
(2014) 12 KL CK 0155
In the High Court Of Kerala
Case No : W.P.(C) No. 17688 of 2009

Theresa Jose

APPELLANT

Vs

Sub Inspector of Police

RESPONDENT

Date of Decision : 17-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10(4)
Kerala Headload Workers Act, 1978 — Section 1, 11, 13(1), 13(2), 18
Tamil Nadu General Sales Tax Act, 1959 — Section 2(d), 2(d)(iii)

Citation : AIR 2015 Ker 168 : (2015) 3 KHC 487 : (2015) 1 KLJ 714 : (2015) 1 KLT 485

Hon'ble Judges : Ashok Bhushan, Acting C.J.;A.V. Ramakrishna Pillai, J;A.M. Shaffique, J;A.K. Jayasankaran Nambiar, J;A. Hariprasad, J

Bench : Full Bench

Advocate : S. Dileep and K. Paul Kuriakose, Advocates for the Appellant; Tom K. Thomas, Spl. Government Pleader, Asok M. Cherian, K.P. Wilson, K.R. Vinod, S. Kannan and P.M.M. Najeeb Khan, Advocates for the Respondent

Judgement

Ashok Bhushan, Actg. C.J.

1. A Division Bench of this Court while hearing this Writ Petition made a reference to a Full Bench to hear the case by its reference order dated 14.07.2009. A Full Bench consisting of three Hon'ble Judges consequently heard the matter and opined that reconsideration of the Full Bench judgment in Raghavan v. Superintendent of Police (1998 (2) KLT 732 (F.B.)) is necessary and it is appropriate that the issue be considered by a Larger Bench. Thus by a reference order dated 01.12.2010 by three Judges, this matter has been placed before this Larger Bench. The brief facts of the case need to be noted first before advertng to the issues which has arisen in this reference. The petitioner, proprietrix of "M/s. Cochin Granites" is running a business establishment and engaged in the trading of marble; granite, ceramic tiles etc. The business establishment of the petitioner is functioning in the compound of her residential

house which is situated in a plot of 128 cents. The petitioner has permanent employees who had been employed for segregating and stacking of different type of marbles, granites, tiles etc. based on their variety, design, colour etc., and their duties also include interaction with customers, sale of the items, cutting and polishing of slabs and doing its unloading work from lorries while such items come in the establishment. Petitioner's case is that goods that come to her premises are to be unloaded inside the premises by her own employees who are persons specifically trained for uplifting heavy slabs using modern forklifts and moving cranes. Petitioner claims that about two or three trucks in a month may come to her business establishment on which occasion the abovementioned work of loading and unloading arises. It is contended by petitioners that the 4th respondent Union, Headload and General Workers Union (C.I.T.U.) and its members demanded that they should be engaged to do the unloading work in the petitioner's establishment. Petitioner informed that she had her own permanent workers who are attending the whole works including loading and unloading of goods from trucks. Hence she does not require the services of any headload worker. On 21.06.2009 when a lorry carrying marble slabs came into the business establishment of the petitioner, 15 persons claiming to be members of 4th respondent Union entered into the premises and obstructed the work. Petitioner also filed a complaint dated 21.06.2009. On the same day when at 10 p.m. the persons again assembled in front of petitioner's house, she informed the police and thereafter lodged F.I.R. and registered crime No. 768/09. Petitioner's further case is that 4th respondent Union have staged a "dharna" very near to the petitioner's establishment. Petitioner requested the 1st respondent to render necessary police protection, however, protection was not provided. In the circumstances, petitioner filed the present Writ Petition praying for the following reliefs:

"A. To call for the records and proceedings of respondents 1 to 3 relating to exhibits P1 to P3 and after scrutiny thereof, to direct respondents, 1 to 3 to afford adequate and effective police protection to the petitioner, her establishment namely, M/s. Cochin Granites, 17/691B, Church Road, Mundanveli P.O., Kochi-682 507, her permanent workers and the articles stored in her establishment, by the issue of a writ of mandamus or any other appropriate writ, order or direction.

B. To declare that the petitioner has the right to get the loading/unloading work of her establishment done, utilizing the services of her permanent workers, who are general supporters of the 4th respondent-Union;

C. To grant any other further or consequential relief including any interim reliefs, as may be prayed for and deemed fit by this Hon"ble Court."

2. A counter affidavit has been filed by the 4th respondent pleading that petitioner has no permanent workers having statutory registration under Rule 26A of the Kerala Headload Workers Rules, 1981. The area in which the petitioner's establishment is situated is a Scheme covered area where the Kerala

Headload Workers (Regulation of Employment and Welfare) Scheme, 1983 is notified. In the scheme notified area, the workers who are having Rule 26A card can do the work. Hence members of the 4th respondent Union are entitled to do the headload work concerned in the petitioner's premises. The so called workers of the petitioner, enlisted in Ext. P4, cannot do the headload work as they have no valid registration as per statute and it is the members of the 4th respondent Union who alone are entitled to do the loading and unloading work in the petitioner's establishment.

3. When the Writ Petition came up for hearing before a Division Bench, the Division Bench noticed a Full Bench judgment of this Court in *Raghavan v. Superintendent of Police* (1998 (2) KLT 732 (F.B.)). The ratio of Full Bench case was noted laying down that in case it is an area covered by the Scheme, the permanent workers cannot do the loading and unloading work unless they are registered under Rule 26A. The Division Bench however observed that the above rule will be applicable only when the Act is made applicable to the petitioner's establishment. Following issues were noticed by the Division Bench in paragraph 2:

"xx xx xx xx

Therefore the second question as to whether the petitioner's establishment is one coming under the purview of the Act looms large. If it is not an establishment coming under the purview of the Act, then the question of any worker being registered under the Act will not arise. In this connection, we may refer to S. 2(j) of the Act. S. 2(j) of the Act defines the term "establishment" as an establishment specified in the Schedule and includes the precincts, thereof. xx xx"

The Division Bench noted the Schedule as per S. 2(j) of the Act, which has specified the "establishments" in paragraph 3 of the judgment.

4. We have heard Sri K. Paul Kuriakose, learned counsel for the petitioner, Sri Asok M. Cheriyan and Sri P.M.M. Najeel Khan for respondents 4 and 6 respectively as well as Sri Tom K. Thomas, Special Government Pleader appearing for the State.

5. Learned counsel for the petitioner in support of the Writ Petition contended that the establishments detailed in the Schedule does not cover the petitioner's business establishment where headload work is not the dominant work. He submits that the petitioner's establishment is engaged in trading of marbles/granites/tiles etc., and in connection with the trading, loading and unloading work occasionally takes place, i.e., twice or thrice in a month which is performed by the petitioner's permanent workmen, hence there is no obligation of engaging any headload workers by the petitioner. He submits that item No. 5 of the Schedule indicates that an establishment shall be covered by the Act only when the main work of the establishment is loading and unloading and other works are incidental only. He submits that the petitioner's business being not covered by

the term "establishment" defined in the Schedule, the 4th respondent Union has no right to claim work in the establishment or to create any obstruction.

6. Learned counsel appearing for 4th respondent submitted that the area being a scheme covered area petitioner cannot do the work of loading and unloading by engaging her own permanent workers, who are having no registration under Rule 26A. It is submitted that in a scheme covered area the headload work of loading and unloading can be done only through registered workers. He submits that those workers who are registered under Regulation 6A of the 1983 Scheme are entitled to carry on the work. He submits that Item No. 5 of the Schedule cannot be given a restricted meaning so as to deny the right of headload workers to do the loading and unloading work. He submits that all establishments are covered by the Schedule where loading and unloading works are done.

7. Learned counsel appearing for 6th respondent has also contended that the area is a scheme covered area and the work of loading and unloading can be done only by registered workers.

8. Learned counsel for the parties have referred and relied on various judgments of this Court which shall be considered while considering their submissions in detail.

9. The Full Bench in turn made a reference to consider the issues by a Larger Bench. From the submissions of learned counsel for the parties and from the reference order as noted above, following are the three main issues which arise for consideration in this Writ Petition.

i. What shall be the interpretation of "establishments" in item No. 5 of the Schedule and whether petitioner's establishment shall be covered by item No. 5 of the Schedule; and

ii. In what manner and up to which extent the Full Bench judgment of this Court in *Raghavan v. Superintendent of Police* (1998 (2) KLT 732 (F.B.)) needs to be reconsidered.

All the issues being interconnected, they are being taken together.

10. The Kerala Headload Workers Act, 1978, the 1981 Rules and the 1983 Scheme framed thereunder, have to be understood before answering the issues. The Kerala Headload Workers Act, 1978 has been enacted to regulate the employment of headload workers in the State of Kerala and to make provision for their welfare, for the settlement of disputes in respect of their employment or non-employment and for matters connected there with. S. 2 is the definition clause which defines in S. 2(g) "contractor", S. 2(h) "dispute", S. 2(i) "employer", S. 2(j) "establishment" and S. 2(m) "headload worker". S. 3 contemplates appointment of Conciliation Officers. S. 6 of Chapter III deals with hours and limitations of employment and wages. S. 11 provides for enforcement of payment of wages. Chapter IV deals with "Schemes".

Section 13(1) empowers the Government by notification in the Gazette to make one or more Scheme or schemes for any employment or group of employments in one or more area or areas specified in the notification, and by similar notification add to, amend or vary any such scheme or substitute another scheme for any such scheme. S. 13(1) is quoted below:

"13. Scheme.--(1) The Government by notification in the Gazette to make one or more Scheme or Schemes for any employment or group of employments in one or more area or areas specified in the notification, and by similar notification add to, amend or vary any such scheme or substitute another scheme for any such scheme:

Provided that no such notification shall come into force unless a draft therefore is published in the Gazette and unless it is finalised after considering objections and suggestions received within one month of the publication of such draft in the Gazette."

Section 13(2) empowers the State to make a scheme. S. 18 provides that Government may, by notification in the Gazette, appoint a Committee for every revenue district in the State and on recommendation of the Board, as many Special Committees as they deem fit in any area falling within any industrial township or other special areas of importance in the State. S. 21 provides for settlement of disputes. S. 25 provides for registration of headload workers. S. 26 provides for maintenance of registers and records by employers. Sections 25 and 26 are quoted below:

"25. Register of headload workers.--(1) Such authority or officer as may be prescribed shall prepare a register of headload workers working within its or his jurisdiction.

(2) The register shall contain such particulars as may be prescribed.

(3) The register shall be maintained by the authority or officer as the case may be, in such manner as may be prescribed.

26. Maintenance of registers and records by employers.--(1) Every employer shall maintain such registers and records as may be prescribed.

(2) The registers and records referred to in sub-section (1) shall contain such particulars and shall be countersigned by such officer and shall be kept in such place, as may be prescribed."

Section 43 is the rule making power of the State. The main issue in the present case is to know the ambit and scope of "establishment" as contemplated in the Schedule of the 1978 Act Establishment has been defined in Section 2(j) which is to the following effect:

"2. Definitions:- In this Act, unless the context otherwise requires.-

XX XX XX XX

(j) "establishment" means an establishment specified in the Schedule and includes the precincts thereof;"

The schedule of the Act is quoted as follows:

- "1. Iron and Steel markets or shops.
2. Cloth and cotton markets or shops.
3. Grocery markets or shops.
4. Railway yards and goods sheds.
5. Establishments employing workers for loading or unloading of goods and other operations incidental and connected thereto.
6. Vegetable markets (including onions and potatoes markets).
7. Establishments employing workers for loading or unloading of goods and other operations incidental and connected thereto.
8. Bus stands, Boat jetties, landing places of country crafts.
9. Forest supply and sale coupes, timber and firewood depots.
10. Quarries.
- 11 Markets (including fish and meat markets) and factories employing workers, which are not covered by any other entries in this Schedule.
12. Rubber, Tea, Coffee or Cardamom Plantations where workers are employed or engaged for loading or unloading timber or wooden logs in or from or to vehicle, trolley or cart.
13. Establishments employing or engaging workers for loading or unloading Liquefied Petroleum Gas cylinders in or from, or to a vehicle."

11. As noted above, as per the 1978 Act, Rules have been framed, namely the "Kerala Headload Workers Rules, 1981". Chapter IV of the Rules deals with "Register and Records, Rules prescribed under Chapter IX." Rule 26A of 1981 Rules is relevant for the present case which deals with Registration of headload workers. Rule 26A of 1981 Rules is quoted below:

"26A. Registration of Headload Workers:--(1) Any headload worker may submit his application for registration in Form IX to the Registering Authority concerned, with as many additional copies as there are employers or contractors from whom he claims to work.

(2) On receipt of such application the Registering Authority shall issue notice in Form X to the employers or contractors from whom the headload worker claims work and in area where the Kerala Headload Workers (Regulation of Employment and Welfare) Scheme, 1983 is in operation, to the Chairman, Kerala Headload Workers Welfare Board Local Committee in such area with copy of the application

inviting objections, if any, on such application.

(3) After considering the objections, if any, received and after giving an opportunity of being heard, the Registering Authority shall register the name of the headload worker in the Register of Headload Workers, on being satisfied that the headload worker is eligible for registration and communicate the fact to the parties within two weeks of such registration. The Registering Authority shall also issue identity card to the registered headload worker in Form XL. If the name is not registered, the Registering Authority shall communicate the fact to the applicant with reasons therefore.

(3A) Where the identity card of registration granted to a headload worker under sub-section (3) is defaced or accidentally lost or irrecoverably destroyed, he shall apply for a duplicate identity card along with two copies of recent photograph and a fine of Rs. 25 (Rupees twenty five only) to the Registering Authority concerned. The Registering Authority may after making necessary enquiries and satisfying himself of the genuineness, issue a duplicate identity card.

4. The registration of the person as headload worker may be cancelled by the Deputy Labour Officer or the District Labour Office concerned or where there is no post of Deputy Labour Officer in that District Labour Office, by the Asst. Labour Officer Grade I after satisfying himself on a report from Registering Authority that the Registration has been obtained by fraud or mistake:

Provided that not less than one month's previous notice in writing specifying the ground on which the registration is proposed to be cancelled shall be given by the authority empowered to cancel the registration of the headload worker, before the registration is cancelled."

Thus any headload worker may submit an application in Form No. IX and the registering authority, after having issued notice to the employer or contractor, may register the worker, after considering the objections if any.

12. Now we come to the Kerala Headload Workers (Regulation of Employment and Welfare) Scheme, 1983. As per Regulation 3 the Scheme shall come into force in an area specified in the Schedule attached to the Scheme in respect of all establishments from such date as may be fixed by the Government by Notification in the Gazette. Regulation 6 of the Scheme deals with the procedure for regulation and employment of headload workers in the Scheme covered area.

Regulation 6(1) and (2) of the 1983 Scheme are relevant in this case and are quoted below:

"6. Procedure for regulation of employment of headload workers on Scheme areas.--(1) No headload worker who is not a registered headload worker under the provision of the Kerala Headload Workers Rules shall be allowed or required to work in any area to which the Scheme applies from the date of commencement of the functional operation of Scheme in the area.

(2) From the date of commencement of the functional operation of the Scheme in any area, no headload worker who is not permanently employed by an employer or contractor shall be allowed or required to work in any area to which the Scheme applies unless he is granted a further registration under the provisions of this Scheme."

Regulation 6A of the Scheme provides for registration of Headload workers under the scheme. Rule 6A is quoted below:

"6A. Registration of headload worker under the Scheme at the commencement of the Scheme.--At the commencement of the Scheme in any area a headload worker who is not permanently employed by an employer or contractor and who is not permanently employed by an employer or contractor and who is registered under the provisions of the Kerala Headload Workers Rules may submit his application in Form A to the Convener of the Committee concerned for registration in the Committee under the Scheme along with two passport size photographs.

(2) On receipt of an application for registration as above, the Convener of the Committee or an officer authorized by him in this behalf shall verify the application with reference to the registration granted as per the provisions of the Kerala Headload Workers Rules and after such enquiry as the Convener may deem fit and after giving the applicant an opportunity of being heard, may on his being satisfied that the applicant is eligible for registration under the Scheme grant such registration to him by registering his name and particulars in the "Register of Headload Workers of the Committee" in Form D, and communicating the fact of the registration to the applicant in writing.

(3) All such Headload Workers registered under sub paragraph (2) above shall be issued an identity card in Form C. One copy of the photograph duly attested by the Convener shall be affixed in the identity card and the other copy affixed in the "Register of Headload Workers of the Committee" in Form D.

(4) If the application for registration in the committee is rejected the Convener shall communicate that fact to the applicant in writing with reasons therefore forthwith."

Regulation 7 deals with registration of employers. Regulation 7(1) is quoted below:

"7. Registration of Employers.--(1) Every employer in the area who engages or employs headload workers in or for an establishment for trade or business either directly or through a contractor shall register their names with the Committee along with such details and in the manner as may be specified by the Board within 30 days from the date of commencement of the functional operation of the Scheme in an area or within such further time that may be allowed by the Committee not exceeding 45 days."

13. Before we proceed further it is relevant to note the Full Bench judgment

which had been referred to in the reference order, i.e. Raghavan's case (supra). In paragraph 21 of the judgment following was laid down:

"21. Yet another point raised before us was the case of workers employed in the establishments who are doing the work of loading and unloading along with other duties. Learned counsel for the petitioners could contend that in such circumstances, the workers cannot be treated as headload workers coming under the definition of that term under the Act. We do not think that this is an issue where an answer in general can be given. It will depend on the facts of each case. If the worker is doing loading and unloading work regularly in the establishment, he cannot be taken out of the purview of the Act only for the reason that he is discharging some other duties also. On the other hand, if he is principally employed to carry on the work other than loading and unloading and if occasionally he does the work of loading and unloading, it may not be possible to treat him as a headload worker coming within the definition. But, as mentioned earlier, it will depend on the facts of each case."

The contention raised before the Full Bench was that workers employed in the establishment who were doing the work of loading and unloading along with other duties cannot be treated as headload workers. The Full Bench held that if a worker is doing loading and unloading work regularly in the establishment, he cannot be taken out of the purview of the Act only for the reason that he is discharging some other duties also. On the other hand, if he is principally employed to carry on the work other than loading and unloading and he occasionally does the work of loading and unloading, it may not be possible to treat him as headload worker.

The conclusion was given in paragraph 24 of the judgment which is to the following effect:

"24. In the light of the above discussion, following principles can be deduced. (1) The provisions under Chapter III of the Act are applicable to all headload workers coming within the definition of the term under the Act. (2) The definition would take in both permanent workers attached to an establishment as also workers engaged in the establishment from time to time. But, workers engaged for domestic purposes are excluded. (3) The provisions of the Act would be applicable only to those headload workers who are engaged in establishments coming under the Schedule under S. 2(j). (4) All headload workers including permanent workers attached to establishments are liable to get registered under R. 26A. (5) In the areas where the Scheme is made applicable, no headload worker who is not a registered headload worker as per the Kerala Headload Workers Rules, shall be allowed or required to work in that area. It is also necessary that such headload worker shall get a registration under the provisions of the scheme. But, a headload worker who is permanently employed by an employer or a contractor is not liable to get registration under the scheme. (6) An employer is bound to maintain registers and records in respect of every headload worker employed by him as per the provisions contained under R. 27

including supply of wage card to any headload worker. (7) It is open to the employer to engage his permanent headload workers attached to his establishment to do the loading and unloading work whether it is in an area where the Scheme is made applicable or not. (8) But, in an area where the Scheme is made applicable, if the employer requires additional workers, he has to get them through the committee formed under S. 18 and in accordance with the provisions of the Scheme. In an area where the Scheme is not made applicable, there is no such obligation on the part of the employer and he can engage workers of his own choice. But he will be bound to comply with the provisions of R. 27 in respect of such headload workers also. (9) If a headload worker permanently attached to an establishment is carrying on their work also, that, by itself, will not take him out of the definition of "headload worker" under the Act. It will depend upon the nature of the principal engagement and that again has to be decided on the facts of each case."

14. Now we come to the Schedule to the Act to find out what is the true ambit and scope of item No. 5 of the Schedule. A perusal of the Schedule indicates that the Schedule contains 13 different items. Establishment means an establishment as specified in the Schedule and includes the precincts thereof. The definition clause contains an inclusive definition. In a definition clause when expression means is used it is always treated as exhaustive and not extensive. The Apex Court in *P. Kasilingam and others Vs. P.S.G. College of Technology and others*, while considering the definition clause following was laid down in paragraph 19:

"19. We will first deal with the contention urged by Shri Rao based on the provisions of the Act and the Rules. It is no doubt true that in view of clause (3) of S. 1 the Act applies to all private colleges. The expression "college" is, however, not defined in the Act. The expression "private college" is defined in clause (8) of S. 2 which can, in the absence of any indication of a contrary intention, cover all colleges including professional and technical colleges. An indication about such an intention is, however, given in the Rules wherein the expression "college" has been defined in Rule 2(b) to mean and include Arts and Science College, Teachers Training College, Physical Education College, Oriental College, School, of Institute of Social Work and Music College. While enumerating the various types of colleges in Rule 2(b) the rule making authority has deliberately refrained from including professional and technical colleges in the said definition. It has been urged that in Rule 2(b) the expression "means and includes" has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. A particular expression is often defined by the Legislature by using the word "means" or the word "includes". Sometimes the words "means and includes" are used. The use of the word "means" indicates that "definition is a hard and-fast definition, and no other meaning can be assigned to the expression man is put down in definition." (See: *Gough v. Gough* ((1891) 2 QB 665); *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others*, . The word

"includes" when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions." (See: *Dilworth v. Commissioner of Stamps*, 1899 AC 99 at pp. 105-106 (Lord Watson); *M/s. Mahalakshmi Oil Mills Vs. State of Andhra Pradesh*, .The use of the words "means and includes" in Rule 2(b) would, therefore, suggest that the definition of "college" is intended to be exhaustive and not extensive and would Cover only the educational institutions falling in the categories specified in Rule 2(b) and other educational institutions are not comprehended."

15. The registration of Headload workers has been provided for in the establishment included in the Schedule. A worker is entitled to make an application for registration in any of the establishment in the Schedule. A perusal of the Schedule indicates that in the Schedule various establishments have been referred to without any condition or prefix for example Items 1, 2, 3 and 4 which are to the following effect:

- "1. Iron and Steel markets or shops.
2. Cloth and cotton markets or shops.
3. Grocery markets or shops.
4. Railway yards and goods sheds."

However, while referring to Item No. 5 following words have been mentioned: "establishments employing workers for loading or unloading of goods and other operations incidental and connected thereto". Item No. 7 also uses the same expression "establishments employing workers for loading, unloading and carrying of foodgrains and such other work incidental and connected thereto". A contrast is very much apparent in defining "establishment" in the above two manners. With regard to Item No. 5, there is a prefix or precondition, which is "establishments employing workers for loading or unloading of goods and other operations incidental and connected thereto". The above two definitions indicate two important properties. (a) establishment employing workers for loading and unloading and (b) other operations being incidental and connected thereto. The above two clauses indicate that the establishment contemplate the work of loading and unloading as primary and other operations incidental and connected thereto. The interpretation of the concept of "incidental and connected thereto" has to be first examined for considering the case. The word incidental has been defined in "Stroud's Judicial Dictionary" in the following manner:

"INCIDENT: INCIDENTAL. A thing is "incident" to another when it appertains to, or follows on, that other which is more worthy, or principal (Co. LITT. 151B) e.g. A court baron is incident to a manor, rent to a reversion, distress to rent, timber

trees to the freehold, title deeds to an estate, etc. "and of incidents, some be separable, and some inseparable" (Co. LITT. 151B); "separable, as rents incident to reversions, & C, which may be severed; inseparable, as fealty to a reversion or tenure" (ibid 93 a), or, possession or usage and time to a custom or prescription (ibid. 113 b)"

In the Law Lexicon by P. Ramanadia Aiyar the word incidental is defined in the following manner:

"Incidental. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air, or heat from or across the land of another.

According to Stroud's Judicial Dictionary, a thing is said to be incidental to another when it appertains to the principal thing. According to the ordinary Dictionary meaning, it signifies a subordinate action. *Hukumchand Jute Mills Ltd. and Another Vs. Labour Appellate Tribunal and Others*, . [Industrial Disputes Act (14 of 1947), S. 10(4)].

A thing is incidental to another if it merely appertains to something else as primary. A store run by the owner of a textile undertaking for sale of provisions, to the workmen employees of the factory is incidental to the business of manufacture of textiles. *State of Tamil Nadu Vs. Binny Ltd., Madras*, . [Tamilnadu General Sales Tax Act (1 of 1959), S. 2(d)(iii)].

The word "incidental" does not imply any casual or fortuitous connection. In a legal sense as applied to powers, it means a power which is subsidiary to that which has been expressed, and of an instrumental nature in relation thereto, which is both necessary and proper for the carrying into execution of the main power which has been expressly conferred. (*Dunichand and Co. v. Narain Das and Co.* (1947) 17 Comp. Cas. 195 (F.B.)."

16. The word incidental came up for consideration before the Supreme Court in *Royal Talkies, Hyderabad and Others Vs. Employees State Insurance Corporation*, . Whether the canteen and cycle stand run along with cinema house can be treated as incidental to the main work of the cinema. Justice V.R. Krishna Iyer speaking for the Bench has laid down that a thing is incidental to another, if it pertains to something else as primary. Thus incidental is an activity which is connected with the main activity but not the primary activity. Following was laid down in paragraph 18:

"18.....A thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Much depends on time and place, habits and appetites, ordinary expectations and social circumstances. In our view, clearly the two operations in the present case, namely, keeping a cycle stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre."

17. A similar view was expressed in *State of T.N. v. Binny Ltd.* (1980 Supp. SCC 686) following was laid down in paragraph 3:

"3. This Court observed in the *Burmah Shell* case that for the purpose of attracting the applicability of clause (ii) of S. 2(d), it was not necessary that the transaction in question must partake of the characteristics of business, but it was sufficient if it was "in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern". The word "such" in clause (ii) was in the opinion of the court, referable to trade, commerce, manufacture, adventure or concern referred to in clause (i) and if there was in existence some trade, commerce, manufacture, adventure or concern falling within clause (i), any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern, would constitute "business" within the meaning of clause (ii), even though the transaction by itself may not have the characteristics of business as understood in ordinary parlance. Now, the business which was carried on by the assessee was manufacture of textiles and the transaction of sale of provisions in the store were, in the submission of Mr. S.T. Desai appearing on behalf of the State, in connection with or incidental to such business. This contention was seriously disputed by Mr. Ramachandran on behalf of the assessee and he urged that there was no connection between the activity of manufacture of textile carried on by the assessee and the sales of provisions in the Store maintained by it nor was it possible to say that the sales effected by the assessee were incidental to the manufacture of textiles. Mr. Ramachandran contended that in order to attract the applicability of clause (ii) of S. 2(d) it was necessary that the connection between the sales of provisions in the Store and the manufacture of textile must be direct and such direct connection was, according to him, wanting in the present case. We do not think the contention of Mr. Ramachandran is at all justified. It is indeed difficult to see how it can at all be said that the activity of selling provisions to the workmen in the Store was not incidental to the business of manufacture of textiles in the factory. The sales which were effected in the Store were to the workmen employed in the factory where textiles were being manufactured and the provision of this facility to the workmen was certainly incidental to the carrying on the business of manufacture of textiles. This view finds support from the decision of this Court in *Royal Talkies, Hyderabad v. Employees State Insurance Corporation* where the question was as to whether a canteen maintained by a cinema owner in the premises of the cinema could be said to be incidental to the business of running the cinema. Krishna Iyer, J., speaking on behalf of the court, pointed out that [SCC p. 212 : SCC (L & S) p. 505] "a thing is incidental to another if it merely appertains to something else as primary. Surely, such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either." Applying this test the court held that it was impossible to contend that "a canteen or cycle stand or cinema magazine booth is not even incidental to the purpose of the theatre. The cinema-goers ordinarily find such work an advantage, a facility, an amenity and sometimes a necessity.

All that the statute requires is that the work should not be irrelevant to the purpose of the establishment." Now, if a canteen maintained by a cinema owner for the benefit of cinemagoers can be regarded as incidental to the purpose of the cinema theatre which is to carry on the business of exhibiting films in the theatre, we fail to see how a Store run by the owner of a textile undertaking for sale of provisions to the workmen employed in the factory can be said to be anything other than incidental to the business of manufacture of textiles. We are clearly of the view that the activity of selling provisions to workmen in the Store was incidental to the business of manufacture of textiles and the sales were, therefore, transactions falling within the definition of "business" in clause (ii) of S. 2(d). We must, in the circumstances, hold that the assessee carried on business of selling provisions in the Store and the sales attracted the liability to tax under the Tamil Nadu General Sales Tax Act, 1959 as it existed during the year of assessment."

18. One of the preconditions for falling an establishment within the meaning of item No. 5 of the Schedule is where the workers, apart from loading and unloading, do some other incidental or connected operations. However, the emphasis is that the other operations are only incidental and connected. The words "incidental" and "connected" are joined by a conjunction "and". Hence meaning of both words would take the same colour. The first condition for being an establishment under item No. 5 is that the workers shall carry operations of loading and unloading as the main and predominant operation in addition to the incidental and connected operations which are not primary. Now the first phrase "establishment employing workers for loading and unloading" is of importance and has been consciously used by the legislature. The words used are "establishment employing workers for loading and unloading". The word used is verb "employing" which indicate that the establishment is employing workers for loading and unloading which is a predominant activity of the establishment. If the establishment is not employing workers for loading and unloading it may not fall in item No. 5. The registration of a worker under Rule 26A is to be made after notice to the employer which is a statutory provision contained in Rule 26A. What is the purpose and intent of giving notice to employer? Notice to the employer is also intended to enable the employer to "object to the notice of registration" and there is an obligation on the registering authority to consider the objections. In the context of the statutory scheme, as indicated in Rule 26A(2) and (3), it is clear that the fact as to whether the establishment is employing workers for loading and unloading becomes important. In the event of the employer not employing workers for loading and unloading, the establishment may not be covered by item No. 5. The registration of workers as headload workers is contemplated under the Scheme and the 1981 Rules in the context of employer and the nature of the establishment. Form No. IX of the 1981 Rules is relevant which is quoted below:

"Form IX APPLICATION FOR REGISTRATION OF HEADLOAD WORKERS

1. Name and Address of the headload worker :
2. Name(s) and Address(es) of the employers under whom the headload worker is working :
3. Nature of work :
4. Date of Birth & Age of headload worker :
5. Date of commencement of work under the employer :

I solemnly affirm that the particulars furnished above are true to the best of my knowledge and belief and request that my name may be registered.

Place:

Date:

Signature of the Applicant"

Names and addresses of employers as well as nature of work is one of the informations sought for. Thus, while registering a worker, the registering authority has to apply its mind as to whether the registration which is claimed by the worker is a registration in an establishment in the Schedule or not.

19. As noted above, the expression establishment employing workers is not used for any other items except Items Nos. 5, 7, 12 and 13. Thus, in the context of other items, the fact as to whether establishment is employing workers for loading and unloading may not be necessary and worker may be held entitled for getting registered. For the purposes of item Nos. 5, 7, 12 and 13, however, the factum of "establishment employing workers" becomes important and has to be given due weight.

20. The Division Bench in its order dated 14.07.2009, making the reference, expressed its view that item No. 5 refers to establishments which are employing workers for doing the loading and unloading work. In other words, the very establishment is to supply workers for loading and unloading. We do not subscribe to the above view. Item No. 5 of the Schedule cannot be interpreted in the above manner. Item No. 5 cannot be read as an agency to supply workers for loading and unloading. The definition of "contractor" as given in S. 2(g) becomes relevant which is quoted below:

"2(g) "contractor" in relation to an establishment, means a person who undertakes to execute any work for such establishment by engaging headload workers on hire or otherwise, or who supplies headload workers as individuals for the purpose of engaging them in such establishment and includes a sub-contractor, a broker, a clearing and forwarding agent, commission agent, mercantile agent, consignment agent or the owner of a vehicle laden with goods."

21. The legislature has contemplated the contractor as a person who supplies

headload workers as individual. There being already the concept of contractor as an agency to supply headload workers, we do not accept the above interpretation put up by the Division Bench. Now we come to some decision of this Court which has been relied on by learned counsel for the parties.

22. The Division Bench judgment in *Obrin Vs. Sub Inspector of Police*, was a case where it was contended that loading and unloading work carried in the industrial unit by the permanent workers was only incidental to the manufacturing process relying on the Full Bench judgment of *Raghavan (supra)* following was observed by the Division Bench in paragraph 5:

"5. Both sides have not disputed before us the above finding entered by the 3rd respondent. It is true that the petitioner has not challenged Ext. P3 order of the 3rd respondent rejecting the application for registration preferred by the workers of the petitioner. But the stand of the 2nd respondent Union as upheld in Ext. P3 order is that loading and unloading work in the Unit of the petitioner is only incidental to the main work of manufacture and therefore the permanent workers of the petitioner are only doing loading and unloading work occasionally. If so, it is paragraph 21 of the Full Bench decision reported in 1998 (2) KLT 732 (*supra*) that applies. The said paragraph reads as follows:

"21. Yet another point raised before us was the case of workers employed in the establishments, who are doing the work of loading and unloading along with other duties. Learned counsel for the petitioners could contend that in such circumstances, the workers cannot be treated as headload workers coming under the definition of that term under the Act. We do, not think that this is an issue where an answer in general can be given. It will depend on the facts of each case. If the worker is doing loading and unloading work regularly in the establishment, he cannot be taken out of the purview of the Act only for the reason that he is discharging some other duties also. On the other hand, if he is principally employed to carry on the work other than loading and unloading and if occasionally he does the work of loading and unloading, it may not be possible to treat him as a headload worker coming within the definition. But, as mentioned earlier, it will depend on the facts of each case."

(emphasis supplied)

The correctness of the above observation of the Full Bench was not canvassed before us by either side. Thus, in a case as the present, where loading and unloading work is only incidental to the main work of the industrial unit, the worker attached to the employer doing such loading and unloading work is not a headload worker and, therefore, the 1978 Act or the Rules or the Scheme do not apply to such worker. If so, the employer is not bound to engage a headload worker, much less, a registered head load worker of the 2nd respondent Union, for doing the loading and unloading work in the establishment where loading and unloading work is incidental to the main work. In other words, the 2nd respondent cannot put forward any right to engage its workers for the loading

and unloading operations in the petitioner's unit."

23. Another judgment which is on the point is the Division Bench judgment of this Court in Venkatraman Vs. Sub Inspector of Police, , which also is a case of Police protection. The company was engaged in distribution of hazardous or toxic nature of chemicals imported from other States and loading and unloading work was also occasionally undertaken. Following was laid down by Division Bench in paragraphs 13 and 16 by the Division Bench:

"13. We feel that in the above context, the prime enquiry has to be conducted with reference to the definition of headload worker as found in S. 2(m) of Headload Workers Act, 1998. A person has to be employed directly or through contractor engaged in or for an establishment, for loading or unloading work, for him to be identified as a headload worker. Therefore, if principally and predominantly a person is not engaged for headload work, he is not a "headload worker" as coming under the Act. Other provision of the enactment lends support to such conclusion. Take for example the restriction regarding hours of work. An adult worker is not to be employed for more than eight hours per day. A person who is above the age of 60 is not to be so employed. Stipulations regarding fixation of pay, intervals etc., also show that what is contemplated is a legislation for a category of a distinct description. A person who may casually attend to loading/unloading work in an establishment is therefore not entitled to be identified as a headload worker.

16. When we take notice of the preamble of the Kerala Headload Workers Act, 1978, vis., "whereas it is expedient to regulate the employment of headload workers in the State of Kerala and to make provision for their welfare, for the settlement of disputes in respect of their employment or non employment and for matters connected therewith;" and the Kerala Loading and Unloading (Regulation of Wages and Restriction of Unlawful Practices) Act, 2002, it could be seen that the exception carved out by the Full Bench, and the reasoning given by decisions are acceptable. The unorganized sector of employees was being extended a protection, by providing for regularity of work. It did not intend to snatch away a portion of work from regular workmen, and in fact dealt hardly with any issues in respect of such group. In all appearances, it does not intend to cover engagement of casual nature, and it is not as if every activity of loading/unloading in the scheme notified areas should be carried out by workers included in the scheme. We are however compelled to observe that precision in the prescription is not a quality claimable by this special statute. It is a bagful of provisions, without bearing in mind the workability of the bundled ideas."

24. The expression "establishment employing workers "which has been used in item No. 5 of the Schedule has also been used in the Scheme, 1983. Rule 7 of 1983 Scheme obliges the employer who engages or employs headload workers in or for an establishment of trade or business to register his name with the Committee. There are various statutory obligations of employer who engages or employs headload workers including registration under the Scheme. The

converse of Rule 7 shall be that those employers who do not engage or employ headload workers in an establishment need not apply for registration. Thus the employing of headload workers is an important factor for identifying the establishment in item No. 5 and for other purpose in the statutory scheme.

25. The judgment of learned Single Judge in Hotel Raj International Vs. Head load Workers Welfare Board, has followed the Full Bench judgment in Raghavan's case (supra) and also made similar observation. Following was observed by learned Single Judge in paragraphs 10, 11 and 12:

"10. The Full Bench has gone on to consider whether the machinery provided by the Act should be resorted to even for settling the issue whether a particular worker is a headload worker or not, even when such disputes give rise to a law and order problem. In paragraph 22 this Court has observed as follows:

"When such an employer approaches this Court under Art. 226 of the Constitution seeking protection of person and property of the employer as well as willing workers, this Court will be justified in granting direction to the police to give protection, if circumstances so warrant. One such consideration can be irreparable injury that would be suffered by the employer and/or the willing workers. There may be other circumstances also which would justify grant of such direction in the facts of particular case."

Therefore, it is not an absolute rule that an employer who disputes his liability under the Act should take recourse to the remedy under S. 21 of the Act.

11. In the decision reported in *Obrin v. Sub Inspector of Police* (supra) the question was whether the work of loading and unloading in an industrial unit which is only incidental to the main work could be got attended to by the permanent workers of the establishment who were not headload workers. Placing reliance on the very same observations of the Full Bench quoted above, a Division Bench of this Court has held that permanent workers of an establishment who attend to headload work only incidentally are not workers coming within the definition of "headload worker" under the Act. The Division Bench has summed up the position in the following words in paragraph 5 of the said decision:

"Thus in a case as the present, where loading and unloading work is only incidental to the main work of the industrial unit, the worker attached to the employer doing such loading and unloading work is not a headload worker and, therefore the 1978 Act or the Rules or the Scheme do not apply to such worker. If so, the employer is not bound to engage a headload worker, much less, a registered headload worker of the 2nd respondent Union, for doing the loading and unloading work in the establishment where loading and unloading work is incidental to the main work. In other words, the 2nd respondent cannot put forward any right to engage its workers for the loading and unloading operations in the petitioner's unit."

Accordingly this Court has held that the work of loading and unloading in an industrial unit, that is ancillary or incidental to the main work of the permanent workers employed by the unit can be attended to by them, though they are not headload workers under the Act.

12. While considering a similar issue, another Division Bench of this Court has held in Venkatraman v. Sub Inspector of Police (supra) that a person who may casually attend to loading and unloading work in an establishment is not a headload worker under the Act. The Division Bench has quoted with approval the judgment in Obrin v. Sub Inspector of Police (supra) and has held that, the Act does not mandate that every work of loading and unloading should be attended to only by registered headload workers. After referring to the object of the enactment and the various provisions contained therein, M. Ramachandran, J. has made the following observations:

"The unorganized sector of employees was being extended a protection, by providing for regularity of work. It did not intend to snatch away a portion of work from regular workmen and in fact dealt hardly with any issues in respect of such group. In all appearances it does not intend to cover engagement of casual nature, and it is not as if every activity of loading/unloading in the scheme notified areas should be carried out by workers included in the scheme. We are however compelled to observe that precision in the prescription is not a quality claimable by this special statute. It is a bagful of provisions, without bearing in mind the workability of the bundled ideas."

On the basis of the above observation, the Division Bench has concluded the issue in the following words:

"The cumulative circumstances, therefore, compel us to come to a conclusion that the demand for grant of work as coming from respondents 4 to 6 has no legal basis. The petitioner will have the right to carry on the work, including unloading work, by engaging his own workmen. Neither the employer, nor the employees are obliged to register themselves under the" Act, Rules or Scheme. In case obstructions come from third persons, the police shall render adequate assistance as the circumstances may require."

Therefore, neither the employer nor the employees are entitled to register their names where the work of the establishment is of a casual nature or incidental or ancillary to the main work. From the wording of paragraph 7 of the Scheme quoted above, it is clear that the said provision also applies only to an "employer who engages or employs headload workers." The petitioner being not an employer under the Act, the above provision has no application to him or to his establishment. Therefore, Exts. P1 and P4 are without jurisdiction and are liable to be set aside."

26. After considering the issues as noted above, now we come to the facts of the present case. As noted above, the petitioner is carrying on trading in Marble, Granite, Ceramic tiles etc., which establishment has its own permanent workers.

It is stated that loading and unloading work occasionally arises, only twice or thrice in a month, which is carried out by its own permanent workers. It is also pleaded by the petitioner that she has not engaged any headload worker of the 4th respondent Union at any time in the establishment. The averments made in the counter affidavit that the work of loading and unloading was done by the members of the 4th respondent was vehemently denied in the reply. It is useful to quote following in paragraph 4 of the reply:

"The statements in paragraph 3 and 4 of the 4th respondent's counter affidavit are denied, as they are not fully true. I have not suppressed any material facts as alleged. As submitted in my writ petition, my business establishment commenced operation only on 29.05.2009. I have a work force of six permanent workers as stated in exhibit P4 in my establishment. On my enquiry, the office of the Assistant Labour Officer, Fort Kochi had informed me that the details of my permanent workers are only to be submitted in the said office within a period of 90 days from the date of commencement of the operation of my establishment. I intend to do the same within the said stipulated time. I have not stated in my Writ Petition that my establishment employ permanent workers having registration under Rule 26A of the Headload Workers Rules, 1981. It is submitted that, the loading and unloading in my establishment arise only occasionally. In such cases, whether the area in which my establishment is situate is notified or not, is not relevant. I have not engaged any of the Headload Workers of the 4th respondent-Union at any time in my establishment. Loading and unloading work is not the predominant work that is carried on in my establishment. As such my establishment is not one which comes within the purview of the Headload Workers Act, 1978."

27. In the counter affidavit there was no details of any worker of 4th respondent who was ever employed by the petitioner. We thus find no reason to disbelieve the above averment of the petitioner. In view of the facts brought on record, we are satisfied that petitioner's establishment was not an establishment in which, for loading and unloading work, any workers were employed. Hence, petitioner was clearly entitled for police protection from obstructions made by 4th respondent. It is further observed that in the event any worker or Union claims that loading and unloading work is entitled to be given to registered workers, remedy is to approach the forum provided in the Act i.e., S. 21 of the Act where any dispute regarding non-employment can be raised before the Assistant Labour Officer, which is the forum that can decide all factual aspects and decide the dispute.

28. We thus are of considered opinion that item No. 5 of the Schedule is to be interpreted to be an establishment which fulfills following three conditions: (i) An establishment is employing workers for loading and unloading of goods (ii) the work of loading and unloading for which the worker is employed, is of a predominant nature (iii) the workers employed may also be carrying on other operations incidental and connected thereto. Paragraph 21 of the Full Bench

judgment in Raghavan's case (supra) has also stated that if principally, the workers are employed to carry on the work other than loading and unloading, and the loading and unloading work is only occasional, they do not come within the definition of headload workers. The Full Bench has also rightly observed that whether the nature of work of the head load worker is predominant work or not is a question which depends on the facts of each case. To the above extent we approve the observation made by Full Bench in paragraph 21.

In the result, we allow the Writ Petition directing respondents 1 to 3 to afford adequate police protection to the petitioner and her establishment from any interference by the members of 4th respondent Union. The reference is answered accordingly.