

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.2565 OF 2016

Mrs. Chaya Kishore Musale

.... Petitioner

versus

Deputy Director
Industrial Safety and Health, Pune,
and another

.... Respondents

Mr.Rajiv Chavan, Senior Advocate a/w Mr.Vijay Tawde, Advocate
i/b. Kenjalkar H. Vinayak, Advocate for the Petitioner.
Mrs. Anamika Malhotra, APP for the State/Respondent.

CORAM : MRS.MRIDULA BHATKAR, J.
DATE : 05th DECEMBER, 2016.

P.C. :

1. This writ petition is filed by the original accused against whom the respondent Deputy Director, Industrial Safety and Health, Pune and Inspector u/s 8 of Factories Act, has initiated proceeding u/s 21(1)(iv) (C) and 92 of Factories Act, 1948. The petitioner is a Director of company, who owns the factory, wherein accident of one worker has taken place in the year 2009 and therefore the respondent has prosecuted her u/s 21(1)(iv) (C) and 92 of Factories Act, 1948 and a private complaint was filed in the year 2010 by Factory Inspector/respondent, pursuant to which the

process was issued on 06/04/2011 u/s 21(1)(iv) (C) and 92 of Factories Act, 1948. In the said complaint the present petitioner appeared and she moved application u/s 101 of Factories Act, seeking exemption from liability in alleged offences on the ground that she has neither directly or indirectly involved in the factory and the offence has taken place due to the negligence of one Chandresh Jayantilal Shah, who is incharge of the factory and therefore he is liable and responsible for the accident. Said application was rejected by an order dated 03/12/2015 by Additional Chief Judicial Magistrate, Pune. Hence this petition.

2. The learned counsel for the petitioner has submitted that learned Magistrate has committed mistake in rejecting this application. The applicant is an occupier under the definition of section 2(n) of the Factories Act and therefore this application u/s 101 of the Factories Act was filed in order to bring the real person or culprit before the Court. Instead of passing appropriate orders therein, the learned Judge has erroneously rejected the said complaint and thus liberty which is made available under the law in view of section 101 to bring real culprit before the Court, is denied to the present petitioner. He submitted that as per 101 of

the Factories Act, the requirement of giving minimum 3 days prior notice to the factory inspector before filing of the complaint, is complied with by the complainant i.e. the present petitioner. He relied on Ex.C collectively, which is the correspondence between the complainant and the factory inspector. He also relied on Ex.D i.e. the verification of complainant i.e. the present petitioner recorded by the Chief Judicial Magistrate Court on 14/03/2013. In support of his submissions he relied on the order dated 11/03/2016 passed by the single judge in Criminal Petition No.200331/16, in the case of Sri. C. Venugopal and another, versus, State of Karnataka.

3. The learned prosecutor opposed this petition and she submitted that the 3 days prior notice, as required under section 101 of the Factories Act, was not received by the respondent. She relied on Ex.D-1 and the contents in the affidavit of respondent, wherein specifically non-receipt of 3 days prior notice is mentioned. She argued that the offence is made out in the original complaint against the occupier i.e. the present petitioner and therefore the order passed by the learned Metropolitan Magistrate is to be maintained. She further submitted that this order should

have been challenged in the revision, therefore, this writ petition is not maintainable.

4. Perused the original complaint, the application u/s 101 of the Factories Act and the impugned order passed by the learned Magistrate, so also the correspondence, which is relied by the learned counsel for the petitioner u/s 101 of the Factories Act. The accident cannot be denied at this stage. The Prosecution u/s 101 of the Factories Act is not the matter of challenge before this Court. The challenge is limited in respect of compliance of the procedure u/s 101 of the Factories Act and the learned Magistrate failed to understand the remedy under section 101 available to the complainant i.e. the petitioner and erroneously rejected the entire application. Ex.C shows that a notice was sent on 08/01/2013. There is an acknowledgment of the office of the respondent. The copy of notice dated 13/12/2012 shows that the present petitioner has disclosed the name of Chandresh Jayantilal Shah, who was the Supervisor of the said factory as the person liable. Thereafter, complaint u/s 101 of the Factories Act was filed. Verification of the complainant was recorded on 14/03/2013, wherein she has stated that one Chandresh Jayantilal Shah was looking after the working

of the factory and so he is the liable person to the accident. In the order of rejecting complaint, the learned Metropolitan Magistrate, though has considered the section 2(n) of the Factories Act and has addressed the present petitioner as an occupier under the said definition, he failed to appreciate the scope of section 101 of the Factories Act and rejected the application.

5. Under section 101, the occupier or the manager of the factory is entitled to point out any other person or actual offender. If such person is pointed out in the complaint by the manager or the occupier, then it is wrong on the part of the Magistrate to reject the complaint in toto. The learned Magistrate is required to follow further proceeding as mentioned in clause (b) of section 101. The actual offender who is pointed out is required to be given notice, so that he can get opportunity to cross examine the occupier or manager and to defend his case. In the case of **Sri. C. Venugopal and another, versus, State of Karnataka** (cited supra), the learned Judge has elaborately dealt with the scope of section 101 of the Factories Act. The relevant paragraph No.12 reads thus;

“Again, on clear reading of this provision, it discloses that notice has to be given to the prosecutor showing the intention to lodge a complaint against a private person, bringing it to the knowledge of the Court that some other person has committed the offence. The application filed u/s.101 of the Factories Act, 1948 though called as an application in nature of a notice to the prosecutor, but virtually the said application is in the nature of a private complaint.”

While discussing the scope and rationale of section 101 of the Act in J.K. Industries Ltd. vs. Chief Inspector of Factories & Boilers, the Supreme Court held as follows:

“49. This section which lays down "third party procedure" as a defence, is in a way an exception to the general rule and enables the occupier or the manager of the factory, to extricate himself from punishment by establishing that the actual offender is someone else and giving satisfactory proof of facts as are contemplated by [Section 101](#) (a) & (b). The principle underlying [Section 101](#) may well be gathered from the following observations of Phillimore J. in Ward v. Smith [1913(3)K.B. 154], while dealing with a somewhat similar provision in England, the learned Judge said :

A prima facie liability is imposed upon the occupier or manager from which however he can extricate himself; otherwise he remains liable. The scheme of the Act is first to find the de facto employer. An information may be laid against the occupier. His way of escape is provided for by this section. He may set up a defence not unlike the defence of warranty which the seller of food may set up under the English Sale of Food and [Drugs Act](#). He may show that the offence was not committed by his fault. To do this he must bring the real offender before the court."

6. It is made clear that the main proceeding of the complaint, which is filed by respondent against the present petitioner shall remain intact. Only the proceedings u/s 101 are to be first decided by the learned Magistrate. Thus order of rejection of the said application is hereby set aside.

7. The matter is remitted back to the learned Magistrate for that enquiry. Order of rejection is hereby set aside and the complaint u/s 101 is restored and remitted to the learned Magistrate and is to be expedited.

(MRIDULA BHATKAR, J.)