
(1974) 07 KL CK 0016
In the High Court Of Kerala

New Street Textiles

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-07-1974

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2
Factories Act, 1948 — Section 1, 7

Citation : (1976) 1 LLJ 238

Hon'ble Judges : T. Chandrasekhara Menon, J

Bench : Single Bench

Judgement

T. Chandrasekhara Menon, J.—The plaintiff which is a firm engaged in the manufacture and sale of hand-loom clothes is the appellant. The suit was for a prohibitory injunction to restrain the Union of India and the Regional Provident Fund Commissioner, Trivandrum from taking any steps against the plaintiff for recovery of any amount on the basis of the Employees' Provident Funds Act (hereinafter called the Act). The third defendant, the State of Kerala was impleaded in the suit because it was through the State that defendants 1 and 2 were threatening to take coercive steps.

2. The allegations in the plaint were centred on three basic factors :

(1) The plaintiff had got a decree against the defendants in O.S. 73 of 1958 of the Cannanore Munsiff Court, confirmed in appeal by the District Court, Tellicherry in A.S. 39/60 of that Court declaring that no amount could be realised from the plaintiff under the Act and restraining the defendants from taking steps to recover any amount from the plaintiff under the Act.

(2) The persons working in the concern of the plaintiff are not employees within the definition of the Act. There is no relationship of master and servant or employer and employee between the workers and the plaintiff.

(3) Action could not be taken by the defendants without enquiry u/s 19A of the Act.

3. The defendants contended that the earlier decree was on the ground that for the applicability of the Act at the relevant time to a concern, it should have at least 50 workers engaged under it and the textile mill of the plaintiff did not have 50 workers. After the decree the Act was amended by Central Act 46 of 1960 by which the Act applied to every establishment which is a factory engaged in industry specified in Schedule 1 of the Act and in which 20 or more persons were employed. The plaintiff, according to the defendants are employing more than 20 persons. They also contended that there was employer-employee relationship between the plaintiff and the workers concerned. According to the defendants there was no necessity to make any enquiry u/s 19A in respect of matters involved in the suit. The plaintiff, the defendants contend are liable to remit contributions to the Employees' Provident Fund from 1-1-1961 onwards.

4. The trial Court found in favour of the plaintiff on all the issues and decreed the suit as prayed. On appeal by defendants 1 and 2, the learned District Judge reversed the Munsiff's findings and dismissed the suit with costs. The appellate Court was of opinion that the decree in the earlier suit is in no way a bar to the present proceedings in view of the subsequent amendment to the Act. There was no necessity for an enquiry u/s 19A as no doubt has arisen in the case as far as matters specifically provided in Clause 1 to 5 of Section 19A are concerned. In reference to the question whether the workers are employees coming within the scope of the Act, the lower Court was of the view that as the "the same question had been raised by the plaintiff in the prior case and the learned Munsiff who decided that case discussed all those rulings in its judgment, copy of which is Ex. B2 and came to the conclusion that the objection against the levy on the ground that the workers in the factory are not persons "employed" in it cannot prevail, it is futile for the plaintiff to raise such a plea again." Therefore, the plaintiff has come up in second appeal.

5. In view of the amendment introduced by Act 46 of 1960, I do not think there is any basis in the contention of the plaintiff that the suit is not maintainable because of the previous decision as evidenced by Exhibit A6. Exhibit B2 is the judgment in the earlier suit and Exhibit A6 is the decree. Exhibit B2 was admitted in evidence at the appellate stage. It was because the number of workers engaged by the plaintiff in the textile factory alone was less than 50, the Court came to the conclusion that the Act is not applicable to the petitioner's concern. By the amending Act which is after Exhibit A6, the Act is now applicable to a factory which employs 20 or more persons. The findings of the appellate Court that the working strength of the appellant's concern at the relevant time was more than 20 is not challenged by the appellant.

6. The next question is whether the absence of an enquiry and decision u/s 19A by the Central Government, bars the second respondent from giving effect to the provisions of the Act. To a great extent the plaintiff's contentions are supported by the decision of Vaidialingam, J. in Dhanalakshmi Weaving Works and Ors. v. The Regional Provident Fund Commissioner, Trivandrum 1963 K.L.J. 885).

However, though that decision is not expressly referred to, a later Division Bench of this Court in *Provident Fund Inspector, Ernakulam v. The Auto Transport Union (P) Ltd.* 1964 KLT 42 , takes a contrary view and should in effect be deemed to have overruled the earlier decision of Justice Vaidialingam. Mr. Justice Vaidialingam had taken the view that when once a doubt has been raised in respect of one or other of the matters mentioned in Sub-clauses (i) to (v) of Section 19A and when there has been no adjudication by the Central Government either at the instance of the authorities concerned or at the instance of the management, no further action can be taken by the authorities to enforce the provisions of the Act. His Lordship was accepting the view of Mr. Justice Rajagopalan in *Annamalai Mudaliar and Bros. Vs. Regional Provident Fund Commissioner, Madras and Others*, . In the Division Bench case which arose in proceedings initiated by the Provident Fund Inspector in the criminal Court for nonpayment of the employer's share of the contribution and failure to submit returns in time, this Court said that Section 19A empowers the Central Government to remove difficulties arising in giving effect to the provisions of the Act. But there is no provision that in every case where a plea is raised that the Act is not applicable to a particular establishment or to a particular person an application should be made u/s 19A and without a decision on that, the criminal Court would have no jurisdiction to proceed with the case and come to its conclusions. Apart from the fact that I am bound by the Division Bench decision, I am in respectful agreement with that view. In this case neither the authorities nor the management has moved the Central Government u/s 19A. The section does not contemplate that whenever the management disputes the applicability of the Act, the Regional Commissioner is to seek the decision of the Central Government. Section 19A does not affect his power to recover the demand- see in this connection *Nagpur Glass Works Ltd. Vs. Regional Provident Fund Commissioner, Bombay*, , *The Nagpur Glass Works Ltd. Vs. The Regional Provident Fund Commissioner and Others*, and *The Delhi Cloth and General Mills Co. Ltd., Delhi Vs. The Regional Provident Fund Commissioner, U.P.*, .

7. The decision in which Mr. Justice Vaidialingam placed reliance - *Annamalai Mudaliar and Bros. Vs. Regional Provident Fund Commissioner, Madras and Others*, -was subsequently overruled by a Division Bench of the Madras High Court in the decision reported in *East India Industries (Madras) Private Limited Vs. Regional Provident Fund Commissioner*, . It was held there that where the Provident Fund Commissioner feels no difficulty, it is not obligatory upon him to refer the matter to the Central Government.

8. A Division Bench of the Patna High Court in *Bankim Chandra Chakravarty and Another Vs. Regional Provident Fund Commissioner and Others*, has said that the section envisages a direction by the Central Government when any difficulty in giving effect to the provisions of the Act, and, if any doubt arises as to the matters referred to in that section in the mind of the authority who has to deal with the matter; if that authority does not feel any difficulty or has no doubt about any of the matters referred to in the section, there is no scope for any

direction being given by the Central Government at the instance of the party who may raise a dispute over the matter. The question of any dispute being raised by the party concerned is foreign to the section,

9. I do not think I need go as far as the Patna decision that the power to move the Central Government under this section is confined to the authority concerned and that an owner of an establishment cannot move the Central Government to resolve disputes mentioned in the section. Here there is no motion by the plaintiff to the Central Government to resolve the dispute. I do not agree with the learned Munsiff in holding that Ex, B1 the letter sent by plaintiff in reply to the demand as per Ex, A1 by which defendants 1 and 2 were made aware of the relevant facts in particular the absence of any decision in the matter by the Central Government and which also intimated them of his decision to file a suit against them, could be deemed to be an application u/s 19A by the plaintiff to the Central Government.

10. The important controversy that arises in the case is whether the workmen concerned are employees of the plaintiff. Section 2 (e) and (f) of the Act define an employer and employee in the following manner ;

(a) " employer " means-

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948, the person so named; and

(ii) in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent;

(f) " 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 an establishment, 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 establishment.

Here the evidence of P.W. 1 is relevant. What he says is summarised by the Munsiff in para 19 of the judgment as follows :

P.W. 1 is the Managing Partner of the plaintiff and he is the only witness examined on behalf of the plaintiff. He describes the relationship between the management and the persons working in the plaintiff's establishment. The plaintiff is engaged in weaving handloom cloth. The plaintiff does not pay daily wages. Wages are paid weekly according to the length of cloth woven by each weaver. All the weavers do not weave an equal length of cloth and the length of cloth woven by each weaver depends upon his capacity, convenience and

dexterity. He also states that each weaver may be specially clever in weaving a particular pattern or design of cloth and he is at liberty to choose his own pattern. The plaintiff-management cannot force them to work. They cannot also be compelled to work for a particular length of time and to finish a particular length of cloth and the same is impracticable also. According to him some persons finish weaving a piece of cloth 22 metres length in 2 days, whereas the others would take 3 or 4 days for the same. He also states that these persons are not bound to come at a particular time of the day or to work for a particular length of time. Thus, some persons work upto dusk, whereas others go earlier. So also, if a particular person does not come for work on a particular day, no action could be taken by the management against him. Even if a worker finishes work only in part on a loom when, thereafter he leaves the work, no action could be taken against him. Finally, he says that there is no employer and employee relationship between the management and the persons working in the establishment. In cross-examination he states that the work of the establishment is to purchase yarn, colour it, weave it and sell the finished cloth. He admits that a licence is required for running the establishment. He also admits that registers showing the handing over of a particular quality and quantity of yarn to a particular worker are available with them. He deposes to the fact that those persons make cloth according to the design prescribed by the management. After measuring the cloth produced by them, they are given wages and the same is entered in the accounts there being no vouchers passed. From this it is clear that the workers can come and go as they like, that they could leave the work even in the middle of weaving a particular cloth never to return with immunity, that they cannot be made to work in any particular way and that no action would be taken against them for not coming to work on a particular day.

On the basis of this evidence and certain rulings of the Supreme Court and Madras High, Court, the learned Munsif came to the conclusion that the workers cannot be considered to be employees of the plaintiff. The learned Munsif proceeded on the basis that the important test to determine the relationship of employer-employee is the existence of the right of control of the manner in which the work is to be done. The appellate Court on the other hand said that the plaintiff is in a way barred from raising the question because of the finding in the earlier case that the persons concerned are employees. The learned District Judge is obviously wrong. The finding cannot conclude the plaintiff who had won that suit on findings on other issues. The plaintiff was not put to the necessity of canvassing the finding on this aspect in appeal.

11. In considering the question whether employer-employee relationship exists in the particular instance, we should take notice of the definition of the term "employee" as used in the Act. This is different from the definition of worker and workmen in Factories Act and Industrial Disputes Act respectively. The definition in the Act will bring in contract labour also under the scope of Section 1(3).

12. Recently the Supreme Court had to consider in Silver Jubilee Tailoring House

and Others Vs. Chief Inspector of Shops and Establishments and Another, , the definition of the term " person employed " in Section 2(14) of Andhra Pradesh (Telengana Area) Shops and Establishments Act, 1951. There " person employed " means, in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop. In that case the Court had to consider earlier Supreme Court cases dealing with the question under various Acts like the Factories Act and the Industrial Disputes Act Mathew, J., who delivered the judgment of the Court also considered some English, Commonwealth and American authorities. The following are some of such authorities which his Lordship took into account. In Cassidy v. Ministry of Health [1951] 1 All E.R. 574 , Lord Justice Sommerwell pointed out that the test of control of the manner of work is not universally correct, that there are many contracts of service where the master cannot control, the manner in which the work is to be done as in the case of a captain of a ship. In many skilled employment, to apply the test of control over the manner of work for deciding the question whether the relationship of master and servant exists would be unrealistic. In Montreal v. Montreal Locomotive Works Ltd. [1947] 1 D.L.R. 161 , Lord Wright had said that instead of the single test, such as the presence or absence of control it would be more appropriate to apply, a complex test involving, (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss and that, control in itself is not always conclusive. Lord Denning said in Bank Voor Handel en Scheepvaart N.V. v. Slatford [1952] 2 All E.R. 956 that the test of being a servant depends on whether the person is part and parcel of the organisation. In Market Investigations Ltd. v. Minister of Social Security [1968] 3 All E.R. 732, the Court said :

I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over A, in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive.

Justice Mathew observed further that it is in its application to skilled and particularly professional work that control test in its traditional form has really broken down. It has been said that interpreting " control " as meaning the power to direct how the servant should do his work, the Court has been applying a concept suited to a past age. Control is obviously important factor and in many cases it may still be decisive factor. But it is wrong to say that in every case it is decisive. It is now no more than a factor, although an important one (Argent v. Minister of Social Security [1968] 1 W.L.R. 1749 . "

13. Finally Mathew, J., gives emphasis to the following observations of Dixon, J., in Humberstone v. Northern Timber Mills [1949] 79 C.L.R. 389):

The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the

performance of his work resided in the employer so that he was subject to the latter's order and directions.

14. Mr, Justice Mathew said that the workers are not obliged to work for the whole day is not very material. There is of course no reason why a person who is only employed part time, should not be a servant.

15. In this connection the following observations of Lord Thankerton in *Short v. J. & W. Henderson Ltd.* [1946] 6 T.L.R. 427, is very pertinent. His Lordship listed the four indicia of a contract of service derived by Lord Justice Clerk from the authorities to which he had referred :

- (a) the master's power of selection of his servant;
- (b) the payment of wages or other remuneration ;
- (c) the master's right to control the method of doing the work; and
- (d) the master's right of suspension or dismissal.

16. His Lordship, quoting from Lord Justice Clerk then said :

The judge adds that a contract of service may still exists if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship. Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when on an appropriate occasion arises, it will be incumbent on this House to reconsider and restate these indicia.

(underling is mine)

17. Roskill, J. in [1968] 1 W.L.R. 1749, cited *supra*, says at page 1760 :

Finally it has been more recently suggested that the matter can be determined by reference to what in modern parlance is called economic reality. All these matters have to be borne in mind. To my mind no single one is decisive. One has to look at the totality of the facts found and then apply them to the language of the statute.

18. In *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 W.L.R. 1, the company employed a number of persons to act as interviewers for short periods of time. The company could specify the persons to be interviewed, the questions to be asked and the order in which they should be asked. The interviewer, however, was free to work when she wished and could undertake similar work for other organisations. It appeared that she could not be dismissed in the middle of a survey and while she was actually at work the company would not be able to contact her. No provision was made for time off, sick pay or

holidays, Cooke, J., said :

...the fundamental test to be applied is this ; " Is the person who has engaged himself to perform these services performing them as a person in business on his own account ?" If the answer to that question is " yes" then the contract is a contract for services. If the answer is " no " then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

He found ample control and pointed out that the right to dismiss for fundamental breach of contract would exist in both types of contract and that the absence of sick and holiday pay reflected only the nature of the job. The interviewer did not provide her own tools or risk her own capital, and her opportunity of profit did not depend on the way she managed her work. He concluded that she was plainly an employee of the company,

19. It is obvious that the lower Courts have not considered this question in the light of the law as laid down by the aforementioned cases. I would, therefore, set aside the judgments and decrees of the Court below and remand the case back to the trial Court for consideration afresh whether the workers concerned are employees of the plaintiff as contemplated under the Act. If they are such employees the suit will have to be dismissed. On the other hand, if they are not found to be plaintiff's employees the suit will have to be decreed. In the circumstances, interests of justice require that both parties should be allowed to adduce further evidence if they so require. In regard to other questions the parties are concluded by this decision. The costs of the appeal will abide by the result of the suit. The appellant is entitled to get refund of the Court fee paid in the appeal.

20. The appeal is disposed of as above.