

**(2008) 12 CAL CK 0004**

**Calcutta High Court**

**Case No:** Writ Petition No. 1099 of 1998

Albert David Ltd. and another

APPELLANT

Vs

Seventh Industrial Tribunal, W.B.  
and others

RESPONDENT

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**Date of Decision:** Dec. 23, 2008

**Citation:** (2009) 121 FLR 242

**Hon'ble Judges:** Debasish Kar Gupta, J

**Bench:** Single Bench

**Advocate:** Amitava Das and Sunith Chatterjee, for the Appellant; Soumya Mazumdar and S.M. Obaidullah, for the Respondent

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### **Judgement**

Debasish Kar Gupta, J.

This writ application is directed against the order dated June 11, 1998 in case No. VIII 135/93/G.O. No. 858-IR-III-314/1992 by the learned 7th Industrial Tribunal, West Bengal.

The fact of the case in a nutshell is that the Petitioner No. 1 is a limited company registered under the Companies Act 1956. At all material time the Petitioner No. 1 carried on the business of manufacturing and selling pharmaceutical drugs and medicines. The company had three manufacturing units at Calcutta, Bhopal, Ghaziabad and had nine Branch Offices all over India. The Petitioner No. 1 had on its rolls about 1530 employees including 400 employees at Calcutta factory and office.

2. By filing an application dated April 24, 1992, the Respondent No. 5 approached the office of the Labour Commissioner, West Bengal, claiming that his alleged service under the Petitioner No. 1 in the post of driver had been terminated illegally from March 1, 1992. Conciliation proceedings were drawn up by the Assistant Labour Commissioner, West Bengal. The company denied the claim of the Respondent No. 5 of his relationship with the Petitioner No. 1 as an employee of the company. The conciliation proceedings failed and the matter was referred to the learned 7th

Industrial Tribunal, West Bengal by an order passed by the State of West Bengal under Memo No. 358-I.R/I.R./IIL-214/92 dated June 17, 1993 to decide the following issues:

(I) Whether the termination of service of the Respondent No. 5 with effect from March 1, 1992 was justified? (II) To what relief, if any, was he entitled?

3. The Respondent No. 5 filed his written statement dated November 3, 1993 before the Respondent No. 5, i.e. the 7th Industrial Tribunal, West Bengal, stating that he had been in the, employment of the Petitioner-company as a car driver since 1982 and drawing salary of Rs. 1255/- per month and he was dismissed illegally on March 1, 1992, The Petitioner-company filed a written statement dated February 19, 1994 denying the employment of the Respondent No. 5 under the Petitioner-company challenging the existence of any industrial dispute between the Respondent No. 5 and the Petitioner-company. The Respondent No. 5 filed an application dated September 7, 1994 before the Respondent No. 1 for a direction upon the Petitioner-company to pay subsistence allowance to him @75% of the last wages drawn. The Petitioner-company filed an objection dated June 18, 1995 before the Respondent No. 1 to the above application of the Respondent No. 5. The Respondent No. 1 passed an order dated August 11, 1995 holding that the question of employer employee relationship in between the Petitioner-company and the Respondent No. 5 should be decided first. After hearing the parties on diverse dates the Respondent No. 1 passed the impugned order dated March 11, 1998 holding that the Respondent No. 5 was an employee of the Petitioner-company at the relevant point of time. The above order dated March 11, 1998 is under challenge in this writ application.

4. It is submitted on behalf of the Petitioner-company that the Respondent No. 1 did not decide the dispute with regard to the alleged date of termination of the Respondent No. 5 from the service of the Petitioner-company. Drawing the attention of the Court towards the statement made in paragraph 3 of the written statement of the Respondent No. 5, it is submitted on behalf of the Petitioner-company that date of termination was on March 1, 1992 according to Respondent No. 5 himself. Drawing the further attention of this Court towards the statements made in paragraph 4 of the application dated September 7, 1994 of the Respondent No. 5 for a direction to grant of interim relief, it is submitted on behalf of the Petitioner-company that the date of alleged termination of the services of Respondent No. 5 was mentioned as August 1, 1992 therein. It is submitted on behalf of the Petitioner-company that the alleged remuneration of the Respondent No. 5 was also a disputed question of fact on the basis of his own pleading in two different documents. In the written statement dated November 3, 1993 the Respondent No. 5 stated his remuneration @ Rs. 1255 per month in paragraph 3 of the written statement while in paragraph 6 of the application. In interim relief dated September 7, 1994 the Petitioner himself stated his remuneration as Rs. 1250/- per

month. According to the learned Counsel appearing for the Petitioner-company the dispute regarding the employer employee relationship in between the Petitioner-company and the Respondent No. 5 cannot be decided without resolving the above dispute. Drawing the attention of this Court towards the statements made in the application dated April 3, 1996 by the Respondent No. 5 claimed to be under employment of the Petitioner-company since 1982 and he had been claiming to be driving vehicle of the company appearing registration No. WNF-9531 to show that the year of manufacture of the above vehicle was 1986. Therefore, the above vehicle was not in existence in the year 1982. According to the Petitioner-company there was no question of appointing the Respondent No. 5 in the year 1982 for driving the above car. It is also submitted on behalf of the Petitioner-company that on the basis of the evidences adduced by the O.P.W. Nos. 1 to 4 in support of their employment as the drivers of the Petitioner-company, it was a surmise and conjecture on the part of the learned Tribunal that the Respondent No. 5 was also a driver of the Petitioner-company. Accordingly, the conclusion of the learned Tribunal was passed on no evidence.

5. On the other hand, relying upon the evidences adduced by the O.P.W 1, 3 and 4 as also the policy of the insurance of car No. WNF 9531, it is submitted on behalf of the Respondent No. 5 that the fact of appointment of drivers under the Petitioner-company without any appointment letter cannot be disputed by the Petitioner-company. It is submitted on behalf of the Respondent No. 5 that the learned Tribunal relied upon the I.O.U slips by the Petitioner-company directing payment of various sums of account of petrol, umbrella repairing and taking delivery of car No. WNW 8272, to come to conclusion that the Respondent No. 5 was an employee under the Petitioner-company. Therefore, it does not lie on the mouth of the Petitioner-company that there was no material on record in support of the employer-employee relationship in between the Petitioner-company and the Respondent No. 5,

6. Relying upon the decision of Collector of Customs, Calcutta and Ors. v. Biswanath Mukherjee, 1974 CLJ 251 it is submitted on behalf of the Respondent No. 5 that the onus of proving the guilt of the workman lies fairly and squarely on the departmental authority and when it fails to discharge this onus it cannot be said that if reasonable opportunity to defend has been given to the workman he is not entitled to challenge the finding made against him.

7. Reliance is further placed on the decision of Sonodyne Television Co. Ltd. v. Sonodyne Television Co. Employees' Union and others, 1997(75) FLR 853 (Cal.) that the order under reference can be challenged even after passing of the final award.

8. I have heard the learned Counsels appearing on behalf of the respective parties I am also given my anxious considerations to the facts and circumstances of this case. The learned Tribunal passed the impugned order relying upon the evidences adduced by the O.P.W.1 to 4 in support of their own relationships with the

Petitioner-company as employees. It is not denied by the Petitioner-company that the names of the O.P.W.1 to 4 never appeared in the pay sheets or attendance register produced before the learned Tribunal by the Petitioner-company. The Petitioner-company did not dispute that the company owned at least six vehicles at the material point of time. Examining the materials on record and evidences adduced by the O.P.W. 1 and thus O.P.W. Nos. 1 to 4, the learned Tribunal came to the conclusion that the Petitioner-company appointed drivers without any letter of appointment without recording their attendance in the register as also without recording the payment of monthly remunerations to them in the pay sheets of the Petitioner-company.

9. The learned Tribunal further took into consideration the I.O.U ships used by the Petitioner company paying various sums of money to the Respondent No. 5 on different accounts. The learned Tribunal further took into consideration the delivery receipts showing delivery of car No. WNW 8272 issued by M/s. Nandi Automobiles bearing signature of the Respondent No. 5 as the person authorised by the Petitioner-company to take delivery of the above vehicle.

10. With regard to the claim of the Respondent No. 5 to drive vehicle being Registration No. WNF 9531, it is an admitted position on the basis of the materials on record that the above vehicle was manufactured in the year 1986 but that does not mean that the Petitioner No. 5 was not appointed by the Petitioner-company in the year 1982 for driving any other vehicle prior to manufacturing of the vehicle mentioned hereinabove.

11. The scope of judicial review of an award passed by a Court settling in writ jurisdiction, the settled principles of law as decided by the Hon"ble Supreme Court in the matter of Gujarat Steel Tubes Ltd. v. Gujarat Steel Tube Mazoor Sabha, 1980 (40) FLR 152 (SC) are quoted below:-

72. Once we assume that the jurisdiction of the arbitrator to enquire into the alleged misconduct was exercised, was there any ground under Article 226 of the Constitution to demolish that holding? Every wrong order cannot be righted merely because it is wrong. It can be quashed only if it is vitiated by the fundamental flaws of gross miscarriage of justice, absence of legal evidence, perverse misreading of facts, serious errors of law on the face of the order, jurisdictional failure and the like.

12. In the above facts and circumstances and on the basis of the above settled principle of law, I find no illegality in the decision-making process of the learned Tribunal in passing the impugned order. Nor it is vitiated by the fundamental flaws of gross miscarriage of justice or absence of legal evidence, or perverse misreading of facts or error of law on the face of the order or jurisdiction failure or like.

13. With regard to the date of termination of the Respondent No. 5 from the services of the Petitioner-company as also regarding the quantum of remuneration paid to the Respondent No. 5 per month those issues can be decided by the learned

Tribunal at the time passing the final award after considering the materials on record as also the evidences to be adduced by the parties. Only the preliminary issue of employer-employee relationship has been decided by the learned Tribunal by passing the impugned order dated March 11,1998.

In view of the above discussions this writ application fails.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.