

Mr.Dharmaratnam vs State Of Kerala on 15 September, 2008

Author: K.M.Joseph

Bench: K.M.Joseph

IN THE HIGH COURT OF KERALA AT ERNAKULAM

WP(C).No. 12790 of 2008(V)

1. MR.DHARMARATNAM, S/O.K.M.DAMODARAN,
... Petitioner
2. E.K.SHAILAJA, D/O.E.C.KRISHNAN VAIDHIYAR
3. HARIS.C.P., S/O.C.P.HASSAN,

Vs

1. STATE OF KERALA, REPRESENTED BY
... Respondent
2. THE CHIEF EXECUTIVE OFFICER,
3. THE DISTRICT EXECUTIVE OFFICER,
4. REGIONAL TRANSPORT OFFICER,
5. T.KRISHNAN, S/O.KANARAN,
6. M.RAMADASAN, S/O.VELAYUDHAN,
7. M.MUSTHAFA, S/O.ABDUL SHUKK00R,
8. ABDUL RAHIM.T., S/O.AB00BACKER.T.,

For Petitioner :SRI.R.SUDHISH

For Respondent :SRI.P.RAMAKRISHNAN, SC,KMTWF BOARD

The Hon'ble MR. Justice K.M.JOSEPH

Dated :15/09/2008

O R D E R

K. M. JOSEPH, J.

W.P.(C). NOS. 12790 OF 2008 V

&

W.P.(C). NO.16055 OF 2008 J

Dated this the 28th August, 2008

JUDGMENT

These two Writ Petitions being connected, they are disposed of by a common Judgment.

2. Briefly put, the case of the petitioners is as follows:

Petitioners in W.P.(C).No.12790/08 are owners of autorickshaws. The first petitioner purchased one autorickshaw in his name and two autorickshaws in his wife's name, the second respondent. The Certificates of Registration are produced as Exts.P1 to P3. The third petitioner, an unemployed youth, purchased an autorickshaw for his own livelihood. All the three petitioners have entered into rental agreements with respondents 5 to 8. Petitioners' autorickshaws are taken on rent at the rate of Rs.130/= per day. They are not employees of the petitioners. They are not workers as contemplated under the Kerala Motor Transport Welfare Fund Act. It is the further case of the petitioners that autorickshaw workers do not stick on the job permanently on a particular vehicle and they migrate to other types of job and some people are going abroad. It is the case of the petitioners that in order to satisfy the autorickshaw sector, the Government has enacted the Kerala Autorickshaw Workers' Welfare Fund Scheme, 1991. This was kept in the cold storage and the Kerala Motor Transport Workers' Welfare Fund Scheme, 1985 which benefited the motor transport workers, was amended and the amended Scheme, called "the Kerala Motor Transport Workers' Welfare Fund (Second Amendment) Scheme, 2005"

enhanced the autorickshaw drivers and autorickshaw owners' contribution to the Scheme from the earlier amount specified in the Kerala Autorickshaw Workers' Welfare Fund Scheme, 1991. According to the petitioners, they are not "employers" within the meaning of the Motor Transport Workers Welfare Fund Act and the Motor Transport Workers' Act. The drivers taking the vehicles of the petitioners are not members of the welfare fund and the petitioners cannot be compelled to pay for these non- members of the Kerala Motor Transport Workers' Welfare Fund Scheme. Reliance is placed on the definition of the word "employee". Petitioners seek a declaration that they are not liable to pay employers' contribution to the Kerala Autorickshaw Workers' Welfare Fund Scheme, 1991 as amended under the Kerala Motor Transport Workers' Welfare (Second Amendment) Scheme, 2005. A direction is also sought not to insist the production of receipt of payment of contribution under the Kerala Autorickshaw Workers' Welfare Fund Scheme, 1991 as amended as

aforesaid.

3. Petitioner in W.P.(C). No.16055/08 J is also the owner of two autorickshaws. He is plying one of the vehicles, by availing a hire purchase loan and as far as the other autorickshaws are concerned, he has entered into rental agreements with respondents 5 to 8 as evidenced by Exts.P6 to P9. Herein also, the prayer is for a declaration that he is not liable to pay employer's contribution and also for a direction not to insist on payment of the contribution.

4. Counter Affidavit is filed on behalf of respondents 5 to 8 in W.P.(C). No.12790/08. They have, inter alia, stated that they are not members of the Scheme as it is not beneficial to them and not reliable. It is also stated that benefits are given to both "member" and "non-member". It is stated that the petitioner is not their employer and they are taking the autorickshaws on rent. A Statement is also filed on behalf of respondents 2 and 3 in W.P.(C). No.12790/08. The case of the official respondents is that the third petitioner is a self-employed person. Reference is placed on the insertion of Sections 2(ja) and 8A. It is stated that the constitutional validity of Section 8A has been upheld by this Court in the decision in Siraj v. Regional Transport Officer (2007(3) KLT 929). The petitioners' autorickshaws were never covered under the Kerala Motor Transport Workers' Welfare Fund Act or the Scheme or under the Autorickshaw Workers' Welfare Fund Scheme and, therefore, the petitioners' autorickshaws are liable to be assessed under the KMTWWF Act and the clearance certificate can be issued only on clearing the welfare fund dues. Reliance is placed on Clause 27 of the 2005 Scheme. The Scheme is applicable to self-employed persons also. Petitioners have filed a Reply Affidavit as also an additional Affidavit. I heard the learned counsel appearing for the parties.

5. Shri R. Sudhish, learned counsel for the petitioners would contend that the petitioners are owners of the autorickshaws in question. They are not employing the party respondents in both the cases. The party respondents can only be treated as their lessees. The law does not prohibit the owner of an autorickshaw entering into a rental arrangement. The party respondents take the autorickshaws every day and they have the freedom to ply the vehicles subject to the law of the land and they return the vehicles in the evening. The petitioners do not control the manner in which the autorickshaws should be driven or the routes they are to take. The minor repairs have to be carried out by the party respondents and the petitioners attend to the major repairs. It is stated that the Act and the Scheme contemplate that in order that there should be an obligation for the employer to contribute for the concerned person or persons should not only be an employee/employees, but he/they should apply and become a member of the Fund. It is only in respect of persons who become members of the Fund that there is an obligation on the part of the employer to make contribution. He took me through the provisions of the Act and also the Scheme which, I shall presently refer to, in an attempt to contend that by no stretch it could be said that there is an employer - employee relationship between the petitioner and the party respondents. Vital to the applicability of the Act and the Scheme is the existence of an employer - employee relationship. It is indispensable, it is submitted. It is wanting in this case and, therefore, there is no obligation on their part to make the contribution to the employees' fund. He also submitted that actually neither the Act, nor the Scheme serve the best interest of the employees.

6. Per contra, learned counsel appearing on behalf of respondents 2 and 3 would submit that this is a welfare legislation. It is enacted to secure the welfare of the employees. Various benefits flow on the basis of contributions being made by the employer. It is pointed out that after the amendment and the insertion of Section 8A which stands upheld by this Court, and what is more, the insertion of the definition of the word "self-employed person" in conjunction with paragraph 27 of the Scheme, there is no escape from the inevitable conclusion that for a person to work as a worker, that if he is not a member, he must apply to become a member and contribution must be made by the employer if tax is allowed to be collected under the Motor Vehicles Taxation Act.

7. In order to appreciate the contentions and to resolve the lis before me, it is necessary to refer to the various provisions of the Act and the Scheme. Section 2(d) defines the word "employee". It reads as follows:

"2(d): "employee" means a person who is
employed for wages in a motor transport

undertaking directly or through an agency to work in a professional capacity on a transport vehicle or to attend to duties in connection with the arrival, departure, loading or unloading of such transport vehicle and includes a driver, conductor, cleaner, station staff, line checking staff, booking clerk, cash clerk, depot clerk, time keeper, watchman or attendant."

The definition of the word "employer" is also crucial. It reads as follows:

"2(e): "employer" means, in relation to any motor transport undertaking, the registered owner or the person who, or the authority which, has the ultimate control over the affairs of the motor transport undertaking, and where the said affairs are entrusted to any other person, whether called a manager, managing director, managing agent or by any other name, such other person".

"Motor Transport Undertaking" is defined under Section 2(h) which reads as follows:

"2(h): "motor transport undertaking" means a motor transport undertaking engaged in carrying passengers or goods or both by road for hire or reward and includes a private carrier."

"Wages" finds its statutory definition in Section 2(k) and it reads as follows:

"2(k): "Wages" means all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash to him."

Section 2(ja) which was inserted by Act 23 of 2005 provides for the definition of "self-employed person" which reads as follows:

"2(ja): "self-employed person" means a person other than an employee who is engaged in the profession of a motor transport undertaking by actually operating the vehicle and depending mainly on such a motor transport undertaking for his livelihood."

Section 4 as it stood was substituted and after the substitution, it reads as follows:

"Section 4: Contribution to the Fund-(1) The contribution payable by the employee to the fund shall be such quantum for each type of motor transport undertaking as may be specified in the Scheme.

(2) The contribution payable by the employer and self-employed person shall be such quantum as may be specified in the Scheme.

(3) The quantum under sub-sections (1) and (2) shall be fixed taking into account the average number of manpower required for operating the motor transport undertaking.

(4) The contribution payable by the employer, employee and self-employed person shall be subject to revision from time to time.

Provided that nothing in this section shall apply to a motor transport undertaking to which the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (Central Act 19 of 1952) or the Payment of Gratuity Act, 1972 (Central Act 39 of 1972) apply."

Section 8 speaks about the determination of the amount due and it provides as follows:

"Sec.8: Determination of amount due - (1) The Chief Executive Officer or any other Officer appointed under sub-section(1) or Section 7 authorised by him in this behalf may, by order, determine the amount due under the provisions of this Act, or of the Scheme from the employer, employee and self-employed person and if the amount due is not paid on or before the due date, he shall issue a demand notice to the defaulter showing the amount of arrears."

Provision has been made therein for filing review and then an appeal is provided before the Board where the arrears exceeds Rs.1 lakh. Section 8A which also was inserted by Act 23 of 2005 reads as follows:

"Sec.8A: Production of receipt of remittance of welfare fund contribution - Notwithstanding anything contained in any other law for the time being in force, every registered owner or person having possession or control of a motor vehicle in respect of a motor transport undertaking liable to pay contribution (other than autorickshaws covered under the provisions of the Kerala Autorickshaw Workers' Welfare Fund Scheme, 1991) shall, at the time of making payment of the tax under

the Kerala Motor Vehicles Taxation act, 1976 (19 of 1976), produce before the Taxation Officer the receipt of remittance of the contribution to the fund due upto the preceding month."

Section 9 provides that every employer and self-employed person shall pay contribution due from him every month in terms of the Scheme. Paragraph 27, inter alia, reads as follows:

"27: Registration - (1) Every employee and self-employed person who desires to be employed as a motor transport worker and qualified to be employed in a motor transport undertaking, if not already registered as a member of the fund, shall submit in person an application for membership and nomination in Form 1 before the concerned District Executive Officer or the Additional District Executive Officer of the Kerala Motor Transport Workers' Welfare Fund Board (hereinafter referred to as the registering authority). Such application shall be accompanied with two stamp size recent photograph of the applicant and an amount of rupees twenty five towards fee for registration."

It further provides for the procedure for registration and the remedies open to the party aggrieved by a decision.

8. Before I touch upon the interpretation to be placed on a conspectus of all the provisions, I must remind myself that I am faced with what undisputably is a social welfare legislation. If there are possibilities of interpreting it in more ways than one, it is elementary that the Court will lean in favour of the view which, going by the principles of purposive interpretation, will attain the goal set by the framer of the law. In this context, as pointed out by the learned counsel for respondents 2 and 3, it is necessary for me to refer to the decision of the Division Bench of this Court in *Siraj v. Regional Transport Officer* (2007 (3) KLT 929), while considering the challenge to Section 8A of the Act. Therein, the Division Bench proceeded, after extracting Section 8A, to hold as follows:

"The stand of the State Government as well as that of the Board was that even though the Act was enacted to provide for the constitution of a fund to promote welfare of motor transport workers in the State, it was noticed that majority of the employers were not giving contributions to the fund. Many of them adopted money evading practices, exploiting loop holes in the Welfare Fund Act by preparing bogus partnership agreements pretending that employees themselves are the employers and were not paying contribution. Only few of the employers used to maintain proper registers and muster roll prescribed under the Act. In order to safeguard the interest of the motor transport workers and at the same time reducing the arbitrariness in fixing the contribution to be made by the employers/self employed towards welfare fund, detailed discussions were held at the level of the Minister (Labour) with the different Trade Unions and Association of motor vehicle owners and also with the Secretary (Transport), Transport Commissioner and it was in principle decided to amend the Kerala Motor Vehicles Transport Workers Welfare Fund Act and the Scheme."

9. The first question to be considered is whether the petitioners are justified in contending that there is no employer - employee relationship between the parties and the party respondents in both these Writ Petitions. I would think that having considered the definition of the words "employer" and "employee" occurring in the Act, the learned counsel for the petitioners may be justified in contending that the petitioners cannot be treated as the employers of the party respondents. Apart from the fact that the party respondents have themselves taken the stand before me that they are not employees of the petitioners, it is apposite to appreciate that the definition of the word "employee" predicates the presence of the element of employment for wages. The necessity of a person working on wages is common to both employment directly or through an agency. It is not unnatural, therefore, that the legislature also took care to provide for the definition of the word "wages". I have already extracted the definition of the word "wages". Having regard to the definition of the word "employee" in conjunction with the definition of the word "wages", it would appear to me that the Act contemplates the payment of wages as defined as necessary for attracting the word "employee". In order that there should be an employer - employee relationship, there must be an employment. Determining existence of an employer - employee relationship, can be said to be a vexed issue. In the case of a rental agreement for which there is no prohibition under any law, there cannot be an employer - employee relationship. If one accepts the case of the petitioners and it is not refuted by the party respondents, under the rental agreement, the party respondents pay to the petitioners sums by way of rental. There is no payment by the petitioners as employers as wages to the party respondents. This is the case of the petitioners. So, I would think that at least, prima facie, it is clear that the learned counsel for the petitioners is right in contending that the petitioners cannot be described as employers and the party respondents cannot be described as the employees of the petitioners. That which no law prohibits and well-nay, in fact the law permits, can certainly be practised by the petitioners. It is perfectly open to a person to enter into a rental agreement in respect of an autorickshaw. In such a case, it is difficult to appreciate the contentions that they would still continue to be employees. On this reasoning, the learned counsel for the official respondents would submit that if this reasoning is accepted, there is no compulsion on the part of the petitioners to pay the contribution as they are not employers. But, he poses the further question whether that should be the end of the enquiry by this Court. He would submit that going by the definition of the word "self-employed person" which I have already referred, the party respondents would be such "self- employed persons". The definition of the word "self employed person" is defined to mean a person other than "employee" to begin with. Thus, going by the case of the petitioners, the party respondents do satisfy the said requirement as it is the definite case of the petitioners that they are not their employees. The further question to be considered is whether the party respondents could be said to be engaged in the profession of motor transport undertaking, by actually operating the vehicles and depending mainly on such a motor transport undertaking for their livelihood. Two interpretations are possible: The first interpretation, in my view, would not admit of any doubt and the same is as follows:

If a person owns an autorickshaw and he himself operates the autorickshaw and he is also depending mainly on such a motor transport undertaking for his livelihood, he would undoubtedly, I feel, fall within the four walls of the said definition. But, by placing such an interpretation in the facts of this case, it would not solve the issue which arises. Learned counsel for respondents 2 and 3 would submit that the party

respondents would satisfy the elements of the definition clause of "self-employed persons". He points out that they are also actually operating the vehicles and if they are mainly depending upon the undertaking, they should also be treated as engaged in the profession. He would commend for my acceptance this interpretation, particularly having regard to the fact that by placing such an interpretation being a social welfare legislation, it will bring within the net of the welfare measures contemplated under the Act and the Scheme, all those persons who actually are operating the autorickshaws themselves and depending mainly on the motor transport undertaking for their livelihood, but who are not employees as such. If the owner of an autorickshaw is in a position to dictate terms to a person who approaches him that he has to enter into a rental agreement, can it mean that the person, who actually operates the vehicle and is mainly depending on the motor transport undertaking for his livelihood, should stand deprived of the welfare measures which would otherwise be available, if there is an employer - employee relationship ? In this context, it is necessary to consider the meaning of the word "profession". "Profession" is defined as follows:

"A type of job that needs special training or skill, especially one that needs a high level of education; the medical/legal/teaching, etc.; to enter/go into/join a profession; the caring professions (that involve looking after people); He was an electrician by profession; She was at the very top of her profession, note at work; all the people who works in a particular type of profession; the legal profession has/have always resisted change; the traditional jobs that need a high level of education and training, such as being a doctor or a lawyer; employment in industry and the professions."

(New Oxford Advanced Learner's Dictionary - 7th Edition).

10. The definition includes to mean as job. when a person takes to driving an autorickshaw and he earns his livelihood mainly from the said activity, I would think that he can be said to be doing a job and, therefore, carrying on profession of the motor transport undertaking. If on the other hand I place the interpretation that the definition of the word "self-employed person" should bear only the first meaning, I should also bear in mind the consequences that flow from such an interpretation. In a market, where the owners of the autorickshaws can call the shots or are in a dominating position and they are in a position to enter into relationship of lease, large sections of the employees could be deprived of the benefits which the law maker has vouch-safed for them by enacting the legislation and the Scheme. Learned counsel for the petitioners mainly refers to the terminology of Section 8A and he points out that there also the provision contemplates that the registered owner or the person having possession who is liable to pay the contribution alone has to comply with Section 8A. He would further submit that a perusal of paragraph 27 which I have already referred to, would show that a choice is with the employee to become a member of the Fund or to remain outside its purview. At the first blush, it would appear that he is correct in contending that it is a matter for the choice of the employee. The result could be said to be derived from the words used in paragraph 27 to the effect that every employee and self-employed person who desires to be employee as a motor

transport worker and qualified to be employed shall submit in person an application for membership. According to him, it is only with respect to such persons who are desirous can take the offer to make an application and who are lawfully enrolled as Members that the employer has a liability to make the contribution. He would submit that if the application is rejected, the Scheme provides for an appeal and the matter can be determined as to whether he is eligible to be enrolled as a member as per paragraph 27. He would submit that unless that process is over and he would submit that in respect of the party respondents they have not applied for becoming as Members of the Fund, it is illegal and idle to demand contributions in their regard from the petitioners. Per contra, learned counsel appearing on behalf of the official respondents would point out that the word "desirous" to be employed as a motor transport worker may not be interpreted in the way the counsel for the petitioners canvasses. It is his contention that the word "desirous" to be employed means that if he wants to work as a motor transport worker. In other words, there is no choice, but to apply and become a member of the Fund. A legislation compelling persons to act in a manner which may at the first blush appear to be contrary to their interest, has been upheld in various jurisdictions. A passenger is forbidden from standing in the foot-board of the bus. The wearing of a helmet is insisted upon in purported pursuit of the best interest of the person as conceived by the law maker. Much as he may dislike it, the law maker still feels in its value judgment and being at the realm of a welfare State that it has every right to act in the best interest of the citizens. I would think that the provision in paragraph 27 is one such provision. Various benefits flow from the fund. For various reasons, an employee may want to opt out from the Fund. It may be for reasons of the amounts that he may expect to get or the amounts he may have to pay. But, that again, is a value judgment of the law maker. I would think that in the context in which the words appear, it should be interpreted as meaning as correctly contended by the counsel for respondents 1 & 2 that there is a prohibition against a person being employed and that he should submit an application for membership and become member of the Fund. This result also flows from the clear wording of Clause 27 of the Scheme. Clause 27 of the Scheme declares that every employee and self-employed person who desires to be employed as a motor transport worker, must apply for membership. It does not say that an employee or the self- employed person who desires to be a member of the Fund, should apply. The words "desire to be employed" is relatable to the word "motor transport worker", and not to registration as member of the Fund. Further, Clause 28 of the Scheme also needs to be noticed. It reads as follows:

"Clause 28: Contribution to the Fund - Every employer or self-employed person of a motor transport undertaking shall contribute to the Fund in respect of his undertaking, an amount of quantum for each type of vehicle shown in the table-I and table-II below, every month, as employer's contribution taking into account the average minimum number of employees fixed for each such vehicle."

Thus, every employer or self-employed person of a motor transport undertaking is duty bound to contribute to the Fund in a sum each depending upon the type of vehicle shown in Tables I & II. Section 4(2) as substituted by Act 23 of 2005, in sub- section (2) provides the contribution payable by the employer and self-employed person, in a case where there is self- employed person. By the definition, "self-employed person" is not an employee. In the case where the vehicle is being operated by a person and who is not an employee and if he falls within the definition of the word

"self-employed person", he is duty bound to contribute as specified in the Scheme. No doubt, Section 8 as substituted again by Act 23 of 2005 speaks about the power of the Officer to determine the amount due under the provisions of the Act from the employer and employee and self-employed person. There is an Appeal provided to the District Labour Officer also. The contention of the learned counsel for the Fund is that even if the petitioners as registered owners of the vehicles may not be liable to make contribution, the motor vehicles tax cannot still be accepted without payment of the contribution in a situation where the party respondents would fall within the definition of the words "self-employed persons". Section 8A speaks about registered owner or person having possession or control of a motor vehicle in respect of a motor transport undertaking which is liable to pay contribution, having a duty to produce the remittance of contribution upto the preceding month. In a situation where there is no employment between the owner and another person or persons, it may be true that the registered owner cannot be compelled to make the contribution. But, in a case where there is a genuine rental agreement and the self-employed person operates the vehicle, the legislative device which is reflective of a survey of the provisions would appear to be that the person in possession or control of a motor vehicle will be liable to pay the contribution for receipt of tax under the Kerala Motor Vehicles Taxation Act, 1976. In a case where the registered owner is found or shown to be not the employer as in a genuine case of a rental arrangement, a question may arise whether he would be the lessee and the lessee could be said to have possession or control of the vehicle. One way of looking at it is that the word "possession" should be understood in the context of the words "actually operating the vehicle" found in the definition of the words "self-employed person". Certainly, he would be a person interested in the payment and of the receipt of tax under the Motor Vehicles Taxation Act as under the said Act without payment of the tax, the vehicle cannot be operated. It could be said that in such a case, the "self-employed person" who is actually in factual possession and in control of the vehicle would also be said to be fulfilling the elements of Section 8A and thus be liable to pay the contribution payable as a condition precedent for receipt of tax under Section 8A. In the light of this discussion, the following conclusions are inevitable:

If the transaction between the petitioners and the party respondents is one of a genuine rental agreement, it is clear that the petitioners cannot be called upon to remit the contribution under the Act. However, if the party respondents whose counsel I have heard in both the cases, are actually operating the vehicles on the basis of a genuine rental agreement and if they are self-employed persons within the meaning of the Act, they would be persons who could be described as being in possession and control of the vehicle within the meaning of Section 8A of the Act and this in turn means that they would be liable to make the contribution under the Act and the Scheme and what is more, the compulsion to pay the contribution as a condition precedent to receipt of tax under the Kerala Motor Vehicles Taxation Act would fasten on them. In other words, it is open to the taxation authority to insist on payment of the contribution by the "self-employed person". However, I hasten to add that it is also open to the registered owner to offer the payment of the dues which could be a payment on behalf of the self-employed persons as the registered owner is also mentioned as one of the categories in Section 8A of the Act.

The Writ Petitions are disposed of as above.

Sd/= K. M. JOSEPH, JUDGE kbk.