

Regional Director, Employees' State Insurance Corporation, Trichur

Vs

Ramanuja Match Industries

Civil Appeal No. 3500 of 1984

(Ranganath Misra, A. N. Sen JJ)

27.11.1984

JUDGMENT

RANGANATH MISRA, J. -

1. The short point which arises for determination in this appeal by special leave is as to whether a partner of a firm is an 'employee' within the meaning of Section 2(9) of the Employee's State Insurance Act, 1948 (hereinafter called 'the Act'). Respondent Ramanuja Match Industries which is a firm is engaged in manufacturing of matches within the Trichur area of Kerala State and the question as to whether it is covered under the provisions of the Act fell for consideration. The Inspector found that there were 18 regular employees and three of the partners who worked regularly for wages were to be put together. Thus the number of 20 employees as required by the Act was satisfied and the respondent did incur liability for contribution. The respondent challenged its liability before the Employee's Insurance Court at Calicut by contending that partners were not employees and when the three partners were excluded, the total number of employees did not exceed the statutory minimum. The Insurance Court found in favour of the respondent and an appeal under the Act was carried to the High Court by the appellant and a Division Bench of that Court following its earlier decision in Regional Director of E.S.I. Corporation v. Oosmanja Tile Works, Alwaye (ILR (1975) 2 Ker 207), held that partners were not employees. It is against this decision that the present appeal has been carried.

2. There is no dispute that under the Act liability to pay contribution arises only when 20 or more persons are employed for wages. It is also not disputed that in the case of the respondent, unless the three partners are included, the basic number of 20 is not reached and no liability under the Act accrues.

3. The term 'employee' has been defined in Section 2(9) of the Act to mean "any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies and -" one of the alternatives in clauses (i), (ii) or (iii). 'Wages' has been defined in sub-section (22) of that section to mean "all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled ...". It is thus clear that in order that someone may be an employee within the meaning of the Act, he has to be employed for wages. The concept of wages would bring in the contract of employment. The Shorter Oxford English Dictionary gives the meaning of 'employ' to be "to use the services of for some special business; to have or maintain in one's service". In common parlance the concept of employee would take with it the correlation of the employer. The term 'employer' had not been defined in the Act but in the absence of an employer who would provide the employment, there would indeed be no employee. In fact, that concept is clear in the scheme of the Industrial Disputes Act of 1947 and the definition

of the term 'employer' in Section 2(g) of that Act makes the position clear.

4. It is appropriate that at this stage we refer to the position of a partner qua the firm. Section 4 of the Partnership Act, 1932, defines 'partnership' and one of the essential requisites of a partnership is that there must be mutual agency between the partners. A Full Bench of the Patna High Court in *Seth Hira Lal v. Sheikh Jamaluddin* ((1946) 224 IC 106), rightly emphasised upon the position that an important element in the definition of partnership is that it must be carried on by all or any one of the partners acting for all. Section 18 of the Partnership Act statutorily declares every partner to be an agent of the firm for the purposes of the business of the firm and Section 19 states that an act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. A partnership firm is not a legal entity. This Court in *Champaran Cane Concern v. State of Bihar* 3 ((1964) 2 SCR 921 : AIR 1963 SC 1737 : (1963) 2 SCJ 499), pointed out that in a partnership each partner acts as an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or employer and employee which concept involves an element of subordination but that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm, it may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of employee.

5. Learned counsel for the appellant strongly relied on a case of the Rajasthan High Court in *Regional Director, E.S.I. Corporation, Jaipur v. P. C. Kasliwal* (1981 Lab IC 671 : 1981 Raj LW 154 : 58 FJR 393). The learned Single Judge has taken the view that a partner can be employed by the firm and if he draws emoluments within the prescribed limits for the work of the factory, he would be an employee under Section 2(9) of the Act. In the same decision it has also been held that a sleeping partner drawing a monthly allowance merely because he is a partner would not come within the ambit of the Act as an employee and contribution in respect of such partner would not be payable. As against this view there is a Division Bench decision of the Kerala High Court in *Regional Director of E.S.I. Corporation v. Oosmanja Tile Works, Alwaye* (ILR (1975) 2 Ker 207), where it has been held that a managing partner of a firm is not an employee if merely he receives salary or other remuneration. Strong reliance has been placed by the Kerala High Court on the position that such managing partner is not an employee who is working under a contract of service. In fact, in the present case support has been drawn from this decision of the High Court as a precedent and following the ratio of that decision, the High Court has decided against the appellant. The Rajasthan High Court has obviously not been alive to the definition of the term 'employee' in Section 2(9) of the Act though the definition has been extracted in extenso. The status of a partner qua the firm with reference to the provisions of the Partnership Act, the concept of "employer" and "employee" and the importance of the definition of "wages" have also been lost sight of in adjudicating whether a partner is an employee. We are, therefore, not inclined to accept the view of the Rajasthan High Court. On the other hand, the view taken by the Kerala High Court seems to be the correct one and fits in with the position of a partner qua his firm and the jurisprudential approach to the matter.

6. The respondent did not choose to appear in this Court to support the order of the High Court. We have, however, come across several judicial opinions of American and English Courts taking the view that a person cannot be the employee of the firm of which he is a partner. In *Words and Phrases* (Permanent Edition) Vols. 14 and 14-A (1974 reprint), several such decisions of the American State Courts have been referred to in support of the view that a partner cannot be an employee of his firm and we propose to refer to some of the more apt ones. In *Dube v. Robinson* 5

(92 NH 312), it has been held that in a partnership each partner is an agent of the others as well as a principal; but he is not in hire as an employee and that he may perform labour even with the employees of the partnership and of the same kind as they perform does not make him an employee of the other partners or of the partnership, and hence such partner cannot be counted to constitute one of the workmen necessary for application of the Employers' Liability and Workmen's Compensation Act to the partnership business. In *United States Fidelity & Guarantee Company v. Neal* (188 Ga 105), it has been held that a partner is not an employee of the partnership within the Compensation Act though at the time of the injury he was performing special services under contract with his partner, separate and independent from the articles of partnership, and is being paid compensation therefor in addition to his share in profits. Again, in *Le Clear v. Smith* (202 NYS 514), it was held that a partner, though he received a salary in addition to his share of the profits, was an employer and not an employee entitled to compensation under the Workmen's Compensation Law, where the insurer did not insure the employers. In *Berger v. Fidelity Union Casualty Co., Texas* (293 SW 235), it has been held that a member of an employer firm cannot be an employee thereof. In *Weaver v. Weinberger* (392 F Supp 721), it was held that "employee" is a person who renders service to another, usually for wages, salary or other financial consideration, and who, in performance of such service, is entirely subject to the direction and control of the other, such other being the employer. *Crooks v. Glens Falls Indemnity Co.* (268 P 2d 203), is an authority for the view that an employee is one who is subject to the absolute control and direction of the employer in regard to any act, labour or work to be done in course and scope of his employment. In *Morici Corporation v. U.S.D.C. California* (500 F Supp 714), the Court held that the test to determine whether one person is another's employee, is whether or not he is subject to control of the other person. In *Burker v. Friedman* (556 F 2d 867), it was held that partners cannot be regarded as employees rather than as employers who own and manage operation of business, and, hence, cannot be included as employees. *Wright v. Dearete* (442 P 2d 888) took the view that partners were not employees for purposes of requirement that compensation law be complied with when there are three or more employees. Though we have not come across any decision of the U.S. Supreme Court on the point, these authorities under various legislations are clearly indicative of the principle that a partner who belongs to the class of employer cannot rank as employee because also works for wages for the partnership. Undoubtedly the term employee is the co-relative of employer.

7. We may usefully refer here to an English decision. The Court of Appeal in *Ellis v. Joseph Ellis & Co.* ((1905) 1 KB 324 : 92 LT 718 : 53 WR 311 (CA)), was called upon to decide whether a partner of a firm could be its employee. The short facts relevant for our purpose available in the judgment of Collins M.R. are :

The deceased appears to have been a skilled workman and, by agreement with his partners, he worked at the mine, sometimes on the surface and sometimes underground, for wages; and, while working underground, he met with an accident which occasioned his death. His representative thereupon claimed compensation under the Workmen's Compensation Act, 1897, On behalf of herself and his children. The question is whether, having regard to his position as one of the partners, he can be regarded as a workman in employ of the partnership, and the partners as his employers within the meaning of the Act. When one looks at the provisions of the Act, they do not appear to be applicable to a case like the present. The supposition that the deceased man was employed, within the meaning of that term as used in the Act (not very different from the definition here), would appear to involve that he, as one of the partners, must be looked upon as occupying the position of being one of his own employers. It seems to me that, when one comes to analyse an arrangement

of this kind, namely, one by which a partner himself works, and receives sums which are called wages, it really does not create the relation of employers 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, and does not affect his relation to the other partners, which is that of co-adventurer and not employee.

The argument on behalf of the applicant in this appeal appears to involve a legal impossibility, namely, that the same person can occupy the position of being both master and servant, employer and employed.

Lord Justice Cozens-Hardy also spoke in the same strain :

All that our decision in this case amounts to, I think, is that the Act only applies where there is on one side an employer, and on the other side, a workman, who are different persons.

This is in complete accord with our view.

8. F. C. Bock and F. F. Manix in their book, the Australian Income Tax Law and Practice (1960 Edn., Vol 3, page 3092) have said :

The decision of the High Court in *Rose v. Federal Commissioner of Taxation* ((1951) 84 CLR 118) established that there is nothing in the relevant income-tax legislation to warrant treating a partnership as a distinct legal entity. A partner cannot, therefore, also be an employee of the partnership, for a man cannot be his own employer

9. It is thus clear that in the United States, Great Britain and Australia, a partner is not treated as an employee of his firm merely because he receives a wage or remuneration for work done for the firm. This view is in complete accord with the jurisprudential approach. In the absence of any statutory mandate, we do not think there is any scope for accepting the view of the Rajasthan High Court.

10. Counsel for the appellant emphasised on the feature that the statute is a beneficial one and the Court should not interpret a provision occurring therein in such a way that the benefit would be withheld from employees. We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme. The Act covers all factories or establishment with 20 or more employees and the benefit is intended to be given to institutions with more than that number. It is not the contention of counsel that because the legislation is beneficial it should also apply to factories or establishments with less than 20 employees. If that be not so, in finding out whether a partner would be an employee a liberal construction is not warranted. A person who would not answer the definition cannot be taken into account for the purpose of fixing the statutory minimum. We are, therefore, not inclined to accept the contention of counsel that on the basis of the statute being beneficial, a partner should also count as an employee.

11. Once we hold that the three partners were not employees, on the admitted fact the total number of employees would be less than 20, the Act would not be applicable to the establishment in question. There is no merit in the appeal and the same is, therefore, to be dismissed. At the hearing

the respondent was not represented; we, therefore, make no direction for costs.

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