
(1957) 07 BOM CK 0008

In the Bombay High Court

Case No : Special Civil Application No's. 3179 and 3213 to 3217 of 1956

Umedsingh Hamirasingh and Others

APPELLANT

Vs

The Marsden Mills, Limited and Others

RESPONDENT

Date of Decision : 02-07-1957

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 3, 3(13), 3(13), 3(14), 3(14)
Constitution of India, 1950 — Article 227
Contract Act, 1872 — Section 10
Factories Act, 1948 — Section 2, 46(1), 92

Citation : AIR 1959 Bom 143 : (1957) 59 BOMLR 985 : (1959) 2 LLJ 658 :
(1957) 2 LLJ 658

Hon'ble Judges : Tendolkar, J;Shelat, J

Bench : Division Bench

Advocate : V.M. Tarkunde, M.A. Rane and H.R. Gokhale, for the Appellant;
Vithalbhai B. Patel, instructed by Manilal Kher Ambalal and Co., K.H. Kazi, for the Respondent

Judgement

Tendolkar, J.—This is a group of petitions under Article 227 of the Constitution of Indian in respect of judgment of the Labour Appellate Tribunal. The facts in all these petitions and the question of law to be decided being identical, the matters were dealt with at all stages by a single judgment, and, therefore, it would be convenient to dispose of these petitions also by a single judgment. But we will take the facts in Special Civil Application No. 3179 of 1956 as typical of the facts which exist in the other applications.

2. The petitioners are employed in a canteen run by a co-operative society of the workers of the Marsden Mills, Ltd., who are the first Respondents. In 1948, an award was made by the Industrial Court regarding the standardisation of wages of all employees employed in the textile industry at Ahmedabad. Subsequently there was a supplementary award regarding dearness allowance. The said award directed the textile mills to pay dearness allowance to contract labour on a certain basis. The petitioners claimed that they were entitled to such dearness

allowance from the mill, and, therefore made applications to the Labour Court, Ahmedabad, praying for a declaration that opponent No. 1 had committed an illegal change within the meaning of Section 46 of the Bombay Industrial Relations Act inasmuch as it had not carried out the terms of the award which were binding on it. The petitioners had also prayed for an order directing opponent No. 1 to withdraw the said illegal change by paying all the arrears of wages and dearness allowance. The Labour Court held that the co-operative society, of which the petitioners were employees, was neither a contractor nor an agent of opponent No. 1 and, therefore, the Petitioners were not employees of opponent No. 1 within the meaning of Section 3 (Sub-section 13) of the Bombay Industrial Relations Act. The petitioners filed an appeal to the Industrial Court, who confirmed the decision of the Labour Court. They then preferred an appeal to the Labour Appellate Tribunal, Bombay. A division bench of the Labour Appellate Tribunal referred three questions to a Full Bench. They are as follows:

1. Whether the decision of this Tribunal in Ahmedabad Mfg. and Calico Ptg. Co., Ltd. v. Their Workmen, 1953 lab LJ 647, requires reconsideration in the light of the later decision of this Tribunal in Simplex Mills Co. v. Their Workmen, 1955 Lab LJ 46
2. Whether the former decision has ceased to apply to the staff of canteens the premises and equipment where of have been provided by the mills but which are managed by Co-operative Societies started by the employees of the mills by reason of the amendments made by the State Government by Government Notification No. 44/8 dated 15-1-1954 in Rules 76 to 78 of the Bombay Factories Rules, read in the light of Section 46 of the Factories Act, 1948?
3. Whether in any event, on the facts admitted by the parties in the present appeals, the Co-operative Societies which manage the canteens, the premises and equipment where of have been provided by the mills concerned for their employees, can be regarded in law as the agents or independent contractors of the respective mills for maintaining or running the canteen, so as to allow the staff engaged by Co-operative Societies for the canteens to be regarded in law for the purposes of the Bombay Industrial Regulations Act as employees of the respective mills?

The findings of the Full Bench on these three questions were:

1. That the Calico Mills case was rightly decided;
2. That the amendments to the rules made in January 1954 have made no difference to the responsibility of the employer for maintaining a canteen and the decision in the Calico Mills case is applicable; and
3. That the co-operative societies managing the canteens must be regarded in law as the contractors of the respective mills within the meaning of Sub-clause (e) of Clause (14) of Section 3 of the Bombay Industrial Relations Act.

(2a) The matter then went back to the Division Bench for disposal, and the

Division Bench held that although the Full Bench had found that the petitioners were employees within the definition of Section 3, Sub-section (13) of the Industrial Relations Act, they were not in the direct employment of opponent No. 1; that they were only entitled to such benefits as the Act had conferred upon them, but they were not entitled to wages and dearness allowance from opponent No. 1 under the award. The Division Bench, therefore, dismissed the appeal. It is against this dismissal that the petitioners have come to us on the plea that there is an error apparent on the face of the record in that the Division bench failed to take into account the fact that the award had become binding on the employer and the employees under the Industrial Relations Act and any obligation arising under the award was an obligation enforceable under the Industrial Relations Act and, therefore, if the petitioners were employees within the meaning of Section 3(13), they were entitled to enforce the obligations under the award against opponent No. 1.

3. Opponent No. 1 on this petition inter alia challenges the finding of the Full Bench that the petitioners were employee and that opponent No. 1 was an employer of the petitioners, and says that if this is the true position in law, the question whether the Division Bench rightly distinguished between rights arising under the Act and rights arising out of direct employment would not survive. That, no doubt, would be so and we propose, therefore, in the first instance, to deal with this plea raised on behalf of opponent No. 1.

4. Now, at the outset, a few admitted facts must be stated. It will be noticed that the third question referred to the Full Bench makes a reference to the facts admitted by the parties and it is on the basis of these admitted facts that the reference was disposed of and we have also to decide these petitions on the basis of these admitted facts. They are set out in paragraph 3 of the Full Bench decision in these terms:

"The admitted facts are that the societies, which are voluntary organisations of mill employees, manage the affairs of the canteens, engage the canteen boys and their employees, including the canteen Manager, pay wages and bonus to the canteen employees out of the assets of the society, and take disciplinary action when necessary against the canteen employees. It is the society which grants leave or refuses it to canteen employees and complaining made by the canteen employees are dealt with by the Canteen Manager and not the mill Manager. The canteen, however, is run on mill premises and in the running of the canteen use is made of the furniture, utensils etc., supplied by the mills management in accordance with certain statutory rules which will be noticed presently. No payment is made by the Co-operative Societies for the use of the canteen premises, furniture and equipment. Profit earned by the running of the canteen is retained by the society for distribution among its members. The mill management does not exercise any direct control over the societies in the running of the canteen,, and there is no express agreement between the mill management and the co-operative society regarding the running of the

canteens."

It must further be mentioned that the Labour Court at Ahmedabad, in its judgment, observes that the applicants had made no attempt to prove that the societies were running the canteens under a contract with the mills - a facts which is very material, as we will point out when we come to discuss the law. The Labour Court also points out that witnesses for the opponent mills have, in their depositions, categorically denied that there was any contract between the mills and the society for running the canteen, and these witnesses were not even cross-examined on this point, with the result that the statement that there was no contract between the society and the mills remains unchallenged. The Full Bench, in their decision, in terms found that admittedly there was no express contract; but they held that on the basis of the admitted facts there was an implied contract, and since the correct inference to be drawn from admitted facts was a question of law, it was within their jurisdiction so to hold. We will revert to the reasons given by the Full Bench for their decision after considering the matter on the basis of the relevant sections and rules in relation to admitted facts.

5. Now, in the first instance, two definitions under the Industrial Relations Act, 1946, are important for the purpose of this reference. The first is the definition "employee" in Section 3, Clause (13)(a). "Employee" means

"any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes a(a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of Sub-clause (e), of Clause (14)".

Turning to Sub-clause (e) of Clause (14), it defines "employer" as including

"where the owner of any undertaking in the course of the for the purpose of conducting the undertaking contracts with any person for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the undertaking, the owner of the undertaking."

Reading the two definitions together, before an employee of a contractor can become the employee of the owner of an undertaking the conditions that must be fulfilled are: (1) that the must be employed by the contractor to do any work for him; (2) that such work must be in the execution of a contract by the contractor with the owner of the undertaking; and (3) that the contract with the owner of the undertaking must be for the execution by or under the contractor of the whole or any art of the work which is ordinarily part of the undertaking. It is only if these three conditions are satisfied that an employee of a contractor becomes an employee of the owner of the undertaking.

6. Now, the work which the petitioners do is in the canteens. They are employed on this work by the societies which manage the canteens and, therefore, the first condition is satisfied. We have to proceed to consider whether the other two

conditions are satisfied.

7. We next turn to Section 46 of the Factories Act, Sub-clause (1) of that Section provides:

"The Provincial Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers."

An "occupier" is defined in Section 2. Sub-clause (n) of the Act as meaning "the person who has ultimate control of the affairs of the factory". Therefore, reading Section 46(1) with the definition, the Provincial Government is empowered to make rules requiring the person who has ultimate control of the affairs of a factory to provide a canteen for the use of the workers. This act was made applicable to the textile industry at Ahmedabad on 20-12-1950. The relevant rules are Rules 72 to 78 Rule 72 has several sub-clause which deal with several requirements regarding the canteen building, which it is unnecessary to go into in very great detail. Rule 73 deals with the compulsory provision of a dining hall in the canteen and makes provision as to its area and the furniture to be provided, etc. Rule 74 requires that there shall be provided and maintained sufficient equipment necessary for the efficient running of the canteen. Rule 75 requires that the prices to be charged shall be conspicuously displayed. Rule 76 provides that the accounts of the canteen shall be produced on demand to the Inspector of Factories and shall be audited once every twelve months. Rule 77 provides for a Canteen Managing Committee which is to consist of an equal number of persons nominated by the occupier and elected by the workers; and Rule 78 provides that the Chief Inspector of Factories shall determine the charges to be made and the foodstuffs to be served in the canteens taking into consideration the menu in vogue in the region concerned and in fixing the prices exclude the rent for the land and building, interest on the amounts spent on the provision and maintenance of furniture and equipment provided for the canteen, depreciation charges, electric charges and the element of profit. This is to be done in consultation with the Canteen Managing Committee. We have referred to the rules as they were when first enacted; but on 10-11-1954, Sub-clause (3) was added to Rule 74 which is as follows:

"Where the canteen is managed by a co-operative society registered under the Bombay Co-operative Societies Act, 1925, the occupier shall provide the initial equipment for such canteen and shall undertake that any equipment required thereafter for the maintenance of such canteen shall be provided by such co-operative society."

Rule 76 was amended by adding a proviso on 15-1-1954, which is to this effect:

"Provided further that where the canteen is managed by a co-operative society registered under the Bombay Co-operative Societies Act, 1925, the accounts pertaining to such canteen may be audited in accordance with the provisions of

the Bombay Co-operative Societies Act, 1925."

A proviso was also added on the same date to Rule 77, Sub-clause (1), which provides for the appointment of a Canteen Managing Committee. The proviso is:

"Provided that where the canteen is managed by a co-operative society registered under the Bombay Co-operative Societies Act, 1925, it shall not be necessary to appoint a Canteen Managing Committee."

On the same day, a proviso was also added to Rule 78 in the following terms:

"Provided that where the canteen is managed by a co-operative society registered under the Bombay Co-operative Societies Act, 1925, such society may be allowed to include in the charges to be made for the foodstuffs served, a profit up to 5 per cent, on its working capital employed in running the canteen."

Therefore, reading Section 46 of the Factories Act along with the rules, it is clear that there is a statutory obligation on the occupier, that is the person who has ultimate control of the affairs of a factory, to provide a canteen which must conform to the rules prescribed in that behalf. The amendments that were introduced in 1954 to which I have already drawn attention contemplate the management of a canteen by a co-operative society; but they do not absolve the occupier from a statutory obligation to provide a canteen in accordance with the rules. It is true that by virtue of the proviso inserted in Rule 77, the control of the Manager, in so far as he would normally have exercised the control through the Canteen Managing Committee to which he could nominate half the number of members, does not exist where the canteen is managed by a co-operative society; but that does not make a difference to the statutory obligation of the occupier to provide a canteen. Under Rule 78 as it stood before the amendment, no profit could be made on the food served at the canteen. The proviso makes it possible for a co-operative society, if it manages a canteen, to make a profit up to 5 per cent.; but the rule emphasizes the fact that if the occupier ran the canteen in whichever manner it was open to him to run it, he could not make a profit for himself. Now, this obligation of the occupier to maintain a canteen is an obligation for the non-observance of which penalty is prescribed by Section 92 of the Factories Act, which in general terms provides that any contravention of any provisions of the act or any rule made thereunder will render the occupier and the manager of the factory guilty of an offence punishable with imprisonment to a term which may extend to three months or with fine which may extend to Rs. 500 or with both. Therefore, it is clear that there was a statutory obligation on the occupier for the breach of which a penalty was provided by the Factories Act.

8. The next question that naturally arises is: What are the possible ways in which the occupier could discharge this statutory obligation? The Full Bench in its decision observes: This responsibility he may discharge either through his own servants or agent or a contractor." So far as it goes, the statement is unexceptional; but does this statement of the Tribunal exhaust the ways in which an occupier can discharge his statutory liability? Take for example a simple case

where a benevolent society established for the purpose of rendering social service offers to the occupier that it will run the canteen on premises and with equipment provided by him. Is it open to the occupier, if he has trust in such an organisation, to entrust the running of the canteen to such a society? And if the society so runs the canteen shall he have discharged his statutory obligation? In our opinion, there can be little doubt that so long as the society observes all the conditions laid down by the rules for the running of the canteen the occupier shall have discharged his statutory obligation. If the society fails to observe any of such conditions, the occupier may well be liable u/s 92 of the Factories Act for failure to observe the requirements of the rules. But there does not appear to us to be anything in the Act or in the rules which prevents an occupier, if he trusts such a society, to take the risk of the society landing him into a situation in which he may be prosecuted. He may well consider such a risk as slight or non-existent, and, therefore, in addition to the modes which the Full Bench points out are the possible modes of discharge of the occupiers' statutory obligation, there appears to us to be at least one more mode in which the occupier could discharge the obligation, and that is by granting a licence to a society or any other body of persons to run a canteen on the premises and with the equipment that he is bound to supply for the purposes of the canteen under the rules. It appears to us, with respect to the Full Bench of the Labour Appellate Tribunal, that it is just because they failed to visualise such a possibility that they came to the conclusion that they did; because left with the option of the occupier discharging his responsibility either through his servants or agents or contractors, since it was no body's case that he was discharging it through his servants or agents in this case, the Tribunal necessarily turned to a contractor and appear to have implied a contract for that purpose. Now, on the facts of this case-and that is material-the Society was in existence long before a statutory obligation arose on the occupier to provide a canteen. It was running a canteen on the premises which the Society was allowed to use by the mills. It is admitted that there was a no express contract with the Society either before or after the statutory obligation arose, and the question is whether under those circumstances it can be said that there was an implied contract which could be inferred from the admitted facts.

9. Now, strictly speaking, the word "implied" may be more appropriate to contracts implied by law; but it is sometimes used to designate what may be called tacit contracts, that is, contracts whether the proposal or the acceptance or both are signified, not by words, but by acts or conduct. But it seems to us that before there can be such a tacit or implied contract, the acts or the conduct relied upon must be of such a nature that it can only give rise to the inference that there must have been an implied offer and acceptance. If the acts or conduct are capable of being consistent with there being no offer or no acceptance no tacit or implied contract can arise from such acts or such conduct. Now, the facts and conduct relied upon by the Full Bench for the purpose of coming to the conclusion that there was an implied contract are these. In their

decision the Full Bench first says:

"On the one side the control of the canteen premises and power to permit the society to run the canteen is in the hands of the occupier. In return for the permission to enter the premises and to run the canteen the society performs work which the occupier is bound by statute to do; the profit, subject to the limits imposed by the statutory rules, goes to the society."

With very great respect to the Full Bench, we fail to see how these three facts which are enumerated by the Full Bench constitute facts from which an inference will necessarily arise of an implied contract. The occupier may well allow the canteen premises to be used by a licensee with his leave and licence and no contact is essential for that purpose. The Society undoubtedly performs the work which the occupier was bound by statute to do; but it is difficult to see, with respect to the Tribunal, on what evidence the Full Bench assumed that this duty they performed "in return for the permission to enter the premises and to run the canteen". Undoubtedly they were enabled to perform the duty which the occupier was statutorily bound to perform by virtue of such permission, but it cannot be said to be "in return" for such permission without any evidence and so far as we are aware, there is none. The fact that the profit goes to the Society is an indifferent factor in determining whether there was or there was not an implied contract between the occupier and the Society. then later on in the judgment the Full Bench again says:

"The relevant facts here are that (1) the societies are performing a duty which the mills are bound to perform, (2) and that they do so in a place and in circumstances which necessarily require the consent of the occupier to their performing that work. (3) On the other side the societies keep the profit which is earned by the running of a canteen. (4) The statutory rule imposes on the occupier responsibility for running the canteen. (5) This responsibility he may discharge either through his own servants or agent or a contractor. In the present case the canteens are run by the societies. which are neither the servants nor the agents of the mills. All the elements necessary for a contract being present, the correct inference appears to be that the societies are running the canteen as contractors undertaking the relevant duties of the respondent mill companies."

Now, the numbers (1) to (5) in this quotation have been inserted by us for the purpose of facility of dealing with each one of the reasons assigned by the Full Bench for holding that there was an implied contract. We have already dealt with reason no. (5) and pointed out that it proceeds on an assumption that the only mode of discharge of the obligation of the occupier was through his own servants or agents or through a contractor an assumption which, with respect to the Full Bench, is, as we have pointed out, unjustified. Turning to the other reasons, the first reason "The societies are performing a duty which the mills are bound to perform" by itself cannot raise any inference of a contract. Anyone may perform the duties which the mills are bound to perform without there being necessarily a

contract in that regard. it may be a voluntary performance altogether. Turning to the second reason "that they do so in a place and in circumstances which necessarily require the consent of the occupier", as we have already pointed out, such consent may be given by way of giving a licence and it does not require a contract, implied or otherwise. The third reason, which is that the societies keep the profit, cannot possibly raise an inference of an implied contract, because they run the canteen and if profits are permissible, they are entitled to the profits. In no event would a contract be necessary with the mills to keep these profits because the mills could never have made any profits out of the canteen. The fourth reason is merely a statement of the statutory obligation from which no inference can arise, that there must have been a contract for the discharge of this statutory obligation by the Society. Indeed, it appears to us, with respect to the Full Bench of the Labour Appellate Tribunal, that they appear to have taken the view that since there is a statutory obligation on the occupier of a factory to run a canteen, and since the premises and equipment for such a canteen must in terms of the rules be provided by the occupier, whosoever runs a canteen must be deemed to have an implied contract with the occupier for running the canteen. Mr. Tarkunde says that he does not wish to urge any such proposition; but what he urges in favour of the view that there is an implied contract is that, although without such contract it may be possible to have a society run a canteen. Mr. Tarkunde says that we should consider which is the more probable thing to happen. Is it likely that the occupier who was under a statutory obligation, for a breach of which he was liable to be convicted and sentenced, would enter into a contract with someone to discharge duties which were primarily his, or is it likely that he would trust the society voluntarily and without a contract to discharge such duties? With respect to Mr. Tarkunde, we do not think that is the correct approach for determining whether there was an implied contract. In our opinion, an implied contract can arise on proved facts and circumstances only if the necessary inference from such facts and circumstances is that there must have been a contract and not if the facts and circumstances are consistent with there having been no contract at all. The moment Mr. Tarkunde concedes that the facts and circumstances are consistent with there not having been a contract, it is not possible, in our opinion, to take the view that because the probabilities of a contract are more than the probabilities of there being no contract, there was an implied contract.

10. There, in our opinion, the Full Bench of the Tribunal, with respect came to a wrong conclusion when they held that there was an implied contract between the Society and the Mills, and this conclusion necessarily led them into committing the further error that the petitioners became employee within the meaning of Section 3, Sub-section (13) of the Bombay Industrial Relations Act. Turning back again then to the requirements of that definition, as we have pointed out, the first requirement was satisfied. Regarding the third requirement, since there is a statutory obligation on the occupier to provide and maintain a canteen, it may be held that to run a canteen was ordinarily a part of the undertaking of the

occupier and indeed, it was so held by a Division Bench of this Court in Special Civil Application No. 1681 of 1953 (judgment delivered by the learned Chief Justice on 24-11-1953); a view with which we respectfully agree. But then the next requirement is; Did the owner of that undertaking contract with the Society to carry out this part of the undertaking, namely, the running of the canteen? If he did not, part of the third requirement is not satisfied, and consequentially, the second requirement that the employee must be doing work in execution of a contract by the contractors with the employer is also necessarily not satisfied. In our opinion, therefore, the Full Bench of the Tribunal, with respect, erred in holding that the petitioners before us were employees within the meaning of Section 3(13) read with Section 3(14) of the Bombay Industrial Relations Act, 1946.

11. The position, therefore, is that it is not necessary for us to consider whether the Division Bench, which acted on the view, as they were bound to that the Full Bench was right on this part of the decision, proceeded to distinguish it on grounds which can be upheld. If the petitioners are not employee, it follows that they cannot claim either wages or dearness allowance from the mills who are not their employers in respect of their employment; and since all these petitions were presented against the mills for payment of wages and dearness allowance, they were liable to be dismissed as the petitioners were not employees of the mills, and as the ultimate result of the decision of the Division Bench of the Labour Appellate Tribunal was a dismissal of the petitions, it is not necessary to set aside the decision. The conclusion they arrive at was right, although not for the grounds stated in their judgment.

12. No order as to the costs of these petitions.

13. Petitions dismissed.