

Narayanan Vs Southern Railway

None

Court: High Court Of Kerala

Date of Decision: Sept. 24, 1979

Acts Referred:

Constitution of India, 1950 – Article 311#Employees Compensation Act, 1923 – Section 12, 2

Citation: (1979) 09 KL CK 0014

Hon'ble Judges: Subramonian Poti, J; Janki Amma, J

Bench: Division Bench

Judgement

Janaki Amma, J.

The appellant was a licensed porter of the Trivandrum Central Railway Station for about 18 years. On 25-1-1977 while he was trying to get into a

passenger train with luggage, some of the passengers who were coming out of the train pushed him out and he fell on the railway line. The train

started and a wheel thereof went over his leg. As a result of the injuries his leg had to be amputated. He claimed compensation from the railway

administration under the Workmen's Compensation Act. The Commissioner for Workmen's Compensation while rejecting the claim of the

appellant that he was a workman under railway administration observed that there was no employer-employee relationship between the appellant

and the railway administration, that for carrying the luggage of passengers, the appellant was being paid by them and that the accident took place

while the appellant was about to carry the luggage of a passenger.

2. The appellant challenges the above reasoning. It is admitted by him that for the services rendered to the passengers he receives payments from

them. But according to him, the conditions which have been imposed on him by the Railway are sufficient to make him a railway servant.

3. Licence in the case of porters directly licensed by the Railway is issued in the name of the President of India. A licensed porter is to work under

the overall supervision of Assistant Station Master/Station Master/Station Superintendent, and carry out instructions given either by him or by the

Platform Inspector/ Mukadam/Mate/Supervisor in connection with the work of handling (1) passengers' luggage; and (ii) parcels and luggage in

the custody of the railway. He is to attend the station and work according to the roster drawn by the Station Master/Station Superintendent. He is

to charge passengers only the notified rates for handling the luggage. Any infringement of this rule is liable to result in the immediate cancellation of

the licence. He is to pay the railway administration a monthly licence fee as may be fixed by the administration from time to time. He is being

supplied with uniforms, badges and buckles under specified conditions and they are to be returned if and when ceases to work as porter or if his

licence is suspended or cancelled by the administration. He is eligible for free outdoor treatment at the Railway Hospital/Dispensary, where they

exist. He may be required to work for the Railway Administration in handling parcels and luggage in the custody of the Railway at rates of

remuneration as may be fixed by the administration. The cost of any package broken or damaged by a porter due to his careless handling may be

recovered from his dues in that connection. He may be suspended for such periods as may be decided by the Station Master/Station

Superintendent for the following reasons

(a) Being present within railway premises without uniform and badges.

(b) Dilatory or inefficient working.

(c) Discourteous behaviour towards passengers.

His licence is liable to be cancelled for--

(a) Disobedience of order issued by the authority.

(b) Unauthorised absence from duty.

(c) Charging of rates in excess of the notified rates from passengers.

(d) Discourteous behaviour towards passengers or causing wilful damage to the property of passengers.

(e) Rough handling of luggage and parcel while working for railway administration.

His licence is liable to be cancelled at any time without assigning any reason.

4. Whether a railway porter working in accordance with the above conditions is a workman for purposes of the Workmen's Compensation Act is

the issue involved in this appeal.

5. A "Workman" is defined in Section 2(n) of the Workmen's Compensation Act, 1923:

(n). "Workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the

purpose of the employer's trade or business) who is--

(i) a railway servant as defined in Section 3 of the Indian Railways Act, 1890, not permanently employed in any administrative, district or sub-

divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed on monthly wages not exceeding five hundred rupees, in any such capacity as is specified in Schedule II, whether the contract of

employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing....

Under Section 3(7) of the Indian Railways Act, 1890 a railway servant means any person employed by a railway administration in connection with

the service of a railway. Section 148(2) of the Railways Act deals with matters supplemental to the definition of "railway servant". Under the said

provision, for the purposes of Sections 5, 21, 83, 100, 100-A, 100-B, 101, 103, 104, 121, 125, 137 Sub-sections (1) and (2) and Section 138,

the expression "railway servant" includes a person employed upon a railway in connection with service thereof by a person fulfilling a contract with

the railway administration.

6. The question as to when a person could be called a railway servant u/s 3(7) of the Act has come to before various High Courts on previous

occasions. In A.V. Joseph v. J.J. Lammond AIR 1924 Rangoon 373, the appellant, a contractor for supply of sleepers to a railway company was

prosecuted for fraud in connection with the contract. The question arose whether the complainant, who was a sleeper passing officer, an

appointment provided in the contract was a railway servant u/s 3(7) of the Railway Act. Under the terms of appointment, the sleeper passing

officer was to receive part of his remuneration from the railway company. The contractor was also to pay him at fixed rates based on the number

of sleepers accepted and rejected. It was held that the word "service" includes maintenance of the railway, that for maintenance it is necessary to

ensure that sleepers are sound and of good quality and, therefore, the sleeper-passing officer was a railway servant. The Court also observed:

An employee may be paid a fixed salary or by time or by the piece but the mode of payment does not affect the fact that he is employed.

7. Periyakkal v. The Agent, South Indian Railway Co. Ltd. Trichinopoly (1935) Mad 674, one Nanjappa Goundan was a cooly working under a

contractor employed by the South Indian Railway in the construction of a bridge on the Nilgiri Railway. He got into a trolley at the place of loading.

Three others also joined him. This was in excess of the permitted number. The driver lost control over and could not apply the brakes. Two of the

coolies including Nanjappa Goundan died. His widow claimed compensation under the Workmen's Compensation Act. The question arose

whether the work which was being done was ordinarily part of the trade or business of the principal for the purpose of Section 12(1) of the

Workmen's Compensation Act. It was held that the business of keeping the railway line in order was as normal and as essential a feature of the

running of a railway as the issue of tickets or the handling of goods.

8. Section 138 of the Railways Act provides the procedure for summary delivery by a Magistrate of First Class, of property detained by a railway

servant to the railway administration. In *S.L. Kapoor v. Emperor* AIR 1937 Lah 547 the petitioner was in occupation of a railway refreshment

room in pursuance of an agreement with the railway to provide meals for Hindu passengers. Under the agreement between the petitioner and the

railway, it was the duty of the petitioner to provide meals to the passengers on behalf of the railway. The railway did not pay him any wages nor

receive any amount from him. But the agreement directed that the petitioner should open and close the refreshment room at specified times, that he

should keep a complaint book which was open to inspection by the railway officers, that he was bound to pay a penalty, if any complaint was held

by the Divisional Superintendent to be justified, that he was to dress his servants in accordance with the special instructions to be issued by an

officer of the railway, that he was liable to be directed as to the pattern of the crockery which he should use and as to the pictures, notices and

advertisements to be displayed in the refreshment room. His remuneration was the profit which accrued from the service of meals. It was held that

he was a servant and not an independent contractor and, therefore, was liable for dispossession u/s 138 of the Railways Act which provided for

summary eviction of a railway servant from property belonging to the railway administration. Blacker, J. observed:

It seems to me therefore that in a very large proportion of the cases in which a person contracts with the railway to perform a certain service on its

behalf he can be said to be employed by the railway to do that service and so comes within the definition of Section 3(7) of the Act.

9. *Ratanlal Majumdar Vs. Alfred Ernest Young*, is a case where a Railway administration sought eviction of a tea-stall contractor u/s 138 of the

Railways Act after terminating the contract entered into with him. The contention raised that he was not a railway servant even under the extended

definition u/s 148(2) of the Railways Act and that under that section his servant alone could be considered as a railway servant was not accepted

by the High Court.

10. The question whether a person who was allotted a tea stall and a refreshment stall as licensee in a railway station is a railway servant came up

before the Supreme Court in *Nanak Awatrai Chainani v. Union of India* (1971) 2 S.C.J. 636. The appellant who was running two stalls was

sought to be evicted invoking the provisions of Section 138 of the Railways Act. It was not disputed before the Magistrate that since the appellant

had to work under the supervision and according to the directions of the railway administration, he was a railway servant. He was ordered to be

evicted. The matter ultimately came before the Supreme Court. Before the Supreme Court, he claimed rights under Article 311 of the Constitution

and also that he had a heritable right. The Court overruled the contentions and held that the only right that the appellant could claim was a

contractual light of a bare licence, subject to the terms contained in the agreement. The Supreme Court observed:

The terms which govern the parties expressly reserve to the railway administration extensive power of directing and regulating the appellant's work

and also, to an extent, of controlling the manner of doing the work. Keeping in view the purposes and objects of these agreements, namely, that of

affording necessary amenities to the travelling public, retention of this overall power by the railway administration is not only appropriate but

necessary. The retention of this power by the railway administration, in our view, constitutes relevant material for sustaining the conclusion of the

Courts below that the appellant is a railway servant, as defined in Section 3(7) read with Section 148(2) Indian Railways Act, against whom action

can be taken u/s 138 of the said Act.

The view expressed by the Lahore and Calcutta High Courts in the decisions already referred to was approved by the Supreme Court.

11. The decision in *Nanak Awartai Chainaniv. Union of India* (1971) 2 S.C.J. 636, has been followed by the Supreme Court in a recent cases

Union of India (UOI) and Another Vs. B.N. Prasad, , also arising u/s 138 of the Railways Act.

12. It is no doubt true that in the cases before the Supreme Court, it was the applicability of Section 138 of the Railways Act that was in issue and

the Supreme Court has also referred to Section 148(2) which extends the definition of railway servant to persons employed upon a railway in

connection with the service thereof by a person fulfilling a contract with railway administration. But in holding that a stallholder is a railway servant

the primary consideration which weighed with the Supreme Court as is seen from the passage extracted above was that the railway administration

had under the contract with the stall-holder the power of directing and regulating his work and to some extent control of the manner of doing the

work. The Supreme Court also took into account the fact that the object of the agreement was to afford necessary amenities to the traveling

public. Chapter VI of the Railways Act deals with working of railways. Section 47 therein makes it incumbent on the Central Government or the

railway company, as the case may be, to make general rules for providing for. the accommodation and convenience of passengers and regulating

the carriage of their luggage. There are restrictions for the entry of the public to the Railway station premises when there are incoming or outgoing

trains and persons who have tickets for travel or platform tickets alone can enter the premises. Providing facilities for handling or carrying luggage

of passengers who travel in trains is an obligation cast on the railway administration. The system of licensing porters is adopted in discharge of that

obligation. Though they are licensees, the terms and conditions for the issues of licence clearly indicate that the Railway administration has power of

supervision over the work of the licensed porters. The work and conduct of licensed porters are being regulated by the railway administration. The

time of work is fixed by the administration. They are to receive payment for the work from the railway administration or as the case may be or

from the passengers at rates fixed by the railway administration. They are to wear uniforms and badges supplied by the railway administration

during the period of work. They are afforded medical facilities so long as they remain licensed porters. The railway administration has disciplinary

control over them. The terms of the contract of licence and the overall control vested in the administration are sufficient indicia for holding that the

licensed porters are railway servants, employed by the railway administration in connection with service of a railway as mentioned in Section 3(7)

of the Railways Act, and, therefore, workmen u/s 2(n) of the Workmen's Compensation Act.

13. Appendix 26 to the Statutory Rules framed under the Railways Act contains the general rules relating to passengers and parcels. Rule 126

deals with platform porters. It is no doubt mentioned therein that ""these men are not railway employees but are licensed by the railways for the

convenience of passengers and must be paid the local authorised charges"" The definition of ""workman"" in the Workmen's Compensation Act

contemplates a contract of employment. Therefore, if Rule 126 alone is to govern, a railway porter is not a workman under the Workmen's

Compensation Act. It cannot, however, be doubted that if the terms of the contract between the railway administration and the licensed porters

indicate an employer-employee relationship, as contemplated by law, the mere mention in the rule that the licensed porters are not railway

employees will not alter their relationship.

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.

(Per Subba Rao, J. in Chintaman Rao and Another Vs. The State of Madhya Pradesh, .

In Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, the Supreme Court, after a review of the case-law on the relationship of

employer and employee, observed:

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 page 23 in Mersey Docks and

Harbour Board v. Coggine & Griffith (Liverpool) Ltd. [1947] 1 A.C. 1, 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* (C)

(*supra*) and Denning, L.J. in *Stevenson*, (*supra*) and Denning, L.J. in *Stevenson, Jordan and Harrison Ltd. v. Macdonald and Evans* (B), (*supra*).

The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and

supervision by the employer.

14. The Supreme Court had again occasion to consider and lay down the law governing the relationship of employer and employee in *Silver*

Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, . In that case, the workers of the appellant,

tailoring concern, were being paid on piece rate basis. The rate of wages depended on the skill of the worker and the nature of the work. If the

work was not done according to instructions, the appellant would reject the work and would ask the worker to re-stitch the cloth. Almost all the

workers used to work in the shop. Some workers were allowed to take cloth for stitching to their homes on certain days on permission of the

proprietor of the shop. The machines and the place where the work was being carried on belonged to the appellant. A worker could absent

himself from work on any day without taking leave and without informing the appellant . If there was no work, the workers could leave the shop

before the closing of the shop. The Supreme Court held that there was the relationship of employer and employee between the appellant and the

workers of the concern. Mathew, J., who delivered the judgment observed that in recent years the control test as traditionally formulated has not

been treated as an exclusive test and continued:

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.

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.

15. That the workers generally attended the shop of the appellant, worked on the sewing machines belonging to the appellant, that the appellant

had the liberty not to give further work to particular worker who did not perform his work according to instructions were some of the factors

which were taken into account by the Supreme Court in holding that the relationship between the appellant and the workers was that of employer

and employee. The Supreme Court also noted that as the appellant had the right to reject the end product if it did not conform to the instructions of

the employer and direct the worker to re-stitch it, the element of control and supervision as formulated in the decisions of Supreme Court was also

present.

16. Whether or not, the relationship of employer and employee exists in a given case is a question of fact. If it exists, the fact that payment is made

at piece rate or by a third person under an arrangement with the employer will not affect the relationship.

17. In the instant case, there is the statutory obligation on the part of the railway to provide for the convenience of passengers and to regulate the

carriage of their luggages. The system of licensing of porters is in discharge of that obligation. The licensed porters are to handle not only the

luggage of the passengers but also the parcels and luggages in the custody of the railway. He is to work under the overall supervision of officers of

the railway. He is to work according to the roster drawn by the Station authorities. He is to receive charges only at the rate stipulated by the

railway authorities. He is being supplied by the railway administration, uniforms, badges and buckles, to be used during work. He is being given

free out-door treatment in the railway hospital or dispensary. He is under the disciplinary control of the railway and is liable to suspension and his

licence is liable for cancellation for misconduct, disobedience, inefficient working etc. There is, therefore, no room for doubt that there is the

relationship of employer and employee between the railway administration and the licensed porters. It is also made out that the employment is in

connection with the service of a railway. That is sufficient to make the appellant in this case an employee of the railway.

18. An argument is advanced that licensed porters do not come under any of the categories mentioned in Schedule II of the Workmen's

Compensation Act. But non-inclusion in Schedule II does not disentitle him from being a workman u/s 2(n)(i) if he is a railway servant. If, on the

other hand, if he falls under Schedule II, even then he would be a workman if his income is within the limits fixed in Section 2(n)(ii) of the Act.

19. The Commissioner for Workmen's Compensation dismissed the petition on the preliminary ground that the appellant is not a workman. The

issues 2 to 5 relating to monthly wages, whether he sustained injuries, whether the respondent-railway is liable to pay compensation and the liability

for costs have not been considered. This means, the petition has to be remitted to the Commissioner for final disposal.

20. The appeal is accordingly allowed. The order of the Commissioner for Workmen's Compensation is set aside. The petition is remanded to him

for disposal, in the light of the finding entered.