(1992) 07 BOM CK 0050

In the Bombay High Court

Case No : Criminal Appeal No''s. 737 and 751 of 1982

P.R. Nerurkar APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 30-07-1992

Acts Referred:

Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969 — Section 2(4), 3(3), 4(3)

Citation : (1992) 3 BomCR 439

Hon'ble Judges : M.G. Chaudhari, J

Bench : Single Bench

Advocate : C.K. Jaisinghani and Sriram Badam, in C.A. No. 751 of 1982, for the Appellant; K.D. Ranadive, Assistant Public Prosecutor for respondent No. 1 in C.A. No. 751 of 1982, K.D. Shah and U.K. Shah, for respondent Nos. 2 to 4 in C.A. No. 751 of 1982, C.K. Tuli, for respondent Nos. 2 to 4 in C.A. No. 737 of 1982, for the Respondent

Judgement

M.G. Chaudhari, J.—As both the appeals involve common questions they can be conveniently disposed of by this judgment.

Facts of Appeal No. 751 of 1982

2. Upon a complaint instituted by the appellant Mr. P.R. Nerurkar, an Inspector appointed u/s 15 of the Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment & Welfare) Act, 1969, (hereinafter referred to as the Act) in the Court of Presidency Magistrate, 16th Court, Ballard Pier, Bombay on 21-4-1980 complaining that the respondent Nos. 2 to 4 (hereinafter referred to as the respondents) who were carrying on export business amongst other things in garments, had contravened Clause 14 of the Cloth Markets or Shops Unprotected Workers (Regulation of Employment and Welfare) Scheme, 1971 (hereinafter referred to as the Scheme) framed by the Government of Maharashtra in exercise of powers conferred under sub-section (1) of section 4 of the aforesaid Act, they had committed offence punishable under Clause 44 read

with Clause 14 of the aforesaid Scheme and section 3(3) of the Act, the respondents were prosecuted but by his judgment and order dated 16-4-1982 (in Criminal Case No. 35/S of 1980) the learned Metropolitan Magistrate, 16th Court, Ballard Pier, Bombay has acquitted the respondents of the same offence. The original complainant has challenged the said acquittal in this appeal filed u/s 378(4) of the Code of Criminal Procedure.

3. The case set out in the complaint, Ex.C was that the respondent No. 2 was engaged in selling, purchasing, trading, packing or acting as agent in cloth markets or shops in Greater Bombay. It was engaged in scheduled employment mentioned in Item No. 2 of the schedule to the Act. The respondent No. 2 was situated at Jolly Maker Chamber No. 2, 11th floor, Nariman Point, Bombay-21. The respondent Nos. 3 and 4 were the directors of respondent No. 2. The respondent No. 2 was established in 1972. However, despite several requests, the respondents did not get respondent No. 2 registered with the Board by applying in form ''A'' appended to the said Scheme as was required to be done on the date of starting of the business as provided in Clause 14 of the Scheme. Thus the respondents not having applied for registration under Clause 14 of the Scheme they were liable to be punished under Clause 44 of the Scheme.

4. From the written statement filed on behalf of respondent No. 2 it appears that it carried on business in the name and style of M/s. M.J. Exports Pvt. Ltd., and that company carried on business as exporters of garments and other items and was an export house having its office at the place mentioned in the complaint. The contention of respondent No. 2 was that they were not an "establishment" as defined in section 2(4) of the Act and as they did not engage unprotected workers by itself or through contractor they were not required to be registered under Clause 14 of the Scheme and thus they had not committed any offence punishable under Clause 44 of the Scheme.

5. In support of its case the prosecution examined two witnesses namely Vishwas Ghadge (P.W. 1) an Inspector of Cloth Market Board and Balkrishna Savlaram Jadhav (P.W. 2) a registered worker of the Cloth Markets & Shops Unprotected Workers Board belonging to toli No. 1024.

6. The learned trial Magistrate was not satisfied with the evidence and after having due regard to the explanation offered by the respondents in their written statement found that the alleged offence was not proved against the respondents and acquitted them.

Facts in Criminal Appeal No. 737 of 1982

7. In this case also the same Inspector, Mr. Nerurkar had instituted a complaint against the respondent Nos. 2 to 4 before the same learned Magistrate on the same day i.e. 21-4-1980 as in the other case. In this complaint also it was alleged that the respondent No. 2 which was established prior to 1981 and of which respondent Nos. 2 and 3 were partners was carrying out business in Greater Bombay and was engaged in scheduled employment but had failed to get

registered under Clause 14 of the Scheme and had thus committed the offence punishable under Clause 44 of the Scheme.

8. According to the written statement of the respondents, the respondent No. 2 was a partnership firm engaged in the business of export of garment textiles. They contended that they were not liable to be registered under the Act and that they had never come in contact with the loading and unloading workers.

9. In this case, the prosecution examined three witnesses namely Vishwas Ghadge (P.W. 2) (who also gave evidence in the other case), worker Balkrishna Pawar (P.W. 3) and Prakash Nerurkar (P.W. 1).

10. After considering the evidence of these three witnesses and having due regard to the statements of the respondents, the learned Magistrate found that the offence was not proved against the respondents and consequently acquitted them by judgment and order dated 29-3-1982 (in Criminal Case No. 34/S of 1980). The complainant has challenged the said acquittal in this appeal which is filed u/s 378(4) of the Criminal Procedure Code.

11. The question that needs consideration in essence is whether the respondents carrying on business as exporters in cloth garments and engaging the services of clearing agents who in their turn engaged unprotected workers as and when required for transporting the goods for export from different textile Mills to the Port Trust docks were covered by Clause 14 of the Scheme.

Relevant provisions of law :

12. The preamble and the recital of objects and reasons of the Act read as follows :

"An Act for regulating the employment of unprotected manual workers employed in certain employments in the State of Maharashtra to make provision for their adequate supply and proper and full utilization in such employments, and for matters connected therewith.

WHEREAS, it is expedient to regulate the employment of unprotected manual workers such as, Mathadi, Hamal etc. engaged in certain employments, to make better provision for their terms and conditions of employment, to provide for their welfare, and for health and safety measures where such employments require these measures; to make provision for ensuring an adequate supply to, and full and proper utilization of, such workers in such employments to prevent avoidable unemployment; for these and similar purposes, to provide for the establishment of Boards in respect of these employments and (where necessary) in the different areas of the State; and to provide for purpose connected with the matters aforesaid;"

13. The material definitions contained in the Act and the provisions of the Scheme relevant to both the appeals may now be set out :

It may be stated that the prosecutions were governed by the provisions of the

Act as it stood prior to its amendment by Act No. 62 of 1981 with effect from 15-1-1982. Hence references will be made to the said amended Act. The various definitions contained in section 2 of the Act are as follows :

(2) "contractor" in relation to an unprotected worker, means a person who undertakes to execute any work for an establishment by engaging such workers on hire or otherwise, or who supplies such workers either in groups, gangs (tollis) or as individuals; and includes a sub-contractor, an agent, a mukadam or a tolliwala;

(3) "employer", in relation to any unprotected worker engaged by or through contractor, means the principal employer and in relation to any other unprotected worker, the person who has ultimate control over the affairs of the establishment and includes any other person to whom the affairs of such establishment are entrusted, whether such person is called an agent, manager or is called by any other name prevailing in the Scheduled employment;

(4) "establishment" means any place or premises, including the precincts thereof, in which or in any part of which any scheduled employment is being or is ordinarily carried on;

(7) "principal employer" means an employer who engaged unprotected workers by or through a contractor in any scheduled employment;

(9) "scheduled employment" means any employment specified in the Schedule hereto or any process or branch of work forming part of such employment;

(11) "unprotected worker" means a manual worker who is engaged or to be engaged in any scheduled employment.

&(12) "workers means a person who is engaged or to be engaged directly or through any agency, whether for wages or not, to do manual work in any scheduled employment and, includes any person not employed by any employer or a contractor, but working with the permission of, or under agreement with the employer or contractor; but does not include the members of an employer''s family;"

Section 3 of the Act provides:---

"3(1) For the purpose of ensuring an adequate supply and full and proper utilization of unprotected workers in scheduled employments, and generally for making better provision for the terms and conditions of employment of such workers, the State Government may by means of a scheme provide for the registration of employers and unprotected workers in any scheduled employment or employments, and provide for the terms and conditions of work of (registered unprotected workers) and make provision for the general welfare in such employments.

(2) In particular, (a scheme may provide for all or any of the following matters that is to say)

(a) for the application of the scheme to such classes of (registered unprotected workers and employers) as may be specified therein;

(b) for defining the obligations of (registered unprotected workers and employers) subject to the fulfilment of which the scheme may apply to them;

(c) for regulating the recruitment and entry into the scheme of unprotected workers, and the registration of unprotected workers and employers, including the maintenance of registers, removal, either temporarily or permanently, of names from the registers, and the imposition of fees for registration."

(d) to (2) ......

14. The relevant clauses of the schedule appended to the Act u/s 2(9) are as follows :

"2. Employment in Cloth and Cotton Markets or shops in connection with loading, unloading, stacking, carrying weighing, measuring, filing, stitching, sorting, cleaning or such other work including work preparatory or incidental to such operation

3. ....

4. ....

5. Employment in markets, and factories and other establishments, in connection with loading, unloading, stacking, carrying, weighing, measuring, filing stitching, sorting, cleaning or such other work including work preparatory or incidental to such operations carried on by workers not covered by any other entries in this Schedule.

6. ....

7. ....

(8 to 13 not quoted)

The relevant clauses from the Scheme published by the Government of Maharashtra on 11th March, 1971, are as follows:

"14. Registration of Employers.---Every employer to whom the scheme applies shall get himself registered with Board by applying in Form ''A'' appended to the Scheme within fifteen days from the date of coming into force of this clause, provided, however, that the employer of any establishment coming into existence after the commencement of the Scheme shall apply for registration simultaneously on the commencement of his business provided further that, where the provisions of this Scheme are applied, after its commencement to any scheduled employment, or extended to other area the employer in that scheduled employment, or in the extended area shall get himself registered within fifteen days from the date on and from which the provisions of this Scheme are applied to such "scheduled employment", or to such area.

(N.B. : Clause 14 came into force in Greater Bombay from 1-5-1971 and applied to Clause 5 of the Schedule from the inception)

Original Clause 44 : Penalties.---(Prior to amendments on 17-1-1975 and 15-4-1977) "Whoever, contravenes the provisions of Clauses 14, 30, 31 shall on conviction be punishable with a fine which may extend to rupees five hundred".

Clause 44 : (as now it reads) Whoever, contravenes the provisions of Clauses 14, 30 or 31 shall on conviction be punished with imprisonment for a term of three months or with fine which may extend to rupees five hundred or with both, where such contravention is a first contravention and with imprisonment for term of six months or with fine which may extend to rupees one thousand or with both, where such contravention is continued further after conviction, he shall be punished with a further fine which may extend to one hundred rupees for each day on which the contravention is so continued".

Mr. Jaisinghani, the learned Counsel for the appellant in both the appeals made the following propositions :

(i) Both the firms of the respondents were engaged in carrying on business in cloth and their contention that they were mere exporters of cloth would not make any difference.

(ii) The business of the respondents involved loading, unloading and carrying of cloth including work of preparatory or incidental to such operations within the meaning of Clause (5) of the Schedule.

(iii) The aforesaid activity was carried on as part of their business and irrespective of the fact that they had their principal office of business at the address given in the complaints, that activity was done at their establishment and though done at different places that would form part of their establishment.

(iv) The activity of loading and unloading etc., of the cloth was carried on through contractor and he being described as a Clearing Agent makes no difference.

(v) That workers were employed through contractor for carrying on the business activities as above and that made the respondents in each case ''principal employer'' and thus liable to get registered with the Board under Clause 14 of the Scheme.

(vi) The failure of the respondents to get themselves registered thus defeated the object of the Act aimed at regulating the employment of unprotected manual workers as were employed for carrying on the business activity of the respondents and thus it was an offence punishable under Clause 44 of the scheme.

(vii) As the Act and the Scheme is a social welfare measure and beneficent piece of legislation the provisions thereof are to be strictly implemented and a contravention thereof has to be seriously looked upon and punished.

(viii) The acquittal of the respondents is bad in law.

In support of the above propositions apart from relying upon the evidence of the witnesses examined on behalf of the complainant, the learned Counsel also placed strong reliance upon the written statements of the respondents and the suggestions that were put on their behalf to the prosecution witnesses. The learned Counsel also relied upon certain rulings.

16. Before discussing the merits of the cases it needs to be stated that it was neither the allegation of the prosecution nor any evidence was adduced to show that any of the unprotected workers including the worker examined in each case engaged by the clearing agents of the respondents in connection with the work of the respondents were deprived of the benefits or advantages available to them under the Scheme during their employment for the work done on behalf of the respondents. The only allegation was that the respondents had failed to register themselves as required under Clause 14 of the Scheme. No evidence was adduced to show that had the respondents been registered certain benefits or advantages would have been available to the workers who were employed and which they were denied owing to non-registration of the respondents. May be that such a consequence could follow and Clause 14 is intended to prevent such mischief. This angle would assume importance if it is found that the respondents were covered by Clause 14 and will be borne in mind while examining the merits.

REASONS IN APPEAL No. 751 of 1982

17. As already stated according to the complaint the respondents were carrying on business at Jolly Maker Chamber No. 2 and it was alleged in the complaint that they were engaged in selling, purchasing, trading, packing or acting as agents in cloth markets or shops in Greater Bombay. It has also been already noted that it was stated in the written statement of the respondents that respondent No. 2 was a private limited company and it carried on business as exporters of garments and other items and theirs was an export house the Administrative Office of which was situated on the 11th floor of Jolly Maker Chamber, Bombay.

18. What Clause 5 of the Schedule requires is that the employment of the workers should be at ''establishment'' in connection with loading, unloading and carrying work. For this purpose reliance was placed by the prosecution on the Scheme which Scheme is meant for the welfare of registered unprotected workers in cloth markets and shops. A bare look at the objects clause of the said Scheme shows that it pertains to ensuring an adequate supply and full and proper utilisation of unprotected workers employed in the cloth markets or shops and Markets and factories and other establishments in connection with loading, unloading, stacking, carrying, weighing or measuring, filing, stitching, sorting, cleaning of -

(i) Cloth of all kind including cotton, wool, silk ________________ cloth and hosiery and

(ii) Yarn of all kinds ________________

or such other work including work preparatory or incidental to such operations carried on by workers referred to in Entry 5 in the Schedule to the Act (which is set out above) i.e. scheduled employment within the meaning of Clause 9 of section 2 of the Act, and for the efficient performance of work and generally for making better provisions for the terms and conditions of employment of such workers and make provisions for their general welfare. Thus Item 5 in the Schedule has to be read and understood in the context of the objects of the scheme and not in isolation. It is clear from reading the objects clause of the Scheme that the work of loading, unloading, carrying etc., should be relating to cloth or yarn as part of the business of the employer in connection of which workers are to be employed by him.

19. Now according to the written statement of the respondents the nature of the business of their company was merely to carry on correspondence between the parties with a view to secure export orders and pass them on to textile mills for execution. For that purpose on occasions they gave contract to M/s. Naranji Desar & Co., who were Custom House Agents (C.H.A.). It was the duty of those agents to guide the company about pre-shipment inspection of the goods to be exported and other matters in connection with exports. It was their job to arrange for freight brokers, get ship bills prepared and passed by Customs, arrange for hand-carts, tempos or trucks as may be necessary for transport of goods through mills, factories, private or public ware-houses, rail heads, airport and transporting them with or without transshipments enroute to the docks, and take all the steps for export of those goods. According to them transport of the export goods from the place of storage to the dock was only a very small part of their duty. The company paid the agents at a fixed rate per case/bale. According to them it was entirely the responsibility of the agents to arrange transport of export cargo and the company did not have any say about the manner and method of transport of export cargo by C.H.A. They further stated that the company did not engage directly or through C.H.A. any worker protected or otherwise at any stage and there was no relationship between the company and any worker that of employer and worker. According to them, the company expected the C.H.A. to handle all the matters as they were persons specialised in this kind of service. They further stated that the office of the company was not situated in any cloth or cotton market. It only had an Administrative Office. It had no shop. According to them P.W. 2 and his associate workers did not fall in the definition of unprotected workers and that the office of the company was not an establishment as defined in section 2(4) of the Act. The written statement of respondents thus shows that they were carrying on business as exporters in cloth and they were not functioning within a cloth market nor were running a cloth shop.

20. (P.W. 1) Vishwas Ghadge had no personal knowledge about the nature of business carried on by the respondents and his evidence does not show that he

had seen any loading or unloading or carrying activity within the meaning of Item 5 of the Schedule carried on by the respondent No. 2 company. His evidence shows that he was working as an Inspector in the Cloth Market Board. On 5-12-1979 he had visited the office of respondent No. 2 at Nariman Point. According to him he did not meet any of the respondents 3 and 4 but had met one Rameshbhai whom he described as a salesman. He says that on enquiring with him he found that the firm was not registered with the Board. Hence he prepared a visit note but Rameshbhai refused to accept it. He then made a report to the Secretary of the Board and on that basis the complaint was filed by Inspector Nerurkar. There is nothing in the evidence in chief therefore to establish the necessary facts to attract Item 5 of the Schedule.

21. Considerable importance was attached by Mr. Jaisinghani to the cross-examination of this witness. He submitted that if the cross-examiner chose to bring on record material which tended to support the case of the prosecution that should be regarded as lending assurance to the case of the prosecution. According to the learned Counsel such was the material brought out in the cross-examination of this as well as the other witness. In the cross-examination of P.W. 1 it was brought out that the respondent No. 2 company exports garments, onion and potatoes and that he would think the office of the respondents to be an establishment. He also volunteered to make an answer that the loading, unloading work of the firm takes place in the docks and mills. That voluntary statement was made by him after having made the following answer :

"No loading, unloading work, stacking, carrying, weighing etc., as mentioned u/s 2(9) of the Mathadi Workers Act takes place in the office".

Apart from what was elicited from him there is nothing more in the cross-examination from which the fact would get established that the respondents were engaged in loading, unloading and carrying cloth business at their establishment. On the contrary certain answers made by the witness in the cross-examination probabalise the case of the respondents set out in their written statement. The witness stated that no manual work was carried on in the office. He admitted that although there were account books and office files in the office he did not inspect them nor did he examine the account books or office files to ascertain whether the firm employed Mathadi workers. He admitted that the company was an export house. However, he did not take inspection of the record to find out whether any work was being carried on so as to fall within the ambit of Item 5 of the Schedule at any other place if not at the office. He admitted that no special Scheme for Mathadi workers employed by export houses existed. He also stated that to his knowledge exporters engage forwarders to look after the physical work involved in bringing the goods from the manufacturers to the dock and that forwarders are not registered under the Scheme. He admitted that Narayanji Desar & Co., were the forwarders engaged by the respondent''s company. He also admitted that the said Narayan Desar & Co., attended to the customs work involved in the export of the cargo belonging to the respondents.

He further admitted that there was no market in the Jolly Maker Chamber building in which the office of the company of the respondents was situated nor according to him there were any shops in that building. His evidence does not show that the respondents had any other place of business such as godown, factory or shop apart from their administrative office. With this nature of evidence of P.W. 1 it is difficult to hold that it was proved that the office premises of the respondents were an ''establishment'' where business was carried on involving scheduled employment as defined under the Act.

22. The second witness examined by the prosecution was Balkrishna Savlaram Jadhav. He himself was a Mathadi registered worker. According to him he is a registered worker of Cloth Market and Shop Unprotected Workers Board. He appears to head a toli as he stated that he is allotted toli No. 1024. He also stated that the respondent company exports clothes. He stated that the respondents entrust their export work to their Clearing Agents. Then after stating that respondent No. 4 had engaged him directly in the month of March 1981 for work of potato export he went on to state thus :

"Before that I never worked directly for the accused. His clearing agent used to entrust documents like name of ship, invoice of purchase of the mill to me. I used to go with the documents to the mill concerned, take delivery of the cloth, load the same into a lorry and bring the goods into the dock and unload them into the shed".

He stated that he had a gang of 10-12 labourers and he was the head of that gang.

23. It is vehemently argued by Mr. Jaisinghani that this part of the evidence of the witness clearly goes to show that the work of loading and unloading of the clothes at the mills and transporting it to the docks through lorries was involved in the business of respondents and services of the witness and other workers from his toli were being utilised and that was enough to attract Clause 5 of the Schedule.

24. Before I deal with that aspect let me complete the further narration of the witness. He stated that it was the clearing agent who use to select one of them (workers) as leader and paid the handling charges per packet. Sometimes the bales were kept in the office of the transporter. The Clearing Agent used to instruct him to go to the transporters office and remove the clothes from the transporters office to the docks. Then he stated :

"The movement was made on account of accused No. 1".

According to him the clearing agent used to pay their wages and he i.e. the clearing agent used to deal with M.J. Exports separately.

25. A careful analysis of the evidence of the witness shows that the respondent-company was engaged in export business and the work of export was carried on through the clearing agents and it were the clearing agents who used to employ

the workers including the witness. It were the clearing agents who paid the wages directly. At no stage the respondents directly came into the picture. However the evidence also shows that delivery of clothes was taken at the mills, the same was loaded into the lorries and carried to the docks and was unloaded into the shed at the dock and the workers were employed for that purpose. There can be no doubt that the goods so dealt were dealt with on account of respondent company and that related to their business. It is argued by Mr. Jaisinghani that it is thus clear that the respondents were covered by the definition of "principal employer" and thus they were subject to the scheme.

26. To my mind the provisions of Clause 5 of the Schedule have to be strictly construed and are required to be fully established before the penal consequence for breach thereof can follow. In that context it appears to me that the distinction between export business and another activity in which loading, unloading and carrying of cloth becomes principal activity of the establishment, has to be borne in mind. The evidence of P.W. 2 points to the fact that respondents'' business is carried on as an export business in which the respondents are not directly concerned with the work of loading, unloading and carrying of clothes. That work is handled by the forwarding agent and as deposed to by P.W. 1 the forwarders are not required to be registered under the provisions of the scheme. When the evidence of P.W. 2 is thus understood in the context of evidence given by P.W. 1 the picture becomes clear namely that the respondents were not engaged in an activity of loading, unloading or carrying of clothes or yarn at their establishment. They would not thus fall within the ambit of Clause 5 of the Schedule.

27. In the cross-examination P.W. 2 stated that number of clearing agents employed services of his toli of workers. The workers so employed went to the premises of the mills or to transporter''s godown to remove goods from the said premises to be taken to the dock. But according to him they had never gone to any other place for that purpose in connection with the business of the respondents. He also stated that he had never gone to respondent No. 4 to collect his wages in connection with the handling of cloth cargo meant for export but the Mukadam submitted the bills to the clearing agents and the amount was paid through the Mukadam by the clearing agent and it was distributed amongst all the workers in that toli equally irrespective of the work done individually by each member. That clearly goes to show that when the clearing agent engaged a group of workers or toli in respect of particular consignment of the respondents he was doing it as a job work and not as part of the business of respondents. The work was merely of incidental nature to the export business of the respondents. That work was done at different times and involved carrying cloth cargo from different places, which were not under the control of respondents, to the docks. That cannot be regarded as an activity carried on by respondents directly. There is thus no nexus between the work done by the workers and the respondents.

28. Apart from the above features of the evidence what is striking is that the

testimony of P.W. 2 is extremely vague. It is not possible to gather from his evidence as to at what point of time he indeed had worked in connection with loading or unloading or transporting the goods for the respondents. He has not even mentioned the name of the clearing agent by whom he and other workers were employed. He has not even disclosed the name of the transporter. He has not even stated as to from which mills on any occasion they had carried the cloth or garments relating to the business of the respondents. This being a criminal trial the evidence has to stand the usual test and scrutiny and should be of such quality as to establish facts from which the offence against the accused can be held proved beyond all reasonable doubt. Neither the evidence of P.W. 1 nor that of P.W. 2 stands that test. The argument of the learned Counsel of the appellant boils down to saying that since there is some evidence given by the worker about having carried certain goods from certain mills on certain occasions in certain vehicles to the docks for certain clearing agents and since according to the respondents they were utilising the services of clearing agents or contractors and since the same workers were employed by the contractor for that job including P.W. 2, it must be presumed that the respondents had engaged in carrying on an activity covered by Clause 5 of the Schedule and since they failed to get themselves registered under Clause 14 of the Scheme they should be held guilty under Clause 44 of the Scheme. It is not possible to base the conviction on the type of evidence as has been adduced by drawing so many inferences as will have to be drawn if the above line of argument is to be accepted.

29. Thus in my opinion the evidence adduced by the prosecution falls short of proving that the respondents were an ''establishment'' required to be registered under Clause 14 or that they had employed workers in contravention of the provisions of the Act and the Scheme and are liable to be punished under Clause 44 of the Scheme.

30. In my opinion, the respondents can only be described as exporters and cannot be held to be persons engaged in manufacture or sale of garments or in that sense persons carrying on business in clothes and garments. I am also of the opinion that whatever loading and unloading of material was involved during the course of business of export that did not fall within the ambit of Clause 5 of the Schedule read with Clause No. 2(1)(b)(i) & (ii) of the Scheme.

31. Considerable argument was advanced by Mr. Jaisinghani on the definition of ''establishment'' contained in section 2(4) of the Act and its true impact in the context of the objects of the Act. On a plain reading of that definition it is clear that it would be a place or premises including the precincts thereof in which or in any part of which any scheduled employment is being or is ordinarily carried on. The definition of scheduled employment shows that it means any employment specified in the Schedule or any process or branch of work forming part of such employment.

32. The evidence of P.W. 1 and P.W. 2 does not show that any activity involving scheduled employment was being carried on or was ordinarily carried on at the

premises of the respondents which was only an Administrative Office. There is no evidence that as part of their business activity something was done at other places such as godown, factories etc. It is argued by Mr. Jaisinghani that when the consignment was lifted from the mills and taken to the dock in connection with the business of the respondents as exporters then those places namely the mills and the shed in the dock where the goods were unloaded ought to be deemed to be part of the ''establishment'' of the respondent-company and such an extended meaning ought to be given to the definition of the expression establishment in section 2(4) having regard to the object of the Act which is a beneficial piece of legislation brought forward to regulate the employment of unprotected manual workers and to improve their conditions of living. It is not possible to agree with this submission having regard to the plain language of sub-section (4) of section 2. Clause 5 of the Schedule must be read with the Scheme which is primarily intended for regulation of employment and welfare of unprotected workers in cloth markets or shops. By giving an extended meaning to the expression "establishment" Clause 5 of the Schedule cannot be extended to the business of export of the nature carried on by the respondent.

33. Mr. Jaisinghani referred to the decision of the Gujarat High Court in Khatija Abdulla Ibrahim Tai and Others Vs. The National Tobacco Company of India Ltd., Calcutta, . In that case the provisions of the Bombay Shops and Establishments Act, 1948 and the provisions of Workmen''s Compensation Act, 1923 were under consideration. However the definition of "establishment" contained in section 2(8) of the Shops & Establishments Act is differently worded than the definition in the present Act. However the Court was considering the definition of "commercial establishment" in section 2(4) of the said Act, These two definitions were as under :

2(4) "Commercial establishment" means an establishment which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade, or profession and includes a society registered under the Societies Registration Act, 1860 and a charitable or other trust, whether registered or not which carries on whether for the purpose of gain or not, any business trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment".

2(8) "Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment to which the Act applies and includes such other establishment as the State Government may by notification in the Official Gazette declare to be an establishment for the purpose of this Act".

While construing the definition of ''commercial establishment'' Their Lordships held that there is nothing in the definition to hold that before an establishment can become a commercial establishment it must have a certain fixed place or abode or premises or location from where it operates. In that context it was observed that the word ''establishment'' has a wide meaning given to it in the Act and that appears to have been done for a very valid reason namely that the Act was a benevolent legislation for ameliorating conditions of service in some of the establishments sought to be covered by the Act. It was argued by Mr. Jaisinghani that therefore even if the respondents in the instant case did not carry on any activity at their Administrative office the transportation of cloth from the mills to the dock for their export business purpose was sufficient to bring them within the meaning of ''establishment'' in sub-section (4) of section 2 of the Act. It is not possible to accept this argument having regard to the difference in the language of the definition of ''establishment'' contained in the two enactments even though the purpose intended to be served may be similar in the respective spheres falling within the ambit of the two Acts. With respect, the above ruling thus does not help Mr. Jaisinghani.

34. It is true that evidence of P.W. 2 as well as written statement of respondents goes to show that the respondents had engaged a contractor whom they described as clearing agent and he in turn had engaged the workers. Question is whether still in that narrow sense the respondents do fall within the definition of ''principal employer''. In this connection it is necessary to bear in mind the nature of duties performed by the clearing agent in connection with export business. He cannot be said to be acting as a labour contractor. This is not a case where the respondents had secured services of some workers through the agency of the clearing agent so that the clearing agent could be described as a labour contractor qua the respondents. The determination of the question as to whether the respondents were ''principal employers'' would not depend on this factor alone but on the nature of the activity carried on by them. As discussed above in my opinion the respondents do not fall within that definition. Clause 5 of the Schedule therefore did not apply to them.

35. For the foregoing reasons I am not satisfied that the appellant has established its case that the respondents were under an obligation to register themselves under Clause 14 of the Scheme. They could not therefore be found guilty for committing offence punishable under Clause 44 of the Scheme. Thus I find no good reason to interfere with the order of acquittal of the respondents passed by the learned Magistrate and consequently the appeal deserves to be dismissed.

REASONS IN CASE No. 37 of 1992 :

36. In this case P.W. 1 visited the premises of the respondent firm M/s. R.E. Anil & Sons Co. on 5-2-1979. He learnt that cloth was being exported by the respondent firm. He also learnt that the respondents were getting the work of delivering the cotton textiles done through clearing agents. There is nothing in his cross-examination to show that any work as contemplated by Clause 5 of the Schedule was being done at the premises nor there is anything in his evidence to show that at any other place such work was being done by them. It must

therefore follow that no work was being done at the said establishment. The second witness Vishwas Ghadge also does not provide any particulars to show to the contrary. All that his evidence shows is that he received information that the respondent firm were transporting cloth purchased by them from the local mills and sending it to the docks for the purpose of being exported. His cross-examination shows that some workers who have claimed to have worked in connection with transporting cloth as part of the business of the respondents were paid their wages by the Mukadam and not directly by any of the respondents. His evidence shows that the respondents were utilising services of clearing agents for their export business. The last witness examined was worker Balkrishna Pawar. He stated that the clearing agent engaged his toli and paid them wages. He did not know the respondents but still maintains that the work of their firm was done by him and other workers of his toli for which the clearing agent engaged them. He stated that the clearing agents of the respondents were Narayanji Desar & Co., (who also were the clearing agents of the respondents in the other case). The evidence of the witness is vague as he does not say as to from which mill or mills he had lifted the stock of cloth or through whom it was transported and where it was unloaded and when was that with reference to the period of time. He has given stereo type evidence but appears to be honest in telling that he and other workers are called whenever there is work by the clearing agents, that he and other workers work in a toli and they attend to different jobs and not exclusively the job relating to the business of the respondents.

37. The written statement of the respondents shows that they received orders from U.K. Buyers and placed orders with upcountry mills and the upcountry mills despatched the goods through transporters. On arrival of the goods in Bombay they are kept in transporter''s godown. Thereafter the documents are handed to the clearing agent and it is the clearing agent who thereafter arranges for the goods to be taken to the Port Trust for the purpose of export. It is the Clearing Agent who has to arrange for the workers and the respondents never came directly in contact with the workers loading and unloading the goods. The respondents were thus exporters.

38. The evidence and facts of this case are similar to the evidence and facts in the other case. The legal arguments also were the same and for the reasons recorded above in connection with the other appeal here also it must be held that the respondents are not proved to have contravened Clause 14 of the scheme and that they have been rightly acquitted by the trial Magistrate. The said acquittal does not call for any interference.

39. Before parting with the judgment, I would like to observe that there may arise instances where taking shelter behind the limited application of the Scheme in view of the definition of word ''establishment'' used in the Act, shrewd business establishments may devise ways and means to avail services of unprotected workers through separate agencies and deprive them of the

protection conferred upon them by the Act. There is thus danger of the objects of the Act getting frustrated. However, unless the relevant definitions are made comprehensive in nature it would be difficult to achieve the purpose even by giving extended meanings to the existing provisions. As it appears the Scheme has itself been applied to different areas in phases. Practical difficulties may also arise in extending the scheme to different areas of business and trade activity. That however would be a matter for the legislature and the Government to look into.

In the result the following order is passed :

Order on Appeal No. 751 of 1982

The order of acquittal of the respondent Nos. 2 to 4 is confirmed and the appeal is dismissed.

Order on Criminal Appeal No. 737 of 1982.

The order of acquittal of respondent Nos. 2 to 4 is confirmed and the appeal is dismissed.

