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"CONTRACT FOR SERVICE" OR "CONTRACT OF SERVICE": ISSUES ARISING IN THE CONTEXT OF AN INSURANCE DISPUTE

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On 15 April 2020, the Supreme Court of India, delivered an important judgment in the case of '*Sushilaben Indravadan Gandhi & Anr. v. The New India Assurance Company Limited & Ors.*'[1], wherein, it explained the key principles to differentiate between *'Contract for Service'* and '*Contract of Service'*, while analysing an insurance claim.

BRIEF FACTS OF THE CASE

Dr. Alpesh Gandhi, an honorary ophthalmic with the Rotary Eye Institute, Navasari had died while travelling in a mini-bus that was owned by the Rotary Eye Institute, Navsari due to rash and negligent driving of the driver. The insured, Rotary Eye Institute, had taken up a "Private Car B" policy from the New India Assurance Company Limited wherein, it had paid an additional premium for endorsement IMT-5 ("**Insurance Policy**"). The endorsement IMT-5 gave additional accidental personal coverage to unnamed passengers other than the insured, his paid driver or cleaner or a person employed by the insured and coming within the scope of Workman Compensation Act, 1923 to the scale of 100% compensation in case of death.

A petition under Section 166 of the Motor Vehicles Act, 1988 before the Motor Accidental Claim Tribunal ("**MACT**") was filed by the wife of the deceased surgeon against the insurance company, insured hospital and the driver of the mini-bus and claimed a compensation of INR 1 Crore for the death of Dr. Alpesh Gandhi. The MACT held that the employment arrangement between the deceased surgeon and the insured hospital to be a *'Contract for Service'* and thus the deceased was not an employee of the insured hospital. On this basis, the MACT directed the insurance company along with the insured hospital and driver of the mini-bus to pay compensation of Rs.37,63,100/- along with interest at the rate of 8%p.a.

On an appeal being filed by the insurance company, the Hon'ble High Court of Gujarat gave a contrary judgment relying on the limitation of liability clause under the Insurance Policy which exempted the insurance company from any liability towards third party, wherein the death arises out of and in the course of the employment of such person. It further held that since the contract between the insurance company and the deceased surgeon was a *'Contract of Service',* the liability of insurance company toward the deceased doctor was limited to the extent of Rs.50,000/-. Being aggrieved by the impugned decision of the Hon'ble High Court of Gujarat, the wife of the deceased surgeon filed an appeal before the Hon'ble Supreme Court of India for enhancing the amount of compensation.

ISSUES CONSIDERED BY THE SUPREME COURT

The main issues that arose for consideration of the Hon'ble Supreme Court were as follows:

(a) Whether the deceased surgeon could have been said to be an employee of the insured hospital; and
(b) Whether the limitation of liability clause was to be applied in favour or against the insurance company on the basis of determination of the contractual arrangement between the deceased surgeon and insured hospital.

[1] *Sushilaben Indravadan Gandhi & Anr. v. The New India Assurance Company Limited & Ors.,* Civil Appeal No.2235 of 2020 (arising out of SLP (Civil) No.1170 of 2019) dated 15.04.2020 ("**Sushilaben Judgement**")

THE SUPREME COURT'S APPROACH

Contract of Service or Contract for Service

The Supreme Court of India took note of the various judgments which laid down the tests to distinguish between a *'Contract for Service'* and a *'Contract of Service'*. The Court undertook a detailed review of previous cases on this aspect, and noted that there are no fixed tests that can be applied, and that each fact situation would need to be analysed for arriving at a conclusion on this aspect. It also observed that the early tests of the extent to which an employer exercises "control" over the person engaged, cannot be applied in isolation. It noted that as the society has progressed from agrarian society to a complex modern society in the computer age, the earlier simple test of control, whether or not actually exercised, has now yielded more complex tests in order to decide complex matters which would have factors both for and against the contract being a 'Contract of Service' as against a 'Contract for Service'. The Court observed that the early 'control of the employer' test in the sense of controlling not just the work that is given but the manner in which it is to be done obviously breaks down when it comes to professionals who may be employed.[2]

The Court explained the evolution of cases, both in India and in the UK and U.S. on this aspect and noted that there are certain key criteria to determine on which side of the line the contract falls, such as:

(i) Existence of right in the master to supervise and control the work not only in the matter of directing what work has to be done but also the manner in which the work shall be done[3];
(ii) Test as to whether the person employed is integrated into the employer's business or is a mere accessory[4];
(iii) Three-tier test laid down by few English judgments, i.e. whether wage or other remuneration is paid by the employer, whether there is sufficient degree of control by the employer and other elastic tests to be applied to variety of cases[5];
(iv) Test as to who owns the assets with which the work is to be done or who ultimately makes a profit or loss so that one may determine whether a business is being run for the employer or on one's own account, when it comes to work being performed by independent contractors as against piece-rated labourers[6];
(v) Economic reality of control test laid down by U.S. decisions which tests whether the employer has economic control over the work subsistence, skill and continued employment to determine whether a particular worker works for himself or for his employer;[7] and
(vi) Test as to whether the person who has engaged himself to perform service performs them as a person in business on his own account.[8]

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[2] Para 24
[3] Para 12 of the Sushilaben Judgement, referring to *Dharangadhara Chemical Works Ltd. v. State of Saurashtra* 1957 SCR 158
[4] Para 12, 24 of the Sushilaben Judgement, referring to *Dharangadhara Chemical Works Ltd. v. State of Saurashtra* 1957 SCR 158
[5] Paras 23, 24 of the Sushilaben Judgement, referring to *E v. English Province of Our Lady of Charity and Anr.* ,2012 EWCA Civ 938
[6] Para 24 of Sushilaben Judgement, referring to *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments* (1974) 3 SCC 498
[7] Para 18, 24 of Sushilaben Judgement, referring to *Hussainbhai v. Alath Factory Thezhilali Union* (1978) 4 SCC 257,
[8] Para 24 of Sushilaben Judgement, referring to *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374

The Court held that in a complex hybrid situation, no single test of universal application but a conglomerate of all applicable tests taken on the totality of the fact situation in a given case would ultimately yield in deciding whether the contract is a 'Contract of Service' or 'Contract for Service'.[9] Depending on the different factual scenario, the Court emphasized that courts can only perform a balancing act weighing all relevant factors which point in one direction as against those which point in the opposite direction to determine the nature of the contractual arrangement between the parties. It further propounded that the balancing process may depend on the context in which a finding is to be made. Thus, if the context is one of a beneficial legislation being applied to weaker sections of society, the balance tilts in favour of declaring the contract to be 'Contract of Service'.[10] On the other hand, where the context is that of legislation other than beneficial legislation or only in the realm of contract, and the context of that legislation or contract would point in the direction of the relationship being a contract for service then, other things being equal, the context may then tilt the balance in favour of the contract being construed to be one which is for service.[11]

The Supreme Court applied the balancing process to examine the contractual arrangement between the insured hospital and the deceased surgeon and held that the factors which make the doctor's contract as a "*Contract for Service"* outweigh the factors which would point in the opposite direction. Thus, the Court observed that as per the terms of the contract, the deceased surgeon was an *independent professional* and not a regular employee of the insured hospital.

Principle of Contra Preferentum

The Supreme Court further applied the well settled principle of *contra preferentum*, i.e. the exemption of liability clauses are to construed against the insurance company and in favour of an insured in case of any ambiguity. It relied upon various judicial precedents, such as, *United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd.,*[12] *Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd.*[13]*,* which explained the principle of *contra preferentum,* as a rule of resolving ambiguity in the wording of the policy by adopting the construction favourable to the insured and against the party who prepared it.

It further cited various earlier judgments, namely, *General Assurance Society Ltd. v. Chandumull Jain*[14]*, United India Insurance Co. Ltd. v. Pushpalaya Printers*[15]*, BHS Industries v. Export Credit Guarantee Corpn. Ltd.*[16] which held that: "*in a contract of insurance there is a requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt*."

In the facts before it, the Supreme Court determined that the deceased was an independent professional and not a regular employee of the insured hospital. It interpreted the exemption clause in the Insurance Policy, to hold that such a clause applied only in the context of employment of a person regularly employed by employer and not an independent professional, such as the deceased. Even otherwise, the Supreme Court explained, that in case of any ambiguity, *contra proferentum* rule must

[9] Para 24 of Sushilaben Judgement
[10] As was done in *Dharangadhara Chemical Works Ltd. v. State of Saurashtra* 1957 SCR 158, *Birdhichand Sharma v. First Civil Judge* (1961) 3 SCR 24, *D.C.Dewan Mohideen Sahib and Sons v. Secretary, United Beedi Workers' Union* (1964) 7 SCR 646, *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments* (1974) 3 SCC 498, *Hussainbhai v. Alath Factory Thezhilali Union* (1978) 4 SCC 257, *Shining Tailors Tailors v. Industrial Tribunal II, U.P.* (1983) 4 SCC 464, *P.M. Patel & Sons v. Union of India* (1986) 1 SCC 32 and *Indian Banks Assn. v. Workmen of Syndicate Bank* (2001) 3 SCC 36
[11] Para 25 of Sushilaben Judgement
[12] (2016) 3 SCC 49
[13] (2016) 15 SCC 315
[14] (1966) 3 SCR 500
[15] (2004) 3 SCC 694
[16] (2015) 9 SCC 414

be applied, thus making it clear that such 'employment' refers only to regular employees of the hospital and not the deceased surgeon who was an independent professional.

CONCLUSION

The recent decision of the Supreme Court brings clarity towards distinguishing between 'Contract for Service' and 'Contract of Service', especially in the context of engagement of professionals for services. The Court has clarified that the relationship between the employer and employee should not be limited to determining the *control* of the employer over the employee, but the same will depend on the specific factual scenario, interpretation of contractual terms between the parties and balancing out the various aspects.

The Court has also held that interpretation of contracts will depend on the context in which the legislation is being applied and that in cases of ambiguity, a beneficial legislation needs to be interpreted in favour of the insured. The present decision was in the context of such a beneficial legislation on insurance. The Court reviewed and explained the principles of the insurance policy, and also noted that the in cases of ambiguity in interpretation, the principle of *contra preferentum* would enable an interpretation in favour of the insured.

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