
(2007) 07 MAD CK 0111
In the Madras High Court
Case No : C.M.A. (NPD) No. 1765 of 1999

E.S.I. Corporation

APPELLANT

Vs

Bethall Engineering Company

RESPONDENT

Date of Decision : 24-07-2007

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2
Employees State Insurance Act, 1948 — Section 2(9), 45A, 75
Shops and Establishments Act — Section 2(24)

Citation : (2007) 4 CTC 529 : (2007) 115 FLR 256 : (2008) 1 LLJ 278 : (2007) 3 LW 870 : (2007) 4 MLJ 1273 : (2008) 2 SLJ 233 : (2008) 1 UPLBEC 560

Hon'ble Judges : A.P. Shah, C.J.;Prabha Sridevan, J;P. Jyothimani, J

Bench : Full Bench

Advocate : R. Vaigai, assisted by S. Vaithyanathan, for G. Desappan, for the Appellant; A.L. Somayaji, SC asstd. by S. Ravindran, for T.S. Gopalan and Co., for the Respondent

Judgement

A.P. Shah, C.J.—The learned single Judge has made this reference to the Larger Bench as he felt that there is an apparent conflict between

the two Division Bench Judgments of this Court as regards the issue whether the right of the principal employer to reject or accept work on

completion, on scrutinizing compliance with job requirements, as accomplished by a contractor, the immediate employer, through his employees, is

in itself an effective and meaningful "supervision" as envisaged u/s 2(9) of the Employees State Insurance Act, 1948 (for brevity's sake, hereinafter

will be referred to as "the Act").

2. The facts leading to this reference may be stated shortly. The Southern Railway placed orders in respect of certain engineering works with the

respondent and for execution of the works, the respondent used to assign some

job work to outside parties by supply of materials. The outside parties were having their own establishment and employees. According to the respondent, the work was done on the specifications provided by the respondent at the premises of the third parties under their own supervision and control and the parties were paid on the basis of job works done by them and the respondent had no supervision or control over the workmen of the outside parties. There was thus no master and servant relationship between the respondent and the employees of the third parties. The appellant - Regional Director, Employees State Insurance Corporation in exercise of his power u/s 45-A of the Act, determined the contribution payable by the respondent towards labour charges in respect of job work entrusted to third parties at Rs. 13,604.40 and he also determined as regards the loading and unloading charges with which we are not concerned in the present reference. The respondent filed E.S.I.O.P. No. 46 of 1990 u/s 75 of the Act before the Employees' State Insurance Court. The Employees State Insurance Court on a consideration of the oral and documentary evidence available on record and by relying upon the decision of the Supreme Court in Calcutta Electric Supply Corporation (C.E.S.C.) Limited etc. v. Subhash Chandra Bose and Ors. 1992 (1) LLJ 475 (SC) and that of the Division Bench of Bombay High Court in Parle Bottling Co. (Private) Limited v. Employees State Insurance Corporation, Bombay 1989 (2) LLN 494 (DB) held that the respondent is not liable to pay any contribution in respect of the work done outside the establishment and the employees of the contractor are not covered by the Act. Being aggrieved by that, the Employees' State Insurance Corporation has filed the present appeal.

3. Before the learned Single Judge, it was argued on behalf of the appellant that since the respondent had arrogated to itself the right to reject the end product manufactured by the contractors/employees, that by itself was "supervision" so as to attract the provisions of the Act. In support of this submission, reliance was placed on a Division Bench judgment of this Court in the case of Poonam Easwardas, Proprietrix Kaleel Corporation v. Employees State Insurance Corporation 2003 (1) L.W. 685, wherein the Division Bench following the decision rendered by the Supreme Court in the case of Silver Jubilee Tailoring House and Others Vs. Chief Inspector of

Shops and Establishments and Another, held that the fact that the employer has the right to direct the worker to re-stitch the garment would itself establish that there exists an element of control and supervision as formulated by the decision of the Supreme Court and that would suffice to sustain the finding that such persons are employees for the purpose of the Act, and consequently, the employer is liable to pay contribution on the amounts paid to the persons who did tailoring work though such work was done outside the premises of the employer and by using tools which did not belong to the employer. On the other hand, learned Senior Counsel appearing for the respondent placed reliance on the Division Bench judgment of this Court in *South India Surgical Co. v. The Regional Director, Employees State Insurance Corporation Madras* 34 1997 (2) L.L.J. 396, wherein following the decision of the Supreme Court in *Calcutta Electric Supply Corporation Limited v. Subhash Chandra Bose*, cited *supra*, it was held that even in cases where supervisory controls were exercised by the manufacturer over the contractors for quality reasons, that by itself would not lead to a conclusion that the workmen of those contractors to become employees of the manufacturer within Section 2(9) of the Act. The learned Single Judge felt that there is an apparent conflict between the said two Division Bench judgments of this Court, which needs to be resolved by a Larger Bench and consequently the matter has been referred to us.

4. After hearing Ms. R. Vaigai, learned Counsel appearing for the appellant and Mr. A.L. Somayaji, learned Senior Counsel for the respondent at some length, we are of the opinion, there is no conflict between the Division Bench judgments in *Poonam Easwardas, Proprietrix Kaleel Corporation v. Employees State Insurance Corporation* and *South India Surgical Co. v. The Regional Director, Employees State Insurance Corporation*, cited *supra*. In *Poonam Easwardas, Proprietrix, Kaleel Corporation v. Employees State Insurance Corporation* the Division Bench consisting of R. Jayasimha Babu, J. and N.V. Balasubramanian, J. was dealing with the case of employees who were directly engaged by the appellant, who was an exporter of garments. The appellant used to buy clothes, and after cutting work was done by a master tailor employed by the appellant, it used to engage persons who work outside in their own premises

on machines owned by them or hired by them to stitch the clothes cut by the appellant's master tailor. The appellant also supplied thread and buttons for making the garments complete. Thus the work of producing a whole garment was done partly in the premises of the appellant, wherein cutting had been done and partly in the place where the workers carried out stitching. The Division Bench, following the decision in *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments*, cited *supra*, held as follows:

10. It is true that the Court did consider the fact of employer providing the tools to a person who used that tool to perform that work for the employer as an important factor, but the decision of the Court did not rest only on that ground. The Court, after holding that the supply of tools to the person who carried out the work which was necessary or incidental to the work of the employer shall be an important consideration in holding that the control and supervision lie with the employer, proceeded to hold that apart from that circumstance, the fact that the employer has the right to direct the employee to re-stitch the garment would itself establish that there exists an element of control and supervision as formulated by the decisions of the Apex Court, and that would suffice to sustain a finding that such persons are employees for the purpose of the Act.

5. The decision of the Supreme Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments* which has been relied upon by the Division Bench was also concerning the direct employees of the establishment. The facts of the said case are extracted in para 7 of the judgment, which is reproduced below:

7. The following facts appear from the finding of the learned Single Judge. All the workers are paid on piece-rate basis. The workers generally attend the shops every day if there is work. The rate of wages paid to the workers is not uniform. The rate depends upon the skill of the worker and the nature of the work. When cloth is given for stitching to a worker after it has been cut, the worker is told how he should stitch it. If he does not stitch it according to the instruction, the employer rejects the work and he generally asks the worker to re-stitch the same. When the work is not done by a worker according to the instructions, generally no further work would be given to him. If a worker does not want to go for work to

the shop on a day, he does not make any application for leave, nor is there any obligation on his part to inform the employer that he will not attend

for work on that day. If there is no work, the employee is free to leave the shop before the shop closes. Almost all the workers work in the shop.

Some workers are allowed to take cloth for stitching to their homes on certain days. But this is done always with the permission of the proprietor

of the shop. The machines installed in the shop belong to the proprietor of the shop and the premises and the shop in which the work is carried on

also belong to him.

The question before the Court was whether in the aforesaid facts and circumstances, the conclusion drawn by the Chief Inspector of Shops and

Establishments and the High Court that there existed employer and employee relationship between the appellants and the workers represented by

the second respondent was correct. The Court held as follows:

31. The fact that generally the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a

relevant factor. When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service.

32. ...

33. That the workers work on the machines supplied by the proprietor of the shop is an important consideration in determining the nature of the

relationship. If the employer provides the equipment, this is some indication that the contract is a contract of service, whereas if the other party

provides the equipment, this is some evidence that he is an independent contractor. It seems that this is not based on the theory that if the employer

provides the equipment he retains some greater degree of control, for, as already seen, where the control arises only from the need to protect

one's own property, little significance can attach to the power of control for this purpose. It seems, therefore, that the importance of the provision

of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor, he expects

the contractor to provide all the necessary tools and equipment, whereas if he employs a servant he expects to provide them himself. It follows

from this that no sensible inference can be drawn from this factor in

circumstances where it is customary for servants to provide their own equipment - See Atiyah, P.S., ""Vicarious Liability in the Law of Torts"", p. 65.

34. ...The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value." It might be that little weight can today be put upon the provisions of tools of minor character as opposed to plant and equipment on a large scale. But so far as tailoring is concerned, I think the fact that sewing machines on which the workers do the work generally belong to the employer is an important consideration for deciding that the relationship is that of master and servant.

35. Quite apart from all these circumstances, as the employer has the right to reject the end product if it does not conform to the instruction of the employer and direct the worker to re-stitch it, the element of control and supervision as formulated in the decisions of this Court is also present.

Thus the decision of the Supreme Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments*, is clearly distinguishable

as it covers the case of direct employees and in the facts and circumstances of the case the Court was satisfied that the test of power or control

within the meaning of Section 2(24) of the Shops and Establishments Act was established.

6. Coming to the Supreme Court decision in *Calcutta Electric Supply Corporation Limited v. Subhash Chandra Bose*, it is seen that it arose in

connection with the workers employed by the third party contractors. In that case, the Calcutta Electric Supply Corporation (hereinafter will be

referred to as "C.E.S.C." for short) engaged various contractors to carry out work of excavation, conversion of overhead electric lines and laying

of underground cables under public roads, as well as for repair and maintenance of the aforesaid works. The respondents were given such

contracts, the terms and conditions of which were reduced to writing. The C.E.S.C. was on notice alerted by the Regional Director of the

Employees State Insurance Corporation that the employees whose wages were being paid through such contractor would fall within the scope of

Section 2(9) of the Act. Thereafter, the C.E.S.C. on its part engaged in correspondence with the Association of the Contractors and finally asked

them to comply with the provisions of the Act immediately or else it will deduct a lumpsum charge from their bills. The contractors then moved the

High Court of Calcutta by filing two writ petitions, which came to be dismissed by the learned single Judge. The learned single Judge took the view

that since ultimate energising of the transmission lines was invariably effected by the C.E.S.C. after proper checks were effected for laying of

cables or other maintenance work, that step by itself was "supervision" so as to attract the provisions of the Act. The learned single Judge also

took the view that the "Act" being a beneficial piece of legislation, enacted for the protection and benefit of workers, required liberal interpretation,

as was held in *M.G. Beedi Works v. Union of India* 1974 I L.L.J. 367 and then proceeded to hold that the principal employer could not escape

the liability for the works of his contractors, as the latter was acting as an agent of the principal, and in that sense, confirmed the view of the

Regional Director of the C.E.S.C. Two appeals were filed against the dismissal of the two writ petitions before the Division Bench of the High

Court, which after reconsidering the matter reversed the decision of the learned Single Judge and allowed the appeals. The C.E.S.C. then

approached the Supreme Court against the decision of the Division Bench. The Supreme Court, while dismissing the Appeals, held as follows:

13. In whatever manner the word "employee" u/s 2(9) be construed, liberally or restrictedly, the construction cannot go to the extent of ruling out

the function and role of the immediate employer or obliterating the distance between the principal employer and the immediate employer. In some

situations he is the cut-off. He is the one who stumbles in the way of direct nexus being established, unless statutorily fictioned, between the

employee and the principal employer. He is the one who in a given situation is the principal employer to the employee, directly employed under

him. If the work by the employee is conducted under the immediate gaze or overseeing of the principal employer, or his agent, subject to other

conditions as envisaged being fulfilled, he would be an employee for the purpose of Section 2(9). Thus besides the question afore-posed with

regard to supervision of the principal employer, the subsidiary question is whether instantly the contractual supervision exercised by the immediate

employer (the electrical contractors) over his employee was exercised, on the terms of the contract, towards fulfilling a self-obligation or in discharge of duty as an agent of the principal employer.

14. Sunil Kumar Dey Vs. Naihati Electrical Supply Co. Ltd., can also be of no help to interpret the word "supervision" herein. The word as such is

not found employed in Section 2(f) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, but found used in the text of the

judgment. It appears to have been used as a means to establish connection between the employer and the employee, having regard to the nature of

work performed. But what has been done in Patel's case cannot ipso facto be imported in the instant case since the word "supervision" in the

textual context required independent construction. In the ordinary dictional sense "to supervise" means to direct or over-see the performance or

operation of an activity and to over-see it, watch over and direct. It is work under eye and gaze of someone who can immediately direct a

corrective and tender advice. In the textual sense "supervision" of the principal employer or his agent is on "work" at the places envisaged and the

word "work" can neither be construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at

all times and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean

moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be

watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as

also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in

our view be supervision for the purposes of Section 2(9) of the Act. It is the consistency of vigil, the proverbial "a stitch in time saves nine". The

standards of vigil would of course depend on the facts of each case. Now this function, the principal employer, no doubt can delegate to his agent

who in the eye of law is his second self, i.e. a substitute of the principal employer. The immediate employer, instantly, the electrical contractors, can

by statutory compulsion never be the agent of the principal employer. If such a relationship is permitted to be established it would not only

obliterate the distinction between the two, but would violate the provisions of the Act as well as the contractual principle that a contractor and a

contractee cannot be the same person. The E.S.I.C. claims establishment of such agency on the terms of the contract, a relationship express or

implied. But, as is evident, the creation of deduction of such relationship throws one towards the statutory scheme of keeping distinct the concept

of the principal and immediate employer, because of diverse and distinct roles. The definition is well drawn in Halsbury's Laws of England

(Hailsham Edition) Vol. I at page 193 as follows:

An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct

control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work; an independent

contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing

his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be

given to him from time to time by his principal, is not subject to its exercise to the direct control and supervision of the principal.

And this statement of law was used with approval by this Court in The Superintendent of Post Offices and Others Vs. P.K. Rajamma, titled as The

Superintendent of Post Offices, etc. v. P.K. Rajamma etc.

7. It is thus clear from the dicta of the Supreme Court that where the job work is entrusted to a third party contractor and such third party

contractor has engaged independent workers, the fact that the principal employer has power to reject the end product manufactured by the

contractor, does not constitute an element of supervision within the meaning of Section 2(9) of the Act. The judgment of the Division Bench in

Poonam Easwardas, Proprietrix, Kaleel Corporation v. Employees' State Insurance Corporation (supra) relied upon by the appellant Corporation

is concerned with the direct employees of the establishment and has no application to the facts of the instant case which is about the contract

employees.

8. The judgment of the Division Bench in South India Surgical Co. v. The Regional Director, Employees' State Insurance Corporation relied upon

by the Employees' State Insurance Corporation is also concerning the liability to pay the ESI charges in respect of the contractor/employees. The

appellant in that case was a trading concern dealing in surgical instruments. They had erected some machines necessary for the manufacture of

surgical instruments and lend them to some contractors for the manufacture of surgical instruments. The Bench after referring to the decision in

Calcutta Electric Supply Corporation v. Subhash Chandra Bose, cited supra, held that the contractor employees cannot be said to be the

employee within the meaning of Section 2(9) of the Act merely because the supervisory controls were exercised by the manufacturers over the

contractors for quality reasons. The relevant observations of the Division Bench are reproduced below:

18. In our opinion, so long as the appellant had arrogated to itself the right to reject the end product manufactured by the disputed workmen, those

workmen could not be claimed to be falling within the meaning of Section 2(9) of the Act.... In fact, the Supreme Court, in its judgment reported in

Calcutta Electric Supply Corporation Limited v. Subhash Chandra Bose 1992 1 L.L.J. 475, has gone to the extent of holding that even in cases,

where supervisory controls were exercised by the manufacturer over the contractors for quality reasons, that by itself would not lead to a

conclusion that the workmen of those contractors to become employees of the manufacturer within Section 2(9) of the Act. In this context, the

appellant's case is an a fortiori one in the sense that the appellant does not exercise supervisory control and simply rejects the materials

manufactured by the disputed workmen.

9. In our opinion, there is no conflict between the judgments of the Division Benches, since the fact situations are totally different. So far as the

issue referred to us is concerned, we answer the same in the negative and hold that the right of the principal employer to reject or accept the work

done by the contractor through his employees is by itself cannot be construed as effective and meaningful "supervision" as envisaged u/s 2(9) of the

Act.

10. Registry is directed to place the papers before the learned Single Judge for disposal of the appeal in accordance with law.