
(1984) 02 BOM CK 0012
In the Bombay High Court
Case No : F.A. No. 686 of 1975

Wardhaman Printing Press

APPELLANT

Vs

The Employees" State Insurance Corporation

RESPONDENT

Date of Decision : 02-02-1984

Acts Referred:

Employees State Insurance Act, 1948 — Section 2, 77

Citation : (1984) 86 BOMLR 251(1)

Hon'ble Judges : Vaze, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vaze, J.—M/s. Wardhaman Printing Press ("Press") at Sholapur, a partnership concern, applied u/s 77 of the Employees" State Insurance Act, 1948 ("Act") to the Employees" State Insurance Court and the Labour Court ("Insurance Court") for a declaration that they are not a factory within the meaning of Section 2(12) of the Act. The application was dismissed by the Insurance Court and hence this appeal.

2. The sheet anchor of the applicant's case is that applicants Nos. 2 and 3, Prakash and Kumud who are partners in the press could not be called "persons who were employed for wages" within the meaning of the expression as used in Section 2(12) of the Act inasmuch as they being partners could not be employed by themselves.

3. It appears that applicants Nos. 2 and 3 have been supervising the work of the firm, executing orders, keeping accounts and in return applicant No. 2 Prakash received a remuneration at the rate of Rs. 1.800/- per annum from 1961 to 1968 which was raised to 3.000/- after that date while the corresponding figures of remuneration for applicant No, 3 Kumud are Rs. 1.200/- and Rs. 2.400/- per annum. Concededly, Prakash and Kumud have also contributed to the capital of the firm to the extent of Rs. 3,866/- each and if Prakash and Kumud are not

regarded as employees, the press had a complement of not more than 18 workmen at a given time. That is to say. the establishment of the press would fall within the ambit of the definition of factory as defined under Sub-section 12 of Section 2 of the Act only if Prakash and Kumud are regarded as persons "employed for wages" within the meaning of that definition.

4. At the first blush, the argument of the appellant appears to be sound inasmuch as a partner cannot be called an employee of his own firm and thus cannot combine in himself capacities of an employer and an employee. In *Ellis v. Joseph Ellis & Co.* (1905) 1 K.B. 324, an argument was advanced that the widow of a member of a partnership firm who was working in a mine as a working foreman receiving weekly wages should be entitled to claim compensation under the Workman Compensation Act from the surviving partners upon his death on account of an accident in the mine on the ground that he was a workman and employed by the firm. Rejecting the suggestion that the deceased man was "employed" within the meaning of that term as used in the Act, the court observed that even though a partner himself works and receives sums which are called wages, it really does not create a relationship of employer and employee but is, hi truth, a mode of adjusting the amount that must be taken to have been contributed to the partnership assets by a partner who has made what is really a contribution in kind. The Court went on to assert that in spite of such contribution, it does not affect his relation to the other partners, which is that of co-adventurer and not employee.

5. It is not uncommon to find in partnership agreements that certain partners are given a fixed salary. Sometimes the intention is to express their initial share of the profits in the form of a fixed salary while other agreements provide for payment of a fixed salary for work done by the partner and a percentage of the profit as well. In *Marsh v. Stacey* (1963) 367 S.D. 512, a partner was to receive a fixed salary of ? 1,200/- as a first charge on the profits and in addition thereto one-third share of the net profits arising from the Reigate branch of the firm. In the year 1957 and 1958 the firm made a profit of less than ? 1,200/- but the partner sued for his salary. Holding that the words "as a first charge on the profits should not become otiose, the court dismissed the partner's claim for the arrears of salary when no profits were made.

6. If the partnership deed of the press were to contain provisions akin to those elicited above regarding salary being a first charge on the profits, I would have found no difficulty in holding that Prakash and Kamud were not employed for wages in the firm. The Marsh hypothesis of a charge on profits would operate as an exception to the general principle that an employee is entitled to his contractual wages whether or not the firm makes a profit. In the *Ellis* situation where only two partners were involved and one of them sought to claim compensation under the Workman Compensation Act from the other, the court refused to countenance the claim as being an internal matter between the two partners. In contrast, when the social security benefits under the Redundancy

Payments Act 1965 were sought to be enforced, the Court in *Rowley, Holmes & Co. v. Barbar* (1977) 11 W.L.R. 371, ruled that a third person in the capacity of the personal representative of the estate of a deceased can make a contract with himself in the capacity of an employee with the result that the continuity of his employment was not broken and he was entitled to a redundancy payment.

7. As observed earlier, the concept of a partner receiving salary is not an uncommon feature of partnership agreements and the question whether such a person can be called as one employed for wages within the meaning of Section 2(12) of the Act would depend upon whether or not such a partner would be entitled to receive his wages in spite of the fact that the partnership venture ran into losses during the period for which wages were being claimed. If he is so entitled the partner sheds the characteristic of a co-adventurer and assumes the colour of an employee as far as his wages are concerned - his liability for losses under the other terms of the partnership deed nonetheless surviving.

8. In the instant case, a perusal of the partnership deed dated December 25, 1968 shows that all the partners after reciting that the capital has been contributed by all of them, proceeded to set out that Prakash and Kumud should supervise the work, keep accounts, effect recoveries and for this additional work receive Rs. 3,000/- and Rs. 2,400/- respectively as honorarium. That is to say, by this deed all the four partners commissioned two of them to do certain extra work which work probably did not merit the employment of a full time manager. From the evidence of Kumud it appears that formerly they had employed a manager but his services were dispensed with from 1969. Sub Section 12 of Section 2 of the Act was amended with effect from January 28, 1968 whereunder for the words "20 or more persons are working or were working", the words "20 or more persons are employed or were employed for wages" have been substituted. Wages have been defined in Clause 22 of Section 2 of the Act to include all types of remunerations except those like travelling allowance etc. The definition is an all inclusive one which would obviously include the "Manadhan?" or "Honorarium" referred to in the partnership deed.

9. Thus, without doing violence to the jurisprudential concept of a partnership, it can be said that Prakash and Kumud were "persons employed for wages" within the meaning of Clause 12 of Section 2 of the Act whether or not they were "employees" within the meaning of Clause 9 of Section 2 of the Act or under the general law of master and servant.

10. In these premises, the appeal fails and is dismissed. No order as to costs.