

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice T. S. Sivagnanam
and**

The Hon'ble Justice Hiranmay Bhattacharyya

FMA 97 OF 2019

Chandan Rai

Vs.

State of west Bengal & Ors.

For the Appellant : Mr. Nayan Rakshit
..... Advocate

For the Respondents : Mr. Ranjay De
.....Advocate

Heard on : 19.01.2022

Judgment on : 31.01.2022

Hiranmay Bhattacharyya, J.:-

1. The instant appeal is at the instance of the writ petitioner challenging the Judgment and Order dated June 22, 2016 passed by a learned Single Judge in WP 8259 (W) of 2016 thereby, refusing to interfere with the award passed by the

learned Judge of the 7th Industrial Tribunal, Kolkata on September 16, 2015 in case No. 37/10 (1B) (d) of 2012.

2. The appellant filed an application under Section 10 (1B) (d) of the Industrial Disputes Act, 1947 (for short “I.D. Act”) before the 7th Industrial Tribunal (for short “the Tribunal”) which was registered as case No. 37/10 (1B) (d) of 2012. In the said application the appellant claims to be a professional car driver engaged by the respondent No. 3 to drive their motor vehicles in the year 2007. The respondent No. 3 is a concern engaged in manufacturing of various kitchen appliances and earning huge profit by engaging workmen and employees under it. The appellant alleges that he is a victim of unfair labour practice and no appointment letter was issued in his favour by the respondent No. 3. The said respondent did not enroll his name in its master roll with an intention to deprive the appellant from all legitimate and due entitlement which he deserved as a workman under the said respondent. It was further alleged that the said respondent during the tenure of the service of the appellant changed the mode of payment of salary to the workman during last few months of his tenure of employment after obtaining his signature in the voucher of one “Bhattacharya Enterprises”. The appellant claims that the respondent No. 3 terminated his service with effect from 21.6.2011 without assigning any reason and only by a verbal order without offering any monetary benefit and/or

compensation while terminating his service. He further claims that his monthly salary was Rs. 5,500/- at the relevant point of time. The appellant prayed for declaration that the termination of service of the appellant is void *ab initio* and for a direction upon the respondent no. 7 to reinstate the appellant in service and to pay him his full back wages and consequential benefits.

3. The respondent No. 7 contested the said application before the Tribunal by filing a written statement challenging the maintainability of the said application. It was specifically contended in the said written statement that there is no employer-employee relationship between the respondent No. 3 and the appellant herein and as such there does not arise any question of termination of service as well as payment of any monetary benefit or compensation. It was also contended that the appellant is an employee of M/s. Bhattacharya Enterprises being the contractor engaged by the respondent No. 3 and as such the alleged dispute cannot assume the character of an industrial dispute. Thus, the respondent No. 3 prayed for dismissal of the said application.
4. The learned Tribunal passed an award on September 16, 2015 thereby dismissing the application filed under Section 10 (1B) (d) of the I.D. Act upon holding that the appellant herein could not prove that there ever existed any employer-employee relationship between the respondent No. 3 and himself. The

said award was challenged by the appellant in a writ petition and the learned Single Judge dismissed the same by an Order dated June 22, 2016. Being aggrieved, the writ petitioner has preferred the instant appeal.

5. Mr. Rakshit, the learned Advocate for the appellant contended that the learned Tribunal as well as the learned Single Judge failed to take into consideration the documents being Exhibits 6 and 7 which support the case of the appellant that he is an employee of the respondent No. 3. He further contended that the appellant worked as a driver under the respondent No. 3 since 2007 and his employment was terminated illegally without assigning any reason and also by not offering any monetary benefit and/or compensation. By placing reliance on a judgment in the case of *Bank of Baroda v. Ghemarbhai Harjibhai Rabari* reported at (2005) 10 SCC 792, Mr. Rakshit contended that since, the appellant in the instant case has proved that he is an employee under the respondent No. 3 and no evidence to the contrary was produced by the respondent No. 3, the learned Tribunal as well as the learned Single Judge erred in law by holding that there does not exist any employer-employee relationship between the appellant and the respondent No. 3.
6. Mr. Ranjay De, learned Advocate who was heard for the respondent company as he appeared before the learned Single Judge seriously disputed the contentions raised by Mr.

Rakshit. By drawing attention of the Court to several exhibited documents, Mr. De contended that the appellant was not an employee of the respondent No. 3 at any point of time but he was an employee of one “Bhattacharya Enterprises”. He further contended that the onus to prove the existence of employer-employee relationship is to be discharged by the workman i.e. the appellant in the instant case and since the appellant has miserably failed to prove existence of such relationship between the parties, the learned Tribunal and the Single Judge were justified in dismissing the claim of the appellant herein.

7. Heard the learned Advocates for the parties and perused the materials placed before us.
8. The appellant examined himself as PW1 before the Tribunal and the respondent No. 3 examined two witnesses namely, Sri Debasish Bhattacharya, the proprietor of M/s. Bhattacharya Enterprises as OPW1 and the Senior Manager (H.R. and Personnel) of the respondent No. 3 as OPW2.
9. The principal issue which has been raised by the appellant in the instant appeal and which is required to be decided is whether there exists any employer-employee relationship between the parties. If the answer to the said issue is in the affirmative, only then the next issue whether the service of the appellant was illegally terminated by the respondent No. 3 and

if so what reliefs the appellant would be entitled to under such circumstances shall arise for consideration.

10. Let us first decide the principal issue whether there exists any employer-employee relationship between the parties. In the instant case the appellant has asserted existence of employer-employee relationship between the parties and the respondent No. 3 has denied such relationship. It is a well settled principle of law that the burden of proving the existence of relationship of an employer and employee lies upon the person who sets up a plea of existence of such relationship. The Hon'ble Supreme Court in the case of *Workmen of Nilgiri Co. Mkt. Society Ltd. vs. State of Tamil Nadu & Ors.* reported at (2004) 3 SCC Page- 514 held as follows:

“47. It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.

48. In N.C. John v. Secy., Thodupuzha Taluk Shop and Commercial Establishment workers' Union the Kerala High Court Held: (LAB IC p. 402, para 9)

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 v. First Labour Court of W.B. it has been held: (LAB IC para 10)

Where a person asserts that he was a workman 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.”

11. Thus, applying the said legal proposition it is to be now analysed as to whether the appellant has discharged the burden of proving the existence of employer-employee relationship between the respondent No. 3 and himself in the instant case. This Court has examined the exhibited documents more particularly, Exhibits 6 and 7 on which heavy reliance has been placed upon by the learned Advocate for the appellant and we are constrained to hold that the learned Tribunal was perfectly justified in holding that the said documents which are nothing but declaring him as an authorized representative of the company cannot in any way be construed to be documents to prove that the appellant was an employee of the respondent No. 3. The learned Tribunal also rightly took note of the admission of the appellant herein during cross-examination that it would not be evident from Exhibits 6 and 7 that he was an employee of the respondent No. 3.
12. Though it is the specific case of the appellant that he worked as a driver under the respondent No. 3 since 2007, the appellant failed to prove such fact by producing any evidence

to that effect. Thus, this Court is of the considered view that the appellant failed to discharge the burden of proving the existence of employer-employee relationship between the parties.

13. On the contrary, record reveals that the proprietor of M/s. Bhattacharya Enterprises adduced evidence as OPW1 and several documents were marked as Exhibits A to D. Exhibited documents reveal that the appellant being an employee of M/s. Bhattacharya Enterprises is the member of the Provident Fund and he is also an insured person under Employees State Insurance Corporation as an employee of M/s. Bhattacharya Enterprises. The learned Tribunal after taking into consideration the exhibited documents namely the original nomination and declaration form signed by the appellant, the smart card of ESI of the appellant, the original attendance register of M/s. Bhattacharya Enterprises being Exhibit B/2 and the salary register being Exhibit B/3 held that M/s. Bhattacharya Enterprises is the pay master of the appellant and also that such company was responsible for provident fund and the ESI. It was further held that the attendance was maintained by the said enterprise and being the employer it exercised the supervision and control over the appellant. The learned Tribunal further held that the appellant is an employee employed by M/s. Bhattacharya Enterprises being the contractor engaged by the respondent No. 3.

14. The Hon'ble Supreme Court in *Nilgiri Co. Mkt. Society (Supra)* further held that the question whether the relationship between the parties is one of 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.
15. The learned Tribunal in our considered opinion rightly held that there never existed any employer-employee relationship between the respondent No. 3 and the appellant herein and also that the appellant is an employee employed by M/s. Bhattacharya Enterprises. Such findings are entirely factual and the same also do not suffer from perversity. Thus, applying the aforesaid judicial pronouncement of the Hon'ble Supreme Court of India regarding the scope of interference in judicial review, this Court is of the considered view that the learned Single Judge was perfectly justified in not interfering with such factual finding returned by the learned Tribunal.
16. The decision relied upon by Mr. Rakshit in the case of *Bank of Baroda (Supra)* do not have any manner of application in the instant case as in the said reported case the workman could establish the fact that he worked as a driver of the car belonging to the Bank for a period of more than 240 days and also produced vouchers to show that he had been paid wages, which was also debited to the account of the Bank whereas in

the case on hand the appellant miserably failed to produce any evidence in support of his claim that he worked as a driver under the respondent No. 3 at any point of time.

17. For the reasons as aforesaid this Court is of the considered view that the learned Tribunal as well as the Single Judge were perfectly justified in holding that there never existed any employer-employee relationship between the respondent No. 3 and the appellant. Thus the principal issue is answered in the negative and against the appellant herein. It is elementary that without any existence of employer-employee relationship between the management and the person concerned the question of termination of service or the question of payment of back wages does not arise. Thus the remaining issue does not arise for consideration in the instant case.
18. For the reasons as aforesaid this Court, therefore, holds that the Order of the learned Single Judge refusing to interfere with the award passed by the Tribunal calls for no interference. Accordingly, the appeal stands dismissed without however any order as to costs.

19. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(T.S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)

(P.A.- PRAMITA, SANCHITA)