

(1978) 02 MAD CK 0052

In the Madras High Court

Case No : Writ Petition No. 6695 of 1973

The Management of Messrs. Whiteway Dresses

APPELLANT

Vs

The Presiding Officer, II Additional Labour Court and Another

RESPONDENT

Date of Decision : 22-02-1978

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 33(C)(2)
Tamil Nadu Industrial Establishments (National and Festival Holidays) Act, 1958 —
Section 3, 5, 5(3)
Tamil Nadu Industrial Establishments (National and Festival Holidays) Rules, 1959 —
Rule 1, 6
Tamil Nadu Shops and Establishments Act, 1947 — Section 10(2), 11, 11(2), 2(12), 25

Citation : (1978) ILR (Mad) 267

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Advocate : A.R. Jagadeesan, for the Appellant; V. Krishnan, for the Respondent

Final Decision : Allowed

Judgement

Ramanujam, J.—The Petitioner herein is a partnership concern engaged in the manufacture and sale of ready-made garments at No. 9. Memorial Hall Street, Madras-3. The second Respondent herein along with seven others filed Claim Petition No. 15 of 1971 on the file of the Labour Court, first Respondent herein, u/s 33(C)(2) of the Industrial Disputes Act claiming in all a sum of Rs. 4,448 as and for holidays and leave wages for a period of six years ending 1970. We are not concerned with the claim put forward by the other claimants in this writ petition. We are concerned in this case only with the claim put forward by the second Respondent.

2. The claim was resisted by the Petitioner on the ground : (i) that the second Respondent is not a person employed as defined in Section 2(12) of the Tamil Nadu Shops and Establishments Act, 1947 (herein after referred to as the Act) (ii) that the second Respondent had no manner of right for wages for (sic) days and for the national and festival holidays when the shop remained closed and (iii)

that he is not eligible for any relief under chapter 6 of the Act.

3. The first Respondent, however held that the second Respondent is a person employed as defined in Section 2(12) of the Act, that therefore he is entitled to claim the benefits of the Act, and that he is entitled to the sum claimed by him in the claim petition. In this view the labour Court awarded a sum of Rs. 4.448 as claimed by the second Respondent, by an order, dated 14th June. 1973. The validity of the said award has been challenged in this writ petition.

4. Firstly, it is contended that the second Respondent cannot be brought within the definition of a person employed u/s 2(12) of the Act. Secondly, it is contended that even, if the second Respondent is taken to be a person employed, he is not entitled to the entire amount claimed by him, and that the first Respondent erred-in-allowing the claim put forward by the second Respondent in its entirety, overlooking provisions of the said Act and the Tamil Nadu National and Festival Holidays Act under which the second Respondent will be entitled if at all only to a lesser sum.

5. On the question as to whether the second Respondent is a person employed as defined in Section 2(12) of the Tamil Nadu Shops and Establishments Act, 1947, the learned Counsel for the Petitioner refers to the facts established in this case and contends that the second Respondent is only a piece-rate worker and is not in the regular employment of the Petitioner. According to him, there was no compulsion for the second Respondent to come and work, the amount paid to him always depended upon the number of garments stitched by him and there was no control or supervision of the work to be done by the second Respondent as a tailor except for the fact that the ultimate garment stitched by him should be in accordance with the design given by the Petitioner. The learned Counsel for the Petitioner referred to the decision of a Division Bench of this Court in Ratnaswami Mudaliar and Ors. In re ILR (1959) Mad. 245, in support of his plea that such a piecerate worker cannot be brought within the definition of & person employed. That was the case of a weaving concern where bed sheets and towels were manufactured by piece rate workers. The question arose whether there was relationship of master and servant between the owner of the weaving factory and the persons who undertook the job of weaving bed sheets and towels on the basis of piece-rates, and whether these persons would come within the definition of the worker as defined under the Factories Act. This Court held that there being no effective control or supervision of the owners of the factory sheds in which weaving was done over the persons working in the sheds, there was no contract of service between them and that the miscellaneous, heterogeneous and irregular piece workers employed herein cannot be treated as workers as defined in the Factories Act. According to the learned Judges, it was purely a case of contract for service of independent contractors and the relationship between them will not attract the provisions of the Factories Act.

6. However in view of the later decisions of this Court and of the Supreme Court, the above decision of this Court cannot be said to hold the field. In D.C. Dew an

Mohideen Sahib and Sons v. United Bidi Workers Union (1964) 2 L.L.J. 633, the Supreme Court had occasion to deal with the scope of the definition of workman u/s 2(s) of the Industrial Disputes Act. In that case a bidi manufacturer engaged a number of persons on contract for getting the work of rolling g the bidis done and such persons in turn engaged a number of other persons who took the leaves home for cutting them in proper shapes and rolling the bidis. The work of re mug the bidis was done by such persons in the premises of the intermediaries with the materials supplied to them by such, intermediaries. I he necessary materials like thread, bidi leaves and tobaaco were supplied to the intermediaries by the bidi manufacturer, Payment to the bidi (sic) was made on piece-rate basis by the intermediaries. The inter mediaries were paid by the manfacturer the commission as well as the piece-rates. On these materials, the Tribunal bad held that the real employer of the bidi rollers was the bidi manufacturer. When the matter was taken to the Supreme Court, it took the view that the bidi rollers were the employees of the bidi manufacturer, that the intermediaries were merely branch managers appointed by the bidi manufacturer, and that the relationship of master and servants subsisted between the bidi rollers and the bidi manufcturer. After referring to certain earlier decisions rendered by it, the Supreme Court ultimately observed:

It is in the light of these decisions that we have to decide whether the workmen who work under the so-called independent contractors in these cases are workmen of the Appellants. It has been found by the tribunal and this view has been confirmed by the appeal Court that the so-called independent contractors were mere agents, or branch managers of the Appellants. We see no reason to disagree with this view taken by the tribunal and confirmed by the appeal Court on the facts of these cases. We are not unmindful in this connection of the view taken by the learned single Judge when he held that on the agreements and the facts found the so-called intermediaries were independent contractors. We are, however of opinion that the view taken by the appeal Court in this connection is the right One. As the appeal Court has rightly pointed out, the so-called independent contractors were indigent persons, who were in all respects under the control of the Appellants. There is in our opinion little doubt that this system has been evolved to avoid regulations under the Factories Act.

7. In a later decision in Madurai General Workers Union v. Brinda Textiles Handloom Factory (1968) 2 L.L.J. 101. Ramakrishnan J., had held that even when the workers are paid on piece-work basis they can be treated as workmen under the Industrial Disputes Act, if there ID regularity of attendance, if they have to work on specified warps supplied by the management during specified hours, and if there are supervision and control in making the article.

8. In this case, it has been found that the Petitioner's shop is open for specified hours and persons like the second Respondent have to work during these hours; that there is regularity of attendance; that the second Respondent is to stitch the garments inside the Petitioner's manufactory and that ultimate garments

stitched by the second Respondent should be in accordance with the design given by the Petitioner. On the evidence, it appears to be very clear that the persons like the second Respondent have been employed to work inside the Petitioner's premises for stated hours, though wages paid to them depend upon the number of garments stitched out of the materials supplied by the Petitioner. The learned Counsel for the Petitioner says that except as to the proper design of the garments there is no control on the work done by the second Respondent. I am of the view, having regard to the nature of the work undertaken by the second Respondent of stitching the garments which have to be ultimately sold to the market, the Petitioner, should have necessarily a quality control. It is also not in dispute that if the garments are not stitched as per the instructions of the Petitioner, he can ask the second Respondent to rectify the defects, if any. That means that the Petitioner has got a right of rejection also of the work done by the second Respondent. There is also a register maintained showing the number of days worked and the weekly payment made by the Petitioner to persons like the second Respondent. That also indicates that there is some regularity in the work done by the second Respondent and others, within the premises of the Petitioner. From the mere fact that the second Respondent has been paid on piece-rate basis rather than on a regular monthly basis, it cannot be said that there is no master-servant relationship between the Petitioner and the second Respondent. The mode of payment cannot decide the issue Whether or not the relationship between the Petitioner and the second Respondent is one of master-servant. It is always open to the employer to choose the mode of payment; it may be either on the basis of number of hour of work or on a piece-rate basis. Therefore, the mere fact that the second Respondent was paid on piece-rate basis will not take him outside the definition of a person employed, if there are other circumstances which indicate that his employment was regular and his work was under the control of the Petitioner. In my view, therefore, the first Respondent is right in holding that the second Respondent is a person employed and that he can maintain the claim petition against the Petitioner under the provisions of the Shops and Establishments Act.

9. The next contention of the learned Counsel for the Petitioner is that the Labour Court is in error in accepting the claim of the second Respondent in toto without going into the question as to whether the second Respondent is entitled to any payment under the provisions of the Shops and Festival Holidays Act. This contention of the learned Counsel has however to be accepted. In the claim petition, as far as the second Respondent is concerned, the following three amounts were claimed.

A verage piece-rate wages per day Rs. 8

1.

Wages due for weekly holidays 52 weeks x 6 years Rs. 8

2,496.00

2.

Wages due for leave 36 days x 6 years Rs.8

1,568.00

3.

Wages due for National Festival Holidays 8 days x 6 years Rs. 8

384.00

4448.00

It was stated in the counter statement of the Petitioner that there is no liability for payment of the amount claimed apart from saying that the second Respondent not being a person employed was not entitled to claim any amount u/s 33(c)(2) of the Act.

10. A perusal of the impugned order of the Labour Court indicates that it first took the question whether the second Respondent is a person employed and after holding that he is a person employed is straightaway proceeded to hold that the claim made by the second Respondent is reasonable and therefore it has to be allowed. In doing so, the Labour Court has completely shut its eyes to the various provisions of the Tamil Nadu Shops and Establishments Act and the National and Festival Holidays Act.

11. In this case, a sum of Rs. 2,496 has been claimed as wages due for weekly holidays and that has been calculated for 52 weeks for six years at the rate of Rs. 8 per day. Next, a sum of Rs. 1,568 has been claimed as wages due for earned leave, sick leave and casual leave, for 36 days for a period of six years at the same rate of Rs. 8 per day. It has already been noted that the second Respondent has been paid on a piece rate basis and on a regular monthly basis. The register of wages which has been marked as exhibit Rule 1 also shows that the second Respondent along with some others has been paid wages on weekly basis for the number of garments made by him. The wage register indicates that the different amounts were paid for different weeks. In this case the second Respondent has claimed wages under three heads at the rate of Rs. 8 per day. He has not shown how the rate of Rs. 8 per day has been claimed by him. The average rate of wages per day has to be calculated by dividing the total wages paid to a person employed by year or month, whichever is taken as basis. Therefore, the Labour Court should have actually ascertained the ordinary average rate of wages by dividing the total wages paid in a particular month by the number of days worked during that month. In this case, the Labour Court has blindly accepted the wage rate at Rs. 8 per day as claimed by the second Respondent without going into the question as to whether it represents the average rate of wage paid per day.

12. Item I, which relates wages claimed for weekly holidays has to be dealt with and Section 11 of the Tamil Nadu Shops and Establishments Act, 1947. That

section says that every shop shall remain entirely closed on one day of the week and that the persons employed in the shop shall be allowed in each week a holiday of one whole day. As regards the claim for wages for earned leave, sick leave and casual leave, we have to look into Section 25 of the Act. Section 25(1) of the Act entitled a person employed to have for a period of 12 days earned leave after twelve months' continuous service in the subsequent period of twelve months, provided that such holidays cannot be accumulated beyond a period of 24 days. Explanation to the said sub-section provides for the manner of determining the continuous period of service. Sub-section (2) entitles a person employed to have 12 days leave on the ground of sickness incurred or accident sustained by him and also to casual leave with wages for a period of 12 days on any reasonable grounds. Sub-section (3) provides the conditions which are to be satisfied before a person employed becomes entitled to 12 days annual holidays. Thus before a person employed is granted the monetary compensation in lieu of weekly holidays, annual holidays, sick leave and casual leave, certain conditions set out in Section 25 have to be complied with.

13. The learned Counsel for the Petitioner contends that in respect of sick leave and casual leave, there is no provision for encashment of the leave not availed of and therefore the second Respondent is not entitled to claim compensation u/s 33(C)(2) in respect of sick leave and casual leave not availed of. It is also contended that the claim for wages in lieu of annual holidays not availed of, if at all, has to be restricted to a period of 24 days as provided under the Act. It is also contended that even for the maximum period of 24 days of annual holidays the person employed can encash the same only in the event of conditions set out in Sub-section 3 of Section 25 being satisfied and not otherwise. As regards the claim made under the third head which relates to national holidays, before a person employed claims compensation for those holidays, he must satisfy the conditions provided in Sub-section 3 of Section 5 of the National and Festival Holidays Act read with Rule 6.

14. However, in this case, as already stated the Labour Court has chosen to straightaway allow the claim made by the second Respondent without going into the question as to the second Respondent's entitlement for the three items of claim made by him and as to the quantum to which he is entitled under the provisions of Sections 10(2), 11(2) and 25 of the Shops and Establishments Act and Sections 3 and 5 of the National and Festival Holidays Act.

15. The learned Counsel for the Petitioner referred to certain decisions touching the interpretation of Section 25 of the Shops and Establishments Act and they are : *Dalmia Cements Ltd. v. Their Workmen* (1961) 2 L.L.J. 130. (2) and *The Bombay Gas Co. Ltd. Vs. R.N. Kulkarni and Another*, .

16. As the Labour Court has not considered the second Respondent's claim in the light of the statutory provisions set out above, I have to remit the matter to the Tribunal for fuller consideration and therefore it is not necessary to consider the scope of the above decisions at this stage. The order of the Labour Court is

therefore set aside with a direction to consider the second Respondent's claim in the light of the provisions set out above and to decide (1) whether the second Respondent is entitled to the claims of salary under the three heads set out above and (2) if so, what is the quantum of money payable by the Petitioner to the second Respondent in the light of the above provisions. This writ petition is, therefore, allowed. Both the parties are at liberty to adduce oral and documentary evidence with reference to the above two questions. The finding given by the Labour Court that the second Respondent is a person employed is affirmed. No costs.