PETITIONER:
T. DEVADASAN

Vs.

RESPONDENT:
M/S. GORDON WOODROFFE & CO. (MADRAS) PRIVATELTD. & ANR.

DATE OF JUDGMENT18/04/1972

BENCH:
REDDY, P. JAGANMOHAN
BENCH:
REDDY, P. JAGANMOHAN
VAIDYIALINGAM, C.A.
MATHEW, KUTTYIL KURIEN

CITATION:
1972 AIR 1479 1973 SCR (1) 213
1972 SCC (3) 700

ACT:
Workmen's Compensation Act-S.41(2)-Scope of-Whether the employee in question was a person employed within the meaning of the Madras Shops and Establishments Act 1947.

HEADNOTE:
The appellant was appointed by Respondent No. 1, a Madras Company, which was the holding company of another, a subsidiary, known as the Pallavaram company.
After 2 years, the holding company revised the terms of engagement of the appellant relating to basic salary, D.A. and Bonus, all other terms of service remaining unaltered. The appellant was given training in the Madras Company for 2 months and later, he was asked to go to Pallavaram Company and work there, which the appellant did. His salary was paid by the Madras Company; but by an agreement between the two companies, his salary was debited to the Pallavaram Company. The appellant worked till 1966 when his services were terminated 'by the holding company.
The appellant, therefore, filed an appeal before the Additional Commissioner for Workmen's Compensation under S.41(2) of the Workmen's Compensation Act. The respondent raised the objection by saying that since the appellant was a person wholly or principally employed by the Pallavaram Company, the appellant was not a "person employed" within the meaning of the Madras Shops and Establishments Act, 1947 and therefore, the provisions of the said Act would not be applicable to him. The main Question for decision was whether the appellant was an employee of the holding company or of the subsidiary company.
Allowing the appeal,
HELD : On the facts and circumstances of the case, the Pallavaram Company is not the employee of the appellant. All relevant facts point to the conclusion that the employer is the Madras Company. It was this company that appointed the appellant. The appointment order shows that he was appointed as an Assistant in that Company. The terms of the order further show that apart from the salary set out there, on which he was appointed, he was to receive dearness allowances at the rate of 35 per cent of the basic salary, or such other rate as the Board of that company may decide

from time to time. He has to become a member of the Provident Fund to which both he and Madras Company have to subscribe. Annual bonus was to be calculated in the same manner as the annual bonus payable to other assistance of the company. His service can only be terminated by the Madras Company and the income-tax deductions were also made by the Madras company. All these facts clearly show that the appellant was an employee of the Madras Company and not Pallavaram Company, where the company directed the appellant to work and the appellant was under an obligation to work wherever the company directs him to work. [220G]

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The Salem Sri Ramaswami Bank Ltd. v. The Additional Commissioner for Workmen's Compensation, Chepauk, Madras and another, [1956] 2 M.L.J. 254, T. P. Chandra v. The Commissioner for Workmen's Compensation, Madras and Another, A.I.R. 1957 Vol. 44 p. 668 and T. Prem Sagar v. The. Standard Vacuum Oil Company Madras and Others, [1964] 5 S.C.R. 1030, discussed and distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1421 and 1422 of 1968.

Appeals by special leave from the order dated January 18, 1968 of the Additional Commissioner for workmen's compensation, Madras in M.S.E. Case No. 131 of 1966, and from the Order dated the 9th January, 1968 of the Commissioner of Labour, Madras in No. C2. 13897 of 1967 respectively.

O. P. Malhotra, Sat Pal and Ashok Grover, for the appellant (in both the appeals).

M. Natesan and D. N. Gupta, for respondent No. 1 (in both the appeals).

The Judgment of the Court was delivered by

P. Jaganmohan Reddy, J.-These appeals are by special leave in which the question which falls for consideration is whether the appellant is a person employed within the meaning of section 2(12) (iii) of the Madras Shops & Establishments Act, 1947 (Madras Act No. XXXVI of 1947) (hereinafter called 'the Act'). The first respondent, a private limited company, (hereinafter termed as 'the holding company' or the 'Madras company'), having been empowered by the Memorandum of Association, promoted another company known as the Gordon Woodroffe Leather Manufacturing Company (hereinafter called the subsidiary company' or the "Pallavaram company') in which it held 80% preference shares and 70% equity shares. The holding company was also the managing agent of the subsidiary company. In 1959 the managing agency of the holding company was terminated but nevertheless in view of its shareholding it continued to control the subsidiary company. The appellant who was a Chartered Accountant qualified in London had applied for and was offered employment as an Assistant in the holding company on the terms and conditions contained in the letter dated 19-10-1963. He accepted the employment and the terms and was accordingly appointed by the holding company. On 28-10-1965 the holding company, in order to simplify the accounting procedures, informed the appellant of its decision to offer revision of the terms of engagement with effect from 1st July, 1965 relating to the basic salary, D.A. and bonus, all other terms of service remaining unaltered. The Appellant was asked to confirm his acceptance of these terms which it appears he did. He was

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thereafter permitted to cross the efficiency bar. It may here be mentioned that after his appointment, the appellant was given training in the Madras company for two months after which it is alleged that the Director had asked him to go to the Pallavaram company to work there. Even while working there his salary was being paid by the Madras company though it was by an. arrangement between the two companies being debited to the, Pallavaram company. The appellant continued to work in the Pallavaram company till 15th October, 1966 on which date, his services were terminated by the holding company. The appellant thereupon filed an appeal before the Additional Commissioner for Workman's Compensation under section 41(2) of the Workmen's Compensation Act. The 1st respondent, however, raised an objection before the Additional Commissioner that the appellant was not a person employed within the meaning of the Act and, therefore, the provisions of the said Act would not be applicable to him. In view of this objection, was filed by the. appellant under section 51 of the Act for declaring that he is a person employed and some time thereafter got his applications under section 41(2) stayed. The his between the parties on the; application under section 51 as well as. under section 41(2) was whether the appellant was an employee of the holding company or of the subsidiary company. The appellant claimed that under the terms of the offer of appointment which was accepted by him he was required, to work either in the Madras office or the Pallavaram office or at any other office or place of business of the company and though he. was working in the Pallavaram office, his salary was being paid by the holding company, his bonus for the year ending 1964 was also paid by that company which also, terminated his services. The 1st respondent averred that though the petitioner might have been appointed or dismissed by the Madras company he was actually a person employed in the Pallavaram company. It was also admitted that while the salary of the appellant was paid initially by the Madras company it was recovered from the Pallavaram company as is evident from the, registers of account maintained that such recoveries from the Pallavaram company was effected, and that for the purposes of the Act what is relevant is not 'employment by' but employment in'. If so as he was employed in the Pallavaram company he was not a person employed within the definition of the Act by the Madras company. The Commissioner of Labour by his order of 9th January, 1968 accepted the 1st respondent's contention and held that the petitioner cannot be declared to be a person employed under section 2 (12) (iii) of the Act and that even under section 2 (12) (ii) of the Act, the petitioner cannot be treated as a person employed vis-a-vis the Pallavaram Company as admittedly the appellant was not a member of the clerical staff employed in the Pallavaram company. The petition was accordingly dismissed.

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After this appeal was dismissed the appeal filed under section 41(2) of the Act was disposed of by the, Additional Commissioner for Workmen's Compensation who held that in view of the findings given by the competent authority under Section 51 of the Act on the question of applicability of the provisions of that Act to the appellant, he had no, jurisdiction to go into the merits of the appeal. He accordingly dismissed that appeal also.

It may be stated that the appellant's Special Leave Petition was filed against both the Orders but in view of the, objection raised by the office, two S.L.Ps. were filed and

this Court gave leave on them. These two appeals were subsequently consolidated.

On behalf of the appellant the following two questions were urged for determination : (1) whether on the facts and circumstances of the case and on a true construction of clause (iii) subsection (12) of section 2, the appellant being wholly and principally employed in connection with the business of the Madras establishment was a person employed, (2) whether the jurisdiction of the authority under section 41 sub-section (2) is circumscribed by the provisions of section 51. In our view the second question is purely academic because if the jurisdiction of the authority under section 41(2) is circumscribed by the provisions of section 51 the question whether the decision of the Commissioner of Labour under section 51 that the appellant is a person employed will nevertheless arise for decision and if it is not even then that question would fall for determination. In any view we have to ascertain what under the provisions of the Act is meant by a person employed and whether the appellant is one such. If he is a person employed then the Additional Commissioner of Workmen's Compensation has to, go into the allegation of the appellant that his services were not terminated in accordance with the provisions of section 41 (1).

A person employed has been defined under the Act and in so far as it is relevant for the purposes of the appeal, section 2(12) (ii) & (iii) alone need be considered. These are set out as under

> "2(12) "person employed" means-
> (ii) in the case of a factory or an industrial undertaking, a member of the clerical staff employed in such factory or undertaking;
> (iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking, a person wholly or principally
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> employed in connection with the business of the establishment, and includes a peon;"'

It is not disputed that the Pallavaram company is a factory and that the appellant is not a member of the clerical staff in that factory. In view of this, admission, the appellant cannot be a person employed under clause 2 (12) (ii) not because he is employed in the Pallavaram company which is itself a matter that has to be determined, but because he is not a member of the clerical staff employed in that factory. The appellants case, therefore, has to be examined under clause (iii) of sub-section (12) of section 2. It has to be noticed that an establishment for the purposes of the clause must be a commercial establishment and even if the clerical department of a factory or an industrial undertaking falls within the definition of commercial establishment, he is not a person in the clerical department of a factory or an industrial undertaking, but is one who is wholly or principally employed in connection with the business of the commercial establishment. Before we examine the meaning of these terms, it is also necessary to consider the definition given in the Act of the terms 'commercial establishment, 'employer and 'establishment' given respectively under clauses (3), (5) & (6) of section 2. These are as follows :-

> "(3) "commercial establishment" means an establishment which is not a shop but which carries on the business of advertising,

commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, brokers' office or exchange and includes such other establishment as the (State) Government may by notification declare to be a commercial establishment for the purposes of this Act;

"(5) " employer" means a person owning, or having charge of, the business of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment;

(6) "establishment" means a shop, commercial establishment, restaurant, eating-house, residential hotel, theatre or any place of public amusement or entertainment and includes such establishment as the (State) Government may by notification declare to be an establishment for the purposes of this Act;"

It is evident that the Madras company is a 'commercial establishment' in terms of the definition as it is a joint stock company, forwarding agents and carries on other activities of a commercial

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nature. It may also be mentioned that under that definition the clerical department of the Pallavaram factory is also a commercial establishment.

As we said earlier, the reason why in clause 12) (iii) of the definition a person who is employed in a clerical department of a factory or an industrial undertaking has been excluded from the definition of a person is because without those words of exception he would have been included. As it was the intention of the Act to confine the definition of a person employed only to a commercial establishment other than clerical department of a factory or an industrial undertaking the words of exception had to be introduced in the definition to reflect that intention. The crucial question for determining whether a person is a person employed is whether he is wholly or principally employed in connection with the business of the establishment. It would not be accurate to focus our attention as was done by the Labour Commissioner only on the question whether the appellant was 'employed in' or 'employed by' because these words employed in without the further requirement that he should be employed in connection with the business of the establishment would be misleading.

The Respondent's Advocate has referred to the Preamble, the Statement of Objects & Reasons and laid emphasis on the intention of the Act which was to cover only cases of those persons who were actually working in a commercial undertaking and not those who were employed in a factory or industrial undertaking. What is sought to be impressed upon is that the test to be applied for ascertaining whether a person is a person employed is not who employs him but where he is employed or works. On this assumption it is contended on behalf of the respondent that it is possible for a person to be employed by one establishment and assigned to work in another establishment and what will determine whether the person so assigned is a person employed is whether the place where he works is or is not a commercial undertaking and if it is not then he is not a person employed. Applying this thesis to the facts of this case, it is submitted that though the Madras Company has

employed the Appellant, it has employed him for working in Pallavaram, the salary though paid by the Madras company was reimbursed from the Pallavaram company and since the appellant on his own admission worked in the Pallavaram company ever since he was appointed he is not a person employed because he was wholly or principally employed in connection with the business of the Pallavaram company which is a factory registered under the Factories Act. In support of this contention he has referred us to The Salem Sri Ramaswami Bank Ltd. v. The Additional Commissioner for Workmen's Com-
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sensation, Chepauk, Madras and another(1), T. P. Chandra v. The Commissioner for Workmen's Compensation, Madras and another(1) and T. Prem Sagar v. The Standard Vacuum Oil Company Madras and Others (3).
What was considered in the first case is not whether the person is a person employed within the meaning of section 2(12) of the Act but whether under section 4(1) (a) which provides that nothing contained in the Act shall apply to persons employed in any establishment in a position of management, the 2nd respondent therein was a person in the position of management and if so whether his appeal under section 41(2) was incompetent. It is evident from this case that the two, objections to the maintainability of the appeal preferred by the second respondent under section 41(2) of the Act which were taken before the Additional Commissioner were : (1) that under section 4(1)(a) of the Act the second respondent had been employed in the Bank in a position of management and (2) that the contention of the second respondent that if he could not be reinstated as Secretary, be, could be reinstated as Cashier was untainable because by a valid notification issued by the Government, Cashiers had been excluded from the purview of the Act. The Additional Commissioner did not record any specific findings on the issue whether the second respondent had been employed as Cashier and whether he is en-, titled to prefer the appeal under s. 41(2). That Court did not in view of the facts of that case consider it necessary to pursue, the matter further. It was only on the question whether the second respondent was occupying a position of management, as such his appeal could not be entertained under section 4 (1) (a) that was considered and decided. The observations of Rajagopalan, J. at page 257 that he was using the expression employed only to mean assign the work of is being sought to support the contention that these words would furnish a test in determining whether a person is a person employed under section 2 (12) (iii). These observations have been torn out of the context, because what the learned Judge says immediately thereafter would negative any such con-

> "In my opinion it is an assignment of work, a valid assignment of the work, by the employer, that should furnish the real test in deciding whether a given employee is a person employed in a position of management within the meaning of section 4 (1) (a)."

We find that throughout the judgment the question whether a person was a person employed within the meaning of section 2 1 2) (iii) has not been mooted. In the second case of Chandra
(1)1956 Vol-2 L.J. p.254.
(3) [1964](5) S.C.R. 1030.
(2) 1957 A.I.R. Vol. 44 p.668.
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also this question was not considered as is clearly apparent from the observations of the learned Chief Justice delivering the Judgment of the Bench at page 669 that it was not contended before them that the Appellant was not a person employed within the meaning of section 2(12) of the Act.

In the third case similarly the decision of this Court turned on the question whether the appellant therein was employed in a position of management. It was held on the facts of that case that he was not a person employed in a position of management and as such did not fall within the exemption of section 4 (1) (a) On the other hand what has been stated by reference to section 2(12) (iii) are useful. Gajendragadkar, J. as he then was observed at page 1036 :

> "The test which has to be applied in determining the question as to whether a person is employed in a commercial establishment is whether he is wholly or principally employed in connection width the business of the said establishment. As soon as it is shown that tie employment of the person is either wholly or principally connected with the business of the establish-ment, he falls within the definition."

The key to section 2 (12) (iii) is whether a person is wholly or principally employed in connection with the business of the commercial establishment. On the very threshold what we have to determine is by whom the respondent is employed. Is he employed by the Madras company or by the Pallavaram company which is a factory and if he is by the former which it is not disputed he is, is he wholly or principally employed by it ? It is contended that the Appellant is employed wholly or principally by the Pallavaram Company because it is the place where he has been working. In our view there is no validity in this submission. On the facts of this case the Pallavaram company is not the employer of the appellant. All relevant facts that have been established and are not disputed point to the irrestible conclusion that the employer is the Madras company. It was this company that appointed the appellant. The, appointment Order of 19th October, 1963 shows that he was appointed as an Assistant in that company. The terms of the Order further show that apart from the salary set out therein on which be was appointed, he was to receive dearness allowance at the rate of 35 per cent of the basic salary or such other rate as the Board of that company may decide from time to time. He has to become a member of the Provident Fund to which both he and the Madras company have to subscribe. The annual bonus was to be calculated in the same manner as the annual bonus payable to other

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Assistants of the company. His services can only be terminated by the Madras company in terms of paragraph 6 of the Order and under paragraph 5 he was required to work either in Madras Office (Office hours 9.15 a.m. to 5.30 p.m.) or Pallavaram (office hours 8 a.m. to 4.30 p.m.) or at any other office or place of business of the company. It is clear from this letter of appointment that he has to work wherever the company directs him to work as such he would be a person wholly or principally employed in connection with the business of the Madras company. Inasmuch as it is apparent that the obligation to work at Pallavaram is under the directions of the company it will be considered to be a part of the business of the company as indeed the words "business of the company" in paragraph 5 govern not only the

obligation to work at Pallavaram but at any other place or places where the company directs him to work. The revised terms of employment of the appellant dated the 28th October, 1965 also show that those terms are applicable to the contracts of all Assistants of the company. It is also to be noticed that the bonus was paid by the Madras company nor is it disputed that his salary and bonus was being paid by that company. The income-tax deductions were made by the Madras company which also furnished a certificate to the tax authority as per Ex. P.9. That company further certified to the Madras Housing Board on January 8, 1966 what the appellant's salary per month and the total salary and allowances which are paid to him by that company were. It may also be mentioned that the appellant's leave had to be granted by the Madras company and not by the Pallavaram company. Ext.M-11 would show that the application for leave was made by the appellant to the Managing Director of the Madras company. One other fact which appears from the evidence of R.W.I., Director of the Madras company who was also the Secretary of the Pallavaram company is that the' appellant was signing bills for Tullies Woodroffee factory at Pallavaram which is another subsidiary of the Madras company. He was also signing the bills of sale of all such manufacture purely for administrative convenience. All these facts support the conclusion that the appellant was employed on the business of the Madras company because he was working under their directions wherever they wanted him to work and whatever work was entrusted to him in terms of the appointment order. The mere fact that he was working in Pallavaram does not make him an employee of that company nor does the Pallavarm company become his employer because neither that company pays his salary nor does it grant leave, nor has it any obligation towards the, appellant in respect of Provident Fund, bonus or any other emoluments, nor for that matter can it suspend or dismiss him. Indeed the very order of termination of his services was made by he Madras company and not by the Palla-
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varm company. On the 15th October, 1966 this is what the Director of the Madras company wrote to the appellant
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" I refer to our letter of appointment of 19th October, 1963.
I have given very serious consideration to the question of renewing your Agreement but have come to the conclusion that in the period during which you have been employed by this company your work has not reached the standard which was expected and therefore it is not possible to renew your appointment.
Will you kindly therefore take this letter as being the requisite one month's notice of termination of your services in accordance with paragraph 6 of the letter under reference.
If you wish to discuss this matter with me I will be available at 3.30 p.m. on Tuesday the 18th October, but I must advise you that I have taken an irrevocable decision in the matter."
This letter clearly shows that the employer is the Madras company because it is only the employer who can terminate the services of an employee. It is, therefore, idle to suggest that the Pallavaram company was the employer merely because the Madras company had asked him to work in that company.
It is further submitted by the respondent that the Madras company and the Pallavaram company being two incorporated

companies they were separate and independent legal entities and that merely because the Madras company has a controlling interest in the Pallavaram company does not vest the administration of Pallavaram company in the Madras company. Whether it is so or not we have no evidence, nor is there anything to show under what arrangements between the two companies, the Madras company was managing the affairs of the Pallavaram company. If we have to accept the contention of the learned Advocate for the respondent that because the appellant was permitted by the Madras company to work in the Pallavaram company he was employed wholly or principally in connection with the business of the Pallavaram company, he will be an employer-less-employee because even though Pallavaram company has no control over him or his work nor has it the power to suspend or discharge him, he would nonetheless be an employee of that company for the purposes of section 2(12) (iii). This would result in an incongruity and would have the effect of arming the employer with a device to circumvent the provisions of the Act inasmuch as all that an employer has to do is to make the employee work at places which

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are factories or industrial undertakings and plead, when he dismisses him without reasonable cause, that he is not a person employed. We do not think that such a result was intended, nor is a conclusion so baneful deducible from the provisions of the Act.

We accordingly allow the appeals with costs, one set and remand the case to the Additional Commissioner of Workmen's Compensation to hear and dispose of the appeal filed by the appellant.

S.N. Appeals allowed.

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