(2003) 04 BOM CK 0007

In the Bombay High Court

Case No : Criminal Writ Petition No. 807 of 1999

Mr. D.V. Shetty, Being the Head Administration of Citicorp Information Technology Industries Ltd. APPELLANT

Vs

Bombay Municipal Corporation, H.Y. Nair, Being Jr. Engineer of Bombay Municipal Corporation and State of Maharashtra RESPONDENT

Date of Decision : 28-04-2003

Acts Referred:

Factories Act, 1948 — Section 2
Mumbai Municipal Corporation Act, 1888 — Section 25L, 390, 390(1), 390(2), 390(3)

Citation : (2004) 2 MhLj 284

Hon'ble Judges : J.G. Chitre, J

Bench : Single Bench

Advocate : Shrish Gupta and R. Sabarwal and Bakul Vyas, instructed by Ramesh Makhija and Company, for the Appellant; Pimple and K.V. Saste, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.G. Chitre, J.—The petitioners are hereby assailing correctness, propriety and legality of the order passed by 39th Court of Metropolitan Magistrate Vile Parle in Court Case No. 19717/M of 1988, whereby the learned Magistrate took cognizance of the complaint, which was filed by Shri R.S. Chavan, Legal Assistant, Bombay Municipal Corporation alleging that the petitioner has committed the offence punishable u/s 390 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as Act for convenience) and initiated criminal prosecution against the petitioner. He prayed for quashing the said proceeding.

2. The petitioners are having an office at Subhash B Road. National Plastic Premises, Vile Parle (East), where there are according to the case of the complainant, conducting Computer software with motor/engine in electric power with total 400 aggregate H.P.

3. According to the case of the Corporation the petitioner is having 190

Computers kept in the premises, which is having A.C. plant. There were 80 persons from the staff members, who were operating those computers on the relevant date. According to the case of the Corporation, the said unit was using 400 H.P. of electricity. He was not having a permit in view of provisions of Section 390 of the Act.

4. Shri Shirish Gupte, Counsel appearing for the petitioner, submitted that the said unit run by the petitioner, is unit of Citicorp Information Technology Industries Ltd. which will not be falling under the purview of the definition given by Section 2(m) of the Factories Act 1948. In view of the provisions of Explanation II of it, which provides that:

"for the purpose of this clause, the mere @@ i fact that an Electronic Data Processing Unit or a computer unit is installed in any premises or part thereof, shall not be construed to make it a factory, if no manufacturing process is being carried on in such premises or part thereon."

Shri Gupte pointed out the announcement of comprehensive I.T. Policy in August 1998 under which several benefits are extended to I.T. Units. He further pointed towards two letters, one written by Shri A. Ramkirshanan, Development Commissioner (Industries) Government of Maharashtra to Shri Shirish Gokhale, the then Municipal Commissioner of Bombay Municipal Corporation dated 4th February 1999 and second written by same person to Shri P. Subramanyam, Chief Secretary to Government of Maharashtra bearing No. D.C.(I)/Misc./99/A 2957, dated 4th February, 1999, whereby it was brought to the notice of both those officers that M/s Citicorp Information Technology Industries Ltd. (CITIL), a unit registered under the STPI scheme and operating from unit No. 10-11, SDF-1, SEEPZ, Mumbai happens to be registered under Shop & Establishment Act, 1948 and the attention of those officers was invited to the fat that vide I.T. Policy of 1998 the State of Maharashtra had done away with the various registrations under Shop and Establishment Act, etc. for the I.T. Sector. It was brought to their notice that eh same was the view taken by his Department that the said sector was to operate with a wide flexibility in its working. It was brought to their notice and it was urged that not only in the case of M/s Citicorp but also in cases of other such units, they should not be asked to register themselves as a factory u/s 390 of the Act. It was requested that appropriate instructions be issued to necessary officers in that context.

5. Shri Gupte further invited the attention of this Court towards the judgment of Madras High Court, in the matter of Seelan Raj R. and 14 Ors.and P.O.I. I Addl. Labour Court and Ors. and between Cholamandalam Software Ltd. and Presiding Officer, I Addl. Labour Court and Ors., reported in L.L.J II 1997 156 wherein the Division Bench of Madras High Court held that:

"The word "factory" has been defined in Section 2(m) of the Factories Act, 1948 and while deciding whether a particular establishment is a factory or not, meaning attribute to the words "manufacturing process" and "industrial establishment would be relevant. On the plain reading of Explanation-II added to 2(m) of the Factories Act with effect from December 1, 1987, it became abundantly clear that Electronic Data Processing Unit or a computer unit from being brought within the purview of Welfare legislations, namely, labour laws. Thus, an establishment solely engaged as electronic data processing unit or computer unit, though may be a factory, yet would be exempted from the application of labour laws by virtue of Explanation-II and such establishment cannot be held as a factory. The only object of introducing Explanation II is to march in step together with industrial modernization and electronic innovation in industrial field. Computer is a recent innovation and has augmented industrial development to a great extent. By computerisation efficiency has been increased adding to the national resources available for development. The legislature still thought to more scope for use of electronics and computer, and its contribution to national development. Thus giving priority to the laudable object of national prosperity legislature though it proper to grant immunity to such units from application of welfare legislation, namely labour laws, so that such development projects can strengthen national growth without any hurdle or impediment. Of course the statement of objects and reasons for bringing out an amendment does not expressly say so, but if read in between the lines we would derive the aforesaid scope from para 2 of the statement of objects and reasons."

6. In the same judgment the Division Bench of Madras High Court pointed out that though the activities carried out by the third respondent may be manufacturing process, it is not a factory by virtue of Explanation-II and therefore, the establishment of third respondent cannot be brought within the purview of the industrial establishment as defined u/s 25L of the Act. If the third respondent is not a factory, and/or an industrial establishment, Chapter V-B of the Industrial Disputes Act would not be applicable. Hence, Labour Court is not justified in ordering reinstatement and the learned Judge was right in setting the order of Labour Court.

7. In view of these things, Shri Gupte submitted that the said prosecution needs to be quashed in the interest of the public at large and in view of the modern technology and the recent development in the world as implementing a progressive formula in that context. He submitted further that keeping in view the declaration of Infotech policy by State of Maharashtra itself, such prosecution has to be quashed and a solace has to be given to such industries.

8. Shri Pimple, Counsel appearing for the prosecution submitted that in view of the judgment of this Court in the matter of State v. S.G. Shekharrao, bearing Criminal Appeal No. 1461 of 1968 (an unreported judgment) even Infotech Unit also falls under purview of Section 2 of the Factories Act as also Section 390 of the Mumbai Municipal Corporation Act, 1888 and therefore, this petition be dismissed.

9. Shri Saste, A.P.P. appearing for the State of Maharashtra submitted that the Court may pass an appropriate order in view of the facts and circumstances of

the case.

10. The State of Maharashtra has issued a brochure on Promotional Incentives for information technology Industry in Maharashtra State by announcing a comprehensive I.T. Policy in August, 1988 under which several benefits are extended to IT units. In order to identify the units eligible for some of these benefits, a system of I.T. registration has been put in place for different kinds of I.T. units depending on their main activity i.e. I.T. hardware/IT software/IT services/enabled services and composite IT Units. The registration guidelines have been issued by Directorate of Industries under circular No. 6/99, dated 07/05/1999 according to which IT Units are entitled for getting IT registration/ LOI/(as Software/IT Hardware/IT Service Units/IT Composite Units) from the registering authorities as mentioned below. Then the brochure goes on dealing with the various enactments and departments like sale tax, some duty exemptions, exemptions of MPCB N.O.C.. It also deals with the fiscal and non fiscal incentives and speaks of Government as well as Institutions. That gives high light on Maharashtra I.T. Policy of 1988. It deals with incentives of Human Resources Development infrastructure. While dealing with the aspect touching fiscal and non fiscal incentives I.T. Policy speaks that a host of fiscal and non-fiscal measures will be offered to the Information Technology industry in the state to consolidate the State''s leading position, as follows:-

1. Software industry will be allowed in residential, industrial and commercial zones.

2. Software industry will be included as one of the permissible users in the No Development zone.

3. 100% additional FSI for Software Technology Parks set up by the public bodies on payment of premium amounting to 25% of the market value.

4. No MPCB (Maharashtra Pollution Control Board) clearance required for software units.

5. Under the Package Scheme of Incentives, benefits meant for industrially backward ''D'' areas will be extended to the Information Technology industry even in relatively advanced A.B. and C areas. This scheme will be in operation till 2000 AD.

6. Sales Tax on hardware will be reduced to 2%, on packaged and off themselves software to 1% and on customized software to nil. These rates will not be raised for the next five years.

This will have to be read with Section 2(m) of the Factories Act which reads:

"Factory" means any premises including the precincts thereof-

"(i) wherein ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the said of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working 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) or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place.

Explanation provides that

(1) For computing the number of workers for the purposes of the clause all the workers in different groups and relays in a day shall be taken into account.

Explanation II provides that:

For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof.

11. Attention will have to be adverted to the definition of "manufacturing process" provided by Clause (k) of Section 2, which reads that:

"manufacturing process: means process for-

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) pumping oil, water sewage or any other substance, or

(iii) generating, transforming or transmitting power, or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;

(v) constructing, reconstructing, repairing refitting, finishing or breaking up ships or vessels or;

(vi) preserving or storing any article in cold storage.

12. In this context Section 390 of the Mumbai Municipal Corporation Act, 1988 will have to be considered, which provides:

"(1) No person shall newly establish in any premises any factory, workshop or workplace in which it is intended that stream, water (electrical) or other mechanical power shall be employed, without the previous written permission of the Commissioner nor shall any person work or allow to be worked, any such factory, workshop or workplace without such permission."

Sub-section (2) provides that:

"The Commissioner may refuse to give such permission if he shall be of opinion that the establishment of such factory, workshop or workplace in the proposed position is objectionable by reason of the density of the population in the neighbourhood thereof, or will be a nuisance to the inhabitants of the neighborhood."

Sub-section (3) provides that:

"If any written permission for the establishment of a factory, workshop or workplace granted under Sub-section (1) be revoked by the Commissioner in the exercise of his powers under Sub-section (3) of Section 479, no person shall continue or resume the working or use of such factory, workshop or workplace until such written permission is renewed or a fresh written permission is granted by the Commissioner."

13. Section 471 the B.M.C. Act has also to be considered in the same context, which provides for penalties. It provides that whoever-

(a) contravenes any provision of any of the sections, sub-sections or clauses mentioned in the first column of the table, or any regulations made thereunder, or

(b) fails to comply with any requisition lawfully made upon him under any of the said sections, sub-sections or clauses, shall be punished, for each such offence, with fine which may extend to the amount mentioned in that behalf in the third column of the said table Subject, however, to a minimum fine which shall not less than fine mentioned in the fourth column of the said table."

Explanation has been provided which provides that the entries in the second column of the said table headed "Subject" are not intended as definitions of the offences described in the sections, sub-sections and clauses mentioned in the first column, or even as abstracts of those sections, sub-sections and clauses, but are inserted merely as references to, the subjects of the sections, sub-sections and clauses, the numbers of which are given in the first column.

A Schedule has been given thereof which mention Sections 149, 150, 152, 188, 190, 191A, 191H, Section 223, 229, 229A

14. Firstly it is pertinent to note that Section 390 has been embodied in Chapter 15 which deals with sanitary provisions which impliedly means that the said provisions are enacted for the purpose of taking care of the nuisance, which is likely to be caused to the residents of that locality. Section 390 falls under the heading Regulation of Factories, Trades, and heading styled as "Factory of not to be newly established without permission of the Commissioner" Sub-section (2) of Section 390 deals with density of the population in the neighborhood of such factories which are to be established and the nuisance which would be thereby caused to the inhabitants of the neighborhood. In this context it is to be kept in mind that the place in which computers are functioning does not create or is not likely to create such a nuisance which is contemplated by working of a factory in general parlance. The factories do work by creating some sort of noise, tremors and account of that the inhabitants or residents of the particular locality are

likely to be put to annoyance and nuisance, but Information Technology units are free from such possibilities. They are not likely to create such type of nuisance to adjoining neighborhood or inhabitants of that locality.

15. What Information Technology does is the collection of data which is already in existence, assimilation of the data in computers which is already in existence. Rewriting of data which is already in existence. Transcription of such data which is already in existence. Classification of data which is already in existence, totalling of date which is already in existence. Nothing new is prepared even talking in general parlance. It is a process by which the modern information technology is used for the purpose of general work in quickness and in short time. In minimises the use of human energy. It uses the human energy and time in optimum way which is beneficial to the activities of human beings. Therefore, this aspect of the performance of Information technology units has to be understood in context with Clause (II) to Clause (K)) of Section 2, which speaks of making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale transport, delivery or disposal. In such units, though electricity is used it is not likely to cause any annoyance as contemplated by Chapter XV of Mumbai Municipal Corporation Act. Nothing new is created or prepared. Things which are already in existence are shaped in a better way for saving human energy and time required for performance of an act for giving a good shape to activities of business or other occupations. There may be more than 20 persons working in such unit and therefore, these activities will have to be read in context with Explanation I provided to Section 2(m) of the Factories Act. It provides that for the purpose of this Clause the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof. The important criterion which is to be considered in this context is whether some thing new has been created or whether something which was already in existence is modulated, shaped in proper way, classified transcript or translated or arranged in proper form so as to make its presentation proper, comprehensive and easily understandable.

16. Shri Gupte has submitted that the Unit in question was meant for giving information to its main concern and was nothing more than that. Though there may be number of computers and workers in the unit in question, it cannot be treated to be a factory in view of discussion above. If such a meaning, applicability is adopted, number of offices would not escape from the meaning like that and from its sweep. A lawyer''s office, which engages in its activities around the computers and use of it, will have to be treated as factory, because those activities are meant for exchange of consideration for work or advise given. A Chartered Accountant''s office would be also falling in the same category for the same reasons. Architect would not be also escaping from its sweep, leave aside other technical, financial experts, if they are to be brought in meaning of

factory, as indicated by the argument of Pimple. Shri There would be hardship to all those persons and that would result in calamity to the members of public at large. That would be creating obstacles in the progress of the society and day to day function of human beings in modern era which law would never contemplate.

17. The world is leaping forward to modern technical and Information Technology. The important outcome of the same so far as normal human behavior is concerned has shown it social commercial utility. Number of State Governments have adopted this forward leap in Information technologies by announcing of policies and resultant benefits. Governments have heralded benevolent broad approach. Some of the States have gone ahead. The State of Maharashtra has also heralded its intention of bringing forth the revolution in Information Technology and has decided to grant number of facilities including rebates in sales tax, reduction in rates of the sales tax, exemption from getting N.O.C., exemption in stamp duty etc. It is high time that the Corporation has to seriously think whether they are going to stick up to atmosphere pertaining to year 1888 when Mumbai Municipal Corporation act was brought in existence.

18. The law provides that the penal provisions cannot be applied adversely to such units which are enjoying the benefits of statutory exemption as Section 2, if read as whole, indicates. While implementing the beneficial law, this aspect cannot be forgotten. Therefore, the complainant, officer of the Mumbai Municipal Corporation, was under obligation to inform himself of explanation II provided to Section 2(m) of the Factories Act. Had he done that, this complaint which has been filed by him before the learned Magistrate would not have come in existence and would not have been presented before that Court, and that would have avoided possibility of there being prosecution initiated against the petitioner. The prosecution which has been brought in existence against the petitioner is against the provisions of Section 2(m) explanation II of the Act. Such I.T. units, units employing more than 20 persons, using electricity as power or manual power for its work by way of use of computers or otherwise and the units are meant not for manufacturing any new thing cannot be brought under the purview of Section 390 of Mumbai Municipal Corporation Act and other similar provisions, because, the main provision of Section 2(m) Explanation II cannot be forgotten. For bringing the case under provisions of Section 390 of parallel provisions, the complainant has to satisfy that the unit is really falling under the term "factory" as contemplated by Factories Act. If not, there would be no application to it of Section 390 of Corporation Act. Therefore, the judgment of this Court on which the complainant''s side wants to place reliance cannot help it, because in those days, the computers were not in common use in India and its use for day to day life was not a phenomenon. The said judgment and the ratio cannot be made applicable so far as present case is concerned. The view taken by this Court finds support from the judgment of the Division Bench of the Madras High Court in Seelan Raj and 14 others'' case (Supra).

19. Thus, the petition is allowed. The prosecution which has been initiated

against the petitioner stands quashed. He need not attend the said Court in response to summons issued to him.

Parties concerned to act on a simple copy of this order, duly authenticated by the Court Stenographer/Sheristedar of this Court.