Before S. S. Sandhawalia, C.J. and M. R. Sharma, J.

SHIBHU METAL WORKS, JAGADHRI,—*Petitioner*

versus

THE REGIONAL DIRECTOR, EMPLOYEES STATE INSURANCE CORPORATION and another,—*Respondents.*

Civil Writ Petition No. 3175 *of* 1969.

November 25, 1981.

Employees State Insurance Act (XXXIV of 1948)—Section 2(9)—Partner working for the business of the firm and drawing remuneration—Such partner—Whether an 'employee' within the meaning of section 2(9).

Held, that the firm and the partners who may be owners of the factory or the establishment are stricto sensu in the position of an employer qua the workers or the persons engaged therein. It would necessarily follow that as regards all other employees within the ambit of section 2(9) of the Act, the firm and the partners are the employees thereof. Once that is so, it is difficult to imagine that such an employer should be himself within the ambit of the definition of an employee. It needs no great erudition to hold that the employer and employee are opposite terms and cannot possibly be treated as synonyms. Therefore, to say that a partner, who is an employer as regards the other employees of the firm, would nevertheless be an employee of the same firm, appears to be rather illogical. If that were so, a partner far from being an employer of the personnel in the factory or the establishment would himself be reduced to the same pedestal and, in fact, would become a colleague of the employees. A firm unlike a company or statutory corporation, does not have a legal personality of its own. A company or a corporation is a legal person separate and distinct from shareholders or constituents. On the other hand, a partnership firm is only a compendious and a useful name for the totality of persons who are its partners. Consequently, on the larger perspective it is not possible to visualise that a partner would be an employee of the very body which he himself constitutes and is indeed an integral and indivisible part thereof. It is significant to recall in this context that by sections 4, 18, 19 and 20 of the Partnership Act, a partner in the eye of

law is always an agent of the firm and indeed invariably represents it. On first principles, therefore, it seems difficult, if not impossible, to hold that a partner should be deemed as his own employee or of the firm which he along with his other partners constitutes. It appears plain enough that the person cannot either employ himself or be his own employee. Once it is held, as it must be that the partnership firm has no separate legal identity of its own, it is not possible to conceive that a partner can by a fiction be deemed to be the employee of a non-existent body or of himself.

(Paras 8 & 9).

Regional Director, E.S.I. Corporation *v.* P. C. Kasliwal & others, 1981 Lab. I. C. 671 DISSENTED FROM.

Petition under Articles 226/227 of the Constitution of India praying that :—

(i) *the records of the case may be summoned for proper and effective disposal of the writ petition ;*

(ii) *an appropriate writ, order or direction in the nature of mandamus prohibition for the purposes of quashing the impugned order contained in Annexure 'E' be issued ;*

(iii) *An appropriate writ, order or direction be issued restraining the respondents not to effect the recovery be issued ;*

(iv) *Any other appropriate writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be issued ;*

(v) Costs of the petition be awarded.

It is further prayed that during the pendency of the writ petition, the implementation of the impugned order may be stayed.

Jagjit Singh Chawla, Advocate, *for the Petitioner.*

Krishan Lal Kapoor, Advocate, *for the Respondent.*

JUDGMENT

S. S. Sandhawalia, C.J.—

(1) Can a partner be deemed to be an "employee" of his own partnership firm within the meaning of section 2(9) of the Employees

State Insurance Act, 1948 (hereinafter called 'the Act') is the somewhat intriguing question, which is before this Division Bench on a reference.

(2) The petitioner M/s Shibbu Metal Works, Jagadhri, is the partnership firm consisting of 10 partners and one Jawahar Lal minor, who has been admitted to the benefits thereof. It is averred that as many as six partners are managing the affairs of the factory and each one has got ultimate control over the affairs of the factory as a managing partner and under section 2 clause (17) of the Act each one of them is the principal employer of the factory. By virtue of the partnership deed these patners are drawing a working partner's remuneration, varying from Rs. 450 to Rs. 500 per month.

(3) The Regional Director appointed under the Act,—*vide* annexure 'A' directed the petitioner-firm to pay certain sums as the Employer's Special Contribution on the amount paid to the working partners who were getting Rs. 500 or less per month. The petitioner disputed this claim on the ground that the partners would not come within the definition of an employee under the Act but the respondents rejected the said claim and ultimately directed recovery of Rs. 368.42 paise as the Employer's Special Contribution from the petitioner as arrears of land revenue. Aggrieved thereby the petitioner preferred the present writ petition.

(4) In the written statement filed on behalf of the respondents, the broad factual position is not in dispute and the firm stand taken is that even working partners drawing a remuneration of Rs. 500 or less would come within the definition of an "employee" under the Act and consequently the liability to pay the Employer's Special Contribution.

(5) This writ petition originally came up before my learned brother M. R. Sharma, J., sitting singly. Noticing some conflict of judicial opinion and the significance of the question, he referred the matter for decision by a larger Bench. It is the common case that the issues of fact and law are identical in the connected civil writ petition 1440 of 1970 and the learned counsel are agreed that this judgment will govern both these cases.

(6) Before inevitably adverting to the precedent on the point, it is refreshing to examine the matter on larger principle and the specific provisions of section 2(9) of the Act, which fall for interpretation.

(7) At the very outset Mr. Kapoor, learned counsel for the respondents, had very fairly conceded that the firm and its partners compendiously were obviously in the position of an employer as regards the other workmen employed in the factory or the establishment. Apart from any concession this position appears to be self-evident from the definition of the 'immediate employer' under section 2(13) and the 'principal employer' under section 2(17) of the Act. The latter provision may be noticed in extenso for facility of reference :—

> "principal employer" means—
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> (i) in a factory, the owner or occupier of the factory, and
>
> includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named;
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> (ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department;
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> (iii) in any other establishment, any person responsible for the supervision and control of the establishment.

(8) It would be manifest from the above that the firm and the partners who may be owners of the factory or the establishment are stricto-sensu in the position of an employer qua the workers or the persons engaged therein. It would necessarily follow that as regards all other employees within the ambit of section 2(9) of the Act, the firm and the partners are the employers thereof. Once that is so, it is difficult to imagine that such an employer should be himself within the ambit of the definition of an employee. It needs no

great erudition to hold that the employer and employee are opposite terms and cannot possibly be treated as synonyms. Therefore to say that a partner, who is an employer as regards the other employees of the firm, would nevertheless be an employee of the same firm, appears to be rather illogical . If that were so, a partner far from being an employer of the personnel in he factory or the establishment would himself be reduced to the same pedestal, and in fact would become a colleague of the employees.

It seems unnecessary to labour the simple home truth that a person cannot be an employee unto himself.

(9) What may next be noticed is the larger legal concept of a partnership firm. It is well settled that a firm, unlike a company or statutory corporation, does not have a legal personality of its own. A company or a corporation is a legal person separate and distinct from shareholders or constituents. On the other hand, a partnership firm is only a compendious and a useful name for the totality of persons who are its partners. Consequently, on the larger perspective it is not possible to visualise that a partner would be an employee of the very body which he himself constitutes and is indeed an integral and indivisible part thereof. It is significant to recall in this context that by sections 4, 18, 19 and 20 of the Partnership Act, a partner in the eye of law is always an agent of the firm and indeed inavriably represents it. On first principles, therefore, it seems difficult, if not impossible, to hold that a partner should be deemed as his own employee or of the firm which he along with his other partners constitutes. It appears plain enough that the person cannot either employ himself or be his own employee. Once it is held, as it must be, that the partnership firm has no separate legal identity of its own, it is not possible to conceive that a partner can by a fiction be deemed to be the employee of a non-existent body or of himself.

(10) Though the issue appears to be manifest on principle yet high authority is not lacking for the proposition either. In **Ellis** v. **Joseph Ellis & Co.**, (1), the identical question whether, having regard to the position of a partner, he can be regarded as a workman in the

(1). 1905 (1) King's Bench Division 324.

employment of his partnership firm within the meaning of the Workmen's Compensation Act, came up before the Court of Appeal. Mathew L. J. concurring with the other learned Judges held as follows:—

> "I am of the same opinion. The argument on behalf of the applicant in this appeal appears to involve a legal impossibility, namely, that the same person can occupy the position of being both master and servant, employer and employed. The deceased man in this case was a partner; and the arrangement made between him and his co-partner as to the payment of wages to him was really an agreement with regard to the mode in which accounts were to be taken between the partners, and to the share of profits to be received by him in excess of that received by the other partners in consideration of the work done by him. The Workmen's Compensation Act, 1897, cannot in my opinion apply to such a case."

One must now turn to the specific provisions of section 2(9) of the Act (as it stood then) which may now be read:—

> "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—
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> (i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere; or
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> (ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
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> (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the

person whose services are so lent or let on hire has entered into a contract of service; (and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment; but does not include)—

(a) any member of (the Indian) naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed five hundred rupees a month:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed five hundred rupees a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period)."

Undoubtedly the definition is couched in wide terms and it has been so held in a number of judgments. What, however, is basic to the issue is the fact that an employee must first be a person "employed for wages". It is only if he satisfies this fundamental pre-requisite that the subsequent issues arise whether he has been employed in connection with the work of the factory or an establishment and whether such employment is direct, indirect or remote. Therefore, on the language of the statute itself it seems manifest that until and unless it can be shown that a person who has been employed by another and for wages, the very question of his coming within the ambit of section 2(9) of the Act would not arise.

(11) Now what appears to be plain on principle and on the language of the statute, seems equally so by the mandate of binding precedent as well. In **Chintaman Rao and another** v. **State of Madhya Pradesh** (2) the concept of employment came up for consideration. K. Subba Rao, J. (as he then was), speaking for the

(2) AIR 1958 S.C. 388.

Court with his illimitable lucidity, observed as follows:—

> ". ....The concept of employment involves three ingredients: (1) employer, (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision....."

The aforesaid enunciation has not, to my mind, been later deviated from by the final Court and continues to hold the field. Consequently, unless the three pre-requisites spelled out are satisfied, the very relationship of employer and employees does not come into existence and the further qualifications of the definition under section 2(9) of the Act would not be attracted. It seems to be wasteful to elaborate the point because it appears plain enough that a partner **qua** his own partnership firm does not satisfy even one of the aforesaid three authoritative tests which have to be applied collectively.

(12) Another vital aspect of the employer and employee's relationship is the concept of control, which the former must exercise over the latter. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work. This indeed is again a basic factor. Where this control is altogether lacking, then the relationship of the employer and the employee would equally be non-existent. Now can it be said that a partner is under the supervision and the control of the firm. The answer is obviously in the negative. Indeed it can well be said that the partners control the firm and not in the reverse that the firm (which as already noticed has no legal personality) controls its partners. Because of this aspect also it is indeed difficult to hold that a partner can be an employee of his own partnership firm.

(13) Now faced with the rigour and the logic of the otherwise binding precedent in **Chintaman Rao's case** (supra), the only argument of Mr. Kapur was that the aforesaid judgment no longer holds the field in view of the recent observations of the Supreme Court

in *Royal Talkies, Hyderabad and others* v. *Employees' State Insurance Corporation through its Regional Director, Hill Fort Road, Hyderabad,* (3). This submission which indeed was the sheet anchor of the stand of the learned counsel for the respondents, has only to be noticed and rejected. As I will show presently, there appears to be no conflict of judicial opinion in the aforesaid two cases. However, assuming entirely for the argument sake (without holding so), even if it were so, this Court is bound by the judgment in **Chintaman Rao's case** (supra), which is by a larger Bench of three Judges. Consequently, viewed from any aspect, the ratio of *Chintaman Rao's case* (supra), holds the field and once that is so, the stand of the respondents is patently untenable against its pristine reasoning and otherwise binding force.

(14) I would, however, wish to make it clear that I discern no clash of view in the later judgment in *Royal Talkies' case* (supra). Therein the final Court was construing the particular provision of section 2(9) of the Act and rightly noticed that the definition therein was one of wide amplitude. Nevertheless it was pointedly noticed that this provision contains two substantive parts and unless a person employed qualifies in both, he would not come within the ambit of an "employee". In this context it was concluded as follows:—

> "Merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'. He must not only be employed in connection with the work of the establishment but also be shown to be employed in one or other of the three categories mentioned in section 2(9)."

(15) It would be manifest from the above that the condition prerequisite herein is that a person must be employed for wages. It is only if this test is satisfied that the other questions consequent thereto would arise. If the very relationship of the employer and the employee is lacking then the issue of being or not being employed either in connection with the business of establishment or the factory or the further effect of such employment being direct,

(3) AIR 1978 S.C. 1478.

indirect, or a case of mere lending of service would be wholly irrelevant. It is worth highlighting that in the *Royal Talkies' case* (supra) the primary question was whether the persons employed in the canteen and cycle stand run on the cinema premises were principally employed by the cinema management. There was not the least dispute that those persons were in fact employed for wages and the only dispute was whether they could be deemed to be employed in connection with the main cinema business. Therefore, I see no discordance what-so-ever betwixt the ratio in the *Royal Talkies case* (supra) and tha tin *Chintaman Rao's case* (supra). Indeed the earlier case was not even referred to and consequently there is not the remotest hint of dissent or divergence from the dictum laid therein. I am, therefore, of the view that the aforesaid two judgments of the final Court are wholly in consonance with each other.

(16) It seems quite plain that the weight of authority in the High Courts is entirely consistent with the view I am inclined to take. In *State* versus *M. M. Pinto*, (4), an identical question had cropped up in the context of the definition of a 'worker' under Section 2(1) of the Factories Act, 1948. Holding that the earlier view to the contrary was no longer of any validity because of the Supreme Court judgment, i.e., *Chintaman Rao's case* (supra). It was held as follows:—

> "The position, therefore, boils down to this that the 18 persons who were found working in the factory on the date of inspection were not workers within the meaning of section 2(1) of the Factories Act, although they were actually carrying on the work on the premises of the factory. They were partners of the concern and as such cannot be considered as the employees, because so far as they were concerned, there was neither any employer nor any contract of employment. They were doing the work in their capacity as partners. The same view holds good in the case of three other persons who were partners in another concern whose premises are the same as the premises of the offending concern."

(17) Again directly in the context of the present Act the issue had arisen before Chandrachud J. (as his Lordship then was), in

(4) AIR 1960 Bombay, 236.

M/s. Bank Silver C. Bombay v. *The Employees' State Insurance Corporation, Bombay* (5) *and* it was concluded as follows :—

> "The application of the Act, however, cannot mean that the several benefits provided for in the Act could be availed of by the partners of the firm who are also working in the establishment. In determining the question whether a person working in the factory is entitled to any particular benefit, regard must be had to the language of the section which confers the benefit and if the language shows that the benefit can be given only to "employees", the benefit cannot be availed of by the partners."

(18) Following the above view a Division Bench of the Karnataka High Court in *M/s. Ambassador and others* v. *The Employees' State Insurance Corporation, Bangalore* (6), has unequivocally held as follows:—

> "In the aforesaid decision, Chandrachud J. held that while the proprietors or partners of a factory who actually work there should be included for determining whether an establishment is a factory defined in clause (12) of section 2 of the Act, they cannot be regarded as employees for the purpose, of ascertaining the benefits provided under the Act. We are in respectful agreement with the aforesaid enunciation of law.
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> 14. An Ex. P-1 the appellants had clearly stated that there were 24 employees and that the two partners were also doing some work. The Court was not justified in treating the two partners also as employees for the purpose of determining the employees' contribution under the Act."

(19) Delhi High Court in *Sehgal Industrial Works Delhi* v *Employees' State Insurance Corporation, New Delhi,* (7) has also taken a similar view.

(5) AIR 1965—Bombay, 111.

(6) 1975—Labour & Industrial Cases 627.

(7) 1975(30) Factory Law Journal 217.

(20) However, there is undoubtedly a touch of discordance from the aforesaid near unanimous view of the authorities. In the Single Bench judgment of Rajasthan High Court reported in *The Regional Director, E.S.I. Corporation, Jaipur* v. *P. C. Kasliwal and others,* (8), the learned Single Judge has arrived at the conclusion that though the sleeping partners drawing a monthly allowance of Rs. 500 or less would not be within the ambit of an "employee" under section 2(9), yet a partner actively engaged in the factory work and drawing such a monthly allowance would be within its meaning. With greatest respect I am unable to subscribe to this view. A perusal of the judgment would disclose that the binding authority of the Supreme Court in *Chintaman Rao's case* missed notice as also the view of the Division Bench of the Bombay High Court in *M. M. Pinto's case* (supra) and some of the other cases referred to above. Reference was made to *Ellis* v. *Ellis*, but then the learned Single Judge seems to have passed on without either distinguishing the same or adequately appraising the weight of the authority of the judgment of the Court of Appeal. Reliance was placed on cases pertaining to Companies and Corporations without adverting to the meaningful distinction that whereas these have distinct legal personality from their Directors and share-holders, the partnership firm is not in an identical situation. A close perusal of the judgment would disclose that an inordinate weight was attached to the fact that by a legal fiction under section 2(17) a person, who has been named as Manager of the factory, would be included in the definition of a principal employer. This in my view is not conclusive, because the statute visualises the owner or the occupier of the factory as the principal employer and by a legal fiction widens the same by including therein the managing-agents of such owner or occupier or their legal representatives and lastly a person named as a Manager for the specific purpose of the Factories Act. It is in this limited context that the Manager of a factory, who may come within the ambit of an employee under section 2(9) might also be fictionally covered under the definition under section 2(17). This, however, is not warrant for concluding that an owner or occupier of a factory would become its own employee under section 2(9). It deserves high-lighting that the partners of the firm are obviously the owners of a factory or the establishment and, therefore. the legal fiction cannot be extended to them. The pitfalls of widening a fiction of law

(8) 1981 Labour & Industrial cases 671.

beyond its pointed purpose was highlighted by their Lordships in *M/s. Braithwaite and Co. (India) Ltd.* v. *The Employees' State Insurance Corporation* (9), whilst construing this very Act in the following terms:—

> "It appears to us that the High Court committed an error in applying this legal fiction which was meant for sections 40 and 41 of the Act only, and extending it to the definition of wages, when dealing with the question of payment in the nature of Inam under the scheme started by the appellant. The fiction in the Explanation was a very limited one and it only laid down that wages were to be deemed to include the payment to an employee in respect of any period of authorised leave, lock-out or legal strike. It did not lay down that other payments made were also to be deemed to be wages. A legal fiction is adopted in law for a limited and definite purpose only and there is no justification for extending it beyond the purpose for which the legislature adopted it."

(21) For the aforesaid reasons with greatest respect I would record a dissent from the view in *P. C. Kasliwal's case* (supra).

(22) Lastly in this context what calls for notice is that the Act is beneficient industrial labour legislation, which has to be liberally construed. It is otherwise plain and the preamble of the Act makes it manifest that its object is to provide for certain benefits to the employees and workers in case of sickness, maternity and employment injury, etc. The purpose of the Act is certainly not to confer these benefits on owners and occupiers of the factory or establishment. A strained construction, therefore, which brings the owners and employers also within the ambit of "employees" who alone are the beneficiaries under the statute has to be avoided on larger cannons of construction as well.

(23) To conclude the answer to the question posed at the very outset is rendered in the negative, and it is held that a partner of the firm, which is the owner or the occupier of the factory or the

(9) AIR 1968—S.C. 413.

establishment cannot be its own employee within the meaning of section 2(9) of the Act.

(24) Applying the aforesaid rule both the writ petitions must succeed, because it is not in dispute that the petitioners therein are partners of their respective firms with regard to whom the demand for contribution under the Act is being raised. Accordingly the writ petitions are allowed and the impugned orders are hereby quashed. The parties, however, will be left to bear their own costs.