
(2003) 02 BOM CK 0021
In the Bombay High Court
Case No : Criminal R.A. No. 57 of 2003

Moinoddin

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 14-02-2003

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(12), 2(17), 85

Citation : (2003) 2 LLJ 1040

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : Vijay Sharma, for the Appellant; K.S. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

N.V. Dabholkar, J.—Heard, learned counsel for the parties.

2. Rule. Rule made returnable forthwith by mutual consent.

3. The revision petitioner was accused in Summary Criminal Case No.2358 of 1995, on the file of Chief Judicial Magistrate, Nanded. He was charged for offence punishable u/s 85(g) of the Employees' State Insurance Act, 1948, for contravention of Section 45(2)(a) of the said Act (henceforth referred to as E.S.I. Act for the sake of brevity). The Chief Judicial Magistrate was pleased to sentence the petitioner for simple imprisonment for six months, fine Rs. 5,000 in default further simple imprisonment for six months. Criminal Appeal No. 32/1999 preferred before Sessions Court, Nanded, was disposed of by Joint District Judge and Additional Sessions Judge, Nanded, vide his judgment and order, dated February 3, 2003. The learned Sessions Judge allowed the appeal partly. He maintained the finding of guilt and conviction, but reduced the amount of fine from Rs. 5,000 to Rs. 4,000, that being the upper limit under the penal provision. The substantive sentence awarded was also maintained.

4. The factual details of the prosecution case in brief can be stated as follows:

Complainant K.P. Jose was working as Inspector in E.S.I. Corporation, Nagpur. At

the material time, he was posted at Nanded as Inspector of E.S.I. Corporation. In such capacity, it was his duty to inspect the factories for coverage under E.S.I. Act as also complaints under the said Act.

After a notice by ordinary post, complainant claims to have visited the premises of accused "Ajanta Hotel." It is his claim that he again visited the premises on December 15, 1994 as also on December 22, 1994 after giving notices. On every occasion, he demanded record for inspection, which was not made available. On the first occasion, petitioner/accused and his son were present on the remaining two occasions, only son was present.

Since the directions to produce the record for inspection were not complied with, complainant claims that accused has indulged into contravention of Section 45(2) (a), which is punishable by residuary clause contained in Section 85(g) of the said Act.

5. Both lower Courts have accepted the version that complainant visited the premises and accused and his son did not provide the record pertaining to the hotel as required to be maintained under E.S.I. Act for inspection and, therefore, recorded finding of guilt and conviction as described earlier. Learned Sessions Judge has also repelled the plea regarding limitation, as also challenge to the jurisdiction as was raised before him during the course of the appeal. By relying upon the definition of "factory" as contained in Section 2(m) of the Factories Act, together with powers of the State Government u/s 85 of the Factories Act, 1948, learned Sessions Judge held that "Ajanta Hotel" was "factory". He has also recorded a finding that petitioner is a proprietor and, therefore, principal employer of the factory, because inspite of notice sent by the Joint Director, he has not replied the same informing that he is not the proprietor/employer or somebody else is the proprietor/employer. In fact, the notice sent by RPAD by the Joint Director, as per observations of learned Sessions Judge, appears to have been refused.

6. While arguing for acquittal, learned advocate Sri Sharma has relied upon only two-fold argument. According to him, the establishment "Ajanta Hotel" is not a "factory" as defined by Section 2(12) of the E.S.I. Act and in any case there is no sufficient evidence to indicate that the said establishment would be within the clutches of definition "factory" under E.S.I. Act. Secondly, it was submitted that prosecution has not produced sufficient evidence to establish that present petitioner was the proprietor of the hotel and, therefore, principal employer as defined in Section 2(17) of the E.S.I. Act. He pointed out that accused in his statement u/s 313 of the Criminal Procedure Code, 1973, has categorically stated that his son runs the hotel and the complainant has not produced any document on record to show that petitioner is registered as proprietor/of the Hotel in the record under E.S.I. Act or under any other legal provisions.

7. The term "factory" is defined by Section 2(12) of the E.S.I. Act as follows:

"(12) "factory" means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on; or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on, but does not include a mine subject to the operation of the "Mines Act, 1952 (35 of 1952) or a Railway running shed."

It is evident that an establishment will be a "factory" if there are 10 or more persons employed in manufacturing process with the aid of power on any day of preceding 12 months. In case, the manufacturing process is carried out without the aid of power, the number of employees required would be 20 or more, on any day of the preceding 12 months.

8. On reference to deposition of complainant, he has admitted that he saw only two or three persons working in the hotel. Presuming it for the sake of argument that these workers were not the family members of the petitioner and they were engaged in the process of manufacturing food articles, still number being less than ten, the establishment would not be termed as "factory" as defined in Section 2(12) of the E.S.I. Act. Learned Sessions Judge has referred to definition of "factory" as contained in the Factories Act. The said definition as contained in Section 2(m) of the Factories Act is practically *pari materia* with the definition as contained in Section 2(12) of the E.S.I. Act. However, in the Factories Act, there are couple of explanations below the said definition, which are absent in the E.S.I. Act. Consequently, even under the Factories Act, in order to label an establishment as a factory, number of workers is required to be minimum 10 at least on one day during preceding 12 months, if the manufacturing process is carried on with the aid of power. Probably being conscious of the admission of the complainant that he had seen hardly two or three workers in the hotel, the learned Sessions Judge resorted to Section 85 of the Factories Act, relevant portion of which reads as follows:

"55. Power to apply the Act to certain premises.- (1) The State Government may by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply to any place wherein a manufacturing process is carried on with or without the aid of power or is so ordinarily carried on, notwithstanding that-

(i) the number of persons employed therein is less than ten, if working with the aid of power and less than twenty if working without the aid of power, or"

Neither learned Sessions Judge has referred to similar provision contained in E.S.I. Act nor learned A.P.P. has been able to draw attention of this Court to existence of similar provision in E.S.I. Act. The learned Sessions Judge has not only relied upon the power of the State Government as contained in Section 85

of the Factories Act, but has also lost sight of the fact that the complainant did not claim any existence of any declaration u/s 85 of the Factories Act, 1948, nor a copy of such declaration was produced for ready reference by the Trial Court or Lower Appellate Court. Moreover, taking into consideration the portion underlined in the provision reproduced hereinabove, the notification of the State Government issued in exercise of the powers u/s 85 of the Factories Act, 1948, would be applicable only for the purpose of provisions of that Act and not for the purpose of E.S.I. Act. The definition of "factory" as contained in Section 2(12) of the E.S.I. Act does not readily borrow the definition of "factory" from the Factories Act, 1948, with clause such as "the term factory wherever it occurs in this Act (E.S.I. Act) shall have the same meaning assigned to it in the Factories Act." Therefore, any establishment, which may be labelled as "factory" under the Factories Act, 1948, need not necessarily be labelled as a "factory" for the purposes of E.S.I. Act. The learned Sessions Judge was at gross error in borrowing the provisions of the Factories Act, 1948, and more so in relying upon the powers of the State Government u/s 85 of the said Act, without there being on record of the trial Court a notification declaring certain establishments to be factories, although number of persons employed is less than 10 or 20 engaged in the manufacturing process with the aid or without the aid of power. The establishment (Ajanta Hotel) is, therefore, not proved to be a "factory" within the meaning of Section 2(12) of the E.S.I. Act and, therefore, it must be said that the provisions of the said Act are not established to be applicable to the same.

9. Learned Sessions Judge has drawn presumption that the petitioner is a proprietor, because petitioner did not reply the notice by the Joint Director, contending that he is not the proprietor or someone else is the proprietor. However, learned Sessions Judge ignored the details available on record which rebut such a presumption or atleast creates a doubt about such a presumption being cent percent correct. In fact, learned Sessions Judge has observed that notice was not received by the accused. It is not clear from the judgment, whether it was not delivered to him or it was refused by the accused. Presuming it for the sake of argument that it was refused by the accused and, therefore, presuming that he was aware of the contents by virtue of Section 27 of the General Clauses Act, such a presumption, as drawn by learned Sessions Judge, cannot be said to be irrebuttable. Admittedly, on the second and third occasion, only son of the petitioner was present in the hotel attending the same. On the first occasion, although complainant claimed in examination-in-chief that petitioner alone was present, in the cross-examination he admitted that son also was present in the hotel. The accused has suggested during the cross-examination, as also stated in the statement u/s 313 that his son runs the hotel. The complainant, admittedly, has not produced any document to show that the accused is the proprietor of "Ajanta Hotel". Such evidence was possible because business establishments are required to be registered and licensed under various provisions. This being a prosecution and consequences being penal, the fact that petitioner was proprietor and, therefore, principal employer ought to have been

established beyond all reasonable doubts and not by preponderance of probability. Learned Sessions Judge has accepted the preponderance of probability as proof of the fact. "Principal employer" as defined by Section 2(17) in relation to a "factory" means the "owner or "occupier" of the factory and includes "managing agent" such owner or occupier. It also includes any person responsible for the supervision and control of the establishment. On reference to deposition of complainant, he has only said "I went to hotel of accused". Beyond this, he has not produced any other evidence showing capacity of accused, either as owner or occupier or Manager or a person having supervisory control over the hotel. Therefore, so far as the issue of petitioner being a principal employer, there is no satisfactory evidence on record.

10. A brief reference to Section 1(4) of the E.S.I. Act may be useful, which says that the Act shall apply to all "factories" other than seasonal factories. The term "factories" must be read as the establishment, which can be termed as "factory" as defined under this very Act and not under the Factories Act. Since "Ajanta Hotel" is not proved to be a "factory" as defined by Section 2(12) of the E.S.I. Act and there is no satisfactory evidence regarding petitioner being "principal employer", the applicability of the provisions of E.S.I. Act itself is negated and, therefore, both the lower Courts could not have recorded a finding of guilt.

11. The revision petition is, therefore, allowed. Conviction and sentence, as confirmed after modification by the Sessions Judge, is quashed and set aside. The petitioner is acquitted. He shall be set at liberty forthwith, if not required in any other offence. Fine paid by the petitioner shall be refunded to him.

12. On reference to operative order of learned Sessions Judge, it is evident that while delivering the judgment on February 3, 2003, learned Sessions Judge ordered the petitioner to surrender his bail bond before the Trial Court- COM Nanded, on February 10, 2003 to undergo remaining part of the sentence.

13. In this context, a reference may be made to a judgment of this High Court (Coram R.M. IODHA, J.) in Dilip Umare Vs. State of Maharashtra, , and more particularly contents in Paras. 5 and 7 of the judgment. It is evident that lower appellate Court after confirming the conviction, has no power to suspend the sentence, even if appellant may express his desire to prefer revision against the said conviction. The order directing the appellant accused to surrender after a week, in effect, resulted into suspension of sentence, by granting him some time to surrender.

14. Reading proviso to Section 387 of the Criminal Procedure Code, it may be argued that, it is not mandatory upon the appellate Court to direct the accused to be brought up or required to attend, to hear the judgment delivered because of the words "shall not" incorporated in the proviso. However, this proviso is required to be read in the light of Section 387 read with Sections 353(5) and 353(6). Provisions regarding the judgment, as contained in Chapter XXVII of the Criminal Procedure Code are applicable to the judgment of subordinate appellate

Court and in Section 387 also the words used are "shall apply". The proviso to Section 387, therefore, shall stand controlled by the provisions contained in Sections 353(5) and 353(6) and, therefore, the subordinate appellate Court will be obliged to secure the presence of accused/appellant before it for pronouncement of judgment except in the cases wherein the judgment is of acquittal or one of fine only. Once the presence of appellant-accused is secured or the purpose of pronouncement of judgment confirming the conviction with substantive sentence, as: observed in the matter of Dilip v. State of Maharashtra (supra), the Subordinate Appellate Court would become functus officio and cannot suspend the sentence or grant bail in order to enable the accused to prefer revision before the High Court. The only course available, therefore, would be to execute the order of conviction confirmed by it, leaving the accused to obtain suspension of sentence and bail from the High Court by preferring appropriate revision.

15. On reference to criminal manual of instructions issued by the High Court of Judicature, Appellate Side, Bombay, for the guidance of criminal Courts and officers subordinate to it, the same contains Form XV regarding "warrant to jailor, in the case of a prisoner at first released on bail pending the disposal of appeal to the Appellate Court, but subsequently rearrested in Court on the dismissal of the appeal or reduction or alteration of sentence, and forwarded to jail to undergo the remaining portion of the sentence". The contents of the warrant clearly indicate that the warrant is to be issued by the Court confirming the conviction and accused appellant cannot be directed to surrender to the trial Court for issuance of conviction warrant.

16. These are not the issues relating to decision of present revision petition on merits. Since the operative part of the order of learned Sessions Judge requires rectification, atleast in future, above discussion for the purpose of enabling the Sessions Court to follow correct procedure in future.

17. The revision petition disposed of. Rule made absolute in terms of Para. 11 above.