appeal directing the Industrial Tribunal to decide the matter on merits in accordance with law. This time, again the award was passed by the Industrial Court on 29-11-2005 after giving opportunity of hearing to the parties. This is how this writ petition is before this Court.

9. Before proceeding further, it would be expedient to notice that on behalf of the petitioner Association five witnesses were examined before the Industrial Court namely Suresh Kumar Lodhi, Parmeshwar Yadav, Awadh Ram, Netram Ratre and Dhannadas Satnami. Though on behalf of the petitioner Association 400 documents were produced, but none of them were exhibited except Exs.P-1 to P-7, as such all the documents remained un-exhibited. On behalf of the respondent Management, one witness namely Sapan Ghatak was examined and documents Exs.D-1 to D-7 were marked.
10. The Industrial Court by its impugned award has answered the reference holding that in the reference item Nos.1 and 2 are not pressed by the first party and thus, answered the same in negative. Answering item No.3 of the reference, the Industrial Court has held that termination of 76 employees as shown in the attached list along with the award, is illegal and unjustified and the respondent Management should be directed to reinstate them with 50% back-wages. While answering the reference, it has been held that the first party (the petitioner herein) has failed to establish that the persons in the scheduled attached with the reference were employees of the second party and that each of them worked for 240 days in one calendar year, as the burden of proof was on them

to prove the same and further held that on the basis of the documents filed by respondent No.1 / Management, it is proved that out of the persons listed in the second schedule attached with the reference, only 76 employees of the second party are the employees of respondent No.1 and worked continuously for more than 240 days in the preceding year and that amounts to their termination without complying the provisions of Section 25-F of the Industrial Disputes Act, 1947, with 50% back-wages.

11. Upon hearing learned counsel for the parties and after going through the record, now, the following question would emerge for consideration: -

“Whether the Industrial Court is justified in holding that 1075 employees attached with the reference are not the employees of respondent No.1 employer and not entitled for reinstatement along with back-wages, and thereby answering the reference in negative?”

12. In order to consider the plea raised at the Bar and to determine the existence of employer-employee relationship, it would be appropriate to notice the relevant judgments of the Supreme Court on the subject, as it is no longer *res integra* and stand settled by the authoritative judgments of the Supreme Court which may be noticed gainfully and profitably herein.

13. The Supreme Court in the matter of **General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lal and another**¹ held that it was for the employee to establish the existence of employer-employee relationship by averring and to prove the said fact by leading reliable legal evidence. Paragraphs

¹ (2011) 1 SCC 635

10 to 13 of the report state as under:-

“10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognised tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that the first respondent is a direct employee of the appellant.

11. On a careful consideration, we are of the view that the Industrial Court committed a serious error in arriving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant. It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the contractor. The first respondent did not discharge this onus. Even in regard to the second test, the employee did not establish that he was working under the direct control and supervision of the principal employer. The Industrial Court misconstrued the meaning of the terms “control and supervision” and held that as the officers of the appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant.

12. The expression “control and supervision” in the context of contract labour was explained by this Court in *International Airport Authority of India v. International Air Cargo Workers’ Union*² thus: (SCC p. 388, paras 38-39)

“38. ... if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour,

2 (2009) 13 SCC 374

when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor.”

13. Therefore, we are of the view that the Industrial Court ought to have held that the first respondent was not a direct employee of the appellant, and rejected the application of the first respondent.”

14. In the matter of **Balwant Rai Saluja and another v. AIR India Limited and others**³, Their Lordships of the Supreme Court having discussed almost all previous judgments on the subject and after referring the judgment in the matter of **National Aluminium Co. Ltd. v. Ananta Kishore Rout**⁴, which pertains to employees of the school established by Nalco, held in paragraphs 62 to 65 as under:-

“62. A recent decision concerned with the employer-employee relationship was that of Nalco case (supra). In this case, the appellant had established two schools for the benefit of the wards of its employees. The writ petitions were filed by the employees of each school for a declaration that they be treated as the employees of the appellant company on grounds of, inter alia, real control and supervision by the latter. This Court, while answering the issue canvassed was of the opinion that the proper approach would be to ascertain whether there was complete control and supervision by the appellant therein. In this regard, reference was made to ***Dharangadhra Chemical Works*** case {AIR 1957 SC 264} wherein this Court had observed that: (Nalco case (supra), SCC pp. 768-69, para 22)

“22. ‘14. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the

3 (2014) 9 SCC 407

4 (2014) 6 SCC 756

master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p. 23 in **Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.**, {(1946) 2 All ER 345 (HL)} “The proper test is whether or not the hirer had authority to control the manner of execution of the act in question”.’ (Dharangadhra Chemical Works case38, AIR p. 268, para 14)”

63. The Nalco case (supra) further made reference to **Workmen of Nilgiri Coop. Mktg. Society Ltd. v. State of T.N.** {(2004) 3 SCC 514}, wherein this Court had observed as follows: (Nalco case (supra), SCC p. 771, para 27)

“27. ‘37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: (a) who is the appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job e.g. whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer’s concern meaning thereby independent of the concern although attached therewith to some extent.’ (Workmen of Nilgiri Coop. Mktg. Society case41, SCC p. 529, paras 37-38)”

64. It was concluded by this Court in Nalco case (supra) that there may have been some element of control with Nalco because its officials were nominated to the Managing Committee of the said schools. However, it was observed that the abovesaid fact was only to ensure that the schools run smoothly and properly. In this regard, the Court observed as follows: (SCC p. 772, para 30)

“30. ... However, this kind of ‘remote control’ would not make Nalco the employer of these workers. This only shows that since Nalco is shouldering and meeting financial deficits, it wants

to ensure that the money is spent for the rightful purposes.”

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, inter alia:

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in **Bengal Nagpur Cotton Mills** case {(2011) 1 SCC 635}, **International Airport Authority of India** case {(2009) 13 SCC 374} and Nalco case {(2014) 6 SCC 756}.”

15. Very recently, the principle of law laid down in **Balwant Rai Saluja** (supra) has been followed by the Supreme Court in the matter of **Jiban Krishna Mondal and others v. State of West Bengal and others**⁵.

16. The principle enunciated and tests laid down by the Supreme Court in **Balwant Rai Saluja** (supra) has been followed by this Court in the matter of **President, Parent Teacher Association and others v. State of Chhattisgarh and others**⁶.

17. At this stage, it is appropriate also to consider the applicability of the provisions of the Evidence Act to Industrial adjudication. It is well settled law that provisions of the Evidence Act, 1872 *per se* are not applicable in an Industrial adjudication, however, its general principles do apply in proceeding before the Industrial Tribunal. The

5 AIR 2015 SC 2417

6 Manu/CG/0171/2015

Constitution Bench of the Supreme Court in the matter of Union of India v. T.R. Varma⁷ while considering the applicability of Evidence Act to the Tribunal held as under:-

“10. Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of law.

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.

If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in *New Prakash Transport Co. v. New Suwarna Transport Co.*, 1957 SCR 98: ((S) AIR 1957 SC 232) (C) where this question is discussed.”

18. Likewise, in the matter of Municipal Corporation, Faridabad v. Siri Niwas⁸, the Supreme Court has held that provisions of Evidence Act, 1872 *per se* are not applicable in Industrial adjudication, but the general principles are applicable. It has also been held that it is imperative for the Industrial Tribunal to see that principles of natural justice are complied with. The principle laid down in Municipal Corporation, Faridabad (supra) has been followed with approval by the Supreme Court in the matter of Amar

7 AIR 1957 SC 882

8 (2004) 8 SCC 195

Chakravarty and others v. Maruti Suzuki India Limited⁹.

19. In **Municipal Corporation, Faridabad** (supra), it has been held by the Supreme Court that burden of proof lies upon the workman to show that he had worked continuously for 240 days in the preceding one year prior to his retrenchment and observed as under:-

“14..... As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25-B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case.”

20. In **Amar Chakravarty** (supra) it has been held that in any proceeding above the burden of proving a fact lies upon a party who substantially asserts it. It has further been held that when employer asserts misconduct of workman, then it was for him to prove that fact by leading evidence and observed as under:-

“12. ... In any proceeding, the burden of proving a fact lies on the party that substantially asserts the affirmative of the issue, and not on the party who denies it. (See *Anil Rishi v. Gurbaksh Singh*¹⁰, SCC p. 561, para 9.) Therefore, it follows that where an employer asserts misconduct on the part of the workman and dismisses or discharges him on that ground, it is for him to prove misconduct by the workman before the Industrial Tribunal or the Labour Court, as the case may be, by leading relevant evidence before it and it is open to the workman to adduce evidence contra. In the first instance, a workman cannot be asked to prove that he has not

9 (2010) 14 SCC 471

10 (2006) 5 SCC 558

committed any act tantamounting to misconduct.”

21. In the matter of **R.M. Yellatti v. Asstt. Executive Engineer**¹¹, Their Lordships of the Supreme Court have held that provisions of the Evidence Act in terms do not apply to the proceeding under Section 10 of Industrial Disputes Act and held as under:-

“17. Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case.”

22. The decision rendered by the Supreme Court in **R.M. Yellatti** (supra) has been followed with approval in the matter of **ONGC Ltd. and another v. Shyamlal Chandra Bhowmik**¹² and further in

11 (2006) 1 SCC 106

12 (2006) 1 SCC 337

the matter of Chief Engineer, Ranjit Sagar Dam and another v. Sham Lal¹³.

23. The Supreme Court in the matter of General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual Workers Union¹⁴ laid down the parameters for judicial review of award of the Industrial Tribunal clearly indicating the grounds for interfering in the award. The relevant paragraph of the report is as under:-

“15. ... It will be seen therefore that the interference would be limited to a few cases and as already noted above, in the case of a patent illegality or perversity. On the contrary, Mr. Sanyal's reliance on Sadhu Ram Case is more appropriate to the circumstances herein. It has been observed as under:- (SCC p.158, para 3)

“3. ... The jurisdiction under Article 226 of the Constitution is truly wide but, for that very reason, it has to be exercised with great circumspection. It is not for the High Court to constitute itself into an appellate court over tribunals constituted under special legislations to resolve disputes of a kind qualitatively different from ordinary civil disputes and to readjudicate upon questions of fact decided by those tribunals. That the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the Tribunal is well competent to decide. Where the circumstances indicate that the Tribunal has snatched at jurisdiction, the High Court may be justified in interfering. But where the Tribunal gets jurisdiction only if a reference is made and it is therefore impossible ever to say that the Tribunal has clutched at jurisdiction, we do not think that it was proper for the High Court to substitute its judgment for that of the Labour Court and hold that the workman had raised no demand with the management.” “

24. After having noticed the principles governing the determination of employee-employer relationship and also taking note of the applicability of the provisions of the Evidence Act to the industrial

13 (2006) 9 SCC 124

14 (2008) 12 SCC 275

adjudication and also taking note of the scope of interference in industrial award, I would turn to the question as to whether existence of relationship of employer and employee has been established between the parties.

25. It is the case of the petitioner Association that their members listed in the reference were the employees of respondent No.1 and their services have been terminated in violation of the provisions contained in Section 25-F of the Industrial Disputes Act, 1947 which is applicable by virtue of the provisions contained in Section 110 of the CGIR Act and neither retrenchment compensation has been paid nor notice pay has been paid and notice to the appropriate Government has also not been served in the manner prescribed as such, their termination is wholly illegal being in contravention of the provisions of the Industrial Disputes Act, 1947 and they have completed 240 days of service in one calendar year preceding the alleged date of termination. On the other hand, it is the case of the respondent Management that they were not the employees of respondent No.1 and therefore the question of serving 240 days in one calendar year preceding the alleged date of termination would not arise, and they were put to strict proof of the same, but they have failed to prove it and thereby the reference has been answered in negative.

26. In order to prove the relationship of employer and employee, only five employees listed in the reference have been examined including Parmeshwar Yadav. He has stated on oath that respondent No.1 has stopped taking work from him since April, 1991 and he has worked for 240 days in that year. No document

has been filed in support of his statement to prove the case. However, in para 11 he has made a general statement that the manner in which the work has been stopped to him, other workmen have also been given similar treatment. The statements of other four witnesses namely, Suresh Kumar Lodhi, Awadh Ram, Netram Ratre and Dhannadas Satnami contain the same version. No document except identity card Ex.P-1 of one Dhan Raju, who has not been examined, his pay slips Exs.P-3, P-4 & P-5 and PF slips Exs.P-6 & P-7 have been filed during the cross-examination of the witness of respondent No.1 Sapan Ghatak. The aforesaid witness has not been examined either on behalf of the petitioner Association or any other person. These witnesses have failed to throw light on the relationship between the employees / petitioner Association and the respondent Management / employer and failed to state that payment of wages was made by respondent No.1 or respondent No.1 exercised effective control over the listed employees of the petitioner / Association. No documents have been filed demonstrating these relevant factors in line with the principle of law laid down by the Supreme Court in **Balwant Rai Saluja** (supra).

27. Chapter IV of the CGIR Act provides for Representatives of Employers and Employees and also provides for appearance on their behalf. Section 27 of the CGIR Act provides for Representation of employees. It states as under:-

“27. Representation of employees.—The following shall be entitled to act and appear in the order of preference specified below as the representative of employees in an industry in any local area:—

(i) a Representative Union for such industry;

(ii) any union of which the employee of such industry is a member;

(iii) Labour Officer:

... ..”

28. Rule 60 of the Chhattisgarh Industrial Relations Rules, 1961 provides as under:-

“60. A party or its representative in any proceeding before a Labour Court, the Industrial Court or a Board shall have the right of examination, cross-examination and re-examination of the witnesses called for by such party or the opposite party as the case may be.”

29. No person in line with the above-stated provision i.e. Section 27 of the CGIR Act and Rule 60 of the Chhattisgarh Industrial Relations Rules, 1961 has been examined on behalf of the petitioner Association except the self-serving statement of the aforesaid five witnesses. On behalf of respondent No.1, Sapan Ghatak has been examined. He has stated that in his factory, six contractors were registered under the provisions of the Contract Labour (Regulation and Abolition) Act and the employees listed in Schedule-A were not employed on behalf of the Management and documents Exs.D-1 to D-6 have been filed and exhibited during the evidence. He has been subjected to lengthy cross-examination by the petitioner Association but nothing has been brought out by the petitioner / Association to support their plea.

30. In the additional reply filed on behalf of the respondent Management, it has been brought on record that the Notice to Produce dated 1-9-2005 was issued by the petitioner Association for production of certain documents which was replied by the respondent Management on 19-9-2005 wherein it has been stated that under Rule 31 of the Minimum Wages Rules, statutory

documents should be preserved only for a maximum period of two years and under Section 13-A of the Payment of Wages Act, statutory records should be preserved for a maximum period of three years and under Rule 121(4) of the Factory Rules (C.G.) 1962, statutory records should be preserved for a maximum period of three years. The aforesaid document has been brought on record as Annexure CA-2. The Industrial Court disposed of that application on 19-9-2005 which has been filed along with this writ petition as Annexure CA-3, as such, no direction was issued by the said Court.

31. The Industrial Court took into account the aforesaid material brought on record by both the sides and concluded in para 45 of the award that all the listed persons in the schedule were not the employees of respondent No.1 / Management and they have also failed to prove that each one of them worked for 240 days in one calendar year preceding the alleged date of termination and burden was upon them to prove it, and held as under: -

“45. Thus we hold that First Party at whose instance this reference has been made has failed to prove that all the enlisted persons were employees of second party, and that each one of them worked for more than 240 days, although this burden was on it, to prove. However, from second party's document form No.6-A of E.P.F. Scheme, it is found proved that out of the persons enlisted in the two schedules 77 (whose list enclosed alongwith this Award) were employees of second party and from the amount they contributed in E.P.F. it can be inferred that they worked continuously for more than 240 days in preceding year. Undisputably they are not in service and they were refused work. This also amounts to their termination without compliance of provisions of section 25 (F) of I.D. Act, hence it was illegal & unjustified. However as per pleading of first party out of these names Deep Chand Yadav at S.No.69 in schedule-A has been taken back in service. Thus the remaining 76 workers shown in the list are proved to have been illegally terminated from service by second party, hence

they are entitled to be reinstated on the same post. So far as back wages are concerned, second party always denied employment of these workers which is not found true, and has not adduced evidence that these workers gainfully remained employed some where else during period out of service, and also could not controvert first party evidence of remaining unemployed during the relevant period, hence these workers are entitled to get it. But as Learned counsel second party has pleaded and argued that Co. is running in financial crisis and has been declared sick Co. under the provisions of sick Industrial Co. Act & the B.I.F.R. by order dt. 7.8.1998, as such looking to the financial capacity of second party, all these 76 workers deserve to be paid 50% back wages with all other benefits like continuity of service etc. However, employer shall be entitled to make adjustment of the amount if any paid to them under provisions of 65 (3) of the Act and any other agreement.”

32. Very recently, the Supreme Court in the matter of **Mohd. Ali v. State of H.P. and others**¹⁵ dealing with similar issue emphasized the need for working 240 days in one calendar year preceding the date of termination, held as under:-

“9. It is a well known fact that the Industrial Disputes Act is a welfare legislation. The intention behind the enactment of this Act was to protect the employees from arbitrary retrenchments. For this reason only, in a case of retrenchment of an employee who has worked for a year or more, Section 25F provides a safeguard in the form of giving one month’s prior notice indicating the reasons for retrenchment to the employee and also provides for wages for the period of notice. Section 25B of the Act provides that when a person can be said to have worked for one year and the very reading of the said provisions makes it clear that if a person has worked for a period of 240 days in the last preceding year, he is deemed to have worked for a year. The theory of 240 days for continuous service is that a workman is deemed to be in continuous service for a period of one year, if he, during the period of twelve calendar months preceding the date of retrenchment has actually worked under the employer for not less than 240 days.

12. Further, it is an admitted position that though the appellant worked as such till 1991 under different work/schemes i.e. Rabi and Kharif and completed 240 days in a calendar year only during the years 1980, 1981, 1982 and 1986 to 1989 but he worked only for 195 days in the year 1990 and 19.5 days in the immediate

preceding year of his dismissal which is below the required 240 days of working in the period of 12 calendar months preceding the date of dismissal, therefore, he is not entitled to take the benefits of the provisions of Section 25F of the Act and Division Bench of the High Court was right in dismissing the appeal of the present appellant. ”

33. After going through the pleadings of the parties, after going through the evidence available and brought on record and after analysing the same and considering the findings recorded by the Industrial Court, I am of the considered opinion that the respondent Management has failed to prove the relationship of employer-employee by bringing cogent and clinching evidence to establish the said relationship of employer-employee, as none of the office-bearers in terms of Section 27 of the CGIR Act read with Rule 60 of the Chhattisgarh Industrial Relations Rules, 1961 were examined to demonstrate the relationship as held by Their Lordships of the Supreme Court in Bengal Nagpur Cotton Mills (supra) and Balwant Rai Saluja (supra). On the other hand, the respondent Management has come fairly by producing the PF account of more than 800 employees on perusal of which the Industrial Court found that 76 employees, whose names listed in the reference order, were employees of the second party and they have contributed in the EPF also, and reached to the conclusion that they have worked for more than 240 days in one calendar year preceding the alleged date of termination and they were terminated without compliance of Section 25-F of the Industrial Disputes Act, 1947 leading to passing of the order directing reinstatement along with 50% back-wages. In sum and substance, it is my considered opinion that the petitioner Association has failed to establish on record that the other 1075

employees were the employees of respondent No.1 – Management and they have worked for 240 days in one calendar year preceding the alleged date of termination and as such, the finding recorded by the Industrial Court is neither perverse nor contrary to record, rather based on material available on record. Therefore, the Industrial Court is absolutely justified in partly answering the reference in negative holding that 1075 employees are not the employees of respondent No.1 and they have not worked for 240 days in one calendar year preceding their alleged date of termination and consequently, not entitled for reinstatement along with back-wages.

34. As a fallout and consequence of the aforesaid discussion, the writ petition deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge