

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 107 OF 2007

Richard Rushton
 Occupier, SKOL Breweries Ltd.,
 (Unit : Pals Distilleries Ltd.)
 L-5, M.I.D.C., Waluj,
 Aurangabad (M.S.)

.. Petitioner
 (Original Accused)

Vs.

The State of Maharashtra
 at the instance of
 Shri H.M. Asalkar,
 Deputy Director,
 Industrial Safety & Health,
 57, Sindhi Colony,
 Aurangabad

.. Respondent

AND

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Mr. Vijay Sharma, Advocate for the petitioner in both Writ
 Petitions
 Ms. R.P. Gour, APP for the respondent/State

CORAM : V.K. JADHAV, J.

DATE : 21/10/2016

ORAL JUDGMENT :

With consent of learned counsel for the parties, both Writ Petitions are heard finally.

2. In the instant criminal writ petitions, the petitioner has challenged the orders of issue of process passed by the learned Chief Judicial Magistrate, Aurangabad, dated 3/4/2016, respectively, in complaint bearing SCC 2228 of 2006 for the offences punishable under section 7(A)(2)(a) r/w section 92 of the Factories Act, 1948 and in the complaint bearing SCC 2229 of 2006 for the offences punishable under section 32(c) r/w. section 92 of the Factories Act, 1948 (for short "**the Act**").

3. Brief facts giving rise to the present criminal writ petitions are as follows :-

. The petitioner was at the relevant time, the managing director and the occupier of SKOL Breweries Ltd., Unit : Pals Distilleries Ltd., situated at L-5, M.I.D.C, Waluj, Aurangabad. The said factory is engaged

in manufacturing the beer. In the first half of the year 2005, the said factory was to undergo expansion and modernisation which included erection of malt silos and bucket elevator in a part of the land covered by SKOL Breweries Ltd. Tenders were invited by the Brewery and consequently the contract for erection of malt silos was given by the petitioner to a construction company namely Briggs of Burton (I) Pvt. Ltd., Bangalore. The said company Briggs of Burton (I) Pvt. Ltd. entered into a contract with sub-contractor M/s Rajkamal Engineering, Aurangabad and sub-contracted a part of its work to them. The said construction work was supervised by one Chourasiya Rakesh, Engineer of the Contractor, Briggs of Burton (I) Pvt. Ltd. and also by the proprietor of the sub-contractor M/s. Rajkamal Engineering.

. On 5/1/2006, as per the routine, the sub-contractor's workers resumed their duties at 9.00 am and two of the sub-contractors's workers Shri Ashok Mule and Shri Abhiman Korde were carrying out the erection of the bucket elevator which was at a height of 25 M. Both the workers climbed the staircase from the backside of the bucket elevator and reached the platform of the elevator which was at a height of 25 M. Once the task was

accomplished, worker Shri Abhiman Korde de-anchored his safety belt before descending the staircase. Another worker Shri Ashok Mule was on his way down when all of a sudden, the bucket elevator started bending and due to movement of the elevator, Shri Mule lost his balance and fell on the ground. Shri Korde somehow managed to reach to the derrick and climbed down. Shri Korde suffered minor injuries. However, due to the said fall, Shri Mule suffered serious injuries and was declared dead by the doctors at the Government Hospital, Aurangabad.

. On the next day, i.e. on 6/1/2006, the respondent alongwith another Deputy Director visited the said factory of the petitioner and made report of the accident. The company also filed report of the accident in Form 24 as required under the Factories Act to the respondent. The respondent also visited the petitioner's factory for making enquiry into the accident. The respondent however filed two separate complaints at Aurangabad. The learned Chief Judicial Magistrate by order dated 3/5/2006, has issued the process against the petitioner as aforesaid. Hence, these Criminal Writ Petitions.

4. Learned counsel for the petitioner submits that the site where the construction of malt silos was being carried out, cannot be said to be the factory, as no manufacturing process was being carried out. Constructions of malt silos is totally distinct and separate from the manufacturing process of the factory. Learned counsel submits that the construction of new structure cannot be said to be a manufacturing process and the site where the activity completely dis-associated with the manufacturing process being carried out cannot be said to be the factory as defined under the Act. Learned counsel further submits that the victim of the accident, who were employed by the sub-contractor cannot be said to be a worker as defined under the Act and thus, the employer cannot be held liable for the death or the injuries. Learned counsel submits that the petitioner/occupier cannot be held liable in absence of any mens rea or connivance or knowledge. It was the responsibility of the contractor and the sub-contractor to look after various safety measures as per the terms of the contract. The petitioner has exercised all reasonable, practicable due diligence and he cannot be held liable. It has alleged

in the complaint that cause of the accident is that the proper system of work was not followed by the workers. Learned counsel submits that even the allegations made in the complaint accepted as it is, no case is made out against the petitioner. The learned Chief Judicial Magistrate has not applied his mind and mechanically issued the process.

5. Learned counsel for the petitioner in order to substantiate his contentions, places reliance on the following cases :-

(i) **The Management of Government Soap Factory, Bangalore – 12 Vs. The Presiding Officer, Labour Court, Bangalore and ors. AIR 1970 Mysore 225;**

(ii) **The Nagpur Electric Light and Power Co. Ltd. Vs. The Regional Director, Employees' State Insurance Corporation AIR 1967 SC 1364;**

(iii) **Workmen of Delhi Electric Supply Undertaking Vs. The Management of Delhi Electric Supply Undertaking (1974) 3 SCC 108;**

(iv) **Hari Shankar Sarma and others V/s. M/s. Artificial Limbs Manufacturing Corporation and others AIR 2002 SC 226;**

(v) Madhavrao Jiwaji Rao Scindia and anr. Vs. Sambhajirao Chadrojirao Angre and others AIR 1988 SC 709.

6. Learned A.P.P. submits that at the time of the erection of the elevator, the workers were required to work at the height of 25 meter and there was every possibility of falling. So as to ensure safety of those workers, safety belts were required to be provided to them. However, during the course of enquiry, no such safety belts were produced before the complainant. Learned A.P.P. submits that the place where the accident took place, is inside of the premises of the factory where manufacturing process is carried out and, therefore, the provisions of the Act and Rules framed thereunder are applicable to the premises. Learned A.P.P. submits that the place where the accident took place, the work of assembling silos was going on and this work is nothing but the "manufacturing process", within the meaning of section 2(k) of the Act. Learned A.P.P. submits that even assuming that work of expansion was going on, the premises where such work was going on, would be deemed to be the manufacturing process. Learned A.P.P. submits that prima facie case is made out

against the petitioner and learned Chief Judicial Magistrate has therefore rightly issued the process against the petitioner/accused. Learned A.P.P. submits that the petitioner's submissions, by way of defence, can be dealt with during the course of trial. However, at the time of issuance of process, the proposed defence of the petitioner/accused cannot be considered.

. The learned A.P.P., in order to substantiate her submissions, places reliance in the case of **Uttaranchal Forest Development Corpn. and anr. Vs. Jabar Singh and others (2007) 2 SCC 112.**

7. On careful perusal of the complaint and its contents, it appears that the complainant visited the factory of the petitioner/accused on 9/1/2006 and 10/1/2006. Is has stated in the complaint that work of expansion was being carried out, which includes new construction, installation of the new machines etc. Part of this expansion is erection of malt silos and bucket elevator near the building in which office is housed. It has further stated in the complaint that work of erection of bucket elevator is given to Briggs of Burton (I) Pvt. Ltd., who again, gave this work to

sub-contractor M/s. Rajkamal Engineering, Aurangabad. This work was started around three months before the accident and the said Rajkamal Engineering put on job 11 workers, to carry out the said work. It has further stated in the complaint that the work was being supervised by proprietor of M/s Rajkamal Engineering and by the Engineers of Briggs of Burton (I) Pvt. Ltd. Further, the details of the accident are given in the complaint. It has alleged in the complaint that the system of work followed while erection of the elevator, was not safe and there was risk to the health of the workers doing the work on 5/1/2006. It has further alleged in the complaint that by not following the safe system of work, while work of erection of the elevator was going on, the occupier has contravened the provisions of the Act.

8. It is rather an admitted position that the expansion of erection of malt silos and bucket elevator near the building in which the office is housed, was going on and the said expansion work also includes the new construction, installation of new machines etc. Section 2(m) of the Act, defines factory. It reads as

under:-

"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 proceeding 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, a railway running shed or a hotel, restaurant or eating place or a poly house or green house engaged in the activity of floriculture of pomology or High Value Crops.

Explanation I - For computing the number of workers for the purpose of this clause all the workers in different groups and relays in a day shall be taken into account.

Explanation II - 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.;

Explanation III - For the purpose of this clause, the term "High Value Crops" shall mean and include -

(i) Plantation of fruits, flowers and vegetables in a green house or shet-net house;

- (ii) Plantation of exotic fruits, flowers and vegetables;
- (iii) Plantation of crops by use of bio-technology;
- (iv) Plantation of medicinal and aromatic plants and processing industry;
- (v) Production of mushroom and processing industry;
- (vi) Production of fruits by micro-drip irrigation by use of plastic and mulching;
- (vii) Nurseries and processing industry where vegetables are produced in a green house;
- (viii) Nursery of ornamental plants;

Section 2(k) of the Act defines the "manufacturing process", which reads as under:-

"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,
- (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;

Section 2(n) of the Act defines the term "occupier", which reads as under:-

"occupier" of a factory means the person who has ultimate control over the affairs of the factory [Provided that-

(i) in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;

(ii) in the case of a company, any one of the directors shall be deemed to be the occupier;

(iii) in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier: Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire,-

(1) the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under-

(a) section 6, section 7A, section 7B, section 11 or section 12;

(b) section 17, in so far as it relates to the providing and maintenance of sufficient and suitable lighting in or around the dock;

(c) section 18, section 19, section 42, section 46, section 47 or section 49, in relation to the workers employed on such repair or maintenance;

(2) the owner of the ship or his agent or master or other officer-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be the occupier for the purposes of any matter provided for by or under section 13, section 14, section 16 or section 17 (save as otherwise provided in this proviso) or Chapter IV (except section 27) or section 43, section 44 or section 45, Chapter VI, Chapter VII, Chapter VIII or Chapter IX or section 108, section 109 or section 110, in relation to—

(a) the workers employed directly by him, or by or through any agency; and

(b) the machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person;"

9. As per the definition of term "occupier", an occupier of a factory means a person, who has ultimate control over the affairs of the factory. There is no dispute that the petitioner's factory comes within the meaning of factory, as defined in section 2(m) of the Act and that the petitioner is the occupier, as defined in terms of section 2(n) of the Act.

10. Learned counsel for the petitioner, by referring the aforesaid definition, submits that the site where the construction of malt silos was being carried out, cannot be said to be a factory, as no manufacturing process was being carried out there. Admittedly, the expansion work was being carried out in the factory premises, which was totally distinct and separate from the manufacturing process of the factory. Construction of such expansion, cannot be said to be a manufacturing process as defined under the Act.

11. In the case of **The Management of Government Soap Factory, Bangalore**, referred supra and relied on by learned counsel for the petitioner, the Mysore High Court has observed that dismantling of the machinery and plant in the existing premises of the factory and transporting the same for being shifted to the new premises, cannot be said to be any part of the process of manufacturing. Such shifting of plant and machinery to a new premises, is not a normal activity of a factory. It is an extraordinary activity which is dehors the ordinary manufacturing process. In paragraph no.54, the Mysore High Court has made the following observations :-

"54. The activities of altering, breaking up, demolishing and adapting, referred to in sub-clause (I) of Section 2(k) of the Act, are all those done in the course of manufacture, that is, in the process of transformation of raw materials into the finished product. In our opinion, dismantling of machinery and plant in the existing premises of a factory and transporting the same for being shifted to new premises, cannot be said to be any part of the process of manufacturing. Such shifting of plant and machinery to new premises, is not a normal activity of a factory. It is an extraordinary activity which is de hors the ordinary manufacturing process. In the present case, dismantling and transport of plant and machinery of the Factory were not for the purpose of normal activity of repair or replacement, but were for the unusual purpose of shifting of the Factory itself from old premises to new premises."

. In the case of **The Nagpur Electric Light and Power Co. Ltd.** referred supra and relied on by learned counsel for the petitioner, the Supreme Court has observed that inside the same compound wall, there may be two or more premises; the premises used in connection with manufacturing process may constitute a factory, and

the other premises within the same compound wall may be used for purpose unconnected with any manufacturing process and may form no part of the factory. Dis-agreeing with the observations made by the High Court to the effect that the manufacturing process is carried on by the Company not only in the building called the workshop or the receiving station but over the whole area over which the process of transmission is carried on including the sub-stations where electricity is stored and supplied to the consumers by further transmission lines and every part over which this process is carried on will be a factory within the meaning of the Employees' State Insurance Act, the Supreme Court observed that this line of reasoning cannot be accepted and it seems to be startling proposition that every inch of the wide area over which the transmission lines were spread, is a factory within the meaning of the definition of "factory" in the Employees' State Insurance Act.

12. In the case of **Uttaranchal Forest Development Corpn.** (cited supra), relied upon by the learned A.P.P., the Supreme Court has almost referred all the previous judgments on this point, including the cases relied upon

by the learned counsel for the petitioner. In this cited case, learned counsel appearing for the petitioner did not press the question of premises and confined his arguments to the issue that cutting of the tress on the wide area of the forest does not amount to manufacturing process and, therefore, the arguments were considered and confined to the manufacturing process alone. However, both the sides admitted that the work of the respondent consist of cutting of the trees by axe and changing the shape of timber into logs by saw. In the backdrop of the said admission, the Supreme Court has observed that the process of cutting of trees by axe and changing the shape by saw, both squarely fall within the definition of the first part of the manufacturing process as cutting would be included into the process of "*making*" and "*breaking up*" included in the said definition. Further, the changing of shape by saw would be included in the process "*altering*" "*adapting*" of the trees. Further, admittedly, the trees and logs both fall within the meaning of "any article or substance", the second part of the definition. Lastly, it is observed that the conversion of trees into logs is admittedly for the purpose of sale, disposal, use and last but not the least for transport, all of which fall

within the third part of the definition.

. In order to explain the above observations, "manufacturing process", as defined in the Act under section 2(k) can be divided into three parts, namely: (i) the process - "making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting"; (ii) the object - "any article or substance" and (iii) the purpose - "with a view to its use, sale, transport, delivery or disposal".

. In paragraph no.38 of the judgment, while considering the submissions made on behalf of the petitioner with regard to the definition of "manufacturing process", the Supreme Court has observed that the above submission is untenable in law and cannot be sustained for more than one reason. The Supreme Court further observed that before dealing with the definition of "manufacturing process", as defined in section 2(k), it is necessary to briefly refer to the functions and powers of the Corporation as mentioned in Sections 14 and 15 of the U.P. Forest Corporation Act, 1974. The functions and powers of the Corporations are inter-alia to undertake removal and disposal of trees

and exploitation of forests and resources. The Corporation has also the power to set up workshops or factories for processing raw materials.

13. In the instant case, however, no such manufacturing process was going on at the relevant time and admittedly the work of expansion of the factory was going on. The said expansion work includes a new construction, installation of new machines and a part of the expansion is also erection of malt silos and bucket elevator near the building in which the office is housed.

14. Learned A.P.P. submits that after completion of the said work, in future, the malt silos and the other completed work would be used for the manufacturing process and as such, it shall be deemed to have been used for carrying out the manufacturing process activity.

15. I do not think that the aforesaid activities, as stated in the complaint, itself satisfy the ingredients of the definition of "manufacturing process", as defined in section 2 (k) of the Act. In the case of **Uttaranchal Forest Development Corpn. and**

anr. Vs. Jabar Singh and others (cited supra), the entire area of the region wherein the standing trees which were allotted to the forest corporation, were admitted by both the sides as factory premises for the reason that functions and powers of the corporation are inter alia to undertake removal and disposal of the trees and exploitation of the forest and resources.

. In the extreme opposite manner, it could be stated that inside the compound wall, there may be two or more premises and the premises used in connection with the manufacturing process may constitute factory and the other premises within the same compound wall may be used for the purpose un-connected with any manufacturing process. Only because the place where the accident took place, is a place inside of the premises of the factory, such penal provisions cannot stand attracted against the petitioner.

. In the case of **Madhavrao Jiwaji Rao Scindia and anr.** (cited supra) and relied on by learned counsel for the petitioner, in paragraph no.7 of the judgment, the Supreme Court has made following observations :-

"7. The legal position is well-settled that

when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

In the instant case, uncontroverted allegations even prima facie, did not establish the offence against the petitioner. It is thus not expedient and in the interest of justice to permit the prosecution to continue.

16. In view of above discussion and the law laid down by the Supreme Court in the various cases, as discussed above in detail, Writ Petitions No. 107 of 2007 is allowed in terms of prayer clause 7(i) and Writ

Petition No. 108 of 2007 is allowed in terms of prayer clause 9(i) thereof.

17. Rule is made absolute in the aforesaid terms.

18. Both the Writ Petitions are accordingly disposed of.

[V.K. JADHAV]
JUDGE

arp/