

Item no. 08 (Monthly List)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice T.S. Sivagnanam

And

The Hon'ble Justice Hiranmay Bhattacharyya

FMA 357 of 2019

Niskar Jena
vs.
Md. Nasim Akhtar & ors.

Appearance:

For the Appellant : Mr. Nayan Rakshit

For the Respondents : Mr. Soumya Majumdar
Mr. Victor Chatterjee

Heard on : 04.01.2023

Judgment on : 04.01.2023

T.S. Sivagnanam J.:

This intra court appeal has been filed by the third respondent in W.P. 11483(W) of 2015, is directed against the order dated 10.06.2016 passed in the writ petition being W.P. 11483 (W) of 2015 filed by Md. Nasim Akhtar challenging the award passed by the 7th Industrial Tribunal, Kolkata in Case no. 14/10(1B)(d) of 2012 dated 30.12.2014. By the said award, the Tribunal had directed the

respondent/writ petitioner to pay a compensation of Rs.2,00,000/- (rupees two-lacs) to the appellant on the ground that his service was wrongfully terminated. The learned writ Court by the impugned order allowed the writ petition and dismissed the claim petition filed by the third respondent before the 7th Industrial Tribunal. Aggrieved by such order, the third respondent has come up before this Court by way of this appeal.

We have heard learned counsel for the parties elaborately. The short question which falls for consideration is as to whether the appellant was an employee of the respondent/writ petitioner and was there any documentary evidence to prove such employment. In the absence of such documentary evidence to prove these two factors, the appellant could not have raised the dispute before the 7th Industrial Tribunal.

The respondent/writ petitioner examined himself as OPW1 before the Tribunal and one other employee of the respondent was examined as OPW 2. In the cross examination of OPW1, he has in no uncertain terms stated that the appellant has never been an employee under him and no wages or salary was paid to him but the service of the appellant was utilized as and when required for the purpose of delivering the tickets to the customers and collecting money from them. This evidence of OPW 1 stood corroborated by the evidence of OPW 2, whose evidence was to the effect that the appellant used to work on daily wage basis as and when required. The evidence of OPW 2 remained intact

even during cross-examination. The appellant examined himself as PW1 and the only document, which according to the appellant, proof of his employment is an identity card stated to have been issued by the respondent/writ petitioner.

There are several decisions wherein it has been held that the identity card cannot be an evidence of employment as identity cards are issued for various purposes. In any event, such identity card was admittedly stated to be valid for three months, even as per the evidence of PW1. Further, PW 1 has admitted in his cross-examination that he did not produce any documentary evidence to show that his monthly wages was Rs. 4500/-. That apart dispute was raised respondent that the age of the appellant was more than 60 years.

Thus, considering all these documents, the learned writ Court was of the view that there is absolutely no evidence to prove employment and, therefore, the Tribunal committed an error in awarding compensation in lieu of reinstatement of the appellant.

Learned counsel for the appellant places reliance on a decision of the Hon'ble Supreme Court in the case of ***Divisional Manager, New India Assurance Co. Ltd. Vs. A. Sankaralingam*** reported in ***2008 III CLR 588 SC*** for the proposition that even a part-time worker would be covered within the definition of Section 2(s) of the Act. What is important to note in the said decision is the fact that the workman therein was working under the control and supervision of the appellant/employer was admitted by all sides. In the said fact situation,

the Hon'ble Supreme Court observed that even a part-time employee, who is working under the control and supervision of the employer, is a workman in terms of Section 2(s) of the Act. In our considered view, the said decision is clearly distinguishable on facts and circumstances and inapplicable to the case in hand.

Further, reliance was placed on a decision of Hon'ble Supreme Court in the case of ***Incharge Officer & Anr. vs. Shankar Shetty*** reported in ***2010 III CLR 367***. This decision was to support the conclusion of the Industrial Tribunal that compensation can be awarded instead of reinstatement. There is no quarrel on the said legal position but what is required to be seen is whether the Industrial Tribunal was justified in granting compensation instead of reinstatement in the absence of any tangible evidence to prove employment of the appellant with the respondent/writ petitioner.

Thus, the learned writ Court was right in holding that the award of the Tribunal was perverse in the sense that in the absence of proof of employment, compensation could not have been awarded.

For all the above stated reasons, we find that there is no ground to interfere with the order passed by the learned writ court. Accordingly, the instant appeal stands **dismissed** however without any order as to costs. Consequently, connected application, if any, stands disposed of.

(T. S. Sivagnanam, J.)

(Hiranmay Bhattacharyya, J.)

RP/Amitava (AR. CT.)