

(1955) 01 MAD CK 0016
In the Madras High Court
Case No : Writ Petition No. 445 of 1954

Annamalai Mudaliar and Bros.

APPELLANT

Vs

Regional Provident Fund Commissioner, Madras and Others

RESPONDENT

Date of Decision : 20-01-1955

Acts Referred:

Constitution of India, 1950 — Article 226
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 1(3),
19, 2

Citation : AIR 1955 Mad 387 : (1955) 1 LLJ 674

Hon'ble Judges : Rajagopalan, J

Bench : Single Bench

Advocate : M.K. Nambiar, for the Appellant; Special Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Rajagopalan, J.—The petitioner is the managing partner of a firm which owns a factory at Karur where bed-sheets and towels are

manufactured on hand-looms. The real question that arises for determination in this application, filed under Article 226 of the Constitution for the

issue of an appropriate writ to the respondents, to restrain them from enforcing the provisions of the Employees Provident Fund Act (Act 19 of

1952) and the scheme framed thereunder against the petitioner firm, was whether it ""employed"" 50 persons or more in the factory within the

meaning of Section 1(3) of that Act,

2. The position was to some extent clarified after the first respondent filed a supplementary counter affidavit. The seven persons enumerated in

para, 2 of that affidavit belonged to the office staff of the petitioner's factory, and they were paid wages on a monthly rate. It was only with

reference to these seven persons that contributions were claimed by the first respondent under the provisions of the scheme framed under Act 19

of 1952. But even that claim could be justified only if the Act applies to the petitioner's factory, that is, only if it could be found that 50 or more

persons, were "employed" in that factory.

3. The conditions under which the labourers worked on the handlooms in the petitioner's factory on its manufacturing side were set out in para. 3

of the affidavit filed by the petitioner. "Weavers from the neighbourhood undertake to weave bed sheets and towels by the yarn supplied by us

within our premises and payment is made not as wages for work done for any particular time but only according to the stipulated rates for the

particular fabric that are woven and turned out by each individual weaver. The weavers who are so engaged on a contract basis do not turn up or

leave the premises at any stipulated time but work in the premises at any time convenient to them in order to suit their agricultural operations during

the same period or to attend to similar work that they usually undertake with similar establishments situated in Karur. There are no fixed employees

for the business of weaving bed-sheets and towels in the firm. No weaver is permanently attached to a particular weaving firm. They are only

casual workers who come and go at such times and days as are convenient to them and paid according to the piece work turned out by them.

These facts were not controverted in either of the affidavits filed by the first respondent. The number of labourers exceeded 50 was not denied by

the petitioner at any time.

4. The main contention of the petitioner was that these workers were not employees as defined in Section 2(f) of the Act and what was payable to

them for the work done by them was not wages. That was what was urged also in para. 15(a) of the petitioner's affidavit.

5. The question in the form in which it was finally raised before me was not decided by the first respondent at any time. Despite the

correspondence between the petitioner and the first respondent, in which this aspect of the conditions of labour was adverted to by the petitioner,

adjudication of the issue on the narrowed basis now presented to me was apparently not sought by the petitioner. In any case, there was no

decision beyond that implied in the claim by the first respondent that the

provisions of the Act applied, which was the basis for the demand notices

he issued to the petitioner to pay up the contributions claimed to be due, and also the further steps taken by the first respondent and the second

respondent to recover the sums demanded as arrears of land revenue under the provisions of Section 8 of the Act.

6. It should, however, be noted that neither the Act nor the scheme vests any power in the first respondent to adjudicate a dispute should one arise,

whether the factory is one to which the Act applied, that is, whether it is a factory within the scope of Section 1(3) of the Act. Section 19-A

specifically provides:

"If any difficulty arises in giving effect to the provisions of this Act and in particular if any doubt arises as to (ii) Whether fifty or more persons are

employed in a factory the Central Government may, by order, make such provision or give such direction, not inconsistent with the provisions of

this Act, as appear to it to be necessary or expedient for the removal of the doubt or difficulty; and the order of the Central Government, in such

cases, shall be final.

Such an order of the Central Government does not appear to have been sought in this case either by the first respondent or by the petitioner.

7. If there had been an adjudication of the question in dispute in the manner provided for by Section 19-A of the Act, what this Court could do in

exercise of its jurisdiction under Article 226 of the Constitution is best explained by the principles laid down by the House of Lords in -- "Smith v.

General Motor Cab Co., Ltd.", 1911 AC 188 (A). The point in controversy in that case was what was the true nature of the relation between the

respondents and the appellant. Was it that of master and servant or bailor and bailee of the taxicab of the respondents of which the appellant, was

a driver? The decision of the County Court Judge, sitting as an arbitrator under the provisions of the Workmen's Compensation Act of 1906, was

that the appellant was not a servant but only a bailee of the cab. Lord Alkinson pointed out that the finding of the County Court Judge, that the

appellant, was a bailee, was a finding on conflicting evidence of an issue of fact. Their Lordships held that the findings of fact by the County Court

Judge sitting as arbitrator could not be set aside if there was evidence to support the findings. Act 19 of 1952 having provided for a specific

machinery in Section 19-A for the determination of a dispute like the one before me now, and that machinery not having been resorted to, I do not

think I would be justified in constituting myself as a tribunal of first instance to go into the disputed question"" of fact and give a decision thereon.

8. It is not necessary for me either to decide at this stage the scope of the statutory finality accorded by Section 19-A of the Act to the decision of the Central Government in proceedings under Article 226 of the Constitution.

9. What the petitioner firm really seeks in this case is that demands for contributions issued to it by the first respondent should not be enforced till

the question, whether the petitioner's is a factory in which 50 or more persons are employed and it so it comes within the scope of Section 1(3) of

the Act, is decided. That relief, I think, he is entitled to get on the short ground, that there is a dispute and that dispute has yet to be decided u/s

19-A of the Act.

10. Though what I have stated is enough to dispose of the petition, I shall also set out some of the features of the dispute urged during the arguments before me.

11. The relevant portion of Section 1(3) runs:

.....it applies in the first instance to all factories engaged in any industry specified in schedule I in which 50 or more persons are employed.

It is not disputed that the, petitioners is a factory as defined by Section 2(g) of the Act; and textile industry is one of the industries listed in schedule

I of the Act. The further requirement therefore is that 50 or more persons must have been ""employed"" in the factory. ""Employed"" itself has not been

defined by the Act. The expression ""employer"" has been defined by Section 2(e). Section 2(f) defines ""employee"" :

Employee"" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of a factory

and who gets his wages directly or indirectly from the employer, and includes any person employed by or through a contractor in or in connection

with the work of the factory."" It is with reference to the definition of an employee that the scope of the expression fifty or more persons ""employed

in Section 1(3) of the Act has to be construed.

11a. Before a person can be held to be an employee as defined by Section 2(f) of the Act, there must be proof (1) that he is employed, (2) that he

is employed for wages, (3) that he is employed in work, manual or otherwise, (4) the work is in or in connection with the work of a factory, and

(5) he gets his wages directly or indirectly from the employer. I am leaving out of account the further provision in Section 2(f) of the Act, that it

includes"" only person employed by or through a contractor in or in connection, with the work of a factory, It is not the case of either party to this

petition that any of the workers in the factory was a person employed by or through a contractor.

12. The learned counsel for the petitioner contended that on the facts averred by the petitioner, the relationship between the petitioner firm and

those who worked in the factory in the manufacture of bed-sheets and towels was not that of a master and servant, and that each piece work

contract between the individual worker and the firm was a contract for services.

13. In Salmond's Law of Torts, 11th Edn. at pages 98 and 99, the distinction between a contract of service and contract for services is

summarised".

What then, is the test of this distinction between a servant and an independent contractor. The test is the existence of a right of control over the

agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his

employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to

time; an independent contractor is a person engaged to do certain work; but to exercise his own discretion as to the mode and time of doing it --

he is bound by his contract, but not by his employer's orders.

This may be put in another way by drawing a distinction between one employed under a contract of service (a servant) and one employed under

contract for services (an independent contractor). The distinction between a contract for services and a contract of service can be summarised in

this way: In the one case the master can order or require what is to be done, while in the other case he cannot only order or require what is to be

done but how itself it shall be done." Other marks of a contract of service are (i) the master's power of selection of his servant, (ii) the payment of

wages or other remuneration, (iii) the master's right of suspension or dismissal.

14. In -- "Collins v. Hertfordshire County Council", 1947 1 KB 598 (B), Hilbery J.

discussed this question at pp. 614 and 616. At p. 616 is the observation;

The proper test is whether or not the hirer had authority to control the manner of execution of the act in question".

15. In 1911 AC 188 (A), to which I have already referred Lord Shaw expressed his opinion:

In my opinion "quoad" the cab, the contract was an ordinary contract locatio rei". Quoad the public, the relation of the cab-driver to the cab

owner was, in my opinion, one of agency;..... "Quoad" the employer himself, the question whether the relation of master and servant existed

between the employer and the driver is one of fact. The fact has been found in this case, that no such relation did exist,.....I think that there was in

this case ample evidence to confirm the finding.

16. What would be the position if these principles were applied to the facts in issue in this case? The owner of the factory had really no control

over the time taken by the worker to complete the work the latter had undertaken to do for the remuneration specified. The worker was under no

obligation to attend on any particular day or at any particular hour. It is no doubt true that the worker had to do his work within the precincts of the

factory, and I presume the hours of work in the factory would be regulated under the Factories Act, But even during those hours no compulsion

could be brought to bear upon the worker to do the work. Further as in 1911 AC 188 (A), the owner of the factory was under no obligation to

provide work for any given worker on any given day, that is, the owner was under no obligation to provide for a reasonable continuity of service

or the work. These features would appear to militate against the existence of a jural relationship of master and servant.

17. The result might be the same if we approach the question from a different angle. In this case the contract between a worker and the owner of

the factory was that with the yarn supplied by the owner, the worker should weave the fabric on the handlooms provided by the owner and within

the precincts of that factory of the owner. When the work was completed, the remuneration contracted for was paid. Suppose the contract had

been that the worker could take the yarn away, weave the fabric anywhere he liked and bring back the finished goods before he claimed the

remuneration payable; quite obviously the owner could exercise no control over the time taken by the worker or the mode in which he worked, and the position of the worker could only be that of a contractor. The mere fact, that the terms of the contract provided that the work should be done within the precincts of the factory, gave the owner no more control over the time of the worker; the worker still continued to control the time factor; that is the time spent on the work was not at the disposal of or under the orders of the owner of the factory. Judged by that test it would be difficult to hold that the relationship between the worker and the owner of the factory was that of servant and master; the worker could only be an independent contractor with reference to each contract of work.

18. Therefore, if the question at issue were, did the relationship between labourers or workers and the owner of the factory conform to the common law concept of servant and master, Mr. Nambiar for the petitioner, would have been well founded in his contention that such a relationship did not exist. The question, however, which I postulated was were those labourers, employees as defined by Section 2(f) of Act 19 of 1952? The inclusion, for instance, in the statutory definition of an employee of a factory, the employee of a contractor in or in connection with the work of that factory is certainly not based on any common law concept of master and servant. The "employee" of a contractor may or may not be a servant of the contractor. But even if he is a servant of the contractor, he would certainly not in common law be the servant of the owner of the factory. Similarly the statutory definition of an employer in Section 2(c) of the Act does not conform to the common law concept of a master in relation to those who were employed in the factory. The question at issue has, therefore, to be decided with reference to statutory definition of an employee in Section 2(f).

19. I have already referred to the elements to be proved before the requirements of Section 2(f) are satisfied. Two of those elements are, that the person must be "employed" and the employment must be for "wages". Neither the expression "employed" nor the expression "wages" has been defined by Act 19 of 1952. Though there is a definition of "basic wages" in Section 2(b) of the Act, that does not really help. "Basic wages" have in substance been defined to mean "all emoluments which are earned by an

employee". So in construing whether a given payment constitutes basic wages, one has to find out whether it had been earned by an employee. We are therefore, thrown back upon the definition of an employee.

Stripped of the other elements under the definition an "employee" is a person employed for wages. It should be clear that what the Act really

intended to provide for was a provident fund for the employees for wages. In construing the word "employed" in Section 1(3) of the Act, it is only employment for wages that would appear to have been contemplated.

.As I said, the expression wages has not been defined by the Act. It may not be possible to import into this Act the definition of wages in other

Acts, for example, Section 2(22) of the Employees State Insurance Act, 34 of 1948. Section 59, Factories Act (Act 63 of 1948) provides for

computation of wages for payment for overtime where the worker is paid on a piece-work basis. But it is not really with reference to these

definitions that the term wages as it appears in Section 2(f) of Act 19 of 1952 can be construed.

.Wages may be interpreted to mean compensation paid to a hired person for his service. Compensation to the labourer may be a specified sum for

a given time of service or a fixed sum for a specified work, that is, payment made by the Job. The word wages by itself does not imply that the

compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done. It means compensation

estimated in either way.

.Section 2(f) itself refers to three classes of persons, the employer, the contractor and the employee. The statutory definition of an employee takes

in as the employee of an employer, also the employee of the contractor. But it should be clear that the contractor himself would not be an

employee". It is not the case that the workers in the factory were employees of a contractor. If the contentions of the petitioner were true, each

worker would be in the position of a contractor, and he could not be his own employee.

.If the position of the worker or labourer was that of a contractor, what would be payable to him under the contract could not be wages, and the

contract itself could only be a contract for services and not a contract of service. Though I am fully alive to the fact, that the definition in any other

enactment may not decide the true content of the statutory definition in Section 2(f) of Act 19 of 1952, the definition of a worker in the Factories

Act is significant: ""Worker means a person employed..... .whether for wages or not, in any manufacturing process etc.

Section 2(f) of Act 19 of 1952, however, requires the payment of wages to a person before that person could be brought within the scope of that

definition of an ""employee"". .

24. If we take the scope of the Act and the scheme framed thereunder, it should be clear that it was intended to provide for employees with

continuous service. One year's continuous service has been prescribed by the rules in the scheme before an employee is entitled to join the fund

and before the liability to contribute to the fund with reference to that employee arises. If there is really no obligation on the part of the employer, --

and the owner of a factory is certainly an employer, --to find work for those who work at their will within the precincts of the factory, it may be

difficult to hold that such persons could satisfy the statutory requirements of the definition of ""employee"" in Section 2(f). In my opinion, the

expression ""employed"" in Section 1(3) taken in the context of the Act as a whole would imply, subject to the statutory definition in Section 2(f), the

existence of the relationship of master and servant between an employer and the worker, and between a contractor and the worker. It would

certainly appear to exclude a contractor from the scope of the definition of an employee in Section 2(f). If the contentions of the petitioner were

well-founded, each of the workers would be in the position of a contractor and not of a servant or an employee as defined by Section 2(f) of the

Act.

25. This petition is allowed. The respondents should forbear from enforcing the demands already issued to the petitioner before the question

whether the petitioner's is a factory within the meaning of Section 1(3) of the Act, is decided u/s 19-A of the Act. In the circumstances of this

case, there will be no order as to costs.