
(1979) 02 GUJ CK 0014
In the Gujarat High Court

Simon Carves India Ltd. and Another	APPELLANT
Vs	
The State of Gujarat	RESPONDENT

Date of Decision : 06-02-1979

Acts Referred:

Factories Act, 1948 — Section 2, 24, 6, 85, 92
Payment of Wages Act, 1936 — Section 5

Citation : (1980) CriLJ 283 : (1980) GLR 357

Hon'ble Judges : M.K. Shah, J

Bench : Single Bench

Judgement

M.K. Shah, J.—This revision application is filed by the original accused who have been held guilty for the offence u/s 92 read with Section 6 of the Factories Act, ("the Act") for breach of R, 4 of the Gujarat Factories Rules, 1963 ("the rules"), and it involves an important question touching the interpretation of the term "factory" used in the Act.

2. Petitioner No. 1 is a public limited company incorporated under the Indian Companies Act and runs business as designers and constructing engineers in different parts of India including Gujarat, It had entered into a contract for structural work to be done at Indian Petro-Chemicals Corporation Limited's (IPCL) project site at Baroda. Petitioner No. 2 is the Managing Director of petitioner No. 1 company. One Y. B. Khedekar was the resident engineer of the company at the IPCL site in charge of the work at site.

3. On 17-1-1977, when the complainant Factory Inspector visited the site, he found that more than 15 workers were working on drilling machines, welding machines etc. making pipe supporters, etc. and, in the process, 100 electric H.P. was used. He found that the work was being carried on in three sheds which were enclosed by means of barbed wire-fencing. On inquiry from the company's engineer, he was told that the said establishment was not registered as a factory under the Act. After some correspondence, the two petitioners were prosecuted before the learned Judicial Magistrate, First Class, 3rd Court at Baroda for the

aforesaid offences; and the learned Magistrate, on the evidence led before him, came to the conclusion that a factory was being run in the said sheds within the meaning of the Act and, as no application for registration and grant of licence was made as provided in Rule 4 of the Rules by the petitioners, they were guilty for the offence with which they were charged. He, therefore, convicted them for the said offence and awarded a fine of Rs. 50/- by his order dated 28-2-1978; and it is this order which is being challenged by the petitioners (original accused) in this, criminal revision application,

4. Mr. V. B. Patel, the learned Advocate appearing for the petitioners, submits that the learned Magistrate in the instant case erred in holding that the establishment of the petitioners was covered by the provisions of the Act. The material on record dis-close that the petitioners were doing the work as construction contractors and accordingly they had entered into a contract with the IPCL with regard to construction work to be done at their site at Baroda. Other contractors were also working on the project of constructing buildings for the IPCL. Certain work in connection with this construction work had to be done by using power with the aid of workers, such as the work of preparing pipe supporters and ladders which were made for the purpose of being utilised in the erection work of the said building of IPCL, as per the specifications contained in their drawings. Their main work was of erection, while this was incidental to the main work. They had no fixed place for doing the said work of manufacturing pipe-supporters, etc. involving use of drilling machines, welding machines with the aid of power, and it, therefore, cannot be said that they were running a factory within the meaning of the Act.

5. Section 2(1) of the Act defines "worker" as meaning.

Person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

The word "factory" is defined by Section 2(m) of the Act, and so far as material for our purpose, reads thus:

(m) "Factory" means any premises including the precincts thereof-

(i) whereon 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 aid of power, or is ordinarily so carried on, or

(ii) x x x x x x x.

A look may also be had at the provisions of Section 85 of the Act which provides thus-

(1) The provincial 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

(ii) the persons working therein are not employed by the owner thereof but are working with the permission of or under agreement with such owner.

Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

(2) After a place is so declared, it shall be deemed to be a factory for the purposes of this Act, and the owner shall be deemed to be the occupier, and any person working thereon, a worker.

Explanation - For the purposes of this section, "owner" shall include a lessee or mortgagee with possession of the premises.

Thus, if in a particular premises, the manufacturing process is being carried on with the aid of power or is ordinarily carried on with 10 or more workers working in the said premises, or were working on any day of the preceding twelve months, then the said premises, including the precincts thereof, would fall within the definition of "factory" as provided in Clause (m) (i) of Section 2. There is no dispute that, in the instant case, on the day on which the complainant visited the site, the work of preparing pipe supporters, ladders etc. was going on on the site provided by IPCL and that about 15 workers were engaged in the said work of preparing pipe supporters, ladders, etc, with the aid of drilling machines, welding machines etc. run with the aid of power.

6. The question which, therefore, arises is as to whether, the company was running any "factory" within the meaning of the Act by doing the said work at the site of IPCL with whom they had entered into a contract to do construction work for a building to be put at their site. In order that the premises in which such manufacturing process is being carried on may be termed a "factory" within the meaning of the Act, it would be essential to show that the said activity so done in the said premises was the main activity independently carried on by the company and was not a mere part of the main activity which part was carried on to achieve the main object and which was incidental to the main work. If this standard is applied, then, it would be clear that the main or predominant activity of the company was to carry out its part of the contract with regard to the erection or the construction of a building at the site of IPCL. In this main activity, the petitioner company will have to engage a large number of workers to do various jobs which are required to be done to carry out the work of construction. A part of the job would be to have pipe supporters, ladders, etc. which would be used in the work of construction. There is no dispute that the material, that is pipes, etc. for preparing supporters, ladders etc. was supplied by IPCL and the

supporters etc. after they were prepared as earlier stated, were to be used, for the construction of building belonging to IPCL. None of the articles so prepared were to be marketed by the company outside nor were they to be kept with the company. Any surplus of material was to be returned to IPCL.

7. This, therefore, makes it abundantly clear that the work which was going on at the time when the complainant inspector visited the site, was not the main or predominant operation which the company was carrying on, but it was a part of an integrated process of constructing a building. Again, it has to be noted that, as per the evidence of the company's resident engineer, this was not a permanent site for preparing the said articles, and that the site would vary from time to time. The site also did not belong to the company, but it belonged to IPCL who is a party with whom the company had entered into a contract as a construction contractor. After completion of the work with IPCL, the company would carry on similar activity of manufacturing such articles required in the work of construction for another party at a different site which that party would later provide. It may also be noted that simultaneously at some other site or sites provided by other party or parties for whom the company may be engaged in similar work of construction, they would be carrying on similar activity of preparing such articles needed for the work of construction. It, therefore, cannot be said that they had a fixed place where the process of manufacture was being carried on and, therefore, it would be difficult to hold that the petitioner company was the owner or occupier of a factory within the meaning of the Act.

8. Mr. Patel, in this connection, draws my attention to a decision of a Division Bench of this Court in *State of Gujarat v. Modern Construction Company Ltd.* Criminal Appeal No. 514 of 1970 decided on 4th October 1972 (Reported in ILR (1973) Guj 782 by J. M. Sheth and A. A. Dave, JJ. (as they then were). This was a case in which when the Inspector (Central) visited the quarries at Ukai, he found that the company, that is Modern Construction Company Limited, respondent No. 1, was running a stone-quarry and as in the opinion of the complainant, they had committed breaches of some of the rules made under the Payment of Wages (Mines) Rules, 1956, prosecutions were launched against the company and its Managing Director, The learned Magistrate who tried the accused acquitted the respondents-accused and the State, therefore, approached this Court in an acquittal appeal. The main question which arose before the court was as to whether by virtue of the fact that the respondents were running a stone quarry at Ukai, the provisions of the Mines Act, 1952 read with Payment of Wages (Mines) Rules, 1956, would apply in that case. After referring to the relevant provisions including the definition of the word "mine" and the definition of "open cast working", the court quoted the following observations of the Supreme Court in *State of Maharashtra Vs. Mohanlal Devichand Shah*, :

The word "mine" is not a definite term. It is susceptible of limitation or expansion according to the intention with which it is used. When one examines the definition of "appropriate Government" in Section 2(b) in the context and in

the background of the Government of India Act, 1935 and the then existing law it is obvious that the Central Legislature intended to include quarries in the word "mine"; otherwise it would be rather incongruous that for some matters like health and safety, hours of employment in quarries should be regulated by the Central Government and minimum wages by the State Government.

The court then observed that one has to give a meaning to the word "mine" in the context in which that word is used, keeping in mind the intention with which that word is used, and the question, therefore, which arose before the court for consideration was posed by the court in the following terms:

Whether we could say that the respondents ran an establishment which would be "mine" within the meaning of Section 2(ii)(d) and Section 24 of the Act.

Then, after referring to the various provisions of the said Act, reference was made to the facts of the case showing that accused Nos. 1 and 2, that is respondents Nos. 1 and 2, were not the owners of the land where the quarry was worked which was being done on land belonging to the Government. They were also not holders of a licence. The accused were engaged in the work of constructing a dam at the Ukai project near the quarry and they were one of the several contractors to build the dam for the Government of Gujarat. Stones which were being excavated from these quarries were being used in the said dam and the facts also revealed that the quarries were being worked by the materials which were all used for the construction of the Ukai project, in pursuance of the contract between the parties. In a letter written by the company, it was specifically stated that the work of quarrying is only incidental to the main work of construction of Spillway in Ukai project, and it was the say of the company that they were working only for and on behalf of the Government who were the owners of the Ukai Project as well as stone quarries. After referring to the provisions contained in Section 5 of the Payment of Wages Act and a decision of the Supreme Court in *The Corporation of the City of Nagpur Vs. Its Employees*, as also another decision of the Supreme Court which inter alia laid down a test that the predominant functions would be the criterion for the purposes of the Act, that is - Industrial Disputes Act, the following important observations are made-

If we apply this test in the instant case, the predominant function of the respondent-company is to do the construction work undertaken by them as building contractors. Only incidentally the materials of building stones have to be acquired as agreed by them with the Government by obtaining building stones by open cast working, It is not worked out of their own volition.

And ultimately holding that the establishment of the respondent cannot come within the definition of "Mine", the order of acquittal passed by the lower court was confirmed, with the following observations:

It can be said that the industrial undertaking of the respondents is a mine, it would be a "mine" within the meaning of Section 2 as well as Section 24 of the Act. Whatever the powers are conferred upon the State Government would be

conferred upon the Central Government in view of the provisions of Section 24 of the Act and for such an establishment which could be said to be a mine, the provisions could be enforced by the Inspector appointed by the Central Government for the purposes of the Act. In our opinion, on the facts and circumstances of the case, it cannot be said that the establishment of the respondents is a mine.

9. What emerges from this decision is that, in order to ascertain as to whether the provisions of a particular Act defining a particular activity would apply to the activity in question, the test is as to whether that activity is the predominant function of the company or firm or person running the same, or is it an incidental activity to the main and predominant function or activity of the company etc. In the instant case, we find that by virtue of the contract between the company and IPCL which is on record at Ex. 33, the company had undertaken to carry out certain work of construction within a particular time. The work was to be carried out at the site of IPCL, and it was, inter alia, provided that the company will have to , make its arrangement for supply of water to its labour camps and for work at its own costs. However, alternatively, IPCL at its discretion may endeavour to provide water to the company at the owner's source of supply provided the company makes its own arrangement for the water meter which shall be in custody of the owner and for other pipe net works from source of supply with the provision that such distribution pipe net work shall have the prior approval of the engineer-in-charge. Similarly, for power supply also, it is stipulated that the IPCL will supply power, subject to the availability, at the nearest substation, from where the company will make its own arrangements for temporary distribution and, the company will, at its costs provide electric meter, fuses, etc. for payment to IPCL for the costs of power at particular rate agreed between the parties, and it is also provided that IPCL would, at its discretion and convenience and for the duration of the execution of the work, make available near the site, land for construction of company's field office, godown,; workshop and assembly yard required for the execution of the contract and the company shall at its own costs construct all these temporary buildings and provide suitable water supply, sanitary arrangement approved by the engineer-in-charge.

10. Thus, in pursuance of this agreement between the parties, facilities were provided by IPCL to the company to run the workshop in the said sheds at the site provided by IPCL for the purposes of preparing pipe supporters and other articles needed in the work of construction. The main and predominant work was the work of construction. Preparation of articles needed for the main work of construction was incidental and subordinate thereto. Predominantly, therefore, what the company was doing was the work of construction and not the work of preparing those articles, though incidentally and in order to carry out the work of construction, the said work of preparation of articles had also to be done as a part and parcel of the main work which would consist of so many jobs and items including preparation of the said articles. Under the circumstances, in my opinion, it cannot be said that the company was running a factory within the

meaning of the Act.

11. In order that the provisions of the Act are attracted it has to be shown that a manufacturing process with the aid of power was being carried on by engaging 10 or more workers in a fixed place as and by way of the main and predominant function of the company. If the company temporarily for the purpose of execution of the contract for construction carries on such manufacturing process at site temporarily provided by the owner for whom they are doing the job, it cannot be said that they are running a factory within the meaning of the Act. If a too literal construction is put on the term "factory" as contended by the learned Advocate for the opponent, the same would not be in consonance with the object and purpose of the Act. In a given case the company, or a concern engaged in similar contract work, may undertake to carry out a job involving a very small construction requiring a very small quantity of articles needed in the construction to be prepared at the site in which case the operation of a manufacturing process by engaging 10 or more workers with the aid of power at the site temporarily provided for the purpose may not take more than a few hours. Yet, the premises where this activity is so done will be covered by the term "factory" under the Act, if the term is so narrowly construed. One can imagine what hardships, difficulties and endeavours to do the impossible will have to be faced by the company or the concern, as the case may be, in an attempt to strictly comply with the provisions of the Act including submission of plans, getting the site approved, obtaining licence, registration etc. for a factory which will have an existence for a few hours only. Such cannot be and does not appear to be the object and purpose of the Act.

12. Mr. Thaker, the learned Public Prosecutor appearing for the State, submits that the ratio laid down in the case of Modern Construction (*supra*) would not apply to the facts of the present case, particularly when in the instant case, the manufacturing process was being carried on in three sheds which were enclosed by means of wire fencing and which were in the exclusive possession of the company as also when, as per the contract, it was the company which had to bear expenses for water and electric supply at the site. I am unable to accept this contention of Mr. Thaker. It is true, the activity was being carried on when the inspector visited the site at a definite location viz. Sheds. But as earlier stated, this was a site temporarily allotted for the purpose of facilitating work of construction. The work involving a manufacturing process etc., was being carried on for a temporary period during which it would be necessary to carry on the said work for the purpose of the main object of construction of IPCL building, and the work would then stop, and if the company got another contract elsewhere, they would carry on such work temporarily at that place for the said purpose which would also be incidental to the main purpose. The fact that the company had to bear the expenses for water and electric supply would have no relevance so far as the nature of their activity is concerned. They had to bear these expenses as per stipulations in the contract. But these stipulations by themselves would not change the nature of their activity. The main criterion is to find out as

to what is the nature of the establishment run by the company, what is the work which the company usually and predominantly carries on and as to whether the work of preparing articles etc. with the aid of power, is done incidentally to the carrying out of the main object of the work of construction, forming only a small part of the whole integrated process of the operation of construction wherein many such incidental activities would contribute their mite so that the main object of construction can be achieved. Applying this test, it is clear that the said work of manufacturing articles in the circumstances aforesaid, does not and cannot amount to establishing and running a factory so as to attract the provisions of the Act.

13. Mr. Thaker lastly urged that such interpretation of giving extended meaning to the definition of "factory" denned in the Act is likely to frustrate the object and purpose of the Act, with the result that some of the workers engaged in such operations as are carried on by the company may lose the benefits to which they would be entitled under the Act, Now, in the first instance, the interpretation which I am putting on the provisions contained in the Act, is placed keeping in view the object and purpose of the Act. There are various enactments on the Statute Book applying to many categories of workers and the Act applies to one such category. It is not intended to take within the sweep of the Act all workers of all types. It is true, some of the workers who are engaged in operations carried on by the company or similar concerns, even though they may be working at a place where more than 10 persons are employed in a manufacturing process carried on with the aid of power, may not answer the description of a "worker" employed in a "factory", as defined in the Act. But that is so because the Act is intended to apply to those establishments which carry on such work as their regular usual and main business and it does not apply to any stray, casual or isolated cases or to cases where incidentally for the main business, some such work is done.

14. However, as provided by Section 85 of the Act, the Government may, in an appropriate case, have recourse to the power to make all or any of the provisions of the Act applicable to such establishments, if they do desire, or if it is found that the existing provisions of the Act do not sufficiently clothe the Government with such powers, then suitable amendments may be effected in the relevant provisions of the Act for the purpose. If a purely literal and restricted construction is placed on the term "factory" appearing in the Act, as suggested by Mr. Thaker, it will lead to absurd results, covering even a casual operation done on a purely temporary basis at premises temporarily provided for the purpose in order to meet an emergency or to facilitate the efficient execution of the main work. To illustrate by referring to an extreme case, suppose in an emergency like the imminent danger of a building or a structure collapsing, if with a view to avoid damage to the public, with the object of providing suitable supports to the dangerous structure, a temporary establishment as an emergency measure is put up to prepare some angles or clamps to fix the supporter rods which would, inter alia, necessitate the carrying on of a

manufacturing process with the aid of power employing more than 10 workers for the emergency period of a few hours or a day or two at the site itself, then the premises at which the said operations are so carried on will come within the purview of "factory" attracting the provisions of the Act and Rules including the ones relating to permission in writing of the authority for the site, submission of plans and specification, obtaining a licence and registration of the factory, By the time a person goes through the cob-web of procedural tangle the dangerous structure would have collapsed. Such can never be the intention of the legislation in enacting the Act.

15. The deciding factor in the case is the fact that the contract between the company and IPCL is a contract for work and labour. It is one and indivisible and the manufacture of materials and its use is accessory or incidental to execution of the work of construction undertaken. In a contract of construction by its very nature, some material is required to be used in execution of the work. But the contract would be one for work and labour for construction and not for manufacturing such materials. In the instant case, pipes etc. that is material was supplied by IPCL, But for the purpose of using it in construction by means of a manufacturing process, pipe supports were prepared therefrom. But this was accessory or incidental to the main contract of construction which was a contract for work and labour and not a contract for supplying any materials or preparing any articles from materials, which latter act was done far the purpose of. facilitating the work of the main contract viz. construction.

16. The learned Magistrate was hence in error in passing the said order of conviction and sentence against the petitioner-accused, and the result will, therefore, be the following order:

Criminal revision application allowed. Rule absolute. Order of conviction and sentence set aside and the accused acquitted of the offence with which they were charged. Fine, if paid, to be refunded.