

(2023) 09 GAU CK 0063
In the Gauhati High Court
Case No : Criminal Petition No. 855 Of 2015

Kaushik Baruah

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 29-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Indian Penal Code, 1860 — Section 307, 326, 342
Code Of Criminal Procedure, 1973 — Section 155(2), 156(1), 482
Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 — Section 2(d), 2(1)(d), 2(g), 2(1)(g), 4, 6, 25
Assam Shops and Establishments Act, 1971 — Section 2(8), 2(9)

Citation : (2023) 09 GAU CK 0063

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : R. Sharma, P. Phukan, R. Dubey, P. Borthakur

Final Decision : Allowed

Judgement

1. Heard Mr. R. Sharma, learned Senior Counsel assisted by Ms. P. Phukan, learned counsel for the petitioner. Also heard Mr. R. Dubey, learned counsel for the respondent No.2 and Mr. P. Borthakur, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1.

2. In this petition under Section 482 of the Code of Criminal Procedure, 1973, the petitioner, namely, Shri Kaushik Baruah has prayed for quashing the C.R. Case No.4152/2013, under Section 4/6 of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (hereinafter referred to as "the 1979 Act") read with Section 25 of the 1979 Act and the order dated 28.05.2015 passed by the learned S.D.J.M.(S) No.1, Kamrup(M), Guwahati, in C.R. Case No.4152/2013.

3. It is to be noted here that the above-noted case has been registered on the basis of one complaint lodged by Shri Prasenjit Talukdar, Labour Inspector cum

Inspector under the 1979 Act and the Rules framed thereunder.

4. The background facts leading to filing of the present petition is adumbrated herein below:-

"On 27.08.2013, the respondent No.2, Shri Prasenjit Talukdar, Labour Inspector cum Inspector under the 1979 Act, had visited the work site, located at Anil Plaza-II, G.S. Road, Guwahati and found that one Kaushik Baruah is executing a civil interior work of his outlet "Mocha" (to be opened) by engaging 9 inter-state migrant workers, whose names were being enclosed in a separate sheet, through M/s K.R.M. Interiors Pvt. Ltd., New Delhi (Contractor) without registering the establishment as "Principal Employer" as required under Section 4 of the 1979 Act. Thereafter, the complainant had issued one notice to the petitioner on 30.11.2013, and pursuant to the said notice, the petitioner had filed his reply. But, having not been satisfied with the reply, the respondent No.2 had lodged the aforesaid complaint before the Court of learned Chief Judicial Magistrate, Kamrup(M), Guwahati.

Upon the said complaint the learned Court below has taken cognizance of the offences and issued process to the petitioner. Accordingly, the petitioner had entered appearance and filed a petition, being petition No. 142, for dismissal of the complaint, on the ground that on the relevant date of inspection, the restaurant was not inaugurated and no business was carried out and as such the restaurant was not an "establishment" with the meaning of definition of section 2 (d) of the said Act of 1979, and that the petitioner has engaged one contractor for interior decoration of the said restaurant and the said contractor has employed the migrant workers.

But, after hearing the parties the learned court below, vide impugned order dated 28.05.2015, had dismissed the petition and explained the particulars of offence to the petitioner under Section 4/6 and Section 25 of the 1979 Act and on to which the petitioner pleaded not guilty and claimed to be tried. Thereafter, the learned Court below has posted the case for evidence."

5. Being aggrieved, the petitioner has approached this Court by filing the present petition mainly on the ground that no offence under the aforesaid sections are made out even after a bare perusal of the complaint petition as on the relevant date of inspection, the restaurant "Mocha" was not inaugurated and no business was carried out and as such the restaurant was not an establishment with the meaning of definition of section 2 (d) of the said Act of 1979, and that the petitioner has engaged one contractor, namely, M/s K.R.M. Interiors Pvt. Ltd. of New Delhi to carry out the interior civil works of the restaurant "Mocha", and the said contractor had employed the migrant workers, and on that count and also in view of the law laid down by Hon"ble Supreme Court in the case of State of Haryana Vs. Bhajan Lal reported in 1992 Supp (1) SCC 335, specially on point No. (c), (e) and (g) of the aforesaid decision, the present complaint is not at all maintainable and therefore, it is contended to allow this petition.

6. Mr. R. Sharma, the learned Senior Counsel, appearing for the petitioner, reiterates the grounds mentioned in the petition. Referring to the notice, which is being enclosed with the additional affidavit as Annexure-A, dated 30.10.2013, submits that the petitioner is not the "principal employer" as defined in Section 2(g) of the 1979 Act. Mr. Sharma further submits that the restaurant "Mocha" of the petitioner was not opened at the relevant time as it has been mentioned in the notice in no uncertain terms as "to be opened" and on such count, it is not an establishment as defined in Section 2(d) of the 1979 Act. Further, referring to the definition of "establishment" in Section 2(8) of the Assam Shops and Establishments Act, 1971, Mr. Sharma submits that both provisions are pari materia and that "Mocha", the restaurant which was not inaugurated at the relevant time is not an "establishment" and that the learned Court below, in spite of submission of the petitioner, had failed to appreciate the aforesaid aspect and dismissed the petition and as such, the impugned order failed to withstand the legal scrutiny and that the complaint is also not maintainable in view of the judgment of the Hon'ble Supreme Court in the case of Bhajan Lal (supra) and therefore, it is contended to allow the petition.

7. On the other hand, Mr. Dubey, learned counsel for the respondent No.2 submits that the "Mocha" is a partnership firm and the petitioner has not enclosed the partnership deed along with his petition. However, Mr. Dubey has not seriously disputed the submissions so made by Mr. Sharma, learned Senior counsel for the petitioner in respect of the definition of "establishment" and the definition of "principal employer" as defined in Section 2(1)(d) and 2(1)(g) of the 1979 Act.

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also gone through the case law referred by Mr. Sharma, learned Senior counsel for the petitioner.

9. Before delving a discussion into the submissions advanced at the bar, it would be appropriate to understand the meaning of "establishment" and "principal employer", as defined in the Act of 1979, which are reproduced herein below for ready reference:-

"2. Definitions. – (1) In this Act, unless the context otherwise requires, -

.....

(d) "establishment" means –

(i) any office or department of the Government or a local authority; or

(ii) any place where any industry, trade, business, manufacture or occupation is carried;

.....

(g) "principal employer" means, -

- (i) in relation to any office or department of the Government or a local authority, the head of that office, department or authority or such other officer as the Government or the local authority, as the case may be, may specify in this behalf;
- (ii) in relation to a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;
- (iii) in relation to a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named;
- (iv) in relation to any other establishment, any person responsible for the supervision and control of the establishment.

Explanation. – For the purposes of sub-clause (iii) of this clause, the expression “mine”, “owner” and “agent” shall have the meanings respectively assigned to them in clause (j), clause (1) and clause (c) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);”

10. Thus, a bare perusal of the definition of “establishment” it appears that in order to become an “establishment” within the meaning of definition, it must be place where any industry, trade, business, manufacture or occupation is carried out. Further, it appears that in order to become a principal employer, with in the definition of section 2(g) of the Act of 1979, the person must be responsible for the supervision and control of the “establishment”. It is also to be mentioned here that as per definition of “establishment” in section 2(8) of the Assam Shops And Establishment Act 1979:-“establishment” means a shop or a commercial establishment or an establishment for public entertainment or amusement. And as per section 2(9) of the said Act “establishment for public entertainment or amusement” means a restaurant, eating house, cafe, cinema, theatre and such other establishment or class thereof as the State Government may by notification, declare to be, for the purposes of this Act, an establishment for public entertainment or amusement, but does not include a shop or a commercial establishment.

11. Now, advertng to the facts and circumstances herein this case I find from the complaint as well as from the notice, dated 30.10.2013, (Annexure-A), that the respondent No.2 has visited the site i.e. Anil Plaza, on 27.08.2023. It also appears from the notice (Annexure-A) that on that day the restaurant, namely, “Mocha” was not opened. And this is clear from the word “to be opened” used in the notice by the respondent No.2. Since the said restaurant, namely, “Mocha” was not opened on that day and no industry, trade, business, manufacture or occupation was carried out, and on such count, said restaurant cannot be termed as an “establishment” within the meaning of the definition of in Section 2(1)(d) of the 1979 Act and also under Section 2(8) of the Assam Shops and Establishment Act, 1971. To become an establishment it must be the industry and trade, business, manufacture or occupation has to be carried out therein.

12. Further, it appears that the allegations made in the complaint that the petitioner is the "principal employer" and as such, he has not registered under the aforesaid Act as required by Section 4 of the 1979 Act. But, it appears that the aforesaid restaurant, namely, "Mocha" is not an "establishment" within the meaning of definition in Section 2(1)(d) of the 1979 Act and as such, the petitioner cannot be termed as a "principal employer" as per definition in Section 2(1)(g) of the 1979 Act. The petitioner engaged only one firm M/s K.R.M. Interiors Pvt. Ltd., New Delhi, who had allegedly engaged 9 inter-state migrant workmen. The petitioner has not engaged them.

13. In view of above, and after perusal of the complaint as well as the Annexure-A and Annexure-B, it cannot be said that any offence under Section 4/6 and 25 of the 1979 Act is made out against the petitioner from a bare perusal of the complaint and accepting the allegation made therein as correct, and as such, the ratio laid down in the case of Bhajan Lal (supra), specially the point Nos. (a), (c), (e) and (g) are squarely applicable here in this case. Mr. R. Sharma, learned Senior counsel has rightly pointed this Court during argument. And in the given facts and circumstances, this Court is inclined to record concurrence with the same. It is to be noted here that in the case of Bhajan Lal (supra) it has been held by the Hon"ble Supreme Court that :-

In the exercise of the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guide- ĩ7 myriad kinds of cases wherein such power should be exercised:

(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and

inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

14. In the result, I find sufficient merit in this criminal petition and accordingly the same stands allowed. The proceeding, being C.R. Case No.4152/2013, under Section 4/6, read with Section 25 of the 1979 Act and the impugned order dated 28.05.2015, passed by the learned S.D.J.M.(S) No.1, Kamrup(M), Guwahati, in C.R. Case No.4152/2013, stands set aside and quashed. The parties have to bear their own costs.