IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10741 of 2008

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE SANDEEP N. BHATT

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

==========

SANTRAM SPINNERS LIMITED
Versus
BABUBHAI MAGANDAS PATEL

==========

Appearance:
MR DIPAK R DAVE(1232) for the Petitioner(s) No. 1
MR DJ BHATT(164) for the Respondent(s) No. 1

==========

CORAM:**HONOURABLE MR. JUSTICE SANDEEP N. BHATT**

Date : 05/08/2022

CAV JUDGMENT

1. The present petition, under Articles 226 and 227 of the Constitution of India is filed by the company – original petitioner, challenging the impugned judgment and award dated 30.11.2007 passed by the Presiding

Officer, learned Labour Court, Kalol (District: Mehsana) in Reference (LCK) No.357 of 1997, by which the learned Labour Court has reinstated the respondent - workman in service with continuity of service along with 20% backwages.

2. Brief facts of the case are as under:

2.1 The respondent - workman has raised an industrial dispute inter alia claiming that he was working with the petitioner company in Spinning Department as a Technical Maintenance In-charge and was earning Rs.9,000/- per month. It was further the case of the respondent that he came to be terminated orally on 18.04.1997. Thereafter, the respondent - workman has filed statement of claim and a copy of statement of claim is annexed herewith and therefore, the petitioner has appeared and has filed its written statement to the statement of claim, which is filed by the respondent - workman and has pointed out the true and correct facts before the learned Labour Court. It was further pointed out by the petitioner that the respondent - workman cannot be termed as workman within the meaning of Section 2(S) of the Industrial Dispute Act, 1947. It was

pointed out before the learned Labour Court that the respondent - workman was working as a maintenance consultant and was paid consultant fees but he was never employed by the petitioner in fact he was working as a consultant on contract basis.

2.2 The respondent - workman did not produce any documentary evidence; such as appointment letter, wages slip etc., to show that there was employer – employee relationship. Further, the petitioner – company has produced various documentary evidence; such as Bills, TDS statement, etc., before the learned Labour Court to show that the respondent - workman was working as consultant.

2.3 The respondent - workman has been examined before the learned Labour Court. One Bhaveshbhai Amin, Manager appeared on behalf of the petitioner company and has been examined.

2.4 The learned Labour Court has passed the impugned judgment and award dated 30.11.2007, as noted above. Feeling aggrieved and dissatisfied with the impugned judgment and award, the petition is filed.

3. Heard learned Advocates.

4.1 Learned advocate Mr. Dipak R. Dave for the original petitioner has submitted that the impugned judgment and award passed the learned Labour Court is absolutely illegal, unjust and improper. He has submitted that the respondent - workman cannot be termed as workman within the meaning of Section 2(S) of the Industrial Disputes Act, 1947 and while passing the award, the learned Labour Court has framed wrong issues by putting the onus upon the petitioner company to prove that the respondent - workman was working as consultant and not as a workman.

4.2 Further, he has submitted that the learned Labour Court has not appreciated as per the settled law of Hon'ble Supreme Court and it is the duty of the respondent - workman to prove that he has been employed with the petitioner. In this case, no proof of whatsoever nature was produced by the respondent - workman to show that he was working with the petitioner. In absence of any documents, the learned Labour Court ought not to have held that there was

employer - employee relationship between the petitioner and the respondent - workman.

4.3 Further, he has submitted that the learned Labour Court has recorded finding that the bills, which have been produced on record are in one hand writing and there are some different amounts, therefore, the said vouchers are complicated and cannot be believed and this finding of learned Labour Court is perverse. In fact, on the face of documents like bill-cum-voucher, which is even shown to the respondent and in cross-examination he has said that the same was signed by him and the learned Labour Court ought not to have disbelieved the said documents.

4.4 Further, he has submitted that the learned Labour Court has recorded finding that Form No.16A, which has been produced on record by the petitioner shows that if the respondent was consultant then there was no need to deduct TDS. It has been recorded by the learned learned Labour Court that Form No.16A has to be filled in by the employer and this finding of learned learned Labour Court is also perverse. In fact, in Form No.16A itself, it has been written that the said TDS

form was submitted by showing nature of payment as consultant. The learned learned Labour Court has not appreciated the fact that Form No.16A has to be filled in irrespective of whether there was employer-employee relationship or it was payment in the nature of professional service or other payment. The finding that only employer has to file Form No.16A deducting salary of employee, is wholly perverse. In fact, Form No.16A shows that the amount was paid as consultant.

4.5 Further, the learned learned Labour Court has not at all looked into Form No.26K, which was produced by the petitioner. It is categorically mentioned that for the purpose of deduction of tax from fees for professional or technical services, the said form has been filled in. Thus, it is absolutely clear that the respondent was paid consultant fees and not salary. Further, the learned learned Labour Court has failed to consider Form No.26K and has held in absolutely illegal manner that there was employer-employee relationship. The learned learned Labour Court has wrongly held that the petitioner has failed to prove that the respondent has worked as consultant. In fact, the learned Judge has wrongly attributed the burden of proof upon the

petitioner. In absence of any documents on behalf of the respondent, the learned learned Labour Court ought not to have believed the case of the respondent and ought to have dismissed the reference of the respondent. The learned learned Labour Court has also miserably failed in appreciating the oral evidence, which is adduced on behalf of the petitioner. Minor discrepancies from the cross-examination have been taken as a defence in favour of the respondent and the learned learned Labour Court has held that the respondent has been illegally terminated, which is perverse.

4.6 Further, the learned learned Labour Court has not appreciated that there is no evidence produced by the respondent on record such as Appointment Letter, Wage Sleep, etc., to prove employer-employee relationship. In absence of any evidence, reference of the respondent ought to have been rejected by the learned learned Labour Court . Further, the learned learned Labour Court has not appreciated that Notification of B.LR. Act, which was produced by the petitioner company to show that B.LR. Act is applicable to the petitioner. Even the plea of the jurisdiction, which has been taken at the time of final argument, which goes to the root of the

matter, ought to have been considered. The petitioner is covered under the B.I.R. Act and, therefore, reference ought not to have been entertained by the learned learned Labour Court .

4.7 Further, the learned learned Labour Court has not appreciated that the respondent ought to have produced certain documents such as his Income Tax return to show that he was working as an employee. The respondent, while claiming TDS from Income Tax Department, would have mentioned his status as salaried person or professional and the learned learned Labour Court ought to have drawn adverse inference in absence of any documents produced by the respondent. In this case the respondent suppressed his return before the learned learned Labour Court , therefore, it ought to have been presumed that in his return, the respondent would have claimed the adjustment of TDS as consultant only. Further, the learned learned Labour Court has not appreciated the fact that the respondent, who was working as a consultant on the contract basis, so as to harass the petitioner and extort money, has filed false case and, therefore, the reference ought to have been rejected with heavy cost. Further, the learned

learned Labour Court has not appreciated the fact that in a small contract like this where consultant is being engaged, there is no practice of written contract but it does not mean that the respondent was not working as consultant. Further, the learned Judge has not appreciated that the respondent has failed to prove that he has completed 240 days of service before his alleged termination. In absence of any proof produced by the respondent to show that he has continuously worked or that he has worked for 240 days in a year preceding his alleged termination, no relief ought to have been granted in favour of the respondent. Further, the learned Judge has erred in granting backwages to the respondent. Even as per the case of the respondent, he is a technical expert person and, therefore, he is not expected to remain idle. Grant of 20% backwages is, therefore, is absolutely illegal.

4.8 Further, learned Advocate Mr. Dave has placed reliance upon the judgment of the Hon'ble Apex Court in the case of ***State of Uttarkhand Vs. Sureshwati*** reported in (***2021) 3 SCC 108***, more particularly para 17 and 18 are relevant and has submitted that in the abovementioned judgment, the onus to prove is entirely

upon the employee that he has worked continuously for a period of 240 days in the petitioner institute as a workman which in the present case, as per the submissions of learned advocate Mr. Dave, the workman has failed to prove such aspect of the matter. He has placed reliance upon the judgment of the Hon'ble Apex Court in the case of ***M.P. State Agro - Industries Development Corporation Ltd. versus Jai Prakash Gautam*** reported in ***2022 LawSuit (SC) 172***, more particularly para 11 is relevant and the Hon'ble Apex Court has observed that the respondent workman has not responded even after the order passed by the learned Labour Court for reinstatement in service and therefore, he has prayed that though the petitioner company has informed the respondent workman to join the service in view of the order passed by the Learned Labour Court, the respondent company has not responded and has failed to resume the duties and therefore, he has submitted that the learned Labour Court has erred in drawing adverse inference in view of the above cited judgments against the petitioner institute by holding that the petitioner company has not produced any documentary evidence; like attendance register, payment register etc., to show that the respondent is not working

as a workman in the petitioner – company.

4.9 Further, the petitioner has not filed any other application with regard to the subject matter of this petition, either before this Court or any other Court of law in India, including the Hon'ble Supreme Court of India. Further, even otherwise also, award dated 30.11.2007 passed by the learned learned Labour Court , Kalol in Reference (LCK) No.357 of 1997 is absolutely illegal, unjust and improper and bad in the eye of law and therefore, the same deserves to be quashed and set aside by this Court.

5. *Per contra*, learned advocate Mr. D.J. Bhatt for the respondent – workman has submitted that the learned learned Labour Court has not committed any error in granting the reinstatement with 20% backwages by giving continuous effect in service. He has submitted that impugned judgment and award passed by the learned Labour Court is just and proper and with proper reasons. He has submitted that the learned Labour Court has rightly found the documents such as bill-cum-voucher regarding the respondent workman, which is produced by the present petitioner – employer at Exh.13/1 to 13/10

and the learned Labour Court has found that though there is variation in the amount of consultation fees paid to the respondent workman but the learned Labour Court has prima facie found that such vouchers are complicated and in addition to that the learned Labour Court has found that the employer has filed income tax Form No.16A, by which the tax was deducted to the income tax by the employer, which is showing that the respondent is working as a workman – employee of the petitioner company. He has submitted that the learned Labour Court has rightly drawn inference against the petitioner company as petitioner has failed to produce any documentary evidence; like attendance register, salary register to show that the respondent is not workman in the petitioner company. Moreover, the learned Labour Court has considered that the respondent workman could not sit idle and therefore, the learned Labour Court has rightly considered 20% backwages and has rightly awarded reinstatement with continuity in service. He has submitted that the learned Labour Court has found that the petitioner institute has failed to establish by leading cogent and convincing reasons to establish its case that the respondent workman is working as a technical consultant and not as a workman

in the petitioner - institute and therefore, he has submitted that the learned Labour Court has not committed any error in the eyes of law and therefore, he has prayed to dismiss the present petition as the present petition is meritless and in view of the above stated reasons.

6.1 I have heard learned advocates for the respective parties. I have considered the impugned judgment and award passed by the Tribunal. I have perused the record and proceedings of the learned Labour Court.

6.2 It is relevant to note that it is the case of the petitioner company in the statement of claim that he was working in Spinning Department of the Santram Spinners Ltd. - present petitioner as a Technical Maintenance In-charge and was earning Rs.9,000/- per month and the petitioner company has terminated his services on 18.04.1997 by oral order, without any genuine reason and without giving any notice or paying any salary towards notice as well as without following any required procedure for terminating his services. He has further pleaded in the statement of claim that he has issued notice to the petitioner company by registered post

AD and the petitioner company has not responded to that notice. It is also relevant to note that in the written statement filed by the present petitioner before the learned Labour Court that the petitioner company has specifically disputed that the respondent company is not covered within the definition of workman with a view to Section 2(S) of the Industrial Dispute Act, 1947. It is further case of the petitioner institute before the learned Labour Court that the respondent workman is rendering services as a maintenance consultant with the petitioner company and consultancy fees is paid to him and vouchers were also produced by the petitioner institute where deduction of TDS for the purpose of income tax is also produced by the petitioner company and the bills, which are issued by the respondent workman and is addressed to the petitioner company, clearly indicates that the bills are issued for the purpose of consultation fees for the services rendered in the petitioner company.

6.3 Further, it also transpires from the record that the respondent workman himself was examined and also cross-examined by the respective learned advocates where the respondent workman has initially in the examination-

in-chief has submitted that he was working in Spinning Department with the Santram Spinners Ltd. - present petitioner as a Technical Maintenance In-charge from the last one year and his services were terminated on 18.04.1997 whereby in the cross-examination he has submitted that he has studied English language and Diploma in Textile and has also admitted that the sum of payment, which is made by the petitioner company by cheque, was received by him. He has also admitted in his cross-examination that there is no evidence with him that he was working as a workman in the petitioner company and his salary is fixed as Rs.9,000/- per month. He has also admitted and verified his signature at bills and vouchers at Mark - 13/1 to 13/10. He has also submitted that the petitioner company has paid total amount of Rs.1,08,000/- to the respondent workman.

6.4 Further, it is also revealed from the record that the petitioner company has examined its witness – Bhaveshbhia Mohanbhai Amin, who was manager in the petitioner company, has categorically stated that the respondent was rendinging his services as a maintenance consultant in the petitioner company and for that services he was raising his bills or vouchers periodically

and accordingly, the petitioner company was paying the amount by way of cheque. Further, he has submitted that there is signature of the respondent workman at Mark - 13/2 to 13/10, which is identified by respondent workman. He has submitted that Mark - 13/11 is the certificate issued by the petitioner company and Mark 13/12 is TDS, which is deducted from the amount of bills raised by the respondent workman. He has further submitted that Mark- 13/13 and 13/14 are the documents related to TDS and the said manager has categorically denied that the respondent workman was not working as a technical maintenance in-charge in the petitioner company.

6.5 Further, he has deposed in a manner that where he has disputed the claim made by the respondent workman and looking to the deposition of the respondent workman and deposition of the manager, which is at Exh.16 and I found that the respondent has failed to establish prima facie that he was appointed as a workman in the petitioner institute. On the contrary, the petitioner institute has established its case that the respondent is rendering his services as a technical consultant and for that purpose, the petitioner company has produced ample

documentary evidences from Mark – 13/1 to 13/10 and 13/11 to 13/13, and more particularly, the respondent has admitted his signature on that document where he has received payment towards his consultation fees. It is pertinent to note that the learned Labour Court has committed gross error in holding that those documents are complicated and therefore, the learned Labour Court has also erred in giving findings that since TDS is deducted by the petitioner company and therefore, the respondent is workman, who is serving in the petitioner institute and in my opinion, this findings of the learned Labour Court is highly erroneous and against the settled proposition of law. The petitioner has successfully established its defence by producing cogent and convincing evidence in view of the vouchers, TDS certificate, etc., and has also proved its case by cross-examining the respondent workman and also examining the manager at Exh.16, therefore, in view of that the learned Labour Court has committed gross error in drawing adverse inference that the petitioner company has not produced attendance register or payment register before the learned Labour Court, therefore, adverse inference should be drawn by inferring that the respondent is working as a workman in the petitioner

company, as pleaded by the respondent in the statement of claim, this finding is also perverse and erroneous and the citations, which are cited at Bar by the learned advocate for the petitioner, are helpful in the facts and circumstances of the present case.

The judgment of Hon'ble Apex Court in the case of ***Sureshwati (supra)***, more particularly, para 17 and 18 is relevant, which is quoted herein below:

> *"[17] The Respondent has failed to prove that she had worked for 240 days during the year preceding her alleged termination on 8.3.2006. She has merely made a bald averment in her affidavit of evidence filed before the Labour Court. It was open to the Respondent to have called for the records of the School i.e. the Attendance Register and the Accounts, to prove her continuous employment till 8.3.2006. Since the School was being administered by the Government of Uttarakhand from 2005 onwards, she could have produced her Salary Slips as evidence of her continuous employment upto 08.03.2006. However, she failed to produce any evidence whatsoever to substantiate her case.*
>
> *The reliance placed by the Respondent on the letter dated 20.6.2013 from the Block Development Officer, Roorkee cannot be relied upon. The letter acknowledges that the Respondent was on leave when the Government took over the School, and started receiving grants in aid. The Block*

Development Officer's recommendation to the Chief Education Officer, Haridwar to act in compliance with the Order dated 5.2.2010 passed by the Labour Court cannot be relied on, as the Award dated 5.2.2010 was set aside by the High Court.

[18] On the basis of the evidence led before the Labour Court, we hold that the School has established that the Respondent had abandoned her service in 1997, and had never reported back for work.

The Respondent has failed to discharge the onus to prove that she had worked for 240 days' in the preceding 12 months prior to her alleged termination on 8.3.2006. The onus was entirely upon the employee to prove that she had worked continuously for 240 days' in the twelve months preceding the date of her alleged termination on 8.3.2006, which she failed to discharge.

A division bench of this Court in Bhavnagar Municipal Corpn. v. Jadeja Govubha Chhanubha11 held that :

"7. It is fairly well-settled that for an order of termination of the services of a workman to be held illegal on account of non-payment of retrenchment compensation, it is essential for the workman to establish that he was in continuous service of the employer within the meaning of Section 25-B of the Industrial Disputes Act, 1947. For

the respondent to succeed in that attempt he was required to show that he was in service for 240 days in terms of Section 25-B(2)(a)(ii). The burden to prove that he was in actual and continuous service of the employer for the said period lay squarely on the workman. The decisions of this Court in Range Forest Officer v. S.T. Hadimani 12 , Municipal Corpn., Faridabad v. Siri Niwas 13 , M.P. Electricity Board v. Hariram14 , Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan15,: 2004 SCC (L&S) 1055] , Surendranagar District Panchayat v. Jethabhai Pitamberbhai16,and R.M. Yellatti v. Executive Engineer17 unequivocally recognise the principle that the burden to prove that the workman had worked for 240 days is entirely upon him. So also the question whether an adverse inference could be drawn against the employer in case he did not produce the best evidence available with it, has been the subject-matter of pronouncements of this Court in Municipal Corpn., Faridabad v. Siri Niwas and M.P. Electricity Board v. Hariram [M.P. Electricity Board v. Hariram, reiterated in RBI v. S. Mani, 2005 5 SCC 100. This Court has held that only because some documents have not been produced by the management, an adverse inference cannot be drawn against it."

And the judgment of the Hon'ble Apex Court in the

case of ***Jai Prakash Gautam (supra)***, more particularly para 11 is relevant, which is quoted herein below:

> *"[11] After we have heard the learned Counsel for the parties, in our considered view, the respondent – workman had not responded even after offer of reinstatement was made by an order dated 29.10.2010 and that apart, he had served for the very short period of time during the period in 1989 – 1990. At the same time, his total period of service even as per his own statement, in different spells is from June 1989 to July 1990 as a daily wager, and no evidence has been placed on record by the respondent – workman to justify that he was not gainfully employed in the intervening period that entitles him from claiming back wages which was stayed by this Court by an interim order dated 06.08.2010. The relevant part of the Order is as under:*
>
> > *"Issue notice confined to the question of payment of back wages from the date of award till the date of reinstatement. The execution of the award to that extent shall remain stayed."*

Thus, in view of the above citations, the findings given by the learned Labour Court are found perverse, illegal and improper and the same is against the materials available on record, therefore, I found that this is a fit case where the supervisory powers, under Article 227 of the Constitution of India are required to be

exercised, by interfering in the impugned judgment and award passed by the learned Labour Court. Accordingly, I hold that the if judgment and award passed by the learned Labour Court is required to be quashed and set aside, the ends of justice would be met.

7. For the reasons recorded above, the following order is passed.

7.1 The present petition is **allowed**, with no order as to costs.

7.2 The judgment and award dated 30.11.2007 passed by the Presiding Officer, learned Labour Court, Kalol (District: Mehsana) in Reference (LCK) No.357 of 1997 is hereby quashed and set aside.

7.3 Pending application(s), if any, shall stand disposed of.

7.4 Rule is made absolute to the aforesaid extent.

(SANDEEP N. BHATT,J)

DIWAKAR SHUKLA