REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2235 OF 2020
(ARISING OUT OF SLP (CIVIL) NO.1170 OF 2019)

SUSHILABEN INDRAVADAN GANDHI & ANR. …APPELLANTS

VERSUS

THE NEW INDIA ASSURANCE
COMPANY LIMITED & ORS. ...RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. On 09.06.1997, the husband of the Appellant No.1, who was a surgeon, was travelling in a mini-bus that was owned by the Rotary Eye Institute, Navsari (the Respondent No. 3 herein) along with other medical staff of the said Institute. The mini-bus had been driven with excessive speed, as a result of which at around 8.30 P.M. when the mini-bus was passing through the Gandevi-Navsari Road, near Kabhar Patiya, the driver of the mini-bus lost control and the vehicle turned turtle. The husband of Appellant No.1 was seriously injured and ultimately succumbed to his injuries.

3. On 17.04.1997, the Respondent No. 3 had entered into a comprehensive Private Car 'B' Policy from the New India Assurance Company Limited (the Respondent No. 1 herein). The aforesaid Insurance Policy was valid from 24.04.1997 till 20.04.1998. The limitation of liability clause which has been relied upon by the impugned judgment of the High Court is set out as follows:

> "SECTION II LIABILITY TỌ THIRD PARTIES
>
> 1. Subject to the limits of liability as laid down in the Schedule hereto the Company will indemnify the insured in the event of an accident caused by or arising out of the use Motor Car against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of
>
> (a) death of or bodily injury to any person including occupants carried in the motor car (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured."

In addition, endorsement IMT-5 states:

> "I.M.T.5. Personal Accidental cover to unnamed passengers other than the insured and his paid driver or cleaner.
>
> In consideration of the payment of an additional premium it is hereby understood and agreed that the Company undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by any passenger other than the insured and/or his paid driver attendant or cleaner and/or a person in the employ of the insured coming within the scope of the Workman Compensation Act,

1923 and subsequent amendments of the said Act and engaged in and upon the service of the insured at the time such injury is sustained whilst mounting into dismounting from or travelling in but not driving the motor car and caused by violent accidental external and visible means which independently of any other cause shall within three calendar months of the occurrence of such injury result in:

	Scale of Compensation
a) Death only	100%
b) Total and irrecoverable loss of: i) Sight of both eyes or of the actual loss by physical separation of the two entire hands or two entire feet or of one entire hand and one entire food or of such loss of one eye and such loss of one entire hand or of one entire foot ii) Use of two hands or two feet, or of one hand and one foot or of such loss of sight of one eye and such loss of use of one hand or one foot.	100% 100%
c) Total and irrecoverable loss of: i) the sight of one eye or the actual loss by physical separation of one entire hand or one entire foot ii) Use of a hand or a foot without physical separation	100% 100%

There is no dispute that additional premium was paid for endorsement IMT-5, which will therefore be applicable in the facts of this case. It is also undisputed that endorsement IMT-16, which deals with a general liability to employees of the insured who may be travelling in the employer's car, other than paid drivers, may also be covered on

payment of an additional premium. It is undisputed on the facts of this case that as far as endorsement IMT-16 is concerned, no such additional premium was paid.

4. The husband of the Appellant No.1, Dr. Alpesh I. Gandhi, had entered into a contract for services, dated 04.05.1996, as an Honorary Ophthalmic Surgeon at the aforesaid Respondent No. 3 institute. Since the important question to be determined in this appeal is whether Dr. Alpesh I. Gandhi can be said to be employed by the Respondent No. 3 or has only entered into a contract for services with the Respondent No. 3 as an independent professional, the terms of the contract being important are set out herein in full:

> "SUB: CONTRACT FOR SERVICES AS HONORARY OPHTHALMIC SURGEON AT ROTARY EYE INSTITUTE, NAVSARI.
>
> This contract on the captioned subject entered into between Dr. ALPESH I. GANDHI, hereinafter referred to as AIG and the Rotary Eye Institute, Navsari, hereinafter referred to as REIN, has become effective from dated 01-04-1996 and the same is governed by the following terms and conditions.
>
> I.DESIGNATION: Honorary Ophthalmiç Surgeon.
>
> II.HONORARIUM: Rs. 4000/- P.M
>
> III.OTHER COMPENSATIONS: That for the Honorary Services to REIN, AIG will be compensated as follows:

i. AIG will be paid 10% of the appropriate percentage of the total money set aside every month out of the OPD collection at the REIN;
ii. AIG will also be paid 10% of the appropriate percentage of the total money set aside every month out of the Operation Fee component of the Hospitalization Bills collected by REIN from the Institute patients;

iii. AIG will also be entitled to 10% of the appropriate percentage of the total money set aside every month out of the Room Visiting Fees component of the Hospitalization Bills collected by REIN from the Institute patients;

NOTES:
a. That the above compensations are in addition to the Honorarium as stated at clause II above;

b. That the Patients Hospitalized under AIG's care will have to be visited by AIG for the post-operative care.

IV. TIME DEVOTION AND DUTIES:

That the AIG will be devoting full time to the REIN to cater to the following:

i. The examination of OPD patients both in the morning and the afternoon sessions;

ii. The Operations of paying as well as non-paying Patients as per the schedules fixed by the Institute Management;

iii. The emergency cases of all natures;

iv. Attending the routine as well as special Diagnostic and Operative Camps as finalized by the competent authority of the Institute;

v. Participation in the R & D activities programmed and planned by the R & D Department of the Institute;

vi. Presenting research papers at the National and International Medical Conferences on behalf of the R & D Department of the Institute upon authorization by the competent authority of the Institute;

vii. Training of junior doctors and other paramedical staff of the Institute to make them competent enough to handle the cases independently.

viii. Any other assignment that might get created in course of time but not clearly visualized at present.

V. LEAVE RULES:

That AIG will be governed by the leave rules of the Institute as in vogue from time to time. AIG will, however, not be entitled to any financial benefit of any kind as that might be applicable to other regular employees of the Institute as far as the leave rules are concerned.

VI. WEEKLY OFFS AND HOLIDAYS:

i. That AIG will be entitled to weekly offs as well as public holidays as decided by the Institute for each accounting year.

That Hon. Hospital Superintendent, however, shall have the rights to make alterations in the same depending upon the Hospital contingencies.

ii. That AIG will be entitled to 30 days of contingency leave during each accounting year.

VII. CONDUCT RULES:

That AIG will be governed by the conduct rules of the Institute as in vogue from time to time and as applicable to the regular employees of the Institute.

VIII. ARBITRATION OF DISPUTES:

That the disputes, if any, arising in course of the tenure of this contract will be referred to the Managing Committee of the Institute and the decision of the Managing Committee will be final.

IX. TENURE OF CONTRACT:

That this contract is operative for a period of THREE YEARS effective from 1-4-96.

This period can, however, be extended from time to time with the mutual consent.

X. TERMINATION OF CONTRACT:

That a notice of clear THREE MONTHS will have to be given.

i. By REIN to AIG, if the institute wishes to terminate this contract or in lieu of notice period the institute shall have to pay an amount (to AIG) equivalent to the Hon. Amount paid to AIG for last three months just preceding the month of termination of contract;

ii. By AIG to REIN, if AIG wishes to terminate this contract or in lieu of the notice period AIG shall have to pay an amount (to REIN) equivalent to the Hon. Amount paid to him by the Institute for the last three months just preceding the month of termination of the contract.

NOTE: That in the event of the proven case indiscipline or breach of Trust, the REIN reserves the right to terminate the contract at any time without giving any compensation whatsoever.

XI. EXPIRATION OF THE PRESENT EMPLOYMENT:

That with effect from 1st April 96, AIG shall no longer remain as the regular employee of the Institute and that the earlier appointment order No. 10795 dtd. 03-04-1995 automatically becomes null and void."

5. The Appellants filed a petition under Section 166 of the Motor Vehicles Act, 1988, being MACP No.1326 of 1997, against the driver, the Respondent No. 3 and the Respondent No.1, in which they claimed compensation for the death of Dr. Alpesh I. Gandhi at INR 1 crore. The petition stated that Dr. Gandhi was 28 years old at the time of his death and was earning a monthly income of INR 13,000.

6. Despite being served, the Respondent No. 2 and the Respondent No. 3 chose to remain absent before the Tribunal. The Respondent No. 1 filed its written statement where it denied the material averments made by the Appellants and, in addition, submitted that the deceased being an employee of the hospital was not covered for death or injury arising out of and in the course of his employment, thereby excluding the liability of the insurance company altogether in the case. The Tribunal framed the following issues and answered them as follows:

> "1. Whether the applicants prove that the deceased died due to the rash and negligent driving on the part of the driver, opponent No.1 of the vehicle involved in the accident?
>
> 2. Whether the applicants are entitled to get compensation? If yes, what amount and from whom?
>
> 2-A Whether the claimant prove that the risk of the deceased is covered in the policy issued to the hospital?
>
> 2-B Whether the opponent No.3 proves that the risk of the deceased is not covered in the policy, because of the deceased being an employee of the hospital and

the death is caused during the course of employment as the Sec-II of the terms and conditions of the policy exclude such risk ?

3. What award and order?

My findings to the above issues are as under for the reasons to follow: -

1. In the affirmative.

2. In the affirmative. As per finding.

2-A In the affirmative.

2-B In the negative

3. As per final order."

7. By way of findings of fact, it found that the driving license in favour of the driver was valid, and that the driver was rash and negligent in driving the vehicle, which led to the death of Dr. Alpesh Gandhi. The Tribunal then found that the said Doctor was earning an annual income of INR 1,47,000. Following **Sarla Verma v. DTC** (2009) 6 SCC 121, the Tribunal, after considering deductions as well as future prospects, ultimately arrived at an income figure of INR 18,275 as the monthly income. The Tribunal then applied the multiplier of '17' to the annual income of INR 2,19,300, making a total of INR 37,28,100/-. Consortium expenses were added as INR 25,000; Funeral expenses as INR 10,000, thereby arriving at a total compensation figure of INR 37,63,100 which had to be paid together with interest at 8% per annum. Importantly, all three Respondents were made jointly and

severally liable to pay the aforesaid amount. This was on the basis that on an analysis of the contract entered into between the Respondent No. 3 and Dr. Alpesh Gandhi, the contract was a contract for service, as a result of which the deceased could not have been held to have been in the employment of the Respondent No. 3.

8. The impugned judgment of the High Court dated 26.07.2018, after analyzing the provisions of the contract for services dated 04.05.1996 between the Respondent No. 3 and Dr. Gandhi came to the opposite conclusion, stating that since the contract was a contract of service, the Insurance Company could not be held liable except to the extent of INR 50,000, which was arrived at after setting out Regulation 27 of the General Regulations of the Indian Motor Tariffs dated 01.08.1989, by which the maximum cover for policies of the kind involved in this case to third persons where the premium paid is INR 25 per person, in addition to the premium paid for the policy, the capital sum insured per person would only be INR 50,000. Thus, the liability of the Insurance Company was pegged to INR 50,000, the liability of the Respondent No. 2 and the Respondent No. 3 being for the balance amount.

9. The vexed question that arises for consideration is as to whether Dr. Alpesh Gandhi could have been said to have been in the employ of the Respondent No. 3 on the date of the accident, as a result of which

the limitation of liability provision in favour of the Respondent No. 1 as set out hereinabove would kick in.

10. Shri Vikas Kochar, learned counsel appearing on behalf of the Appellants, has taken us through the contract between Dr. Gandhi and the Respondent No. 3 and has emphasised that the contract is one for services, and that an honorarium of INR 4000 per month is paid. Further, Dr. Gandhi will not be entitled to any financial benefits as might be applicable to other regular employees so far as the leave rules are concerned, making it clear that Dr. Gandhi is not, therefore, a regular employee of the Respondent No.3. He also emphasised the fact that Dr. Gandhi no longer remains as a regular employee of the institute with the coming into force of this new arrangement between the parties. He then placed reliance on **Dharangadhara Chemical Works Ltd. v. State of Saurashtra** 1957 SCR 158 and **National Insurance Company Limited v. Balakrishnan** (2013) 1 SCC 731.

11. Learned counsel appearing on behalf of Respondent No. 1 has supported the judgment of the High Court, stating that on a holistic reading of the agreement between the Respondent No. 3 and Dr. Alpesh Gandhi, dated 04.05.1996, the contract is one of service and not for service. Even otherwise, the learned counsel argued that the High Court was wrong in stating that the insured was covered by

endorsement IMT-5, by which personal accident cover to unnamed passengers other than the insured and his paid driver or cleaner will be extended to the extent of 100% where death is caused, on payment of an additional premium. The learned counsel states that IMT-5 would not be applicable in the facts of this case, but that IMT-16 would be applicable. Since additional premium has not been paid to apply IMT-16, the Insurance Company is not liable to indemnify the insured in respect of any liability arising for death sustained by an employee in respect of the accident in connection with the motor vehicle in question.

12. This Court has in a series of judgment indicated the tests to be followed in order to determine, in the context of the Industrial Disputes Act and the Factories Act, as to whether different kinds of persons who supply goods or services could be said to be “in the employ” of the employer. Thus, in **Dharangadhara** (supra), the question posed before the Court was whether the salt manufactured by a class of professional laborers, known as agarias, from rain water that got mixed with saline matter in the soil, could be said to be in pursuance of contracts of service with the appellant, as a result of which they would then be entitled to be treated as workmen under the Industrial Disputes Act. After setting out the definition of “workman” under

Section 2(s) of the said Act, this Court referred to the earliest test laid down to distinguish between a contract of service and a contract for service, namely, that whereas in the latter case, the master can order or require what is to be done, in the former case, he can not only order or require what is to be done, but also how it shall be done. After referring to a number of English judgments, the Court then held, giving the example of a ship's master, a chauffeur, and a reporter on the staff of a newspaper as against a ship's pilot, a taxi man and a newspaper contributor, that the test would be whether work is done as an integral part of the business of the employer, in which case it would be a contract of service, or whether it was done as an accessory to such business, in which case it would be a contract for service. Other tests that were laid down were as to whether the master had the power to select the servant, whether he paid wages or other remuneration, whether the master had the right to control the method of doing the work, and whether the master had the right to suspend or dismiss the employee. Ultimately, the true test, according to the judgment, was held to be as follows:

> "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 p. 23 in *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.* [(1952) SCR 696, 702] "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.
>
> The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. As has been noted above, recent pronouncements of the Court of Appeal in England have even expressed the view that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that the test of control was not one of universal application and that there were many contracts in which the master could not control the manner in which the work was done (Vide observations of Somervelle, L.J. in *Cassidy* v. *Ministry of Health*, (supra), and Denning, L.J. in *Stevenson, Jordan and Harrison Ltd.* v. *Macdonald and Evans*, (supra)."

Ultimately, the Court held that it would be a question of fact to be decided by all the circumstances of the case. It was further held that the mere fact that the agarias did piece-rated labour, the work being seasonal, and the fact that they can engage others to do the work for them, would not detract from the fact that they are professional labourers who have been hired by the employer. Finally, the Court refused to exercise its discretion to interfere with the Industrial Tribunal's finding that on the facts of the case these agarias would have to be considered as workmen under the Industrial Disputes Act.

13. In **Chintaman Rao v. State of M.P.** 1958 SCR 1340, this Court held that Sattedars and their coolies were not workers within the meaning of Section 2(1) of the Factories Act. In so holding, the Court referred to the judgment of **Dharangadhara** (supra) and held that the fact that bidi rolling was done outside the factory premises, and that such rolling can be done at any time that the Sattedar chooses clinched the issue in favour of the fact that Sattedars and their coolies were independent contractors. The court then hedged its decision by stating that it was not intended to lay down that under no circumstances can a Sattedar be considered to be a worker within the meaning of the Factories Act. Ultimately, everything depends on the terms of the contract entered into between such person and the employer.

14. In **Birdhichand Sharma v. First Civil Judge** (1961) 3 SCR 24, this Court found on facts that the persons employed in a bidi factory, who could work at the time they chose, on a piece-rated basis, the caveat being that if they came after mid-day they were not allowed to work, even though the factory closed at 7 PM, that such persons were workers under the Factories Act. The earlier two judgments of this court were discussed and emphasis was laid on the fact that the persons who were employed had to work within the factory premises and had to report to work before mid-day. Further, the “right of control”

was extended to mean that so long as there is some amount of supervision by the management, inasmuch as the management has the right to reject the bidis prepared if they do not come up to the proper standard, would indicate that such persons would be workers.

15. In **Shankar Balaji Waje v. State of Maharashtra** 1962 Supp (1) SCR 24, this Court set out the established facts between one Pandurang, who was employed by the owner of a factory manufacturing bidis, and the employer, as follows:

> "The first contention is based on the established facts of the case which, it is submitted, do not make out the relationship of master and servant between the appellant and Pandurang, inasmuch as they indicate that the appellant had no supervision and control over the details of the work Pandurang did in the factory. The following are the established facts:
>
> (*1*) There was no agreement or contract of service between the appellant and Pandurang.
>
> (*2*) Pandurang was not bound to attend the factory for the work of rolling bidis for any fixed hours of work or for any fixed period. He was free to go to the factory at any time he liked and was equally free to leave the factory whenever he liked. Of course, he could be in the factory during the hours of working of the factory.
>
> (*3*) Pandurang could be absent from work on any day he liked. He could be absent up to ten days without even informing the appellant. If he was to be absent for more than ten days he had to inform the appellant, not for the purpose of taking his permission or leave, but for the purpose of assuring the appellant that he had no intention to give up work at the factory.
>
> (*4*) There was no actual supervision of the work Pandurang did in the factory.

(*5*) Pandurang was paid at fixed rates on the quantity of bidis turned out. There was however no stipulation that he had to turn out any minimum quantity of bidis in a day.

(*6*) Leaves used to be supplied to Pandurang for being taken home and cut there. Tobacco to fill the bidis used to be supplied at the Factory. Pandurang was not bound to roll the bidis at the factory. He could do so at his place, on taking permission from the appellant for taking tobacco home. The permission was necessary in view of Excise Rules and not on account of any condition of alleged service.

(*7*) At the close of the day, the bidis used to be delivered to the appellant and bidis not up to the standard, used to be rejected."

On these facts, the judgment in **Birdhichand** (supra) was distinguished and that of **Chintaman Rao** (supra) applied. The Court held:

"Further, the facts of the case indicate that the appellant had no control and supervision over the details of Pandurang's work. He could not control his hours of work. He could not control his days of work. Pandurang was free to absent himself and was free to go to the factory at any time and to leave it at any time according to his will. The appellant could not insist on any particular minimum quantity of bidis to be turned out per day. He could not control the time spent by Pandurang on the rolling of a bidi or a number of bidis. The work of rolling bidis may be a simple work and may require no particular supervision and direction during the process of manufacture. But there is nothing on record to show that any such direction could be given.

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It is true, as contended for the State, that persons engaged to roll bidis on job work basis could be workers, but only such persons would be workers who

work regularly at the factory and are paid for the work turned out during their regular employment on the basis of the work done. Piece-rate workers can be workers within the definition of 'worker' in the Act, but they must be regular workers and not workers who come and work according to their sweet will. It is also true, as urged for the State, that a worker, within the definition of that expression in the Act, need not be a whole-time worker. But, even then, the worker must have, under his contract of service, an obligation to work either for a fixed period or between fixed hours. The whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master.

We may say that this opinion further finds support from what we hold on the second contention. If Pandurang was a worker, the provisions about; leave and leave wages should apply to him. We are of opinion that they do not and what we say in that connection reinforces our view that Pandurang was not a worker as the three criteria and conditions laid down in *Shri Chintaman Rao case* [1958 SCR 1340] for constituting him as such are not fulfilled in the present case."

16. In **D.C. Dewan Mohideen Sahib and Sons v. Secretary, United Beedi Workers' Union** (1964) 7 SCR 646, the Court set out a sample agreement which disclosed the facts of the case before it, as follows:

"It seems that a sample agreement was produced before the High Court, which provided inter alia for the following terms:

(*1*) That the proprietor should supply the tobacco and the bidi leaves;

(*2*) that the intermediary should engage premises of his own and obtain the requisite licence to carry on the work of having the bidis rolled there;

(*3*) that at no time should more than nine bidi rollers work in the premises of that intermediary;

(*4*) that the intermediary should meet all the incidental charges for rolling the bidis including the cost of thread and the remuneration paid to the bidi rollers;

(*5*) that for every unit of 1000 bidis rolled and delivered by the intermediary to the proprietor, the latter should pay the stipulated amount, after deducting the cost of the tobacco and the bidi leaves supplied by the proprietor;

(*6*) that the intermediary should not enter into similar engagement with any other industrial concern;

(*7*) that the price of the raw materials and price to be paid for every unit of 1000 bidis rolled and delivered were to be fixed at the discretion of the proprietor.

Besides these conditions, the contract also provided that it was liable to termination on breach of any of the conditions, and that the proprietors had no connection with and that they assumed no responsibility for the bidi workers who had to look to the intermediary for what was payable to them for rolling the bidis."

The earlier judgments of this Court were referred to. After applying the tests laid down in the said judgments, this Court found:

"There is in our opinion little doubt that this system has been evolved to avoid regulations under the Factories Act. Further there is also no doubt from whatever terms of agreement are available on the record that the so-called independent contractors have really no independence at all. As the appeal court has pointed out they are impecunious persons who could hardly afford to have factories of their own. Some of them are even ex-employees of the appellants. The contract is practically one-sided in that the proprietor can at his choice supply the raw materials or refuse to do so, the so-called contractor having no right to insist upon the supply of raw materials to him. The so-called independent contractor is even bound not to employ more than nine persons in his so-called factory. The sale of raw materials to the so-called independent contractor and resale by him of the manufactured bidis

> is also a mere camouflage, the nature of which is apparent from the fact that the so-called contractor never paid for the materials. All that happens is that when the manufactured bidis are delivered by him to the appellants, amounts due for the so-called sale of raw materials is deducted from the so-called price fixed for the bidis. In effect all that happened is that the so-called independent contractor is supplied with tobacco and leaves and is paid certain amounts for the wages of the workers employed and for his own trouble. We can therefore see no difficulty in holding that the so-called contractor is merely an employee or an agent of the appellants as held by the appeal court and as such employee or agent he employs workers to roll bidis on behalf of the appellants. The work is distributed between a number of so-called independent contractors who are told not to employ more than nine persons at one place to avoid regulations under the Factories Act. We are not however concerned with that aspect of the matter in the present appeals. But there can be no doubt that the workers employed by the so-called contractors are really the workmen of the appellants who are employed through their agents or servants whom they choose to call independent contractors."

17. The next case in chronological order is of seminal importance in deciding which side of the line a particular set of facts would lead to a conclusion that a contract is one for service or of service. Thus, in **Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments** (1974) 3 SCC 498, this Court had to determine whether there is a relationship of employer and an employee between a tailoring shop and persons employed by the owner of the shop for stitching purposes under Section 2(14) of the Andhra Pradesh (Telangana Area) Shops and Establishments Act, 1951. Section 2(14)

of the said Act defined a 'person employed' as meaning, in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop. The facts were set out in paragraph 7 of the said judgment as follows:

> "**7.** The following facts appear from the finding of the learned Single Judge. All the workers are paid on piece-rate basis. The Workers generally attend the shops every day if there is work. The rate of wages paid to the workers is not uniform. The rate depends upon the skill of the worker and the nature of the work. When cloth is given for stitching to a worker after it has been cut, the worker is told how he should stitch it. If he does not stitch it according to the instruction, the employer rejects the work and he generally asks the worker to restitch the same. When the work is not done by a worker according to the instructions, generally no further work would be given to him. If a worker does not want to go for work to the shop on a day, he does not make any application for leave, nor is there any obligation on his part to inform the employer that he will not attend for work on that day. If there is no work, the employee is free to leave the shop before the shop closes. Almost all the workers work in the shop. Some workers are allowed to take cloth for stitching to their homes on certain days. But this is done always with the permission of the proprietor of the shop. The machines installed in the shop belong to the proprietor of the shop and the premises and the shop in which the work is carried on also belong to him."

After referring to several judgments of this Court, the Court then referred to judgments of the English and American Courts as follows:

> "**19.** In *Cassidy* v. *Ministry of Health* [(1951) 1 All ER 574, 579] Lord Justice Sommerwell pointed out that the test of control of the manner of work is not

universally correct, that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a Captain of a ship.

20. In many skilled employments, to apply the test of control over the manner of work for deciding the question whether the relationship of master and servant exists would be unrealistic.

21. In *Montreal* v. *Montreal Locomotive Works Ltd. etc*. [(1947) 1 DLR 161 at p. 1969] Lord Wright said that a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior and that in the more complex conditions of modern industry, more complicated tests have often to be applied. He said that it would be more appropriate to apply a complex test involving: (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss, and that control in itself is not always conclusive. He further said that in many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties.

22. In *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford* [(1952) 2 All ER 956 at 971] Denning, L.J., said:

"... the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation...."

23. In *U.S.* v. *Silk* [331 US 704] the question was whether men working for the plaintiffs, Silk and Greyvan, were 'employees' within the meaning of that word in the Social Security Act, 1935. The Judges of the Supreme Court of U.S.A., agreed upon the test to

be applied, though not in every instance upon its application to the facts. They said that the test was not "the common law test," viz "power of control, whether exercised or not, over the manner of performing service to the undertaking", but whether the men were employees "as a matter of economic reality". Important factors were said to be "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation".

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25. In *Market Investigations Ltd.* v. *Minister of Social Security* [(1968) 3 All ER 732] the Court said:

"I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B. was entitled to exercise over A. in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive."

26. It is in its application to skilled and particularly professional work that control test in its traditional form has really broken down. It has been said that in interpreting "Control" as meaning the power to direct how the servant should do his work, the Court has been applying a concept suited to a past age.

"This distinction (viz., between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill

and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization) a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer i.e. what to modern eyes appears as an imperfect division of labour. [See Prof. Kahn-Freund in (1951), 14 Modern Law Review, at p. 505] "

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 1759].”

Ultimately, the Court found that two important considerations clinched the issue in favour of deciding that the persons employed were employed wholly or principally in connection with the business of the shop. First and foremost, machines on which sewing took place were supplied by the proprietor of the shop. And, secondly, supervision and control in tailoring business terms would include the right to reject sub-standard work. These factors were held to outweigh the fact that such persons did not have to work exclusively for the owner of the shop as also that they are not obliged to work for the full day.

18. In **Hussainbhai v. Alath Factory Thezhilali Union** (1978) 4 SCC 257, this Court was confronted with persons who are engaged to make ropes from within a factory which manufactured ropes. What was argued before the Court was that the workmen were not the employer’s workmen but only the contractor’s workmen. The question that came up for consideration was whether they are “workmen” within

the meaning of Section 2(s) of the Industrial Disputes Act. The test applied by this judgment to find out whether such persons are "workmen" was as follows:

> "**5.** The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the *maya* of legal appearances."

Applying this test, the economic reality of control of the employer over the workman's subsistence, skill and continued employment pointed to such persons being direct employees of the owner.

19. In **Shining Tailors v. Industrial Tribunal II, U.P.** (1983) 4 SCC 464, a 3-Judge Bench of this Court followed **Silver Jubilee** (supra) to arrive

at the conclusion that the persons employed were “workmen” within the meaning of the U.P. Industrial Disputes Act, 1947.

20. In **P.M. Patel & Sons v. Union of India** (1986) 1 SCC 32, this Court was faced with the important question as to whether the workers employed at their homes in the manufacture of bidis are entitled to the benefit of Employees’ Provident Funds and Miscellaneous Provisions Act, 1952. After referring to the earlier judgments of this Court, this Court held that the **Silver Jubilee** case (supra) made the law take a major shift from the earlier judgments on criteria to be applied to determine relationship of master and servant, and pointed out that the right of rejection of sub-standard bidis can constitute, in itself, an effective degree of supervision and control, so as to render a finding that such persons are “employees” within the meaning of Section 2 of the said Act.

21. In **Indian Banks Assn. v. Workmen of Syndicate Bank** (2001) 3 SCC 36, this Court after referring to **Silver Jubilee** (supra) found that Deposit Collectors employed by specified banks were entitled to be treated as workmen. The court held:

> “**26.** We also cannot accept the submission that the banks have no control over the Deposit Collectors. Undoubtedly, the Deposit Collectors are free to regulate their own hours of work, but that is because of the nature of the work itself. It would be impossible to

fix working hours for such Deposit Collectors because they have to go to various depositors. This would have to be done at the convenience of the depositors and at such times as required by the depositors. If this is so, then no time can be fixed for such work. However, there is control inasmuch as the Deposit Collectors have to bring the collections and deposit the same in the banks by the very next day. They have then to fill in various forms, accounts, registers and passbooks. They also have to do such other clerical work as the Bank may direct. They are, therefore, accountable to the Bank and under the control of the Bank."

22. In **Indian Overseas Bank v. Workmen** (2006) 3 SCC 729, the question was whether the banks who employed jewel appraisers for loans were "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act. After distinguishing the **Indian Banks** case (supra), this Court referred to **Dharangadhara** (supra), **Silver Jubilee** (supra), **Shining Tailors** (supra) and **Chintaman Rao** (supra) and then held:

"**17.** The inferences culled out from the reading of those judgments can be summed up as follows:

(*a*) Where the contractors were substantially responsible for the main and sole business, they would be treated as workers.

(*b*) One exception is that where in such cases flexibility of the contract was at variance with the normal worker's contract, the contractors would not be treated as workers.

(*c*) Where the contractor is in the nature of supplier of goods and services, they are to be treated as supplier contractors and not workmen.

18. At this juncture the distinction between jewel appraisers and the regular employees of the Bank can be noted.

Regular employees	*Jewel appraisers*
1. Subject to qualification and age prescribed.	*1*. No qualification/age.
2. Recruitment through employ-ment exchange/Banking Service Recruitment Board.	*2*. Direct engagement by the local Manager.
3. Fixed working hours.	*3*. No fixed working hours.
4. Monthly wages.	*4*. No guaranteed payment, only commission paid.
5. Subject to disciplinary control.	*5*. No disciplinary control.
6. Control/supervision is exercised not only with regard to the allocation of work, but also the way in which the work is to be carried out.	*6*. No control/supervision over the nature of work to be performed.
7. Wages are paid by the Bank.	*7*. Charges are paid by the borrowers.
8. Retirement age.	*8*. No retirement age.
9. Subject to transfer.	*9*. No transfer.
10. While in employment cannot carry on any other occupation.	*10*. No bar to carry on any avocation or occupation.

Therefore, the jewel appraisers are not employees of the Bank."

23. At this stage, it is important to advert to a fairly recent judgment of the English Court of Appeal in **E v. English Province of Our Lady of**

Charity and Anr. 2012 EWCA Civ 938. In the aforesaid case, a question arose as to whether the Roman Catholic Church would be vicariously liable in a claim brought for damages alleging that a lady, when she had been resident in a children's home operated by a Roman Catholic order of nuns, had been sexually abused by a priest appointed by the diocesan bishop. Under the sub-heading "*The hallmarks of the relationship of employer and employee*" the court referred to various earlier English judgments and the tests laid down as follows:

> "**64.** I indicated early on at para 21, vicarious liability tended to depend on the difference between employee and independent contractor. If, as I believe, it is necessary to attempt to capture the essence of what it is that makes a man an employee, I must examine those differences in more detail. Generally speaking, an employee works under the supervision and direction of his employer: an independent contractor is his own master bound by his contract but not by his employers orders. An employee works for his employer: an independent contractor is in business on his own account. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (a case which I observe with envy occupied the court for six days whilst we were allowed one only), MacKenna J said, at p 515, that a contract of service exists if these three conditions are fulfilled:
>
> "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the others control in a sufficient degree to make that

other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

He elaborated:

"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant."

Later, at p 524, he commented on Lord Thankerton's "four indicia" of a contract of service, said in *Short v J & W Henderson Ltd* (1946) 62 TLR 427, 429 to be: "(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal." MacKenna J said:

"It seems to me that (a) and (d) are chiefly relevant in determining whether there is a contract of any kind between the supposed master and servant, and that they are of little use in determining whether the contract is one of service. The same is true of (b), unless one distinguishes between different methods of payment, payment by results tending to prove independence and payment by time the relation of master and servant."

65. That leaves control as an important distinguishing factor. The example is often given of the difference between the chauffeur and the taxi driver but it is not always as easy as that. As times have changed so control has become an unrealistic guide. It may have been more meaningful when work was done by labourers under the direction of employers who had the same or greater technical skills than their workmen. Now that one is frequently dealing with a professional person or a person of some particular skill and experience, for example a brain surgeon, there can be no question of the employer telling him how to do his work for in truth the skilled person is engaged

for the very reason that he possesses skills which the employer lacks. The emphasis placed on control has thus been reduced. As Roskill J said in *Argent v Minister of Social Security* [1968] 1 WLR 1749, 1758—1759:

“in the earlier cases it seems to have been suggested that the most important test, if not the all-important test, was the extent of the control exercised by the employer over the servant. If one goes back to some of the cases in the first decade of this century, one sees that that was regarded almost as the conclusive test. But it is also clear that as one watches the development of the law in the first 60 years of this century and particularly the development of the law in the last 15 or 20 years in this field, the emphasis has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor. In some cases it may still be the decisive factor, but it wrong to say that in every case it is the decisive factor. It is now, as I venture to think, no more than a factor albeit a very important one.”

Roskill J's test was, at p 1760:

“Finally it has been more recently suggested that the matter can be determined by reference to what in modern parlance was called economic reality. All these are matters which have to be borne in mind. To my mind, no single one is decisive. One has to look at the totality of the evidence, at the totality of the facts found and then apply them to the language of the statute. One cannot do better than echo the words of Somervell LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343 , 352: ‘one perhaps cannot get much beyond this: “was his contract a contract of service within the meaning which an ordinary person would give to the words?”’”

Roskill J also referred to Denning LJ's views expressed in *Stevenson Jordan & Harrison Ltd v Macdonald & Evans* [1952] 1 TLR 101 , 111 and *Bank voor Handel en Scheepvaart NV v Slatford* (No 2) [1953] 1 QB 248 , 295. In the former Denning LJ said:

“One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.”

67. The Privy Council in the *Lee Ting Sang* case did, however, give this help [1990] 2 AC 374, 382:

“What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 , 184–185: ‘The fundamental test to be applied is this: “is the person who has engaged himself to perform these services performing them as a person in business on his own account?” If the answer to that question is “yes”, then the contract is a contract for services. If the answer is “no”, then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.’”

> **68.** To much the same effect is an earlier Privy Council case, *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 , where Lord Wright said, at p 169:
>
> "In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive."
>
> He went on to say that:
>
> "it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."
>
> **69**. There being no single test, what one has to do is marshal various tests which should cumulatively point either towards an employer/employee relationship or away from one. Adopting that approach confirms that which is accepted as the common ground, namely, that Father Baldwin is not a true employee. The test may yet be useful to see whether he can be said to be an independent contractor, for if he is, the law is clear: the employer is *not* vicariously liable for the torts of his independent contractor. I am satisfied that Father Baldwin is no more a true independent contractor than he is an employee. For a start, he has no contractual relationship with his bishop. He is hardly a person in business on his own account with a free hand to carry out the job, if it is a job, as and when he wishes."

In concluding that the Church would be vicariously liable, the Court then held:

> "**81.** The result of each of the tests leads me to the conclusion that Father Baldwin is more like an employee than an independent contractor. He is in a relationship with his bishop which is close enough and so akin to employer/employee as to make it just and fair to impose vicarious liability. Justice and fairness is used here as a salutary check on the conclusion. It is not a stand alone test for a conclusion. It is just because it strikes a proper balance between the unfairness to the employer of imposing strict liability and the unfairness to the victim of leaving her without a full remedy for the harm caused by the employer's managing his business in a way which gave rise to that harm even when the risk of harm is not reasonably foreseeable."

24. 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 U.S

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** [1990] 2 A.C. 374, 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.

25. Given the fact that this balancing process may often not yield a clear result in hybrid situations, the context in which a finding is to be made

assumes great importance. Thus, if the context is one of a beneficial legislation being applied to weaker sections of society, the balance tilts in favour of declaring the contract to be one of service, as was done in **Dharangadhara** (supra), **Birdhichand** (supra), **D.C.Dewan** (supra), **Silver Jubilee** (supra), **Hussainbhai** (supra), **Shining Tailors** (supra), **P.M. Patel** (supra), and **Indian Banks** (supra). On the other hand, where the context is that of legislation other than beneficial legislation or only in the realm of contract, and the context of that legislation or contract would point in the direction of the relationship being a contract for service then, other things being equal, the context may then tilt the balance in favour of the contract being construed to be one which is for service.

26. Looked at in this light, let us now examine the agreement between Dr. Alpesh Gandhi and the Respondent No. 3. The factors which would lead to the contract being one for service may be enumerated as follows:

(i) The heading of the contract itself states that it is a contract for service.

(ii) The designation of Dr. Gandhi is an Honorary Ophthalmic Surgeon.

(iii) INR 4000 per month is declared to be honorarium as opposed to salary.

(iv) In addition to INR 4000 per month, Dr. Gandhi is paid a percentage of the earnings of the Respondent No. 3 from out of the OPD, Operation Fee component of Hospitalization Bills, and Room Visiting Fees.

(v) The arbitration clause which speaks of disputes arising in the course of the tenure of this contract will be referred to the Managing Committee of the Institute, the decision of the Managing Committee being final, is also a clause which is unusual in a pure master-servant relationship.

(vi) The fact that the appointment is contractual – for 3 years – and extendable only by mutual consent, is another pointer to the fact that the contract is for service, which is tenure based.

(vii) The fact that termination of the contract can be by notice on either side would again show that the parties are dealing with each other more as equals than as master-servant.

(viii) Clause XI of the agreement also makes it clear that the earlier appointment that was made of Dr. Gandhi would cease the moment this contract comes into existence, Dr. Gandhi no longer remaining as a regular employee of the Institute.

27. As against the aforesaid factors which would point to the contract the contract being a contract for service, the following factors would point in the opposite direction:

(i) The employment is full-time. Dr. Gandhi can do no other work, and apart from the seven types of work that Dr. Gandhi is to perform under Clause IV, any other assignment that may get created in the course of time may also be assigned to him at the employer's discretion.

(ii) Dr. Gandhi is to work on all days except weekly offs and holidays that are given to him by the employer. However, what is important is that though governed by the leave rules of the Institute as in vogue from time to time, Dr. Gandhi will not be entitled to any financial benefit of any kind as may be applicable to other regular employees of the Institute under Clause V.

(iii) Dr. Gandhi will be governed by the Conduct Rules of the Institute as invoked from time to time and as applicable to regular employees of the Institute.

(iv) That in the event of a proven case of indiscipline or breach of trust, the Institute reserves a right to terminate the contract at any time without giving any compensation whatsoever.

28. If the aforesaid factors are weighed in the scales, it is clear that the factors which make the contract one for service outweigh the factors which would point in the opposite direction. First and foremost, the intention of the parties is to be gathered from the terms of the contract. The terms of the contract make it clear that the contract is one for service, and that with effect from the date on which the contract

begins, Dr. Gandhi shall no longer remain as a regular employee of the Institute, making it clear that his services are now no longer as a regular employee but as an independent professional. Secondly, the remuneration is described as honorarium, and consistent with the position that Dr. Gandhi is an independent professional working in the Institute in his own right, he gets a share of the spoils as has been pointed out hereinabove. Thirdly, he enters into the agreement on equal terms as the agreement is for three years, extendable only by mutual consent of both the parties. Fourthly, his services cannot be terminated in the usual manner of the other regular employees of the Institute but are terminable on either side by notice. The fact that Dr. Gandhi will devote full-time attention to the Institute is the obverse side of piece-rated work which, as has been held in some of the judgments hereinabove, can yet amount to contracts of service, being a neutral factor. Likewise, the fact that Dr. Gandhi must devote his entire attention to the Institute would not necessarily lead to the conclusion that *de hors* all other factors the contract is one of service. Equally important is the fact that it is necessary to state Dr. Gandhi will be governed by the Conduct Rules and by the Leave Rules of the Institute, but by no other Rules. And even though the Leave Rules apply to Dr. Gandhi, since he is not a regular employee, he is not entitled to any financial benefit as might be applicable to other regular

employees. Equally, arbitration of disputes between Dr. Gandhi and the Institute being referred to the Managing Committee of the Institute would show that they have entered into the contract not as master and servant but as employer and independent professional. A conspectus of all the above would certainly lead to the conclusion, applying the economic reality test, that the contract entered into between the parties is one between an Institute and an independent professional.

29. Even otherwise, it is well-settled that exemption of liability clauses in insurance contracts are to be construed in the case of ambiguity *contra proferentum.* Thus, in **General Assurance Society Ltd. v. Chandumull Jain** (1966) 3 SCR 500, this Court held:

> "A contract of insurance is a species of commercial transactions and there is a well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery…In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberrima fides* i.e. good faith on the part of the assured and the contract is likely to be construed *contra proferentem* that is against the company in case of ambiguity or doubt."

30. This judgment has been cited with approval in **United India Insurance Co. Ltd. v. Pushpalaya Printers** (2004) 3 SCC 694 as follows:

“**6.** The only point that arises for consideration is whether the word “impact” contained in clause 5 of the insurance policy covers the damage caused to the building and machinery due to driving of the bulldozer on the road close to the building. It is evident from the terms of the insurance policy that the property was insured as against destruction or damage to whole or part. The appellant Company agreed to pay towards destruction or damage to the property insured to the extent of its liability on account of various happenings. In the present case both the parties relied on clause 5 of the insurance policy. Clause 5 is also subject to exclusions contained in the insurance policy. That a damage caused to the building or machinery on account of driving of vehicle on the road close to the building is not excluded. Clause 5 speaks of “impact” by any rail/road vehicle or animal. If the appellant Company wanted to exclude any damage or destruction caused on account of driving of vehicle on the road close to the building, it could have expressly excluded it. The insured possibly did not understand and expect that the destruction and damage to the building and machinery is confined only to a direct collision by vehicle moving on the road with the building or machinery. In the ordinary course, the question of a vehicle directly dashing into the building or the machinery inside the building does not arise. Further, “impact” by road vehicle found in the company of other words in the same clause 5 normally indicates that damage caused to the building on account of vibration by driving of vehicle close to the road is also included. In order to interpret this clause, it is also necessary to gather the intention of the parties from the words used in the policy. If the word “impact” is interpreted narrowly, the question of impact by any rail would not arise as the question of a rail forcibly coming to the contact of a building or machinery would not arise. In the absence of specific exclusion and the word “impact” having more meanings in the context, it cannot be confined to forcible contact alone when it includes the meanings “to drive close”, “effective action of one thing upon another” and “the effect of such action”, it is reasonable and fair to hold in the

context that the word “impact” contained in clause 5 of the insurance policy covers the case of the respondent to say that damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its “impact”. It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression “impact”, even otherwise applying the rule of contra preferentem, the use of the word “impact” in clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in *General Assurance Society Ltd.* v. *Chandmull Jain* [AIR 1966 SC 1644 : (1966) 3 SCR 500] has expressed that (AIR p. 1649, para 11)

“in a contract of insurance there is requirement of *uberrima fides* i.e. good faith on the part of the assured and the contract is likely to be construed *contra proferentem*, that is, against the company in case of ambiguity or doubt””.

31. Likewise, in **Export Credit Guarantee Corpn. of India Ltd. v. Garg Sons International** (2014) 1 SCC 686, this Court held:

“**11.** The insured cannot claim anything more than what is covered by the insurance policy. “The terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely.” The clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the insurance company

must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonise the terms thereof, keeping in mind that the rule of *contra proferentem* does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon. (Vide *Oriental Insurance Co. Ltd.* v. *Sony Cheriyan* [(1999) 6 SCC 451] , *Polymat India (P) Ltd.* v. *National Insurance Co. Ltd.* [(2005) 9 SCC 174 : AIR 2005 SC 286] , *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459 : AIR 2010 SC 3400] and *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran* [(2012) 5 SCC 306 : AIR 2012 SC 2829] .)"

Likewise, in **BHS Industries v. Export Credit Guarantee Corpn. Ltd.**

(2015) 9 SCC 414, this Court held:

"**31.** As has been held in *Chandumull Jain* [AIR 1966 SC 1644 : (1966) 3 SCR 500] by the Constitution Bench that in a contract of insurance, there is a requirement of good faith on the part of the insured and in case of ambiguity, it has to be construed against the company. As per other authorities, the insurance policy has to be strictly construed and it has to be read as a whole and nothing should be added or subtracted. That apart, as has been held in *Polymat India (P) Ltd.* [(2005) 9 SCC 174] , it is the duty of the Court to interpret the document as is understood between the parties and regard being had to the reference to the stipulations contained in it.

xxx xxx xxx

35. The terms of the policy are to be strictly construed. There can be no cavil about the proposition of law that in case of ambiguity, the construction has to be made in favour of the insured"

32. In **United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd.** (2016) 3 SCC 49, this Court quoted *Halsbury's Laws of England* as follows:

> "**37.** In *Halsbury's Laws of England* (5th Edn., Vol. 60, Para 105) principle of *contra proferentem rule* is stated thus:
>
> "*Contra proferentem rule*.—Where there is ambiguity in the policy the court will apply the *contra proferentem* rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured. Similarly, as regards language which emanates from the insured, such as the language used in answer to questions in the proposal or in a slip, a construction favourable to the insurers will prevail if the insured has created any ambiguity. This rule, however, only becomes operative where the words are truly ambiguous; it is a rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the rule has no application.""

33. In **Industrial Promotion & Investment Corpn. of Orissa Ltd. v. New India Assurance Co. Ltd.** (2016) 15 SCC 315, this Court referred to the *contra proferentum* rule as follows:

> "**10.** We proceed to deal with the submission made by the counsel for the appellant regarding the rule of *contra proferentem*. The Common Law rule of construction "*verba chartarum fortius accipiuntur contra proferentem*" means that ambiguity in the wording of the policy is to be resolved against the

party who prepared it. *MacGillivray on Insurance Law* [Legh-Jones, Longmore et al (Eds.), *MacGillivray on Insurance Law* (9th Edn., Sweet and Maxwell, London 1997) at p. 280.] deals with the rule of contra proferentem as follows:

"The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. 'One must not use the rule to create the ambiguity — one must find the ambiguity first.' The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances."

(footnotes omitted)

11.*Colinvaux's Law of Insurance* [Robert and Merkin (Eds.), *Colinvaux's Law of Insurance* (6th Edn., 1990) at p. 42.] propounds the *contra proferentem* rule as under:

"Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentem, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt.

But a clause is only to be contra proferentem in cases of real ambiguity. One must not use the rule

> to create an ambiguity. One must find the ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly."
> (footnotes omitted)"

34. The High Court held in the impugned judgment that as additional premium had been paid so as to attract the applicability of IMT-5, in any case the Insurance Company would be liable under the policy to pay compensation in the case of death to unnamed passengers other than the insured and his paid driver or cleaner, Dr. Alpesh Gandhi being one such unnamed passenger. This was done on the footing that the exception to IMT-5 was that a person in the employ of the insured coming within the scope of the Workmen's Compensation Act, 1923 is excluded from the cover, but that as Dr. Alpesh Gandhi did not come within the scope of the Workmen's Compensation Act, compensation payable due to his death in a motor accident would be covered by IMT-5. We see no reason to disturb this finding. The inapplicability of endorsement IMT-16, as additional premium had not been paid would, therefore, make no difference on the facts of this case. Section-II, entitled "liability to third parties" in the insurance policy dated 17.04.1997 set out hereinabove exempts the insurance company from the death of a person carried in a motor car where such

death arises out of and in the course of the employment of such person by the insurer. The question that arises before us is as to whether the expression “employment” is to be construed widely or narrowly – if widely construed, a person may be said to “employed” by an employer even if he is not a regular employee of the employer. However, the wider meaning that has been canvassed for by the insurance company cannot possibly be given, given the language immediately before, namely, “in the course of”, thereby indicating that the “employment” can only be that of a person regularly employed by the employer. Even otherwise, assuming that there is an ambiguity or doubt, the *contra proferentum* rule referred to hereinabove, must be applied, thus making it clear that such “employment” refers only to regular employees of the Institute, which, as we have seen hereinabove, Dr. Alpesh Gandhi was certainly not.

35. The Appellants placed reliance on an Order of this Court dated 05.03.2019, which reads as follows:

> “1. Leave granted.
>
> 2. The limited question to be examined arising from the impugned order is the effect of the direction that the insurance company is liable to pay only a sum of Rs.25,000/- and the balance amount may be recovered from the respondent No.2.

> 3. The appellant(s)/claimant(s) seeks to contend that it is impossible for the appellants to enforce their remedy specially giving their economic status.
>
> 4. On the conspectus of the matter and on hearing learned counsel for the parties, we consider it appropriate to direct that full amount should be paid by respondent No.1-Insurance Company and the amount beyond the liability to be paid by respondent No.1 may be recovered by the Insurance company from respondent No.2.
>
> 5. The appeal accordingly stands disposed of. Parties to bear their own costs."

This Order seems to have been passed under Article 142 of the Constitution on the facts of that case, without reference to any case law. In the view that we have taken, it is unnecessary for us to place reliance on such Order.

36. In this view of the matter, we allow the appeal, set aside the judgment of the Gujarat High Court and restore that of the Motor Accident Claims Tribunal.

……J.
(R.F. Nariman)

……J.
(S. Ravindra Bhat)

New Delhi;
April 15, 2020.