

(2017) 05 MP CK 0111
In the Madhya Pradesh High Court
Case No : 134 of 2017

The National Insurance Company Ltd.

APPELLANT

Vs

Ajudhya Bai & others

RESPONDENT

Date of Decision : 27-05-2017

Acts Referred:

Constitution of India, Article 37 -
Application of the principles contained In this Part
Factories Act, 1948, Section 6, Section 2(k), Se

Citation : (2017) 05 MP CK 0111

Hon'ble Judges : Hemant Gupta, Rajeev Kumar Dubey

Bench : Single Bench

Advocate : Sudeep Bhargava

Judgement

1. This order shall dispose of the above two appeals raising identical questions of law and facts. In Writ Appeal No.135/15, the challenge is also an order passed by the appellate authority raising a demand of Rs.34,59,000/- on 27.03.2015. Hence, for the facility of reference, facts are taken from W.A.No.134/2017.

2. The order dated 11.01.2017 passed by the learned Single Bench is the subject matter of challenge in the present writ appeal 134 of 2017, wherein the appellant challenged the show cause notice 01.09.2015 for not complying with the provisions of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short "the Act").

3. The petitioner is a public limited company and is having license to run the factory since long. In the factory premises, the appellant started construction of a Godown for keeping raw material or finished products after seeking approval of the building plans from the Chief Inspector of Factories under Section 6 of the Factories Act, 1948 (for short "the Factories Act"). The appellant commenced construction works of the Godown. It is at that stage a show cause notice was served on 3.8.2014 that the appellant is violating the provisions of section 7 & 46

of the Act. The appellant submitted a reply asserting that the Act is not applicable and the employees of the factory are governed under the provisions of the Factories Act as construction is being raised with the approval of the authorities under the Factories Act. Thereafter, the impugned show cause notice was issued which is challenged by the appellant by way of writ petition before this Court. The learned Single Bench dismissed the writ petition, after returning the following finding:- 16. The construction of civil work is altogether different work, which is nothing to do with the main industrial activity of the factory. The permission, which was given to the petitioner by the Chief Factory Inspector dated 23.09.2008 was under the provisions of the Factories Act with certain terms and conditions. Condition No.6 specifically provides that this permission does not absolve the petitioner from any other enactment or rules. That does not mean, after taking permission under the Factories Act, they are not covered in any other enactment.

18. It is not the case of the petitioner that in the construction activity his own regular workers are engaged who are already covered under the provisions of Factories Act, 1948 but the workers who are engaged in the construction work are not the workers & employees of the petitioner and hence, would not be covered under the provisions of Factories Act, 1948, therefore, the benefit and the welfare measures provided under the BOCW Act cannot be denied to them, therefore, the authorities under the BOCW Act & Rules has not committed any error while issuing notice to the petitioner.

4. Learned counsel for the appellant before this Court vehemently argued that in terms of Section 2(d) of the Act, the Act is not applicable in respect of any building or other construction work to which the Factories Act or the Mines Act would apply. It is also contended that the Act is an enactment for the benefit of unorganized workers and the Workmen Compensation Act, Minimum Wages Act etc. are applicable to the workers engaged by the appellant, therefore, in terms of the provisions of Schedule-II to the Unorganized Workers' Social Security Act, 2008, the construction activity undertaken by the appellant is not covered under the Act.

5. It is contended that the judgment of the Supreme Court in Lanco Anpara Power Limited vs. State of Uttar Pradesh and others reported in (2016) 10 SCC 329 has been wrongly relied by the learned Single Bench as that was a case where the manufacturing activity was not started, therefore, the building was not covered under the Factories Act but in the present case since the factory was in production, therefore, the Factories Act is applicable and the provisions of the Act cannot be made applicable to the construction activity undertaken by the appellant.

6. To a pointed query, learned counsel for the appellant admitted that the construction of the Godown was not raised by the workers of the appellant but by workers engaged by a contractor to whom the contract for construction of Godown was given. With these facts, we have examined the arguments raised by

the appellant.

7. Firstly, the relevant statutory provisions need to be extracted. Section 2(d) of the Act reads as under: 2. Definitions-(1) In this Act, unless the context otherwise requires, -

xxx xxx xxx xxx

Xxx xxx xxx xxx (d) "building or other construction work" means the construction, alteration, repairs, maintenance or demolition, or or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmissions towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply;

8. The provisions Section 2(k) & (m) of the Factories Act are as under: 2. Interpretation-In this Act, unless there is anything repugnant in the subject or contest

xxx xxx xxx xxx

Xxx xxx xxx xxx (k) "manufacturing process" means any 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 (or)

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

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

(l) xxx

(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) 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 (35 of 1952) or (a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place).

9. The Factories Act is applicable to any premises including premises where 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. Therefore, the emphasis in Section 2(m) of the Factories Act is on the manufacturing process. The manufacturing process has been defined in Section 2 (k) of the Factories Act which includes making, altering, repairing, ornamenting, finishing, packing, oiling, washing, etc. but does not even remotely suggest that construction of building is also a manufacturing process. Since the workers engaged in the construction were not engaged in the manufacturing process, therefore, such workers are not covered under the provisions of the Factories Act. Such workers were not even engaged by the appellant. They were not on the rolls of the appellant. They were paid wages through the contractor i.e. an independent and distinct contract than the industrial activity undertaken by the appellant in its factory.

10. Some construction work is contemplated to be covered by the definition of manufacturing process i.e. constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels. Generally speaking, the construction of building is not a manufacturing process to which the Factories Act would be applicable.

11. The definition of building or other construction work as contained in Section 2 (d) of the Act excludes the provisions of the Factories Act if in respect of any building or any other construction work to which the provisions of Factories Act would apply. It means the Act will not be applicable in respect of "construction work" to which the provisions of the Factories Act are applicable. Therefore, the definition of building or other construction work as contained in Section 2 (d) of the Act clearly exclude such building and construction work to which the provisions of the Factories Act are applicable. Since the construction undertaken by the appellant was not undertaken by the employees of the appellant but by an independent contractor, therefore, the workers engaged in the construction work were not covered under the Factories Act and would be covered under Section 2 (d) of the Act.

12. In Lanco Anpara's case (supra) though no manufacturing process was commenced in the factory but the Act was made applicable to those workers who are engaged in the process of setting up of factory building wherein their work

was to set up their factory. The workers who are engaged in the manufacturing process in a factory alone will be excluded from the operation of the Act whereas all workers engaged in the construction of civil work would be covered under the Act. Paras-25, 34, 35, 37, 38, 39 & 47 of the judgment in the case of Lanco Anpara's case (supra) are reproduced below: 25. We have bestowed our due and serious consideration to the submissions made of both sides, which these submissions deserve. The central issue is the meaning that is to be assigned to the language of Section 2(1)(d) of the Act, particularly that part which is exclusionary in nature i.e. which excludes such building and construction work to which the provisions of the Factories Act apply. Before coming to the grip of this central issue, we deem it appropriate to refer to the objectives with which the Factories Act and the BOCW Act were enacted, as that would be the guiding path to answer the core issue delineated above.

34. On the conjoint reading of the aforesaid provisions, it becomes clear that "factory" is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of "worker" under the Factories Act. On these two aspects, there is no cleavage and both parties are at ad idem. What follows is that these construction workers are not covered by the provisions of the Factories Act.

35. Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of the BOCW Act and the Welfare Cess Act as well. Could this be the intention while providing the definition of "building and other construction work" in Section 2(1) (d) of the BOCW Act? Clear answer to this has to be in the negative.

37. We now advert to the core issue touching upon the construction of Section 2(1)(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(1)(d) of the BOCW Act dealing with the building or construction are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not include ?ny

building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies". Thus, first part of the definition contains the nature of activity; second part contains the subject-matter in relation to which the activity is carried out and the third part excludes those building or other construction work to which the provisions of the Factories Act or the Mines Act apply.

38. It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work" as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words "but does not include any building or other" construction work to which the provisions of the Factories Act....apply" (emphasis supplied). The question is as to whether the provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply" only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with the approach adopted by this Court in *Organo Chemical Industries v. Union of India*. Two separate, but concurring, opinions were given by Justice V.R. Krishna Iyer and Justice A.P. Sen, and we reproduce here below some excerpts from both opinions:

Justice A.P. Sen (SCC p.586, para 23) "23.....Each work, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words "devoid of concept or purpose" will reduce much of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole." (emphasis supplied)

Justice V.R. Krishna Iyer (SCC p.592, para 41) "41. A policy oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to assign to "damages" a larger, fulfilling meaning." 39. The aforesaid meaning attributed to the exclusion clause of the definition is also in consonance with the objective and purpose which is sought to be achieved by the enactment of the BOCW Act and the Welfare Cess Act. As pointed out above, if the construction of this provision as suggested by the appellants is accepted, the construction workers who are engaged in the construction of buildings/projects will neither get the benefit of the Factories Act nor of the BOCW Act/Welfare Cess Act. That could not have been the intention of the legislature. The BOCW Act and the Welfare Cess Act are pieces of social security legislation to provide for certain benefits to the construction workers.

47. It is stated at the cost of repetition that construction workers are not covered

by the Factories Act and, therefore, welfare measures specifically provided for such workers under the BOCW Act and the Welfare Cess Act cannot be denied.

13. In view of the above, we do not find any error in the order passed by the learned Single Bench which warrants interference in the present appeals. The appeals stand dismissed. However, the appellant in Writ Appeal No.135/2017 is at liberty to approach the competent authority if there is any calculation mistake in the cess amount, who shall consider the same in accordance with law.