

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

CWP No.25081 of 2019

Date of Decision : 09.09.2019

Dhanesh Kumar

....Petitioner

v/s

Presiding Officer, Industrial Tribunal-cum-Labour Court-II,
Gurugram and another

....Respondents

Coram : Hon'ble Mr. Justice B.S. Walia

Present: Mr. Narender Kumar Vashist, Advocate for the petitioner.

B.S. Walia, J.

[1] Prayer in the petition under Article 226/227 of the Constitution of India is for the issuance of a writ of Certiorari for quashing award Annexure P/1 dated 05.12.2017 passed by the Industrial Tribunal-cum-Labour Court-II, Gurugram, (hereinafter referred to as the Tribunal) as also for the issuance of a writ of Mandamus for directing respondent No.2 to reinstate the petitioner in service with full back wages w.e.f. 16.11.2011.

[2] Learned Counsel contended that the petitioner was working as Operator in respondent No.2-Company w.e.f. 27.02.2010 but on 16.11.2011 his services were illegally terminated orally without serving any notice, giving notice pay or retrenchment compensation and despite demand notice he was not reinstated, that he was unemployed from the date of his illegal termination and in the circumstances entitled to be reinstated in service with continuity and full back wages but the learned tribunal wrongly rejected the reference.

[3] I have considered the submissions of learned counsel and gone over the paper book.

[4] Admittedly, except for his oral statement, the petitioner led no cogent and convincing evidence to prove that he ever remained an employee of the respondent-management. On the other hand, the management led evidence to prove that the petitioner was appointed by a Contractor, M/s A & S Manpower Management on 01.01.2010 as a Helper and that he submitted his resignation on 17.11.2011 and took full and final dues from the contractor. MW-1 Praveen Kumar, H.R. Executive filed his affidavit (Ex.MW1/A) to prove that the petitioner was never an employee of the management. He also proved copies of payment register (Ex.MW-1/1), details of Labour Welfare Fund (Ex. MW-1/2) and attendance register (Ex. MW-1/3) of the relevant period in which there was no mention of the name of the workman. Besides no evidence in the shape of appointment letter, wage slip, PF slip etc was produced on the record to prove the stand of the workman of his being an employee of the respondent-management. Moreover, PW-2 admitted that the contractor i.e. M/s A & S Manpower Management Private Limited was working in the respondent-company. Besides, MW-2 Nand Kishore, LDC office of ESIC, Gurugram on the basis of official record proved extract of C-6 Register (Ex.WW2/1) and ESIC details of petitioner (Ex. MW-2/2) and in both the documents, as against employee code Dhanesh Verma, the employer code mentioned is of M/s A & S Manpower Management Private Limited. Thus evidence of MW-2, also reveals that the petitioner remained employee of M/s A & S Manpower Management Private Limited. Additionally, the petitioner workman on query by the Tribunal admitted that his full name was Dhanesh

the job, he had mentioned his name as Dhanesh Kumar in the application. The Tribunal held that in the documents produced by the official witness, the name of the petitioner was mentioned as employee of M/s A & S Manpower Management Private Limited and he had led no positive evidence to prove his claim, therefore, it did not lie in his mouth to say that he was an employee of the respondent-Management, rather it supported the version of the management that he was an employee of the said contractor. i.e. M/s A & S Manpower Management Private Limited. Accordingly, on the aforementioned basis, the Tribunal held that there was no relationship of employer and employee between the parties, therefore, the petitioner could not claim that his services had been terminated by the respondent-management. Accordingly, the reference was rejected.

[5] Hon'ble Supreme Court in Workmen of Nilgiri Coop Marketing Society Limited vs State of Tamil Naidu while approving the following decisions i.e.

48. In N.C. John v. Secretary Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and Others, 1973 Lab. I.C. 398, the Kerala High Court held:

"The burden of proof being on the workmen to establish the employer- employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship."

49. In Swapan Das Gupta and Others v. The First Labour Court of West Bengal and Others, 1975 Lab. I.C. 202, it has been held:

"Where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to

prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

50. *The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."*

held that it was settled law that burden of proof lies upon him who seeks to establish existence of relationship of employer and employee.

To similar effect is the decision in '**Rajwanti** versus **Divisional Forest Officer, Bhiwani and others**', 2014(9) S.C.T. 268. Relevant extract of the same is reproduced as under:-

7. *Counsel for the petitioner has not been able to address any meaningful argument since the onus to prove that she was an employee of the department was on her as per the settled principles of law. The workwoman is alleged to have worked for a period of 18 long years from 1992 to 2010 and not a single employee from the department has been examined in support of her claim to allege that she had worked in the said department for the 18 long years. The onus thus could not be shifted by the workwoman to the management which she was required to do. The record has been examined by the Labour Court and nothing could be shown that at any point of time, the workwoman's presence had been marked. The Apex Court in **R.M Yellatti v. Asstt. Executive Engineer.**, (2006) 1 SCC 106 laid down the principles that the drawing of adverse inference would depend upon the facts of each case and normally, the record of the employment is with the management and this Court is not to interfere under **Article 226 of the Constitution of India** in the finding of the Labour Court unless they are perverse. The earlier judgment of the Apex Court in **Manager, RBI, Bangalore v. S.***

***Mani**, (2005) 5 SCC 100 was also considered. The following principles were laid down:-*

*“Analyzing 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 aforestated 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 workwoman stepping in the witness box. This burden is discharged upon the workwoman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workwoman (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 facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant/workwoman will not suffice in the matter of discharge of the burden placed by law on the workwoman 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 workwoman 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 facts of each case.”*

[6] In view of the fact that the petitioner-workman did not lead any evidence except for oral statement of being an employee of the respondent-management while the respondent-management led evidence as referred to above, it stands proved that the petitioner was not an employee of the respondent-management but of the Contractor M/s A & S Manpower Management Private Limited.

[7] Thus, in the absence of cogent evidence having been produced on record by the petitioner to establish relationship of workman and employer between him and the respondent-management, the finding of the Tribunal that there was no relationship of workman and employer between the petitioner and the respondent-management, instead the petitioner was an employee of the Contractor M/s A&S Manpower Management Private Limited does not warrant any interference. Accordingly, finding no merit in the writ petition, the same is ***dismissed***.

(B.S. Walia)
Judge

September 09, 2019
'Rajneesh'

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No