
(1990) 02 KL CK 0036
In the High Court Of Kerala
Case No : M.F.A. No. 213 of 1986

Regional Director, ESI Corpn.

APPELLANT

Vs

Ramlal Textiles

RESPONDENT

Date of Decision : 28-02-1990

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(9)

Citation : (1991) 61 FLR 298 : (1990) 2 LLJ 568

Hon'ble Judges : U.L. Bhat, J;Balanarayana Marar, J

Bench : Division Bench

Advocate : T.P.M. Ibrahim Khan, for the Appellant; U.K. Ramakrishanan and E.K. Madhavan, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—Regional Director, E.S.I. Corporation, Trichur being aggrieved by the judgment of the E.S.I. Court, Calicut in E.I.C. No. 53/83 has filed this appeal.

2. The respondent is a firm engaged in the manufacture and sale of handloom textile goods. Respondent has a factory of its own covered by E.S.I. scheme. Appellant by letter dated 18th November 1981 sent to the respondent required the latter to pay E.S.I. contribution for a sum of Rs.4,82,040.28. Bulk of this account represented wages paid on account of "outside weaving charges" and "outside winding charges". Admittedly these amounts have not been taken into account for payment of contribution. This was followed by letter dated 23rd February 1983 to the same effect. Respondent sent a reply dated 20th April 1983 denying liability and followed it up by filing an application u/s 75 of the Employees State Insurance Act before the E.S.I. Court seeking declaration that the direction of the appellant is illegal and unenforceable and to restrain the appellant from recovering the amount by way of revenue recovery proceedings. The E.S.I. Court accepted the contention of the respondent and allowed the application. Hence this appeal.

3. The stand taken in the application filed before the E.S.I. Court can be summarised as follows: The factory manufactures handloom cloth and workers are employed in the factory for that purpose. In Cannanore there was practice of giving the work of winding and weaving cloth to outsiders who undertake to do the work in their own places. Such persons collect yarn from the factory for winding on weightage basis and return "wound yarn" to the establishment and for that purpose charges are paid to them. Similarly yarn is given to outsiders for weaving. They are not employed in connection with the work carried on in the factory and there is no employer-employee relationship. Respondent has no right of supervision over these workers. It is a contract for service and they are not employees as defined in the Act. Yarn is supplied by the establishment to master weavers available in the locality and they manufacture and supply cloth to the establishment. These master weavers carry yarn to their own work place, weave cloth either by themselves or by engaging other persons under them and sell manufactured cloth to the establishment. From the price payable for the cloth supplied, value of yarn supplied to the master weaver is deducted and the balance amount is paid to them. This is purely a commercial transaction. Learned counsel for the respondent further elaborated by stating that master weavers have their own looms and they engage workers to work in their looms and convert the yarn to cloth. Learned counsel also submitted that persons engaged by master weavers are not employees of the respondent's factory and they are not paid by respondent. Appellant contends that this is only a ruse to deny E.S.I. benefits to the employees and absolve respondent of liability to pay contribution. P.W.I examined on behalf of the establishment deposed to its case. The E.S.I. Court held that the actual workers are not employees within the definition of the Act.

4. It is not contended for the Corporation that the persons to whom winding work and weaving work are entrusted, are "employees" as defined in the Act. The stand taken is that the workers who actually carry out the work and employed by the contractors or master weavers are employees as defined in the Act.

5. Learned counsel appearing on both sides have referred us to several decisions. In *Shankar Balaji Waje Vs. State of Maharashtra*, it was held that persons engaged to roll bidis on job work and working without supervision of the employer are not persons employed directly for the purpose of the Factories Act. This decision is of no assistance since the definition of the expression "employee" in the E.S.I. Act is different from the definition of "worker" in the Factories Act. In *Chintaman Rao and Another Vs. The State of Madhya Pradesh*, the Supreme Court held, on the facts of the case, that an independent contractor or his coolies or servants who are not under the control and supervision of the employer could not be workers within the definition in Section 2(1) of the Factories Act. In *Shri Birdhichand Sharma Vs. First Civil Judge Nagpur and Others*, the Supreme Court considered the case of workers similarly placed and held that they were workers within the definition in Section 2(1) of the Factories Act. It has to be noticed that the Supreme Court in *Shankar Balaji Waje's* case (supra) did not approve the

decision in *Birdhichand Sharma v. First Civil Judge, Nagpur* (supra).

In *Management of D.C. Dewan Mohideen & Sons v. Union of U.B. Workers* (AIR 1966 S.C. 370) Supreme Court considered the case of proprietors of two concerns who entered into contracts with contractors to take tobacco leaves from the proprietors and manufacture bidis by engaging workers. The workmen take leaves home and cut them there, but the actual process of rolling by filling the leaves with tobacco took place in the contractor's factories. There is no attendance register for the workmen or no condition that they should come and go at fixed hours. Workmen are not bound to come for work every day. Sometimes they inform the contractors if they want to "be absent and sometimes they do not. Payment was made to the workmen at piece rates after beedis were delivered. The system is that the proprietors fix the price of tobacco and leaves supplied to the contractors who take them to the places where work of rolling is done and give them to the workmen. Next day manufactured beedis would be taken to the proprietors who pay a certain price for the manufactured beedis after deducting the cost of the tobacco and the leaves already fixed. The balance is paid to the contractors who in turn pay wages to the workmen. According to the Supreme Court, correct approach is to consider whether having regard to the nature of work there is due control and supervision by the proprietors and the nature of the control required to make a person a servant of the master would depend upon the facts of each case. The Supreme Court held that the so-called independent contractors are mere agents or branch managers of the appellants and they are indigent persons in all respects under the control of the appellants and there will be no doubt that the workers employed by the so-called contractors are really the workmen of the proprietors and are employed through their agents or servants whom they choose to call independent contractors. It is hardly likely that the so-called independent contractor will accept beedis which are not upto the standard; for that is usually the system which prevails in this trade as will be apparent from the facts of many bidi manufacturing cases. The Supreme Court further held that the relationship of master and servant between the proprietors and the workmen employed by the so-called contractors is established.

7. In *Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another*, a case under the Shops & Establishment Act of Andhra Pradesh, a question arose whether there was relationship of employer and employee between tailors employed in a tailoring shop and shop owner. Tailors generally attend the shop every day if there is work and different rates are fixed for them according to their skill and their work is checked then, even though there may be no regular hours of work and there is no obligation to attend every day and they could take the work home. It was held that there was relationship of employer and employee between the tailoring shop and tailors. It was indicated that in recent years the control test as traditionally formulated has not been treated as an exclusive test and it is relevant to consider right of termination of the incumbent. In *B.M. Lakshmanamurthy Vs. The Employees*"

State Insurance Corporation, Bangalore, appellants are partners of a firm which owns a factory. There is another factory situated near the appellant's factory. Granite stones from the quarry are brought to the factory of the contractors and cut and dressed in the said factory and thereafter they are sent to the factory of the appellants where they are designed, polished and exported. The question arose whether the employees employed to cut and dress the materials in the contractor's factory are employees of the appellant. The Supreme Court held that even though the two factories are separate, the work in the two places had an intimate correlation and was a piece of an integrated whole, that the work undertaken by the contractors is preliminary or incidental to the work in the principal employer's factory turning out the finished product for export and the work by the contractors through their labour is ordinarily part of the work of the principal-factory. Therefore the employees engaged by the contractors were held to be employees of the principal factory for the purpose of E.S.I. Act.

8. In *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, the Supreme Court observed that the whole goal of the statute is to make the principal employer primarily liable for the insurance of the kindred kinds of employees on the premises, whether they are there in the work or are merely in connection with the work of the establishment. The definition of Section 2(9) has been cast deliberately in the widest terms and the draftsman, has endeavoured to cover every possibility so as to exclude even distinct categories of men employed either in the primary work or cognate activities and it will defeat the object of the statute to truncate its semantic sweep and throw out of its ambit those who are obviously within the benign contemplation of the Act.

9. In *Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others*, Supreme Court considered a case where workmen were engaged to make ropes but they were hired by contractors who had executed agreements with the petitioner to get such work done. A few of those workmen were denied employment and an industrial dispute was referred by the State Government and the award was attacked on the ground that workmen were not workmen of the petitioner. The Supreme Court held that the work done by the workmen was an integral part of the industry concerned, that the raw material was supplied by the management, that the factory premises belonged to the management, that the equipment used also belonged to the management and that the finished product was taken by the management for its own ; trade, the workmen were broadly under the control of the management and defective articles were directed to be rectified by the management and this concatenation of circumstances is conclusive that the workmen were the workmen of the petitioner. The Supreme Court indicated the true test thus: Where a worker or group of workers labour to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is virtually laid off. The presence of intermediate

contractors with whom alone the workers have immediate or direct relationship ex-contract is of no consequence, when, on lifting the veil or looking at the conspectus of factors governing employment, the naked truth is discerned, and especially since it is one of the myriad devices resorted to by managements to avoid the responsibility when labour legislation casts welfare obligations on the real employer based on Articles 38, 32, 42, 43 and 43A of the Constitution. If livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of enterprise, the absence of direct relationship or the presence of dubious intermediaries cannot snap the real life bond.

10. related to a case where peeling and grading work is done by workers employed by independent contractors in pursuance of contract entered into with a firm of exporters. They were working at several places outside the premises of the firm. There is neither peeling nor grading shed inside the premises of the firm. E.S.I. Corporation could not prove that firm employed the workers or the firm exercised any supervision in the work executed by the contractor. The E.S.I. Court held that workers engaged by the contractors are not employees of the factory. This Court held that there is no substantial question of law arising for consideration and dismissed the appeal. This Court further held that the first limb of Section 2(9)(ii) was not satisfied since work was not on the premises of the firm and the second limb was not satisfied since there was no evidence that the firm had any supervision in work done by the workers and those workers are not employees as defined in Section 2(9)(ii) of the Act. The decisions of Supreme Court in *Management of D.M. Sahib & Sons v. Union of U.B. Workers* (supra), *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments* (supra) and *B.M. Lakshmanamurthy v. E.S.I. Corporation* (supra) were not placed before this Court. The decision in *P.M. Patel and Sons and Others Vs. Union of India (UOI) and Others*, came long after this decision.

11. In *Regl. Director v. P.R. Narahari Rao* 1986 KLJ 994 this Court dealt with a case of hotelier who got food articles prepared by independent contractors. The argument in that case was that casual employees of the contractors are employees of the hotelier by virtue of Section 2(9)(i) of the Act. It was not argued before Court that they are employees as defined in Section 2(9)(ii) of the Act. On the evidence, this Court held that they do not attract Section 2(9)(i) of the Act. Hence this decision is not of much assistance to us.

12. Almost the last of decisions is the one in *P.M. Patel & Sons v. Union of India* (supra). Petitioners before the Supreme Court were persons engaged in manufacture and sale of bidis. Factory has administrative and clerical staff and other employees. The work of rolling beedis is entrusted by the manufacturers either to workers directly employed by them in their premises or to home workers engaged through contractors. The latter prepare beedis at home after obtaining supply of raw material either directly from the manufacturers or through contractors. Alternatively, the work is entrusted by

independent contractors to the workers who are treated as their own employees and get the work done by them either at their own premises or in the dwelling houses of the workers in order to fulfil and complete contracts - entered into with the manufacturers for the supply of finished product from the raw material supplied by the manufacturers to the contractors. In the case of home workers who bring beedis to the factory, beedis which conform to the standards envisaged by the manufacturers would be accepted while those which do not conform to the standards would be rejected. Payment will be made directly or distributed through the contractors. In the case of contracts between the manufacturers and independent contractors, manufactured product is collected by the contractors from their home workers and delivered to the manufacturer. The case arose on a challenge made by the manufacturers of the validity of the notifications issued under the Employees Provident Fund Act and Scheme thereunder. The manufacturers contended that while the benefit of the Scheme is extended to workers employed in the factory itself, it cannot be extended to home workers because there is no relationship of employer and employee between manufacturers and home workers. It was also pointed out that home worker cannot be described as an employee within the definition of Clause (f) of Section 2 of the Employees Provident Fund Act and there is no power in the manufacturer to retire such home workers on the ground of superannuation and the provisions of the Scheme do not apply to them.

13. The Supreme Court in the above case referred to most of the earlier leading decisions of the court and approved the observations of Mathew, J. in *Silver Jubilee Tailoring House case* (supra) to the following effect *Sunil Kumar Dey Vs. Naihati Electrical Supply Co. Ltd.*, :

"It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction."

Ultimately the Supreme Court held as follows:

"In the context of the conditions and the circumstances set out earlier in which the home workers of a single manufacturer go about their work, including the receiving of raw material, rolling the beedis at home and delivering them to the manufacturer subject to the right of rejection there is sufficient evidence of the requisite degree of control and supervision for establishing the relationship of master and servant between the manufacturer and the home worker. It must be remembered that the work of rolling beedis is not of a sophisticated nature,

requiring control and supervision at the time when the work is done. It is a simple operation which, as practice has shown, has been performed satisfactorily by thousands of illiterate workers.... In the circumstances, the right of rejection can constitute in itself an effective degree of supervision and control."

14. As indicated by Mathew, J. in Silver Jubilee Tailoring House case (supra), all the factors relating to a particular case must be considered and the decision taken on balance of conflicting factors. The E.S.I. Court adverted to the report and the evidence of P.W.I to the effect that they have no control over the master-weavers and they supervise their work and the work is done outside the factory, that the work is given to outsiders on contract basis and contractors get work done by their workers. The E.S.I. Court did not advert to other materials available in the case. It is pointed out by learned counsel for respondent that yarn is supplied to master-weavers and they get the yarn woven by workers in their looms and the finished product is sold to respondent for a price. Ext.P4 is the register of master-weavers account. The register contains the following columns: .Name of master- weaver, Count, Hangs, Rate per hang, Cost of yarn, Metres, Rate less 6 1/4%, Cost of cloth and "cash for wages". Learned counsel for respondent would explain that the last column represents differences between the cost of cloth and cost of yarn. We find this is not so in all cases. In some cases the column "cash for wages" shows amounts far less than the difference between what is shown as cost of cloth and cost of yarn. The columns "cash for wages" and "rate less 6 1/4%" are significant. Column "cash for wages" may indicate that this is the amount handed over to contractor for payment of wages to workers who actually do the work. We asked learned counsel for the respondent whether respondent is bound to receive all the cloth brought by master-weavers. Learned counsel replied in the negative and stated that only cloth which conforms to quality and standard are received. This may mean that substandard cloth is rejected or if accepted, lesser amount will be paid. These circumstances were not taken into consideration by the E.S.I. Court.

15. Learned counsel for the respondent contends that workers are employed by the master weavers to weave yarn in the looms belonging to them. It is stated that master-weavers have invested in the loom. We do not think that that would make any difference in this case. Master-weavers receive commission under the contract. The fact that their looms are used by the workers must have been taken into consideration in fixing the remuneration payable to them.

16. The facts disclosed from the evidence and arguments are as follows: Raw materials belong to and are supplied by the respondent. Work is admittedly done by workers engaged by the master-weavers in premises outside the establishment of the respondent. Finished fabrics are returned to the respondent who makes payments. Amounts required to be paid as wages are separately shown in the accounts. It is evident that the master- weavers will retain their commission or remuneration due to them for their investment in time. Right of rejection of substandard cloth spells out effective degree of supervision and

control as observed in *P.M. Patel & Sons v. Union of India and Ors.* (supra). This principle can be applied where lesser amounts are paid for such cloth. Identical work as is done by outside workers is done in the premises of the factory of the respondent who employs employees for that purpose. Having regard to all these circumstances and the purpose of the statute as explained by the decisions of the Supreme Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments* (supra) and *B.M. Lakshmanamurthy v. E.S.I. Corporation and Ors.* decisions which were not taken into consideration by the E.S.I. Court, we are of opinion that the court has committed a substantial error of law in arriving at a decision in favour of the respondent. We hold that the out-workers who are paid wages through contractors are employees as defined in Section 2(9)(ii) of the Act since they do the work which is ordinarily part of the work of the factory of the respondent and which is incidental to the purpose of the factory and which is subject to the supervision of the principal employer. This conclusion cannot be faulted merely because respondent has tried to comouflage the real relationship by creating smoke-screen of sale of yarn and purchase of woven cloth.

17. Learned counsel for the respondent contended that the transaction between the respondent and the master weavers amounts to contract of bailment within the meaning of Section 148 of the Indian Contract Act and therefore there is no question of employer-employee relationship arising between the respondent and the actual workers. A bailment is delivery of goods by one person to another for some purpose, upon a contract that goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them. Respondent's case, as already indicated above, is that yarn is sold to the master-weaver and ultimately there is a purchase of woven cloth. If that be so, certainly the transaction cannot amount to bailment. The only basis for the relationship is that the master-weaver is mere contractor through whom actual workers are engaged. This contention therefore fails.

18. We are not satisfied that the E.S.I. Corporation has arrived at the correct amount of wages paid to the employees and calculated the correct contribution due. Wages paid to the employees and not the total amount paid to master-weavers is to be reckoned as wages for the purpose of computing the contribution. This aspect of the case was evidently not adverted to by the Officers of the Corporation in arriving at the total amount of wages and the total contribution due. It is therefore necessary that the appellant applies his mind to this question and arrives at the correct contribution amount due.

19. In the result, the impugned order is set aside and the appellant is directed to determine the contribution amount due from the respondent after proper enquiry in accordance with law and in the light of the observations contained in this judgment. The appeal is thus allowed, but in the circumstances without costs.