

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 390 OF 2023

**SANTOSH
SUBHASH
KULKARNI**

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SANTOSH SUBHASH
KULKARNI
Date: 2023.07.06
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M/s. Hallmark Diamonds, through its
Partners, Mr. Prabhakar Vishnu Girkar,
Haing address at: 9, Vachha Gandhi
Road, Gamdevi, Grant Road, Mumbai
400 007

...Petitioner

Versus

- 1 State of Maharashtra,
Through Principal Secretary, Labour
Department, Room No.129, Mantralaya,
Mumbai
- 2 Shri Babu7 Purushothaman, 9,
Shivam, Shree Jai Om CHS Ltd. Near
Madhavi Schoo, Rajaji Path, Dombivli
(E) 421 201, Thane (Dist.)
- 3 The Assistant Commissioner of Labour
D-Ward, Office of Commissioner of
Labour, Kamgar Bhavan, C-20, E-
Block, Bandra Kurla Complex, Bandra
(E), Mumbai – 400 051
- 4 The Collector of Mumbai City
Recovery Branch, Old Custom House,
Shahid Bhagatsingh Marg, Mumbai
400 001

...Respondents

Mr. Zia Syed, i/b Md. Mohammed Asim, for the Petitioner.
Mrs. V. S. Nimbalkar, AGP for the State/Respondent No.1.
Mr. Babu Purushothaman, Respondent No.2-in-person.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 20th JUNE, 2023

PRONOUNCED ON: 6th JULY, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the parties, heard finally.

2. This petition calls in question the legality, propriety and correctness of an *ex parte* award dated 23rd May, 2022 passed by the learned Presiding Officer, Labour Court, Mumbai, in Reference (IDA) No.12 of 2020. Under the said award, the termination of the service of respondent No.2 – second party by M/s. Hallmark Dimonds – first party/petitioner has been declared illegal and the petitioner has been directed to reinstate respondent No.2 in service with full back-wages from the date of termination, i.e. 25th August, 2018.

3. Background facts can be stated in brief as under:

(a) Respondent No.2 – employee claimed that he was appointed as, “Steno-Typist” in the Legal Department of the Companies, of which Mr. Kishor Mehta and Mrs. Charu Mehta were the owners/partners, namely; Hallmark Diamonds, Beautiful Realtors, Crystal Gems, Splendour Gems Ltd. Respondent No.2 continuously worked as Steno-Typist from 5th September, 2017 to 25th August, 2018. Taking undue advantage of the fact that on 25th August, 2018, respondent No.2 had taken a days off, respondent No.2’s services were terminated illegally

in gross violation of the principles of natural justice. The said illegal act was in retaliation to the grievance raised by respondent No.2 about the unlawful deduction of amount from the salary of respondent No.2. Neither any notice nor memo was served on respondent No.2. Nor the compliance of the provisions contained in Section 25-F of the Industrial Disputes Act, 1947 was made before unlawfully terminating the services of respondent No.2.

(b) Respondent No.2 raised an industrial dispute. Upon failure of conciliation in exercise of the power under Section 12(5) of the Act, 1947, the appropriate Government made a reference to the Labour Court for adjudication of industrial dispute.

(c) Respondent No.2 filed a statement of claim. Since none appeared for the first party, by an order dated 2nd September, 2021, the learned Presiding Officer, Labour Court, directed that the reference shall proceed *ex parte* against the first party.

(d) An application was preferred on behalf of the petitioner (Exhibit-C2) purportedly under Order IX Rule 13 of the Code of Civil Procedure, 1908 ("the Code") to set aside the *ex parte* order dated 17th September, 2021. Respondent

No.2/second party filed an application (Exhibit-U11) seeking to restrain the first party from being represented by a practicing Advocate. By an order dated 15th November, 2022, the learned Presiding Officer allowed the said application and restrained the first party from being represented by a legal practitioner as the second party – employee did not give the consent as envisaged by Sub-section (4) of Section 34 of the Act, 1947. By an order of even date, the application (Exhibit-C2) preferred on behalf of the first party to set aside an *ex parte* order came to be rejected on the ground that the said application was filed under the signature of the legal practitioner for the first party, as the first party had already been restrained from being represented through a legal practitioner. Resultantly, the reference proceeded *ex parte*.

(e) Eventually, by the impugned award, the learned Presiding Officer was persuaded to answer the reference in the affirmative holding, *inter alia*, that the services of the second party were illegally terminated by the first party with effect from 25th August, 2018 and that the second party was entitled to be reinstated in service with full back-wages and continuity of service from that date. It was observed that the first party failed to appear and adduce evidence.

(f) The petitioner has invoked the writ jurisdiction asserting that respondent No.2 never worked with the petitioner. Respondent No.2 has not specifically named his employer. The learned Presiding Officer committed a gross error in law in fastening the liability without cogent evidence to establish employer – employee relationship, on the basis of omnibus statements on the part of respondent No.2.

4. I have heard Mr. Syed, the learned Counsel for the petitioner, Mrs. Nimbalkar, the learned AGP for the State/Respondent No.1 and Mr. Purushothaman, Respondent No.2-in-person. With the assistance of the learned Counsel and respondent No.2-in-person I have perused the material on record including the affidavit-in-reply filed by respondent No.2 and the documents annexed thereto.

5. Evidently, an *ex parte* award came to be passed. Had the matter been restricted to examining the legality and correctness of the *ex parte* award on the touchstone as to whether the Labour Court was justified in proceeding *ex parte* against the petitioner and whether the uncontroverted material warranted *ex parte* award, considerations would have been different. In the case at hand, apart from the alleged defect in procedure adopted by the learned Presiding Officer in passing *ex parte*

award, there is a fundamental issue of the identity of the first party as the employer of respondent No.2. That question goes to the root of the controversy.

6. The circumstances which attended the raising and reference of the industrial dispute to the industrial adjudicator bear upon the aforesaid issue. A copy of the justification statement-cum-intervention letter addressed by respondent No.2 to the Deputy Labour Commissioner dated 9th April, 2019, which preceded the reference by the appropriate Government is of critical significance. It incorporates the industrial dispute sought to be raised by respondent No.2 and was accompanied by the demand letter dated 22nd March, 2019.

7. It would be suffice to refer to the unnumbered opening paragraph and the relevant part of the first paragraph of the said letter. It reads as under:

“Please find attached herewith a copy of my demand letter dated 22.3.2019 addressed to Mr. Kishor Mehta/Mrs. Charu Mehta, owners/partners of Companies comprising of Hallmark Diamonds, Beautiful Realtors, Crystal Gems, Splendour Gems Ltd. and Trustees of Lilavati Hospital and LKMMT Trust, Diamond House 9, Vachha Gandhi Road, Gamdevi, Grant Road, Mumbai – 400 007 with a copy to yourselves. I have not received any response from them even after 15 days, hence, I have to submit following justifications in support of my demand for reinstatement and to this end I beg your intervention for my reinstatement with full back wages and continuity of service since my demand has not yet been considered by the Management.

1. I was working continuously as “Steno typist” in the Legal Department of Companies as mentioned above from 5.9.2017 till 25.8.2018. During the tenure of my service, I

have worked sincerely and faithfully till the Management has abruptly terminated my service over phone without any notice of reasons whatsoever when I was a day's off after prior permission from them on 24.8.2018.”

8. The aforesaid communication addressed to the Deputy Labour Commissioner indicates that respondent No.2 claimed that he was working with a group of companies comprising of Hallmark Diamonds, Beautiful Realtor, Crystal Gems, Splendour Gems Ltd. of which Mr. Kishor Mehta and Mrs. Charu Mehta, were the owners/partners, and they were also trustees of Lilavati Hospital and LKMMT Trust. Interestingly, the order of reference made by the appropriate Government records that the industrial dispute had arisen between M/s. Hallmark Diamond, Mumbai and respondent No.2 and, accordingly, the dispute was referred to for adjudication to the Labour Court. It is pertinent to note that in the affidavits-in-reply filed by respondent No.2 it was categorically stated that Mr. Prabhakar Vishnu Girkar, who claimed to be a partner of the Hallmark Diamonds Pvt. Ltd. was a proxy and M/s. Hallmark Diamond was in fact owned by Mr. Kishor Mehta and Mrs. Charu Mehta.

9. The case of respondent No.2, as asserted in the justification statement-cum-intervention letter, referred above essentially seems to be that he was employed with a

conglomerate comprising different entities. In this backdrop, the Labour Court was enjoined to delve into the core issue as to whether there was employer – employee relationship between the first party and the second party. The correspondence, which is annexed to the affidavit-in-reply of respondent No.2 (pages No.126 to 132) emanating from Prashant Mehta and Hallmark Diamond, indicates that the employer – employee relationship was put in contest.

10. In the aforesaid view of the matter, the impugned award deserves to be quashed and set aside and the reference is required to be remitted for afresh determination to the Labour Court. Hence, the following order.

: O R D E R :

- (i) The petition stands partly allowed.
- (ii) The impugned award stands quashed and set aside.
- (iii) The Reference (IDA) No.12 of 2020 stands restored to the file of First Labour Court, Mumbai.
- (iv) By way of abundant caution, order dated 2nd September, 2021 setting the reference *ex parte* and the order dated 15th November, 2021 rejecting the application to set aside the *ex parte* order also stand set aside.

- (v) The Labour Court is requested to adjudicate the reference afresh after providing an effective opportunity of hearing to the parties, as expeditiously as possible, and preferably within eight months from the date scheduled for the appearance of the parties.
- (vi) Second party shall file its written statement within a period of two weeks from the scheduled date of appearance.
- (vii) The parties shall appear before the Labour Court on 24th July, 2023.
- (viii) No separate notice need be issued to the parties.
- (ix) The petitioner shall pay the costs of Rs.25,000/- to respondent No.2 or deposit the same in the Labour Court within two weeks from today and in that event respondent No.2 be permitted to withdraw the same.
- (x) Rule made absolute to the aforesaid extent.

[N. J. JAMADAR, J.]