PETITIONER:
SILVER JUBILEE TAILORING HOUSE AND OTHERS

Vs.

RESPONDENT:
CHIEF INSPECTOR OF SHOPS AND ESTABLISHMENTS AND ANOTHER

DATE OF JUDGMENT25/09/1973

BENCH:
MATHEW, KUTTYIL KURIEN
BENCH:
MATHEW, KUTTYIL KURIEN
BEG, M. HAMEEDULLAH
MUKHERJEA, B.K.

CITATION:
1974 AIR 37 1974 SCR (1) 747
1974 SCC (3) 498
CITATOR INFO :
R 1974 SC1832 (38)
F 1984 SC 23 (5)
E&R 1987 SC 447 (9)

ACT:
Andhra Pradesh 'Telengana Area' Shops and Establishments Act 1951, Sections 2(14)--Determination of relationship of employer and employee--Right to control manner of work not an exclusive test--Factors relevant for determination indicated--Court must balance the various factors.

HEADNOTE:
The second respondent representing the tailors working with the, appellants filed certain claims under s. 37-A of the Andhra Pradesh (Telengana Area), Shops and Establishments Act r/w s. 15 of the Payment of Wages Act, 1936, contending that they were the employees of the appellants and that the Andhra Act was applicable. The facts as established on evidence were as follows :

The petitioners generall attended the shops every, if there was work. The rate depended upon the skill of the worker and the nature of the work. When the cloth is given for stitching to a worker, after it has been cut, the worker was told how he could stitch it. If he not stitch it according to the instructions, the employer rejected the work and would generally ask the worker to re-stitch the same. When the work is not according to the instructions, generally, no further work would be given to him. If a worker did not want to come for work to the shop on a particular day, he did not make any application for leave nor was there any obligation on his part to inform the employer that he would not attend the work on that day. If there was no work, the employee was free to leave the shop before the shop closed. Almost all the workers worked in the shop. Some workers were allowed to take the cloth for stitching at their homes on certain days, with the permission of the proprietor. The sewing machine installed in the shop belonged to the proprietor of the shop and the premises of the shop in which the work was carried on also belonged to him. The material part of Section 2 (14) reads as follows :-

"Person employed means (i) in the case of a

shop a person wholly or principally employed therein in connection with the business of the shop.,,

The Chief Inspector or Shops and Establishments and the High Court of Andhra Pradesh held that the tailors we're the employees of the appellants and that the Andhra Pradesh Shops and Establishment Act applied to them.

Rejecting the appeal,

HELD : (1) During the last two decades the emphasis in the field is shifted from and no longer rests exclusively or so strongly upon the question of control. In deciding upon the question of relationship of the employer and an employee, "control" is obviously an important factor and in many cases, it may still be a 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. A search for a formula in the nature of a single test will not serve the useful purpose, and all factors that have been referred to in the cases on topic, should be considered to tell a contract of service. Clearly, not all 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. [756H-757c]

(2) The 'Control' idea was more suited to the agricultural society prior to Industrial Revolution. 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 systema-

748

tically imparted in institutions of learning from universities down to the technical schools. The exclusive test of control would not in modem times be consistent with the changing modes and method of production and division of labour.

[756F]

Casaidy v. Ministry of Health, [1951 1 All E.R. 574, 579, Montreal v. Montreal Locomotive Works Ltd. et-at, [1947] 1 D.L.R. 161 at p. 169, Bank Voor Handel en Hebeepkaart N.V. v. Elatford Danning L.J., [1952] 2 All E.R. 956 at 971, U . S. v. Silk, 331 U.S. 704, Market Investigations Ltd. v. Minister of Social Security [1968] 3 AII.E.R. 732, Prof. Kahn-Freund in [1951] 14 Modem Law Rev. at p. 505, Atiyah P.S., "Vicarious Liability in the, Law of Torts" pp. 37-38 Argent v. Minister of Social Security and Another, [19681 1 W.L.R. 1749 at 1759, referred to.

2. Held further

(i) When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service.

(ii) If the employer provides the machine and equipment on which the worker works, this is some indication that the contract is a contract of service whereas if the other party provides the equipment, this is some evidence that he is an independent contractor. However, where it is customary for servants to provide their own equipment, no sensible inference can be drawn from this factor. [757 F-G]

Atiyah P.S. "Vicarious Liability in the Law Torts" p. 65, referred to.

(iii) The employer's right to reject the end product if it does not conform to the instructions of the employer speaks for the element of control and supervision. So also, the right of removal of the worker or not to give the work has the element of control and supervision. The degree of control and supervision would be different in different types of business. However, if the element of authority over the worker in the performance of his work rested in the employer so that he is subject to latter's direction, he is an employee and not the independent contractor. [758E]
Humberstone v. Norther Timber Mills, [1949] 79 C.L.R. 389, referred to.
(iv) Working with more than one employers does not militate against being the employee of the proprietor of the shop where he attends work. A servant need not be under exclusive control of one master. So also, the fact that the workers are not obliged to work for the whole day in the shop is not very material. Sec. 2(14) of the Act do not require that the Person should be wholly employed but it is sufficient that he is principally employed in the shop. [759D]
3. The right of the employer to reject the end product signifying the control and supervision is important in case of tailoring. The reputation of a tailoring establishment depends not only on the cutter but also upon the tailor. In many cases, stitching is a delicate operation when the cloth upon which it is to be carried on is expensive. The defect in stitching might mar the appearance not only of the garment but also of its wearer. So when the tailor returns the garment the proprietor has got to inspect it to see that it is perfect. He has to keep the customers pleased and he has also to be punctual, which means that the stitching must be done according to the instructions of the employer and within the time specified. The fact that sewing machines generally belong to the employer is an important consideration for deciding that the-relationship is that of Master and servant. That some employees take up the work from other tailoring establishments and do that work also does not militate against their being employees of the establishment in question. A servant need not be the exclusive control of one master. That the workers are not obliged to work for the whole day in the shop is not very material, as even part-time employment can suggest a contract of service. S. 2(14) of the Act merely requires that a person wholly or principally employed therein in connection with the business of the shop. Considering the above facts and circumstances, the Chief Inspector Of Shops and Establishment and High Court came to the right conclusion that employer and employee relationship existed between the parties and that the Act was applicable. [758 D, F, G; 759C]
749
Dharagahaa Chemical Works Ltd. v. State of Saurashtra, L1957] S.C.R. 152, Birdhichand Sharma V. The First Civil Judge, Nagpur and others, [1961] 3 S.C.R. 161, D.C. Dewan Mohideen Sahib and Sons v. The Industrial Tribunal, Madras, [1964] 7 S.C.R. 646,, Shankar Balaji Wage V. State of Maharashtra, [1962] Supp. I S.C.R. 249, V. P. Gopala Rao v. Public Prosecutor, Andhra Pradesh, [1969] 3 S.C.R. 875 at 880 and Stevanson Jordan and Harrison v Mac donald and. Evana, [1952] 1 T.L.R. 101 C.A., referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1706 of 1969.
Appeal by Special leave from the Judgment and order dated the31st December, 1968 of the High Court of Andhra Pradesh in Writ Appeal No. 564 of 1968.
S. I/. Gupte, and S. Markandya for the Appellant.
P. Rama Reddy and A. P. Nair, for Respondent No. 1.
B. P. Maheshwari and Suresh Sethi for Respondent No. 2.
The Judgment of the Court was delivered by_
MATHEW, J. In this appeal, by, special leave, the question for consideration is whether the High Court of Andhra Pradesh was right in accepting the conclusion arrived at by the Chief inspector of Shops and Establishments, Hyderabad that, employer and employee relationship existed between the Silver Jubilee, Tailoring House and others, the appellants, and the workers represented by the second respondent, and that the provisions of Andhra Pradesh (Telengana Area) Shops and Establishments Act, 1951, hereinafter referred to as the Act, was therefore applicable to the establishments in question.
The, second respondent representing the workers, made certain claims before 'the competent authority' under Section 37A of the Act read with Section 15 of the Payment of Wages Act 1936 against the Silver Jubilee Tailoring House and Others, the appellants. Thereafter, "the competent authority" referred for the decision of the State Government under Section 49 of the Act, the question whether the provisions of the Act are applicable to the establishments. The Government in turn referred the matter to the Commissioner of Labour to whom the power to decide the question was delegated under S. 46 of the Act. He enquired into the matter, heard the parties, but before he could pass the order, the power to decide the question by the State Government under S. 49 was delegated to the Chief Inspector of Shops and Establishments, Hyderabad. The Chief Inspector of Shops and Establishments thereafter heard the parties and came to the conclusion that the provisions of the Act were applicable to the establishments, as employer and employee relationship- -existed between the appellants and the workers represented by the second respondent.
The appellants filed a writ petition before the High Court to quash this order. The writ petition was dismissed by a learned Single Judge, on the basis of his finding that the workers represented by the second respondent union were employed in the establishment within the meaning of S. 2 (14) of the Act, and, therefore, the Act was applicable.
The appellants filed an appeal against the decision to the Divi Bench of the same Court. The Division Bench dismissed the appeal in
limite.
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The material part of S. 2(14) reads as follows : "person employed" means-(I) in the case of a shop, a person wholly or principally employed therein in connection with the business of the shop".
Two witnesses were examined to show the nature and character of the work done by the workers. One was the proprietor of one of the establishments and the other the Assistant Inspector of Labour.
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 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.

The question is whether from these circumstances the conclusion drawn by the Chief Inspector of Shops and Establishments and the High Court that there existed employer and employee relationship between the appellants and the workers represented by the 2nd respondent was correct.

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

In Dharangadhara Chemical Works Ltd. v. State of Saurashtra(l) the appellants before this Court were lesseses holding a licence for the manufacture of salt on the lands in question there. The salt was manufactured by a class of professional labourers known as agarias from rain water that got mixed up with saline matter in the soil. The work

(1) [1957] S. C. R. 152..

751 (Mathew, J.)

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

The question for decision was whether the agarias were workmen as defined by S. 2(s) of the Industrial Disputes Act of 1947 or whether they were independent contractors. The Court said that the prima facie test to determine whether there was relationship between employer and employee 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, employee is to do but also the manner in which he had to do the work. In other words, the proper test according to this Court is, whether or not the master has the right to control the manner of execution of the work. The Court further said that the nature of extent of the control might vary from business to business and is by its nature incapable of precise definition, 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 even the test of control over the manner of work is not one of universal application and that there are many contracts in which the master could not control the manner in which the work was done.

In Birdhichand Sharma v. The First Civil Judge, Nagpur and others(') the question was whether the bidi rollers in question there were "workmen" within the meaning of that term in the Factories Act, 1948. The facts found were : The workers who rolled the bidis had to work at the factory and where not at liberty to work at their houses their attendance was noted in the factory and they had to work within the factory hours, though they were not bound to work for the entire period and could come and go away when they liked, but if they came after midday they were not supplied with tobacco and thus not allowed to work even though the factory closed at 7 p.m.Further, they could be removed front service if absent for eight days. Payment was made on piece rates according to the amount of work done, and the bidis which did not come upto the proper standard could be rejected.

On these facts, it was held that the workers were workmen under the Factories Act and were not independent contractors. This Court pointed out that the nature and extent of control varied in different industries and could not by its very nature be precisely defined. The Court said that when the operation was of a simple nature and did not require supervision all the time, the control could be exercised

(1) [1961] 3 S. C. R. 161.

752

at the end of the day by the method of rejecting bidis which did not come upto the proper standard : such supervision by the employer was sufficient to make the workers, employees of the employer, and not independent contractors.

In D. C. Dewan Mohideen Sahib and Sons. v. The Industrial Tribunal, Madras(') the question was again considered by this Court. On the basis of evidence led, the industrial Tribunal found as follows

The contractors took leaves and tobacco from the appellant and employed workmen for manufacturing bidis. After bidis were manufactured, the contractors took them back from the, workmen and delivered them to the appellants. The workmen took- the leaves home and cut them there; however the process of actual rolling by filling the leaves with tobacco took place, in what was called contractors' factories. The contractors kept no attendance register for the workmen, there was no condition for their coming and going at fixed hours, nor were they, bound to come for work every day sometimes they informed the contractors if they wanted to be absent and some times they did not. The contractors said that they could take no action if the workmen absented themselves even without leave. The payment was made to the workmen at piece rates after the bidis were delivered to the appellants. The system was that the appellant paid a certain sum for the manufactured bidis, after deducting therefrom the cost of tobacco and the leaves already fixed,

to the contractors, who, in their turn, and to the workmen who rolled bidis, their wages. Whatever remained after paying the workmen would be contractors' commission for the work done. There was no sale either of the raw materials or of the finished products, for, according to the agreement, if the bidis were not rolled, raw materials had to be returned to the appellants and the contractors were forbidden from selling the raw materials to anyone else. Further the manufactured bidis could only be delivered to the appellants who supplied the raw materials. Further the price of raw materials and finished products fixed by the appellants always remained the name and never fluctuated according to market rate. The Tribunal concluded that the bidi workers were The employees of the appellants and not of the so-called contractors who were themselves nothing more than employees or branch managers of the appellants. Thereupon, the appellants filed writ petitions in the High Court, which held that neither the bidi roller nor the intermediary was an employee of the appellants, and allowed the writ petitions. On appeal by the workmen the appellate Court allowed the appeal and restored the order of the Tribunal. On appeal by certificate, this Court said that, on the facts found, the appellate Court was right in holding that the conclusion reached by the Tribunal that the intermediaries were merely branch managers appointed by the management, and thatthe relationship of employers and employees subsisted betweenthe appellants and the bidi rollers, was correct.

In following thetest

(1) [964] 7 S.C.R. 646.

753

laid down in Birdhichand's case (supra) the Court said since the work is of such a simple nature, supervision all the time is not required, and that supervision was made through a system of rejecting the defective bidis at the end of day. In Shankar Balaji Wage v. State of Maharashtra(l) the question again came up for consideration in this Court. The appellant before the Court was the owner of a factory manufacturing bidis and one Pandurang alongwith other labourers used to roll bidis in the factory with tobacco and leaves supplied to him by the factory. The following facts were established in the evidence. There was no contract of service between the appellant and Pandurang. He was not bound to attend the factory for rolling bidis for any fixed hours or period; he was free to go to the factory at any time during working hours and leave the factory at any time he liked. He could be absent from the work any day he liked and for ten days without even informing the appellant. He had to take the permission of the appellant if he was to be absent for more than 10 days. He was not bound to roll the bidis at the factory. He could do so at home with the permission ofthe appellant for taking home the tobacco supplied to him. There was no actual supervision of the work done by him in the factory and at the close of the day, rolled bidis were delivered to the appellant- Bidis not upto the standard were rejected. He was paid at fixed rates on the quantity of bidis turned out and there was no stipulation for turning out any minimum quantity of bidis. The questions which arose for decision were whether Pandurang was a workman within the meaning of that expression under the Factories Act and whether he was entitled to any leave wages under S. 80 of that Act.

The majority found that Pandurang was not "workman", and distinguished the decision in Birdhichand's case (supra) and said that the appellant had no control or supervision over the work of Pandurang.

The reasoning of the majority was as follows
"The appellant could not control his (Pandurang's) 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 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. The mere fact that the person rolling bidis has to roll them in a particular manner can hardly be said to give rise to such a right in the management as can be said to be a right to control the manner of work. The manner of work is to be distinguished from the type of work
(1) [l962] Supp. (l) S. C. R. 249.
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to be performed. In the present case, the management simply says that the labourer is to produce bidis rolled in a certain form. How the labourer carries out the work is his own concern and is not controlled by the management, which is concerned only with getting bidis rolled in a particular style with certain contents".
Subba Rao, J. as he then was, dissented. He said. The appellant engages the labourers; he entrusts them with work of rolling bidis in accordance with the sample; he insists upon their working in the factory, maintains registers giving the particulars of the labourers absent, amount of tobacco supplied and the number of bidis rolled by each one of them, empowers the gumasta and superviser, who regularly attends the, factory to supervise the supply of tobacco and leaves, and the receipt of the bidis rolled. The nature and pattern of bidis to be rolled is obviously well understood, for, it is implicit in the requirement that the rolled in bidis shall accord with the sample. 'The rejection of bidis found not in accord with the sample is a clear indication of the right of the employer to dictate the manner in which the labourers shall manufacture the bidis. The fact that a labourer is not compelled to work throughout the working,-, hours is not of much relevance, because, for all practical purposes, a labourer will not do so since his wage depend upon the bidis he rolls, and, as he cannot roll them outside the factory necessarily he will have to do so in the factory. If he absents himself, it is only at his own risk.
In V. P. Gopala Rao v. Public Prosecutor, Andhra Pradesh(') the Court said that there in no abstract a priori test of the work control required for establishing a contract of service and after refering to Bridhichand's case (supra) observed that the fact that the workmen have to work in the factory imply a certain amount of supervision by the management, that the nature and extent of control varied in different industries, and that when the operation was of a simple nature, the control could be exercised at the end of the day by the method of rejecting the bidis which did not come upto the proper standard.
In Cassidy v. Ministry of Health(2) 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.
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.

In Montreal v. Montreal Locomotive Works Ltd. et-al(3) 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

(1) [19691 3 S.C.R. 875, at 880. (2) [19511 1, All. E. R. 574,579.

(3) (1947] 1 D. L. R. 161 at p. 169.

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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.

In Bank Voor Handel en Scheepvaart N. V. v. Slatford(l) 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....."

In U.S. v. Silk(2) 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."

Silk sold coal by retail, using the services of two classes of workers, unloaders and truck drivers. The unloaders moved the coal from railway vans into bins. They came to the yard when they wished and were given a wagon to unload and a place to put the coal. They provided their own tools and were paid so much per ton for the coal they shifted. All the nine judges held that these men were employees :

"Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer’s trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been field to be employees in tort cases."

(1) (1952] 2 All E. R. 956 at p. 971. (2) 331 U. S. 704.

7 56

In Market Investigations Ltd. V. Minister of Social Security(l) 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".

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 rela tionships 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.(2)

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

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

(1) [19681 3 All. E. R. 732.

(2) See Prof. Kahn-Freund in (I 951) , 14 Modern Law Rev. at p. 505.

757

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. (1)

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.(2)

The fact that generally the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a relevant factor. When the services are performed generally in the employer's premises, this is some indication that the contract is a contract of service. It is possible that this is another facet of the incidental feature of employment. This is the sort of situation in which a court may well feel inclined to apply the "Organisation" test suggested by Denning, L.J. in Stevenson Jordan and Harrison v. Mac. donal and Evans.(3)

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

That the workers work on the machines supplied by (fie proprietor of the shop is an important consideration in determining the nature of the relationship. If the employer provides the equipment, this is some indication that the contract is a contract of service, whereas if the other party provides the equipment, this is some evidence that he is an independent contractor. It seems that this is not based on the theory that if the employer provides the equipment he retains some greater degree of control, for, as already seen, where the control arises only from the need to protect one's own property, little significance can attach to the power of control for this purpose. It seems, therefore, that the importance of the provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor, he expects the contractor to provide all the necessary tools and equipment, whereas if he employs a servant he expects to provide them himself. It follows from

(1) See Atiya'h. P. S. "Vicarious Liability in the Law of Torta" pp. 37-38.

(2) See Argent U. minister of Social Security and Another, [1968] 1, W.T...R. 1749 at 1959.

(3) [19521 1 T. L. R. 101 C. A.

758

this that no sensible inference can be drawn from this factor in circumstances where it is customary for servants to provide their own equipment.(')

Section 220(2) of the American Restatement, Agency 2d. includes among the relevant factors :

> "(e) Whether the employer or the workman supplies the instrumentalities, tools, and the Place of work for 'the person doing the work". The comment on the first part of this paragraph is in these words:
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> "Ownership of instrumentalities. The ownership of the instrumentalities and tools used in the work is of importance. The fact

that a worker supplies his down tools is evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value."

It might be that little weight can today be put upon the provisions of tools of minor character as opposed to plant and equipment on a large scale. But so far as tailoring is concerned, I think the fact that sewing machines on which the workers do the work generally belong to the employer is an important consideration for deciding that the relationship is that of master and servant.

Quite apart from all these circumstances, as the employer has the right to reject the end product if it does not conform to the instruction of the employer and direct the worker to restitch it, the element of control and supervision as formulated in the decisions of this court is also present.

The reputation of a tailoring establishment depends not only on the cutter but also upon the tailors. In a many cases, stitching is a delicate operation when the cloth upon which it is to be carried on is expensive. The defect in stitching might mar the appearance not only of the garment but also of its wearer. So when the tailor returns a garment, the proprietor has got to inspect it to see that it is perfect. He has to. keep his customers pleased and he has also to be punctual, which means that the stitching must be done according to the instruction of the employer and within the time specified.]-he degree of control and supervision would be different in different types of business. If an ultimate authority over the worker in the performance of his work resided in the employer so that he was subject to the latter's direction. that would be sufficient. - In Humberstone v. Norther Timber HIlls(2), Dixon, J. said :

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by

(1) SeeP. S.. "Vicarious Liability in the Law of Torts", p. 65.

(2) [19471 79 C. L. R. 389.

759

an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions".

That some of the employees take up the work from other tailoring establishments and do that work also in the shop in which they generally attend for work, as spoken to by the proprietor in his evidence, would not in any way militate against their being employees of the proprietor of the shop where they attend for work. A person can be a servant of more than one employer. A servant need not be under the exclusive control of one master. He can be employed under more than one employer.(1)

That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no reason why a person who is only employed part time, should not be a servant and it is doubtful whether regular part

time service can be considered even prima facie to suggest anything other than a contract of service. According to the definition in s.2(14) of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a "person employed" within the meaning of the sub-section. Therefore, even if he accepts some work from other tailoring establishments or does not work whole time in a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed.

We think that on the facts and circumstances of the case the Chief Inspector of Shops and Establishments and the High Court came to the right conclusion that employer and employee relationship existed between the parties and that the Act was therefore applicable. We therefore dismiss the appeal, but in the circumstances, we do not make any order as to costs.

S.B.W.

Appeal dismissed.

(1) See "The Modern Law of Employment" by G. H. I-. Fridman, P). 18, -ad also Between Patwardhan Tailors, Poona and Their workmen, [1960]1 L.L.J.

P. 722 at 726.

760