
(1985) 08 BOM CK 0044
In the Bombay High Court
Case No : Misc. Cri. Application No. 908/84

Jagdish Amritlal Karia

APPELLANT

Vs

Madhusudan Nagindas Hundiwala and others

RESPONDENT

Date of Decision : 01-08-1985

Acts Referred:

Bombay Shops and Establishments (Amendment) Act, 1977 — Section 2
Bombay Shops and Establishments Act, 1948 — Section 2(4), 2(8), 48, 5(1), 52
Constitution of India, 1950 — Article 14
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1987) 1 LLJ 294 : (1986) MhLj 677

Hon'ble Judges : D.N. Mehta, J

Bench : Single Bench

Judgement

1. This Criminal Application has been filed by the petitioner Jagdish Amritlal Karia praying that the proceedings in case No. 294 of 1984 pending in the Miscellaneous Court of the learned Special Metropolitan Magistrate, Mazgaon, Bombay, be quashed.

2. A few relevant facts may be stated here below :-

On 8th March 1984 at about 2.30 p.m. one Madhusudan Nagindas Hundiwala, an Inspector appointed u/s 48 of the Bombay Shops and Establishment Act (Bombay Act No. LXXIX of 1948) visited the office of the petitioner Jagdish A. Karia and his wife Anuradha J. Karia at the J.K. Industrial Estate, Moosa Killedar Street, Bombay. In the office Hundiwala found the Rent Collector Louis E. D'Souza, who was employed by the petitioner Jagdish A. Karia since the last about 3 1/2 years on a salary of Rs. 600/- per month. The Inspector found that no records or registers were maintained in respect of the said Rent Collector Louis E. D'Souza and the Rent Collector had attended the office although it was a Sunday. The Inspector stated in his report that the estate of the petitioner Jagdish K. Karia and Anuradha J. Karia had not been registered under the Shops and Establishments Act. The Inspector then submitted a report to his superiors.

In due course a complaint was filed on 30th April 1984 in the Court of the learned Special Metropolitan Magistrate, Mazgaon, Bombay. The Complainant was Hundiwala, the Inspector who had visited the office of the petitioner. The petitioner was charged for contravention of section 7(1) read with sections 52 and 56 of the Bombay Shops and Establishments Act 1948. The Deputy Municipal Commissioner granted sanction to prosecute u/s 60(1) of the said Act.

3. On the same day, i.e. on 30th April 1984, the learned Special Metropolitan Magistrate was pleased to issue a summons to the petitioner Jagdish A. Karia charging him with breach of section 7(4) read with sections 52 and 56 of the Bombay Shops and Establishments Act, 1948. It is against this summons and the proceedings taken against him in case No. 294 of 1984 that the petitioner has approached this Court with a prayer to exercise its inherent powers for the purpose of quashing the said summons as also the proceedings pending against him.

4. In the petition the petitioner has narrated the circumstances under which he came to have a half share in the property situated at 35-43 Moosa Killedar Street, Jacob Circle, Bombay, bearing Municipal "E" Ward Nos. 7411(1), 7411(2), 7411(4) and 7411(5 and 6). The petitioner stated that there were four buildings constructed on the said immovable properties, and all the four buildings were fully tenanted. The petitioner stated that he received the rents of the four buildings and for the purpose of recovering the rents he had engaged the services of the Rent Collector Louis E. D'Souza. The petitioner has impugned the order of the learned Metropolitan Magistrate directing process to be issued against the petitioner on the ground that the office maintained by the petitioner would not be an establishment as defined u/s 2(8) of the Bombay Shops and Establishments Act. The petitioner has contended that his office was not required to be registered as an establishment u/s 7(1) of the said Act.

5. It may be pointed out here that the petitioner in his petition has contended that he is a practicing Advocate of this Court and the office which was visited by the Inspector on 8th March, 1984 was the office in which he conducted his practice as an Advocate. There is however, no evidence on record to show that the office visited by Hundiwala the Inspector appointed under the Shops and Establishments Act, was an office which was used as an Advocate's office by the petitioner. I will, therefore, proceed on the footing that this office was used by the petitioner as the landlord for the purpose of managing the immovable properties and the four buildings situate thereon and for the purpose of recovering rents.

6. Shri Dhanuka, learned counsel appearing on behalf of the petitioner has, firstly, submitted that an office maintained by a landlord for the purpose of management of his properties and for the recovery of rents thereof cannot be termed as a commercial establishment as defined u/s 2(8) of the Bombay Shops and Establishment Act. Shri Dhanuka pointed out that the Bombay Municipal Corporation had prosecuted the petitioner for committing default in registering

an establishment which fell within the purview of the Notification issued by the Government of Maharashtra under the Shops and Establishment Act dated : 7th February 1951 which was published in the Bombay Government Gazette dated 15th February, 1951.

7. Secondly, Shri Dhanuka submitted that in the Inspection Notes which have been marked as Exhibit "C" to the petition, the Inspector required the petitioner to register his "Estate" under the Shops and Establishments Act. Shri Dhanuka stated that an estate could never be described as an establishment either u/s 2(8) of the said Act nor would it fall within the definition of the word "establishment" as used in the said Notification dated 7th February, 1951. Shri Dhanuka contended that if the prayer of the Bombay Municipal Corporation, was granted, then every landlord in Bombay, big or small, would have to register himself under the Bombay Shops and Establishments Act.

8. Now in order to appreciate Shri Dhanuka's submissions, it will be relevant to point out the provisions of section 7(1) of the Bombay Shops and Establishments Act under which the petitioner has been prosecuted Section 7(1) of the said Act provides.

"7. (1) Within the period specified in sub-section (4), the employer of every establishment shall send to the Inspector of the local area concerned a statement, in a prescribed form, together with such fees as may be prescribed, containing - (a) the name of the employer and the manager, if any;

(b) the postal address of the establishment;

(c) the name, if any, of the establishment;

(d) the category of the establishment, i.e., whether it is a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment; and

(e) such other particulars as may be prescribed."

9. Sub-section (4) of section 7 provides that an establishment mentioned therein should be registered within thirty days.

10. Now the term "establishment" has been defined under clause (8) of section 2. Clause (8) of section 2 provides :-

"(8) "Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the State Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act.

It is pertinent to note that the terms "establishment" has been defined under clause (8) of section 2 as a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or

entertainment to which the Act applies and to such other establishment as the State Government may, by notification in the Official Gazette, declare.

11. It will be pertinent to set out the provisions of the Notification for the breach of which the petitioner has been prosecuted. The Notification states :-

"In exercise of the powers conferred by sub-section (1) of section 5 of the Bombay Shops and Establishment Act 1948 (Bom. LXXIX of 1948), the Government of Bombay is pleased (1) to declare with effect from 1st March 1951 the establishment engaged by a landlord for the collection of rents of his property or for any other purpose in the management of his property, to be an establishment to which the said Act shall apply; and

(2) to direct that all the provisions of the said Act which apply to commercial establishment shall apply to the said establishment with effect from the said date."

12. Now the question is whether it can be stated that the petitioner had engaged an establishment for the collection of rents of his property or for any other purpose in the management of his property. If the answer is in the affirmative, then it is that establishment which has been engaged by the landlord which is required to be registered under the Bombay Shops and Establishments Act.

13. Shri Dhanuka has cited a ruling of the Supreme Court in the case of Dr. Devendra M. Surti Vs. The State of Gujarat, wherein the issue was whether a private dispensary maintained by a doctor could be called a "commercial establishment". Their Lordships observed at p. 122.

"A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment. That is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of "industry" u/s 2(j).

Applying a similar line of reasoning, we are of opinion that the dispensary of the appellant would fall within the definition of section 2(4) of the Act if the activity of the appellant is organised in the manner in which a trade or business is generally organised or arranged and if the activity is systematically or habitually undertaken for rendering material services to the community at large or a part of such community with the help of the employees and if such an activity generally involves co-operation of the employer and the employees. To put it differently, the manner in which the activity in question is organised or arranged, the condition of the co-operation, between the employer and the employees being necessary for its success and its object being to render material service to the community can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of section 2(4) of the Act.

Tested in the light of these principles, we hold that the case of the appellant does not fall within the purview of the Act and the conviction of the appellant of the offence u/s 52(c) of the Act read with section 62 of the Act and Rule 23(1) of the Rules is illegal."

14. Shri Dhanuka then cited a ruling of our High Court in the case of Narendra Keshrichand Fuladi and another Vs. State of Maharashtra, There the Court was called upon to consider whether an office maintained by a lawyer or advocate would fall within the purview of the Bombay Shops and Establishment Act. Their Lordships considered the provisions of section 2(b) of the Bombay Shops and Establishments (Amendment) Act (64 of 1977). The learned Judges observed at p. 31.

"We have already pointed out here that there are no common properties or characteristics to be found in the other commercial establishment and the establishment of a legal practitioner which have been herded together. There is no rational basis for herding them together and the conclusion that they were brought together arbitrarily, is inescapable. The differential must be intelligible and must be reasonably related to the object of the law. The herding up, which is done either arbitrarily or irrationally would, ex facie, be unreasonable. We are, therefore, clear that the inclusion of the establishment of a legal practitioner in the context of the connotation of commercial establishment, to which we have already adverted, does not answer the test of reasonableness and the inclusion would, therefore, be violative of article 14 of the Constitution also on the ground of unreasonableness."

15. Shri Phadtare, learned counsel appearing on behalf of respondent No. 1, the Inspector appointed under the Bombay Shops and Establishments Act, has submitted that the Bombay Shops and Establishments Act was a welfare legislation which was beneficial and remedial. Learned counsel submitted that the legislation was for the protection of employees who were underdogs and were exploited by the employer. Shri Phadtare urged that the Court should construe the provisions of the said Act liberally and in any manner as would embrace as large an area of establishments as possible. Shri Phadtare relied on a ruling of this Court in the case of State Vs. A.H. Bhiwandiwalla, wherein their Lordships observed :-

In regard to remedial and beneficent legislation like the Factories Act, what is sometimes described as the equitable construction of the statute is permissible and it would be the duty of the Court to adopt such construction of the statute as shall suppress the mischief and advance the remedy."

16. Shri Phadtare next pointed out the observations of the Supreme Court in the case of Chinnamarkathian alias Muthu Gounder and Others Vs. Ayyavoo alias Periana Gounder and others, wherein their Lordships were construing the provisions of the Tamil Nadu Cultivating Tenants Protection Act (25 of 1955). Their Lordships observed :-

"The Tamil Nadu Cultivating Tenants Protection Act is a beneficent legislation for granting security of tenures to cultivating tenants of agricultural lands. It is a well-settled canon of construction that in construing the provisions of such enactments the court should adopt that construction which advances, fulfils and furthers the object of the Act rather than the one which would defeat the same and render the protection illusory."

17. Shri Phadtare then relied on a ruling of this Court in the case of Emperor Vs. Mahamed Kassam Panwalla, 43 Bom LR 952, in which the issue was whether a panshop conducted by the employer himself singly could be construed as a commercial establishment. Their Lordships were pleased to observe :-

"If S. 5 does not apply to a one-man shop, one would certainly expect to find some provision protecting the employer who is compelled to close his shop at 9 O'clock, from competition by the one-man shop after that hour; and there is no such provision in the Act. It seems to me, therefore, that there is no justification for restricting the meaning which the legislature has seen fit to give to the word "employer" for the purposes of this Act, although the meaning may not be the one normally attached to the word in the English language.

"The learned Magistrate. I think, fell into an error not uncommon in construing Acts of the Legislature. He made up his mind, apart from the Act, what was the intention of the Legislature in passing the Act, and construed the Act so as to give effect to his preconceived idea as to the Legislature's intention. He made up his mind that the object of the Legislature was to protect employees, and nothing else, and construed the Act so as to make every part of it fit in with that object. With all respect to the learned Magistrate, that is not the way to construe the Act. One has to take the language as one finds it, although, of course, one has to look at the Act as a whole and construe it so as to give effect to what appears from the language of the whole act to be the intention of the Legislature. The language of the preamble and of S. 5 and the definition of "employer" do not suggest that the sole intention was to benefit employees."

18. Now the only issue in this is whether the petitioner as a landlord could be said to have engaged an establishment for the collection of rents of his property or for any other purpose in the management of his property. If the answer to this question is in the affirmative, then it would be an establishment to which the Bombay Shops and Establishment Act will apply and the petitioner was rightly prosecuted and process rightly issued.

19. There is no dispute with regard to the fact that the petitioner had an office in which he had an employee one D'Souza who was employed as a Rent Collector. To that extent it could be stated that the petitioner maintained an office for the purpose of managing his property and for collecting rents. It is, however, pertinent to note that the Notification uses the words "engaged by a landlord for the collection of rents of his property or for any other purpose in the management of his property." It is clear that the petitioner had not engaged any

establishment for the collection of rents of his property. He carried on the work of the collection of rents himself with the help of an employee. It, therefore, cannot be stated that the office of the petitioner was a commercial establishment. Nor can it be stated that the petitioner had engaged an establishment. To my mind, the Notification envisages a situation where an agency undertakes rent forming contracts on behalf of landlords and to such an agency the provisions of the Notification will certainly apply. It is relevant to note that what is required to be registered is not the landlord's estate or the landlord's office, but the establishment engaged by the landlord for the collection of rents of his property. Construing in that manner the Notification will have no application to the petitioner's estate or the office maintained by him.

20. The next question is whether this Court can interfere with the Order of the learned Metropolitan Magistrate directing process to be issued against the petitioner by the exercise of its inherent jurisdiction u/s 482 of the Code of Criminal Procedure.

21. In the case of Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, Their Lordships laid down four categories of cases where the High Court could exercise its inherent powers for quashing proceedings. Their Lordships observed :-

"Thus it may be safely held that in the following cases an order of the magistrate issuing process against the accused can be quashed or set aside : (1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

22. Therefore, where the complaint filed does not disclose the essential ingredients of an offence which is alleged against the accused, the Court has the right to interfere and quash the proceedings u/s 482 of the Code of Criminal Procedure.

23. I am of the view that in the instant case the petitioner cannot be called upon to register his office nor the estate of the petitioner as stated in the Inspection Notes, Exhibit "C". The petitioner as a landlord had not engaged an establishment for the collection of rents of his property or for any other purpose

in the management of his property. That being the case, the Petitioner's office cannot be called "an establishment" which required registration under the provisions of the Notification dated 7th February, 1951.

24. In the result, the rule is made absolute. The order of the learned Special Metropolitan Magistrate for issue of process, dated 30th April, 1984 and the proceedings in Case No. 294 of 1984 at the Court are quashed.

Rule made absolute.