
(1977) 02 OHC CK 0004
In the Orissa High Court

B.D. Jhunjhunwalla and Another

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 25-02-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 26
Factories Act, 1948 — Section 105, 92

Citation : (1977) 43 CLT 440 : (1977) CriLJ 1390

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Judgement

S. Acharya, J.—The petitioners stand convicted u/s 92 of the Factories Act (hereinafter referred to as the "Act") and each of them has been sentenced thereunder to pay a fine of Rs. 200/- ; in default to undergo S. I. for 15 days.

2. It is not necessary for me to state here the allegations against the petitioners on which they were prosecuted, as the impugned order of conviction is challenged on a pure question of law which is stated herein below.

3. Mr. Panda, the learned Counsel for the petitioners, contends that the trial against the petitioners upto the stage preceding the delivery of the judgment proceeded in the court of a second class Magistrate who did not have the power to try the petitioners for the offences alleged against them, and so the entire trial was vitiated, and hence the judgment of the trial court and also that of the appellate court, on this ground alone, cannot be sustained. Mr. Panda contends that as per Section 105(2) of the Act no court below that of a Presidency Magistrate or of a Magistrate of the first class can try any offence punishable under this Act. That being so, in this case the trial of the petitioners for the alleged offences under the Act could not at all have commenced and/or proceeded upto the examination of the defence witnesses in the court of the Magistrate second class, and the illegality so committed was not cured merely by the passing of the judgment in this case by a Magistrate of the first class on the evidence and materials recorded by the second class Magistrate.

4. Undisputedly, the trial of this case is governed by the provisions of the Criminal Procedure Code, 1973. Section 26(b) provides that any offence under any law other than those under the Indian Penal Code shall, when any court is mentioned in this behalf in such law, be tried by such court. Accordingly, the offences alleged against the petitioners, being only under the Factories Act, could only be tried by a Magistrate of the first class as provided u/s 105(2) of the Act. The word "trial" is not defined in the Code of Criminal Procedure. Their Lordships of the Privy Council in AIR 1933 218 (Privy Council) state that "trial" means the whole of the proceeding, A Division Bench of the Bombay High Court in the case reported in *Dagdu Govindshet Wani Vs. Punja Vedu Wani*, observed that the Courts in the Bombay Presidency have always accepted the definition of "trial" which has been given in the case reported in ILR (1898) 25 Cal 863 (*Comer Sirda v. Queen Empress*) wherein it is said :

"Trial" has always been understood to mean the proceeding which commences when the case is called on with the magistrate on the Bench, the accused on the dock and the representatives of the prosecution and defence, if the accused is defended, present in Court for the hearing of the case.

The above view is also supported by the decisions reported in AIR 1922 Lah 49 : 23 Cri LJ 330 (*Sahib Din v. Emperor*) ; AIR 1925 Lah 435 : 21 Cri LJ 735 (*Fakhruddin v. The Crown*) and AIR 1934 Sind 106 : 35 Cri LJ 1261 (*Labhsingh v. Emperor*).

Their Lordships of the Madras High Court in the case reported in AIR 1915 Mad 23 : 15 Cri LJ 673 (*Sriramulu v. Krishna Row*) took the view that in a warrant case the trial only commences from the framing of the charge. The learned Judges of the Bombay High Court in the above-mentioned case, while referring and not differing from the aforesaid view taken in the above-mentioned Madras case in AIR 1915 Mad 23 : 15 Cri LJ 673, expressly preferred the view taken in the above-mentioned Lahore and Sind decisions. I respectfully agree with the view taken in the above-mentioned Bombay, Lahore and Sind decisions.

Accordingly, the trial of the petitioners for the alleged offences under the Act could not have commenced and proceeded with in the court of the Magistrate, second class. The Magistrate second class after recording the prosecution evidence, the statements of the accused persons and the defence evidence could come to know that he did not have the jurisdiction to try the case, and at that stage he sent the case to the court of the Magistrate, first class, who without doing anything further in the case, only delivered the judgment of conviction in this case basing his findings and conclusions on the evidence and materials recorded by the 2nd class Magistrate. The transferee Magistrate first class, after receiving the case records, could have proceeded to try the case *de novo* from the very beginning and if he would have done so, the illegality of the trial commencing in the court of the Magistrate, second class, could have been cured. As that was not done, and the trial of the case, in the most part of it, was conducted by a second class Magistrate, who did not have the power to try that

case, the conviction and sentence passed against the petitioners in this case are illegal and are liable to be and are hereby set aside, and the petitioners are acquitted of the same.

Mr. Swamy, the learned Additional Standing Counsel for the State, concedes that the conviction of and the sentence passed against the petitioners in this case cannot be sustained in view of the said illegality in the trial of the case.

5. Merely because the petitioners did not rake up the said question of jurisdiction in the trial or appellate court, that will not debar them to agitate this question at this the, as the question now agitated is a pure question of jurisdiction of the court to try the case against the petitioners.

6. The petitioners were found guilty only of the offence of improper provision and maintenance of the latrines and urinals" in their factory premises. The petitioners were prosecuted on five different allegations, but four out of the same could not be established against them. The contraventions were allegedly detected on 21-9-1973 and the petitioners had to undergo trial in a court which had no jurisdiction to try this case. On the above facts I do not deem it proper to send back this case now to the proper court for a fresh trial after more than three years of the detection of the alleged violations. The prosecuting authorities may start fresh prosecution against the petitioners if they find that the alleged violations are still continuing.

The revision accordingly is allowed.