Delhi High Court Automobile Assoc. Upper India vs The P.O. Labour Court Ii And Anr. on 24 April, 2006 Equivalent citations: 130 (2006) DLT 160, (2006) IIILLJ 929 Del Author: G Mittal Bench: G Mittal JUDGMENT Gita Mittal, J. 1. This writ petition raises a very fundamental issue in industrial adjudication. The question which requires to be answered is as to whether a workman can rest his case solely on a plea set up by the management, thereby, shifting the onus and burden of proof of proving his claimed employment totally upon the management. It appears that the respondent No. 2 Shri Chotey Lal set up a plea that he was employed with the Automobile Association of India, petitioner herein, as a watchman on a monthly salary of Rs. 300/- per month. It was claimed that he was working with the management for the last seven years and was appointed at the car parking behind the LIC Building. The workman set up a claim that his services were illegally terminated on 22nd September, 1989 and that wages of Rs. 3200/- for the period November, 1988 to September, 1989 were due and payable to him. Further an amount of Rs. 4950/- was claimed as arrears for the period 1987 to 1988 at the rate of Rs. 562/- and Rs. 262/- per month amounting to Rs. 3144/- and arrears from 1986 to 1987 at the rate of Rs. 412/- per month and at the rate of Rs. 112/- per month which amounted to to Rs. 1244/- The respondent No. 2 also claimed back wages as a period 1985 to 1986 amounting to Rs. 3200/- 2. Against this claim, the petitioner herein had denied regular employment of the workman with the petitioners and the entire claim set up by the workman. The petitioner had also disputed any relationship of employment of the respondent No. 2. 3. According to the petitioner, it was engaged in providing services to its members and the motoring community. Certain persons were operating voluntarily as car park attendants in and around the area of the Connaught Place looking after the cars and other vehicles parked in these areas. Such persons had formed a union namely the Car Parking Attendants Union (registered) having its office at 5/6 Scindia House, New Delhi. These car parking attendants were not employed by any person but used to earn their livelihood with the money so collected as tips from persons parking their vehicles in available parking places in this area. In order to encourage and help the members of the union by assisting them through education and guidance, the petitioner decided to provide free cotton uniforms once a year to the members of this registered union of the car attendants and also to pay a sum of Rs. 150 per month by way of an honorarium which was in the nature of a washing allowance to such members of the union who were nominated by it. For this purpose, the petitioner entered into an agreement dated 1st January, 1987 with the car parking attendants Union. This agreement stipulated that the relationship of the Automobile Association of India with the members of the Car Parking Attendants Union would not be that of employer and employee and the union was required to take an undertaking from all its members in this behalf. 4. The respondent No. 2 Shri Chotey Lal was one of the members of the Car Parking Attendants Union who was nominated by the Union or operating as a car attendant. The petitioner had provided him a uniform and a sum of Rs. 150/- as honorarium was being paid by the petitioner to the attendants in terms of the aforenoticed arrangement. The purpose of this agreement was a

social cause and benevolent to society inasmuch as incidents of car thefts were on the increase in the city. 5. It appears that the respondent No. 2 approached the appropriate government raising a dispute that his services were illegally terminated. The plea raised by the respondent No. 2 were as have been noticed hereinabove and included a claim that he was an employee of the petitioner. In exercise of its powers under Section 10 of the Industrial Disputes Act, 1947, the appropriate government referred the matter for adjudication to the industrial adjudicator vide a notification dated 24th September, 1990 on the following terms: Whether the termination of the services of Shri Chotey Lal is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect? 6. The petitioner contested the claim set up by the respondent No. 2 denying employment of the respondent No. 2. The matter proceeded to evidence. After a consideration of the material placed before it, the industrial adjudicator held that the respondent No. 2 was an employee of the petitioner; that the petitioner had failed to establish the case set up by it that the respondent No. 2 was engaged on the basis of a contract and rejected the documentary evidence produced by the petitioner on the ground that the same had not been specifically mentioned in the written statement filed by it. After so holding, the industrial adjudicator answered the reference in favor of the workman vide its award dated 20th March, 1996 holding that his services had been terminated illegally inasmuch as the petitioner had failed to comply with the provisions of Section 25F of the Act and held that the workman was entitled to reinstatement into service with continuity of service and full back wages with effect from 22nd September, 1989 which was the alleged date of the illegal termination. 7. The petitioner has assailed this award dated 20th March, 1996 by way of the present writ petition. It has been contended that the onus to prove employment with the management lies wholly on the workman who is so claiming and that in the instant case the workman had failed to discharge this burden on it caste on him by law. It has further been contended on behalf of the petitioner that the industrial adjudicator had failed to notice that even the terms of the agreement had been incorporated in the written statement filed by the petitioner and consequently the evidence led by the petitioner could not have been ignored. The petitioner has explained that the construction placed by the industrial adjudicator on the letter dated 9th January, 1989 is also erroneous inasmuch as the same was merely a letter to ensure that the antecedents of the car attendants were verified and for no other reason. 8. Learned counsel for the respondents had also submitted that industrial adjudicator has fallen into error in denying reinstatement into service on the ground that the respondent No. 2 has been reinstated into service. Such plea has been set up even in the counter affidavit filed by the respondent No. 2. 9. Having heard the learned Counsel for the parties and perused the available record, it is noteworthy that the workman had set up a case of seven years of the employment with the petitioner on a monthly wages of Rs. 300/- per month. It is settled law that a plea is to be proved by a party who has set up the same. Therefore, undoubtedly, the workman had to prove that he was employed by the petitioner as well as the wages which were being drawn by him and the period for which he had been

employed. 10. It is well settled that the primary burden of proof to establish a plea rests on a person so claiming. In this behalf reference can be appropriately made to the judicial pronouncement in State of Gujarat and Ors. v. Pratamsingh Narsinh Parmar 2004 LLR 351 (para 49) Nilgiri Coop. Marketing Society Ltd. v. State of Tamil Nadu; 2001 LLR 148 Dhyan Singh v. Raman Lal; 1996 Lab. I.C. 202 Swapan v. First Labour Court, West Bengal and 1973 Lab. I.C. 398 N.C. John v. TTS & CE Workers Union; Thus burden lies on a person claiming the establishment to be an industry to place positive facts before the court in this behalf. For this reason, the primary burden to establish the relationship of employment also lies on the workman who is claiming the same. 11. In this behalf, it was only if the respondent had discharged the onus and burden of proof cast on him and had placed some material on record to indicate that he had been employed by the petitioner that the petitioner would have been required to displace the case set up by the respondent by leading positive evidence. 12. In Manager, Reserve Bank of India v. S. Mani and Ors., it was held by the apex court that it is only if the initial burden of proof, which was on the workman, was discharged to some extent, that a finding can be returned in respect of the defense of the management. Furthermore, a plea having been set up by the workman, the initial burden of proof was on the workman to show that he had been employed by the petitioner in the claim capacity on the stated terms. The circumstances in which the court may draw an adverse inference against the management have also been succinctly set down thus: 22. An adverse inference, therefore, was drawn for non-production of the attendance register alone, and not for non-production of the wage-slips. Reference to 'other relevant documents' must be held to be vague as the appellant herein had not been called upon to produce any other documents for the said purpose. 23. It appears that the learned Tribunal considered the matter solely from the angle that the appellant had failed to prove its plea of abandonment of service by the respondents. 24. The question came up for consideration before this Court recently in Siri Niwas wherein it was held : (SCCp.198, para 15) 15. A court of law even in a case where provisions of the Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. 25. Referring to the decision of this Court in Indira Nehru Gandhi v. Raj Narain this Court observed : (Siri Niwas case, SCC p. 199, para 19) 19. Furthermore a party in order to get benefit of the provisions contained in Section 114III(g) of the Evidence Act must place some evidence in support of his case. Here the respondent failed to do so. 26. In Hariram this Court observed : (SCC p. 250, para 11) 11. The above burden having not been dischasrgsed and the Labour Court having held

so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. 27. As noticed hereinbefore, in this case also the respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference. Burden of proof 28. The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service stating: It is admitted case of the parties that all the first parties under the reference CRs Nos. 1 to 11 of 1992 have been appointed by the second party as ticca mazdoors. As per the first parties, they had worked continuously from April 1980 to December 1982. But the second party had denied the above said claim of continuous service of the first parties on the ground that the first parties has not been appointed as regular workmen but they were working only as temporary part-time workers as ticca mazdoor and their services were required whenever necessity arose that too on the leave vacancies of regular employees. But as strongly contended by the counsel for the first party, since the second party had denied the above said claim of continuous period of service, it is for the second party to prove through the records available with them as the relevant records could be available only with the second party. 29. The Tribunal, therefore, accepted that the appellant had denied the respondents' claim as regards their continuous service. 30. In Range Forest Officer v. S.T. Hadimani it was stated : (SCC p. 26, para 3) 3. ... In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year proceeding his termination. Filing of an affidavit is only his own statement in his favor and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. 31. In Siri Niwas this Court held : (SCC pp. 197-198, para 13) 13. The provisions of the Evidence Act, 1872 per se are not applicable in an industrial adjudication. The general principles of it are, however, applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent workman herein to show that he had worked for 240 days in the preceding twelve months prior to his alleged retrenchment. In terms of Section 25F of the Industrial Disputes Act, 1947, an order retrenching a workman would not be effective unless the conditions precedent therefore are satisfied. Section 25F postulates the following conditions to be fulfillled by an employer for effecting a valid retrenchment: (i) one month's notice in writing indicting the reasons for retrenchment or wages in lieu thereof; (ii) payment of compensation equivalent

to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. It was further observed : (SCC p. 198, para 14) 14. ... As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case. 32. Yet again in Hariram it was opined : (SCC p. 250, para 10) 10. ... We cannot but bear in mind the fact that the initial burden of establishing the factum of their continuous work for 240 days in a year rests with the respondent applicants. 13. In entitled Cholan Roadways Ltd. v. G. examined. It does not appear from the order dated 29-4-1988 passed by the Presiding Officer, Industrial Tribunal that the respondent herein made any prayer for cross-examining the passengers who travelled in the ill-fated bus and who were examined by the said Shri M. Venkatesan. It is evident from the order of the learned Tribunal that only in the sow-cause notice filed by the respondent in response to the second show-cause notice, was such a contention raised. The learned Presiding Officer, Industrial Tribunal in his impugned judgment further failed to take into consideration that even if the statements of the said passengers are ignored, the misconduct allegedly adduced by Shri M. Venkatesan together with the circumstantial evidence brought on record. The learned Single Judge of the High Court although referred to the sketch drawn by PW 1 on the site (Ext. P-2) and 4 photographs (Ext. P-8) but ignored the same observing that unless witnesses were examined in support of the two exhibits, it is not possible to draw any inference there from. The Division Bench of the High Court did not examine the materials on record independently but referred to the findings of the Industrial Tribunal as also the learned Single Judge to the effect that from their judgments it was apparent that the driver had not been driving the bus rashly and negligently. 14. Engagement and appointment in service can be established directly by the existence and production of an appointment letter, a written agreement or by circumstantial evidence of incidental and ancillary records which would be in the nature of attendance register, salary registers, leave record, deposit of provident fund contribution and employees state insurance contributions etc. The same can be produced and proved by the workman or he can call upon and caused the same to be produced and proved by calling for witnesses who are required to produce and prove these records. The workman can even make an appropriate application calling upon the management to call such records in respect of his employment to be produced. In these circumstances, if the management then fails to produce such records, an adverse inference is liable to be drawn against the management and in favor of the workman. 15. In the in-

stant case, the workman filed an affidavit by way of evidence on the 29th April, 1993 and closed his evidence. Thus, the only evidence in support of the plea of employment was the self serving affidavit filed by the workman and nothing beyond that to support his claimed plea of service of seven years. In view of the principles laid down by the Supreme Court in Range Officer v. S.T. Hadimani, such affidavit by itself is wholly insufficient to discharge the burden of proof on the workman. 16. Against this evidence put up by the workman/respondent No. 2 herein, the petitioner had denied the claim of employment of the respondent No. 2 with the petitioner. It had been stated that the workman had been appointed pursuant to a contract. The petitioner has vehemently urged that not only was the contract pleaded but the terms of the agreement had been incorporated in the written statement which was filed by the petitioner and subsequently proved. Undoubtedly, the management is required to lead evidence in order to prove the pleas which had been taken by it. The petitioner had pleaded that there was no privity of contract of service between the parties as claimed by the workman. The petitioner had proved on record as Exhibit MW1/2 which was the agreement dated 1st January, 1987 between the Automobile Association of Upper India and the Car Parking Attendants Union. Further, the letter written by the Car Park Attendants Union(Registered) to the Office of the Labour Commissioner which was dated 8th January, 1990 was proved on record as Exhibit WW 1/M1. This was so exhibited as the same was put to the workman and he had admitted his signatures thereon as well as receipt of a copy of the letter. While the agreement dated 1st January, 1987 clearly showed that the Automobile Association of India had entered into an arrangement with the Car Parking Attendants Union of which the respondent No. 2 was a member as part of its public service activity to its members and the general motoring community. The intention of the petitioner was encouraging and helping the Car Parking Attendants Union by assisting the attendants through education, guidance and incentives like free uniforms and the honorarium. This agreement unconditionally stipulated that the disbursement of the honorarium and the free uniforms would not create any relationship of employment between the Automobile Association of Upper India and the members of the Car Parking Attendants Union. In reiteration of this stipulation, the members of the Car Park Attendants Union had certified that they are doing voluntary service for which visitors and customers may make voluntary payment of tips without any compulsion the Automobile Association of Upper India was giving incentives by providing free uniforms and honorariums at the rate of Rs. 150/- per month to 29 of the members of the union which helps them to live honestly and with pride. The signatories to this letter dated 8th January, 1990 had stated that they are not employees of the Automobile Association of Upper India which was therefore not required to maintain any attendance register, issue letter of appointment, salary registers etc. The members of the Car Park Attendants Union which included the respondent No. 2, by way of this communication dated 8th January, 1990(Exhibit WW1/M1) had also affirmed the statements made by the Automobile Association of Upper India in its letter No. 8360 sent to the Labour Commissioner. 17. It is noteworthy that the respondent No. 2

has admitted in his evidence that he was getting a uniform from the petitioner as had been claimed by it. 18. The witness who was examined by the petitioner namely Shri J.R. Kochar had clearly stated that the parking spaces where these parking attendants who were nominated by the Car Park Attendants Union were nominated were not in the control of the association and are deputed only by the Car Park Attendants Union in free parking areas only. This witness has deposed that it was this union of the attendants which exercised full control on its members and that the attendants are working as volunteers looking after cars and other vehicles in various parkings in the Connaught Place and were not directed, deputed or instructed by the Automobile Association of Upper India at all. None of these depositions of this witness was subjected to any cross examination. The industrial adjudicator has completely overlooked this material evidence on behalf of the petitioner. The industrial adjudicator has refused to examine the agreement which was proved on record as MW1/1 on the ground that there is no specific pleadings with regard to this agreement in the written statement and has discarded the evidential revalue of the letter dated 8th January, 1990 which was Exhibit WW1/M1 on the ground that the workman did not know the contents of the document or the English language used in this document. I find however that these findings are not supported by the copies of the records which has been placed before this Court and are therefore erroneous. A letter dated 9th January, 1989 appears to have been put to the witness of the management in its cross examination which was sent by him to the SHO, Connaught Place, New Delhi. The witness has explained that this letter pertained to the period January, 1989 while the case in hand pertained to the year 1983. In any case, the petitioner has explained that such communication were addressed to the SHO to check the antecedents of the persons who were working as car parking attendants voluntarily to whom the petitioner wished to provide uniform and that this letter was in response to a letter received from the SHO, Connaught Place, New Delhi. I find force in the submissions made on behalf of the petitioner inasmuch as these car parking attendants were being deputed to look after vehicles in free parking areas and were thereby performing a public service without any sanction from any authority. The police was an authority obviously concerned with the safety and security of the property of the public which was visiting these public areas. 19. In these circumstances, the refusal to consider the documents proved on record by the petitioner was not justified. In any case, even if such evidence was to be ignored, still the workman had to conclusively establish the case set up by it before the industrial adjudicator by cogent and reliable oral and documentary evidence. The workman has failed to establish his case and has failed to produce and prove any records. 20. I therefore find force in the submission on behalf of the petitioner to the effect that the findings of the industrial adjudicator to the effect that the respondent No. 2 was an employee of the petitioner is based on no evidence whatsoever and hence is without jurisdiction. 21. There is yet another angle to the matter. The industrial adjudicator has recorded that the workman had been reinstated by the management with effect from 1st October, 1989. It has been stated in the award that this has been admitted by the workman and consequently there is no

need for passing any direction to reinstate the workman into service. Shri R.S. Rathi, learned Counsel appearing for the workman has vehemently contended that the workman had never so admitted inasmuch as he was never reinstated into service. Even in the counter affidavit dated 11th July, 2001 filed before this Court, the respondent No. 2 has stated that he was working till 22nd September, 1989 and since then he is not an employee of the petitioner. 22. Before this Court, an issue has been raised with regard to the real identity of the respondent No. 2. It has been contended that Chotey Lal who had filed the claim had expired and on his request, his son was working as a parking attendant. It is contended that the person who is contending the present case is not even the real Chotey Lal. 23. In view of what has been held by me hereinabove, it is not necessary for me to go into these controversy of facts which in any case is wholly, legally impermissible. I may notice an implied admission by the respondent No. 2 in his counter affidavit wherein he has denied that the respondent No. 2 was not being paid the honorarium. 24. In view of what is noticed hereinabove, the respondent No. 2 workman failed to discharge the burden of proof on him of establishing a relationship of employment with the petitioner. The award dated 20th March, 1996 is therefore based on no evidence and is not sustainable. The petition is allowed. The award dated 20th March, 1996 is hereby set aside and quashed. There shall be no order as to costs.