

\$~14, 15, 16, 17, 35 & 36

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decided on: 13.02.2020*

+ W.P.(C) 1511/2019
M/S ORIX AUTO INFRASTRUCTURE SERVICES LIMITED
..... Petitioner

versus

VIKRAM CHAUDHARY
..... Respondent

+ W.P.(C) 1517/2019
M/S ORIX AUTO INFRASTRUCTURE SERVICES LIMITED
..... Petitioner

versus

MANOJ KUMAR
..... Respondent

+ W.P.(C) 1567/2019
M/S ORIX AUTO INFRASTRUCTURE SERVICES LIMITED
..... Petitioner

versus

KAPIL KUMAR VERMA
..... Respondent

+ W.P.(C) 1583/2019
ORIX AUTO INFRASTRUCTURE SERVICES LIMITED
..... Petitioner

versus

DHAMENDER KUMAR
..... Respondent

+ W.P.(C) 5148/2015
ORIX AUTO INFRASTRUCTURE SERVICES LTD. (DELHI CAB)
..... Petitioner

versus

PRADEEP SAINI
..... Respondent

+ W.P.(C) 8578/2015 & CM APPL. 18553/2015
ORIX AUTO INFRASTRUCTURE SERVICES LTD. (DELHI CAB)
..... Petitioner

versus

SUNDER PAL

..... Respondent

Through: Mr. Anurag Chowdhary and Mr.
Saurabh Jain, Advocates for
petitioner.
Mr. Akarsh Bhalla and Mr. Pankaj
Anil Arora, Advocates for
respondents.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. These petitions impugn the awards dated 25.10.2016, 28.01.2017, 12.01.2017, 30.01.2014 and 02.01.2014 passed by the learned Labour Court holding that: i) there was an employee-employer relationship between the petitioner and the respondents and ii) directing payment of lump sum monies to the respondents on account of illegal termination of their services. The petitioner contends that the impugned orders have erred, insofar as the respondents were not employees but only Business Associates. The learned counsel for the petitioner refers to the Business Agreement between the parties.

2. A rationale for the aforesaid conclusion in the impugned order, is as under:

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*Here in view of above referred depositions made by
claimant / WW-1 Vikram Chaudhary admittedly Business*

Agreement Ex.MW1/2 (also exhibited as Ex.WW1/M1x) bears the signatures of the claimant. In the totality of facts and circumstances of this case, this court can proceed with the assumption that Business Agreement Ex, MW1/2 (also exhibited as Ex.WW1/M1x) was executed between the parties.

NOW this Court shall make an attempt to know the nature of relationship between the management and the claimant in terms of business agreement Ex. MW1/2 (also exhibited as Ex, WW1/M1x). In particular the Court will try to know whether relationship of employer and employee can be said to have existed between the management and the claimant on the basis of the business agreement Ex. MW1/2 (also exhibited as Ex. WW1/M1x) or that claimant' worked as a Business Associate and not as an employee with the management.

Unless and until there existed relationship of employer and employee between the management and claimant, claimant cannot fall within the definition of section 2(s) of the Industrial Disputes Act, 1947. Also, ifin the totality of facts and circumstances of this case, claimant is held to be an employee of management and, thus, a workman of the management, the fact that claimant has been mentioned as a Business Associate in the Business Agreement would not affect the status of the claimant as of an employee of the management. Mere designation/description given to claimant in the Business Agreement is of no importance and the nature of real relationship existing between the claimant & management is to be determined keeping in view totality of all the relevant facts and circumstances of this case.

Determination of the vexed questions as to whether a contract is a contract of service or contract for service has never been an easy task. There is no hard and fast rule. The question in each case has to be answered having regard to the facts involved therein. No single test - be it control test, be it organisation or any other test - has been held to be the

determinative factor for determining the jural relationship of employer and employee,

In Shivanandan Sharma Vs. Punjab National Bank Ltd. MANU/SC/0054/1955 the Hon'ble Supreme Court has observed that supervision and control test is the prima facie test for determining the relationship of employment, The nature and extent of control required to establish such relationship would vary from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor.

A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope of the duty undertaken. It is the element of control of the work that distinguishes the relationship of master and servant from the independent contract relationship. The most important test in determining whether one employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved to the employer. In other words, the identifying mark of the servant is that he should be under the control or supervision of the employer in respect of the details of the work. In law, time honoured expression 'master and servant' indicates the relationship which when one person who employs another to do certain work exercises the right of control over the performance of the work to the extent of prescribing the manner in which It IS to be executed. The employer is the master and the person who is employed is the servant. The words 'employer and employee' are the out-growth of the old term 'master and servant'; they have been adopted by the reason of the shift of the relation in general from a personal to an impersonal one and are the terms now commonly used to describe the relationship. It would seem that the terms 'employer and employee' make a better designation of the relation in this industrial age.

It is now clear that it is impossible to define a contract of service in the sense of stating a number of

conditions which are both necessary to, and sufficient for, the existence of such a contract.

In Indian Overseas Bank I.O.B. Staff Canteen Workers' Union and Anr. MANU/SC/0272/2000 the Hon'ble Supreme Court has observed that "The standards and nature of tests to be applied for finding out the existence of master and servant relationship cannot be confined to or concertized into fixed formula(e) for universal application, invariably in all class or category of cases. Though some common standards can be devised, the mere availability of any one or more or their absence in a given case cannot by itself be held to be decisive of the whole issue, since it may depend upon each case to case and the peculiar device adopted by the employer to get his need fulfilled without rendering him liable. That being the position, in order to safeguard the welfare of the workman, the veil may have to be pierced to get at the realities. Therefore, it would be not only impossible but also not desirable to lay down abstract principles or rules to serve as a ready reckoned (sic) for all situations and thereby attempt to compartmentalize and peg them into any pigeonhole formulae, to be insisted upon as proof of such relationship. This would only help to perpetuate practicing unfair labour practices than rendering substantial justice to the class of persons who are invariably exploited on account of their inability to dictate terms relating to conditions of their service. Neither all the tests nor guidelines indicated as having been followed in the decisions noticed above should be invariably insisted upon in every case, nor the mere absence of any one of such criteria could be held to be decisive of the matter. A cumulative consideration of a few or more of them, by themselves or in combination with any other relevant aspects, may also serve to be a safe and effective method to ultimately decide this often agitated question. Expecting similarity' or identity of facts in all such variety or class of cases involving different type of establishments and in dealing with the different employers would mean seeking for things, which are only Impossible to find."

In Sh.Chintaman Rao and Ann Vs. The State of Madhya Pradesh 1958 SCR 1340 the Hon'ble Supreme Court has observed that ".....The concept of employment involves three ingredients (1) employer, (2) employee and (3) the contract of employment, The employer is one who employs, i.e. one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision....".

The prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall, do his work. Whether in a given case there existed relationship of employer and employee, is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger the ground for holding it to be a contract of service, and similarly the greater the degree of independence of such control, the greater the probability that the services rendered are of the nature of professional services and that the contract is not of service. To determine whether there existed relationship of employer and employee in a given case regard has to be had to the real relation between the parties as shown by all relevant facts taken together. Use of specific words, by itself, in the agreement cannot be conclusively determinative of existence of real relationship between the parties. Merely because business agreement Ex. MW1/2 mentions the claimant as "BUSINESS ASSOCIATES", it cannot be said that claimant was as a matter of fact in reality was a "BUSINESS ASSOCIATES" of the management.

BUSINESS AGREEMENT EX,MW-1/2 (ALSO EX.WW-1/MIX) ALONGWITH ADDENDUM AGREEMENT DATED 11.02,2010 IS BEING ANNEXED

HEREWITH AS ANNEXURE - AAS PART AND PARCEL OF THIS AWARD

By virtue of Clause (9); Relationship of the Parties in the Annexure – A management want to show/prove that claimant was an independent Business Associate or, if one may say so, contractor rather than an employee /agent /joint venture / partner of the management. It is pertinent to note that above clause is contrary to stand of the management as pleaded in the WS to the effect that status of Business Associate/Claimant was that of a partner in the business.

As per WHEREAS Clause in Annexure – A management is engaged in amongst others, owning and managing the business of Radio Taxi. Thus, business of Radio Taxi is a regular business of management. As per this clause services of claimant have been offered and agreed to be availed "on an exclusive basis". This aspect of providing of his exclusive services by claimant to management to some extent, if not exhaustively/wholly, negates the possibility of claimant being a Business Associate and support the belief that claimant entered into contract, of service with management. Clause 3): OBLIGATIONS OF BUSINESS ASSOCIATE. - Sub Clause (m) specifically provides that, " This agreement is for provision of services...." i.e. contract of service and not contract for service.

In the words of Lord Denning, '.....under a contract of service, a man is employed as a part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not intergated into it but is only assessorory to it.' (Stevenion, Jordan & Harrison Ltd. Vs. MacDonald &Evans [1952]1 TLR JO], 111 (CA), per Lord Denning LJ. Here claimant has been employed as driver to run/drive the radio taxi owned by management. Thus, claimant can be said to have been employed as a part of business of management and claimant is doing work as an integral part of the business of the management. Thus, by applying the organizational principle as well, claimant can be said to be working under a contract of service with the

management. Work of claimant cannot be said to be only accessory to the main business of the management.

As per CLAUSES (1) & (2) of the Business Agreement (Annexure - A) entire initial capital and another expenses on the radio taxi to be driven by claimant have borne by management. Even the expenses of medi-claim insurance of claimant/his spouse have been agreed to be borne by management. Notably claimant, as per Clause (e), is not having even free access in the premises of the management.

As per CLAUSE (3) : OBLIGATIONS OF BUSINESS ASSOCIATE, of the Business Agreement (Annexure - A) entire revenue earned by claimant is to be deposited by him with the management on daily basis immediately on completion of duty. There is an agreement as regards the way claimant has to behave during performance of his services under the business agreement. The clauses (3)(f), (g), (i) & (j) are indicative of existence of contract of service between claimant & management rather than contract for service. Claimant is bound to run taxi for minimum of 12 hours a day & 26 days a month. This shows control of management over working hours per day & no. of days in a month of the claimant and management can have such a control when there exist contract of service between the two & not when there exist contract for service. As per clause 3(s) claimant is not authorized to get the taxi repaired through any person except ORIX or authorized Service Centre of ORIX. No discretion has been left with claimant in this regard. As, per clause (3) (v) claimant even cannot fit any accessories, fittings, stickers etc. without prior written permission of ORIX. This all shows the extent of control of the management qua the claimant with regard to taxi run by claimant.

As per Clause (7): TERM AND TERMINATION of Annexure - A claimant was supposed to work upto the satisfaction of management and management had the right to terminate the Agreement services of claimant unilaterally.

Here claimant used to be made to work through DDS System. As pleaded by management in the WS, based on the calls received by a Call Center created by the management, the calls are routed through the DDS System to the Business Associate who then reaches the targeted customer. Further, as admitted by management in the WS, the some of the Business Associates were plying the Radio Taxi for some of the establishment who had negotiated with the management for recurring business. Also, as per Clause (2): OBLIGATIONS OF ORIX - Sub - Clause (1), "...ORIX shall provide marketing assistance to Business Associate to generate Business." There is nothing to suggest that claimant had any option to decline the work/business offered by the management. This all shows that claimant worked under the control and supervision of management.

The extent of control over the claimant/Business Associate in terms of above guidelines is indicative of existence of employer employee relationship between the management and claimant.

Merely because claimant was allowed to pick up walk in passengers on load does not bring about a change in the relationship existing between claimant and management in as much as entire revenue collected by the claimant in day was to be deposited by claimant with the management, Also merely because claimant was engaged by management on profit sharing formula basis does not necessarily mean that there did not exist relationship of employer and employee between the management & claimant. Mode/criteria of payment is not the determinative factor to decide whether there existed relationship of employer and employee or not. The fact that as per Payout claimant received variant amounts is not a factor affecting the decision of the Court on the question whether there existed relationship of employer and employee between the management and the claimant. What matters is the extent of control and supervision exercised by the management on the work and conduct of the claim, and not the criteria on the basis of which remuneration is paid to the claimant for the work

done by him under the control and supervision of the management. In case law reported as Shining Tailors Vs. Industrial Tribunal II, U.P., Lucknow & Ors, AIR 1984 SC 23 relationship of employer and employee was held to be existing between the employer and piece rated workers. In this case claimant was to be paid on the basis of revenue earning total km run of the taxi in a month. Management is in the business of plying Radio Taxi commercially as its, inter alia, main business object, Thus, unless it agreed to pay the driver on the basis of revenue earning total km run of the taxi driven by claimant in a month, possibly it cannot effectively, efficiently or smoothly run its business. Merely because management had allowed the claimant to keep the vehicle in his possession all the time does not bring about a change in the relationship found to be existence in the facts and circumstances of this case.

It is not case of management that claimant had any right to participate in meetings of the management company. As per Business Agreement what was agreed was that claimant had to provide his services as a Driver of the radio taxi owned by the management and nothing more. This all suggest that business agreement was not on principal to principal basis but it was on the basis of employer & employee.

Failure on the part of claimant to support his case through documentary proof, the fact that claimant did not disclose about Business Agreement Ex. MWI/2 (also exhibited as Ex, WWI/M1x) in the statement of claim and failure on the part of claimant to file his bank statement is / are to no effective consequences in as much as case/issues involved herein can be decided/adjudicated upon by the court on the basis of material which has been brought on record by the parties.

In my considered opinion, while determining nature of real relationship existing between the parties by virtue of Business Agreement Ex. MWI/2 (also exhibited as WWI/M1x) the objective (whether it has been drafted with a view to defeat the benefits available to the claimant under

the labour laws) need not been examined / gone into by the court and what is to be seen by the court is the exact nature of relationship arising as a matter of fact between the parties by virtue of provisions of such Business Agreement. It is equally immaterial that terms of Business Agreement are so as to comply, if really so, with the provisions of Motor Vehicles Act, 1988, Delhi Motor Vehicle Rules, Central Motor Vehicle Rules or Radio Taxi Scheme 2006. What is material is the nature of resultant relationship between the parties. None of the case laws relied upon by the management is of no help to the management in the facts and circumstances of this case inasmuch as it is well settled that judicial precedent cannot be followed as a statute and has to be applied with reference to the facts of the case involved in it, The ratio of any decision has to be understood in the background of the facts of that case. What is of the essence in a decision Is its ratio and not every observation found therein nor what logically follows from the various observations made in it, It has to be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without regard to the factual situation and circumstances of the two cases.

In view of above detailed discussion it can be safely concluded that as per business agreement Ex. MW1/2 (also exhibited as WW1/M1x), which is an admitted document of management as being relied upon by management, it cannot be said that claimant was a partner with the management even for the purposes of running the radio taxi and, in fact, there existed. relationship of employer & employee between the management & claimant keeping in view the extent of control and supervision of the management over the workman and also by applying organizational principle.”

3. The Court however, would note that certain important elements of the agreement have not been taken into consideration, in particular the agreement unequivocally records that: it was a principal to principal arrangement. The primary and fundamental understanding between the parties that both were to contribute to the business, wherein one party would provide mechanism and the machinery (motor vehicles) and the other party- the Business Associate, would provide the services for running the vehicle for 12 hours for 26 days a month and revenue generated in the process would be shared on a fixed basis. How much revenue was necessarily to be generated was never fixed. It was entirely dependent upon the working style, commitment and luck of the Business Associate i.e. it would depend upon the number of passengers the Business Associate got to serve through the petitioner's messaging service and/or the walk-in passengers. So, there would always be an element of luck apropos the generation of revenue, which would be shared at the end of the month. There was no fixed monthly amount to be taken away by the Business Associate who claims to be an employee of the petitioner.

4. Furthermore, nothing in the agreement shows that the Business Associate was supposed to work for a particular duration within the course of the day. His working was not directly under the watchful eyes of the petitioner. He could drive the vehicle anywhere in the city, at any time during 24 hours of the day. His conduct with passengers was also not under watch of the petitioner. The relevant clauses of the business agreement dated 02.05.2007 are reproduced as under:

“(e) This agreement is a principal to principal arrangement and does not create now or in the future any relation of

employer - employee between ORIX and the Business Associate. In the event Business Associate or any other person(s) on its behalf or any Government, statutory or any other agency raises any demands or claim or brings any action against ORIX on the ground that the Business Associate is working for or at the premises of ORIX then and in that event Business Associate shall settle the matter immediately and to the complete satisfaction of ORIX.

Business Associate hereby agrees that any expenses, legal or otherwise, if any, shall be the liability of Business Associate. Business Associate further agrees to indemnify and keep ORIX indemnified against all such expenses, losses, damages or action that may be suffered or brought against ORIX in respect of the Business Associate providing service under this Agreement.

(f) The Business Associate is not authorized to hire any person on behalf of ORIX and that the personnel if designated by the Business Associate to carry out its obligations under this Agreement shall at all times be the employee(s) of the Business Associate

(g) The Business Associate can appoint, any other chauffeur only in case of unforeseen circumstances beyond the control of Business Associate, during his absence to drive the Radio Taxi but the same would require a prior approval from ORIX on case to case basis. This would at no point of time mean that the Business Associate can appoint any other person to drive the Radio Taxi for long periods or for the entire term of contract until specifically approved by ORIX in writing. However in such circumstances the replacement of chauffeur will be at the sole risk and cost of Business Associate and ORIX will not be responsible for any compliances of statute on behalf of such replacement, including applicable Labour Laws.”

5. The aforesaid clauses clearly show that the Business Associate i.e. stated to be the driver of the vehicle, could appoint any other driver as a chauffer for the vehicle, in exigent circumstances. Albeit, for such

substitution or replacement of driver, the prior approval of the petitioner was to be taken, since it was the latter's vehicle which the substituted driver would be driving. In other words, the agreement is not of services of the individual but for services to be rendered by him. The petitioner-taxi owner, was only concerned with the plying of the taxi for 12 hours a day for 26 days a month, for which there was a fixed enabling amount of Rs. 5,000/- per month to the Business Associate.

6. For a person to be considered as an employee, it is that individual's services which are to be duly remunerated; whereas in the present case, it was not necessary that the services of that individual-the Business Associate, be performed for payment of remuneration or his share of the business generated in a particular month. The remuneration was not dependent upon his services since the same could be rendered by another person. The arrangement between the replaced driver and the Business Associate would entirely be their concern, with no liability on the taxi owner/petitioner. Indeed, it is so iterated in clause F (supra) which shows that if a person is designated by the Business Associate to carry out the obligations of such Business Associate, then such person shall at all times be the employee of the Business Associate i.e. the conduct, work, liability, etc., emanating from the engagement of the replaced driver would have no bearing on the taxi owner-petitioner.

7. The learned counsel for the respondents submits that clause J of the business agreement restricts the use of the vehicle for any party other than what is spelt in the agreement, without prior consent of the petitioner. The Court is unable to see how this clause can be termed as establishing any form of employer and employee relationship. The petitioner has only

safeguarded itself from the misuse of the vehicle, to ensure that it is not put to illegitimate use and/or to such use as may render the petitioner liable for unforeseen circumstances, especially apropos their insurance contracts and/or their business profile and goodwill.

8. Interestingly, the agreement does not limit the employee from carrying out similar business or enterprise in a competing business. Furthermore, the Court would note that unlike in an employer-employee relationship whereunder, the liabilities of the employee, in the course of his duties, is covered entirely by the employer; in the present case, a whole lot of financial liabilities fastened responsibilities upon the Business Associate. For example, the Second Schedule of the agreement casts the following responsibility upon the Business Associate: *“i) upkeep of radio taxi, ii) cassettes & CD in radio taxi, iii) magazines and newspapers in radio taxi, iv) safety and security of radio taxi, v) cost of ownership conversion,vi) mobile communication, Printer roll in vehicle, vii) repair and maintenance over and above 3 insurance allowance per annum, viii) fuelling of the vehicle”* and in clause E (4), (5) and (6), it stipulates that: *“ix) replacement driver be provided by the Business Associate, x) penalties for non-compliance to be borne by the Business Associate and xi) challans for traffic rules disobedience”*. Similarly, in Clause G, it is mentioned that: *“xii) local taxes and parking, xiii) court cases hearing on accidents, xiv) 15 days notice prior to going on leave”*. Interestingly, both parties could walk away from the contract with prior notice of termination.

9. All these clauses go to show that there was clear monetary liability upon the Business Associate driver for providing services for running of the radio taxi, in a manner that would generate revenue for both parties, of

which 40% would come to the share of the Business Associate and from this 40%, Rs. 5,000/- would be set-off, which was given at the beginning of the month. In effect, the said amount was only a facilitating amount for each month. A facilitating amount or at best, cash in hand, cannot be deemed to be a fixed salary.

10. What emanates from the preceding discussion is that there was no employee and employer relationship, instead the agreement was clearly principal and principal relationship. Financial liability was envisaged and cast upon both parties and there was no direct supervision by the petitioner upon the work of the Business Associate. The maintenance of vehicle, filling of fuel, payment of penalties, challans, local taxes and parking, upkeep and many other expenses were to be borne by the Business Associate, who is sought to be termed as an employee. Surely, no employee has to bear such costs on behalf of his management. The monthly emoluments of the Business Associates were also not fixed. From the preceding discussion, it is clear that there was no employer and employee relationship. Therefore, the business agreement clearly factors-in the uncertainties of revenue generations from month to month; the suspense of what would be the share of the business at the end of the month as opposed to the fixed salary which is known to an employee. Unlike an employer, the services of Business Associate were not specific to him, because he could substitute a driver in place of himself and for such arrangement he only would be liable without any responsibility of the petitioner. Accordingly, the impugned order is set aside.

11. The amounts deposited by the petitioner be refunded to it.
12. The petitions are allowed and disposed-off in terms of the above.

NAJMI WAZIRI, J

FEBRUARY 13, 2020

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