
(2014) 11 MAD CK 0095

In the Madras High Court

Case No : Crl. O.P. No. 28345 of 2014 and M.P. Nos. 1 and 2 of 2014

P. Shanmuganathan

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-11-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 2(y), 360, 4, 4(2)
Factories Act, 1948 — Section 105, 2(n), 3, 49(1), 5
Major Port Trusts Act, 1963 — Section 24(1)(a)
Penal Code, 1860 (IPC) — Section 32, 43
Wild Life (Protection) Act, 1972 — Section 50, 51, 54

Citation : (2015) 1 MLJ(Cri) 75

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : R. Karthikeyan, Advocates for the Appellant; M. Maharaja, Addl. Public Prosecutor, Advocates for the Respondent

Judgement

S. Nagamuthu, J.—Seeking to quash the case in C.C. No. 2627 of 2014 on the file of the learned Chief Metropolitan Magistrate, Chennai, the petitioner who is the sole accused in the case, has come up with this petition. The respondent has filed the said case by way of a private complaint alleging that the petitioner had committed offence punishable under Section 92 of the Factories Act.

2. I have heard the learned counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the respondent. Having regard to the legal issues involved in this case, Mr. A. Ragunathan, learned senior counsel was requested by this Court to act as Amicus Curiae and accordingly he has made his submissions as well.

3. The short facts necessary for disposal of this petition are as follows: Chennai Port Trust/Harbour, Chennai is admittedly a factory in terms of the Factories Act. The same has been registered as a factory under the provisions of the said Act. The petitioner Mr. P. Shanmuganathan is the Chief Mechanical Engineer. The Chennai Port Trust submitted Form No. 2 viz., "Application for Registration and

Grant or Renewal of Licence for the year 2012 and Notice of Occupation specified under Sections 6 and 7" specified under Sections 3 & 7 of the said Act. In the said Form No. 2, the petitioner Mr. P. Shanmuganathan, the Chief Mechanical Engineer has been specified as the "occupier" of the factory viz., the Chennai Port Trust as per Section 2(n) of the Act. The petitioner was appointed by the Government of India under office order No. 09/2011 dated 03.08.2011. The said appointment order has been made by the Under Secretary to the Government of India, Ministry of Shipping, in exercise of powers conferred under Section 24(1) (a) of the Major Port Trust Act, 1963. Thus, admittedly, the petitioner is a public servant removable only by the Central Government.

4. According to the respondent on 07.08.2012, the Headquarters Deputy Inspector of Factories made a surprise inspection of the Factory viz., Chennai Port Trust, during which, he found violation of Section 7(1) and Rule 12B (3) & (4), Sections 51 and 54 and Section 49(1) of the Factories Act, 1948 and the Tamil Nadu Factories Rules 1950. These violations, according to the respondent, are offences punishable under Section 92 of the Factories Act. Thus, for the above violations, the above prosecution was launched by way of a private complaint by the respondent.

5. In this petition, the learned counsel appearing for the petitioner would contend that since the petitioner is a public servant removable only by the Central Government, the present prosecution launched against him without sanction from the Central Government as required under Section 197 of the Code of Criminal Procedure is illegal and thus, the order of the learned Magistrate in taking cognizance followed by issuance of summons to the petitioner/accused is illegal and so the entire proceedings should be quashed, the learned counsel contended.

6. But the learned Additional Public Prosecutor appearing for the respondent submitted that for prosecuting the petitioner, no such sanction is required in view of the specific provision contained in Section 105 of the Factories Act, which states that no Court shall take cognizance of any offence under this Act except on complaint by, or with the previous sanction in writing of an Inspector. He would submit that in the instant case, complaint was made by the Inspector of Factories as provided under Section 105 of the Factories Act and therefore, no separate sanction is required under Section 197 of the Code of Criminal Procedure.

7. In the alternative, the learned Additional Public Prosecutor would submit that assuming that such sanction is required under Section 197 of the Code of Criminal Procedure, it is curable and therefore for want of sanction the proceedings cannot be quashed.

8. The learned senior counsel Mr. A. Ragunathan, the Amicus Curiae, would submit that Section 105 of the Factories Act is not contrary to Section 197 of the Code of Criminal Procedure. He would submit that it operates in a different spear

without either conflicting with or overlapping Section 105 of the Factories Act. He would contend that Section 105 of the Factories Act regulates as to who is competent to present a complaint before the Court. The said provision, according to the learned senior counsel has not stated anything about the sanction to be obtained. He would further submit that Section 197 of the Code of Criminal Procedure has not been excluded by Section 105 of the Factories Act. Therefore, according to him, in the instant case, sanction ought to have been obtained.

9. The learned senior counsel brought to my notice the judgment of the Hon'ble Supreme Court in *Moti Lal Vs. Central Bureau of Investigation and Another*, , wherein, in paragraph 14, the Hon'ble Supreme Court has held as follows:

"14. In our view, the aforesaid judgment has no bearing in the present case. As stated above, the Central Government has issued notification dated 21.3.2000 under Section 5 read with Section 6 of the Act empowering the CBI for investigation of the case against the appellants under the Wild Life Act and Indian Penal Code. The scheme of Section 50 of the Wild Life Act makes it abundantly clear that Police Officer is also empowered to investigate the offences and search and seize the offending articles. For trial of offences, Code of Criminal Procedure is required to be followed and for that there is no other specific provision to the contrary. Special procedure prescribed is limited for taking cognizance of the offence as well as powers are given to other officers mentioned in Section 50 for inspection, arrest, search and seizure as well of recording statement. The power to compound offences is also conferred under Section 54. Section 51 provides for penalties which would indicate that certain offences are cognizable offences meaning thereby police officer can arrest without warrant. Sub-section (5) of Section 51 provides that nothing contained in Section 360 of the Code of Criminal Procedure or in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence with respect to hunting in a sanctuary or a national park or of an offence against any provision of Chapter 5A unless such person is under 18 years of age. The aforesaid specific provisions are contrary to the provisions contained in Code of Criminal Procedure and that would prevail during the trial. However, from this, it cannot be said that operation of rest of the provisions of the Code of Criminal Procedure are excluded."

Referring to the same, the learned senior counsel would submit that in the instant case, since Section 105 of the Factories Act and Section 197 of the Code of Criminal Procedure operates in different fields with different objectives, it cannot be held that Section 105 of the Factories Act would exclude the operation of Section 197 of the Code of Criminal Procedure.

10. The learned senior counsel would also bring to my notice the judgment of Madhya Pradesh High Court in *S.K. Prasad v. State of Madhya Pradesh* in CrI.R. No. 1545 of 2010 dated 09.05.2013, wherein also, similar view has been taken.

11. Mr. R. Karthikeyan, the learned counsel appearing for the petitioner would

rely on a judgment of this Court in Thiru. K. Masthan Rao Vs. State, , wherein, a learned Judge has taken the view that launching of prosecution for the offences under the Factories Act against a public servant removable by the Government without the sanction as required under Section 197 of the Code of Criminal Procedure is a ground to quash the entire proceeding.

12. I have consider the above submissions.

13. As rightly submitted by the learned senior counsel Mr. A. Ragunathan, a reading of Sections 4 and 5 of Cr.P.C. would make it abundantly clear that unless it is so specifically stated to the contrary in the special enactment, the provisions of the Code of Criminal Procedure are very much applicable to any investigation, enquiry or trial or otherwise while dealing with the offences.

14. In this case, Section 105 of the Factories Act provides as to who is competent to present a private complaint before the Court of Law in respect of offences committed by an Occupier. It states that such a complaint can be made either by the Inspector of Factories himself or with the previous sanction by anyone else. Except saying this, this provision does not say anything about sanction to be obtained for prosecuting a public servant without recourse to Section 197 of the Code of Criminal Procedure. Thus, it is quite clear that neither Section 105 nor any other provision in the Factories Act either expressly or impliedly exclude the operation of Section 197 of the Code of Criminal Procedure.

15. In this regard, we may have a look into the judgment of the Hon"ble Supreme Court in Moti Lal v. C.B.I. (supra), referred to by the learned senior counsel. In that case, while dealing with a case under the Wild Life (Protection) Act, the Hon"ble Supreme Court found that Section 50 of the Wild Life Act deals only with the powers of an officer to investigate the offence, search and seize the offending articles as well as recording of statements. Similarly, Section 54 of the Act speaks of the power to compound an offence. Section 51 of the Act provides for penalties which would indicate that certain offences are cognizable offences meaning thereby a police officer can arrest without warrant. Having referred to these provisions, the Hon"ble Supreme Court held that for trial of offences under the said Act, the Code of Criminal Procedure is required to be followed as there is no other specific provision in the said Act contrary to the Code of Criminal Procedure. In other words, the view taken by the Hon"ble Supreme Court was, as I have already pointed out, unless there is a specific provision excluding the applicability of any of the provisions of the Code of Criminal Procedure, the said provision in the Code of Criminal Procedure should be followed. The Madhya Pradesh High Court in S.K. Prasad v. State of Madhya Pradesh (supra), has taken the same view.

16. This Court in K. Masthan Rao v. State rep. by the Inspector of Factories (supra), has also taken a similar view. But it is seen in paragraph 38 of the Judgement of this Court that this Court had no occasion to reconcile Section 197 of the Code of Criminal Procedure and Section 105 of the Factories Act. This

Court had simply followed the judgment of the Madhya Pradesh High Court in *S.K. Prasad v. State of Madhya Pradesh* (supra) and few other cases.

17. In my considered opinion, when one compares Section 105 of the Factories Act and Section 197 of the Code of Criminal Procedure and reconciles both the provisions, it would emerge that there is no conflict between these two provisions. One can also find that these two provisions do not overlap and instead they operate in two different spheres which are distinct in their object. Therefore, I hold that for prosecuting a person covered under Section 197 of the Code of Criminal Procedure, if the offence alleged to have been committed under the Factories Act is in discharge of the official duties, sanction is mandatory and in the absence of such sanction, no Court shall take cognizance of the offence.

18. In the instant case, the next question to be answered is as to whether the offence said to have been committed by the petitioner under the Factories Act has been committed while this accused was acting or purporting to act in discharge of his official duty?

19. The allegation against the petitioner as "occupier" in terms of the Factories Act is that he had failed to comply with the provisions contained in Rule 12B(3) & (4) and Sections 7(1), 51, 49(1) and 54 of the Act. In other words, he has omitted to comply with these provisions. It is contended before me that Section 197 of the Code will come to the rescue of the petitioner, if only the offence had been committed in discharge of his official duties, but here, the petitioner had not discharged his official duties and instead, he had omitted to discharge his official duties. Therefore, it is argued that for such omission by the petitioner to comply with the provisions of the Factories Act, which amounts to an offence, no sanction need be obtained.

20. This argument does not persuade me at all for more than one reason. In Section 197 of Cr.P.C. the expressions "act" or "purporting to act" need to be underlined. Now what does the expression "act" denote? Admittedly, the said term has not been defined anywhere either in the Factories Act or in the Rules. As per Section 4(2) of the Cr.P.C. all the provisions of Cr.P.C. are applicable to the trial of offences under the Factories Act. As we have already noticed, the provisions of Cr.P.C. have not been excluded by the Factories Act.

21. Section 2(y) of Cr.P.C. states "words and expressions used herein and not defined but defined in the Indian Penal Code have the meanings respectively assigned to them in that Code". From this provision, it can be deduced that the meaning of the expression "act" as mentioned in Section 197 of Cr.P.C. has to be found in Section 32 of I.P.C. which reads as follows:

"32. Words referring to acts include illegal omissions: In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions."

22. Thus, as defined under Section 32 of I.P.C., it is crystal clear that "illegal

omission" itself is an "act" unless a contrary intention appears in the Code or in the Special Enactment. Admittedly, no such contrary intention appears. Therefore, "illegal omission" itself is an "act".

23. Now the next question is, "whether such omissions committed by the petitioner are "illegal omissions" as referred to in Section 32 of I.P.C.?" The term "illegal" is again defined in Section 43 of I.P.C. which reads as follows:

"43. "Illegal". "Legally bound to do": The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit."

24. Since the omissions allegedly committed by the petitioner amount to an offence punishable under Section 92 of the Factories Act, the said omissions are "illegal omissions" and therefore it is construed as an "act" as defined in Section 32 of I.P.C.

25. Therefore, I have no hesitation to hold that omission by a public servant, if it constitutes an offence, would fall under Section 197 of Cr.P.C. Thus, the expression discharge of his official duty will include illegal omission to act in accordance with his official duty. In this regard, I may refer to the judgment of the Hon'ble Supreme Court in P.K. Pradhan Vs. The State of Sikkim represented by the Central Bureau of Investigation, wherein, in paragraph 15 of the Judgment the Hon'ble Supreme Court has held as follows:

"75. Thus, from a conspectus of the aforesaid decisions, it will; be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence established that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused, that the act that he did was in course of the performance of his duty was reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an

eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

26. As has been held by the Hon"ble Supreme Court in the above judgment, the fundamental test to ascertain whether protection under Section 197 of Cr.P.C. is available or not, is as to whether there is reasonable connection between the act complained of and the discharge of official duty. The Hon"ble Supreme Court has further clarified that an official act can be performed in the discharge of official duty as well as in dereliction of it. The term "dereliction of it" requires attention. Thus, not only those positive acts of the official but dereliction of it is also an "act" falling within the scope of Section 197 of Cr.P.C. But, I hastened to add a word of caution that it is not every act or omission of a public servant that protects him under Section 197 of Cr.P.C. The act or omission should have close proximity to the official act. For illustration, policeman causing voluntary hurt unwarrantedly when the situation does not necessitate at all such an act by him will not fall within the ambit of Section 197 of Cr.P.C.

27. As I have already pointed out, in the instant case, dereliction allegedly committed by the petitioner is that he did not comply with the provisions of the Act enumerated herein above. In other words, it was a dereliction of duty. Thus, in my considered view, the offence which the petitioner had allegedly committed is in discharge of his official duty and therefore for the Court to take cognizance, sanction from the Central Government should have been obtained by the respondent. For want of such sanction, the order of the learned Magistrate taking cognizance is illegal.

28. The contention of the learned Additional Public Prosecutor that the defect is curable does not persuade me. But at the same time, I want to clarify that there will be no bar for the respondent to again lay a private complaint against the petitioner after obtaining necessary sanction from the Central Government under Section 197 of Cr.P.C. provided there is no other impediment like expiry of the limitation period etc. In the result, the petition succeeds and the case in C.C. No. 2627 of 2014 on the file of the learned Chief Metropolitan Magistrate, Chennai, is hereby quashed however with liberty to the respondent as indicated above. Before parting with the case, I would like to place on record my deep appreciation for the assistance rendered by the learned senior counsel Mr. A. Ragunathan who once again exhibited erudition and his deep knowledge in law by assisting this Court as Amicus Curiae. Consequently, the connected miscellaneous petitions are closed.