SUPREME COURT OF INDIA

Manager M/s. Pyarchand Kesarimal Porwal Bidi Factory

Vs.

Onkar Laxman Thenge

C.A.No.793 of 1966

(J. M. Shelat and V. Bhargava, JJ.)

27.09.1968

JUDGEMENT

SHELAT, J. :-

1. This appeal, by special leave, directed against the order of the High Court of Bombay (Nagpur Bench) which set aside the orders of the Assistant Commissioner of Labour and the Industrial Court, Nagpur and remanded the case to the Assistant Commissioner.

2. The appellant-firm conducts a number of bidi factories at various places in Vidharba including the one at Kamptee. Its head office is also situate there. The factory at Kamptee and the head office have always been treated as separate entities though owned by the same firm. Consequently, the head office was registered under the Central Provinces and Berar Shops and Establishments Act, 1947 and the factory at Kamptee was registered under the Factories Act. The factory has also its own standing orders certified under the Central Provinces and Berar Industrial Disputes Settlement Act, 1947. Respondent 1 was originally employed in the factory at Kamptee. Two or three years thereafter he was directed to work at the head office and worked therein for about six years prior to

the impugned order of dismissal passed against him by the munim of the head office. Aggrieved by the order he filed an application under Section 16 of the C. P. and Berar Industrial Disputes Settlement Act alleging that the said order was incompetent and illegal. The appellant-firm contended that at the material time Respondent 1 was employed as a clerk in the head office that the head office was a separate entity, that the dismissal order had not been passed by the appellant-firm as the owner of the said factory, that the firm, as such owner, was wrongly impleaded and that the application was misconceived.

3. The Assistant Commissioner dismissed the application holding that Respondent 1 at the material time was not the employee in the factory, but was employed in the firm's head office. He relied on the fact that the head office and the factory had separate rules, that Respondent 1 used to sign his attendance in the register of the head office, that he was being paid his salary by the head office, and lastly, that his name was not on the muster roll of the factory. He also found that whereas the staff of the head office was governed by the C. P. and Berar Shops and Establishments Act, the factory was governed by the C. P. and Berar Industrial Disputes Settlement Act. Against the dismissal of his application Respondent 1 filed a revision application before the Industrial Court, Nagpur. The Industrial Court dismissed the application holding that the only question raised before it was whether Respondent 1 was the employee of the head office and that being purely a question of fact, he could not interfere with the finding of fact arrived at by the Assistant Commissioner. Respondent 1 thereafter filed a writ petition in the High Court challenging the said orders. The High Court held that it was possible in law for an employer to have various establishment where different kinds of work would be done, in which case an employee in one establishment would be liable to be transferred to another establishment. But the High Court observed that unless it was established that the employment of Respondent 1 in the factory was legally terminated it could not be assumed merely because he was directed to work in the head office, that his employment was changed and the head office was substituted as his employer in place of the said factory. As the order passed by the Assistant Commissioner was not clear on this question, the High Court remanded the case for disposal according to law.

4. Mr. Phadke, for the appellants, raised the following contentions against the High Court's order: (1) that the High Court made out a new case for Respondent 1, in that respondent 1 had never challenged the validity of the order of dismissal on the ground that there was no change of employment, and that therefore, the head office was incompetent to order his dismissal, (2) that the facts of the case justified the conclusion that Respondent 1 had ceased to be the employee of the factory, and (3) that in any event he must be held to have given an implied consent to his being treated as the employee of the head office. In support of these contentions he relied upon the fact that Respondent 1 had worked at the head office for the last six years without any protest, that his name was on the attendance register of the head office, that it was the head office which paid his salary and lastly, that he worked in the head office under the direction and control of the munim of that office.

5. As to the first contention, it would not be correct to say that the High Court made out a new case for the first time for Respondent 1 which was not pleaded by him before the Assistant

Commissioner. In Para 1 of his application he had expressly averred that about three years after his employment in the factory he had been ordered to work in the head office. In reply to the application the appellants conceded that though Respondent 1 was first employed in the factory and had worked there for about three years, he had thereafter been transferred to and been working as a clerk in the head office. There was, however, no averment in that reply that the contract of service of Respondent 1 with the said factory was at any time put an end to or that when he was directed to work in the head office a fresh contract of service was entered into between him and the head office. The Assistant Commissioner in his said order held that the head office and the factory were two separate establishments registered under two different Acts, and, therefore, subject to different provisions of law. He further held that since Respondent 1 was not actually working in the factory and his name did not figure in the factory's muster roll and was not paid his wages by the factory, the applicant could not be said to be an employee of the said factory. In his revision application before the Industrial Court, Respondent 1 made an express plea that when he was directed to work in the Head office, he had received no notice from the factory that his services were terminated there or that he had henceforth become the employee of the head office. It is clear from these pleadings that it was not for the first time in the High Court that Respondent 1 contended as to the incompetence of the head office to take disciplinary action against him and to pass the order of dismissal. The first contention of Mr. Phadke, therefore, cannot be accepted.

6. As regard the second and the third contentions, there is no dispute that though the head office and the said factory belong to the same proprietors, they were always treated as two distinct entities registered under two different Acts, that Respondent 1 was employed first in the factory where he worked for 2 or 3 years and was thereafter ordered to work at the head office where admittedly he worked for about six years before the impugned order terminating his services was passed. The question, therefore, which the Assistant Commissioner and the Industrial Court had to decide, in view of the pleadings of the parties, was whether Respondent 1 had ceased to be the employee of the factory and was in the employment of the head office at the time when the impugned order was passed, or whether his services were simply lent to the head office and he continued all along to be the employee of the factory?

7. The general rule in respect of relationship of master and servant is that a subsisting contract of service with one master is a bar to service with any other master unless the contract otherwise provides or the master consents. A contract of employment involving personal service is incapable of transfer. Thus, where a businessman joins a partnership firm and takes his personal staff with him into the firm, his staff cannot be made the staff of the firm without the consent of the other partners. (cf. Mersery Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd., 1947 AC 1 at p. 17). In certain cases, however it is possible to say that an employee has different employers, as when the employer, in pursuance of a contract between him and a third party, lends or hires out the services of his employee to that third party for a particular work. Such an arrangement, however, does not effect a transfer of the contract of service between the employer and his employee, but only amounts to a transfer of the benefit of his services. (cf. Century Insurance Co. Ltd. v. Northern Ireland Road Transfer Board, 1942 AC 509). In such cases where a third party engages another person's employee it is the general employer who is normally liable for the tortuous acts committed by the employee and his liability is not affected by the existence of a contract between him and the third party under which the services of the employee are lent or hired out for a temporary period to

such third party. In order to absolve the employer from the liability and to make the person who temporarily engages the employee or hires his services it is necessary to prove that the relationship of master and servant was temporarily constituted between such third party and the employee, and that it existed at the time when the tortuous act was committed by the employee. There is, however, a presumption against there being such a transfer of an employee as to make the hirer or the person on whose behalf the employee is temporarily working and a heavy burden rests on the party seeking to establish that the relationship of master and servant has been constituted pro hac vic between the temporary employer and the employee; (1947 AC 1 (supra)). In cases where an employer has hired our or lent the services of his employee for a specific work and such an employee has caused damage to another person by his tortuous act, the question often arises as to who of the two i. e., the employer or the person to whom such services are hired out or lent, is vicariously responsible for such damage. In cases commonly know as cranes and carriage cases, courts in England evolve the rule of the employee being temporarily the employee of such third party of impose the responsibility on him if it was established that in the matter of the act, in the performance of which the tortuous act was committed such third party had exercised control and direction over the performance of the act in question and the manner in which it was to be performed. The classic case commonly cited and in which this rule was applied is Quarman v. Burnett, (1840) 6 M and W 499. (cf. also Jones v. Scullard, (1898) 2 QB 565 where Lord Russell applied the test of the power to direct and control the act in performance of which damage was caused to another person). The position in law is, therefore, clear that except in the case of a statutory provision to the contrary, a right to the service of an employee, cannot be the subject matter of a transfer by an employer to a third party without the employee's consent. Thus, in Nokes v. Doncaster Amalgamated Collieries, Ltd., 1940-3 All ER 549 where an order was made under Section 154 of the Companies Act, 1929 transferring all the assets and liabilities of a company to another company, Viscount Simon held that such an order did not mean that contracts of service between the appellant and the transferor-company also stood transferred. The principle that even in cases where the services of an employee are lent to a third party temporarily for a particular work, the employee still remains the employee of the employer is illustrated in Denham v. Midland Employees Mutual Assurance Ltd., 1955-2 QB 437. There Eastwoods Ltd., employed Le Grand to make test borings on their property. Le Grands provided two skilled drillers with plant and tackle to carry out the borings and Eastwood Ltd. agreed to provide one of the labourers, one Clegg, to assist those skilled men free of charge to Le Grands. While the said work was being carried out, Clegg was killed in circumstances in which Le Grands were liable to pay damages to his widow on the ground that his death was caused on account of the negligence of Le Grands or their servants. Le Grands sought to be indemnified by their insurers against their said liability. They were covered by two policies, one with the Midland Employees Mutual Assurance Ltd. in respect of their liability to the employees and the other with Lloyds in respect of their liability to the public in general. The policy issued by the Midland Employers Mutual Assurance Ltd., provided that if any person "under a contract of service" with the insured were to sustain any personal injury by accident caused during the period of employment, and if the insured became liable to pay damages for such injury the association would indemnify the insured against all sums for which he would be so liable. The policy issued by the Lloyds indemnified Le Grands for any sums for which they might become liable to pay in respect of death or accidental bodily injury to persons and loss or damage to property arising in or out of the business of borings carried out by Le Grands. The question was whether at the time of his death Clegg was the servant of Le Grands and under "a contract of service" with them as provided in their policy with the Midland Assurance Ltd. Dealing with that question, Denning, L. J., observed that the difficulty which surrounded such a subject arose because of the concept that a servant of a general employer may be transferred to a temporary employer so as to become for the time being his servant. Such a

concept was, he said, a very useful device to place liability on the shoulders of the one who should properly bear it, but did not affect the contract of service itself. No contract of service can be transferred from one employer to another without the servant's consent and such consent is not to be raised by operation of law but only by the real consent in fact of the man express or implied. He further observed:

"In none; of the transfer cases which has been cited to us had the consent of the man been sought or obtained. The general employer has simply told him to go and do some particular work for the temporary employer and he has gone. The supposed transfer, when it takes place, is nothing more than a device-a very convenient and just device, mark you - to put liability on to the temporary employer; and even this device has in recent years been very much restricted in its operation. It only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only what the servant is to do, but also how he is to do it.

Applying these principles to the facts before him, he observed that he had no doubt that if a third person had been injury by the negligence of Clegg in the course of his work, Le Grands and not Eastwoods would be liable to such third person. So, also when Clegg himself was killed, Le Grands were liable to his widow on the same footing that they were his masters and not merely inviters. These results were achieved in law by holding that Clegg became the temporary servant of Le Grands. He further observed that there was no harm in thus describing him so long as it was remembered that it was a device designed to cast liability on the temporary employer. However, on the question whether Clegg was "under a contract of service" with Le Grands, he held that he was not, for his contract of service was with Eastwoods. They had selected him and paid his wages and they alone could suspend or dismiss him. Clegg was never asked to consent to a transfer of the contract of service and he never did so. If he was not paid his wages or if he was wrongfully dismissed from the work, he could sue Eastwoods for the breach of contract and no one else. If he failed to turn up for work, Eastwoods alone could sue him. He could, therefore, see no trace of a contract of service with Le Grands except the artificial transfer raised by law so as to make Le Grands liable to others for his faults or liable to him for their own faults and that the artificial transfer so raised cannot be said to be a contract of service within the said policy of assurance. Le Grands, therefore, were not entitled to be indemnified by the Midland Assurance Company under the employer's liability policy but were entitled to be indemnified by Lloyds under their public liability policy.

8. A contract of service being thus incapable of transfer unilaterally, such a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract to service by mutual consent and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract is not made as aforesaid and the employee continues to be in the employment of the employer. Therefore, when an employer orders him to do a certain work for another person, the employee still continues to be in his employment. The only thing that happens in such a case is that he carries out the orders of master. The employee has the right to claim his wages from the employer and not from the third

party to whom his services are lent or hired. It may be that such third party may pay his wages during the time that he has hired his services, but that is because of his agreement with the employer. That does not preclude the employee from claiming his wages from the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But if the employee fails to carry out his directions he cannot dismiss him and can only complain to the employer. The right of dismissal vests in the employer.

9. Such being the position in law, it is of the utmost importance in the present case that the appellants at no time took the plea that the contract of employment with the factory was ever terminated or that the respondent gave his consent, express or implied to his contract of service being transferred to the head office, or that there was a fresh contract of employment so brought about between him and the head office. Unless , therefore, it is held from the circumstances relied upon by Mr. Phadke that there was a transfer of the consent of service or that Respondent 1 gave his consent, express or implied, to such a transfer, Respondent 1 would continue to be the servant of factory. Since the case has been remanded to the Assistant Commissioner, we refrain from making any observations as regards the effect of the admissions said to have been made by Respondent 1 and relied on by the Assistant Commissioner.

10. Mr. Phadke, however, relied on Jestamani Gulabrai Dholkia v. Scindia Steam Navigation Co., 1961-2 SCR 811 = (AIR 1961 SC 627) in support of his contention that there was a transfer of the contract of employment and that it was not a mere transfer of the benefit of the services of Respondent 1. In that case the appellants were originally in the service of the Scindia Steam Navigation Company. In 1937 Air Services of India Ltd., was incorporated. In 1943, the Scindias purchased the ASI and by 1946 ASI became a full-fledged subsidiary of the Scindias. Between 1946 to 1951 the Scindias transferred several of their employees including the appellants to the ASI. The Scindias had a number of such subsidiary companies and it was usual for them to transfer their employees to such companies and also to recall them whenever necessary. In 1953, the Government of India decided to nationalise the airlines operating in India with effect from June 1953. On April 6, 1953 the appellants wrote to the Scindias to recall them to their original posts but the Scindias refused to do so as they were not in a position to absorb them. They pointed out that a Bill, called the Air Corporation Bill, 1953, was pending before Parliament, that under clause 20 thereof persons working with ASI on the appointed day would become the employees of the Corporation, that under that clause they had the option to resign if they did not wish to join the Corporation and that if the appellants exercised that option, the Scindias would treat them as having resigned from their service. The Act was passed on May 28, 1953. Section 20 of the Act provided that every employee of an existing air company employed by such company prior to July 1, 1952 and still in its employment immediately before the appointed day, shall, in so far as such employee is employed in connection with the undertaking which has vested in the Corporation by virtue of the Act, become as from the appointed date, the employee of the Corporation in which the undertaking has vested. On June 8, 1953 the appellants made a demand that if the Corporation were to retrench any person from the staff loaned to ASI within the first five years, the Scindias should take them back. The Scindias refused. None of the appellants had exercised the option provided by Section 20 (1). On August 1, 1953, ASI became vested in the Corporation and Section 20 (1) came into force as from that date. The appellants contended inter alia that the contract of service between them and the Scindias was not transferable. The contention was rejected on the ground that by reason of Section

20 (1) the contract of service of the appellants stood transferred to the Corporation and that though the appellants were not originally recruited by ASI and were transferred by the Scindias to the said company, they were the employees of ASI and were such employees on the appointed day and since they had not exercised the option under Section 20 (1) they became the employees of the Corporation by operation of that provision. The Scindias, therefore, were no longer concerned with them. It is true that the appellants were transferred to ASI on condition that they would receive the same remuneration and other benefits as they were getting in the Scindias and further that it was possible to contend that Scindias alone could dismiss them. But the learned Judge explained that these were special terms applicable to the appellants. But in spite of them they still had become the employees of the ASI and were such employees on the appointed day. It seems that this conclusion was reached on the footing that since ASI was the subsidiary company of the Scindias like several other subsidiary companies, and it was usual for the Scindias to transfer any of their employees to such subsidiary companies, the appellants on their transfer were deemed to have commenced to become the employees of ASI in spite of right of the Scindias to recall them whenever necessary and further that the appellants continued to be and were the employees of the ASI on the appointed day and were, therefore, governed by Section 20 (1) of the Act. It is clear that this was a case of employees becoming the employees of the Corporation by virtue of the operation of a statute. The decision, therefore, is not an authority for the proposition that an employer can transfer his employee to a third party without the consent of such employee or without terminating the contract of employment with him. That being the position the case of 1961-2 SCR 811 = (AIR 1961 SC 627) (supra) cannot assist Mr. Phadke.

11. In our view the High Court was right in setting aside the order of the Assistant Commissioner and the Industrial Court on the ground that unless a finding was reached on the facts of the case that the contract of service with the said factory came to an end and a fresh contract with the head office came into being Respondent 1 continued to be in the employment of the factory and the head office, therefore, was not competent to dismiss him. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.