CASE NO.:
Appeal (civil) 19 of 2007

PETITIONER:
G.M., B.S.N.L. & Ors.

RESPONDENT:
Mahesh Chand

DATE OF JUDGMENT: 15/02/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 19 OF 2007

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a Division Bench of the Rajasthan High Court, Jaipur Bench, dismissing the Special Appeal filed under Section 18 of the High Court Ordinance Act, 1949 (in short the 'High Court Act'). In the Special Appeal challenge was to the order passed by a learned Single Judge in SB Civil Writ Petition No. 3514 of 2005. The learned Single Judge had upheld the award made by the Central Government Industrial Tribunal, Jaipur (in short the 'Tribunal').

Background facts in a nutshell are as follows:
Respondent made grievance that his services were illegally terminated with effect from 13.10.1998. His case was that he had worked continuously from 1987 till 1998. He worked for 240 days in a calendar year. Therefore, his services could not have been terminated without complying with the requirements of Section 25-F of the Industrial Disputes Act, 1947 (in short the 'Act').

Appellants took the stand that the respondent was engaged on a purely temporary basis and was engaged for doing part time work on some days. The question of his having worked for more than 240 days is not therefore relevant. He was actually engaged for 2 to 3 hours a day on some days. It was pointed out that there was no such post of Safaiwala ever created and, therefore, the claim was thoroughly mis-conceived.

The following reference was made to the Tribunal:
"Whether the action of management of Telecommunication Department in terminating the services of workman Sh. Mahesh Chand w.e.f. 13.10.98 was legal and justified? If not, what relief the workman is entitled and from what date?"

By its award dated 29.9.2004 the Tribunal came to hold that the claim of the respondent was that he had worked for five hours a day and therefore was entitled to be regularized as a regular Safaiwala. Accordingly, it was held that termination

of the respondent from service is illegal and he is entitled to be re-instated with continuity in service but without back wages.

Learned Single Judge of the High Court as noted above dismissed the writ petition filed.

2. Learned counsel for the appellants submitted that the casual and part time nature of the engagement is evident from the fact that some times the mother and some times the wife of the respondent was engaged. The Tribunal noted the claim of the respondent that respondent was being paid Rs.8/- per day. Even according to his own, the respondent, which has also not been accepted by the present appellants, was working for five hours a day.

3. Learned counsel for the respondent on the other hand has submitted that he was working for nearly 8 hours every day and, therefore, the orders of the Tribunal and the High Court cannot be faulted.

4. On the question of whether the respondent had worked continuously for 240 days in a calendar year the Tribunal and the High Court have wrongly placed the onus on the employer to prove the negative. This is clearly contrary to the decision of this Court.

5. In a large number of cases the position of law relating to the onus to be discharged has been delineated. In Range Forest Officer v. S.T. Hadimani (2002 (3) SCC 25), it was held as follows:

"2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10.8.1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.
3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in State of Gujarat v. Pratamsingh Narsinh Parmar (2001) 9 SCC 713. 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 preceding his

termination. Filing of an affidavit is only his own statement in his favour 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. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

The said decision was followed in Essen Deinki v. Rajiv Kumar (2002 (8) SCC 400).

6. In Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan and Anr. (2004 (8) SCC 161), the position was again reiterated in paragraph 6 as follows:

"It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in Range Forest Officer v. S.T. Hadimani (2002 (3) SCC 25). No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed."

7. In Municipal Corporation, Faridabad v. Siri Niwas (2004 (8) SCC 195), it was held that the burden was on the workman to show that he was working for more than 240 days in the preceding one year prior to his alleged retrenchment. In M.P. Electricity Board v. Hariram (2004 (8) SCC 246) the position was again reiterated in paragraph 11 as follows:

"The above burden having not been discharged 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. At this stage it may be useful to refer to a judgment of this Court in the case of Municipal Corporation, Faridabad v. Siri Niwas JT 2004 (7) SC 248 wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents. This is what this Court had to say in that

regard:
"A court of law even in a case where provisions of the Indian 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. In the instant case, the Industrial Tribunal did not draw any adverse inference against the appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent."

8. In Manager, Reserve Bank of India, Bangalore v. S. Mani and Ors. (2005(5) SCC 100) a three-Judge Bench of this Court again considered the matter and held that the initial burden of proof was on the workman to show that he had completed 240 days of service. Tribunal's view that the burden was on the employer was held to be erroneous. In Batala Cooperative Sugar Mills Ltd. v. Sowaran Singh (2005 (7) Supreme 165) it was held as follows:

"So far as the question of onus regarding working for more than 240 days is concerned, as observed by this Court in Range Forest Officer v. S.T. Hadimani (2002 (3) SCC 25) the onus is on the workman."

9. The position was examined in detail in Surendranagar District Panchayat v. Dehyabhai Amarsingh (2005 (7) Supreme 307) and the view expressed in Range Forest Officer, Siri Niwas, M.P. Electricity Board cases (supra) was reiterated.

10. In R.M. Yellatti v. The Asst. Executive Engineer (JT 2005 (9) SC 340), the decisions referred to above were noted and it was held as follows:

"Analyzing the above decisions of this court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a

given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case."

(See ONGC Ltd. And Anr. v. Shyamal Chandra Bhowmik (2006 (1) SCC 337).

11. Additionally, the specific stand of the appellants in the proceedings before the Tribunal and the High Court was that there is no sanctioned post of Safaiwala. There is no finding recorded by the Tribunal or the High Court that this stand is incorrect. Further, the respondent is also not consistent as to the period for which he worked. At one place he said he was working for five hours each day and other places he had stated that he was working for 8 hours. On the contrary, the appellant with reference to the nature of work done categorically stated that on a part time basis depending on the need and requirement the respondent was engaged for 2 to 3 hours periodically. Interestingly, the work that was being done by the respondent was also being done by his wife and his mother. Sometimes, no order of appointment was admittedly issued to the respondent. This fact is mis-conceived. In view of the aforesaid factual scenario, the award made by the Tribunal as affirmed by learned Single Judge and the Division Bench cannot be sustained and is set aside. The appeal is allowed with no order as to costs.