

(1959) 06 BOM CK 0021
In the Bombay High Court
Case No : Reference No. 8 of 1959

Sidisha Ibrahimsha (Bidi Merchant) and Others	APPELLANT
Vs	
Their Workmen (Bidi Kamdar Mandal, Jamnagar)	RESPONDENT

Date of Decision : 17-06-1959

Acts Referred:

Industrial Disputes Act, 1947 — Section 2
Workmens Compensation Act, 1923 — Section 4

Citation : (1960) 1 LLJ 390

Hon'ble Judges : N.L. Vyas, J

Bench : Single Bench

Judgement

1. The dispute about bonus for Samvat year 2012 raised by the bidi workers or bidi rollers employed by eleven bidi merchants of Jamnagar is referred by order No. AJB. 87(1) 58, dated 12 January, 1959, for adjudication to this tribunal.

All these eleven merchants are doing business in a small way. Only six of them were doing before 1956 business to a considerable extent but after the Shops and Establishments Act was applied to the City of Jamnagar, these six merchants who were doing business jointly in two names have split up their business and are thereafter carrying on separately. It appears that before 1956 Sidisha, Haidersha and Hasansha were carrying on business jointly in the name of Haidersha Ibrahimsha. Similarly, Ladhahbai, Gokuldas and Damjibhai were carrying on business jointly in the name of Ladhahbai Premjibhai. Even now, the business in the name of Haidersha is the joint business of all the three partners. Similarly, the business in the name of Ladhahbai, Gokuldas and Damji are joint businesses of all the three brothers. In all, there are about 126 workmen employed by these eleven merchants for making bidis. Out of these 126 workmen 28 have made applications, Exs. 2, 6, and 7, in which they have stated that they are not the workmen of the merchants for whom they are working and that they are independent contractors. There is also no dispute that all the bidi workmen are organized in one union and it is that union which has represented the case of all these bidi workers before this tribunal. It would, therefore,

appears that a large majority of the bidi workers are the members of this union and with the exception of 28, who have made applications, Exs. 2, 6 and 7, the rest have supported the claim of the union that all the bidi workers are the workmen of the bidi merchants and are not independent contractors.

2. In the written statements, which are filed separately by all the eleven merchants, it is contended that all the bidi workers are independent contractors and are not employed by them and consequently the dispute raised by them is not an industrial dispute raised by them is not an industrial dispute and cannot, therefore, be referred for adjudication to this tribunal. In effect the contention of the merchants is that the Government was incompetent to make a reference to this tribunal, as there was no industrial dispute in existence on the date of the reference. It is also contended that as some of the bidi workers have made the applications, Ex. 2, 6 and 7, alleging that they are independent contractors and had not raised the dispute, the Government had no jurisdiction to refer this dispute about bonus for Samvat year 2012 to this tribunal for adjudication. As already stated, on behalf of the bidi workers it was urged by the union that all of them are employed by the bidi merchants and are their employees and therefore the dispute about bonus between them and the bidi merchants is an industrial dispute and consequently the Government has jurisdiction to refer the dispute for adjudication to this tribunal.

3. The points for decision in this reference are :

(1) whether the bidi workers are the workmen of the bidi merchants, who are parties to this reference, and

(2) whether in the Samvat year 2012 there was any surplus after providing for prior charges, which would justify this tribunal to award bonus to the bidi-makers.

The second question would arise only if I hold that the bidi-makers are the workmen employed by the eleven merchants, who are parties to this reference. Therefore, evidence was allowed to be led by both the parties on the question as to whether the bidi-makers employed by these merchants are their employees or not. Both the parties have produced oral as well as documentary evidence on this question. A reference was also made to several decisions of the Supreme Court and of the High Court of Madras in order to show as to whether the bidi-makers employed by the bidi merchants for making bidis in their premises can be classed as their workmen or as independent contractors.

4. Before I proceed to consider the decisions referred to by both the parties, it would be necessary to state the mode of work, which appears to be commonly employed by the bidi merchants of Jamnagar. All these eleven merchants are not carrying on their business in big premises employing numerous workmen. As already shown, these eleven merchants had employed in all only 126 workers. A large majority of workmen are employed by Haidersha and his brothers and Ladhabhai Premjibhai and his sons. The remaining merchants are employing between 5 and 8 workmen each. It appears that none of them employs more

then ten workmen for making bidis. It is undisputed that these bidi-makers work either in their shops where bidis are sold by the merchants or in place rented by the merchants where groups of bidi-makers sit and make the bidis. These places rented specially for this purpose are called at Jamnagar "bhandas," and it appears that in each bhanda more than 10 workmen are not employed. The bidi-makers are given the leaves in the evening and they have to take these leaves home, soak them in water and cut them in sizes suitable for making bidis of the type directed by their employers. The next morning they bring these leaves to the shop or the bhanda and there tobacco, after weighing, is supplied to each one of them; thread is also supplied by the employer and they are required to sit in the shop or the bhanda for making the bidis. As soon as they finish their work, the bidis are to be handed over to the employer, and they are paid at a fixed rate at the close of the day. Ordinarily, payments are made at 8 p.m. and leaves are also supplied to them for the next day at that time. Under the Minimum Wages Act, the rate for one thousand bidis is fixed at Rs. 2-11-3 and it appears that with one exception all the merchants are paying the bidi-makers at this rate. Only for a special type of bidis the payment is made at a little higher rate. It would, therefore, appear that these bidi-makers are required to work in the premises of the bidi merchants and they are paid at fixed rates. It is also clear that the raw materials for making bidis are supplied by the bidi merchants. The premises are either owned by the merchants or are rented by them and baskets and other things required for work are also supplied by the bidi merchants. As regards this mode of working, there is no dispute.

5. But it was contended on behalf of the bidi merchants that the bidi-makers are not required to attend for work at regular hours and are under no obligation to give particular production and are even free to leave the premises any time they like without leave, and therefore, it must be held that there is no control of the bidi merchants on the bidi-makers regarding the details of work or regarding the manner of working and the time of working and therefore they should not be considered to be the workmen of the bidi merchants but should be considered as independent contractors. According to the bidi merchants, the bidi-makers are simply given contract to make bidis at stated rate out of raw materials supplied to them. They are free to work in any manner they like, at any time they like and to remain absent without leave for any number of days they like and therefore, they cannot be considered to be their employees. In order to prove this, oral evidence was produced by the bidi merchants. Some of the bidi merchants, who were examined as witnesses and some of the bidi-makers working for these bidi merchants no doubt stated in their evidence that the bidi-makers were not required to attend at fixed hours and were also free to work in any manner they like without any supervision on their part. They also stated that it was not necessary for them to obtain leave for remaining absent. But, at the same time, they had to admit that the bidi-makers were required to make the bidis in the premises of the bidi merchant and were also given instructions about the types of bidis to be made by them.

They have also admitted that particular quantities of leaves were given to the bidi-makers according to the requirements of the merchants, and if there was accumulation of stock, the bidi-makers were given lesser quantities of leaves. They have also admitted that how much tobacco is to be used in particular type of bidis is also stipulated by the bidi merchants, and if the bidi-makers make lesser number of bidis or use greater quantity of tobacco, they are being told to be careful in future. It also appears from their evidence that no bidi-maker is required to work for more than eight hours either in the shop or in the bhanda. According to the bidi merchants, the premises are kept open from 8 a.m. to 8 p.m., but no one is allowed to work for more than eight hours. These merchants and their witnesses have, no doubt, stated that bidi-makers come for work at any time they choose, but even they had to admit that majority of the workmen attend for work from 10 a.m. to 1 p.m. and from 3 p.m. to 8 p.m. The premises are kept closed for two hours from 1 p.m. to 3 p.m. In order that no bidi-maker can work for more than eight hours, a particular quantity of leaves is given to them. No one is given leaves weighing more than four seers, and it is not in dispute that no one can work for more than eight hours, if only three to four seers of leaves are given to him. This is stated by Ayub, Ex. 76, who was working for Haidersha, in Pars. 43 to 46 of his deposition. Even Sidisha at Ex. 62 has admitted in Paras. 54 to 57 of his deposition that workmen are instructed about the types of bidis to be made by them. He has further admitted in Para. 63 that according to the stock position leaves are given to the workmen. Therefore, when these bidi merchants and their witnesses say that the bidi-makers are not under their control about the manner in which they should work, does not appear to be believable, because even Haidersha had issued a notice Ex. 69 to a bidi-maker in which he was told to give sufficient production of bidis in relation to the quantity of leaves given to him. Even notice Ex. 72 was given by Haidersha to some of the bidi-makers to discharge them for unsatisfactory work. A notice Ex. 74 given by Haidersha also shows that a bidi-maker is liable to be discharged for working for another bidi-maker. In the face of these notices, Sidisha and other bidi merchants stated that the bidi-makers were at liberty to work for others and no objection was ever taken by them.

6. But there is documentary evidence to show that these bidi-makers were treated as their employees by the bidi merchants. Ramniklal Popatlal, who is one of the parties to this reference, had given notice Ex. 126 to his workman for coming late; that was in June 1956. Similarly chargesheet Ex. 127 was given by him to a workman for absence without leave and for giving production below the normal. He had also given a notice, Ex. 129, to suspend one workman; by notice Ex. 132 dated 14 June, 1956 another workman was discharged for misconduct by Ramniklal. He had also given a notice Ex. 137 to another workman to show cause why he should not be discharged for misconduct. Not only this, but Ramniklal Popatlal had made settlements Exs. 152 and 153 with the union about reinstatement of certain workmen. Ramniklal was examined as a witness and he explained as a witness and he explained that he had given these notices,

chargesheets and orders of dismissal on the advice of Sri Dinkar Oza, the secretary of union, and that he was Unaware of the legal position. This can hardly be believed. It is clear from this documentary evidence that Ramniklal Popatlal had treated the bidi-makers as his workmen, and it is only after the claim was made by the workmen for bonus and for other rights as workmen that he is coming forward with the plea that these bidi-makers were not his workmen but were independent contractors.

7. The union had also made settlements with Ladhahbai, Gokuldas and Damjibhai, who are parties to this reference. These settlements were made in 1956. They are Exs. 154, 155, and 156. In all these settlements, the bidi-makers were recognized as their workmen. On this basis, settlements were made about giving sufficient leaves to workmen and about compensating them for not giving sufficient leaves. It is true that when the dispute had again arisen between Ladhahbai Premjibhai and the bidi-makers on the same point, the merchant had raised the contention that the bidi-makers were not his workmen and settlement Ex. 139 was made on 8 October, 1958 without admitting that the bidi-makers were his workmen. But this position was stated for the first time in 1957 or 1958. In 1956 the position appears to have been accepted by all the bidi merchants that the bidi-makers were their workmen.

8. This should be further clear from the attitude adopted by Manharlal Ambalal and Laxmichand Sangraj, who are also parties to this reference. In 1956, Manharlal Ambalal had given notice of discharge to several workmen. Objection was raised by the union against their discharge and Manharlal has stated that no action was taken on these notices. Then again in the same year one Gulabrai was discharged by Manharlal Ambalal, and there was a dispute about his reinstatement, and ultimately settlement Ex. 148 was made with the union about his reinstatement. If this bidi merchant had not considered the bidi-makers as his employees, there would have been no occasion to discharge them or to reinstate them. There was a similar settlement, Ex. 186, made with Laxmichand Sangraj about reinstatement of one workman. It would, therefore, appear that out of these eleven bidi merchants, there is documentary evidence to show that six of them had treated the bidi-makers as their workmen and on that basis had either taken disciplinary action against them or had come to some sort of settlement with the union either about their reinstatement or about their conditions of work. There is such documentary evidence only regarding the five merchants, but in view of the fact that majority of the bidi merchants were treating the bidi-makers as their workmen, it must be assumed that the other bidi merchants were also considering the bidi-makers as their workmen in 1956, and it was only after the union was formed and demands about their conditions of work were made that the stand was taken by the bidi merchants that the bidi-makers were not their employees but were independent contractors.

9. In view of the documentary evidence referred to in the foregoing paragraphs, the evidence of Hasamkhan who is working in Haidersha's bhandra, and of Sri

Dinkar Oza, about there being fixed hours of work for the bidi-makers becomes believable. Hasamkhan has stated in his evidence that the bidi-makers are required to work from 10 a.m. to 1 p.m. and from 3 p.m. to 8 p.m. Similarly, evidence is given by Sri Dinkar Oza, the secretary of the union. Both have stated that after the Shops and Establishments Act was applied to the City of Jamnagar, a board was put up in the bhandas stating the hours of work to be from 10 a.m. to 1 p.m. and from 3 p.m. to 8 p.m. It is true that no question about such a board being exhibited in any bhanda was put to any bidi merchant, but, it appears from the letter Ex. 187 dated 1 July, 1958 written by the union to Vrajlal Ravji that after the Shops and establishments Act came into force, the bidi-makers were required to work from 10 a.m. to 1 p.m. and from 2-30 p.m. to 7-30 p.m., and that after the demands were made about bonus and about other conditions of work and after conciliation proceedings about these demands had ended in failure on 20 June, 1958, the bidi merchants had discontinued the practice of taking work at stated hours and started the practice of keeping the bhanda open from 8 a.m. to 8 p.m. By this letter, the bidi merchant was called upon to pay overtime charges to the workmen for taking work from them for more than eight hours. Reply, Ex. 188, was given to this letter, and in this reply it was alleged that hours of work were not fixed by the bidi merchants and that under the instructions of the union the bidi-makers were attending for work at fixed hours. It is further alleged in this reply that no one was required to work for more than eight hours and that all the bidi-makers were independent contractors. But from this letter Ex. 188, it would clearly appear that before a certain date in 1958 the bidi-makers were attending at regular hours and only thereafter the bidi merchants were not requiring them to work at stated hours. In view of this correspondence between one of the bidi merchants and the union it would appear that what Sri Dinkar Oza has stated in his evidence about the bidi-makers" working at stated hours before a certain date appears to be true. It is only after the union was well organized and it presented demands about leave with wages and about other condition of work that the bidi merchants took up the stand that the bidi-makers were independent contractors and were not under their control about the manner of work or about the hours of work. I am, therefore, inclined to place greater reliance on the evidence of Hasamkhan and Dinkar Oza, as their evidence already referred to. It would therefore, appear that the bidi-makers were treated as their employees by the bidi merchants upto the year 1956, and that they were not independent contractors in the sense that they were given the contract to make bidis independently of the employers but were really under the control of the employers not only as regards the raw materials to be used, the quantum of production to be given in relation to the supply of leaves and tobacco, but also in regard to the place of work and the hours of work. It is true that no regular attendance register was ever maintained by the bidi merchants. It is also true that the bidi-makers were not required to take leave in writing for remaining absent, but the method of work is such that the employers would know who would remain absent on the next day from the fact the leaves were not taken by them on the previous evening. If the leaves

are taken on the previous evening, they must come for work within 2-3 days because otherwise the leaves would be spoiled. I cannot therefore believe for a moment that the bidi-makers are not at liberty to remain absent for any number of days after the leaves for making bidis. Similarly, the bidi-makers are not at liberty to work at home. They must work in the premises of the bidi merchants. They must also work during stated hours and for not more than eight hours. They are usually not allowed to take helpers to assist them in their work. On these facts, I feel no doubt in holding that the bidi merchants are exercising real control over the work of the bidi-makers and therefore they must be considered their workmen.

10. The distinction between a workman and an independent contractor is stated in the decision of the Supreme Court in *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, . In this case, the question was whether the agarias employed in the salt works of the company at Kuda were the workmen of the company or independent contractors. These agarias were not under any obligation to work at stated hours; they were also at liberty to employ additional labour to assist them in their work; they brought their own bullocks for their work, and no attendance registers were maintained. Still, as there was supervision of the company over the production of salt by the agarias, it was held that the control exercised by the company about the manner of work was sufficient to make them the workmen of the company. In that decision, after reviewing several English cases on the question, the Supreme Court laid down the principle that if on the facts of a particular case it appears that there is control of the employer about the manner in which the work shall be done by the workman, he would be the workman of the employer and not an independent contractor. The following observations at p. 481 of the report are relevant :

"The principle which emerges from these authorities is that the prima facie test for determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work."

In a later decision in *Chintaman Rao and Another Vs. The State of Madhya Pradesh*, , the Supreme Court has reaffirmed this principle and has observed as follows at p. 256 of the report :-

"There is a well-understood distinction between a contractor and a workman and between contract for service and contract of service. In Stroud's Judicial Dictionary (3rd Edn., Vol. 1, p. 616), the distinction between a contractor and a workman is brought out in bold relief in the following manner :-

"Of course, every person who makes an agreement with another for the doing of work is a contractor, in a general sense, but as used the Workmen's Compensation Act, 1897 [60 and 61 Vict. c. 37], S. 4 "contractor" and "workman" have come to have a more restricted and distinctive meaning and

"contractor" means "one who makes an agreement to carry out certain work specified but not on a contract of service."

The same idea is repeated in a different terminology thus :

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

There is, therefore, a clear-cut distinction between a contractor and a workman. The identifying mark of the latter is that he should be under the control and supervision of the employer in respect of the details of the work."

11. Similar question arose for decision before the industrial tribunal, Madras, in the dispute between Maharaja Beedi Factory v. North Arcot District Beedi Workmen's Union and another. The award of the tribunal is reported in 1958 I L.L.J. 159. Against this award, appeal was taken to the High Court of Madras and the decision of the tribunal on this point was confirmed. That decision is reported in 1958 - II L.L.J. 736. The dispute there was between the bidi factory and the workmen employed in the factory. The mode of work of the factory was similar to the one prevailing in Jamnagar. The factory was kept open from 7-45 a.m. to 6 p.m. The workers came to the factory during those hours and took delivery of a specified quantity of leaves to roll them into bidis within the premises of the factory. The bidi leaves were distributed to the workers on the previous day for being taken home. The workmen were required to work in the factory premises with the raw materials supplied by the owner. On these facts, the contention of the owner of the factory was that the bidi-rollers bidi-makers were the independent contractors and were not employed by him. On those facts, the tribunal held that there was sufficient control of the factory owner about the manner of doing the work and therefore they were the employees of the factory owner. This decision was confirmed by the Madras High court. The Madras High Court, after referring to several decisions including the decision of the Supreme court in the Dhrangadhra Chemical Works case (supra), observed as follows at p. 740 of the report :-

"Whether or not the test of control and supervision, inclusive of the control over the time of the labourer, is the sole test to apply, that test must be satisfied before the relationship of master and servant is established. That relationship must be established before a person could be said to be "employed" within the meaning of S. 2(s) of the Industrial Dispute Act. In applying that test we have to consider what the industry is, what the activity of the labourer is in that industry, and what is the control exercised in relation to that activity by the person for whom that activity is carried on. In *Zulis v. Wirth Bros., Pty., Ltd.* 93 C.L.R. 561 , the learned Judges pointed out :

"The duties to be performed may depend so much on special skill or knowledge or they may be clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command

in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."

The factual position and the economic realities in a given case cannot be ignored in applying the test which, eminent Judges have pointed out, is by no means an easy one in its application."

It would appear from these observations that whether there is control or not of the employer should be determined on the facts of each case and on the nature of the control which is possible to exercise considering the nature of the industry. Applying this test, I find that whatever control is possible for the employer to exercise in an industry of this nature is, in fact, being exercised by the employer, because he gives directions about the type of bidis to be made, the quantity of raw materials to be used and about the place and hours of work.

12. As against this decision, reference was made on behalf of the bidi merchants to the decision of the West Bengal Industrial Tribunal, 1958 II L.L.J. 621; but, in that case the facts are that ordinarily the bidi-makers were working at home and not in the premises of the employer. On this one fact, the tribunal came to the conclusion that there was no control of the employer and therefore the bidi-makers were the independent contractors. On the facts established in the reference before me, I am inclined to follow the decision of the Madras High Court above referred to.

13. In the result, I overrule the preliminary objection raised by the bidi merchants that the bidi-makers are not their employees and therefore the reference is incompetent.