M/s. Bhikusa Yamasa Kshatriya (P) Ltd., & Anr

Vs

Union of India and Another

Writ Petition No. 145 of 1962

(P. B. Gajendragadkar, K. N. Wanchoo, M. Hidayatullah JJ)

08.02.1963

JUDGMENT

SHAH, J. -

The first petitioner is a private limited Company incorporated under the Indian Companies Act, 1913 and the second petitioner is a Director of the Company. The Company maintains 23 establishments for manufacturing bidis in the District of Nasik, Poona and Ahmednagar in the State of Maharashtra. A large majority of these establishments are borne on the registar of factories maintained by the Chief Inspector of Factories under the Factories Act, 63 of 1948. Craftsmen called rollers, attend these establishments and prepare bidis, using materials supplied by the Company. The establishments remain open during specified hours but the rollers are not bound to attend for any fixed period; a roller may come to and leave the establishment according as is convenient to him, and he is paid for the bidis turned out by him according to a fixed tariff. It appears that this is the accepted modus of work in bidi establishments in the Maharashtra region. These establishments were, it was held by the Bombay High Court, 'factories' and the rollers working therein were 'workers' within the meaning of the Factories Act 63 of 1948 : The State v. Alisaheb Kashim Tamboli [I.L.R. 1955 Bom. 624.]. In that case the High Court held that the expression 'employed' in s. 2(1) of the Factories Act, 1948 does not necessarily involve the relationship of master and servant, and therefore owners of bidi establishments had to conform to the requirements of the Factories Act and to afford to the workers the benefits provided under that Act, even though the workers did not maintain uniform hours of attendance, and were paid only for bidis turned out by them. But this Court in Shankar Balaji Waje v. The State of Maharashtra [(1962) Supp. 1 S.C.R. 249.) - (Subba Rao, J. dissenting) - held in dealing with the case of workers in an establishment for manufacturing bidis whose attendance was characterised by the features hereinafter set out, that they were not employed within the meaning of s. 2(1), and could not claim the privileges accorded to workers by ss. 79 and 80 of that Act. The features noticed by the Court were, that there was no agreement or contract of service between the owner of the establishment and the bidi roller; the bidi roller was not bound to attend the factory for any fixed hours or to work for any fixed period; he was free to go to the factory at any time he liked and was equally free to leave the factory whenever he liked; the bidi roller could be absent from work on any day and if his absence was expected to be of a duration longer than ten days he informed the owner not because he had to obtain permission or leave, but for assuring the owner that he did not intend to give up work at the factory; there was no actual supervision of work which the bidi roller did in the factory, and he was paid at fixed rates on the quantity of bidis turned out there being no stipulation for turning out any minimum quantity of bidis in a day; bidi leaves were supplied to the rollers for being taken home and cut and tobacco was supplied at the factory, but they were not bound to roll bidis at the factory - they could take the materials outside after obtaining permission of the owner; at the close

of the day the bidis used to be delivered to the owner and bidis not up to the standard were rejected; and the bidi worker's attendance was not noted though the days he worked could be ascertained from the work register. The Court held on these facts that the bidi roller could no be said to be 'employed' by the owner and was not therefore a worker, there being no contract of employment, under which the bidi roller agreed to serve the employer subject to his control and supervision.

Since this judgment was pronounced, owners of bidi-making establishments in the State of Maharashtra commenced denying to the bidi rollers benefit of weekly holidays and wages in lieu of holidays previously accorded to them and even denied access to the Inspectors appointed under the Factories Act to their establishments. There are in the State of Maharashtra more than 35000 bidi rollers borne on the pay rolls of bidi-making establishments on the register maintained by the Chief Inspector of Factories. There are also many other bidi-making establishments which are not so borne on the register of the Chief Inspector. There was grave unrest among the bidi rollers resulting form the denial of benefits previously enjoyed by them. With a view to protect the bidi rollers against exploitation by the owners of bidi making establishments and against deprivation of the benefits enjoyed by them, the Government of Maharashtra issued the following Notification in exercise of the powers vested under s. 85 of the Factories Act :-

> "In exercise of the powers conferred by section 85 of the Factories Act, 1948 (LXIII of 1948), the Government of Maharashtra hereby declares that all the provisions of the said Act shall apply to the places specified in column 2 of the Schedule appended hereto wherein a manufacturing process is carried on with or without the aid of power or is so ordinarily carried on the establishments specified against them in column 3 of the said Schedule notwithstanding that the persons working therein are not employed by the owner of such places but are working with the permission of or under agreement with such owner :
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> Provided that the manufacturing process is not being carried on by the owner only with the aid of his family."

To the notification was appended a Schedule (including many of the establishments of the Company) setting out the particulars of Districts, the places where the establishments were situate and the names of the establishments. The effect of the Notification was to make bidi rollers in places set out in the Schedule 'deemed workers', and on that account entitled to the benefits provided to workers under the Factories Act.

The petitioners then challenged by this petition the validity of s. 85 of the Factories Act and the Notification issued in exercise of the authority conferred thereby, on the plea that the provisions of the section and the Notification issued thereunder infringe the fundamental rights of the petitioners under Arts. 14 and 19(1)(g) of the Constitution.

'Factory' is defined in s. 2(m) of the Act as meaning "any premises including the precincts thereof:-

> (i) Whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
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> (ii) Whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is

being carried on without the aid of power, or is ordinarily so carried on, -

but does not include a mine subject to the operation of the Mines Act, 1952, or a railway running shed;" 'Worker' is defined in s. 2(1) of the Act as meaning "a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other king of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process;"

Premises in which a manufacturing process is carried on where the number of workers is less than the minimum prescribed do not fall within the definition of 'factory'. Again a person to be a 'worker' must be employed in a manufacturing process or in cleansing machinery used for the process, or in any work incidental to or connected with the manufacturing process. To attract the provisions of the Factories Act which confer certain benefits and privileges upon workers and impose obligations upon owners of factories qua those workers, there must, therefore, be a manufacturing process carried on in any premises, the number of persons working in the manufacturing process or cleansing machinery used for the process or in work incidental to or connected therewith be not less than the number specified in the definition in s. 2(m) and that the persons so working must be employed (under a contract of service) for wages or not and directly or indirectly. A person working in a factory, but not under a contract of service cannot be regarded as a worker within the meaning of that expression in s. 2(1) of the Act.

Section 85 of the Factories Act which occurs in Ch. IX provides :

"(i) The State Government may, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply to any place wherein a manufacturing process is carried on with or without the aid of power or is so ordinarily carried on, notwithstanding that -

(i) the number of persons employed therein is less than ten, if working with the aid of power and less then twenty if working without the aid of power, or

(ii) the persons working therein are not employed by the owner thereof but are "working with the permission of, or under agreement with, such owner :

Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

(2) After a place is so declared, it shall be deemed to be a factory for the purposes of this Act, and the owner shall be deemed to be the occupier, and any person working therein, a worker."

The section is enacted with the object of conferring authority to extend in appropriate cases the provisions of the Act to establishments which are otherwise not factories within the meaning of the Act, and to ensure to persons working in factories even if not workers within the meaning of the Act, the benefits provided thereby. The section authorises the State Government to make all or some of the provisions of the Act applicable to any place wherein a manufacturing process is carried on with or without the aid of power, notwithstanding that the number of persons employed therein is less than the numbers specified in the definition of 'factory', or where the persons working therein are not employed by the owner but are working with the permission of, or under agreement with,

such owner. On the issue of a Notification by the State Government the place designated will be deemed a factory, the owner of the place will be deemed an occupier and persons working herein will be deemed workers.

Section 85, it is contended, is invalid on the grounds that it imposes unreasonable restrictions upon the fundamental right of the owner to carry on his business, and it enables the State Government by a Notification arbitrarily to discriminate between owners of establishments who are similarly situate, inasmuch as the Act confers an unguided and uncontrolled power to select places to be deemed factories by a Notification under s. 85 of the Act and to impose thereby obligations laid by the Factories Act upon the owners of those places. Before dealing with the impact of s. 85 of the Factories Act and the impugned Notification upon the fundamental rights of the petitioners, it would be useful to make a brief retrospect of factory legislation in India, with special reference to bidi-making establishments.

The Indian Legislature enacted Act 15 of 1881 as the first Act which dealt with factories. The Act was limited in scope : it was followed by Act 11 of 1891 which in turn was followed by Act by Act 12 of 1911. Diverse amendments were made to that Act from time to time. In 1929 a Royal Commission of Labour in India was appointed to make a detailed investigation into labour problems. The Commission investigated the conditions in various industries including the bidi-making industry and submitted its report in June 1931 containing diverse recommendations for amendment of the Indian Factories Act, 1911. The Commission stressed the need for exercise of power of extend the provisions of the Act to industries not covered by the definition of the term 'factory', and considered the bidi-making industry in that context in particular. In describing the conditions prevailing in bidi manufactories, the Commission observed :

> "Every type of building is used, but small workshops preponderate and it is here that the graver problems mainly arise. Many of these places are small airless boxes, often without any windows, where the workers are crowded so thickly on the ground that there is barely room to squeeze between them. Others are dark semi-basements with damp mud floors unsuitable for manufacturing processes, particularly in an industry where workers sit or squat on the floor throughout the working day. Sanitary conveniences and adequate arrangements for removal of refuse are generally absent. Payment is almost universally made by piece-rate, the hours are frequently unregulated by the employer and many smaller workshops are open day and night. Regular intervals for meals and weekly holidays are generally non-existent. In the case of adults these matters are automatically regulated by individual circumstances, the worker coming and going as he pleases and often, indeed, working in more than one place in the course of the week. Nevertheless in the case of full-time workers, i.e., those not using bidi-making as a supplementary source of income, the hours are too frequently unduly long, the length of the working day being determined by the worker's own poverty and the comparatively low yield of the piece-rates paid."

The Commission recommended the enactment of a separate Act applicable in the first instance to all places without power machinery, employing fifty or more persons during any part of the year and suggested that the Provincial Governments may be authorised to extend any provision of the Act to factories employing less than the prescribed number when in their opinion conditions justify such action. But the Indian Legislature enacted a comprehensive measure - Act 25 of 1934 - amending and consolidating the provisions of factory legislation in India. The object of the Act was to reduce hours of work, improve working conditions in the factories, provide for adequate inspection and

strict observance of the Act : but places where the manufacturing process was carried on without the aid of power were not covered by the definition of 'factory' in s. 2(j). The Legislature by Act 16 of 1941 amended s. 5 and authorised the Provincial Government by Notification in the Official Gazette to declare all or any of the provisions applicable to factories to any place wherein manufacturing process was being carried on or was so ordinarily carried on with or without the aid of power where ten or more persons were working therein.

A Labour Investigation Committee was appointed by the Government of India in February, 1944 to investigate conditions of employment in respect of various industries. This Committee enquired into the conditions of workmen in the bidi, cigar and cigarette industry, and observed that the picture drawn by the Royal Commission on the working conditions in the bidi industry remained largely true. They observed :

> "The prominent features of the bidi and cigar industries are long hours and insanitary conditions of work and employment of child labour. Women are also employed in large numbers in this industry. X X X X
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> X X X X X The bidi and cigar labour, however, satisfies many of the criteria of sweated labour, such as sub-contract system, long hours, insanitary working conditions, home work (in bidis), employment of women and children, irregularity of employment, low wages, and lack of bargaining power."

Dealing especially with the conditions prevailing in the Province of Bombay they observed :

> "In Bombay these workshops are situated immediately behind panshops. X X X X The conditions of these workshops, so far as sanitation, light and ventilation are concerned, beggar description. They are dark, dingy places with very few, if any, windows and the approaches are very insanitary. Workers are huddled together, men, women and in some cases children, and there is hardly any space to move. One can see bags of tobacco heaped in one corner and manufactured bidis in another. Most of the workshops have no lavatories and where they are, they are in a most deplorable condition. Some of the workshops have low wooden ceiling above which some workers sit and carry on their work. These are not usually reached by staircases and the workers have to go up with great difficulty."

The Committee recorded its conclusions as follows :-

> "matters requiring immediate attention in the bidi and cigar industries are the unhealthy working conditions, long hours of work, employment of women and children, deductions from wages and the sub-contract system of organisation. It is desirable to abolish the out-work system and to encourage establishment of big factories in the bidi and cigar industries, if protective labour legislation is to be enforced with any degree of success."

Application of factory legislation to protect the legitimate interests of bidi rollers was therefore a crying necessity. The Factories Act, 1948 extended the definition of factory. The bidi making industry was spread in small units over extensive areas, and the working conditions in the units varied considerably, and presumably on that account no legislation applicable exclusively to establishments manufacturing bidis was undertaken, but establishments in which the number of

persons working exceeded the number specified in cl. (m) of s. 2 were registered under the Factories Act. It is true that even then a number of establishments were not brought within the operation of the Factories Act, but with the enactment of the Minimum Wages Act and fixation of minimum wages by the diverse States there was some improvement in the condition of bidi rollers. Under s. 85 of the Factories Act of 1948 power was reserved to make the Act applicable to any place in which manufacture of bidis was carried on could be exercised but it does not appear to have been exercised for the reason that the larger establishments in which bidi-making was carried on were regarded as covered by the Factories Act, it being assumed that the expression 'employed' in s. 2(1) of the Factories Act included mere engagement or occupation in a manufacturing process without any contract giving rise to a relation of master and servant : State v. Alisaheb Kashim Tamboli [I.L.R. 1955 Bom. 642.] and Ram Chandra Prasad v. The State of Bihar [(1956) I.L.R. 35, Patna 877.].

The Factories Act, as the preamble recites is an Act to consolidate and amend the law regulating labour in factories. The Act is enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. For that purpose it seeks to impose upon the owners or the occupiers certain obligations to protect workers unwary as well as negligent and to secure for them employment in conditions conducive to their health and safety. The Act requires that the workers should work in healthy and sanitary conditions and for that purpose it provides that precautions should be taken for the safety of workers and prevention of accidents. Incidental provisions are made for securing information necessary to ensure that the objects are carried out and the State Governments are empowered to appoint Inspectors, to call for reports and to inspect the prescribed registers with a view to maintain effective supervision. The duty of the employer is to secure the health and safety of workers and extends to providing adequate plant, machinery and appliances, supervision over workers, healthy and safe premises, proper system of working and extends to giving reasonable instructions. Detailed provisions are therefore made in diverse chapters of the Act imposing obligations upon the owners of the factories to maintain inspecting staff and for maintenance of health, cleanliness, prevention of overcrowding and provision for amenities such as lighting, drinking water, etc. etc. Provisions are also made for safety of workers and their welfare, such as restrictions on working hours and on the employment of young persons and females and grant of annual leave with wages. Employment in a manufacturing process was at one time regarded as a matter of contract between the employer and the employee and the State was not concerned to impose any duties upon the employer. It is however now recognised that the State has a vital concern in preventing exploitation of labour and in insisting upon proper safeguards for the health and safety of the workers. The Factories Act undoubtedly imposes numerous restrictions upon the employers to secure to the workers adequate safeguards for their health and physical well-being. But imposition of such restrictions is not and cannot be regarded, in the context of the modern outlook on industrial relations, as unreasonable. Extension of the benefits of the Factories Act to premises and workers not falling strictly within the purview of the Act, is intended to serve the same purpose. By authorising imposition of restrictions for the benefit of workers who in the view of the State stand in need of some or all the protections afforded by the Factories Act, but who are not governed by the Act, the Legislature is merely seeking to effectuate the object of the Act i.e. it authorises extension of the benefit of the Act to persons to whom the Act, to fully effectuate the object, should have been, but has on account of administrative or other difficulties not been extended. Provisions made for the benefit of 'deemed workers' cannot therefore be regarded as not reasonable within the meaning of Art. 19(1)(g) of the Constitution.

The Factories Act primarily applies to establishments in which ten or more persons are working where power is used and twenty or more persons where no power is used, thereby excluding from

its operation small establishments. Presumably, the Legislature felt that uniform application of the Factories Act to all establishments in which a manufacturing process is carried on requiring even small establishments to comply with the elaborate requirements of the Factories Act may impose great administrative strain upon governmental machinery, and involve hardship ordinarily not commensurate with the benefit secured thereby. But the Legislature with a view to prevent circumvention of the provisions of the Factories Act, and to secure to the persons working in establishments where manufacturing process is carried on, adequate safeguards where necessity is felt has authorised the State Government by Notification to declare any place which does not fall within the definition of "factory" to be a factory and to make all or any of the provisions of the Act applicable thereto. Similarly the Act is primarily intended to govern relations of persons standing as master and servant in connection with manufacturing processes in factories, and liberty of contract otherwise was not sought to be affected by the principal provisions of the Act. But here again the Legislature has authorised the State Government to issue Notifications applying the provisions of the Act even to those establishments in which persons are working with the permission or under agreement with, but not as employees of the owners. Exclusion from restrictions inherent in the definitions of "factory" and "worker" has its source not in any desire to afford special privileges to any class of owners. The policy underlying s. 85 authorising the State Government to extend the benefit of the Act is apparent on its face. The section aims at making provision for securing the health and safety of persons engaged in hazardous employments, and for that purpose the Legislature has entrusted to the State Governments, in the case of establishments not falling expressly within the regulatory provisions of the Act, authority to extend those provisions, where the necessity to regulate, having regard to the circumstances, is felt. The power to extend the regulatory provisions of the Act is therefore not intended to confer an arbitrary power to pick and choose between establishments similarly situate : it is granted with a view to secure the protection of persons engaged in industrial occupations in the light of special circumstances of a particular industry, a locality or an establishment, where circumstances justifying the extension of the protection exist. The conditions of small establishments in different parts of the country may and do widely vary. Control in respect of some industries or establishments not governed by the Factories Act may not be necessary, whereas necessity in that behalf may be acutely felt in others. It is to carry out effectively the object underlying the Act that power has been given to the State Government to decide with reference to local conditions whether it is desirable that the provisions of the Act or any of them should be made applicable to any establishment which is not covered by the definition of "factory" or to workers in a factory who are not entitled to the benefits of the Act, because of the definition of "employment."

In M/s. Bhikusa Yamasa Kshatriya v. Sangamner Akola Taluka Bidi Kamgar Union [(1963) Supp. 1 S.C.R. 524.], in dealing with the validity of certain provisions of the Minimum Wages Act, it was observed by this Court :

> "The object and policy of the Legislature appear on the face of the Act. The object of the Act is to prevent exploitation of the workers, and for that purpose it aims at fixation of minimum wages which the employers must pay. The Legislature undoubtedly intended to apply the Act to those industries or localities in which by reason of causes such as unorganized labour or absence of machinery for regulation of wages, the wages paid to workers were, in the light of the general level of wages, and subsistence level, inadequate. X X X X X X X It is to carry out effectively the purpose of this enactment that power has been given to the appropriate Government to decide with reference to local conditions, whether it is desirable that minimum wages should be fixed in regard to any scheduled trade or industry, in any locality,

> and if it is deemed expedient to do so, the rates at which the wages should be fixed in respect of that industry in the locality. By entrusting authority to the appropriate Government to determine the minimum wages for any industry in any locality or generally, the Legislature has not divested itself of its authority, nor has it conferred uncontrolled power upon the State Government. X X X X X X X X X X Selective application of a law according to the exigencies, where it is sanctioned, ordinarily results in permissible classification. Article 14 forbids class legislation but not reasonable classification for the purpose of legislation. If the basis of classification is indicated expressly or by implication, by delegating the functions of working out the details of a scheme, according to the objects of the statute and principles inherent therein, to a body which has the means to do so at its command, the legislation will not be exposed to the attack of unconstitutionality. In other words, even if the statute itself does not make a classification for the purpose of applying its provisions, and leaves it to a responsible body to select and classify persons, objects, transactions, localities or things for special treatment, and sets out the policy of principles for its guidance in the exercise of its authority in the matter of selection, the statute will not be struck down as infringing Art. 14 of the Constitution."

The principle of that case will apply in considering the plea of discrimination raised by the petitioners. Section 85 of the Factories Act permits selective application of the beneficent provisions of the Act to workers not covered thereby. The power is conferred to carry out effectively the purpose of the Act, and to an authority which has the means at its command for making the requisite enquiries for ascertaining whether extention of the benefits is, in the interest of the workers and the public generally, demanded. Such a provision cannot be regarded as discriminatory.

It is true that even if a statute which permits executive action to be taken is not ultra vires, but the executive action taken under the statute in the matter of selection may be ultra vires if it infringes any fundamental right. In the present case, however, the affidavit of Mr. V. N. Pimenta, Under Secretary to Government of Maharashtra in the Industries and, Labour Department, discloses clearly the basis on which the factories mentioned in the Schedule were selected by the Notification under s. 85(1). In paragraph 7 of his affidavit it is stated :

> "On careful consideration of the facts of this (Shankar Balaji Waje's) case the Government of Maharashtra was of the view that for the purpose of protecting the bidi rollers against any arbitrary treatment by the bidi manufacturers, and to maintain the protection given to them under the Factories Act which they had hitherto obtained prior to the decision of this Hon'ble Court in the case of Shankar Balaji Waje a Notification under s. 85 of the Factories Act, 1948 should be issued. Accordingly, the Government of Maharashtra issued the impugned Notification including therein those factories which were on the register of Factories maintained by the Chief Inspector of Factories."

He further stated that probably there were other bidi manufacturing establishments to which the provisions of the Factories Act were applicable, but these factories were not within the purview of the impugned Notification because they were not on the register of factories maintained under the Factories Act and on the basis of which the impugned Notification was issued. But such establishments were not included in that register because of the failure of the owners to register them. Mr. Pimenta said that the Government was making enquiries about such other factories and that they would or would not be brought under the purview of the Act, as circumstances demanded,

by amendment of the impugned notification under s. 85 of the Factories Act when the enquiries were over. He further stated that the impugned Notification was issued to maintain industrial peace and harmony. There is nothing on the record to discredit these statements. Before the impugned Notification was issued, the Bombay and other High Courts had held that bidi workers who though not servants of the owners of the bidi factories in which they were working, were still employed in a manufacturing process to whom the benefits of the Factories Act were admissible. As a result of the clarification of the legal position by the decision of this Court in Shankar Balaji Waje's case [(1962) Supp. 1 S.C.R. 249.], there was grave unrest among bidi rollers and the State Government felt obliged to intervene for the protection of bidi rollers against deprivation of benefits previously accorded to them for an appreciable length of time, and with that object in view in the first instance applied the provisions of the Factories Act by Notification issued under s. 85(1) to all such establishments as were included in the list maintained by the Chief Inspector of Factories and commenced an enquiry for including others which were not included in that list. In the situation which arose inclusion of bidi manufactories registered as factories with the Chief Inspector of Factories in which bidis were rolled by workers must be deemed to be a rational basis for classification. The fact that to other factories carrying on the same business but not included in the list of the Chief Inspector of Factories, the provisions of the Act were not extended immediately does not expose the Notification to a charge of absence of rational classification. Selective application of a law by an authority such as a State based on an objective test such as entry in the list maintained by the Chief Inspector of Factories in the exercise of statutory authority, would in the light of the emergency, be deemed to be a rational basis for classification. It also appears from the affidavit of Mr. Pimenta that the Government of Maharashtra is holding enquiries about other factories which may properly be, but are not, included, because of absence of adequate information. The exclusion of owners of bidi establishments, not on the list of the Chief Inspector of Factories, is ex facie not due to any differentiation made with "an evil eye or uneven hand" but on account of the felt necessity of a situation which caused great hardship to a large number of workers, and rectification of which in the interest of maintaining industrial peace brooked no delay.

It was urged, however, that the application of all the provisions of the Factories Act without considering the appropriateness of extending the individual provisions, infringed Art. 19 of the Constitution. It was submitted that provisions like ss. 79 and 80 which only apply to factories employing persons who work under contracts of service with the owner would be wholly inapplicable to persons who work under contracts not of service with the owner of the factory and who are under no obligation to attend the factory for any fixed duration during working hours or for any fixed number of days during the year, and providing benefits for such persons by extending those provisions amounts to imposing unreasonable restrictions upon the right of the owner of the factory. Section 79(1) provides for grant of annual leave with wages for the number of days calculated at certain rates to every worker who has worked for a period of 240 days or more in a factory during a calendar year. Section 80 is consequential upon s. 79 : it provides that a worker shall be paid for the leave allowed to him at the rate equal to the daily average wage of his total full time earnings for the days on which he worked during the month immediately preceding his leave exclusive of any over-time and bonus but inclusive of dearness allowance and cash equivalent of the advantage accruing through the concessional sale to the worker of foodgrains and other articles. Section 79 clearly applies to workers who work for the full period of employment during factory hours and for the prescribed number of days and it may appear at first sight somewhat inappropriate that the benefit of annual leave with wages should be extended by Notification under s. 85(1) to persons who do not work for the hours fixed for the establishment. But it is in our judgment clear that s. 79 if it is made applicable by notification under s. 85 would apply to those workers only who

work in the factory for the full period prescribed under ss. 61, 71 and 66(1) of the Factories Act by the employer for not less than the number of qualifying days. A "deemed worker" who is paid only for work done by him and who is under no obligation to attend at any fixed time may be entitled to benefit of annual leave with wages only if he fulfils the working conditions applicable to workers as defined in s. 2(1) of the Act. The privilege of working for a period less than the period prescribed for regular workers in a factory will not, if he works for less than the prescribed hours, come to the aid of a deemed worker so as to enable him to claim the benefits of s. 79; but that privilege will not deprive him, if he fulfils the conditions relating to the duration of work, of the benefit of s. 79. The fact that a deemed worker in a factory, to which s. 79 is extended by a Notification, by virtue of his contract or otherwise is not bound to attend at times fixed by the owner of the factory does not mean that he can never fulfil the conditions relating to attendance for earning leave with wages. If a deemed worker attends the factory for the full duration fixed as factory hours and works for 240 days or more during a calendar year, he would be entitled to the benefits of ss. 79 and 80 of the Act.

The observations made in Shankar Balaji Waje's case [(1962) Supp. 1 S.C.R. 249.], that 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" is not inconsistent with the view expressed by us. In Shankar Balaji Waje's case [(1962) Supp. 1 S.C.R. 249.], no Notification under s. 85 was issued by the State Government, and the Court was considering, whether having regard to the conditions governing his attendance, he could be regarded as a worker. The observation relied upon does not mean and could not have intended to mean that if a Notification under s. 85 had been issued and the workers concerned had worked for the full period of work displayed in the factory for more than 240 days in the preceding year, he would still not have been entitled to annual leave with wages. In our judgment the right to leave with wages arises in favour of a worker or deemed worker under s. 79 only if he has worker or deemed worker under s. 79 only if he was worked during the full period of factory employment for the prescribed number of days in the previous year because by the use of the expression 'days' in s. 79, working for the full period of work displayed in the factory under the appropriate section of the Factories Act is contemplated. Work for a period less than the period displayed will not, in computing the number of days, be taken into account as a day within the meaning of s. 79.

We may also observe that in Bridhichand Sharma v. First Civil Judge, Nagpur [(1961) 3 S.C.R. 161.], this Court in dealing with the question whether rollers in a bidi factory who were obliged to work within the factory hours, but not for the entire period were entitled to the benefit of s. 79, held on a consideration of all the circumstances, that the bidi rollers being employed in the factory were workers within the meaning of s. 2(1) of the Factories Act, and entitled to that benefit. It was also observed that the leave provided under s. 79 arises as a matter of right when the worker has attended for the minimum number of working days and he is entitled to it, and absence of the worker from attendance for a longer period than that provided by s. 79 had no bearing on his right to leave under that section. That was again a case not covered by a Notification under s. 85. On the facts proved the Court held that the workers in the factory were 'employed' and would if they fulfilled the requirements of s. 79 - viz, the total number of days of work - be entitled to the benefit of leave with pay. The attendance to qualify for leave in that case had obviously to be for the appropriate full period fixed by the owner of the factory.

As we have already observed the Act primarily applies to workers strictly so called who are employed in any manufacturing process in a factory, but it is open to the State Government by a Notification to apply all or any of the provisions of the Act to any place wherein any manufacturing process is carried on and if such a Notification is issued the place so declared is to be deemed a

factory under the Act, the owner to be deemed an occupier and the person working therein a worker notwithstanding the fact that the number of persons working therein are not employed by the owner thereof but are working with the permission of or under agreement with such owner. If by imposing liability to afford to workers strictly so-called under the Act, there is no infringement of the fundamental right of the owner of the factory to carry on his business, a similar obligation in favour of deemed workers, who satisfy the requirements of s. 79, cannot, having regard to the object of the statute, be regarded as infringing that fundamental right. Therefore by imposing liability to afford to "deemed worker" annual leave with wages under s. 79 and s. 80 in the same manner and to the same extent as is afforded to workers strictly so-called under s. 2(1) of the Factories Act, no unreasonable restriction has been imposed upon the occupier or the owner of the factory.

To conclude : in our judgment s. 85 which authorises the State Government to issue a Notification applying all or any of the provisions of the Act to any place in which a manufacturing process is carried on, and which involves the consequence that the place is deemed a factory and the persons working therein are deemed workers is not by itself discriminatory so as to infringe Art. 14 of the Constitution; nor does the provision amount to authorising imposition of unreasonable restriction upon the fundamental right of the owner of the factory to carry on his business. The impugned Notification issued under s. 85(1) is also not open to attack on the ground that the State has issued the Notification by selecting for application of the provisions of the Act, some out of the places in which bidi manufacturing processes are carried on. Nor does the Notification in so far as it seeks to apply the provisions of the Act imposing upon the owner or an occupier of the factory obligation to grant annual leave with wages impose any unreasonable restriction.

On that view the petition must fail and is dismissed with costs, two sets, one hearing fee.

Petition Dismissed.

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