

**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

MAT 1485 of 2011

with

IA No. CAN 2 of 2014 (Old No. CAN 3215 of 2014)

M/s. Weather Control

vs.

State of West Bengal & ors.

For the Appellant : Mr. Tapan Coomar Dey
Mr. Subrata Bhattacharya
Ms. Shreya Chatterjee
..... advocates

For the Respondent : Mr. Jayanta Das Gupta
Mr. Saibal Mukherjee
Mr. Balaram Patra
.....advocates

Heard on : 07.02.2022

Judgment on : 16.03.2022

Hiranmay Bhattacharyya, J.:-

1. This intra court appeal is at the instance of the writ petitioner and is directed against an order dated August 18, 2011 passed by a learned Single Judge in WP No. 20403 (W) of 2010. By the order impugned the learned Single Judge dismissed the writ petition upon holding that there is no

illegality with the award passed by the learned Industrial Tribunal.

2. Respondent no. 9, claiming to be a workman, raised a dispute by a representation dated 17.05.1993 before the Labour Department, Government of West Bengal which was referred to the tribunal being Reference Case No. VIII-46/95 for adjudication of the issue whether termination of the respondent no. 9 is justified and the reliefs which he may be entitled to.
3. The respondent no. 9 in his written statement before the Tribunal stated that he joined M/s. Weather Control on 1st April, 1992 as a window/ room cooler mechanic but no formal appointment letter was issued to him. All of a sudden on March 17, 1993 while the respondent no. 9 attended his duty, the proprietor of M/s. Weather Control orally terminated his service without assigning any reason therefor. It was specifically stated that no chargesheet was issued to him and no disciplinary proceeding was held. Such termination was made illegally in contravention of the statutory provisions of the Industrial Disputes Act (for short "the ID Act") and in violation of the principles of natural justice. The respondent no. 9 through various written representations objected to such illegal termination from service and since the appellant made no response, the respondent no. 9 raised dispute before the Labour Department by a representation dated May 17, 1993. Such dispute gave rise to the reference case being no. VIII-46/95.

4. The appellant contested the said reference case by filing a written statement denying the material allegations contained in the written statement filed by the respondent no. 9. The appellant claims to be a proprietorship firm carrying on business of maintenance, service and repairs of air conditioners, air coolers etc. The appellant entered into contracts for maintenance, servicing and repairing of air conditioners and air coolers with various government concerns. The appellant used to secure persons from other firms including M/s. Cold Draft for getting some of the contractual job performed. M/s. Cold Draft used to receive payments from the appellant after raising bills. The appellant, further, claims that M/s. Cold Draft used to generally send Mihir Kumar Pal i.e., the respondent no. 9 herein for executing the jobs. The respondent no. 9 used to get his salary from his employer namely M/s. Cold Draft. The respondent no. 9 with a *mala fide* intention wrote letters to the appellant alleging that he was their employee since April 1, 1992. The respondent no. 9 made a false complaint to the Assistant Labour Commissioner, Govt. of West Bengal with a request that he may be reinstated in service and for compensation for unlawful termination.
5. The learned Tribunal by the impugned award held that the termination is bad, illegal and unjustified. However, the learned Tribunal instead of passing an order for reinstatement directed the appellant to pay compensation of

Rs. 3 lakhs to the respondent no. 9 within the time limit specified in the said award.

6. Being aggrieved by and dissatisfied with the aforesaid award the appellant challenged the same before the learned Single Judge by filing an application under Article 226 of the Constitution of India being WP No. 20403 (W) of 2010. The learned Single Judge by the judgment and order dated August 18, 2011 dismissed the said writ petition. Being aggrieved, the writ petitioner preferred the instant appeal.
7. Mr. Dey, learned advocate for the appellant contended that since the employer-employee relationship is disputed, onus lies upon the respondent no. 9 to prove such relationship. He contended that the respondent no. 9 could not produce any document to show that there is existence of employer-employee relationship between the parties. According to him, the question of termination of the respondent no. 9 by the appellant herein does not arise in the absence of such relationship. He further contended that the learned Tribunal while passing the impugned award failed to take into consideration material evidences which would go to show that the respondent no. 9 was an employee of M/s. Cold Draft. He also contended that the learned Single Judge while exercising powers of judicial review failed to appreciate that the award passed by learned Tribunal suffers from perversity and the same is based on surmise and conjecture. Mr. Dey placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Bengal*

Nagpur Cotton Mills Rajnandgaon Vs. Bharat Lal & Anr. reported at (2011)1 SCC 635 and contended that the tests laid down therein for deciding the issue of employer-employee relationship has not been satisfied in the instant case.

8. Mr. Dasgupta, learned advocate for the respondent no. 9 seriously disputed the contentions raised by the learned advocate for the appellant. He contended that when the Tribunal, being the fact finding forum, arrived at a finding that the appellant is the employer of the respondent no. 9, such finding of fact should not be interfered with by the Writ Court while exercising its power of judicial review. He further contended that the alleged subcontract between the appellant and the M/s. Cold Draft is nothing but a paper arrangement. He contended that from the various letters written by him to the appellant as well as to the Assistant Labour Commissioner and the oral evidence adduced by him such employer-employee relationship between the parties has been established. He further, contended that the appellant with a mala fide intention did not issue any appointment letter in his favour. He contended that the learned Tribunal as well as the learned Single Judge were justified in drawing an adverse inference against the appellant for non-production of the wage register, attendance register etc, which are material documents. According to him, the learned Tribunal was perfectly justified in passing the award.

9. Mr. Dasgupta placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Hussainbhai vs. The Alath Factory Tezhilali Union and ors.* reported at AIR 1978 SC 1410 and in the case of *Bharat Heavy Electrical Ltd. vs. State of Uttar Pradesh & Ors.* reported at 2003 III CLR 188 and *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya and others* reported at 2013 (139) FLR 541 in support of his contentions.
10. Heard the learned advocates for the parties and perused the materials placed. The learned Tribunal directed the appellant to pay compensation to the respondent no. 9 after holding that there exists employer-employee relationship between these parties. The learned Writ Court dismissed the writ petition without interfering with the finding on the issue as to the employer-employee relationship. This appeal is against such concurrent findings of fact. In this appeal this court is to decide as to whether the learned Writ Court was justified by not interfering with the order passed by the learned Tribunal.
11. Industrial Tribunal, is the final court of facts in respect of the disputes which are referred to it. Since the appellant has assailed the concurrent findings in this appeal this court has to first consider the scope of interference in respect of a dispute of the instant nature. The Constitution Bench of the Hon'ble Supreme Court of India in the case of *Yakoob vs. K.S. Radhakrishnan* reported at AIR (1964) SC 477 held that the jurisdiction to issue a writ of certiorari is a

supervisory one and the court exercising it is not entitled to act as an appellate court. The findings of fact reached by inferior court or tribunal as a result of appreciation of evidence cannot be reopened or questioned in writ proceedings except under the circumstances pointed out in the said decision. The Hon'ble Supreme Court held thus:-

“An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari.”

12. The Hon'ble Supreme Court in the case of *Madurantakam Coop. Sugar Mills Ltd. vs. S. Viswanathan* reported at (2005) 3 SCC 193 held as follows:-

“12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final court of facts in these types of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a

finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon.”

13. The Hon’ble Supreme Court in the case of *Electrical Rengali Hydro Electrical Project vs. Giridhari Sahu* reported at (2019) 10 SCC 695 held that once a decision is rendered by a body amenable to certiorari jurisdiction, certiorari could be issued when a jurisdictional error may be from failure to observe the limits of its jurisdiction. It may arise from the procedure adopted by the body after validly assuming jurisdiction. It may also act in case of violation of principles of natural justice. It was further held therein that a finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ court to interfere. If the overwhelming weight of the evidence does not support the finding, it would render the decision amenable to certiorari jurisdiction.
14. Thus, from the proposition of law laid down by the Hon’ble Supreme it is evident that the scope of certiorari jurisdiction is very limited. A writ court can interfere only if a finding of fact is a perverse one or if the overwhelming weight of the evidence does not support the finding or such finding is wholly unwarranted by the evidence.
15. In order to decide as to whether the learned Writ Court was justified in not interfering with the finding of the learned

Tribunal this court perused the materials which have been produced by the parties before the learned tribunal.

16. The learned Tribunal after returning a finding that there exists employer-employee relationship between the parties held that the respondent no. 9 was terminated unlawfully. The learned Single Judge did not interfere with such finding.
17. The respondent no. 9 claims that he was illegally terminated by the appellant. On the other hand the appellant claims that the question of termination of the respondent no. 9 by the appellant does not arise as there is no existence of employer-employee relationship between the parties. Before entering into the issue of termination from service, this Court is to first decide as to whether the learned Tribunal was justified in holding that there exists employer-employee relationship between the parties as the appellant contended that such finding suffers from perversity.
18. It is the specific case of the appellant that respondent no. 9 was the employee of M/s. Cold Draft and in terms of the contract between M/s. Cold Draft and the appellant, the respondent no. 9 was sent to the appellant for getting the job work performed by him. On the other hand it is the specific case of the respondent that he is the employee of the appellant and used to perform his duties as per the directions of the appellant.
19. Since the respondent no. 9 asserts that he is an employee of the appellant and existence of such relationship between

the parties is denied by the appellant, the onus to prove existence of such relationship lies upon the respondent no. 9. It is well settled that in order to prove existence of employer-employee relationship, it is for the employee to aver and prove that he was paid salary directly by the person who, he claims to be his employer and also that he was working under the direct control and supervision of such person.

20. In the instant case the respondent no. 9 could not produce any appointment letter issued by the appellant nor could he produce any document to show that he received salary from the appellant. Thus, the respondent no. 9 failed to prove that he was paid salary directly by the appellant.
21. Now this court shall examine as to whether the respondent no. 9 could establish that he was working under the direct control and supervision of the appellant.
22. The learned advocate for the respondent no. 9, in course of his argument, laid special emphasis on the document marked Exhibit C series which, according to him, is the log book. According to the respondent no. 9, the entries in the log book go to show that he was sent to different organisations for performing job works as per the directions of the appellant which proves that he was working under the direct control and supervision of the appellant.
23. In order to decide as to whether giving some instructions to a person to attend a particular organisation as reflected from the entries in the log book would be deemed that such

person is working under the control and supervision of the person giving direction, it will be profitable to extract a portion of the judgment of the Hon'ble Supreme Court of India in the case of *Bharat Lal* (supra) wherein the expression "control and supervision" was explained. The Hon'ble Supreme Court held thus-

"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 thus:

"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 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, 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." "*

24. Thus, it was held in the said reported decision that when the contractor sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but such control is a secondary one and the principal control is with the contractor. The aforesaid principle laid down by the Hon'ble Supreme Court of India can be applied to the case of instant nature. The documents produced by the respondent no. 9 including Exhibit C series merely shows that the respondent no. 9 was sent to different organisations by the appellant. Directions given by the appellant to the respondent no. 9 to visit certain organisations for performing job work may at best amount to secondary control over the said respondent in view of the principles laid down by the Hon'ble Supreme Court. This Court is of the considered view that the entries in the log book do not prove that the respondent no. 9 was working under the direct control and supervision of the appellant.

25. On the other hand the service challans which were marked as Exhibit F series goes to show that the respondent no. 9 was sent to different organisations on behalf of M/s. Cold Draft. A challan being Exhibit G shows that the office of the Executive Engineer, Calcutta Electrical Division sent certain air coolers for testing to M/s. Cold Draft through the respondent no. 9. The said documents prove that the

respondent no. 9 used to work for M/s. Cold Draft also. The respondent no. 9 has, however, not explained as to in what capacity he used to work for M/s. Cold Draft. The respondent no. 9 totally suppressed the fact that he used to work for M/s. Cold Draft. The documents filed by the parties thus, support the case of the appellant that he is an employee of one organisation and also worked for the other in terms of some arrangement. The learned Tribunal after considering the documents filed by the parties also observed that the respondent no. 9 worked both for the appellant and M/s. Cold Draft. However, the learned Tribunal thereafter observed that the respondent no. 9 devoted most of his time in doing the job of the appellant, and accordingly held that the appellant is the principal employer of the respondent no. 9. The said finding is, however, not based on any material on record and the same is a perverse one. Even otherwise time devoted by a person for doing a job cannot be the sole criteria for deciding the employer-employee relationship. That does not also prove that the respondent no. 9 was working under the control and supervision of the appellant. Thus, this Court is of the considered view that the respondent no. 9 failed to prove that he was working under the direct control and supervision of the appellant.

26. The OPW-2 produced several documents which were marked as Exhibit H series which are the vouchers bearing the signature of the respondent no. 9 acknowledging that he accepted the salary from M/s. Cold Draft for the months of

October 1992, September 1992, July 1992, January 1993, December 1992 and November 1992. Thus, the aforesaid documents go to show that the respondent no. 9 received salary from M/s. Cold Draft and not from the appellant.

27. The learned advocate for the respondent no. 9 contended that the appellant did not produce the salary register, leave register, wage register, overtime register, attendance register etc. in spite of specific directions passed by the Tribunal. He further, contended that in the event, such documents were produced by the appellant the same would prove the employer-employee relationship between the parties. He, thus, submitted that the Tribunal was justified in drawing an adverse inference against the appellant for non-production of the aforesaid documents.
28. The Hon'ble Supreme Court in the case of workman of *Workmen of Nilgiri Co. Mkt. Society Ltd. vs. State of Tamil Nadu & Ors.* reported at (2004) 3 SCC 514 held that since the burden of proof to establish the employer-employee relationship is on the workman, an adverse inference cannot be drawn against the employer for non-production of records by him. The Hon'ble Supreme Court in the said reported decision held thus-

“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.”

29. Thus, in view of the aforesaid proposition of law, the learned Tribunal was not justified in drawing an adverse inference against the appellant for non production of such records as the burden to establish the employer-employee relationship was on the respondent no. 9.
30. An adverse inference was also drawn by the learned Tribunal for non-filing of written statement by M/s. Cold Draft. M/s. Cold Draft was not a party to the reference case. OPW-2 was only called as a witness to adduce evidence for proving the case of the appellant. The learned Tribunal failed to appreciate that a witness is not required to file written statement unless he is a party to such proceeding.
31. After going through the materials produced by the parties this Court finds the case to be of no evidence being produced by the respondent no. 9 to prove his employment under the appellant. The learned Tribunal shifted the burden of proof of employer employee relationship upon the appellant when burden of proof lay on the respondent no. 9. Thus, the procedure adopted by the Tribunal in placing onus on the wrong person amounts to an error of law enabling the writ court to interfere. The overwhelming weight of the evidence also does not support the finding of the tribunal. Thus, for the reasons as aforesaid this court is of the considered view that the writ court failed to exercise

its power of judicial review by not interfering with the order of the learned Tribunal in the instant case.

32. In *Hussainbhai* (supra) it was held on facts that the workman was under the control of the management and held that the Court can lift the veil to discern the naked truth. The Hon'ble Supreme Court further held on such facts that the real employer is the management and not the immediate contractor. The Hon'ble Supreme Court further made it clear that if there is total dissociation in fact between the disowning management and the aggrieved workman, even the management's adventitious connection cannot ripen into the real employment. In the case on hand there is no finding of fact arrived at by the Tribunal that the respondent no. 9 was working under the control of the appellant. On the contrary, evidence on record goes to show that he was not working under the direct control of the appellant. Thus, the said reported decision is not applicable to the facts of the instant case.
33. The issue involved in *Deepali Gundu* (Supra) was with regard to entitlement of back wages in a case of wrongful termination from service. The said issue does not arise for consideration in the instant case in view of the finding arrived at by this court on employer employee relationship between the parties and as such the said decision is of no assistance to the respondent no. 9 in the instant case.
34. In *Bharat Heavy Electrical Limited* (supra) the attendance register was destroyed so that no proof may remain and

thereafter the workers were removed from service and the photo copies of such documents were filed by the worker to prove the relationship. On such facts the Hon'ble Supreme Court held that the Labour Court was justified in drawing an adverse inference in non-production of such records and was thus, pleased not to interfere with the concurrent findings recorded by the labour court and the High Court as such findings cannot be said to be either perverse or based on no evidence or unsustainable at all. The said judgment is distinguishable on facts and as such the same cannot be applied to the facts of the instant case.

35. On one hand the respondent no. 9 failed to discharge the onus to prove the existence of employer-employee relationship between him and the appellant and on the other hand, evidence on record shows that the respondent no. 9 was not an employee of the appellant. Thus, this court is of the considered view that the impugned award passed by the learned Tribunal as well as the judgment passed by the learned Single Judge calls for interference.
36. For the reasons as aforesaid, this Court accordingly holds that the respondent no. 9 has failed to prove that he is an employee of the appellant. As there is no existence of employer-employee relationship between the respondent no. 9 and the appellant, the question of termination of service of the respondent no. 9 by the appellant does not arise. Hence, the appellants cannot be fastened with the liability for payment of any monetary compensation. The impugned

award passed by the learned Tribunal in case no. VIII-46/95 and the order dated August 18, 2011 passed by the learned Single Judge in WP No. 20403 (W) 2010 are set aside.

37. The instant appeal accordingly stands allowed without, however, any order as to costs. Application also stands disposed of accordingly.
38. 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.-Sanchita)