

(1996) 08 KL CK 0048
In the High Court Of Kerala
Case No : O.P. No. 4720 of 1990

Spencer and Co. Ltd.

APPELLANT

Vs

Deputy Labour Commissioner

RESPONDENT

Date of Decision : 23-08-1996

Acts Referred:

Industrial Disputes Act, 1947 — Section 2
Kerala Shops and Commercial Establishment Act, 1960 — Section 18(2), 2(6), 3(1), 3(2)

Citation : (1997) 1 ILR (Ker) 571 : (1996) 2 KLJ 353 : (1997) 1 LLJ 664

Hon'ble Judges : G. Rajasekharan, J

Bench : Single Bench

Advocate : T.L. Ananthasivan, Shaji Mathew and Biju Varghese, for the Appellant; A. Antony and A. Antony (Jr.), for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasekharan, J.—The Petitioners are the Spencer and Company Ltd., 769, Anna Salai, Madras and its Branch Manager respectively.

2. The second respondent was appointed as a Salesman Trainee for a period of six months with effect from February 22, 1982 for a stipend of Rs. 400/- per mensem. Ext.P-1 is the order of appointment. The period of training was being extended and it was terminated with effect from September 15, 1986 on payment of one month's stipend in lieu of notice and a compensation amount of Rs. 2,450/-. The second respondent filed an appeal u/s 18(2) of the Kerala Shops and Commercial Establishments Act, 1960 (for short "the Act") before the first respondent, namely the Deputy Labour Commissioner, Kozhikode (originally the appeal was filed before the Deputy Labour Commissioner, Trichur which was transferred to the Deputy Labour Commissioner, Kozhikode). It was contended before the 1st Respondent that the second respondent was not an employee as defined u/s 2(6) of the Act. He was engaged only as a salesman trainee purely on provisional basis, that he is not entitled to question the termination of his

traineeship, that the termination was pursuant to the decision of the management to reorganise the functions of the company's business on more economical lines, and that the second respondent is not entitled to any relief.

3. The first respondent allowed the appeal as per the original of Ext. P-2 dated, March 12, 1990 and it was directed that the second respondent shall be reinstated with continuity of service and back wages and in default, to pay a compensation of Rs. 63,450/- inclusive of back wages, notice pay, D.A. etc. That order of the first respondent is challenged in this original petition on the grounds that the second respondent was not an employee u/s 2(6) of the Act, that the second respondent was mainly travelling for canvassing business for the company and he comes within the exemption provided u/s 3(1) of the Act, that the letter of appointment, was misinterpreted by the Authority, that the D.A. awarded is excessive and that the termination was quite valid and it is in accordance with the terms of the traineeship or appointment.

4. The first argument advanced by the learned counsel for the petitioners is that the 2nd respondent was not an employee as defined u/s 2(6) of the Act and even assuming that he was an employee, he falls under the exemption in Section 3(1) (b) of the Act.

5. The term "employee" is defined u/s 2(6) as:

"employee" means a person wholly or principally employed in and in connection with, any establishment and includes an apprentice".

It was not disputed that the second respondent was employed in an establishment.

6. Ext. P-1 would read that the second respondent was enrolled as a salesman trainee for a period of six months from February 22, 1982 at the Engineering Division at Kozhikode Branch of the Company. In the second paragraph of Ext. P-1 it is mentioned:

"It must be understood, that you are not an employee and are not entitled to any Dearness Allowance or other privileges of an employee but you will be subject to the rules of discipline and other Company's rules".

Then in paragraph (3) of Ext. P-1, it is stated:

"It must be further understood that we shall be at liberty to terminate your apprenticeship at any time, without having to give any reason for such termination".

In Paragraph (4), it is stated that the training period will come to an end automatically on August 21, 1982.

7. Even though as per Ext. P-1 the term of appointment was to expire on August 21, 1982, the appointment was extended and the termination was only in 1986, after a lapse of about four years. Even though in Ext. P-1, it is mentioned that

the second respondent will not be entitled to any D.A., actually he was being paid D.A. is an admitted fact. According to the second respondent, Ext. P-1 was given a go-by by the employer and he was allowed to continue as an employee and he was drawing wages and clearness allowance. It is the further case of the second respondent that his status in the establishment could be established by the production of pay sheets from 1982 to September 1986, ESI Register, Muster Roll, P.F. Register and original voucher towards Onam advance. The petitioners herein were called upon to produce those documents. But instead of producing those documents, they filed a statement which is evasive in its very nature. The reason attributed for non-production is that the registers are permanent registers which are in use every day and only photo copies could be produced. Even photo copies were not produced before the first respondent. In the circumstances, an adverse inference has to be drawn and the contention of the 2nd respondent that he was a regular employee of the petitioners has to be accepted.

8. The next contention which was emphasised by the learned counsel for the petitioner is that even assuming that the second respondent was an employee as defined u/s 2(6) of the Act, he squarely falls u/s 3(1)(b) exemption and so, is not an employee. The relevant provision reads:

"3. Exemptions:- (1) Nothing contained in this Act shall apply to -

(b) persons whose work mainly involves travelling, and persons employed as canvassers and caretakers and whose names do not appear in the muster rolls".

9. Referring to Ext. P-1, it was argued that the very appointment of the second respondent under Ext. P-1 was as a salesman and his job involved travelling and canvassing business for the company. Even accepting that contention, the requirements of Clause (b) of Section 3(1) are not satisfied. It is not enough to attract the exemption u/s 3(1)(b) that the work of the person mainly involved travelling and he was employed as a canvasser or caretaker, but it was further to be proved that the second respondent's name does not appear in the muster rolls.

10. To show that the second respondent's name does not appear in the muster rolls, the best evidence is the muster rolls itself. The petitioners have no case that they were not keeping muster rolls. There is no specific averment anywhere in the statement filed in answer to the application filed by the 2nd respondent herein before the first respondent for calling for production of the documents, that the company was not keeping muster rolls and the second respondent's name does not appear in the muster rolls. On the other hand, as stated earlier, the reply was evasive and there was no justification for the non-production of the muster rolls. This aspect of the matter was noticed by the first respondent in paragraph (6) of his order. Necessary adverse inference has to be drawn and it has to be found that the second respondent's name actually appears in the muster rolls. So the exemption u/s 3(1)(b) of the Act is not attracted. That would mean that the second respondent was an employee as defined u/s 2(6).

11. Referring to the decisions reported in 1973 KLT 798 J. & J. De Chane Distributors v. State of Kerala & Or 1987 II LLU 180 M.J. Joseph v. Labour Court & 1992 I CLR 992 Glaxo Laboratories (I) Ltd. v. State of Kerala. It was argued by the learned counsel for the petitioners that the second respondent whose work involved travelling and canvassing of business, is not an employee. All those decisions were entered interpreting Section 2(5) of the Industrial Disputes Act, 1947 which defines a "workman" as follows:-

""Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act, in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person". (We are not concerned with clauses (i), (ii), (iii) and (iv)).

12. It has to be noted that the definition of "workman" in the Industrial Disputes Act, 1947 specifically mentions the categories of persons who would fall within the definition of "workman". These categories included persons employed in any industry to do any manual, unskilled, technical, operational, clerical or supervisory work. The definition of "employee" u/s 2(6) of the Kerala Shops and Commercial Establishments Act is much wider in scope and the nature of work entrusted with the employee is not material unless the exception clause is attracted. "Employee" means a person wholly or principally employed in and in connection with any establishment and includes an apprentice. So, for becoming an employee, it is enough that he was employed wholly or principally in connection with the establishment or in the establishment. It may be repeated that the nature of work becomes relevant only if he falls under the exemptions - in the case at hand, exemption in Section 3(1)(b). In the circumstances, the decisions cited by the learned counsel cannot be applied to the facts of this case and they have no relevance in the matter at hand.

13. The petitioners herein were pleading an exemption and the burden of proof was on them. Further, the best evidence to prove that the second respondent falls under the exemption, was the muster rolls which was in the custody of the petitioners herein. It was upto them to produce that and prove that the second respondent's name does not find a place in the muster rolls. In spite of the second respondent calling for the muster rolls and other records, the employer failed to produce these records without any justifiable cause. That leads only to the inference that if the documents were produced, they would have gone against the contention of the employer. The inescapable conclusion is that the second respondent was an employee under the petitioner. His services were terminated without justifiable cause and the first respondent in Ext. P-2 order has entered the right conclusions and findings in that regard. There is no error

apparent on the face of the record, no error of law or fact and Ext. P-2 order is not liable to be interfered with in this proceeding.

The original petition is without merit and hence dismissed. No costs.