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C.M.A.Nos.1813, 2020 and 2042 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.07.2024

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THE HONOURABLE MR.JUSTICE K.RAJASEKAR

C.M.A.Nos.1813, 2020 and 2042 of 2021
and
C.M.P.Nos.5623 and 5625 of 2022

C.M.A.No.1813 of 2021

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

..Appellant/Respondent

Vs.

Bala Tourist Service,
Bala House,
No.132, Kodambakkam High Road,
Nungambakkam, Chennai – 600 034,
Rep. by its Partner B.Pradeep.

.. Respondent/Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82(2) of the Employees' State Insurance Act, 1948, praying to set aside the order dated 27.01.2021 passed in ESIOP No.87 of 2005 on the file of the Employees Insurance Court (Principal Labour Court), Chennai.



C.M.A.Nos.1813, 2020 and 2042 of 2021

C.M.A.No.2020 of 2021

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

..Appellant/Respondent

Vs.

Bala Tourist Service,
Bala House,
88-A, MGR Road,
Nungambakkam, Chennai – 600 034,
Rep. by its Partner B.Pradeep.

.. Respondent/Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82(2) of the Employees' State Insurance Act, 1948, praying to set aside the order dated 27.01.2021 passed in ESIOP No.84 of 2010 on the file of the Employees Insurance Court (Principal Labour Court), Chennai.

C.M.A.No.2042 of 2021

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

..Appellant/Respondent

Vs.

Bala Tourist Service,
Bala House,



C.M.A.Nos.1813, 2020 and 2042 of 2021

88-A, MGR Road,
Nungambakkam, Chennai – 600 034,
Rep. by its Partner B.Pradeep.

.. Respondent/Petitioner

PRAYER: Civil Miscellaneous Appeal filed under Section 82(2) of the Employees' State Insurance Act, 1948, praying to set aside the order dated 27.01.2021 passed in EIOP No.85 of 2010 on the file of the Employees Insurance Court (Principal Labour Court), Chennai.

For Appellant : M/s.G.Narmadha
for Mr.G.Bharadwaj
For Respondent : Mr.C.Manohar
for M/s.Gupta & Ravi
(in all appeals)

COMMON JUDGMENT

All these three Civil Miscellaneous Appeals are filed by the Employees' State Insurance Corporation ('ESI Corporation' in short) challenging the separate orders passed by the ESI Court in ESIOP.Nos.87/2005, 84/2010 and 85/2010 dated 27.01.2021.

2. The subject matter of all these appeals are relating to payment of contribution by the respondent Establishment under the ESI Act for three different periods, namely,



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- (i) 1997-98 to 2000-01,
- (ii) 2005-06 to 2007-07 and
- (iii) 2007-08 and 2008-09.

The Establishment has initiated original proceedings before the ESI Court disputing the order passed under Section 45A of the Employees' State Insurance Act ('ESI Act' in short). Since the points for consideration arising for the disposal of the appeals are one and the same, all the three appeals have been taken up together for hearing and a common order is hereby passed.

3. The brief facts leading to the filing of this appeal are as follows:

The respondent in these appeals herein (hereinafter referred to as 'Establishment') is a Tourist Vehicle Operator engaged in the business of operating tourist vehicles on hire to various institutions, customers at Chennai. It has 35 employees under various categories such as staffs and drivers. The Establishment is paying contribution and has the Code No.51-51540-101. It also engaged owner-cum-drivers to attend its business and operation of tourist vehicle. It was served with Form C-18 (adhoc) notice



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by the ESI Corporation calling upon to submit their accounts and other documents for fixing the contribution, if any, to be payable by the Establishment for three different periods as stated in the earlier paragraphs. Even though several claims were made by the Corporation, the major claim was in relation to car hire charges paid to owner-cum-drivers. The Establishment has submitted a detailed reply and also produced various documents such as,

- (i) copies of car hiring statement for the relevant periods,
- (ii) bills for the period in respect of local and outstation operators,
- (iii) RC Books,
- (iv) agreement entered into between the Establishment and third party owner-cum-drivers.

After due enquiry, the competent authority has passed orders under Section 45-A of the ESI Act for three different periods, fixing the liability to payment of contribution for the said car hire payment made to various drivers, who have been classified by the Establishment as owner-cum-drivers. The said orders have been challenged by the Establishment before the ESI Court by filing three separate Original Petitions under Section 75 of



the ESI Act.

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The case of the Establishment:

4. The Establishment has contended before the ESI Court that it is having its regular employees in its rolls under various categories such as staffs and drivers. Apart from them, the Establishment has also procured vehicles from other tourist vehicle operators or owners of vehicles. When the Establishment is not able to provide a particular vehicle booked by the client, they arrange the very same type of vehicle from other tourist vehicle operators for serving their client. In such circumstances, the tourist vehicle operators from whom the vehicle is obtained, will not directly receive payments from the customers, they will raise invoice in the name of the Establishment and payment will be made by the Establishment to the tourist vehicle operators. Similarly, the Establishment is engaging individual owners of vehicles having tourist vehicle permits. Owner-cum-drivers are also tourist vehicle operators and they operate in their own name. The earnings from these vehicles go to them and only fixed percentage of commission is paid to the main operators like the Establishment herein. The Establishment never pays any salary to the independent driver-cum-



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operators. In every service offered by them, the owner-cum-drivers benefit more than the Establishment. These owner-cum-drivers have not rendered any service to the Establishment, they serve only to the customers of the Establishment. The Establishment is not having any control over the owner-cum-drivers and they can refuse the trip if they are not willing to attend the trip. They are having liberty to park their vehicles anywhere and they can choose the timing for carrying out the trips etc. They have not been given any uniform. The maintenance, repair, fuelling the vehicle, obtaining permits, payments of road taxes are carried out by the owner-cum-drivers. The Establishment is only receiving booking from the customers and they transfer the service request to any owner-cum-drivers, who is willing to carry out the trip. Accordingly, there is no master and servant relationship between the Establishment and the owner-cum-drivers. The amounts paid to the owner-cum-drivers have been accounted on the heading 'car hire charges' in the books of accounts. Hence, the Establishment is not liable to pay any contribution as ordered by the ESI Corporation.

The case of the ESI Corporation:



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5. The case of the appellant/Corporation is that on the basis of the inspection of records, the ESI Corporation has issued a show cause notice in Form C-18 (ad hoc notice) and opportunity was also afforded to the Establishment to represent and submit their records, statements etc. After hearing the representative of the Establishment and after verification of all the records, orders under Section 45-A have been passed by the competent authority. On verification of records, it is observed that all the payments made to the owner-cum-drivers are not made directly by the customers of the Establishment, it had been made only through the Establishment. They have also been provided with company uniform and their attendance were marked by using log book. It is also reported that there is no written agreement or contract between the Establishment and the owner-cum-drivers for engaging them for some period. In the absence of contract, the relationship between the Establishment and the owner-cum-drivers is only an employer-employee relationship and the definition of 'employee' provided under Section 2(9) of the ESI Act applies to the owner-cum-drivers. No separate wage details were produced by the Establishment and the payments made to the owner-cum-drivers includes vehicle engagement



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charges, diesel expenses, maintenance expenses, TDS deducted etc. As long as these drivers work under the Establishment, they have to abide by the rules of the Establishment and satisfy the clients as per the norms and follow the standards prescribed by the Establishment. The Establishment has also taken conflicting stands regarding the terms of engagement of the owner-cum-drivers. During the period 2005-2006, Establishment produced Memorandum of Understanding entered by them with owner-cum-drivers and recitals in the MOU also supports the case of the Corporation that, these drivers are to be treated only as employees of the Establishment and Section 2(9) of the ESI Act is applicable to them.

Proceedings of the ESI Court:

6. For substantiating their stands, both the parties have adduced oral and documentary evidence before the ESI Court. After considering the oral and documentary evidence placed on record, the ESI Court has accepted the case of the Establishment and allowed the Original Petitions filed by the Establishment under Section 75 of the Act and set aside the orders passed by the ESI Corporation under Section 45A of the Act. The ESI Court has held that the ESI Corporation failed to prove that the owner-cum-drivers engaged



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by the Establishment would fall within the definition of Section 2(9) of the ESI Act and there is an employer-employee relationship between them.

Aggrieved over the separate orders passed, these Civil Miscellaneous Appeals have been filed by the ESI Corporation.

Arguments of the ESI Corporation:

7. The learned counsel for the appellant/Corporation submits that the scope of term 'employee' used in Section 2(9) of the ESI Act or definition given for the term 'employee' under the ESI Act, Payment of Gratuity, Maternity Benefit Act is of wider amplitude than the word 'workmen' or 'worker' used in Industrial Disputes Act or Factories Act. The definition of 'workmen' is not in pari materia with the definition of 'employee' under the ESI Act and it has been time and again held that social legislation by ESI Act shall receive a beneficial and liberal construction. As per the definition of Section 2(9) of the ESI Act, 1948, the owner-cum-drivers, who were engaged by the Establishment, are to be termed only as 'employee'. They have been directly employed by the principal employer Establishment and in addition to being incidental, preliminary or connected to the work of the respondent Establishment, comprising of the major portion of their business.



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Even though they are having own car, they have been engaged throughout the month by the Establishment based on their regular service request received by them. These drivers have to comply the services as a representative of the Establishment and not as an independent owner-cum-driver as projected by the Establishment. The person, who sought services of the Establishment, treat these drivers as the employees of the Establishment. The Establishment is maintaining a log book to record the regular presence of the drivers. The terms of Memorandum of Understanding entered between the Establishment and the owner-cum-drivers also indicate that the Establishment is having authoritative disciplinary control over them. The drivers have no say in terms of the contract including the remuneration fixed. It gives clear upper hand to the Establishment and it is only a contract of service and not a contract for service. The contract does not permit the owner-cum-drivers to terminate the same for any reason, but the Establishment can terminate the contract without any reason.

8. The learned counsel for the appellant further submitted that after completion of the services to the customers, the bills were issued only in the



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name of the Establishment and after collecting the amounts from the customers, the Establishment pays the owner-cum-drivers at the end of the month after deducting their portion of profit in the name of commission and expenses towards maintenance, etc. The owner-cum-drivers have to strictly follow the disciplinary procedures as required by the Establishment. The percentage of labour charges out of the total amount paid to the owner-cum-drivers after deducting expenses towards maintenance etc., is nothing but wages for which the Establishment is liable to pay contribution under the Act.

9. She further submitted that since ESI Act is a beneficial statute, it has to be construed in its strict correct perspective so as to fructify the legislative intent. Originally, the test to fix the employer-employee relationship was based on control test and subsequently, as decided by the Hon'ble Apex Court in *Shivnandan Sharma Vs. Punjab National Bank Limited* reported in *AIR 1955 SC 404*, this control test was further expanded to mean due control and supervision in many cases, based on the judgment of the Hon'ble Apex Court in *Dharangadhra Chemical Works Limited Vs. State of Saurashtra [1957 AIR 264]*. Subsequently, the Apex



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Court in ***Birdhichand Sharma Vs. Civil Judge, Nagpur and others [AIR***

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1961 SC 644], has held that the control test no longer being a sole determination test and over time, the other tests such as organisation/integration test was emerged. In ***Silver Jubilee Tailoring House Vs. Chief Inspector of Shops and Establishments*** reported in ***(1974) 3 SCC 498***, the Apex Court held that the organisation test looks at a degree of integration in work committed in the hirer's primary business with the understanding that the higher the level of integration, the more likely the worker is to be an employee. In this case, the two combination of control and integration tests allows professional workers to be classified as employees notwithstanding the lack of control over the manner work. Subsequently, in ***Hussainbhai Vs. Alath Factory Thezhilali Union*** reported in ***(1978) 4 SCC 257***, the Apex Court has observed that even in the absence of traditional factors of control and integration, other facts in the employment arrangements shall also be relevant to decide the relationship. This was further clarified in ***Ram Singh Vs. U.T., Chandigarh*** reported in ***(2004) 1 SCC 126*** that multi factors attached with the employment arrangements are to be relevant to decide the relationship. Therefore, in this



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case, even if the contention of the Establishment that they are having written arrangements, is accepted, the Court has to pierce the veil of the contract to look at working conditions. The contractual terms shall not be sham arrangements designed to ensure the principal employer avoids providing various benefits a regular employee receives. The learned counsel further relied on the judgment of the Apex Court in *Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu* reported in (2004) 3 SCC 514 in support of the principle of piercing the veil for the purpose of deciding the status of workmen.

Arguments of the Establishment:

10. The learned counsel for the respondent/Establishment submits that the owner-cum-drivers are independent professionals. They provide services to various customers on their own. The Establishment is also having a separate staff strength and by tourist taxi service, they extend the services to various customers. Sometimes there may be more demand for seeking services of the Establishment, at that time, they engage the owner-



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cum-drivers for their services. Accordingly, the owner-cum-drivers attend the services forwarded to them and after completion of service, the service charges have been paid in the name of the Establishment and after collecting a small portion of the bill amount as a commission, the remaining amount is being paid for the services offered to the customers. The Establishment only forwards the service orders to these owner-cum-drivers and at any point of time, these drivers are not under the control or supervision of the Establishment herein. These drivers have not been engaged on permanent basis and only as a casual labour, that too, during the contingency such as non-availability of the drivers and cars of the Establishment, they engage these owner-cum-drivers. Hence, there cannot be any claim that there is an employer-employee relationship between the Establishment and the owner-cum-drivers. There is a separate contract entered between these owner-cum-drivers for extending their services to the Establishment so as to ensure the proper payment and binding contract between the parties and this could not be termed as a sham contract. Only on the basis of this contract, arrangements have been made between the Establishment and the owner-cum-drivers that they will attend the service request forwarded by the



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Establishment. In support of his submission, the learned counsel also relied on the recitals in the contract.

11. The learned counsel further submitted that the owner-cum-drivers used to park their vehicles on their own at any place and they are free to avoid the service orders forwarded to them. They are free to engage any other customers on their own. There is no compulsion for them that they shall attend only the service request order forwarded by the Establishment herein and thereby, there is an absolute freedom of their style of functioning and undertaking the service orders of the Establishment. Since they are having freedom to choose to accept the work of the Establishment, there cannot be any employer-employee relationship between them.

12. The learned counsel further submits that there must be a clear distinction between the contract for service and contract of service and the owner-cum-drivers are engaged only for the purpose of contract for service and not as contract of service. In support of his submission, the learned counsel also relied on the following judgments:



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- (i) *Chintaman Rao Vs. State of Madhya Pradesh [AIR 1958 SC 388]*
- (ii) *Shankar Balaji Waje Vs. State of Maharashtra [AIR 1962 SC 517]*
- (iii) *Employees' State Insurance Corporation Vs. Maharaja Bar and Restaurant [1979 SCC OnLine AP 297]*
- (iv) *Employees' State Insurance Corporation Vs. Ayurvedic I.C.P. [1979 SCC OnLine Ker 148]*
- (v) *Puri Urban Cooperative Bank Vs. Madhusudan Sahu [(1992) 3 SCC 323]*
- (vi) *Employees' State Insurance Corporation Vs. Vattiyoorkavu H.W. Co-operative Society [1996 SCC OnLine Ker 295]*
- (vii) *Employees' State Insurance Corporation Vs. R.K. Furnaces [2006 SCC OnLine Bom 638]*

13. I have considered the submissions made on both sides and perused the materials available on record.

Questions of law raised:

14. From the pleadings and the submissions made by both sides, the substantial questions of law framed by this Court are as follows:

- a) Whether the engagement of the owner-cum-drivers by the



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Establishment for attending the tourist service request orders of the customers of the Establishment would create employer-employee relationship between them and whether the owner-cum-drivers are employees covered under Section 2(9) of the ESI Act or not?

b) Whether the car hire charges paid to the owner-cum-drivers/third party operators, who are directly engaged by the Establishment, shall be treated as wage component and the contribution claimed by the Corporation for the same is valid or not?

Case laws:

15. The Hon'ble Apex Court in *Silver Jubilee Tailoring House and others Vs. Chief Inspector of Shops and Establishments and another* reported in (1974) 3 SCC 498, while deciding the employer-employee relationship between the Tailoring House and the workers under the Andhra Pradesh (Telengana Area) Shops and Establishments Act, 1951, considered the various judgments of the Apex Court on the tests to be followed for



designing the employer-employee relationship. The relevant portion of the

judgment reads as follows:

"9. It was argued for the appellants that according to the decisions of this Court the test to determine whether employer and employee relationship existed between the parties is to see whether the so called employer has the right to control and supervise the manner of work done by the workers and from the facts found by the High Court it is impossible to come to the conclusion that the appellants had any right to control the manner of work or that they had actually exercised any such control. It is therefore necessary to examine the question whether the right to control the manner of work is an exclusive test to determine the nature of the relationship and even if it is found that that is the test, whether facts proved would satisfy the requirements of the test.

10. In Dharangadhara Chemical Works Ltd. v. State of Saurashtra [1951 SCC 43 : AIR 1957 SC 264 : 1957 SCR 152 : 1957 SCJ 208 : (1957) 1 Lab LJ 477] the appellants before this Court were lessees holding a licence for the manufacture of salt on the lands in question there. The salt was manufactured by a class of professional labourers known as agarias from rain water that got mixed up with saline matter in the soil. The work was seasonal in nature and commenced in October after the rains



and continued till June. After the manufacture of salt the agarias were paid at the rate of 5 as. 6 pies per maund. At the end of each season the accounts were settled and the agarias paid the balance due to them. The agarias who worked themselves with the members of their families were free to engage extra labour on their own account and the appellants had no concern therewith. No hours of work were prescribed, and no muster rolls were maintained. The appellants had also no control over the working hours. There were no rules as regards leave or holidays and the agarias were free to go out of the factory after making arrangements for the manufacture of salt.

....

28. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite



direction [See Atiyah, PS. “Vicarious Liability in the Law of Torts”, pp. 37-38] .

29. During the last two decades the emphasis in the field has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor and in many cases it may still be the decisive factor. But it is wrong to say that in every case it is decisive. It is now no more than a factor, although an important one [See Argent v. Minister of Social Security and Another, (1968) 1 WLR 1749 at 1759] .

....

31. The further fact that “a worker can be removed” which means nothing more than that the employer has the liberty not to give further work to an employee who has not performed his job according to the instructions of the employer, or who has been absent from the shop for a long time as spoken to by the Inspector of Labour in his evidence, would bespeak of control and supervision consistent with the character of the business.

32. That the workers work on the machines supplied by the proprietor of the shop is an important consideration in determining the nature of the relationship. If the employer provides the equipment, this is some indication that the contract is a contract of service, whereas if the other party provides the equipment, this is some evidence that he is an independent contractor. It seems that this is not based on the theory that if the



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employer provides the equipment he retains some greater degree of control, for, as already seen, where the control arises only from the need to protect one's own property, little significance can attach to the power of control for this purpose. It seems, therefore, that the importance of the provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor, he expects the contractor to provide all the necessary tools and equipment, whereas if he employs a servant he expects to provide them himself. It follows from this that no sensible inference can be drawn from this factor in circumstances where it is customary for servants to provide their own equipment [See Atiyah, P.S., “Vicarious Liability in the Law of Torts”, p. 65] .

....

37. That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no reason why a person who is only employed part time, should not be a servant and it is doubtful whether regular part time service can be considered even prima facie to suggest anything other than a contract of service. According to the definition in Section 2(14) of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a ‘person employed’ within the meaning of the sub-section. Therefore, even if he accepts some work from other



tailoring establishments or does not work whole time in a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed. "

16. In ***Royal Talkies, Hyderabad and others Vs. Employees State Insurance Corporation*** reported in (1978) 4 SCC 204, which was relied on by the learned counsel for the appellant, the Apex Court has once again considered the definition of 'employee' under Section 2(9) of the ESI Act and held as follows:

"15. The primary test in the substantive clause being thus wide, the employees of the canteen and the cycle stand may be correctly described as employed in connection with the work of the establishment. A narrower construction may be possible but a larger ambit is clearly imported by a purpose-oriented interpretation. The whole goal of the statute is to make the principal employer primarily liable for the insurance of kindred kinds of employees on the premises, whether they are there in the work or are merely in connection with the work of the establishment."

17. In ***M/s.P.M. Patel and Sons and others Vs. Union of India and others*** reported in (1986) 1 SCC 32, the Apex Court has considered the



employer-employee relationship between the Beedi Manufacturers and Beedi rollers working from home within the definition of clause (f) of Section 2 of Employees' Provident Fund Act. The Apex Court by relying on *Silver Jubilee Tailoring House's* case cited supra, has held in paragraph 10 and 11 as follows:

"10. In the context of the conditions and the circumstances set out earlier in which the home workers of a single manufacturer go about their work, including the receiving of raw material, rolling the beedis at home and delivering them to the manufacturer subject to the right of rejection there is sufficient evidence of the requisite degree of control and supervision for establishing the relationship of master and servant between the manufacturer and the home worker. It must be remembered that the work of rolling beedis is not of a sophisticated nature, requiring control and supervision at the time when the work is done. It is a simple operation which, as practice has shown, has been performed satisfactorily by thousands of illiterate workers. It is a task which can be performed by young and old, men and women, with equal facility and it does not require a high order of skill. In the circumstances, the right of rejection can constitute in itself an effective degree of supervision and control. We may point out



that there is evidence to show that the rejection takes place in the presence of the home worker. That factor, however, plays a merely supportive role in determining the existence of the relationship of the master and servant. The petitioners point out that there is no element of personal service in beedi rolling and that it is open to a home worker to get the work done by one or the other member of his family at home. The element of personal service, it seems to us, is of little significance when the test of control and supervision lies in the right of rejection.

11. In our opinion, the home workers are “employees” within the definition contained in clause (f) of Section 2 of the Employees' Provident Funds Act."

This Section 2(f) of the Employees Provident Fund Act is a pari materia to the definition of 'employee' under the ESI Act.

Section 2(9) of the ESI Act 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 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 apprentice, not being an apprentice engaged under the Apprentices 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 forces; or

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

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;"

18. In ***Regional Director, ESI Corporation, Madras Vs. South India Floor Mills (P) Limited*** reported in (1986) 3 SCC 238, the Apex Court has once again considered the scope of Section 2(9) of the ESI Act and has held as follows:

"6. It appears from the definition that three categories of persons as mentioned in clauses (i), (ii) and (iii) of Section 2(9) can be employees. We are, however, concerned with the category under clause (i) inasmuch as in all the cases before us the workers concerned were directly employed by the principal employers, namely, the respondent companies. Under category (i), in order to be an employee a person must be employed directly by the employer for wages in the factory or establishment on any work



which should be incidental or preliminary to or connected with the work of the factory or establishment. The definition seems to be very wide and brings within the purview various types of employees. As soon as the conditions under the definition are fulfilled, one becomes an employee within the meaning of the definition.

....

13. The Act is a piece of social security legislation enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury. To hold that the workers employed for the work of construction of buildings for the expansion of the factory are not employees within the meaning of Section 2(9) of the Act on the ground that such construction is not incidental or preliminary to or connected with the work of the factory will be against the object of the Act. In an enactment of this nature, the endeavour of the court should be to interpret the provisions liberally in favour of the persons for whose benefit the enactment has been made. "

19. In ***Sushilaben Indravadan Gandhi and another Vs. New India Assurance Company Limited and others*** reported in (2021) 7 SCC 151, the Apex Court has considered the employer-employee relationship and narrated the various tests adopted by the Apex Court under various



circumstances and after considering the judgments of

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1. ***Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra*** cited supra
2. ***Chintaman Rao Vs. State of M.P. [AIR 1958 SC 388]***
3. ***Shankar Balaji Waje Vs. State of Maharashtra [AIR 1962 SC 517]***
4. ***Birdhichand Sharma Vs. Civil Judge*** cited supra,

has observed in paragraph 32 as follows:

"32. A conspectus of all the aforesaid judgments would show that in a society which has moved away from being a simple agrarian society to a complex modern society in the computer age, the earlier simple test of control, whether or not actually exercised, has now yielded more complex tests in order to decide complex matters which would have factors both for and against the contract being a contract of service as against a contract for service. The early "control of the employer" test in the sense of controlling not just the work that is given but the manner in which it is to be done obviously breaks down when it comes to professionals who may be employed. A variety of cases come in between cases which are crystal clear — for example, a master in a school who is employed like other employees of the school and who gives music lessons as part of his employment, as against an independent professional piano player who gives music lessons to persons who visit her premises. Equally, a variety of cases arise between a ship's master, a chauffeur and a staff reporter, as



against a ship's pilot, a taxi driver and a contributor to a newspaper, in order to determine whether the person employed could be said to be an employee or an independent professional. The control test, after moving away from actual control of when and how work is to be performed to the right to exercise control, is one in a series of factors which may lead to an answer on the facts of a case slotting such case either as a contract of service or a contract for service. The test as to whether the person employed is integrated into the employer's business or is a mere accessory thereof is another important test in order to determine on which side of the line the contract falls. The three-tier test laid down by some of the English judgments, namely, whether wage or other remuneration is paid by the employer; whether there is a sufficient degree of control by the employer and other factors would be a test elastic enough to apply to a large variety of cases. The test of who owns the assets with which the work is to be done and/or who ultimately makes a profit or a loss so that one may determine whether a business is being run for the employer or on one's own account, is another important test when it comes to work to be performed by independent contractors as against piece-rated labourers. Also, the economic reality test laid down by the US decisions and the test of whether the employer has economic control over the workers' subsistence, skill and continued employment can also be applied when it



comes to whether a particular worker works for himself or for his employer. The test laid down by the Privy Council in Lee Ting Sang v. Chung Chi-keung [Lee Ting Sang v. Chung Chi-keung, (1990) 2 AC 374 (PC)] , namely, is the person who has engaged himself to perform services performing them as a person in business on his own account, is also an important test, this time from the point of view of the person employed, in order to arrive at the correct solution. No one test of universal application can ever yield the correct result. It is a conglomerate of all applicable tests taken on the totality of the fact situation in a given case that would ultimately yield, particularly in a complex hybrid situation, whether the contract to be construed is a contract of service or a contract for service. Depending on the fact situation of each case, all the aforesaid factors would not necessarily be relevant, or, if relevant, be given the same weight. Ultimately, the Court can only perform a balancing act weighing all relevant factors which point in one direction as against those which point in the opposite direction to arrive at the correct conclusion on the facts of each case."

The above recent judgment of the Apex Court provides various tests to be followed including three tier test laid down by some english judgments.

20. (i) The Apex Court in ***Chintaman Rao Vs. State of Madhya***



Pradesh cited supra, has considered the meaning of the words 'contract of service' and 'contract for service' and held as follows:

"9. This takes us to the consideration of the definition of the term 'worker' under the Act. 'Worker' is defined to mean a person employed, directly or through any agency, whether for wages or not, in any manufacturing process. It is and it cannot be disputed that the making of bidis is a manufacturing process. But is a Sattedar a person 'employed', directly or through agency, within the meaning of the definition "employed". 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. Can it be said that a Sattedar is employed by the management of the factory to serve under it? There is a well understood distinction between a contractor and a workman and between contract for service and contract of service. In Stroud's Judicial Dictionary (Third Edition, Volume 1, Page 616) the distinction between a contractor and a workman is brought out in bold relief in the following manner:

"Of course, every person who makes an agreement with another for the doing of work is a contractor, in a general sense;



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but as used in Workmen's Compensation Act, 1897 (60 & 61 Vict., c. 37), Section 4 “contractor” and “WORKMAN” “have come to have a more restricted and distinctive meaning,” and “contractor” means ‘one who makes an agreement to carry out certain work specified, but not on a contract of service’.”

The same idea is repeated in a different terminology thus:

“A ‘contractor’ is a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control in respect to the details of the work.”

There is, therefore, a clear-cut distinction between a contractor and a workman. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work. This Court in Dharangadhara Chemical Works Ltd. v. State of Saurashtra [(1957) SCR 152] in the context of the definition of “workman” under the Industrial Disputes Act (XIV of 1947) made the following observations at page 157:

“The essential condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry, that there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the term as contained in the Act.” ’

10. Elaborating the point further, Bhagwati, J., who delivered the judgment on behalf of the Court proceeded to state:



“The test which is uniformly applied in order to determine the relationship is the existence of a right of control in respect of the manner in which the work is to be done.”

After considering the case-law on the subject the learned Judge restated the principle at page 160 thus:

“The principle which emerges from these authorities is that 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, or to borrow the words of Lord Uthwatt at page 23” in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd., ([1947] I A.C. 1, 23), “The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.”

After noticing the subsequent trend of decisions wherein it is observed that the test of control is not one of universal application, the learned Judge expresses his view thus:

“The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer.....” ”

(ii) In ***Shankar Balaji Waje Vs. State of Maharashtra*** cited supra, the Apex Court has considered the definition of 'worker' under the Factories Act and held as follows:

“12. The one essential ingredient which should exist to make a person come within the definition of “worker” in Clause (1) of



Section 2 of the Act is that he be employed in one of the processes mentioned in that clause. There is no dispute that the work which Pandurang did came within one of such processes. The sole question for determination then is whether Pandurang can be said to be employed by the appellant.

13. This Court, in Shri Chintaman Rao v. The State of Madhya Pradesh [1958 SCR 1340] , said at p. 1346:

“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 where under the employee agrees to serve the employer subject to his control and supervision.”

Employment brings in the contract of service between the employer and employed. We have mentioned already that in this case there was no agreement or contract of service between the appellant and Pandurang. What can be said at the most is that whenever Pandurang went to work, the appellant agreed to supply him tobacco for rolling bidis and that Pandurang agreed to roll bidis on being paid at a certain rate for the bidis turned out. The appellant exercised no control and supervision over Pandurang."

(iii) The High Court of Andhra Pradesh in ***Employees' State Insurance***



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Corporation Vs. Maharaja Bar and Restaurant, cited supra, considered the nature of work of cabaret artistes and orchestra players under the ESI Act and held as follows:

"9. The only contention which is urged and which arises for consideration in the appeal is, whether the three cabaret artistes and four orchestra players can be deemed to be 'persons employed for wages' in the restaurant. The determination of this question depends upon the nature of the contract entered into by each of them with the management. If the terms of the contract show that it is a contract of service, each of them would be treated as a person employed for wages. On the other hand, if the terms of the contract show that it was a contract for services, then they cannot be treated as persons employed."

(iv) The High Court of Kerala in **Employees' State Insurance Corporation Vs. Ayurvedic I.C.P.**, reported in **1979 SCC OnLine Ker 148**, has considered Section 2(9) of the ESI Act and held as follows:

"8. We had attempted to highlight on earlier occasions that every engagement need not necessarily be employment. There may be engagements which may not amount to service and so long as it is not service by one under another there is no question of a



relationship calling for coverage under the Act. This does not mean that the service must be under the person who is called upon to effect coverage under the Act. But the person whose coverage is called for must be a person who is kept in the service of another or, in other words, who is employed by another. We can envisage many instances where a person does work for another without entering into his service, and on the basis merely of a contract to carry out such work. No doubt service is also a contractual relationship. But where there is no case of a person entering into the service of another but nevertheless he is governed by a contractual obligation in executing a particular work such person is not “employed” within the concept of the Employees' State Insurance Act. A porter, for instance, no doubt does the work of the passenger for wages. But he is not an employee of the person whose work he does. A plumber called in to repair is no doubt paid for his work but for that reason he does not enter into a contract of service or employment. Instances need not be multiplied. Actually in practice it is easy to distinguish between a case where a person who is paid wages for his work is so paid not because of an express or implied contract of service entered into by him and a case where a person is employed in service and wages paid to him. In the latter case there is relationship of master and servant, while in the former the person who is paid wages is evidently not in the service of another. One of the main distinguishing features may be said to be disciplinary



control. When a person is in the service of another; however, short the period of service may be, he is under the disciplinary control of the other to the extent such service calls for such control. But in the case of a person who is not in the service of another there is no disciplinary control and the relationship is governed by the obligations arising under the contract of engagement."

(v) Judgment of the Apex Court in ***Puri Urban Cooperative Bank Vs. Madhusudan Sahu*** reported in ***(1992) 3 SCC 323***, considered the status of the appraisers under the Industrial Disputes Act and held as follows:

"5. It was contended on behalf of the appellant that the appellant may be a workman as commonly understood, but work of appraising in the context is partly manual, as goes the weighing part, and partly mental, as goes the appraising part, wholly or partially skilled and/or technical and wages/commission for that work may fall within the expression 'hire or reward'. Still, it is maintained, that unless there was a jural relationship of master and servant between Sahu and the Bank, he could not be termed as a workman, for the purposes of the Industrial Disputes Act, 1947. It stands established that Industrial Law revolves on the axis of master and servant relationship and by a catena of precedents it stands established that the prima facie test of relationship of



master and servant is the existence of the right in the master to supervise and control the work done by the servant (the measure of supervision and control apart) 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. See in this regard D.C. Works Ltd. v. State of Saurashtra [AIR 1957 SC 264, 268 : 1957 SCR 152 : (1957) 1 LLJ 477] and Chintaman Rao v. State of M.P. [AIR 1958 SC 388, 392 : 1958 SCR 1340 : (1958) 2 LLJ 282] And this principle holds the field."

(vi) The High Court of Kerala in ***Employees' State Insurance Corporation Vs. Vattiyoorkavu H.W. Co-operative Society*** reported in **1996 SCC OnLine Ker 295**, considered Section 2(9) of the ESI act and held as follows:

"4. In the instant case, PWs 1 and 2 gave evidence to the effect that the members of the society are being given yarn by the society and the finished products are supplied to the society and they are being paid by paying the difference in the price of yarn and the finished products. There was no evidence to show that the member were being paid any wages. There was no evidence to show that the members were working within the premises of the society using the looms owned by the society. As per the definition of "employee" given in S. 2(9) of the Employees' State Insurance Act,



“‘employee’ means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies”. So, the crucial question to be considered is whether any wages were paid to the members of the society. By the nature of the functioning of the society, it appears that all the members of the society share the profit according to the quantity of the finished products and the price of the yam is collected from the members. It cannot be said that the members of the society were working as employees and they were earning therefrom.

...

8. In the instant case, we are of the view that the members of the society are not workers of the society and the members of the society were self employed and they share the profits. It has rightly been held by the Insurance Court that the society was not covered by the Employees' State Insurance, Act. Appeal is accordingly dismissed."

Discussion:

21. The Establishment is having its own employees around 36. The total car hire payments made to the owner-cum-drivers shows that more than 80% of the car hire payments paid only to the owner-cum-drivers. Nearly 250-300 service orders carried by engaging owner-cum-drivers by the



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Establishment, whereas, only around 36 including staff are being employed for running its entire tourist operations of the Establishment and they are having 40 cars on their own.

22. Both the parties have adduced evidence before the ESI Court and the Officer of the Establishment has been examined as P.W.1 before the ESI Court. In his cross-examination, he has admitted that the owner-cum-drivers may drive continuously in a month and except for three days as a leave and accordingly after availing their services for a whole month, the payments are made based on their running time. For the period prior to 2003, admittedly, there was no agreement for service or any Memorandum of Understanding entered between the owner-cum-drivers and the Establishment and they have been allotted work for nearly more than 8 hours in a day either in a single service or by two or more service orders depending upon the needs of the customers.

23. The factual aspects stated reveals that all the payments made to the owner-cum-drivers have not been made directly by the customers to the



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owner-cum-drivers and it has been made to the Establishment, who, in turn, after deducting some amount, pays the charges to them in monthly basis.

During the period between 1997-1998 to 2000-2001, there was no agreement between the Establishment and the owner-cum-drivers and they have been directly engaged for primary work of the Establishment and they worked without any written agreement. On the payments being made to these owner-cum-drivers, TDS is deducted and being remitted on their behalf by the Establishment. They were permitted to take only three days leave for a month, whereas, the regular drivers are given four days leave for a month. After the year 2003, the Establishment has entered into written agreement, on very same terms of engagement with these drivers.

24. It is contended by the Corporation that more than 80% of the work is being carried by the owner-cum-drivers and payments made to them under 'car hire charges' is more than the payments made to the regular employees of the Establishment. This Court is of the view that to understand the nature of engagement and to avoid any mischief and to achieve the purpose of the law to find whether the relationship between the



Establishment and the above drivers is an employer-employee relationship, lifting the veil of the contract is necessary.

Memorandum of Understanding and Engagement Rules:

25. After initiation of inspection dated 12.09.2003 for the period 1997-1998 to 2000-2001, the Establishment has started entering into agreement for engagement called Memorandum of Understanding. A Memorandum of Understanding entered between the Establishment and one of the drivers, namely, K.Pradeesh dated 1st September, 2008 have been placed before me and I have given my sincere consideration of it. The said Memorandum of Understanding reads as follows:

“MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding entered into at Chennai on this the 1st Day of September 2008

By and Between

BALA TOURIST SERVICE, a firm represented by its Managing Partners, Mr.M.P. Balakrishnan and Mr. B.Pradeep, having office at "Bala House", 88-A, M.G.R. Salai (formerly known as Kodambakkam High Road), Nungambakkam, Chennai-600 034 hereinafter referred to as the First Party which term wherever the context so requires or permits shall mean and include the said firm, its successors in office, executors, administrators and assigns



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AND

Mr.K.Pradeesh S/o Mr. V. Kasu, a Hindu, aged about years, residing at No. 3710/53, J.J. Nagar, Mogappair East, Chennai-600 037, hereinafter referred to as the Second Party which term whenever the context so requires or permits shall mean and include the said party, his heirs, legal representatives, executors, administrators and assigns, is as follows:

WHEREAS the First Party is a reputed Tourist Vehicle Operator having a well established business and goodwill operating at Chennai.

*WHEREAS the Second Party is the exclusive owner of a **Tata Indicab** Tourist vehicle bearing Registration No.TN 02AC 3540*

*WHEREAS the Second Party as the **owner-cum-driver** of the said vehicle offered to run the said vehicle for the customers of the First Party during his free time, as per the trips and assignments allotted by the First Party*

WHEREAS the First Party has agreed to utilise the services of the Second Party subject to the terms and conditions agreed between the parties and reduced into writing as under.

NOW THIS MEMORANDUM OF UNDERSTANDING WITNESSETH:



The Second Party agrees to run his vehicle referred above driven by him for the customers of the First Party during his free time.

The Second party shall alone be liable for the maintenance of the vehicle, payment of Insurance, Road Tax, etc

The Second Party agrees to indemnify the First Party against any third party claim arising out of the vehicle and also agrees to discharge the financial liability, if any, as a personal liability.

The Second Party shall carry out the service contract and trips as and when assigned by the First Party irrespective of place, distance and time.

The consolidated charges based on the kilo meters run and time involved shall be paid by the First Party Monthly as per the schedule of rates given after deducting statutory levies such as TDS, Service Tax and any other outstanding, etc.

The Second Party whenever he makes himself available with the vehicle driven by him shall report to the duty and behave in a courteous and sincere manner and be faithful and true and perform the duty as a driver to the utmost satisfaction of the First Party and their customers.

The trips shall be allotted solely at the discretion of the First Party who reserves their right of preference among similarly placed parties. The Second Party shall not be entitled to demand any duty. Trips will be assigned or allotted only if the Second Party indicates



his availability. The Second Party also agrees not to decline to undertake a trip or abort it once it is accepted, to avoid causing unnecessary inconvenience to the customers.

The Second Party shall not smoke or consume alcohol or indulge in gambling during duty hours or at work place.

The Second Party shall use and maintain duty books, Log Sheets and trip sheets etc provided by the First Party, and record details of running kilo meters, reporting and journey conclusion time and submit the same regularly to the First Party after each trip allotted by the First party. Any wrong reading or deletion resulting in loss to the First Party shall lead to the termination of this agreement at the discretion of the First Party.

The Second Party shall be prepared to undertake local / outstation trips depending upon the requirement the First Party irrespective of the time, place or distance, A/C or Non A/C.

The Second Party shall not pick up quarrel with the other drivers of the concern of the First Party or otherwise engaged by the First Party and any misbehaviour/ discourteous behaviour would render termination of his service contract without notice.

The Second Party shall strictly observe and abide by traffic rules and regulations and he alone shall be responsible of any violations thereof. He shall hold valid license during the period of this service contract.



The First Party shall be entitled to adjust any outstanding and dues of the Second Party from and out of the settlement of the bills of the Second Party.

The Vehicle of the Second Party shall not be parked at the office of the First Party unless specifically requested.

The Second Party shall take care of the baggage and articles of the customers while on duty as a man of ordinary prudence and any loss of the items due to his negligence shall be reimbursed by the Second party.

The Second Party is not supposed to enter the office premises of the First Party unless called by the staff of the First Party for allotment of trips or any other matter connected to the office work.

The charges for the running kilo meters shall be fixed by the First Party and in the event of any revision the same shall be intimated to the Second Party as soon as possible and the Second Party shall have no say whatsoever in this matter.

The Second Party shall report in uniform of white pant and white shirt and shoes made/purchased at his own cost will not be eligible for claiming either cost of the same or reimbursement from the First Party. The Second Party will not use the articles and materials such as Logo on Uniform, Placard etc. of the First Party for trips not assigned or allotted by the First Party or secured by the Second Party directly or through other sources.



The vehicle of the Second Party shall be of recent make and shall be maintained in good and very sound condition in conformity of the standards of the First Party to the utmost satisfaction of the customers of the First Party. Any complaint of bad condition of the vehicle by any of the customers of the First Party would render termination of this contract.

The Second Party shall not have the status of an employee of the First Party and he shall not be entitled to any labour perquisites from the First Party and there shall be no relationship of employer and employee between the First Party and the Second Party. The Second Party will not be eligible or entitled to any benefits, Privileges, Concessions applicable and/or presently applicable or that may be applicable in future to the employee drivers of the First Party.

The Second Party shall alone be responsible to pay all third party claims. In the event of any third party claim being made against the First Party, the Second Party hereby agrees to indemnify the First party and shall also be liable for reimbursement of the loss, if any. It is specifically agreed that the vehicle of the Second Party shall be duly insured covering all third party claims and own damages and the First Party shall not be liable under any circumstances.

The Second party solemnly pledges and undertakes not to use the vehicle during the operation of this Service Agreement for any illegal purposes whatsoever and in the event of any such activity



coming to the knowledge of the First Party, this agreement will be terminated without any notice.

The Second Party realizes that customer satisfaction is of utmost importance and shall conduct himself in exemplary manner so as to gain customer appreciation.

This agreement is valid for one year from 1st September 2005 i.e. up to 31st August 2009 and can be renewed by the parties on mutual consent.

The Second Party, with the consent of the First Party, may replace the present vehicle with another vehicle if warranted by circumstances such as drop in demand, damage to vehicle, operation becoming uneconomical due to increased input costs or the vehicle becoming obsolete or any other reason whatsoever. In the event of the vehicle being replaced, the replaced vehicle should be of recent make and in acceptable condition to the First Party. In the event the replaced vehicle is of a different make model, the schedule of rates relevant to the same will be applicable. All the terms and conditions of this agreement will automatically stand applicable to the new vehicle till the expiry of the original agreement.

The Second Party will ensure punctuality and avoid any inconvenience to the passengers. In order to avoid delay for filling up fuel, the First Party suggests that the Second Party utilizes the



Coupons System available in the Organisation under which fuel can be filled from specified dealers against Coupons to be issued by the First Party. The cost of fuel filled during the month will be deducted from out of the earnings of the Second Party during the month. In case the Second Party opts not to utilize the Coupon System, he should ensure that the vehicle does not run short of fuel after pick up.

The Second Party assures the First Party for timely renewal of insurance policy. The First Party agrees to advance necessary amount by way of cheque to be issued in favour of the Insurance Company for such renewal and deduct the amount of premium so advanced from out of the earning of the Second Party at the month end. Similarly cash advance can be availed for all other expenses, if required by the Second Party to be deducted from the amount due at the month end.

*The Second Party hereby solemnly and categorically declare that the vehicle No. **TN 02AC 3540** he proposes to operate through the First Party is exclusively owned by him and that no employee of the First Party has any share, interest or claim whatsoever in the said vehicle and the entire earnings generated through the operation of the said vehicle will completely accrue to the Second Party alone and no part of it is payable or will become payable at any later date to any of the employee of the First Party. The Second Party further*



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whole heartedly agrees and consents without any reservation whatsoever that if at any time either during the operation of the vehicle through the First Party or after expiry it comes to knowledge of the First Party that any employee of the First Party has had any interest in the said vehicle of the Second Party, the First Party will have absolute right to proceed against the Second Party legally and recover the entire amount earned during the operation of the said vehicle.

The Second Party realises that customer satisfaction is of utmost importance and shall accordingly conduct himself in an exemplary manner so as to gain customer appreciation. Realising the high expectation of the customers, the Second Party confirms that he will assist the customers with their luggage, open the door for them etc.

In the event of breach of any of the above agreed terms, the First Party shall be entitled to terminate this service agreement without any notice.

Notwithstanding anything contained in this Service Agreement, the First Party shall be entitled to terminate the Service Agreement without assigning any reason by giving one month's notice.

City – Tata Indica Non A/c			City – Tata Indica A/c		
Hours	Kms.	Hire	Hours	Kms.	Hire
2.00	25	200	2.00	25	300



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2.00	40	270	2.00	40	320
3.00	40	315	3.00	40	355
4.00	40	335	4.00	40	395
5.00	50	395	5.00	50	450
6.00	60	475	6.00	60	565
7.00	70	550	7.00	70	675
8.00	80	630	8.00	80	790

Non A/C

A/C

City : Xtra Hr. Rs. 37.50 /

Xtra Hr. Rs. 45.00/

Xtra Km.Rs. 4.75

Xtra Km. Rs. 6.75

Outstation Xtra Hr.Rs. 37.50 /

Xtra Hr. Rs. 40.00/

: Xtra Km.Rs. 5.00

Xtra Km. Rs. 6.50

In witness whereof the Parties have signed this Memorandum of Understanding on the day, month and year first above written in the presence of

WITNESSES:

1.

First Party (signed)

2.

Second Party (signed)''

26. The above Memorandum of Understanding has been highly relied on by the ESI Corporation to support their case that, these drivers are not engaged for contract for service and their engagement is only contract of service and Section 2(9)(i) of the ESI Act is applicable to them. On bare



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perusal of the same, it shows that the owner-cum-drivers are doing the regular work of the Establishment identical to the direct employees. They have to carry out orders as per the direction of the Establishment and they are the major contributors of the business of the Establishment. Various disciplinary rules are prescribed to the drivers and in violation, they are liable for cancellation of their services. The drivers shall carry out the service contract and carry out trips as and when assigned by the first party irrespective of place, distance and time. This shows that the owner-cum-drivers have no option of avoiding orders and it is mandate on them to carry out the trips as and when assigned by the first party irrespective of place, distance or time.

27. Even though it is stated that while referring the offer of the owner-cum-drivers that, they agree to carry out the trips and assignments during their “Free Time”, nowhere it is stated that these owner-cum-drivers are independently operating their vehicles to various persons and they are free to decide whether they can avoid or carry out the service orders given to them by the Establishment.



28. There is also a specific clause accepted by the owner-cum-drivers that they will not be treated as employee of the Establishment and not eligible for benefits and privileges, concessions applicable to the employee drivers of the Establishment. The owner-cum-drivers have also been extended with fuel support to carry out the service orders of the system and fuel coupons. The maintenance of vehicle, renewal of insurance policy of the vehicle shall be borne by the owner-cum-drivers. The undertaking also provides for termination of service agreement without any notice by the Establishment in case of breach of agreement. Further, by issuing one month notice, Establishment reserves its right to terminate the service agreement without assigning any reason. The agreement provides schedule of rates payable to the drivers and they are not entitled to fix the hire charges payable by the customers.

29. This MOU entered with K.Pradeesh shows that his vehicle number is TN 02 AC 3540 and the statement of operation of the vehicle for the month of September, i.e., 01.09.2008 to 30.09.2008, was also produced before this Court. This agreement was already marked before the Trial Court along with the vouchers and account statements.



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30. On perusal of the monthly statement, it shows that he has attended the work range of minimum from 1 ½ hours to 14 hours in a single day and also in some period, they have attended the work for more than one to four days depending upon the trips. It also shows that everyday, the service orders have been given to them except one or two days in the month. Further, the statement also shows that in the whole month, he attended the works allotted to him without fail and only one or two days, the work was allotted to him for less than six hours and majority of the month, the work allotted to him runs more than eight hours. Whenever the smaller hour trips have been referred, on the same day itself, additional orders have been placed and he has attended almost more than eight hours per day without fail except on leave days. The ESI Court has not adverted to these exhibits and the ESI Court has not made any attempt to lift the veil and to go into the work nature of engagement of the owner-cum-drivers.

31. On closer scrutiny of the evidence placed on record by the Establishment, it reveals that for whole month, the owner-cum-drivers have been engaged by the Establishment and no evidence was placed on record by the Establishment that only at the free time of the owner-cum-drivers,



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they have been engaged. These drivers are engaged full time by the Establishment and they have been given three days off during the month.

The owner-cum-drivers are not having power to collect the charges directly from the customers and they have to complete the service demand of the customers and after completion of the work, they have to rely on their log book for any claim of their payment. The Establishment prepares the bill for the work attended by these drivers in the name of the Establishment and the customers are making payments directly to the Establishment. Only after deducting their profit, on monthly basis, the Establishment calculates the hire charges and pays the amount to the owner-cum-drivers depending upon the rates agreed between them. Similarly, the owner-cum-drivers have no say in the rates to be charged by the Establishment from the customers. There is no possibility to know the exact charges collected from the customers by the Establishment. But the Establishment shall disburse the only agreed amount to them. This shows that they have no independence to fix charge of the customers and only after completion of service as per the directions of the Establishment and they have to collect the rates agreed between them. The Memorandum of Understanding clinchingly shows that



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they are bound to carry out whatever service orders placed before them by the Establishment. They have no discretion to deny or avoid the services, thereby, the contention of the Establishment that these drivers are the independent operators of taxi services and they are not under the control of the Establishment, is hereby rejected.

32. The other various conditions including disciplinary control would reveal that there is a complete control of the Establishment over these drivers. It is also noticed, as discussed in the earlier paragraphs, from the records that majority of the work of the Establishment is only carried out by these owner-cum-drivers and they are the prime employees, who are doing the work of the Establishment and only for the purpose of avoiding legal consequences and to avoid the payment of any statutory liabilities, they are maintaining very few person as their approved employees. One another contention raised by the Establishment is that the car used for the service request of customers belongs to the drivers and the Establishment is not giving cars to these drivers and since these drivers were not dependent on any equipment to be supplied by the Establishment, they are to be



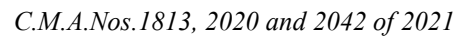
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considered independent. As observed by the Apex Court in paragraph 32 of *Silver Jubilee Tailoring House* case cited supra, owning car with transport permit is the essential requirement to avail work of the Establishment. In other words, it is to be termed that, possessing car with permit is additional qualification to work as drivers of the Establishment.

33. As observed by the Apex Court in *Sushilaben Indravadan Gandhi's* case cited supra, the Society which has moved away from being a simple agrarian society to a complex modern society in the computer age, the earlier simple test of control, whether or not actually exercised, has now yielded more complex tests. This case is one such case, which requires complex test, since in this case, the owner-cum-drivers are being engaged by the Establishment by using the present day context in an online engagement of vehicles for transport of the customers. In this case, almost 85% trips have been carried on by these drivers and they are engaged by the Establishment by using small office and by engaging only 35 persons in their office like control center, the Establishment is running the entire work of nearly 250-300 tourist taxi trips and area of operations covers across Chennai and also outside Chennai. The remuneration is being paid to the



owner-cum-drivers as per the Memorandum of Understanding that they are entitled to get remuneration on the basis of the rates agreed based on the days and time for which the services are offered by them. It is impossible for a tourist cab operator to own nearly 200 cars and to run its business around the city and to serve the customers who are more than the number of vehicles used by the Establishment. The main defence of the Establishment is that the owner-cum-drivers used to park the vehicle anywhere and they have not been allowed to come to the premises of the Establishment or they need not have any regular presence in the office, does not mean that these drivers would not fall within the definition of Section 2(9) of the ESI Act. During this computer age and modern developments, the vehicles need not come to the office to get the service orders. They can stay anywhere in the city and depending upon the location of the customers, the service orders are being passed on by the Establishment to those owner-cum-drivers. By this mode, Establishment is saving time, various types of expenses and to serve the customers within a short time. It is also contended by the Establishment that the engagement is only a casual engagement and they could not be considered as employees. Even though it is stated that they



34. Similarly, the various conditions contained in the Memorandum of Understanding that the owner-cum-drivers are not permitted to deny the service orders forwarded to them would only mean that they have no say and they have to attend the work allotted to them like the regular employee. Since the Establishment itself has directly engaged the owner-cum-drivers to attend the work of the Establishment, which is also an essential work done by the regular employee. The owner-cum-drivers are rendering the major contribution to the business of the Establishment. Without their presence or without utilizing their services, the services of the Establishment or business of the Establishment cannot be carried out. The competent authority in the orders passed under Section 45A dated 20.02.2010, has taken into account the report of the Social Security Officer



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and made a statement of “Total hire payments” and the requirement of operation of vehicles for the Establishment and observed that in the absence of the present arrangements, the Establishment with the number of vehicles and employees on their roll is disproportionate to the actual requirement by the Establishment of their business and the statement reads as follows:

Particulars	2007-2008	2008-2009
Travels Chennai	45	52
Travels other city	26	32
Owner cum drivers	375	326
Total	446	410

This reasoning given by the competent authority in his order has not been controverted and thereby, it is admitted fact that the owner-cum-drivers are doing the business on behalf of the Establishment. The above facts squarely satisfy the control and integration test and also satisfy the definition of Section 2(9)(i) of the ESI Act.

35. As held by the Apex Court in *Royal Talkies* case cited supra, Section 2(9) of the ESI Act has been cast deliberately in the widest terms in



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order to cover every possibility so as not to exclude even distant categories of men employed either in primary work or cognate activities. It is enough if the employee does some work which is ancillary, incidental or has relevance to or link with the object of the Establishment. Therefore, this Court is of the view that since the factual aspects as discussed above, leads to the conclusion that the owner-cum-drivers even though they are having cars on their own and maintaining the expenses of the car, they are dependent and being engaged continuously by the Establishment as their regular employee. Even though they have not been accorded the status of a regular employee as per their mutual agreement, they are entitled for protection under the ESI Act, which is a social welfare legislation. Resultantly, the substantial question of law no.1 framed that, whether there exist employer-employee relationship between the Establishment and the owner-cum-drivers, is held in favour of the Corporation and the definition of 'employee' under Section 2(9) of the ESI Act, covers these drivers also.

36. The ESI Court, based on the evidence adduced on the side of the Establishment, totally accepted their case and it has also wrongly shifted the



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burden of proving the fact that car hire charges paid to the owner-cum-drivers would mulct the Establishment to pay contribution as demanded by the ESI Corporation.

37. As per Section 102 of the Evidence Act, the burden to prove that the owner-cum-drivers are not employees of Establishment lies on the Establishment herein, since they have approached the ESI Court and challenged the order passed against them under Section 45A of the ESI Act. The evidence adduced on the side of the Establishment is very clear that without the assistance or engagement of the owner-cum-drivers, the Establishment will not be able to run their business. The evidence adduced on the side of the ESI Corporation shows that there are huge payments made to the owner-cum-drivers under the head of 'car hire charges'. In the order passed under Section 45A of the ESI Act, the competent authority has narrated the dates during which the services of the owner-cum-drivers have been used and the number of deployment and also the fact that the owner-cum-drivers have to perform their duty to the utmost satisfaction of the Establishment and there are disciplinary conditions applicable to them. Since these facts have been disputed after admitting the payment of huge



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amounts under the head of 'car hire charges', the burden of proof lies on the Establishment to show that those payments were really car hire charges and engaging owner-cum-drivers shall not be treated as an employer-employee relationship. The ESI Court further held that the owner-cum-drivers have not been enquired by the Corporation and based on the various answers regarding the failure to prove the uniform used by the owner-cum-drivers and non-production of attendance register, it has been held that the failure to prove the above facts resulted in case to be considered in favour of the Establishment. In this regard, this Court is of the view that the approach of the ESI Court is not proper and the orders passed by the ESI Court are liable to be set aside. As held by this Court in earlier paragraphs that, owner-cum-drivers are employees of the Establishment, the car hire charges paid to them shall be considered as wage component. The substantial question of law no.2 is answered accordingly.

38. Accordingly, the Civil Miscellaneous Appeals are allowed and the orders passed by the ESI Court in ESIOP Nos.87 of 2005, 84 of 2010 and 85 of 2010 dated 27.01.2021 are set aside and the orders passed by the ESI Corporation under Section 45A of the Act are valid. The respondent



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Establishment is directed to remit the contribution fixed by the ESI Corporation within a period of six (6) weeks from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

11.07.2024

Index : Yes / No
Speaking Order : Yes / No
Neutral Citation : Yes / No
Lm



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K.RAJASEKAR,J.

Lm

To

1.The Employees Insurance Court
(Principal Labour Court),
Chennai.

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

Judgment made in
C.M.A.Nos.1813, 2020 and
2042 of 2021

11.07.2024