
(1984) 08 KL CK 0036
In the High Court Of Kerala

ESIC	Vs	APPELLANT
Pooppally Foods		RESPONDENT

Date of Decision : 01-08-1984

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 75, 82
Income Tax Act, 1961 — Section 147, 2

Citation : (1985) 1 LLJ 10

Hon'ble Judges : Paripoornan, J;Narendran, J

Bench : Division Bench

Judgement

Paripoornan, J.—The Regional Director, ESI Corporation, Trichur, is the appellant. This appeal is filed against the order of the Employees" Insurance Court, Alleppey, dated 3rd November, 1978, rendered in Insurance Cast- No. 34 of 1977. The respondent herein filed an application under Ss.76 and 77 read with Section 75 of the Employees" State Insurance Act, 1948 (Act 34 of 1948), before the Employees" Insurance Court, Alleppey, and contended that it has no legal liability to pay the sums demanded by the appellant by letter dated 7th April, 1977, towards contribution. The Employees" Insurance Court held that the respondent is not liable to pay any contribution to the ESI Corporation. The Regional Director, ESI Corporation. Trichur, has come up in appeal.

2. A short resume of facts essential for determining the points raised in this appeal are: The respondent is a firm carrying on business in export of fish (prawns). Peeling and/or grading are done through independent contractors at their premises. It is not done either by the firm or in its premises. There is no relationship of employer-employee between the firm and the persons who do the work. The firm has no knowledge of the persons who do the work or the number of persons who are engaged in the work nor exercises any supervision over the work. The contractors do their contract work for different persons. In such circumstances, the firm contended that it is not liable to pay any contribution to the ESI Corporation for persons who were doing peeling and grading and that the Corporation is not entitled to claim the same.

3. In the written objection filed by the Regional Director, ESI Corporation, Trichur, amongst others, it was stated that the Insurance Inspector who inspected the firm on 1st September, 1975, found that the employees for peeling work were employed under Shri Joseph John, contractor of the firm; that the amount paid was debited as peeling charges; that the employees engaged by Joseph John were working at the premises of the firm and so they should be treated as employees of the firm and the applicant was the principal employer. It was contended that there is employer-employee relationship between the firm and the "peeling" workers.

The Employees' Insurance Court exhaustively adverted to the evidence of PW 1, Accountant of the respondent-firm, and DW 1, Office Manager of the ESI Corporation, Local Office, Chalakudy, and held as follows;

The dispute in the instant case is regarding the peeling and grading charges paid by the applicant to the contractor. Admittedly peeling work is done by the contractor employing his own set of workers. It has come in evidence through PW 1 that peeling work is done by the contractor, Mr. Joseph John, engaging workers of his own at several places outside the factory. (According to PW1 there is neither a peeling shed nor grading shed inside the premises of the factory). DW1, Shri Antonv, has also admitted that he has not seen any peeling or grading work carried on inside the premises of the factory. Further, DW1 has also admitted that the peeling work may be done by the contractor outside the factory at several places. Of course, peeling and grading expenses incurred by the applicant are entered in exhibit 1) ledger as peeling and grading charges. PW1 has pointed out that the amount [laid to the actual workers of the factory are entered in the ledger as freezing wages, canning wages, etc.

4. At any rate the opposite party could not establish that the peeling and grading work is done by persons employed by the applicant himself by adducing any cogent evidence. On the other hand the accountant of the applicant who was examined as PW1 has emphatically affirmed that the applicant is not doing the peeling work or grading work inside the factory with their own workmen, that the contractor, Joseph John, is getting the said works done by engaging his own persons, that the identity of such persons are not known to the applicant, that the applicant has never engaged any supervisors to supervise peeling and grading work executed by the contractor and that in fact there is no employer-employee relationship between the applicant and peeling or grading workers engaged by the contractor. The veracity of his version could not be repudiated in the cross-examination by the learned representative of the Corporation. Therefore, there is no reason for me to disbelieve PW1 who is the only witness examined by the applicant.

In the light of the above, the Court declared that the firm is not liable to pay any contribution to the ESI Corporation in respect of peeling charges or grading charges and that the ESI Corporation is not entitled to claim the same. The Regional Director has come up in appeal.

5. Counsel for the appellant stressed the fact that peeling and grading are essential or ancillary to the work carried on by the firm. It was also contended that the various workers though apparently employed by the independent contractor, Shri Joseph John, are in fact directly employed by the firm. The introduction of the alleged independent contractor is nothing but a device or make-believe. At any rate, it is the contention of counsel for the appellant that even assuming that the peeling or grading are done outside the premises through the independent contractor, when they are brought to the firm's premises, it used to be tested and in this process there is sufficient supervision of the work by the principal employer, the firm. A perusal of Section 2(9) of the Employees' State Insurance Act defining "employee" will show that the workers who do the peeling or grading are employees of the firm. The decision of the lower court is, therefore, unsustainable.

6. On the other hand, counsel for the respondent-firm, Mr. O.V. Radhakrishnan, contended that the question as to whether the particular workers engaged in peeling or grading work are employees within the meaning of the Act is a pure question of fact. u/s 82 of the Act, an appeal will lie to this Court only if it involves a substantial question of law. No such substantial question of law is involved in this case. Even so, it is evident, from a perusal of paragraphs 11 and 12 of the judgment of the lower court (extracted hereinabove) that the persons who do the peeling or grading work are not directly employed by the firm; they are done by the contractor, Shri Joseph John, engaging his own I workers at several places outside the factory; there is no plea or proof that the arrangement with the independent contractor is sham or a make-believe; that there is absolutely no supervision by the firm or its agent on any part of the work and, in such circumstances, there is no question of employer-employee relationship between the firm and the persons who were engaged by the contractor to do the peeling or grading.

Sections 2(9)(i), (ii) and 82(2) of the Employees' State Insurance Act, 1948 are relevant:

2.(9) "Employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

82(2). An appeal shall lie to the High Court from an order of an Employees'

Insurance Court if it involves a substantial question of law.

7. It is true that in *P.D. Vidawatka v. E.S.I. Corporation* [1974] Lab. I.C. 874, the Gauhati High Court held that the question whether or not certain labourers answer the description of "employee" u/s 2(9) of the Act, on the basis of the evidence led before the Court raises a question of fact only, and as such that question cannot be agitated in the High Court. In *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras*, Venkatarama Ayyar, J., speaking for the Court, laid down the following propositions (at p.65):

The position that emerges on the authorities may thus be summed up:

(1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the Court u/s 66(1).

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.

(3) A finding on a question of fact is open to attack u/s 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

Earlier, at page 58 of the report, the learned Judge observed:

In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site, that the defendant is the owner of the adjacent residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse-possession, the Court has firstly to find on an appreciation of the evidence what the facts are. So far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the requirements of law are satisfied. That is a question of law. The ultimate finding on the issue must, therefore, be an inference to be drawn from the facts found, on the application of the proper principles of law, and it will be correct to say in such cases that an

inference from facts is a question of law. In this respect, mixed questions of law and fact differ from pure questions of fact in which the final determination equally with the finding or ascertainment of basic facts does not involve the application of any principle of law. The proposition that an inference from facts is one of law will be correct in its application to mixed questions of law and fact but not to pure questions of fact.

In *Edwards v. Bairstow and Harrison* 1955 All ER 48, Lord Radcliffe observed at page 35 (Page 57 of All ER):

I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part. I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only take their colour from the combination of circumstances in which they are found to occur.

Even earlier, in *Bean v. Doncaster Amalgamated Collieries, Ltd.* (1944) 2 All F.R. 279, Parcq, L.J. said:

If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support it. To come to a conclusion when there is no evidence to support is to make an error in law.

Even so, u/s 82(2) of the Act, an appeal shall lie from an, order of the Employees' Insurance Court only if it involves a substantial question of law. It is not sufficient if the question involved is a question of law simpliciter; it should be

a substantial question of law. What is meant by the phrase "substantial question of law" has been dealt with by the Supreme Court in *Mahindm and Mahindra Ltd. v. Union of India* AIR 1979 S.C. 798 Bhagwati, J., speaking for the Court, said:

What should be the test for determining whether a question of law raised in an appeal is substantial has been laid down by this Court in *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, and it has been held that the proper test would be whether the question of law is of general public importance or whether it directly or substantially affects the rights of the parties, and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views.

For the reasons which follow, we are of opinion, that even though the ultimate conclusion to be arrived at in this case, namely, as to whether the persons who did the peeling and grading, are "employees" as defined in Section 2(9) of the Act, on the basis of proved or admitted facts, is a question of law, and the adjudication of such question affects the rights of the parties, the test to be applied for coming to the conclusion is settled by the decisions of the Supreme Court and there is neither difficulty to decide the matter nor does the situation call for discussion of alternative views. The definition of the word "employee" in Section 2(9) of the Act is clear. The decisions of the Supreme Court in *Hussainbhai v. Alath Factory Tozhitali Union* (1978)53 F.J.R. 278 and *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, have stated the relevant law on the subject. On the basis of the findings of fact arrived at in paras 11 and 12 of the judgment of the court below, read in the light of S 2(9) of the Act and the decisions of the Supreme Court referred to, we have no hesitation to hold that the decision of the Court below does not call for any interference and no substantial question of law is involved in the matter.

Appellant's counsel, Mr. C. Sankaran Nair, argued:

(1) Though the work of peeling and grading were done through an independent contractor, this was only a camouflage or make-believe to avoid the applicability of the statute:

(2) that the workers employed through the independent contractor should be deemed to be directly employed since peeling and grading is preliminary or incidental with the end product;

(3) that the work was done by the workers in the premises of the factory or establishment;

(4) at any rate, there is supervision by the firm in the peeling or grading work when finally the goods are brought to the factory.

We are unable to accept the above submissions. On the first point, there is no plea or evidence on record to show that arrangement with the independent contractor for peeling and grading was merely a camouflage or sham or a make-

believe arrangement. There is no finding of the court below on this score. This is a pure question of fact. It was not pleaded in the court below. There is no proof for such plea either. That apart, we are of the view that there is a vital difference between "avoidance" and "evasion". "Avoidance" is "not evasion" and it carries no ignominy with it; it is trite law that it is open to any person to so arrange his affairs as to reduce his burden. But, it should not be a pretence or a make believe or sham. As observed by Lindley, L.J., in *Yorkshire Railway Wagon Company v. Maclure* (1882) 21 Ch. D. 309

If we look on that transaction as the real transaction, upon what ground can we treat it as illegal? If it were a mere cloak or screen for another transaction one could see through it, but once we come to the conclusion that it was the bona fide real transaction between the parties, intended by both sides to operate according to its tenor, there is no mode that I know of holding it illegal unless you find it prohibited by some Act of Parliament or void by reason of some principles of law. It is said to be an evasion of the Act of Parliament really to borrow the money. There is always an ambiguity about the expression "evading an Act of Parliament". In one sense you cannot evade an Act of Parliament; this is to say, the court is bound so to construe every Act of Parliament as to take care that that which is really prohibited may be held void. On the other hand, you may avoid doing that which is prohibited by the Act of Parliament and you may do something else equally advantageous to you which is not prohibited by the Act of Parliament.

Even earlier. Lord Cranworth, L.C., said in *Edwards v. Hall* (1855) 25 L.J. Ch. 82

I never understood what is meant by an evasion of an Act of Parliament: either you are within the Act of Parliament or not within the Act of Parliament. If you are not within it, you have a right to avoid it to keep out of the prohibition; if you are within it, say so, and then the course is clear; and I do not think you can be said not to be within it because the very words have not been violated. In *Ghatge and Patil Concern's Employees' Union Vs. Ghatge and Patil (Transports) Private Ltd. and Another*, Hidayatullah, J., speaking for the court, observed:

...A person must be considered free to so arrange his business that he avoids a regulatory law and its penal consequences which he has, without the arrangement, no proper means of obeying. This, of course, he can do only so long as he does not break that or any other law...." So also in *Commissioner of Income Tax, Gujarat Vs. A. Raman and Company*, speaking for the Court, Shah, J., observed:

Counsel for the Commissioner contended that if by resorting to a "device or contrivance", income which would normally have been earned by the assessee is divided between the assessee and another person, the Income Tax Officer would be entitled to bring the entire income to tax as it had been earned by him. But the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his

hands; income which he could have, but has not earned is not made taxable as income accrued to him. By adopting a device, if it is made to appear that income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the hands of the assessee, and if the income has escaped tax in a previous assessment a case for commencing a proceeding for reassessment u/s 147(b) may be made out. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income Tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented.

In this case, the respondent-firm, has, if at all, so arranged or adjusted its affairs to reduce its burden and thereby the firm has not done anything forbidden by any law. The adjustment or arrangement by which "peeling and grading" were done through "independent contractor" is not forbidden by law and it is not open to any challenge.

8. Secondly, there is no evidence in the case to show that the persons who did the peeling or grading work were directly employed by the respondent firm. Thirdly, the only available evidence in the case shows that the work of peeling or grading were done by the contractor by employing his own set of workers at several places outside the premises of the 1st respondent-firm. Fourthly, regarding supervision, stress was laid on Section 2(9) of the Act. That sub-sec, requires either (a) that the person to be an employee should be employed on the premises of the factory, or (b) that the work is done by the person employed under the supervision of the principal employer (the firm) or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory, etc. In this case, the first limb aforesaid, (a) of Section 2(9) is not satisfied, because the persons who did the peeling or grading work were not working in the premises of the factory. The second limb aforesaid, (b) of Section 2(9) also is not attracted, because there is no evidence that the firm had any supervision in the peeling or grading work done by the workers. So, on a mere look of Section 2(9) of the Act, in the light of the evidence available in the case, we are satisfied that the contention of the appellant's counsel is devoid of force. Counsel relied on certain passages in the decisions reported in *Hussainbhai v. Alath Factory Tozhilali Union*, (supra) and *Royal Talkies v. ESI Corporation*, (supra) and stressed that "peeling" and "grading" done in this case by persons employed by the contractor will rope in such persons within Section 2(9) of the Act. We perused through the aforesaid judgments with care. It should be stated that for a proper understanding of the ratio of the decisions, the judgments should be read as a whole and in the light of the facts disclosed in those cases. Some observations torn out of context should not be read in isolation to understand the true ratio of the decisions. (See *A.K. Abraham and Others Vs.*

The State of Kerala and Another, ; Sethu Lakshmi Bayi Vs. State of Kerala, . Reading the decisions of the Supreme Court aforesaid as a whole, we are satisfied that they are distinguishable and will not apply in the light of the facts found by the Tribunal and proved in this case.

9. We dismiss the appeal. There should be no order as to costs.