IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Biswaroop Chowdhury

APO 526 of 2015
With
WPO 878 of 2003

Upendra Choudhury
Vs.
M/s. J. K. Industries Ltd. & Ors.

For the Appellant	**:-**	**Mr. Nayan Rakshit, Adv.**
For the Respondents	**:-**	**Mr. Kushal Chatterjee,** **Mr. Subhendu Sinha Roy, Advs.**
Judgment On	**: -**	**30.09.2022.**

Biswaroop Chowdhury, J.:-

The appellant before us was a workman before the Industrial Tribunal and respondent no-1 in Writ Application 870 of 2003. This appeal is directed against the Order dated 6th August 2015 passed in the said Writ Application.

The case of the appellant may be summed up thus:

1. That the Writ Petitioner/Company is widely known and well reputed concern earning huge profit and growing day by day by the skillful performance and hard labour rendered by its labourer / workmen engaged under it.
2. The Company though a prosperous and flourishing one but unfair and exploitative to its workmen and has little regards to observe the principles and provisions of Industrial laws, specifically those enacted for the welfare of the labourers.
3. The workman/appellant concerned was engaged under the said Company as a driver in the year of 1994, without issuance of any appointment letter. He had to work 14, to 16 hours in a day and even on Sundays and holidays without any extra remuneration

and in a very poor emoluments. His name was not enrolled in the attendance register, pay register only to deprive him from all legitimate dues, entitlement, though he drove the car belonging to the company under the instruction and supervision of the company and paid by the company for the said services.

4. The appellant/workman concerned orally protested to stop all such unfair practices, and irregularities, but he had to keep under the threat of throwing out of employment by the company. Inspite of such injustice and ruthless antilabour policy the workmen had all along been working hardly sincerely honestly and left no stone unturned to satisfy his superiors by best of his services throughout the tenure of employment.

5. Inspite of his earnest effort and best services the workman all on a sudden was terminated from his services, by the said company w.e.f. 07.09.97 without assigning any reason and prior notice but only by verbal order. His monthly salary was Rs. 2000/- at that point of time.

6. Under the said circumstances the workman protested against the said illegal and unjustified termination and demanded his immediate re-instatement in service with full back wages along with all consequential benefits by writing a letter dated 20-10-97 addressed to the company and sent the said letter through registered post with acknowledgement, simultaneously forwarding a copy of the said letter to the union of which he is a member, authorizing the union to represent his case.

7. Thereafter when the union came to understand that the company is in no mode to accept the legitimate and justified demands of the workman, the union represented the matter before the Labour Directorate West Bengal vides their representation dated 25-11-97 addressed to the Assistant Labour Commissioner West Bengal New Secretariat Building, 11th floor, Calcutta-700001 and the said

office took up the said matter. Md. Zahiruddin, Asstt. Labour Commissioner, initiated the conciliation proceedings and exerted his efforts to settle the dispute inter alia convening joint conferences between the representations of the company and union but his efforts went in vain due to the adamant and non-conciliatory attitude of the company.

8. Under the circumstances the conciliation officer submitted necessary report before the Government and thereafter the matter came up for adjudication before the Learned 4th Industrial Tribunal for adjudication of the issue as framed in the order of reference by the Government.

9. The company has acted in highly illegal unjustified arbitrary and malafide manner to terminate the services of the workman by violating all the provisions of Industrial Law and principles of natural and social justice as well. The workman was issued no charge-sheet nor any domestic enquiry was proceeded with against him before the termination. He was given no notice and/or any monetary benefit prior to the termination. He was simply asked verbally not to come any more for duty which is nothing but a colourable exercise of powers used by the company as a part of their hire and fire policy.

10. The workman has failed to obtain any employment and/or any sort of earning since his termination of service and passing hard days with extreme poverty and starvation.

The writ petitioner/company contested the case by filing written statement of defence. The written statement of defence may be summed up thus:

1. The alleged dispute referred to The Hon'ble Tribunal under section 10 of the Industrial disputes act 1947 obviously does not fall under section 2(K) of that Act because it has not been raised or espoused by a substantial number of the managements' workmen. It is apparent sponsorer that is the Calcutta Motor Drivers' Union represents none

else but Shri Upendra Chowdhury who is not and has never been an employee or a workman of the management. Thus the dispute falls under section 2A of the Act.

2. The written statement of claim is neither signed nor verified by Shri Upendra Chowdhury, it was instead signed and verified by Shri Prasanta Mukherjee, General Secretary at the Calcutta Motor Drivers' Union. Nothing is indicated therein as to what prevented Shri Chowdhury to himself sign and verify the same. The written statement of claim is liable to summary dismissal unless Shri Chowdhury files with the leave at the Tribunal, a fresh properly signed and verified written statement of defence.

3. Assuming though most emphatically denying that the present dispute falls within the ambit of Section 2(K) of the Industrial Disputes Act, 1947 Shri Chowdhury in the eyes of law is certainly not the 'person' as understood therein. The Calcutta Motor Drivers' Union does not have on its roles, a single employee or workman of the management, the interest of the union members and the management's workmen is poles apart. The written statement of claim is also liable to summary dismissal. The respondent/company on merits has denied paragraph Nos.1, 2, 3, 4, 5, 10 and 11 of the written statement of claim. The respondent/company has contended that since the claimant was never an employee of the management as alleged or otherwise, there was never any occasion or reason to terminate his services on 7th September, 1997 or for that matter on any other day, no question of assigning any reason or giving prior notice did or could arise. The fact that the space for entering the rate of the claimants' salary has been left blank in the last line of the paragraph under reply is an eloquent proof of the falsity of his being an employee of the management. Even at the later stage, the claimant does not know the rate of his own salary. The claimant was never an employee of the management, the contentions to the contrary in the paragraph under reply were denied.

It is further contended that the appellant was never an employee under the management but a personal and privately employed driver of Shri T. C. Sharma the then Regional Manager (Tyres) of the Management at Calcutta. The Calcutta Motor Drivers' Union has no locus standi in the present proceedings. The respondent/company prayed for dismissal of the claim case.

Learned Tribunal upon considering the evidence adduced by both the Appellant/Workman, and Respondent/ Company was pleased to pass an award holding that the appellant/workman was an employee of the respondent/company and re-instatement of the appellant with back wages and consequential benefits. The respondent/company being aggrieved by the award passed by the Learned 4th Industrial Tribunal Calcutta moved a Writ Application being W.P. No. 878 of 2003. By order dated on 6th August, 2015, Learned Trial Judge was pleased to pass an order allowing the Writ Application by setting aside the order passed by Learned 4th Industrial Tribunal Calcutta.

The Appellant being aggrieved by the order passed by the Learned Trial Judge in W.P. No. 878 of 2003 has come up with the present appeal.

The Writ petitioner/respondent challenged the award on the ground that the Appellant was never an employee of the petitioner in any manner whatsoever and there was no occasion for terminating his services on 07-09-1997 or on any other date. It was further contended that there was no material before the Learned Tribunal to come to the conclusion that the appellant/workman was the employee of the company as a driver. It was also contended that the award does not disclose any material or proof showing engagement/appointment of the appellant as a driver of the petitioner and payment of salary or wages made to the appellant. It was also argued that the appellant not being an employee or a workman of the management of the writ petitioner the alleged dispute falls under Section 2A of the said Act of 1947.

Learned trial Judge was pleased to dispose of the writ application by setting aside the award passed by the learned Tribunal. Learned trial Judge was pleased to observe that the findings of the learned Tribunal in the impugned award is perverse. Learned Judge was further pleased to observe that the materials on record show that the absence of any proof whatsoever regarding nexus between the respondent no.1 and the petitioner save and except allegations made by the former.

Heard learned advocate for the appellant/workman and the learned advocate for the writ petitioner/respondent company.

Learned advocate for the appellant submits that the learned trial Court erred in law in interfering with the award passed by the learned Tribunal when the said award was not perverse. It is further submitted by the learned advocate that the learned trial Judge did not appreciate the facts to the effect that the car in question belonged to the company used to be driven by the appellant/workman as no documents were proved by the writ petitioner/company that the said car was used by the Officer of the company and the appellant/workman was personal driver of the said Officer. Learned advocate for the appellant draws attention to the deposition of O.P W. No.1, an employee of the writ petitioner/company and submits that as the employee of the company has deposed that the appellant was the employee of the writ petitioner, it is a sufficient proof that the appellant was the employee of the writ petitioner.

Learned advocate for the writ petitioner submits that the alleged dispute referred to under Section 10 of the Act of 1947 does not fall under Section 2k of the said Act of 1947 because it has not been raised or espoused by a substantial number of management's workmen. Learned advocate further submits that as the appellant/workman is not an employee or a workman of the management of the petitioner the alleged dispute falls under Section 2A of the said Act of 1947. It is also submitted by the learned advocate that although the appellant/workman drove the vehicle of the petitioner company but he was engaged by Mr. T.C Sharma as his personal driver.

Learned advocate for the respondent/writ petitioner relies upon the following decision, namely, Employers in relation to Punjab National Bank vs. Ghulam Dastagir, reported in 1978 LLJ P-312.

Learned Advocate for the parties have also relied upon the following decisions:

1. Workmen of the Food Corporation of India vs. Food Corporation of India, reported in 1985 (2) SCC 136,
2. Kumar Exports vs. Sharma Carpets reported in 2009(2) SCC 513.
3. Syed Yakoob vs. K.S Radhakrishan reported in 1964 AIR (SC) 477.
4. Pepsi Co India Holding Pvt. Ltd. vs. Krishnakant Pandey reported in 2015 ICCR 560,
5. Bank of Baroda vs. Hemarbhai Harjibhai Robari reported in 2005 IICLR 279,
6. Paradeep Phosphates Ltd. vs. State of Orissa & Ors. reported in 2018 (157) FLR 996.

Upon hearing the learned advocates and considering the materials on record and upon perusing the evidence adduced before the learned Tribunal it will appear that the fact of the appellant driving vehicle being No. DL 2 CG 3751 which is vehicle of the company. The company/writ petitioner contended that the appellant was neither engaged nor employed by the management as a driver or otherwise in 1994 or at any time, and thus was never an employee of the management but a personal and privately employed driver of Shri T.C Sharma, the then Regional Manager (Tyres) of the management at Calcutta. The writ petitioner's case is that there is no post of driver in the company although it is deposed by the witness of the company that the appellant was the employee of the writ petitioner/company and was driving the vehicle of the company. As from the evidence it is an admitted position that the appellant/workman used to drive the car of the company being DL 2 CG 3751, the two issues which come for consideration is whether appellant/workman was personally

engaged by Mr. T.C Sharma, manager of the writ petitioner/company and paid salary by him and whether there is any post of driver in the company.

At the very outset it is to be remembered that when a vehicle is owned by an individual or a business undertaking the power to induct driver for plying the said vehicle lies with the said individual or business undertaking. Drivers may be inducted directly by a business undertaking on salary basis or it may be inducted from Drivers centre/Drivers Agency by entering into contract with the said agency. When an agreement is entered with drivers' agency, drivers are provided by the said agency and different drivers may be provided for different periods and the obligation of payment of salary to the said driver vests with the driver's centre/agency. In the instant case, the writ petitioner-company did not produce any documents to show that the appellant was engaged through the drivers agency, thus, it is to be inferred that the appellant workman was engaged by the writ petitioner-company as driver. The writ petitioner-company had tried to convince by contending that the appellant used to bring Mr. T. C Sharma from his residence to Office and back and the appellant was engaged by Mr. Sharma and salary was paid by him. Although the writ petitioner-company has raised the contention that Mr. Sharma engaged the appellant and paid his salary but no document was furnished in this regard. When a vehicle is owned by a business undertaking to carry staff/employees from Office to their residence or to be taken to other places for official work the normal presumption is that the driver is the employee of the said undertaking unless the contrary is proved. When a business undertaking takes a policy decision in general or with regard to some individual employees that the vehicle of the company will be used by employees on condition to pay the drivers salary and with a discretion of the said employees to appoint drivers of their choice there will be an administrative order to that effect by the said undertaking and when the vehicles will be handed over to the officers, terms and conditions will be entered into between the said officers and the business undertaking.

Without any specific administrative order and agreement between a business undertaking and its employees it cannot be presumed that an officer/employee of a business undertaking is under obligation to pay the driver and have power to appoint driver of his choice. In the instant case, the writ petitioner-company has failed to show any administrative order empowering the officers/employees who are using the vehicle for official purpose to appoint drivers of their choice, and no document showing terms and conditions with Mr. T.C Sharma and his authority to appoint driver of his choice and obligation to pay the said driver with regard to the vehicle used by him for official purpose. Moreover, Mr. Sharma who could be the best witness in this regard was not examined by the writ petitioner-company before Tribunal. Thus, there is ground for inference that the appellant was driver of the writ petitioner-company. Now with regard to the evidence adduced by the parties, it appears that O.P.W 1, the witness of the company stated in his examination-in-chief that the appellant was an employee of the company. Again from the deposition of O.P.W 2, it will appear that the said witness in cross-examination stated that the appellant workman was driving the vehicle belonging to the company.

Upon considering these statements, it will be clear that the appellant workman was engaged by the writ petitioner-company to drive the vehicle belonging to the company. Although no appointment letter was issued but that cannot negate the claim of the appellant as employee of the company. It was a specific case of the appellant/workman that he was engaged in service without issuing any appointment letter. Thus, in order to ascertain as to whether the appellant was engaged in service the oral evidence and surrounding circumstances is to be considered. The writ petitioner-company is not a Government Company thus, there may not be existence of the procedure of issuance of appointment letter in all cases. Moreover, when there is allegation of non-issuance of appointment letter at the time of engagement, such allegation is to be enquired into and relevant evidence should be considered in this regard. Labour Law is enacted to mitigate the

problems of unfair labour practices, thus necessary enquiries should be made when there is such allegation. It is not unnatural that sometimes business undertaking engages employees without issuing appointment letter and terminates without issuing termination letter and make payment without issuing pay slip. Thus, if the claim of an employee is discarded on the ground of not possessing appointment letter without considering the relevant evidence and surrounding circumstances it would not be doing justice in accordance with the letter and spirit of labour legislation. Thus, Learned Trial Judge erred in holding that the appellant failed to produce documentary evidence regarding appointment, payment of salary, or termination and rejecting the claim of the appellant and setting aside the judgment passed by the Learned Tribunal, without taking into consideration the oral evidence. The decision relied upon by Learned Trial Court in the case of **Punjab National Bank vs. Ghulam Dastagir** reported in AIR 1978 SC 481 is not applicable in the facts of the case. The said case which was relied upon by the writ petitioner-company will show that the Bank authorities specifically proved that Rs.200/- was paid by the Bank to the area manager to employ a personal driver of his own, and Rs.200/- was the maximum allowance payable and if the expense incurred by the area manager Shri K. P Sharma was less than Rs.200/- the allowance would be reduced to the actual. In the instance case, the writ petitioner-company did not produce any document to show car allowance was paid to Mr. T.C Sharma who was brought from residence to office by the appellant, nor was any administrative order produced permitting Mr. T.C Sharma to use company's car and engage driver of his choice, and pay his salary. No document was produced to show any agreement between T.C Sharma and the company permitting T.C Sharma to engage driver of his choice and pay his salary. Moreover, Mr. T.C Sharma who could have been the best witness was not examined by the writ petitioner-company before the Tribunal. Thus, case relied upon by the Learned Trial Judge is not applicable. The statement of the appellant workman in cross-examination

that in absence of Mr. Sharma, staff of the office sometimes also used the vehicle when necessary will clearly go to show that the appellant was not the driver of Mr. Sharma but driver of the company and there was nexus between the company-writ petitioner and the appellant workman. The argument of the writ petitioner that the statement of the appellant in cross-examination that he was paid salary by T Sharma goes to show he was employed by Mr. Sharma cannot be accepted as the appellant in cross-examination has also stated that he used to receive salary from the office as well as Mr. Sharma. Thus, if the evidence of the appellant before the Tribunal as well as the evidence of the witness of the company read as a whole, it will give the inference that the appellant was engaged by the company, to drive the vehicle of the company and was paid salary by the company. It is not very unnatural that on some occasions salaries are paid by managerial persons to drivers, when there is delay in payment of salary by office and hardship is faced by the drivers concerned but that does not alter the position to convert drivers of the company as drivers of the said managers when there is evidence to show that the drivers were engaged by the company.

It is to be remembered that Industrial Disputes Act is welfare legislation, the object of which is peaceful settlement of industrial dispute through conciliation officers and in case of failure of settlement of dispute, reference to the Labour Court or Industrial Tribunal for adjudication. Even when matters come before the Industrial Tribunal for adjudication the tribunals are not bound to follow law of evidence or strict principles of the Code of Civil Procedure but are to follow principles of natural justice. The Legislature in its wisdom has excluded Civil Courts in case of reference of industrial disputes and in case of adjudication of dispute before the Tribunal there is restriction of engagement of advocate unless there is consent of the opposite party and the members of Trade Union can also depose before Industrial Tribunal for necessary adjudication. Hence strict proof which is required in civil suit is not required in case of adjudication of

Industrial Dispute. When a tribunal is prima facie satisfied after hearing the necessary parties that there exist some rights the tribunal can declare those rights and grant the relief. It is not necessary for the Industrial Tribunal or the Labour Court to insist on proof of fact by law of evidence. When unfair labour practices are committed by some business undertaking it is quite natural that an employee will not have relevant documents to establish his right hence in such a situation the Labour Court or Industrial Tribunal will have to consider oral evidence and surrounding circumstances to decide as to whether an employee/labour is deprived of his lawful rights. In the event the Industrial Tribunal insists on production of relevant documents in all cases and proof of the case strictly as per law of evidence then in most of the cases an employee/labour will not be able to establish his right and have to return with frustration after litigating for a considerable period which is not the object of labour legislation.

In the case of **Punjab National Bank vs. Ghulam Dastagir** reported in **(1978) 2 SCC Para 358** the Hon'ble Supreme Court observed as follows:

> *'Social justice is the signature time of the Constitution of India and this note is nowhere more vibrant than in industrial jurisprudence'.*

In the case of **Paradeep Phosphates Limited and the State of Orissa and Others** reported in **2018 (157)FIR 996** the Hon'ble Supreme Court observed as follows:

> *"undoubtedly it is a cardinal principle of law that beneficial laws should be construed liberally. The Indistrial Disputes Act, 1947 is one of the welfare legislations which intends to provide and protect the benefits of the employees. Hence, it shall be interpreted in a liberal and broad manner so that maximum benefits could reach to the employees. Any attempt to do strict interpretation would undermine the intention of the legislature. In a catena of cases, this Court has held that the welfare legislation shall be interpreted in a liberal way".*

In the case of **Bank of Baroda vs. Ghemarbhai Harjibhai Rabari** reported in **2005 II CLR-279** the Hon'ble Supreme Court observed as follows:

"while there is no doubt in law that the burden of proof that a claimant was in the employment of a Management primarily lies on the workman who claims to be a workman. The degree of such proof so required would vary from case to case"

In the case of **Krushna Narayan Wonjori vs. Jai Bharti Shikshan Sanstha Henganghat** through its Secretary and Another reported in **(2018) 2 SCC (L and S) 386** the Hon'ble Supreme Court observed as follows:

"Having regard to the fact that the documents were produced before the High Court we are of the view that the High Court was not justified in refusing to look into the same. After all the Industrial Court had looked into the entire materials and had awarded the salary for the disputed period. Unless the approach is wholly perverse in the sense that the Tribunal acted on no evidence, the High Court under Articles 226/227 is not justified in interfering with the award. It is not a Court of first appeal to re-appreciate the evidence. Therefore, the appeal is allowed and the impugned orders are set aside and the order dated 14.03.2012, passed by the Industrial Court, Nagpur Bench, Maharashtra is restored''

In the case of **Indian Overseas Bank vs. I.O.B. Staff Canteen Workers Union and Anr.** reported in **2000 II CLR 268 SC** the Hon'ble Supreme Court observed as follows:

"The Learned Single Judge seems to have undertaken an exercise impermissible for him in exercising writ jurisdiction by liberally re-appreciating the evidence and drawing conclusions of his own on pure questions of fact unmindful though aware fully that he is not exercising any appellate jurisdiction over the awards passed by a Tribunal presided over by a judicial officer. The findings of fact recorded by a fact finding authority duly constituted for the purpose and which ordinarily should be considered to have become final cannot be disturbed for the mere reason of

having been based on materials or evidence not sufficient or credible in the opinion of the Writ Court to warrant those findings at any rate as long as they are based upon some materials which were relevant for the purpose or even on the ground that there is yet another view which can reasonably and possibly be taken"

Now with regard to the last contention of the writ petitioner-company that the alleged dispute referred to under Section 10 of the Industrial Disputes Act, 1947 does not fall under Section 2 (k) of the said Act of 1947 because it has not been raised or espoused by a substantial number of management's workmen, and that the learned Industrial Tribunal ought to have considered that the appellant not being an employee or a workman of the management of the petitioner the alleged dispute falls under Section 2A of the said Act of 1947 it is necessary to consider the provision contained in Section 10 of the Industrial Disputes Act, 1947.

Section 10 of the Industrial Disputes Act, 1947 provides as follows:

1. Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended it may at any time by order in writing-

    a) refer the dispute to a Board for promoting a settlement thereof; or

    b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or

    c) refer the dispute or any matter specified in the Second Schedule to a Labour Court for adjudication; or

    d) refer the dispute or any matter appearing to be connected with or relevant to the dispute whether it relates to any matter specified in the Second Schedule or the Third Schedule to a Tribunal for adjudication.

In the case of **Bangalore Woolen Cotton and Silk Mills Co. Ltd. vs. Workmen** reported in **(1968) 1 CLJ 555 (SC)** it is observed that the

discretion of the appropriate government under Section 10(1) is very wide to refer an industrial dispute or any matter appearing to be connected with or relevant to the dispute whether it relates to any matter specified in the Second Schedule or the Third Schedule to a Tribunal for adjudication.

Upon perusing the order of reference dated 01.08.2000 being No. 1232-I.R./IR/10C-66/99 made by the State Government it clearly appears that the State Government was of opinion that Industrial Dispute exists and referred the matter to the 4th Industrial Tribunal for adjudication after specifying the issues. As the company/writ petitioner did not challenge the said reference by filing objection before the State Government or by way of Judicial Review the said reference reached its finality. The Learned Tribunal adjudicated the matter in terms of the said reference, considered all relevant evidence and came to a finding that the appellant was employee of the writ petitioner. The findings of the Learned Tribunal are not at all perverse.

Thus the Learned Trial Judge erred in setting aside the findings of the Learned Tribunal.

In view of the discussion made hereinabove, I with due respect am unable to accept findings made and order passed by the Learned Trial Judge in WPO No. 878 of 2003. The Appeal is thus allowed. Impugned order dated 6th August, 2015 passed in WPO no. 878 of 2003 is set aside and the WPO No.878 of 2003 is dismissed.

The Award passed by Learned 4th Industrial Tribunal in Case No. VIII-105/2000 is restored. I request the Learned Industrial Tribunal to expedite the execution of the Award.

(Biswaroop Chowdhury, J.)

I. P. MUKERJI, J.:-

I have read the draft judgment proposed to be delivered by my brother. I fully concur with the reasons advanced by his lordship and the ultimate order that he proposes to pass. However, I would like to add a few words of my own.

The question of law raised in this appeal is the extent to which a court exercising its writ jurisdiction can evaluate the correctness of an award passed by an Industrial tribunal.

The ground of perversity was mainly taken by the employer to challenge an award dated 21st November, 2012 made by the tribunal. It succeeded before the learned single judge. By a final judgment and order dated 6th August, 2015, the writ application was allowed, setting aside the impugned award.

The issue whether the award was perverse or not arose from the finding of the learned tribunal on a preliminary issue. The jurisdiction of the tribunal to hear the reference made to it by the government of West Bengal was challenged before it by the company by raising the issue that the appellant was not its workman.

The appellant's case was that since 1994 he was working as a driver of the company at a salary of Rs.2,000/- per month. He was entrusted with driving the vehicle with Registration No.3751DL20C, owned by the company. This vehicle was used by one T.C. Sharma, an officer of the organization and in his absence by other employees.

The learned tribunal noted that the appellant had very successfully proved the above facts. That the car was owned by the company was admitted. According to the company, although, the alleged workman drove the company's car, he was the personal driver of T.C. Sharma, who paid his salary.

The learned judge in passing the impugned judgment and order dated 6th August, 2015 came to the following finding:-

"*In this case the materials on record to show the absence of any proof whatsoever regarding nexus between the respondent no.1 and the petitioner save and except allegations made by the former. The findings of the Tribunal in the impugned award, therefore, are also perverse in satisfying the circumstances laid down in* ***Collector of Custom*** *(supra).*

For the reasons aforesaid, the writ petition succeeds. The impugned award and the order publishing the same are both set aside."

Although the facts are a lot but not completely similar, **Punjab National Bank vs. Ghulam Dastagir** reported in **(1978) 2 SCC 358**, does not come to the aid of the respondent. In that case, it was clearly established by evidence that the monthly remuneration of the driver was paid by the employee who used the vehicle. This impelled the court to form an opinion that the alleged employee had not been able to discharge his burden of proof, that his salary was drawn from the employer and that his service was under his control and direction. The said tests to determine who is the employer was prescribed in **Merssy Docks & Herbour Board vs. Coggins & Sr ffith Liverpool Ltd.** reported in **1947 AC 1** and approved by the Supreme Court in **Shivnandan Sharma vs. Punjab National Bank Ltd.** reported in **AIR 1955 SC 404**.

In our case, the assertion of the appellant that his monthly remuneration was paid by the company could not be disproved by the employer by calling Sharma as a witness as observed by the learned tribunal.

What had to be established by the appellant was that he was working in an industry, that he was employed by the employer and that there was a relationship of employer and employee or master and servant between them as held by the Supreme Court in **Workmen of the Food Corporation of India vs. Food Corporation of India** reported in **(1985) 2 SCC 136**.

Facts more similar to this case occurred in **Bank of Baroda vs. Ghemarbhai Harjibhai Rabari** reported in **2005 II CLR 279**. It was decided by a three judge bench of the Supreme Court. Here, it was established that the car belonged to the bank and driven by a driver for its

employee. The workman asserted that his salary was paid by the bank. As in our case, the bank could not prove through the employee who had used the car, that the salary was paid by the employee and not by the bank. Mr. Justice N. Santosh Hedge held that the workman had been able to discharge the burden of proof on him and able to prove his case that he was employed by the bank as a workman under Section 2(s) of the Industrial Disputes Act.

Mr. Justice Gajendragadkar in **Syed Yakoob vs. K.S. Radhakrishnan and Ors.** reported in **AIR 1964 SC 477** displaying his lordship's mastery of the law wrote:-

"7.....A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or properly, as for instance, it decides a question without giving an opportunity, be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. 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. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said

finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide ***Hari Vishnu Kamath v. Syed Ahmad Ishaque****, 1955-1 SCR 1104 : Nagandra Nath v. Commr. of Hills Division, 1958 SCR 1240* *and* ***Kaushalya Devi v. Bachittar Singh****, AIR 1960 Supreme Court 1168."*

In **Pepsico India Holding Pvt. Ltd. vs. Krishna Kant Pandey** reported in **(2015) I CLR 560**, the Supreme Court did not approve of the High Court re-appreciating the evidence and drawing its own conclusion with regard to the status of the alleged workman.

In this case, the tribunal had tried the issue as a preliminary issue. It had followed a proper procedure of allowing both the employer and the alleged employee to adduce evidence both oral and documentary. It had taken into account the evidence produced by both the parties. In my opinion, this evidence was correctly weighed, analysed and evaluated by the learned judge of the tribunal. The observation of the learned judge that if the bank had to prove that Mr. Sharma had paid the remuneration of the driver, he had to be called as a witness which the bank did not do, was a very proper analysis and interpretation of the evidence before it. Thereafter, the tribunal held on the basis of the evidence produced before it that the vehicle belonged to the bank, it was driven by the appellant for its employee Mr. Sharma, and that the appellant had discharged his evidential burden. In the above facts, a presumption could also be made that the appellant was an employee of the company, which could not rebut the presumption or disprove the facts proved by the appellant. The appellant had and the bank had failed to discharge its burden of proof. The conclusion reached by the tribunal and the reasons in support thereof were, in my opinion, logical, most probable, reasonable and far from perverse.

On this appreciation of evidence, the learned writ court below was not right in coming to a different conclusion because the learned judge felt otherwise.

Therefore, I fully agree with my brother that the impugned judgment and order is to be set aside and the order of the Industrial tribunal affirmed and upheld.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I. P. MUKERJI, J.)