Shankar Balaji Waje

Vs

State of Maharashtra

Criminal Appeal No. 63 of 1960

(J. L. Kapur, K. Subha Rao, Raghuvar Dayal JJ)

27.10.1961

JUDGMENT

RAGHUBAR DAYAL, J. –

This appeal, by special leave, is directed against the order of the High Court of Bombay, rejecting the reference made by the Additional Sessions Judges, Nasik, and confirming the conviction of the appellant under s. 92 of the factories Act, 1948 (Act LXIII of 1948), hereinafter called the Act.

The appellant is the owner and occupier of "Jay Parkash Sudhir Private Ltd., a factory which manufactures bidis. Pandurang Trimbak Londhe, hereinafter called Pandurang, rolled bidis in that factory for a number of days in 1957. He ceased to do that work from August 17, 1957. It was alleged by the prosecution that the appellant terminated Pandurang's services by a notice put up on August 12, 1957. The appellant, however, admitted the putting up of such a notice, but denied that Pandurang, the labourer, had left his service of his own accord.

Inspector Shinde, P.W. I, visited this factory on August 22, 1957. He found from the weekly register and the wages register of the Factory that Pandurang worked for 70 days and earned 4 days leave. Pandurang, however, did not enjoy that leave and was therefore entitled to be paid wages for that period i.e., for 4 days' leave. He was not paid those wages, and therefore, the appellant contravened the provisions of s. 79(11) of the Act. He consequently submitted a complaint against the appellant to the Judicial Magistrate First Class, Sinnar.

It was contended for the accused before the Magistrate that Pandurang was not a worker within the meaning of that expression, according to s. 2(1) of the Act and that therefore no leave could be due to him and the appellant could not have committed the offence of contravening the provisions of s. 79(11). The learned, Magistrate did not agree with the defence contention and held Pandurang to be a worker and convicted the appellant of the offence under s. 92 read with s. 79(11) of the Act and sentenced him to a fine of Rs. 10.

It may be mentioned that this case was a test case. Similar cases against the appellant with respect to the non-payment of leave wages to other workers were pending in the Court.

The appellant went in revision to the Court of the learned Additional Sessions Judge, Nasik. The Sessions Judge was of the opinion that Pandurang was not a worker and that the conviction of the appellant was bad. He accordingly referred the case to the High Court. The High Court, however did not agree with the view of the Sessions Judge and, holding that Pandurang was a worker, rejected the revision and confirmed the conviction and sentence. It is against this order that this

appeal has been filed.

Two points have been raised on behalf of the appellant. One is that Pandurang was not a worker within the meaning of that expression in the Act. The other is that even if Pandurang was a worker, he was not entitled to any leave wages under s. 80 of the Act.

The first contentions is based on the established facts of the case which, it is submitted, do not make out the relationship of master and servant between the appellant and Pandurang, inasmuch as they indicate that the appellant had no supervision and control over the details of the work Pandurang did in the factory. The following are the established facts :

(1) There was no agreement or contract of service between the appellant and Pandurang.

(2) Pandurang was not bound to attend the factory for the work of rolling bidis for any fixed hours of work or for any fixed period. Hew was free to go to the factory at any time he liked and was equally free to leave the factory whenever he liked. Of course, he could be in the factory during the hours of working of the factory.

(3) Pandurang could be absent from work on any day he liked. He could be absent up to ten days without even informing the appellant. If he was to be absent for more than ten days he had to inform the appellant, not for the purpose of taking this permission or leave, but for the purpose of assuring the appellant that he had no intention to give up work at the factory.

(4) There was no actual supervision of the work Pandurang did in the factory.

(5) Pandurang was paid at fixed rates on the quantity of bidis turned out. There was however no stipulation that he had to turn out any minimum quantity of bidis in a day.

(6) Leaves used to be supplied to Pandurang for being taken home and cut there. Tobacco to fill the bidis used to be supplied at the factory. Pandurang was not bound to roll the bidis at the factory. He could do so at his place on taking permission from the appellant for taking tobacco home. The permission was necessary in view of Excise Rules and not on account of any condition of alleged service.

(7) At the close of the day, the bidis used to be delivered to the appellant and bidis not up to the standard, used to be rejected.

The second contention is based on the inapplicability of the provisions of ss. 79 and 80 of the Act to the case of the appellant, inasmuch as it is not possible to calculate the number of days the worked or the total full time earnings for the days on which he worked during the relevant period mentioned in s. 80.

On behalf of the respondent State, it is submitted that the appellant had the right to exercise such supervision and control over the work of Pandurang as was possible with respect to the nature of Pandurang's work which was of a very simple kind and that therefore Pandurang was a worker. It is further urged that there is no difficulty in calculating the number of working days or the total full-time earnings contemplated by s. 80 of the Act.

We have given very anxious consideration to this case, as the view taken by the Court below in this case had been stated to be the right view in the decision of this Court in Shri Birdhichand Sharma v. The first Civil Judge, Nagpur [[1961] 3 S.C.R. 161], on which reliance is placed by the respondent. The facts of that case are distinguishable, and only some of the facts of that case are similar to some of the facts of this case. The similar facts are only these : Pandurang as well as the workers in that case could go to the factory at any time and leave it at any time, within the fixed hours of work and they were paid at piece rates and the bidis below the standards were rejected. It is to be noticed that the decision in that case is based on facts which do not exist in the present case. That decision, therefore, is distinguishable and the opinion about the view of the High Court in the present case to be correct, appears to have been expressed without noticing that the facts of this case are different in material respects from the facts of the case this Court was deciding. The decision of that case it based really on the following facts :

(1) The alleged workers had to work at the factory.

(2) Their attendance was noted.

(3) If they came to the factory after mid-day, they were not given any work and they thus lost wages.

(4) The management had the right to remove them if they stayed away for a continuous period of eight days.

In the present case, Pandurang could work at the house if the appellant permitted tobacco to be taken home. There is nothing on record to show that the attendance is noted. Of course, the days Pandurang worked could be found out from the work register. It is not the case here that no work was to be given to Pandurang if he went to the factory after mid-day. There is no allegation that the appellant had the power to remove him, as a result of continued absence for a fixed number of days. We are therefore of opinion that the decision in Birdhichand's Case [[1961] 3 S.C.R. 161] is distinguishable on facts and cannot be applicable to the facts of this case.

The one essential ingredient which should exist to make a person come within the definition of 'worker' in cl. (1) of s. 2 of the Act is that he be employed in one of the processes mentioned in that clause. There is no dispute that the work which Pandurang did came within one of such processes. The sole question for determination then is whether Pandurang can be said to be employed by the appellant.

This Court, in Shri Chintaman Rao v. The State of Madhya Pradesh [[1958] S.C.R. 1340, 1346, 1349, 1350, 1351], said :

> "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."

Employment brings in the contract of service between the employer and the employed. We have mentioned already that in this case there was no agreement or contract of service between the appellant and Pandurang. What can be said at the most is that whenever Pandurang went to work,

the appellant agreed to supply him tobacco for rolling bidis and that Pandurang agreed to roll bidis on being paid at a certain rate for the bidis turned out. The appellant exercised no control and supervision over Pandurang.

Further s. 85 empowers the State Government to declare that certain provisions of the Act would apply to certain places where a manufacturing process is carried on, notwithstanding the persons therein are not employed by the owner thereof but are working with the permission of or under agreement with such owner. This provision draws a distinction between the person working being employed by the owner and a person working with the permission of the owner or under agreement with him. We are of opinion that the facts of this case strongly point to Pandurang's working with the permission of or under agreement with the owner and not on any term of employment by the owner.

Further, the facts of the case indicate that the appellant had no control and supervision over the details of Pandurang's work. He could not control his hours of work. He could not control his days of work. Pandurang was free to absent himself and was free to go to the factory at any time and to leave it at any time according to his will. The appellant could not insist on any particular minimum quantity of bidis to be turned out per day. He could not control the time spent by Pandurang on the rolling of a bidi or a number of bidis. The work of rolling bidis may be a simple work and may require no particular supervision and direction during the process of manufacture. But there is nothing on record to show that any such direction could be given.

In this connection reference may again be made to the observation at page 1349 in Shri Chintaman Rao's Case [[1958] S.C.R. 1340, 1346, 1349, 1350, 1351]. The Court was considering whether the Sattedars were workers or were independent contractors. The Sattedars used to receive tobacco from the management and supply them rolled bidis. They could manufacture bidis outside the factory and could also employ other labour. It was, on these facts, that it was said :

"The management cannot regulate the manner of discharge of his work."

In the present case too, Pandurang used to be supplied tobacco. He could turn out as many bidis as he liked and could deliver them to the factory when he wanted to cease working. During his period of work, the management could not regulate the manner in which he discharged his work. He could take his own time and could roll-in as many bidis as he liked. His liability under the daily agreement was discharged by his delivering the bidis prepared and the tobacco remaining with him unused. The appellant could only order or require Pandurang to roll the bidis, using the tobacco and leave supplied to him, but could not order him as to how it was to be done. We are therefore of opinion that the mere fact that the person rolling bidis has to roll them in a particular manner can hardly be said to give rise to such a right in the management as can be said to be a right to control the manner of work. Every worker will have to turn out the work in accordance with the specifications. The control of the management, which is a necessary element of the relationship of master and servant, is not directed towards providing or dictating the nature of the article to be produced or the work to be done, but refers to the other incidents having a bearing on the process of work the person carries out in the execution of the work. The manner of work is to be distinguished from the type of work to be performed. In the present case, the management simply says that the labourer is to produce bidis rolled in a certain form. How the labourer carries out the work is his own concern and is not controlled by the management, which is concerned only with getting bidis rolled in a particular style with certain contents.

Further, this Court, in Shri Chintaman Rao's Case [[1958] S.C.R. 1340, 1346, 1349, 1350, 1351], examined the various provisions of the Act and then said :

> "The scheme of the aforesaid provisions indicates that the workmen in the factory are under the direct supervision and control of the management. The conditions of service are statutorily regulated and the management is to conform to the rules laid down at the risk of being penalised for dereliction of any of the statutory duties. The management obviously cannot fix the working hours, weekly holidays, arrange for night shifts and comply with other statutory requirements, if the persons like the Sattedars, working in their factories and getting their work done by others or through coolies, are workers within the meaning of the Act. It is well nigh impossible for the management of the factory to regulate their work or to comply with the mandatory provisions of the Act. The said provisions, therefore, give a clear indication that a worker under the definition of the Act is a person who enters into a contract of service under the management and does not include an independent contractor or his coolies or servants who are not under the control and supervision of the employer."

It can be said, in the present case too, that the appellant could not fix the working hours or weekly holiday or make arrangements for night shifts and comply with other statutory requirements, if Pandurang be held to be a worker within the meaning of the Act. We are therefore of opinion that Pandurang was not a worker.

It is true, as contended for the State, that persons engaged to roll bidis on job work basis could be workers, but only such persons would be workers who work regularly at the factory and are paid for the work turned out during their regular employment on the basis of the work done. Piece-rate workers can be workers within the definition of 'worker' in the Act, but they must be regular workers and not workers who come and work according to their sweet will. It is also true, as urged for the State that a worker, within the definition of that expression in the Act, need not be a whole-time worker. But, even then, the worker must have, under his contract of service, an obligation to work either for a fixed period or between fixed hours. The whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master.

We may say that his opinion further finds support from what we hold on the second contention. If Pandurang was a worker, the provisions about leave and leave wages should apply to him. We are of opinion that they do not and what we say in that connection reinforces our view that Pandurang was not a worker as the three criteria and conditions laid down in Shri Chintaman Rao's Case [[1958] S.C.R. 1340, 1346, 1349, 1350, 1351] for constituting him as such are not fulfilled in the present case.

Before discussing the provisions of ss. 79 and 80 of the Act, which deal with leave and wages for leave, we would like to state that the terms on which Pandurang worked, did not contemplate any leave. He was not in regular employ. He was given work and paid according to the work he turned out. It was not incumbent on him to attend to the work daily or to take permission for absence before absenting himself. It was only when he had to absent himself for a period longer than ten days that he had to inform the management for administrative convenience, but not with a view to take leave of absence.

Section 79 provides for annual leave with wages and s. 80 provides for wages during leave period.

It is on the proper construction of the provisions of these sections that it can be said whether the appellant contravened the provisions of sub-s. (11) of s. 79 of the Act and committed the offence under s. 92 of the Act.

Sub-section (1) of s. 79 reads :

> "(1) Every worker who has worked for a period of 240 days or more in a factory during a calendar year shall be allowed during the subsequent calendar year, leave with wages for a number of days calculated at the rate of -
>
> (i) if an adult, one day for every twenty days of work performed by him during the previous calendar year;
>
> (ii) if a child, one day for every fifteen days of work performed by him during the previous calendar year.
>
> Explanation - 1. For the purpose of this sub-section -
>
> (a) any days of lay off, by agreement or contract or as permissible under the standing orders;
>
> (b) in the case of a female worker, maternity leave for any number of days not exceeding twelve weeks; and
>
> (c) the leave earned in the year prior to that in which the leave is enjoyed;
>
> shall be deemed to be days on which the worker has worked in a factory for the purpose of computation of the period of 240 days or more, but shall not earn leave for these days.
>
> Explanation - 2. The leave admissible under this sub-section shall be exclusive of all holidays whether occurring during or at either end of the period of leave."

It is clear that this applies to every worker. If it does not apply to any type of person working in the factory, it may lead to the conclusion that the person does not come within the definition of the word 'worker'.

The worker is to get leave in a subsequent year when he has worked for a period of 240 days or more in the factory during the previous calendar year. Who can be said to work for a period of 240 days ?

According to cl. (e) of s. 2, 'day' means a period of twenty-four hours beginning at mid-night. Section 51 lays down that no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week, and, according to s. 54, for not more than nine hours in any day. Section 61 provides that there shall be displayed and correctly maintained in every factory a notice of period of work for adults showing clearly for every day the periods during which adult workers may be required to work and that such periods shall be fixed beforehand and shall be such that workers working for those periods would not be working in contravention of any of the provisions of ss. 51, 52, 54, 55, 56 and 58.

Section 63 lays down that no adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory. A 'day', in this context, would means a period of work mentioned in the notice displayed. Only that workers can therefore be said to work for a period of 240 days, whose work is controlled by the hours of work he is required to put in, according to the notice displayed under s. 61.

Pandurang was not bound to work for the period of work displayed in the factory and therefore his days of work for the purpose of s. 79 could not be calculated. It is urged for the State that each day on which Pandurang worked, whatever be the period of time that he worked, would count as one day of work for the purpose of this section. We do not agree with this contention. When the section provides for leave on the basis of the period of working days, it must contemplate a definite period of work per working day and not any indefinite period for which a person may like to work on any particular day.

Section 80 provides for the wages to be paid during the leave period and its sub-s. (1) reads :

> "For the leave allowed to him under section 79, a worker shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he worked during the month immediately preceding his leave, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the worker of foodgrains and other articles."

The question is how the daily average of his total full time earnings for the days on which he worked during the month immediately preceding his leave is to be calculated. It is necessary for the calculation of the rate of wages on leave, to know his total 'full time earnings' for the days he had worked during the relevant month. What does the expression 'total full time earnings' means ? This expression is not defined in the Act. It can only mean the earnings he earns in a day by working full time on that day, full time to be in accordance with the period of time given in notice displayed in the factory for a particular day. This is further apparent from the fact that any payment for overtime or for bonus is not included in computing the total full time earnings.

> 'Full time', according to Webster's International Dictionary, means 'the amount of time considered the normal or standard amount for working during a given period, as a day, week or month'.

In Words & Phrases, Permanent Edition, published by West Publishing Co., Vol. 17, with regard to the expression 'Full time' it is stated :

> "In an industrial community, term 'full time' has acquired definite significance recognized by popular usage. Like terms 'part time' and 'over time' it refers to customary period of work; and all these terms assume that a certain number of hours per day or days per week constitute respectively a day's or week's work within a given industry or factory."

It is also stated at page 791 :

> "'Full time' as basis for determination of average weekly wages of injured employee means time during which employees is offered employment, excluding time during which he has no opportunity to work."

We are therefore of opinion that there can be no basis for calculating the daily average of the worker's total full time earnings when the terms of work be as they are in the present case and that therefore the wages to be paid for the leave period cannot be calculated nor the number of days for which leave with wages can be allowed be calculated in such a case. It does not appear from the record, and it is not likely, that any period of work is mentioned in the notice displayed under s. 61, with respect to such workers who can come at any time they like and go at any time they like and turn out as much work as they like.

For the reasons stated above, we are of opinion that the conviction of the appellant for an offence under s. 92, read with s. 79(11) of the Act is wrong. We accordingly set aside the order of the Court below and acquit the appellant. Fine, if paid, will be refunded.

SUBBA RAO, J. –

I have had the advantage of perusing the judgment prepared by my learned brother Dayal, J. I regret my inability to agree. The question raised in this appeal is directly covered by the judgment of this Court in Birdhi Chand Sharma v. First Civil Judge, Nagpur [[1961] 3 S.C.R. 161]. As may learned brother has taken a difference view, I propose to give reasons for my conclusion.

This appeal by special leave is directed against the judgment of the High Court of Bombay in Criminal Reference No. 94 of 1959 made by the Additional Sessions Judge, Nasik, under s. 438 of the Code of Criminal Procedure, and it raises the question of interpretation of some of the provisions of the Factories Act, 1948 (63 of 1948), (hereinafter referred to as the Act).

The appellant is the owner of a factory named "Jay Parkash Sudhir Private Ltd." engaged in the manufacture of bidis. He engaged 60 persons for the work of rolling bidis in his factory. On August 12, 1257, the appellant issued a notice to the said persons terminating their services with effect from August 17, 1957. On August 22, 1957, the Inspector of Factories paid a visit to the factory and found that one of the said persons by name Pandurang Trimbak had worked for 70 days in the factory and had earned leave for 4 days which he had not enjoyed nor was he paid wages in lieu of the leave before his discharge. It is not disputed that the position in regard to the other 59 persons is also similar. The Inspector of Factories filed 60 complaints against the appellant in the Court of the Judicial Magistrate, First Class, Sinnar, for infringing the provisions of s. 79(2) of the Act. The Magistrate found the appellant guilty and convicted and sentenced him to pay a fine of Rs. 10. On revision, the learned Additional Sessions Judge, Nasik, taking the view that the conviction should be quashed, referred the matter to the High Court under s. 438 of the Code of Criminal Procedure. A division bench of the High Court, on a consideration of the facts found the material provisions of the Act and the relevant decisions cited, came to the conclusion that a person rolling bidis in a factory is a "worker" within the meaning of s. 2(1) of the Act and on that basis upheld the order of conviction and sentence passed by the learned Magistrate. Hence this appeal.

Learned counsel for the appellant contends that the persons rolling bidis in the factory are not "workers" within the meaning of the Act; as the said persons can come any day they like, work as they like and, therefore, they cannot be said to be employed by the manufacturer under the Act. Alternatively he argues that even if they were "workers", s. 79 of the Act, 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.

At the outset it would be convenient to ascertain exactly how these persons rolling bidis are engaged

by the appellant and how they work in the factory. Admittedly, Pandurang Trimbak and other 59 persons were engaged by the appellant for rolling bidis in his factory. The registers maintained by the factory, namely, weekly register and wages register, had on their rolls the names of the said persons as labourers for doing the said work. It is also common case that the said persons attend the factory and roll bidis in the premises of the factory during the working hours of the factory. Leaves are supplied to the labourers on the previous day, which they cut in their houses after dipping them in water, and on the next day, when they go to the factory, tobacco is given to them. After they make the bidis the master verifies whether they are according to the sample. Those that are not according to the sample are rejected. Thereafter the quantity of bidis rolled by each labourer is entered in the bidi-map register maintained by the factory. D.W. 1 is a gumasta and general supervisor in the factory. He supervises the work of the man who supplies tobacco. He enters the quantity of bidis rolled by each labourer against his name in the register and if a labourer is absent, his absence is noted against his name in the said register. The labourers are paid at the rate of Rs. 2-2-0, or such other rate as agreed by them, per thousand bidis rolled. So far there is no difference between a labourer working in the appellant's factory and a labourer working in any other factory. Just like any other manufacturer, the appellant engages the labour, allots work for them and extracts work from them and pays them wages for the work so done.

Now let us look at the differences between the labourers in a bidi factory and those in other factories on which much emphasis is laid by learned counsel for the appellant. P.W. 1, the Inspector or Notified Factories, says that during their working in the factory, there, is no supervision over them. P.W. 2, Pandurang Trimbak, admits in the cross-examination that during the factory hours he used to work in the factory of the appellant at any time and go at any time. He further states that they can sit at any compartment of the factory and there is no compulsion on the labourer to do a minimum quantity of work every day and that the permission of the master is required only if a labourer wants to absent for more than ten days or when he wants to bind bidis in his house. D.W. 1, the gumasta and supervisor in the factory, also says that a labourer can leave the factory in the midst of work after giving the finished product and after returning the tobacco. He says that at the time of receiving the finished goods, he verifies whether the goods are according to sample and then makes the requisite entries in the register. What emerges from this evidence is that there in no supervision in the sense that nobody regularly watches their work from start to finish giving directions, if and when required. But the labourers understand that the bidis to be rolled in by them shall accord with the sample and, therefore, they roll the bidis to accord with that sample. The names of persons that are absent, the quantity of tobacco issued to each of the labourer, and the number of bidis rolled by each of them are entered in the appropriate registers. The rejected bidis are given away to the labourers; it cannot obviously mean that dereliction of duty is rewarded but it only shows that the rejected bidis are insignificant in number. In short, the appellant engages a labourer, extracts work from him, pays him wages in accordance with the quantity of bidis rolled by him, and exercises a right of supervision as the nature of the work requires.

With this background let us look at the definition of "worker" in s. 2(1) of the Act. "Worker" is defined to mean "a person employed, directly or through any agency, whether for wages or not in any manufacturing process....."Under this definition, a person employed in a manufacturing process is a worker. The question raised in this case turns upon the interpretation of the word "employed" in the definition. This Court in Chintaman Rao v. State of Madhya Pradesh [[1958] S.C.R. 1340, 1346] defined the word "employed" thus :

> "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."

In making out the distinction between an employer and an independent contractor, this Court in the above case quoted the following observations of Bhagwati, J., in Dharangadhara Chemical Works Ltd. v. State of Saurashtra [[1957] S.C.R. 152, 157] :

> "The test which is uniformly applied in order to determine the relationship is the existence of a right of control in respect of the manner in which the work is to be done."

The same view was reiterated by this Court in The State of Kerala v. V.M. Patel [Criminal Appeal No. 42 of 1959 decided on 12-10-60]. That was a case where 23 persons were employed in the process of garbling pepper and packing them in bags. Hidayatullah, J., speaking for the Court, stated :

> "It was observed that, to determine whether a person was a "worker", the proper test was to see whether or not the "employer" had control and supervision over the manner in which the work was to be done".

Adverting to the distinction between an independent contractor and a servant, the learned Judge Proceeded to state :

> "An independent contractor is charged with a work, and has to produce a particular result; but the manner in which the result is to be achieved is left to him. A servant, on the other hand, may also be charged with the work and asked to produce a particular result, but is subject to the directions of the master as to the manner in which the result is to be achieved."

This decision also emphasized that a right to control or supervise is one of the tests for determining the relationship of master and servant. In this context a judgment of the Madras High Court in Palaniappa v. Court of Additional First Class Magistrate, Kulitalai [I.L.R. 1958 Mad. 999, 1009, 1010] is strongly relied upon on behalf of the appellant. There the petitioner was the owner of a weaving concern at Karur. He had put up a thatched shed where he had installed a certain number of handlooms and where towels and bed-sheets were manufactured. His office consisted of only two clerks, who were the permanent members of his establishment. Some of the residents of the village, most of whom were agriculturists, but who knew weaving, used to go to the petitioner's shed when they had time, and when they felt inclined to do so and they were supplied with yarn. These, they wove into bed-sheets and towels and they were paid at certain rates for the articles they wove. These persons came in and went out when they liked. On those facts, Balakrishna Ayyar, J., held that they were not "workers" within the definition of the word "worker" in the Factories Act. After considering the relevant decisions cited and after distinguishing the cases arising under the Industrial Disputes Act, the learned Judge proceeded to state thus :

> "An examination of these decisions confirms what one was inclined to suspect at the outset, viz., that "employed" is a word with a varying content of meaning and that it signifies different things in different places..... On the other hand, when

> we say that X is employed by Y we ordinarily imply that Y remunerates X for his services and that he has a certain measure of control over his time and skill and labour. But the degree and extent of conrlto may be nominal or extensive..... In between lie infinite grades of control and supervision. But a certain amount of supervision or control is necessarily implied in the connotation of the word 'employed'."

Having said that, the learned Judge graphically describes the relationship between the parties thus:

> "The worker can come any day he likes, work as long as he likes or as short as he likes and go away. He may work fast or he may work slow. The petitioner cannot tell him that he should work on towels and not on bed-sheets or vice versa..... And, more important of all, the petitioner cannot prevent anybody from working for a competing manufacturer. Come when you like, go when you like, work when you like, stop when you like, work as fast as you like, work as slow as you like, work on what you like or not at all, that is the position of the workers vis-a-vis the petitioner. Such persons cannot, in my opinion, be said to be 'employed' by the petitioner within the meaning of clause (1) of section 2 of the Factories Act."

It is not necessary to express our opinion whether the conclusion of the learned Judge on the facts of that case is correct or not. But the principle accepted by him, namely, that a certain amount of supervision or control is necessarily implied in the connotation of the word "employed", has been accepted by this Court in earlier decisions and this decision is only an application of that principle to a different set of facts.

The present case falls to be decided on its peculiar facts. As we have pointed out, though there is some laxity in the matter of attendance, it cannot be said that the appellant has no right of supervision or control over the labourers working in the factory or does not supervise to the extent required having regard to the nature of the work done in the factory. All the necessary ingredients of the word "employed" are found in the case. The appellant engages the labourers, he entrusts them with work of rolling bidis in accordance with the sample, insists upon their working in the factory, maintains registers giving the particulars of the labourers absent, amount of tobacco supplied and the number of bidis rolled by each one of them, empowers the gumasta and supervisor; who regularly attends the factory, to supervise the supply of tobacco and leaves and the receipts of the bidis rolled. The nature and pattern of bidis to be rolled is obviously well understood, for it is implicit in requirement that the rolled in bidis shall accord with the sample. The rejection of bidis found not in accord with the sample is a clear indication of the right of the employer to dictate the manner in which the labourers shall manufacture the bidis. Supposing a worker uses more quantity of tobacco than a bidi is expected to contain, it cannot be suggested that the supervisor cannot tell him that he shall not do so. If he spoils the leaves, which he is not expected to do, it cannot be said that the labourer cannot be pulled up in the direction. So too, the supervisor can certainly compel the labourers to work in a specified portion of the factory or direct them to keep order and discipline in the course of the discharge of their duties. The fact that they cannot take the tobacco outside the factory without the leave of the management shows that they are subject to the supervision of the management. The circumstance that they cannot absent themselves for more than 10 days without the permission of the appellant also is a pointer in that direction. That a labourer is not compelled to work throughout the working hours is not of much relevance, because, for all practical purposes, a labourer will not do so since his wage depends upon the bidis he rolls, and, as he cannot roll them outside the factory, necessarily he will have to do so in the factory. If he absents himself, it is only at

his own risk. For all the aforesaid reasons I hold that all the ingredients of the word "employed", as laid down by this Court are present in this case, and therefore the labourers are workers within the meaning of s. 2(1) of the Act.

The next contention of learned counsel for the appellant was that even if the labourers in the factory were workers within the meaning of the Act, s. 79 thereof would not apply to them and, therefore, there could not have been any contravention of that section. The material part of s. 79 of the Act reads :

> "Every worker who has worked for a period of 240 days or more in a factory during a calendar year shall be allowed during the subsequent calendar year, leave with wages for a number of days calculated at the rate of -
>
> (i) if an adult, one day for every twenty days of work performed by him during the previous calendar year;.....".
>
> Section 80 says,
>
> (1) "For the leave allowed to him under section 79, a worker shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he worked during the month immediately preceding his leave, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the worker of foodgrains and other articles."

The argument is that ss. 79 and 80 have to be read together and that s. 79 cannot be applied to a worker to whom s. 80 does not apply. Section 80, the argument proceeds, entitles a worker for the leave allowed to him under s. 79 to be paid at a rate equal to the daily average of his total full time earnings for the days for which he worked during the month immediately preceding his leave and that as the workers in question had the option to work for the full day or part of the day, the words "full time earnings" would not apply to them. This argument, though at first blush appears to be plausible, one a deeper scrutiny reveals that it is unsound. The following words stand out in s. 80 : (i) full time earning and (ii) days. "Day" has been defined in s. 2(e) to mean "a period of twenty-four hours beginning at midnight". It cannot be suggested, and it is not suggested, that "full time earnings" for a day means earnings made during all the twenty-four hours. Such a contention cannot be raised for the reason that the provisions of the Factories Act restrict the number of hours of work during the day of twenty-four hours. Under s. 51 of the Act, "No adult worker shall be required or allowed to work in a factory for more than forty-eight hours in one week", and under s. 54, "Subject to the provisions of section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day". A combined reading of these two sections indicates that subject to the maximum period of working hours fixed for a week, no worker shall be allowed to work for more than 9 hours a day. For the purpose of calculation of wages during the leave period under s. 80, the full time earnings for a day can be taken to mean the amount earned by a worker for the daily hours of work fixed for a factory. In the instant case it is admitted that the working hours for the factory are fixed and the workers are entitled to work throughout the working hours, though they can leave the factory during those hours if they choose to do so. But they cannot be prevented from working for all the hours fixed for the factory and they are entitled to be paid their wages on the basis of the number of bidis rolled by them. The wages earned by them during the working hours of the factory would be their full time earnings for the day. If so, there cannot be any difficulty for the

management to ascertain the rate under s. 80 of the Act for the payment of wages during the leave period, for under that section the management would have to pay at a rate equal to the daily average of their total full time earnings for the days they worked. The factory registers would show the total full time earnings of each worker for the days during the month immediately preceding his leave. The average shall be taken of the earnings of those days and the daily average of those earnings would be the criterion for fixing the wages during the leave period. I cannot, therefore, say that s. 79 of the Act by its impact on s. 80 thereof makes it inapplicable to a worker of the category with which we are now concerned. This argument, therefore, is rejected.

No other question was raised before us. In the result, the appeal fails and is dismissed.

BY COURT.

In accordance with the opinion of the majority the appeal is allowed, the order of the Court below set aside and the appellant acquitted. Fine, if paid, will be refunded.

Appeal allowed.

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