Basf India Limited And Anr. vs M. Gurusamy And Anr. on 15 January, 2004

Equivalent citations: 2004 (101) FLR 724, (2004) IILLJ 500 Bom

Bench: R Lodha, A V Mohta

Basf India Limited And Anr. vs M. Gurusamy And Anr. on 15/1/2004

JUDGMENT

R.M. Lodha, J.

1. This Appeal is directed against the judgment and order dated February 23, 1995 passed by the learned Single Judge whereby the Writ Petition filed by the present Appellants aggrieved by the order dated July 8, 1992 passed by the Regional Provident Fund Commissioner, Maharashtra and Goa (for short "Commissioner") came to be dismissed.

2. On 28th December 1984 the Commissioner issued summons to M/s. BASF India Limited (first Appellant and hereinafter referred to as "the Company") under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "Act of 1952"). In the summons it was recorded that the Commissioner had reason to believe that the Company failed to remit the provident fund dues in respect of their establishment covered by the Act of 1952 and the Rules framed thereunder and that provident fund benefits were not extended to the trainees and contractor employees after completion of 60 working days. The Company was thereby directed to give evidence and to produce all the records including those mentioned in the summons for conducting an enquiry and determining the amount due from the Company. It appears that during the course of hearing of the said proceeding the question arose regarding coverage of drivers appointed by the Managers. By the reply filed by the Company on 18th June 1992 the explanation was submitted by the Company to the effect that the personal drivers of the Company's Managers were basically their domestic servants; the Managers themselves selected them and employed them; the Managers called their domestic servants at any day and instruct them to drive the car at any place with any passengers as per their personal requirements; the drivers were under exclusive supervision and control of the respective Managers in their individual capacity and not in the capacity of the Company's employees; the Company's role was confined only to the extent that as a part of service conditions agreed with the Managers, it will reimburse to the Managers the expenses incurred by them in utilising their personal drivers services for to and fro drive between the residence and the office or any place outside for official work. The Company thus set up the case that there was no master-servant

relationship of any kind between the Company and the drivers of the Company's Managers and that such drivers were not covered within the definition of "employee" under Section 2(f) of the Act of 1952. Upon receipt of the reply from the Company, the Commissioner on that very day i.e. 18th June 1992 directed the Company to file documents, namely, who were the individuals engaged as car drivers, how long they continued to work and who paid their wages. In response thereto the Company on 6th July 1992 annexed the list of the drivers indicating period of their engagement and reiterated that the wages of these drivers were paid by the respective Managers but the expenses incurred by managers for utilising the services of personal drivers were reimbursed to the extent (a) upto Rs. 1,900/- per month if service with the Manager was less than five years and upto Rs. 1,950/- per month if service with the Manager was five years or more; (b) an amount upto Rs. 800/- towards uniforms; footwear, monsoon equipments and winter clothing and (c) an amount for overtime upto Rs. 4.50 per hour if the Manager would use his driver for Company's duty beyond driver's normal working hours with the Manager.

3. The Commissioner after hearing the authorised representative of the Company by order dated 8th July 1992 held that the said drivers were paid wages directly or indirectly by the establishment for the work carried out by them in or in connection with the establishment and therefore they were employees under Section 2(f) of the Act of 1952. Aggrieved by the said order the Company filed Writ Petition which came up for hearing before the learned Single Judge. The Company heavily relied upon the judgment of the Supreme Court in Employers in relation to P.N.B. v. Ghulam Dastagir,]978(I) L.L.J. 312 before the learned Single Judge and urged that relationship of master and servant did not exist between the Company and the drivers of the Managers. The contention was that the drivers were working under the control and supervision of the concerned Managers and the Company has no control over in the matter of selection, appointment, terms and conditions of service, hours of duty, nature of work, etc. of such drivers. On the other hand on behalf of the Commissioner it was contended before the learned Single Judge that the concerned drivers were employed in connection with the establishment and that the definition of "employee" under Section 2(f) of the Act of 1952 was much wider. It was also contended on behalf of the Commissioner that the control and supervision were not the decisive factors and the issue has to be decided in each case on its own merits. The learned Single Judge found that on the facts the judgment of the Supreme Court in Ghulam Dastagir was not applicable and that in view of the judgment of the Supreme Court in Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments, (1974)3 SCC 4987 in deciding the question of contract of service, though the control is an important factor and in many cases it may still be decisive but it is wrong to say that in every case it is decisive and held that the test of control was not the sole criteria and in the facts of the present case it was established that the drivers were the employees of the Company under Section 2(f) of the Act of 1952. It is this judgment which is impugned before us.

4. Mr. J.P. Cama, the learned Senior Counsel appearing for the Appellants urged that the learned Single Judge erred in not relying on the case of the Supreme Court in Ghulam Dastagir which squarely was applicable to the facts and circumstances of the present case. He submitted that the learned Single Judge fell in error when it was held by him that for existence of relationship of master and servant in Section 2(f) of the Act of 1952, the test of control was not the sole criteria. The learned Senior Counsel strenuously urged that for existence of relationship of master and servant the test of control was the most decisive test and that is what has been held by the Supreme Court in Ghulam Dastagir and host of other judgments. The learned Senior Counsel urged that the Company had no control over the drivers engaged by the Managers nor were the said drivers were paid wages by the Company. According to the learned Senior Counsel, the wages to such drivers were paid by the Managers themselves and the Company was only reimbursing the Managers to some extent by way of perquisites. The learned Senior Counsel, thus, submitted that the concerned drivers were not employees under Section 2(f) or the Act of 1952. In this connection the learned Senior Counsel relied upon Ghulam Dastagir (supra), Employers in relation to the Management of Reserve Bank of India and Their Workmen, 1977 II L.L.J. 42, C.E.S.C. Limited, etc. v. Subhash Chandra Bose and Ors., , Ratan Lal v. The Regional

Provident Fund Commissioner, New Delhi and Anr., 1977 LAB.I.C. 1765, J.K. Cotton Spinning and Weaving Mills Company Ltd, And Labour Appellate Tribunal of India and Ors., 1963 II L.L.J. 436, Employers in Relation to the Management of Reserve Bank of India v. Reserve Bank of India, and State Bank of India and Ors. v. State Bank of India Canteen Employees' Union (Bengal Circle) and Ors., .

5. On the other hand, Mr. Rashmikant C. Master, learned Counsel appearing for the respondents supported the judgment of the learned Single Judge. He referred to the definition of the word "employee" appearing in Clause (f) of Section 2 of the Act of 1952 and submitted that the concerned drivers in the instant case clearly fall in the said definition. He submitted that determining factor for deciding the question whether an employee falls within the definition of Section 2(f) of the Act of 1952 is that a person should be employed in or in connection with the work of the establishment. In this connection the learned Counsel relied upon the judgment of the Supreme Court in Royal Talkies, Hyderabad and Ors. v. Employees' State Insurance Corporation through its Regional Director, Hill Fort Road, Hyderabad, and the Division Bench of Andhra Pradesh High Court

in G. V. V. Swamy v. Regional Provident Fund Commissioner, Hyderabad and Ors., 1987 Lab.I.C. 719. The learned Counsel for respondents submitted that in the present case on the basis of the available material no doubt is left that the concerned drivers were the employees of the Company.

6. We reflected over the matter and in our view no case for interference is made out in the impugned judgment and order.

7. Section 2(f) of the Act of 1952 defines "employee". If reads thus :

"2(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets, his wages directly or indirectly from the employer, and includes an person, --

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1962 (52 of 1961), or under the standing orders of the establishment;"

8. A reading of the said definition would show that any person who is employed for wages in any kind of work, manual or otherwise, in an establishment and who gets his wages directly or indirectly from the employer is an employee. Similarly, an employee who is employed for wages in any kind of work, manual or otherwise, in connection with the work of an establishment and who gets his wages directly or indirectly from the employer is also an employee. It would also include any person employed by or through a contractor in or in connection with the work of the establishment. It would also include any person engaged as an apprentice not being an apprentice engaged under Apprentice Act, 1961 or under the standing orders of establishment.

9. The expression "in connection with the work of establishment" means that there must be some nexus between the establishment and work of the employee, though it may be loose connection. The work should not be irrelevant for the purposes of establishment. It is sufficient if it is incidental to it as held by the Supreme Court in Royal Talkies. It is enough if the employee does some work which has relevance to or link with the establishment. In other words such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Applying the aforesaid test to the instant case, it would be seen that the cars are provided to the Managers by the Company. All the 21 Managers have 21 drivers. They are paid wages upto Rs. 1,900/- or Rs. 1,950/-, as the case may be, depending on the length of service put in by such drivers. The payment made by the Managers to the drivers is reimbursed for to and fro drive between the residence and the office or outside place for office work. Such drivers are also paid overtime if the Managers use drivers for Company's duty beyond the driver's normal working hours with the management. These personal drivers are provided uniforms, footwear, monsoon equipments and winter clothing. Obviously the reimbursement to the drivers of the Managers is done by the Company because the drivers are engaged by the Managers for the benefit of the

Company. The material placed before the Commissioner amply showed and established that the drivers were paid directly or indirectly by the Company for the work carried out in or in connection with the Company. We are not persuaded by the submission of Mr. Cama that the Company does not pay wages to the drivers of the Managers and what is reimbursed to the Managers is not the wages paid by the Managers to the drivers but the reimbursement is made by way of perquisites and therefore such drivers do not fall within the definition of "employee" under Section 2(f) of the Act of 1952. In our considered view the form of payment made to the Managers is not very important but what is important is what is reimbursed to the Managers is nothing but the payment made by the Managers to such drivers for the services rendered by the drivers in connection with the work of the Company. We may note that the Commissioner in his order dated 8th July 1992 noticed the following circumstances for holding the concerned drivers the employees of the Company :

(i) 21 car drivers are employed by the 21 Managers in possession of the Company;

(ii) the personal drivers are paid wages upto Rs. 1,900/- per month and upto Rs. 1,950/- per month if their services with the Managers is less than five years or five years or more respectively; .

(iii) the personal drivers are provided uniforms, footwear, monsoon equipments and winter clothing;

(iv) such drivers are paid overtime;

(v) the cars are provided to the Managers by the establishment;

(vi) these drivers do service to the individual Managers for the official purpose.

Taking cumulative effect of these aspects the Commissioner held that there was no need for the establishment to have reimbursed the Managers towards the expenses for engaging these drivers had they not been engaged for the benefit of the establishment. The finding thus concluded by the Commissioner that these facts would prove that the concerned drivers are paid wages directly or indirectly by the establishment for the work carried out by them in or in connection with the establishment and therefore, they are nothing but employees as defined under Section 2(f) of the Act of 1952 cannot be faulted.

10. As noted above, the learned Senior Counsel appearing for the Company strenuously contended that the Company has no control over these drivers and if the control over these drivers is not established, such drivers cannot be held to be employees within the meaning of Section 2(f) of the Act of 1952. Insofar as this aspect is concerned we may observe that though in the reply filed by the Company on 18th June 1992 the plea was set up that the drivers were under exclusive supervision and control of the respective

Managers in their individual capacity, no evidence was produced by the Company in support of this plea. It was for the Company to lead proper evidence in support of their case that such drivers were not under the control of the Company. The learned Senior Counsel submitted that the Company could not have led negative evidence. The contention is hardly acceptable. The Managers who had appointed these drivers were the employees of the Company and their evidence could have been led by the Company to demonstrate and indicate the nature of the control over the drivers. For want of any evidence in support of their case that the Company does not have any control over the concerned drivers and that the drivers were under exclusive supervision and control of the respective Managers, the contention of the learned Senior Counsel that the respective Managers had control over the concerned drivers and that the Company had no control over such drivers cannot be accepted.

11. In Ghulam Dastagir (supra) the workman failed to establish that the Bank had the control and direction over him and that there was a nexus between him and the Bank and in this backdrop the Apex Court that the award passed by the industrial Tribunal was unsupportable. The Apex Court further observed thus :

"4. We wish to make two comments. It is quite conceivable that the facts in the case of employment of other drivers may be different. If other materials are available regarding the terms and conditions of service regarding the direction and control of the drivers and regarding other indicia of employment, the conclusion may be different. We cannot, therefore, dogmatize generally as to the nature of employment of other drivers under this bank or other industry even where features of allowance may be present. We mention this, because, as Lord Macmillan pointed out in the case we have already referred to, facts vary from case to case and conclusions are reached on the basis of the facts and evidence of each case. There is no invariable proposition where fluid facts are involved."

12. The learned Single Judge therefore cannot be said to have erred in not applying Ghulam Dastagir to the instant case. Incidentally we may observe that the three Judge Bench of the Supreme Court in Silver Jubilee Tailoring House (supra) (this case has been referred by the learned Single Judge and relied upon) it was held that in order to decide relationship of employer and the employee the test of right to control cannot be treated as an exclusive test and that it is not necessary that the servant should be under exclusive control of one master. In paragraphs 27, 28 and 29 of the report, the Apex Court held thus:

"27. It is, therefore, not surprising that in recent years the control test as traditionally formulated has not been treated as an exclusive test.

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 7759)."

13. In our considered view the legal position laid down by Apex Court in Silver Jubilee Tailoring House as noticed above is not deviated in the two Bench decision of the Supreme Court in Ghulam Dastagir. This legal position does not get changed in Employers in relation to the Management of Reserve Bank of India v. Their Workmen (supra) and State Bank of India v. State Bank of India Canteen Employees' Union (Bengal Circle) (supra).

14. Thus we find no infirmity in the order of the learned Single Judge warranting interference in Appellate jurisdiction.

15. Appeal is accordingly dismissed with no order as to costs.