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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.10.2021

PRONOUNCED ON : 20.10.2021

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.M.A.Nos.1361, 1362 & 1374 of 2021

GRT Hotels and Resorts Private Limited,
(Formerly G.R. Thangamaligai Private Limited),
Represented by its head HR
Dr.Syed Arifullah,
New No.136 (Old No.104), Usman Road,
T.Nagar, Chennai - 600 017.

... Appellant in all CMAs/Petitioner

..Vs..

Employees State Insurance Corporation,
Represented by its Deputy Director,
Employees State Insurance Corporation,
143, Sterling Road,
Nungambakkam,
Chennai - 600 034.

... Respondent in all CMAs/Respondent

Common Prayer: Civil Miscellaneous Appeals filed under Section 82 of the Employees State Insurance Act, 1948 against the order dated 28.10.2020 passed in E.I.O.P.Nos.7, 6 & 5 of 2011 respectively on the file of the Employees State Insurance Court (Principal Labour Court), Chennai.

For Appellant in

all CMAs. : Mr.Vijay Narayanan, Senior Advocate
for Mr.R.Parthiban

For Respondent in

all CMAs. : Mr.S.P.Srinivasan



COMMON JUDGMENT

These appeals have been filed challenging the separate orders dated 28.10.2020 passed by the Employees State Insurance Court (Principal Labour Court, Chennai) in EIOP.Nos.7, 6 & 5 of 2011 under which the Employees State Insurance Court confirmed the separate orders dated 22.10.2009 passed by the respondent corporation under section 45(A) of the Employees State Insurance Act calling upon the Appellant to pay Employees State Insurance contributions for Aacharis/Silversmiths engaged by the Appellant as detailed hereunder:

CMA.No.	Period	Employees State Insurance contributions payable (Rs.)
1361 of 2021 corresponds to EIOP.No.7 of 2011	1997-99	94,378/-
1362 of 2021 corresponds to EIOP.No.6 of 2011	2004-2007	15,48,351/-
1374 of 2021 corresponds to EIOP.No.5 of 2011	1996-97 to 1997 - 2002	20,74,532/-

2. Since the issues involved in these appeals are one and the same, they are disposed of by this common judgment.

3. The contention of the Appellant is that Aacharis/Silversmiths engaged by them will not fall within the definition of an employee as per section 2(9) of the Employees State Insurance Act, 1948 and therefore, they are not liable to pay the Employees State Insurance contributions for the remuneration paid by them to Aacharis.

4. However, it is the contention of the respondent corporation that the Aacharis/Silversmiths engaged by the Appellant fall within the definition of an employee under section 2(9)(i) of the Employees State Insurance Act, 1948 as Aacharis are being regularly employed by the Appellant and it is their contention that it is immaterial whether the product is manufactured by the Aacharis within the premises of the Appellant or elsewhere.



5. These appeals are admitted on the following substantial questions of law:

(a) Whether the Acharis engaged by the Appellant are the employees of the Appellant falling within the definition of Section 2(9) of the Employees State Insurance Act, 1948;

(b) Whether the Appellant is liable to pay contribution as demanded by the Employees State Insurance Corporation for the sum of money paid to Acharis by the Appellant.

(c) Whether the Employees State Insurance Court has failed to take into account, the Full Bench Judgment of the Madras High Court in Bethall Engineering case, where the Court has held that in case of lack or absence of supervision, the same cannot establish an employer and employee relationship?

6. Heard Mr.Vijay Narayan, learned Senior Counsel representing Mr.R.Parthiban, learned counsel for the Appellant and Mr.S.P.Srinivasan, learned standing counsel for the respondent.

7. In support of the contentions of the Appellant, the learned Senior counsel for the Appellant drew the attention of this Court to the following authorities:

(a) A decision of the Hon'ble Supreme Court in the case of CESC Limited and Others vs. Subhash Chandra Bose and Others reported in (1992) 1 SCC 441 and in particular, he referred to paragraphs 14, 19 & 20 of the said judgment and would submit that since there is no constant vigil over the work entrusted to the Acharis and there is no control over the same by the Appellant, Acharis who were engaged by the Appellant will not fall within the definition of an employee under section 2(9) of the Employees State Insurance Act. He submitted that the Appellant is only concerned with the end product namely the Jewellery item manufactured by Acharis and the Appellant is not involved in the supervision of the Acharis during the course of manufacturing process. He would further submit that the Acharis will also not fall within the definition of "Agent" as defined under section 182 of the Indian Contract Act, 1872;

(b) A decision of the Hon'ble Supreme Court in the case of Bharat Heavy Electricals Ltd. vs. Employees State Insurance Corporation reported in (2008) 3 SCC 247.

Relying upon the said decision, the learned Senior Counsel



for the Appellant would submit that without affording sufficient opportunity to the Appellant, the respondent Corporation has passed the separate orders under section 45(A) of the Employees State Insurance Act erroneously holding that the Aacharis fall within the definition of an employee under section 2(9) of the Employees State Insurance Act and therefore, the Appellant is liable to pay Employees State Insurance contributions for those Aacharis;

(c) A Full Bench decision of the Madras High Court in the case of Employees State Insurance Corporation vs. Bethall Engineering Company reported in 2008 (1) LLJ 278;

Relying upon the aforesaid decision, the learned Senior Counsel would submit that mere right of accepting or rejecting the work done by the Aacharis by the Appellant would not amount to supervision so as to attract definition of employee as defined under section 2(9) of the Employees State Insurance Act. In particular, he referred to paragraphs 1, 4, 6 & 7 of the said Judgment. Learned Senior Counsel would further submit that SLP filed before the Hon'ble Supreme Court as against the full bench judgment of the Madras High Court was also dismissed by the Hon'ble Supreme Court.

(d) A Single Bench Decision of the Madras High Court in the case of Allied Industries, Madras vs. Employee's State Insurance Corporation, Madras and another reported in 2008 (4) LLN 601;

Relying upon the said judgment, learned Senior Counsel would submit that in the case on hand also, the Employees State Insurance Corporation did not give sufficient opportunity of hearing to the Appellant with regard to their demand as in the case referred to supra.

(e) A decision of the Hon'ble Supreme Court in the case of Managing Director, Hassan Cooperative Producer's Society Union Limited vs. Assistant Regional Director, Employee's State Insurance Corporation reported in (2010) 11 SCC 537 and in particular, learned Senior Counsel for the Appellant referred to paragraphs 5, 6, 16, 17, 26, 31 and 33 and would submit that supervision by the principal employer means something more than mere exercise of some remote or indirect control over the activities or the work of the workers. The supervision is the constant vigil by the principal employer. He would submit that in the case of the Appellant, there is no constant vigil by them over the Aacharis and hence, Aacharis will not fall under the definition of employee as defined under section 2(9) of the Employees State Insurance Act.



(f) A Single Bench Judgment of the Madras High Court in the case of Regional Director, Employees State Insurance Corporation, Chennai vs. Ledrex Products Private Ltd., rep. by its Director Sanjay Dhurka, Madras reported in 2014-1-LLJ-640 and in particular, he referred to paragraphs 13, 14 and 15 of the said judgment and would submit that the learned Single Judge has followed the Full Bench decision of the Madras High Court in the case of Employees State Insurance Corporation vs. Bethall Engineering Company reported in 2008 (1) LLJ 278 referred to supra.

(g) A Single Bench decision of the Madras High Court in the case of Deputy Director, Insurance No.V, Employees' State Insurance Corpn., Chennai reported in 2014-1-LLJ-574 and in particular, he referred to paragraphs 8 and 11 of the said judgment. He would submit that once again another learned Single Judge of this Court by following the Full Bench decision of the Madras High Court in the case of Employees State Insurance Corporation vs. Bethall Engineering Company reported in 2008 (1) LLJ 278 referred to supra, held that the employees of independent contractors could not be held to be employees coming within the purview of section 2(9) of the Employees State Insurance.

8. The learned Senior Counsel for the Appellant also submitted that another Employees State Insurance Court by its order dated 11.10.2019 accepted the contention of the Appellant in EIOP.No.153 of 2005 holding that the Appellant is not liable to pay Employees State Insurance contributions for the Aacharis as there is no supervision by the Appellant on the Aacharis who are making the Ornaments. According to him, there must be uniformity in the levy of Employees State Insurance contributions by the respondent Corporation. He would also submit that under the order dated 11.10.2019 passed in EIOP.No.153 of 2005 referred to supra, the demand for Employees State Insurance contributions from the Appellant for the period of 1991-92 to 1995 - 96 was set aside by the Employees State Insurance Court, whereas under the impugned order, the Appellant has been directed to pay the Employees State Insurance contributions in respect of similar transactions wherein also the Appellant has engaged Aacharis for manufacturing ornaments. He would also submit that many jewellers are not paying Employees State Insurance contributions for engaging Aacharis and the Appellant is one amongst the few Aacharis, who have been



singled out by the respondent Corporation.

9. Per contra learned standing counsel for the respondent would submit as follows:

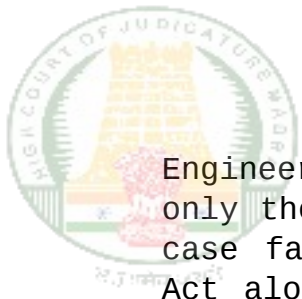
(a) The Appellant has been engaging in manufacturing process, whereby gold bars are purchased by them, designs made by them and given to Aacharis for converting them into jewels and selling with the trade mark of GRT. They incur expenses towards manufacturing process called as "making charges" which are payments made to Aacharis for the labour and skill utilised by them. For the labour content/expenses which are nothing but wages, which attracts Employees State Insurance contributions as per section 2(22) of the Employees State Insurance Act and the said Aacharis are treated as workmen under section 2(9) of Employees State Insurance Act.

(b) PW1, the Appellant's witness has admitted that the Appellant purchased gold bars and along with designs give it to the Aacharis for manufacturing jewellery items. PW1 has also admitted that the Appellant is having Excise Code number and the Aacharis do not have the same. PW1 has also admitted that the Appellant sells gold jewels manufactured by the Aacharis with the trademark of GRT.

(c) The Appellant has not filed any contract to prove that the Aacharis have been engaged by them through a contract. PW1 in his deposition has admitted that there is no contract between them, but there is direct relationship between the Appellant and the Aacharis.

(d) The Judgment of the Employees State Insurance Court in EIOP.No.97 of 2001 dated 30.07.2021 and another judgment of the Employees State Insurance Court pertaining to the Appellant for the previous assessment years will not have any bearing on the impugned orders passed in EIOP.No.5, 6 & 7 of 2011 under appeal for the reason that the evidence available on record in EIOP.Nos.5, 6 & 7 of 2011 and the factual aspects and issues raised in that O.P. are totally different. There is no commonality and the principal of judicial precedent is not applicable.

(e) The Full Bench Judgment of the Madras High Court in Bethall Engineering case referred to supra relied upon by the learned Senior counsel for the Appellant lays down the ratio of "Supervision" as defined under section 2(9)(ii) of Employees State Insurance Act and did not deal with the scope of section 2(9)(i) of Employees State Insurance Act. The Bethall



Engineering case is pending adjudication before this Court and only the scope of Supervision has been discussed and the present case falls within section 2(9)(i) of Employees State Insurance Act alone as held by Employees State Insurance Court. In this case, Aacharis were engaged in the manufacturing process, which is part of the work of GRT. There is direct relationship between the Appellant and the Aacharis as gold bars and designs were given to the Aacharis and finished jewels were handed over by the Aacharis directly and payments were also made to them directly.

(f) As far as findings of fact is concerned, the Employees State Insurance Court being the trial court only can determine and render a finding on factual aspects and this Court cannot interfere with the said finding, unless it is perverse and arbitrary.

(g) As per sections 101 to 106 of Indian Evidence Act, burden of proof is on the person who asserts a fact. Under section 106, a person who has exclusive knowledge of a fact has to prove the said fact. In the case on hand, engagement of Aacharis is within the exclusive knowledge of the Appellant, whereas it has neither let in oral evidence of Aacharis nor produced documents to prove its contention.

Discussion:

10. The issues that arises for consideration in this appeal are whether the Aacharis/Silversmiths engaged by the Appellant for manufacturing ornaments on payment of remuneration are employees falling within the definition of section 2(9) of Employees State Insurance Act and whether the remuneration paid to the Aacharis can be treated as wages falling within the definition of "wages" under section 2(22) of the Employees State Insurance Act.

11. Section 2(9) of Employees State Insurance Act 1958 reads as follows:

(9) " employee " means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and

—

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by



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the employee in the factory or establishment or elsewhere ; or

(ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment ; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment ; [or any person engaged as an apprentice, not being an apprentice engaged under the Apprentice Act, 1961 (52 of 1961), [and includes such person engaged as apprentice whose training period is extended to any length of time] but does not include]-]

(a) any member of [the Indian] naval, military or air force; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government]:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period ;]

12. According to the respondent Corporation, the Aacharis/Silversmiths fall under Section 2(9)(i) of Employees State Insurance Act as they are directly employed by the Appellant and there is no intermediary. However, the said



contention was disputed by the Appellant as according to them, the Acharis are independent contractors over whom, the Appellant does not have any control or supervision. According to them, they give designs for the ornaments to be manufactured to the Acharis, who in turn, employ labourers for manufacturing ornaments as per the Appellant's designs and the said Acharis also act for other jewellers as well. According to the Appellant, they do not have any personal supervision over the work entrusted to the Acharis. According to them, in case the Appellant is not satisfied with the end product, they have the right to reject the same. Hence, it is the contention of the Appellant that the Acharis/Silversmiths cannot be treated as an employee falling under section 2(9) of Employees State Insurance Act.

13. Section 2(22) of Employees State Insurance Act defines wages which reads as follows:

(22) " wages " means all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes [any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and] other additional remuneration, if any, [paid at intervals not exceeding two months], but does not include –

(a) any contribution paid by the employer to any pension fund or provident fund, or under this Act ;

(b) any travelling allowance or the value of any travelling concession ;

(c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment ; or

(d) any gratuity payable on discharge ;"

14. As seen from the definition of wages, the remuneration must be paid to the employees and there must be a contract of employment either express or implied. In the case on hand, there is no express contract for employment. However, it is the contention of the respondent Corporation that engaging Acharis /Silversmiths being a regular activity of the Appellant in the course of their regular business, there is an implied contract of employment between the Appellant and the



Aacharis/Silversmiths.

15. To determine whether Aacharis engaged by the Appellant are employees or not for the purpose of the Employee's State Insurance Act, 1948, Section 2(9) which defines an Employee has to be read in conjunction with Section 2(22) which defines wages. Only if the payments made by the Appellant to the Aacharis are wages falling within the definition of Section 2(22), the Aacharis can be treated as employees of the Appellant as defined under Section 2(9) of the Act.

16. As seen from section 2(9) and Section 2(22) of Employees State Insurance Act, the following requirements have to be satisfied for bringing a person within the definition of an employee:

- (a) The person must be paid wages; and
- (b) There must be an express or implied contract of employment between the employer and the alleged employee;
- (c) Direct employment by the principal employer; or
- (d) Employed by or through an immediate employer or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the establishment; or
- (e) Whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service.

17. We now need to see as to whether the Aacharis engaged by the Appellant fall under any of the aforementioned categories. In the case on hand, Aacharis/Silversmiths are not alone engaged by the Appellant but also by other Jewellers.

18. The remuneration payable by the Appellant to the Aacharis /Silversmiths is not a monthly salary but is on item to item basis, i.e., once the finished product is made at the request of the Appellant, the Appellant pays the remuneration to the Aacharis for the same. The Aacharis/Silversmiths engaged by the Appellant has got multiple clients and the Appellant is one among them. The designs for the product alone is given by the Appellant to the Aacharis and the Aacharis do job work in their premises independently by employing their own labourers. In case, any product made by the Aacharis is not to the satisfaction of the Appellant, they have got the power to reject



the same. The Appellant do not have any control and supervision over the work entrusted to the Aacharis/Silversmiths. But the Aacharis/Silversmiths do their work independently with the assistance of their own work force. The Appellant is only interested in the quality of the end product and it is not interested in the method adopted by the Aacharis/Silversmiths for manufacturing the end product as required by the Appellant. The Aacharis/Silversmiths also do not get any training from the Appellant and they use their own skill for satisfying the requirements of the Appellant in getting the desired end product.

19. The relationship between the Appellant and the Aacharis is only a temporary relationship and in case, the Appellant is not satisfied with the concerned Aacharis/Silversmiths performance, the Appellant is entitled to engage the service of another Aachary /Silversmith to get the desired end product. It cannot be said that the relationship between the Appellant and the Aacharis/Silversmiths is a continuing relationship. As observed earlier, the relationship is only temporary and is on case to case basis.

20. From the above, it is clear that the nature of transaction between the Appellant and the Aacharis/Silversmiths is a temporary relationship and the remuneration paid by the Appellant to the Aacharis/Silversmiths cannot be treated as wages falling within Section 2(22) of the Employee State Insurance Act, 1948 as there is no express or implied contract of employment between the Appellant and the Aacharis/Silversmith and the statutory benefits available to an employee are also not applicable to the Aacharis/Silversmiths.

21. The evidence available on record including the deposition of PW1 (Appellant's witness) does not reveal that the Aacharis/Silversmiths are the employees of the Appellant. The Appellant has discharged its initial burden of proof to establish that the Aacharis are not their employees. The Appellants having discharged their initial burden of proof, it is for the respondent corporation to prove that the Aacharis are employees of the Appellant which they have failed to prove as seen from the evidence available on record. The preponderance of probabilities from the evidence available on record would clearly reveal that the Aacharis/Silversmiths engaged by the



Appellant are not the employees of the Appellant.

22. The Full Bench Judgment of the Madras High Court in Bethall Engineering case referred to supra relied upon by the learned Senior Counsel for the Appellant squarely applies to the facts of the instant case also. In the instant case, as in the case of Bethall Engineering case, the Aacharis/Silversmiths engaged by the Appellant are also independent contractors and the Appellant has got the right to accept or reject the work done by the Aacharis/Silversmiths on their behalf. In Bethall Engineering case, the Full Bench of the Madras High Court held that the contractor in that case does not fall within the definition of section 2(9) of Employees State Insurance Act as the employer as a principal had the right to reject the end product manufactured by the private contractor and the said contractor was not permanently associated with the principal employer. The relevant paragraph is extracted hereunder:

"7. It is thus clear from the dicta of the Supreme Court that where the job work is entrusted to a third party contractor and such third party contractor has engaged independent workers, the fact that the principal employer has power to reject the end product manufactured by the contractor, does not constitute an element of supervision within the meaning of section 2(9) of the Act. The judgment of the Division Bench in Poonam Eswardas, Proprietrix, Kaleel Corporation vs. Employees' State Insurance Corporation (supra) relied upon by the appellant Corporation is concerned with the direct employees of the establishment and has no application to the facts of the instant case which is about the contract employees."

23. The aforesaid full Bench decision of the Madras High Court has also been followed by learned Single Judges of this Court which the learned Senior Counsel for the Appellant had relied upon. Admittedly no contra evidence has been produced by the respondent Corporation to disprove the contention of the Appellant that the Aacharis/Silversmiths engaged by them are only independent contractors, over whom, they did not have



supervision and control, during the entire manufacturing process of the end product.

24. The decision of the Hon'ble Supreme Court in the case of CESC Limited and others vs. Subash Chandra Bose and others reported in (1992) 1 SCC 441 also supports the case of the Appellant. As seen from the evidence available on record, it is clear that the Appellant does not have supervision on daily basis over the Aacharis/Silversmiths in the course of their manufacture of end product for which, the Appellant had engaged their service.

25. Even in the deposition of PW1, the Appellant's witness, has not admitted that the Aacharis/Silversmiths are the Appellant's employees. Though the Appellant may be registered under the Employees State Insurance Act, 1948, only when the person engaged by the Appellant falls within the definition of an employee as per section 2(9) of the Employees State Insurance Act, 1948, the Appellant is liable to pay Employees State Insurance contributions for those employees. Just because, the Appellant is registered under the Employees State Insurance Act, 1948, the respondent Corporation cannot arbitrarily demand Employees State Insurance contributions for remuneration paid by the Appellant to various independent contractors which will not fall within the definition of wages under Section 2(22) of the Employee's State Insurance Act. Only when the respondent Corporation is able to establish that the Aacharis/Silversmiths engaged by the Appellant fall within the definition of an employee under section 2(9) of the Act, they can demand Employees State Insurance contributions from the Appellant.

26. In the case on hand, the respondent Corporation has failed to produce any supporting evidence to prove that the Aacharis/Silversmiths engaged by the Appellant are infact the employees of the Appellant. The Employees State Insurance Court has under the impugned orders by total non-application of mind to the definition of wages and employee as found in the ESI Act as well as to the full Bench decision of the Madras High Court in Bethal Engineering case referred to supra has erroneously come to the conclusion that there is an employer - employee relationship between the Appellant and the Aacharis/Silversmiths. Hence the substantial questions of law formulated by this Court are answered in favour of the Appellant



by holding that Acharis engaged by the Appellant are not employees falling within the definition of employee under Section 2(9) of the ESI Act and the remuneration paid to them will also not fall within the category of wages as defined under Section 2(22) of the Act.

27. In the result, the impugned orders all dated 28.10.2020 passed in E.I.O.P.Nos.5, 6 & 7 by the Employees State Insurance Court, (Principal Labour Court, Chennai as well as three separate orders dated 22.10.2009 passed by the respondent corporation under section 45(A) of the Employees State Insurance Act are hereby set aside against the Appellant and the Appeals are allowed. No costs.

Sd/-
Assistant Registrar (CS-CCC)

// True Copy //

Sub Assistant Registrar

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To

1. Employees State Insurance Court
Principal Labour Court,
Chennai.

2. The Section Officer,
V.R. Section,
High Court Madras.

+3CCs to M/s.S.P.Srinivasan, Advocate, SR.No. 54029,54030,54031
+1CC to M/s.R.Parthiban, Advocate, SR.No. 53637

C.M.A.Nos.1361, 1362 & 1374 of 2021

RSI(CO)
B.VC (29/10/2021)