D. C. Dewan Mohideen Sahib and Sons

Vs

The Industrial Tribunal, Madras

Civil Appeals Nos. 721 and 791 of 1963

(CJI P. B. Gajendragodkar, K. N. Wonchoo, K. C. Das Gupta JJ)

06.04.1964

JUDGMENT

WANCHOO, J. –

These two appeals by special leave raise a common question and will be decided together. The appellants are proprietors of two bidi concerns. A reference was made by the Government of Madras of dispute between the appellants and their workmen with respect to three matters. In the present appeals however we are concerned with only one matter, namely, whether reduction of annas two in the wages of workers employed under the agents of the appellants was justified and to what relief the workers were entitled.

The contention of the appellants before the tribunal was that the workers in question were not their workmen and therefore there being no relation of employers and employees between them and the workmen, the reference itself was incompetent and there could be no industrial dispute between them and the workmen concerned, their case being that the workmen concerned were the workmen of independent contractors. It was found by the tribunal on the basis of evidence led before it by both parties that the modus operandi with respect to manufacture of bidis in the appellants' concerns was that contractors took leaves and tobacco from the appellants and employed workmen for manufacturing bidis. After bidis were manufactured, the contractors took them back from the workmen and delivered them to the appellants. The workmen took the leaves home and cut them there; however the process of actual rolling by filling the leaves with tobacco took place in what were called contractors' factories. The contractors kept no attendance register for the workmen. There was also no condition that they should come and go at fixed hours. Nor were the workmen bound to come for work every day; sometimes the workmen informed the contractors if they wanted to be absent and sometimes they did not. The contractors however said that they could take no action if the workmen absented themselves even without leave. The payment was made to the workmen at piece rates. After the bidis were delivered to the appellants payment was made therfore. The system was that the appellants fixed the price of tobacco and leaves supplied to the contractors who took them to the places where work of rolling was done and gave them to the workmen. Next day, the manufactured bidis were taken by the contractors to the appellants who paid a certain price for the manufactured bidis after deducting therefrom the cost of the tobacco and the leaves already fixed. The balance was paid to the contractors who in their turn paid to the workmen, who rolled bidis, their wages. Whatever remained after paying the workmen would be the contractors' commission for the work done. It may also be mentioned that there were written agreements on the same pattern between the appellants and the contractors in that behalf, though no such agreement has been printed in the paper books.

On these facts the appellants wanted to make out a case as if there was a sale of leaves and tobacco by the appellants to contractors and after the bidis were rolled there was a resale of the bidis to the appellants by the contractors. The tribunal however held that it was clear that there was no sale either of the raw materials or of the finished products, for, according to the agreement, if bidis were not rolled, raw materials had to be returned to the appellants and the contractors were forbidden from selling the raw materials to any one else. Further after the bidis were manufactured they could only be delivered to the appellants who supplied raw materials and not to any one else. Further price of raw materials fixed by the appellants as well as the price of the finished products always remained the same and never fluctuated according to market rates. The tribunal therefore concluded that there was no sale of raw materials followed by resale of the finished products and this system was evolved in order to avoid regulations under the Factories Act. the tribunal also found that the contractors generally got only annas two per thousand bidis for their trouble. The tribunal also referred to a clause in the agreement that the appellants would have no concern with the workers who rolled bidis for whom only the contractors would be responsible. But it was of the view that these provisions were deliberately put into the agreement by the appellants to escape such statutory duties and obligations as may lie on them under the Factories Act or under the Madras Shops and Establishments Act. Finally on a review of the entire evidence, the tribunal found that this system of manufacture of bidis through the so-called contractors was a mere camouflage devised by the appellants. The tribunal also found that the contractors were indigent persons and served no particular duties and discharged no special functions. Raw materials were supplied by the appellants to be manufactured into finished products by the workmen and the contractors had no other function except to take the raw materials to the workmen and gather the manufactured material. It therefore held that the so-called contractors were not independent contractors and were mere employees or were functioning as branch managers of various factories, their remuneration being dependent upon the work turned out. It therefore came to the conclusion that the bidi workers were the employees of the appellants and not of the so-called contractors who were themselves nothing more than employees or branch managers of the appellants. It finally held that reduction in the wages by two annas per thousand bidis was not justified and the workmen were entitled to the old rates. It therefore ordered the reduction in wages to be restored.

Thereupon the appellants filed two writ petitions in the High Court, their contention being that the tribunal was wrong in holding that the contractors and the workmen employed by the contractors were the workmen of the appellants. It seems that a sample agreement was produced before the High Court, which provided inter alia for the following terms :-

> (1) That the proprietor should supply the tobacco and the bidi leaves;
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> (2) that the intermediary should engage premises of his own and obtain the requisite license to carry on the work of having the bidis rolled there;
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> (3) that at no time should more than nine bidi rollers work in the premises of that intermediary;
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> (4) that the intermediary should meet all the incidental charges for rolling the bidis including the cost of thread and the remuneration paid to the bidi rollers;
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> (5) that for every unit of 1,000 bidis rolled and delivered by the intermediary to the proprietor, the latter should pay the stipulated amount, after deducting the cost of the tobacco and the bidi leaves supplied by the proprietor;

(6) that the intermediary should not enter into similar engagement with any other industrial concern;

(7) that the price of the raw materials and price to be paid for every unit of 1,000 bidis rolled and delivered were to be fixed at the discretion of the proprietor.

Besides these conditions, the contract also provided that it was liable to termination on breach of any of the conditions, and that the proprietors had no connection with and that they assumed no responsibility for the bidi workers who had to look to the intermediary for what was payable to them for rolling the bidis.

The learned Single Judge on a review of the terms of the contract and the evidence on record held that neither the bidi roller nor the intermediary was an employee of the appellants. In consequence there could be no industrial dispute within the meaning of s. 2(k) of the Industrial Disputes Act between the appellants and the bidi rollers. The petitions were therefore allowed and the award of the tribunal was set aside.

Thereupon there were two appeals by the workmen. The appeal court on a consideration of the terms of the contract and the findings of the tribunal came to the conclusion that the so-called contractors were really the agents of the appellants and that there was no utter lack of control by the appellants on the bidi workers who actually rolled the bidi. The appeal court also found that the intermediaries were impecunious and according to the evidence could hardly afford to have factories of their own. It also found that the evidence revealed that the appellants took the real hand in settling all matters relating to the workers, and the intermediary was a mere cipher and the real control over the workers was that of the appellants. The appeal court therefore held that the appellants were the real employers of the workmen and the so-called intermediaries or so-called independent contractors who were in some cases ex-employees, were no more than agents of the appellants. In this view of the matter the appeal court held that the conclusion reached by the tribunal that the intermediaries were merely branch managers appointed by the management and the relationship of employer and employees subsisted between the appellants and bidi rollers was correct. The appeals were therofore allowed, and the order of the tribunal was restored. The appellants have come before us on certificates granted by the High Court.

The question whether relationship of master and servant subsists between an employer and employee has been the subject of consideration by this Court in a number of cases. In Dharangadhara Chemical Works Limited v. State of Saurashtra [[1957] S.C.R. 152] it was held that the question whether a person was a workman depended on whether he had been employed by the employer and the relationship of employer and employee or master and servant subsisted between them. It was well settled that a prima facie test of such relationship was the existence of the right in the employer not merely to direct what work was to be done but also to control the manner in which it was to be done, the nature or extent of such control varying in different industries and being by its very nature incapable of being precisely defined. The correct approach therefore was to consider whether, having regard to the nature of the work there was due control and supervision by the employer. It was further held that the question whether the relation between the parties was one as between an employer and employee or master and servant was a pure question of fact, depending upon the circumstances of each case. In that case, the dispute was whether certain agarias who were a class of professional labourers, were workmen or independent contractors. The facts found in that case were that the agarias worked themselves with members of their families and were free to engage extra labour on their own account. No hours of work were prescribed. No muster rolls were

maintained; nor were working hours controlled by the master. There were no rules as regards leave or holidays and the agarias were free to go out of the factory after making arrangements for the manufacture of salt. Even so, though certain features which were usually to be found in a contract of service were absent, the tribunal held that on the whole the status of agarias was that of workmen and not that of independent contractors, particularly as supervision and control was exercised by the master extending to all stages of manufacture from beginning to end. This Court upheld the view of the tribunal on a review of the facts found in that case.

The next case to which reference has been made is Shri Chintaman Rao v. The State of Madhya Pradesh [[1958] S.C.R. 1340]. That was a case of bidi manufacture, and the question that arose for determination was whether certain persons known as sattedars and those who worked under the sattedars were workmen or not. It was found that the sattedars undertook to supply bidis by manufacturing them in their own factories or by entrusting the work to third parties at a price to be paid by the management after delivery and approval. Reference was made to the principles laid down in Dharangadhara Chemical Works Limited's case [[1957] S.C.R. 152] to determine whether the persons employed were workmen or not, and it was found that the sattedars were not under the control of the factory management and could manufacture the bidis wherever they pleased. It was therefore held that the coolies were neither employed by the management directly nor by the management through the sattedars. A special feature of that case was that none of the workmen under the sattedars worked in factories. The bidis could be manufactured anywhere and there was no obligation on the sattedars to work in the factory of the management. The sattedars were even entitled to distribute tobacco to the workers for making bidis in the worker's respective homes. It was in these circumstances that this Court held that the sattedars were independent contractors and the workers employed by them were not the workers of the management.

Then we come to the case of Shri Birdhichand Sharma v. First Civil Judge Nagpur [[1961] 3 S.C.R. 161]. That was also a case of bidi manufacture. The facts found were that the workmen who rolled the bidis had to work at the factory and were not at liberty to work at their houses; their attendance was noted in the factory and they had to work within the factory hours, though they were not bound to work for the entire period and could come and go away when they liked; but if they came after midday they were not supplied with tobacco and thus not allowed to work even though the factory closed at 7 p.m. Further they could be removed from service if absent for eight days. Payment was made on piece rates according to the amount of work done, and the bidis which did not come upto the proper standard could be rejected. On these facts it was held that the workers were workmen under the Factories Act and were not independent contractions. This Court pointed out that the nature and extent of control varied in different industries and could not by its very nature be precisely defined. When the operation was of a simple nature and did not require supervision all the time, control could be exercised at the end of day by the method of rejecting bidis which did not come upto proper standard, such supervision by the employer was sufficient to make the workers, employees of the employer and not independent contractors. The nature of the control required to make a person a servant of the master would depend upon the facts of each case.

The next case is Shankar Balaji Waje v. State of Maharashtra [1957] S.C.R. 152]. That was also a bidi manufacturing case. On the facts of that case the majority held that decision in Shri Birdhichand Sharma's case [[1961] 3 S.C.R 161] was distinguishable and the appellant was not a worker within the meaning of the Factories Act. It may be noted however that that case also followed the line of decision of this Court since the decision in the case Dharangadhara Chemical Works Limited [(1962) Suppl. I S.C.R. 249] as to the criteria for coming to the conclusion whether a person was an employee or an independent contractor.

The last case to which reference has been made is again a bidi manufacturing case, namely, Bhikusa Yamasa Kashtriya (P) Limited v. Union of India [[1964] 1 S.C.R. 860]. In that case the main question raised was about the constitutionality of s. 85 of the Factories Act and the notification issued by the State of Maharashtra thereunder. The Constitutionality of s. 85 and the notification made thereunder was upheld. The question there involved was about the application of s. 79 of the Factories Act with reference to leave and the difficulty felt in Shankar Balaji Waje's case [[1957] S.C.R. 152] as to how leave could be calculated in the circumstances was explained with reference to the decision in Shri Birdhichand Sharma's case [[1961] 3 S.C.R. 161].

It is in the light of these decisions that we have to decide whether the workmen who work under the so-called independent contractors in these cases are the workmen of the appellants. It has been found by the tribunal and this view has been confirmed by the appeal court that so-called independent contractors were mere agents or branch managers of the appellants. We see no reason to disagree with this view taken by the tribunal and confirmed by the appeal court on the facts of these cases. We are not unmindful in this connection of the view taken by the learned Single Judge when he held that on the agreements and the facts found the so-called intermediaries were independent contractors. We are however of opinion that the view taken by the appeal court in this connection is the right one. As the appeal court has rightly pointed out the so-called independent contractors were indigent persons who were in all respects under the control of the appellants. There is in our opinion little doubt that this system has been evolved to avoid regulation under the Factories Act. Further there is also no doubt from whatever terms of agreement are available on the record that the so-called independent contractors have really no independence at all. As the appeal court has pointed out they are impecunious persons who could hardly afford to have factories of their own. Some of them are even ex-employees of the appellants. The contract is practically one sided in that the proprietor can at his choice supply the raw materials or refuse to do so, the so-called contractor having no right to insist upon the supply of raw materials to him. The so-called independent contractor is even bound not to employ more than nine persons in his so-called factory. The sale of raw materials to the so-called independent contractor and resale by him of the so-called independent contractor and resale by him of the manufactured bidis is also a mere camouflage, the nature of which is apparent from the fact that the so-called contractor never paid for the materials. All that happens is that when the manufactured bidis are delivered by him to the appellants, amounts due for the so-called sale of raw materials is deducted from the so-called price fixed for the bidis. In effect all that happened is that the so-called independent contractor is supplied with tobacco and leaves and is paid certain amounts for the wages of the workers employed and for his own trouble. We can therefore see no difficulty in holding that the so-called contractor is merely an employee or an agent of the appellants as held by the appeal court and as such employee or agent he employs workers to roll bidis on behalf of the appellants. The work is distributed between a number of so-called independent contractors who are told not to employ more than nine persons at one place to avoid regulations under the Factories Act. We are not however concerned with that aspect of the matter in the present appeals. But there can be no doubt that the workers employed by the so-called contractors are relly the workmen of the appellants who are employed through their agents or servants whom they choose to call independent contractors.

It is however urged that there is no control by even the agent over the bidi workers. Now the evidence shows that the bidi workers are permitted to take the leaves homes in order to cut them so that they might be in proper shape and size for next day's work; but the real work of filling the leaves with tobacco (i.e. rolling the bidis) can only be done in the so-called factory of the so-called independent contractor. No tobacco is ever given to the workers to be taken home to be rolled into bidis as and when they liked. They have to attend the so-called factory of the so-called independent

contractor to do the real work of rolling bidis. As was pointed out by this Court in Shri Birdhichand Sharma's case [[1961] 3 S.C.R. 161] the work is of such a simple nature that supervision all the time is not required. In Birdhichand Sharma's case [[1961] 3 S.C.R. 161] supervision was made through a system of rejecting the defective bidis, at the end of day. In the present cases we have not got the full terms of the agreement and it is therefore not possible to say that there was no kind of supervision or control over the workers and that the so-called independent contractors had to accept all kinds of bidis whether made upto standard or not. It is hardly likely that the so-called independent contractor will accept bidis which are not upto the standard; for that is usually the system which prevails in this trade as will be apparent from the facts of the many bidi manufacturing cases to which we have referred. We are therefore not prepared to hold in the absence of any evidence one way or the other that there is no supervision whatsoever of the work done by the workers. In the circumstances we are of opinion that the relationship of master and servant between the appellants and the workmen employed by the so-called independent contractors is established. As the appeal court has pointed out whenever there was a dispute in connection with the manufacture of bidis the workers looked to the appellants for redress. In one of the cases the manager of one of the appellants sent a letter to the labour officer that the factory was agreeable to incerease the wages of the workers from Rs. 1/14/- to Rs. 2/- per thousand bidis. In the other case also a similar letter was addressed showing that whenever there was incereas or decrease in wages of the workers who work under the so-called independent contractors the real decision was taken by the appellants. This conduct on the part of the appellants is clearly inconsistent with their plea that the workers are not their employees and there is no privity between them and the said workers. We are therefore of opinion that on the facts found in these cases the appeal court was right in holding that the conclusion reached by the tribunal that the intermediaries were merely branch managers appointed by the management and the relationship of employers and employees subsisted between the appellants and the bidi rollers is correct. In this view the appeals fail and are hereby dismissed with costs - one set of hearing costs.

Appeals dismissed.

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