(1959) 10 BOM CK 0016

Bombay High Court

Case No: Criminal Ref. No. 94 of 1959

State		APPELLANT
	Vs	
Shankar Balaji Waje		RESPONDENT

Date of Decision: Oct. 9, 1959

Acts Referred:

- Factories Act, 1948 - Section 2(1), 79, 80

Citation: AIR 1960 Bom 296 : (1959) 61 BOMLR 1676 : (1960) CriLJ 896 : (1961) 2 LLJ 8

Hon'ble Judges: Tarkunde, J; S.T. Desai, J

Bench: Division Bench

Advocate: Goveronment Pleader, for the Appellant; M.V. Paranjpe, for the Respondent

Judgement

S.T. Desai, J.

(1) This Reference by the Additional Sessions Judge, Nasik, raises the vexed question of the connotation of the expression "employed" in S. 2(1) of the Factories Act which gives the interpretation of a "worker." It involves a decision trifling in pecuniary amount, but of considerable consequence to a large number of persons engaged as bidi rollers by manufacturers of bidis. The decided cases do not lay down any definition exclusive or inclusive of the expression "employed" nor any criterion of absolute applicability as to the exact conception of that expression used in the Factories Act (to be referred to by us as the Act). The question tha we have to determine is whether the relationship of employer and employee subsisted between the owner of a Bidi factory and a person rolling bidis in that factory and the question arose when the Inspector of Factories prosecuted the owner for contravening the provisions relating to leave in S. 79 of the Act. Four indices of a contract of service were discussed in a decision of the House of Lords in England and have been referred to in a recent decision of our Supreme Court. Of this mor hereafter.

(2) The accused is the owner and occupier of a Bidi factory, Jay Prakash Sudhir Private Limited and oe Pandurang Londhe did the work of rolling bidis in that

factory. The services of Pandurang Londhe and 59 other persons doing similar work were terminated by the accused as from 17-8-1957 by putting up a notice dated 12-8-1957. The Inspector of Factories paid a visit to the factory of the accused on 22-8-1957 and found that Pandurang Londhe had worked for 70 days and had earned leave for 4 days which he had not enjoyed and took the view that he should have been paid wages for the leave period. The position as regards the other 59 persons was similar and the Factory Inspector filed sixity complaints against the accused alleging contravention by him of the provisions of S. 79(2) of the Act. The principal defence of the accused and one with which we are here concerned was that Pandurang Londhe was no a "worker" within the meaning of that expression as defined in the Act as he wa not "employed" by the accused Accused is the owner of a number of bidi factories where inter alia the work of rolling bidis is done by hundreds of persons. The learned First Class Magistrate, Sinnar, held against the accused and convicted and sentenced him to pay a fine of Rs.10/-. The matter was carried in revision to the Sessions Court at Nasik and the learned Additional Sessions Judge being of the view that the order of conviction against the accused should be quashed has made a report to this Court under S. 438 of the Criminal Procedure Code.

(3) Certain facts which are not in dispute and not disputable in this case are that in case of the persons who attend the factory of the accused for the work of rolling bidis the hours of work are fixed but there is no compulsion to attend the factory during those hours. They may attend the factory and may leave it at any time they choose during the working hours and can remain absent. There is no actual ''supervision'' on their wor in the ordinary sense of that expression. They are not paid a fixed daily or weekly wage but are paid at fixed rates on the quantity of bidis turned out by them. It is also clear from the evidence that there was no express contract between the accused and Pandurang Londhe about the "work" and there was no stipulatin about the minimum quantity of work to be done by him every day. The learned Judge below has referred to a decision of the Supreme Court. Chintaman Rao and Another Vs. The State of Madhya Pradesh, and to some other decisions and observed that it is clear from the decided cases that the real test to find out if a person is a worker or not is to see whether the owner or occupier of the factory exercises any supervision and control over him as to the details of his work and on a cosideration of the facts stated above he has expressed the view that Pandurang Londhe and the other persons who did the work of rolling bidis in the factory of the accused were not "workers" within the four corners of the Act. He has also pointed out that in the circumstances of the case it would be almost impossible for the accused to comply with some of the provisions of the Act.

(4) It has been argued before us by the learned Government Pleader that the real test is not whether the owner or occupier of the factory actually exercises any supervision or control but whether existence of that right or authority its exercise or non-exercise during the actual work of rolling bidis is irrelevant. It is also urged that

the operation of rolling bidis is one and so simple that no direct supervision is necessary. The work does not run into any details and the initial directions would be all that would be necessary and those also would be meagre. Having regard to the nature of the work and particularly the fact that payment was made on piece-work basis, so the argument ran, no direct supervision of the operation was at all necessary but the right or authority to control the work was all along there. The learned Government Pleader has relied on the following observation in the judgment of the Supreme Court in Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, :

"The principle which emerge 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 shal do his work, or to borrow the words of Lord Uthwatt at page 23 in Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd. 1947 1 AC 23. ''The proper test is whether or not the hirer had authority to control the manner or 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 very 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 work was done. . . . The correct method of approach, therefore, would be of the work there was due control and supervision by the employer."

(5) On the other hand, it has been argued by Mr. M. V. Paranjpe, learned counsel for the accused, that the facts of the case must lead to the conclusion that there was in this case no control and no supervision and the relationship of the accused and the bidi roller was not that of an employer and an employee or master and servant but that the bidi roller was really in the position of an independant contractor. Strong reliance has been placed on the following observations from a decision of the Madras High Court reported in S. Palaniappa Mudaliar v. Addl. First Class Magistrate Kulittalai (1958) 14 FJR 445: AIR 1958 Mad 602:

"A person working fr the owner of an establishment on the conditions come when you like go when you like, work when you like, stop when you like, work as fast as you like can, work as slow as you like work on what you like or not at all'', cannot be said to be ''employed'' by the owner of the establishment and will not fall within the definition of ''worker'' in S. 2(1) of the Factories Act, 1948," Learned counsel for the accused has also relie on certain observations in the case of Chintaman Rao and

Another Vs. The State of Madhya Pradesh, recently decided by the Supreme Court.

(6) In Chintaman Rao and Another Vs. The State of Madhya Pradesh, the Supreme Court has considered the concept of employment in Section 2(1) of the Act which defines the expression "worker" as under:

""worker'' means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in clearning any part of the machinery or premises used for manufactuing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process." Their Lordships observed at p. 391.

"The concept of employment involve 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."

"There is a well understood distinction between a contractor and workman and between contract for service and contract of service.

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A ''contractor'' is a person who in the pursuit of an indepedent business, undertakes to do specific jobs of work for other persons without submitting himself to their control in respect to the details of the work."

(7) From the current of the decisions on the subject and particularly the two decisions of the Supreme Court to which we have already referred, the following propositions are clearly deducible:

1. The concept of employment in the definition of ''worker'' in S. 2(1) of the Act involves three ingredients of employer, employee and the contract of employment. 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;

2. The prima facie test for the determination of the relationship of employer and employee is whether or not the owner or occupier of the factory had right to supervise and control the manner of execution of the work in question;

3. The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business;

4. No distinction can be drawn from the circumstance of a person being remunerated at so much per day or by the job or piece-work;

5. The circumstance that rules regarding hours of work, etc. applicable to other persons may not be conveniently applied to the case of person doing particular work such for instance that of bidi rollers does not prevent the relationship of employer and employee existing between the management and the persons doing such work.

(8) But there are many contracts of service where the management cannot be said ostensibly to control or supervise directly the manner in which the work is to be done by persons engaged for the purpose although it may be clear that the work doen is an integral part of the business. The pima facie test of supervision and control is not always easy to apply in the context of modern industrial conditions. Though the broad principles governing the question have been affirmed in the decided cases no conclusive test and no definite criterion of universal applicability has been laid down for the determination of the question whether in a given case a person is a worker or an independent contractor. Doubt and difficulty must beset the question for contracts which fall under either category have at times many characteristicsand features which are common and the inquiry no doubt perplexing must ultimatelybe resolved like any complicated question of fact.

(9) The border line between an employee employed in service and an independent contractor is at times rather fine and a clear cut demarcation is not always possible. At one end of the scale can be the case, to take the illustration of a bidi roller who attends and works in a bidi factory and is paid wages in the ordinary sense that is on periodical basis. The nature of the work being very simple little direct supervision would be necessary on the part of the employer except for the purpose of seeing that the bidi roller puts in full time and regular work. But the control and supervision is indubitably there, and no one would suggest that the bidi roller is not a worker employed by the owner or occupier of the factory. At the other end of the scale can be the case of a contract by the owner of a bidi factory with a Sattedar to whom the management supplies tobacco and bidi leaves and the Sattedar fulfils the contract by engaging persons to do the work the rolling bidis in his own place or in the houses of those persons. Such was the substantial position in thecase of Chintaman Rao and Another Vs. The State of Madhya Pradesh, decided by the Supreme Court and as their Lordships held in that case theSattedar cannot be said to have bee employed as a ''worker'' by the management. He only performs his part of the contract by making bidis and delivering them at the factory. But between these two cases can lie a number and variety of intermediate cases where the circumstances may point towards one conclusion or the other.

(10) Four indicia of a contract of service derived from authorities of Courts in England were recapitulated by Lord Thankerton in Short v. Henderson Ltd, decided by the House of Lords and reported in (1946) 62 T. L. R. 427:

"There are (a) the master''s power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master''s right to control the method of doing

the work; and (d) the master''s right to suspension or dismissal."

After stating the four indicia Lord Thankerton observed:

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these indicia. For example, (a), (b) and (d), and probably also (c), are affected by the statutory provisions and rules which restrict the master''s choice to men supplied by the labour bureaux, or directed to him under the Essential work provisions, and his power of suspension or dismissal is similarly affected. These matters and all also affected by trade union rules, which are, at least primarily made for the protection of wages earners. The statement of Lord Justice Clerk Alness in Park v. Wilsons and Clyde Coal Co. 1928 SC 121 that selection, payment and control are inevitable in every contract of service, is clearly open to reconsideration."

After referring to the four indicia of a contract of service and the observations quoted above Bhagwati, J. observed in the case of Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, :

"Until the position is resated as contemplated in 1946 TLR 427 we may take it as the prima facie test for determining the relationship between master and servant."

(11) It is not our purpose to suggest any precise orientation of those four elements of indicia of a contract of service but it seems permissible to us humbly to state that the principles enunciated in the decisions of the highest tribunals to which we have referred leave it open to the court to evolve necessary corollaries, albiet within the matrix of those principles. ''Supervision'' and ''control'' are not expressions of inflexible import and exercise of the same can in some cases be of a very nebulous character. The scope as also the manner o the exercise of supervision and control in a given case must of necessity depend on a variety of factors such for instance a the nature of the work done by a person, the circumstances in which and the place where he is asked or permitted to do the work, the skill or technique or method, if any, required of him in performance of the work, the status and the number of persons engaged in performance of the work and in a large majority of cases on the mode or manner of remuneration adopted in respect of the particular work required of a person.

(12) Applying the prima facie test of the existence of right to supervision and control the manner in which the work is to be done as determinative of the existence of the relationship of empolyer and employee and considered in the light of the observations we have made, the facts of the case before us lead to the conclusion tha the bidi roller Pandurang Londhe was in the employment of the accused and a ''worker'' within the meaning of that expression in S. 2(1) of the Act. The root of the matter in cases of this type often lies in the nature of the work and the mode of

remuneration adopted by the management. The nature of the work in the case before us being of the simplest and a well-defined task and the remuneration being on the basis of quantity of work done little direct supervision actually needed to be exercised but such supervision as was felt necessary by the management was of course there and whatis more important there was the right to supervise the manner in which the work was to be done. It is abundantly clear that it was due to these two elements of the simple nature of the operation and payment on the basis of quantity of work actually done that the management had little occasion to give specific directions as to the manner of doing the work or to watch the progress of the work. These aspects appear to us to be the speciality of the situation. The modus operandi adopted by the management shows that the right and authority to contrl the manner in which the work of turning bidis was to be done was also there. It cannot seriously be disputed that the management had the power to control and give directions to the bidi rollers as to the manner of rolling bidis but the nature of the operation being very simple, any occasion for actual exercise of that power could hardly have arisen. But then it was urged on behalf of the accused that the bidi roller was free to go to the factory when he liked and leave it when he liked and was not even bound to put in any minimum quantity of work. Now it would seem that in the circumstances of the case and having regard to the mode of payment and the system of work adopted by the management itself this freedom was more apparent than real or substantial. In any case this freedom even if real and though of some congency cannot, in out judgment, be regarded as critical or decisive of the relationship. A contrary view founded simply on this element of freedom to work for as much time as the bidi roller liked would enable dextrous employers to avoid provisions of law otherwise applicable and aimed at protecting those who are inops consilii by adopting a modus operandi to the ostensible nature of which little objection can be taken and with which an average worker may readily fall in line. But the Court will look at the body and substance of the arrangement and then determine the real relationship of the parties and fasten responsibility according to its true and real character. It is a question of substance and not of mere form. For all these reasons we are of the opinion that the contention pressed on behalf of the state must be upheld.

(13) There remains for consideration a further contention urged on behalf of the accused. It was contended that the order of conviction was not sustainable even if the reltionship of employer and employee existed between the parties. the argument was that S. 79 which deals with the question of "leave with wages" cannot apply to a worker who is paid wages according to the quantity of work done by him and not per day or per week. It was said that there being no fixed hours of work and no fixed daily wage in case of such worker S. 79 can have no operation. Sections 79 and 80 read together make it abundantly clear that wages for period of leave are payable to a worker at a rate equal to the daily average of the total full time earnings for the days on which he has worked and in our opinion the right to claim

wages for leave can be climed by a worker whose wages are regulated on the basis of the amount of work put in by him. The present contention must therefore be negatived.

(14) In the result the order of conviction and sentence passed by the learned Magistrate must be upheld and there will be no other order on the Reference.

(15) Revision dismissed.