

**Mudra Communications Ltd. Vs. Ganesh Kumar and ors.**

**Mudra Communications Ltd. Vs. Ganesh Kumar and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/848719](http://sooperkanoon.com/848719)

**Court :** Delhi

**Decided On :** Apr-21-2010

**Judge :** Rajiv Sahai Endlaw, J.

**Acts :** Industrial Disputes Act - Section 17B; ;[Motor Vehicles Act, 1988](#) - Section 180; ;[Constitution of India](#) - Article 226

**Appeal No. :** W.P.(C) 4913/1997

**Appellant :** Mudra Communications Ltd.

**Respondent :** Ganesh Kumar and ors.

**Advocate for Def. :** R.K. Gupta, Adv. and;Party-in-Person for R-1

**Advocate for Pet/Ap. :** Puneet Bajaj, Adv.

**Disposition :** Petition allowed

**Judgement :**

**Rajiv Sahai Endlaw, J.**

1. The petitioner employer impugns the award dated 5th July, 1997 of the Industrial Tribunal holding the respondent No. 1 workman to be an employee of the petitioner and directing the petitioner to reinstate the respondent No. 1 workman with full back wages. The respondent No. 1 workman claimed to be

working/employed with the petitioner as a driver. It was the plea of the petitioner company that the respondent No. 1 workman was the personal driver of Mr. Karan Ahluwalia working as a General Manager with the petitioner company and which Mr. Karan Ahluwalia, as per the terms of his employment, was entitled to reimbursement of car expenses; that the respondent No. 1 workman was driving the car of the said Mr. Karan Ahluwalia and Mr. Karan Ahluwalia having left the employment of the petitioner, the petitioner had no obligation whatsoever towards respondent No. 1 workman.

2. The Tribunal found that the witness of the petitioner employer in his cross examination had admitted that the respondent No. 1 workman used to drive the car which belonged to the petitioner company and that the said car had been given by the petitioner company to the said Mr. Karan Ahluwalia for his official use. It was further found that the said stand of the petitioner in its evidence was inconsistent with the stand taken in the written statement; while in the written statement it was pleaded that the petitioner was not having any car except the one for its Managing Director but during the cross examination it was admitted that the car had been provided by the petitioner to its General Manager Mr. Karan Ahluwalia. The Tribunal held that the respondent No. 1 workman without being employed with the petitioner could not have driven the car owned by the petitioner. This forms the crux of the reasoning of the Industrial Tribunal.

3. This Court, upon the petitioner citing Employers in relation to Punjab National Bank v. Ghulam Dastagir : 1978 1 LLJ 312 (SC) issued notice of this petition and stayed the operation of the award subject to the petitioner depositing a sum of Rs. 1,50,000/- in this Court. Litigation expenses were also directed to be paid to the respondent No. 1 workman. Rule was issued on 13th September, 2000 and the interim order made absolute during the pendency of the petition. On application of the respondent No. 1 workman under Section 17B of the ID Act, vide order dated 31st January, 2002 the petitioner was directed to pay a sum of Rs. 800/-per month to the respondent No. 1 workman from the date of filing of the application and till the disposal of the writ petition. It is informed that a total sum of Rs. 1,14,003/- has been paid till now by the petitioner to the respondent No. 1 under the said order.

4. Though the scope of interference and judicial review in respect of the awards of the Labour Court/Industrial Tribunal in exercise of powers under Article 226 of the [Constitution of India](#) is limited and within certain parameters but I find no legal basis for the reasoning in the impugned award. The only ground on which the award holds the respondent No. 1 workman to be an employee of the petitioner is the fact that the respondent No. 1 workman used to drive the car belonging to the petitioner and provided by the petitioner to its then General Manager. Employment is a matter of contract. No contract of employment can come into existence merely by the respondent No. 1 workman being found to be driving the car belonging to the petitioner. As far as the petitioner was concerned, it had provided the said car to its General Manager Mr. Karan Ahluwalia. It was not the case of the respondent No. 1 workman that Mr. Karan Ahluwalia was required to drive the said car himself only or prohibited from allowing the said car to be driven by any person who was not an employee of the petitioner company. There is nothing in the Motor Vehicles Act also which requires a motor vehicle to be driven by the owner only or under the authority of the owner only. Section 180 of the [Motor Vehicles Act, 1988](#) imposes an obligation, on the owner of a vehicle, only of not allowing a person without driving licence and/or underage to drive the vehicle. Thus, the General Manager Mr. Karan Ahluwalia of the petitioner was free to either drive the car, given by the petitioner to him, himself or to have the same driven by any other person; such person entrusted/engaged by Mr. Karan Ahluwalia to drive the car, would by reason of the petitioner being the owner of the car, not become the employee of the petitioner or have any claim against the petitioner. In the circumstances, the only logic given in the award for holding the respondent No. 1 workman as the employee of the petitioner cannot be sustained and the award is perverse.

5. The Tribunal appears to have been swayed by the inconsistency in the written statement and evidence of the petitioner. This Court also before issuing notice of the petition had directed the petitioner to file copies of the written statement and the evidence. A perusal thereof does show that the stand in the written statement was that

the management herein does not maintain any cars of its own except one for its Chairman and Managing Director. Consequently, no drivers are employed by the management for any other executive of the company. The executives of the company are simply given a car allowance for their conveyance purpose, to utilize as they desire.

and in cross examination the witness of the petitioner admitted that the car driven by the respondent No. 1 workman belonged to the petitioner company. It was further clarified that the said car was given by the petitioner company to Mr. Karan Ahluwalia for his official use and the company used to pay the running expenses for the said car. However, the said inconsistency cannot lead to a finding of the respondent No. 1 being the employee of the petitioner. Moreover, the plea in the written statement was qua 'maintain' and not ownership of the car.

6. Though the Tribunal has in the award not cited any other reason/evidence in support of the finding of the respondent No. 1 workman being the employee of the petitioner, the respondent No. 1 workman alongwith his counter affidavit has filed photocopies of certain documents. However, a perusal of the oral evidence led before the Tribunal shows that the witness of the petitioner in cross examination was confronted with only two of the said documents. One of the said documents is a letter on the letter head of the petitioner company addressed to M/s Ludhiana Aviation Club, Ludhiana by the said Mr. Karan Ahluwalia requesting for refund of monies to the bearer of the letter namely the respondent No. 1 workman. The witness of the petitioner identified the signature of Mr. Karan Ahluwalia on the said document. However, the said document also does not constitute the respondent No. 1 workman as an employee of the petitioner. Merely because the respondent No. 1 workman, who was admittedly working as a driver (the question is, whether employed by said Mr. Karan Ahluwalia or by the petitioner), was authorized by Mr. Karan Ahluwalia to run the said errand would not constitute the respondent No. 1 workman as the employee of the petitioner. The other document is also on the letter head of the petitioner company under the signature of the said Mr. Karan Ahluwalia to all staff members intimating the new office timings. The witness of the petitioner admitted the signature of Mr. Karan Ahluwalia on the said document but could not say whether the same was signed by the respondent No. 1 workman

also or not. The respondent No. 1 workman in his evidence did not prove his signatures on the said document. Thus the signatures of the respondent No. 1 workman on the said document do not stand proved. Even if the said document is held to be bearing the signature of the respondent No. 1 workman, again it is no evidence of the respondent No. 1 workman being the employee of the petitioner. The letter does not bear the names of the employees/staff members to whom it was addressed. The letter has come from the custody of the respondent No. 1 workman. Nothing could have prevented the respondent No. 1 workman from putting his signatures on the said document before producing the same in evidence.

7. I find it strange that the respondent No. 1 workman did not choose to examine Mr. Karan Ahluwalia. Mr. Karan Ahluwalia was admittedly no longer in the employment of the petitioner when the dispute was raised. The best evidence available to the respondent No. 1 workman was the said Mr. Karan Ahluwalia and who has not been examined. The Tribunal has also drawn adverse inference against the petitioner not replying to the notice issued by the respondent No. 1 workman prior to raising the dispute. However, the petitioner, immediately when summoned before the Conciliation Officer had taken the plea that the respondent No. 1 workman was the personal employee of Mr. Karan Ahluwalia and his grievance should be against Mr. Karan Ahluwalia. No adverse inference from not replying to the notice could be raised inasmuch as a person and especially a Public Limited Company is not required to reply to letters of persons with whom it has no privity.

8. The respondent No. 1 workman has before this Court filed photocopies of certain other documents also. However, the said documents were not put to the witness of the petitioner and appear to have been produced in this Court for the first time. The respondent No. 1 in his counter affidavit has opposed vehemently to the petitioner producing fresh evidence in this Court. What has been urged qua the evidence sought to be produced by the petitioner for the first time before this Court applies equally to the respondent No. 1 also. The said evidence thus cannot be looked into. It may however be noted that the said documents comprise of:

i. letter on the letter head of the petitioner company signed by Mr. Karan Ahluwalia certifying that respondent No. 1 is working with him as a driver and goes home late.

ii. printed vouchers of the petitioner company bearing the signatures either of the respondent No. 1 workman only or also of Mr. Karan Ahluwalia of payment of salary/wages of respondent No. 1 workman.

iii. printed voucher of the petitioner company of payment of travel expenses and dinner expenses for late working to the respondent No. 1 workman signed by Mr. Karan Ahluwalia.

However, as aforesaid, without the said documents having been put to the witness of the petitioner, this Court cannot take cognizance of the same. Needless to add that the petitioner has disputed the said documents. I am also not inclined to give any weight to the said documents because in the normal course the said documents, even if genuine, ought not to have been in custody of the respondent No. 1 workman. The respondent No. 1 workman has not explained as to how the same came to be in his custody. Secondly, none of the said documents bear the signatures of the Accountant of the petitioner though so required by providing column therefor. It thus appears, that the documents, even if genuine, are not of payment by the petitioner and in which case they would have been signed by the Accountant of the petitioner; but the voucher form of the petitioner company has been used by Mr. Karan Ahluwalia to obtain receipt of payments made by him to the respondent No. 1 workman. I must also notice that the respondent No. 1 workman has without any leave of the court, on 6th April, 2010 filed another set of the same documents, and therewith also filed a photocopy of a purported attendance register containing his name. Again it is not explained as to how the respondent No. 1 came into possession of the attendance register of the petitioner. No cognizance thereof can also be taken.

9. Coming back to Ghulam Dastagir (supra) on the basis whereof notice of this writ petition was issued by this Court, in that case the plea of the bank was that the workman was the personal driver of the Executive of the bank. The Industrial Tribunal held the workman to be an employee of the bank. The Supreme Court

found that the Executive (Area Manager) of the bank had been given a personal allowance of Rs. 200/- to enable him to employ a driver. The Supreme Court held that the test was as to who exercises control and supervision over the workman. It was held that the workman in that case had failed to prove that the control and supervision over his employment was by the bank. In that case also the jeep which the driver was to drive, its petrol and oil requirements and maintenance were the responsibility of the bank. Similarly the salary of the workman driver in that case was also paid by the bank through its Executive by way of allowance. In spite of all these factors, the Supreme Court held that there was no nexus between the bank and the workman and set aside the award of the Industrial Tribunal. The Supreme Court also noticed that it was not the case of the workman in that case that the bank had practiced any camouflage in the employment of the workman. In the present case also it is not the case of the respondent No. 1 workman that the petitioner had practiced any camouflage in the matter of his employment.

10. The Counsel for the petitioner also relies on:

a. Workmen of Nilgiri Co-operative Marketing Society Ltd. v. State of Tamil Nadu : AIR 2004 SC 1639 again laying down the test of control and supervision to determine the existence of the contract of employment. In that case also the workers though working in the Yard of the State whose employees they were claiming to be were held to be not the employees of the State.

b. G.M., Tanda Thermal Power Project v. Jai Prakash Srivastava : 2008-I-LLJ-887 (SC) laying down that when existence of relationship of employer and employee is disputed, the same has to be determined in presence of all concerned parties who are interested in the subject matter of reference.

c. Mahesh Chand v. Godrej Sara Lee Ltd. ILR 2008 Delhi 17 where a Single Judge of this Court dismissed the petition against the award of the Industrial Tribunal holding the workman in that case to be a personal employee of the executive of the company and not of the company.

11. I find that the Supreme Court in Bank of Baroda v. Ghemarbhai Harjibhai Rabari : AIR 2005 SC 2799 was also faced with a case of driver employed by one

of the executives of the bank. Reliance was placed by the bank on the judgment in Ghulam Dastagir. The High Court had distinguished the said judgment inasmuch as the workman in the said case had established that not only did he work as a driver of a car belonging to the bank but had also produced three vouchers which showed that he had been paid certain sums of money towards the wages and the said amount had been debited to the account of the bank. In the said facts, the Supreme Court refused to interfere. However, the said judgment also does not persuade me to reject the present petition inasmuch as in the present case no payment towards the salary from the account of the petitioner to the respondent No. 1 workman has been proved.

12. Otherwise I find that a Single Judge of this Court in Subash Chand v. Mitsui & Co. following Ghulam Dastagir rejected the petition of a similarly placed workman against the award of the Labour Court holding that the relationship of employee and employer did not exist. Another Single Judge in Nar Bahadur v. Management of Shree Electricals dismissed the writ petition of the workman against the award of the Labour Court holding the relationship of employer and employee having not been established. The judgment of the Supreme Court in Ghemarbai (supra) was distinguished by holding that in that case the workman had proved his wages to be debited to the bank.

13. This petition thus has to succeed. The question which however arises is as to whether any order is to be made with respect to the payments made during the pendency of this petition to the respondent No. 1 workman under Section 17B. Undoubtedly, the Supreme Court in Dena Bank v. Kiritikumar T. Patel : (1999) 2 SCC 106 has held that payment under Section 17B is in the nature of subsistence allowance which would not be refundable even if the award is set aside by the High Court. However, the liability for subsistence allowance even can be to an employee or an ex-employee. There can be no liability for subsistence allowance to an absolute stranger or to a person with whom the management/employer does not have and has never had any privity and which person is found to have made an absolutely false claim of being an employee of the management/employer. To allow such person to retain the amounts received under Section 17B would be travesty of justice and amount to giving undue benefit to him. Two single judges of

this Court in Cement Corporation of India v. Shriram Chaurasia and in DTC v. Braham Prakash have held that in rarest of rare/exceptional cases where there is no relationship between the parties, order under Section 17B can be refused. On the same parity of reasoning, when the High Court finds that there never was any relationship of employer and employee, the court remains entitled to direct refund of payments made under Section 17B.

14. However, I find that another Single Judge of this Court in Titan Industries Limited v. Kishan Lal 137 (2007) DLT 566 while setting aside an award and holding the workman to be not an employee of the petitioner in that case nevertheless held that the payments made under Section 17B were not required to be refunded. I find that a single judge of Bombay High Court in Godawari Marathwada Patbandhare v. Devidas also, on allowing the writ against the award of the Industrial Tribunal and holding the appointment to be irregular, directed the amounts deposited in court pursuant to order under Section 17B to be withdrawn by the employer and only the amount already withdrawn from court by the workman was allowed to be retained by the workman.

15. Thus, though the petitioner has become entitled to refund of the amount of Rs. 1,14,003/- paid to respondent No. 1 workman but I opt to follow the same route, even though the claim of the respondent No. 1 workman has been found to be dishonest and I restrain myself from directing the respondent No. 1 workman to refund the sum of Rs. 1,14,003/- already received from the petitioner. The writ petition is therefore allowed. The award dated 5th July, 1997 is set aside and quashed. No order as to costs.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**