

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.O.P Nos.5932 & 6080 of 2011

and

M.P.Nos.1 and 1 of 2011

T.V.Ramanathan
Crl.OPs

.. Petitioner in both the

Vs.

The Tamil Nadu State,
Rep. by Asst. Inspector of Factories,
Office of the Inspector of Factories,
6, Lalbahadur Sasthri Street,
Periyakuppam,
Thiruvallur - 602 001.
the Crl.OPs

.. Respondent in both

Common Prayer: Criminal Original Petitions filed under Section 482 of Criminal Procedure Code, to call for the records relating to the case in S.T.C.Nos.866 and 867 of 2010 on the file of the Chief Judicial Magistrate Court, Thiruvallur, quash the same by allowing the criminal original petition.

For Petitioner : Mr.N.Manokaran

For Respondent : Mr.B.Ramesh Babu
Government Advocate (Crl.Side)

COMMON JUDGMENT

By invoking the inherent power of this court as contemplated under section 482 of Cr.P.C., the petitioner who is an accused in S.T.C. Nos.866 of 2010 and S.T.C.No.867 of 2010 on the file of the learned Chief Judicial Magistrate, Thiruvallur has filed the instant petition to quash the proceedings in S.T.C.Nos.866 and 867 of 2010.

2.The S.T.C.No.866 of 2010 was filed by the respondent/complainant for the non-compliance of the procedures as laid down under section 6(1) and Rule 312 of the Factories Act, 1948 wherein the petitioner has not made any application for

permission to use the premises at No.49/1, Bhagyalakshmi Nagar, Gopurasanallur, Poonamalli Post, Thiruverkaadu, Chennai-77.

3.As far as the case in S.T.C.No.867 of 2010 is concerned, it is the complaint filed by the respondent/complainant for the non-compliance of the procedures as laid down under section 7(1), Rule 12 of the Factories Act, 1948 wherein the petitioner has not made any not of occupation to use the above said premises.

4.In both the cases, the second charge is one and the same i.e., without the registration and license to undertake service and repairing of batteries were carried on. So, according to the complainant it is in contravention of section 6 (1), rule 312 of the Factories Act, 1948. In both the cases, the charges are interrelated and one and the same, therefore both the cases are clubbed together and the following common order is passed.

5.The case of the petitioner is that a complaint was filed before the learned Chief Judicial Magistrate, Thiruvallur by the Respondent/Complaint for the alleged offence under section 7(1) and sections 112 Rule 103 and section 7(5) of Factories Act, 1948. In the said complaint the petitioner is shown as sole accused and further the allegations leveled in the said complaint are that the Petitioner/Accused, without sending the notice of occupation in Form No.2 to the Deputy Chief Inspector of Factories, has commenced the usage of the premises at No.49/1, Bhagyalakshmi Nagar, Gopurasanallur, Poonamalli Post, Thiruverkaadu, Chennai-77, as a factory named and styled as Exide Industries Limited with 12 workers by using 40 HP Servicing and repairing of batteries therein.

6.Another charge leveled against the Petitioner/Accused is that in the said factory, no muster roll of all the 12 workers is maintained in Form No.25. Further, it is also the allegation that during the joint inspection with Inspector of Factories, Thiruvallur and Deputy Inspector of Factories, Thiruvallur, the muster roll was not readily available for inspection that is on 22.09.2010.

7.By refuting the allegations leveled as against the Petitioner/Accused, the learned counsel appearing for the petitioner would submit that in pursuance of the joint inspection, the respondent issued a show cause notice and the petitioner filed his reply on 02.12.2010 by denying the allegations made in the show cause notice. The gist of the

reply given to the show cause notice was that the premises where the joint inspection was conducted is the office of the company to cater the service related queries and other issues relating to the function and performance of the batteries purchased by the customers.

8. In addition to that it was also the submission of the learned counsel for the petitioner that in the aforesaid premises absolutely no manufacturing process is being carried on not only at the time of inspection but forever. Apart from that the learned counsel for petitioner would submit that the testing of the status, performance and working condition of the batteries will not come under the purview of manufacturing. So, the allegation as if the activities of the petitioner in the premises inspected and in contravention of section 6(1) Rule 312 of the Factories Act is unsustainable. Further, since the disputed premises is not a manufacturing unit of any batteries the invoking of Provisions under Factories Act is an abusing the process of law.

9. The learned counsel for petitioner would also submit that as per section 2(n) of the Factories Act, if a person is having ultimate control over the affairs of the factory alone would come under definition of an occupier. However, the petitioner is not an occupier as he is not having the ultimate control over the affairs of the factory. The further submission of the learned counsel for the petitioner is that the company has engaged a service provider namely M/s.S.M.S Power Tech to attend the complaints of the customers and there is a contract between the service provider and the company. Further, the Exide Industries limited is a company registered under the Companies Act, 1956 and the same is having its registered office in Kolkatta. In fact, the company alone is being carried on manufacture of batteries on various capacities. So, when the petitioner is not having any activities to undertake the process of manufacture there is no violation on his part as alleged by the respondent, hence he prays this court to quash the proceedings as the points raised above and also that the learned Magistrate has not properly applied his mind while taking cognizance based on the materials available.

10. Per contra, the learned Government Advocate (Criminal side) would submit that it is an admitted fact that the factory premises that is No.49/11 of Bhagyalakshmi Nagar, Gopurasanallur village, was inspected on 22.09.2010. During the inspection two irregularities were found as submitted by the counsel for the petitioner. Further, the learned Government Advocate criminal side would attempt to justify the initiation of the prosecution as the authorities have conducted joint inspection, found irregularities, issued show

cause notice and as the explanation given by the Petitioner/Accused was not satisfactory, it was constrained to initiate prosecution before the learned trial court. He adds further that the merits and de-merits of the case of the prosecution cannot be testified in the proceedings under section 482 of Criminal Procedure Code. So, the complaint filed by the Respondent/Complainant in the interest of justice is to be permitted to proceed with further by dismissing the quash petition.

11.I heard Mr.N.Manokaran, learned counsel for the petitioner and Mr.B.Ramesh Babu, learned Government Advocate (Criminal Side) for the respondent in both the criminal original petitions and the materials available on record are perused.

12.It is the case of the petitioner that the premises allegedly inspected by the authorities concerned would not come under the definition of factory as defined under section 2(m) of the Factories Act, as follows:

"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 in 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 in ordinarily so carried on,

but does not include a mine subject to the operation of (the Mines Act, 1952 (xxxv of 1952) or (a mobile unit belonging to the armed forces of the union, a railway running shed or hotel, restaurant or eating place)"

13.At the same time, it is to be noted that section 2(k) of the Factories Act, 1948 would say that "manufacturing process would mean and include any process of making altering, repairing, and ornamenting and other things". However the case of the petitioner is that he has not engaged in the process as contemplated under sub-section 1 Section (2k) of the Factories Act, 1948. At the same time, it is useful to refer here section 2(1) of the Factories Act. The term worker is defined as follows that "a person directly or by or through any agency including a contractor with or authority for knowledge of the employer whether the remuneration or not, in any

manufacturing process or in planning in any part of machinery or premises for a manufacturing process or the subject in manufacturing process between documents not include any member of armed forces of the union".

14. The perusal of the counter filed by the Assistant Director of Industrial Safety and Health, Thiruvallur District would show that the persons employed in the premises inspected are the persons through an agency namely S.M.S Power Tech. But it is contended that those employees employed in the inspected premises engaged themselves in the manufacturing process. If it is so, the respondent ought to have justified as to why the S.M.S Power Tech has not been arrayed as accused. At this juncture it is useful to refer here the judgment of this court quoted in 2010 (3) MWN Criminal 191, wherein it is held as follows:

"7. At this juncture, it is to be noted that the provisions of the ESI Act would be applicable only to the 'factory' as defined under Section 2(12) of the ESI Act.

8. Section 2(12) of the ESI Act reads as follows:

"Section 2: Definitions.--In this Act, unless there is anything repugnant in the subject or context,--

.....

.....

(12) "factory" means any premises including the precincts thereof--

(a) whereon ten or more persons are employed or were employed for wages 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

(b) whereon twenty or more persons are employed or were employed for wages 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 railway running shed;"

9. From the definition of Section 2(12) relating to 'factory', it is clear that in the 'factory', ten or more persons should be employed for manufacturing process with the aid of power or ordinarily so carried on, and the persons should be employed for wages on any day of the preceding 12 months. There should be document to prove the same

https://hcservices.ecourts.gov.in/hcservices/ me of inspection. While perusing the report

submitted by one Shanmugham, Supervisor of the Mills, as seen from page 35 of the records, it mentions only 13 names and two persons under monthly salary, but their names and their father's names only have been given, without any other particulars.

12. In the present case, as seen from the records, from page 35, except the list of alleged employees and their father's names, nothing has been given. In such circumstances, learned Senior Counsel appearing for the respondents-accused would contend that the ESI Inspector has not followed the procedures to find out whether the first respondent-Mills would attract the provisions of the ESI Act. So, I am forced to accept the argument advanced by the learned Senior Counsel appearing for the respondents-accused that the appellant-ESI has failed to prove that the first respondent is a 'factory' as defined under Section 2(12) of the ESI Act. Furthermore, no one has been examined to show that with the aid of electricity power, manufacturing process was carried on in the first respondent-Mills.

14. In this connection, it is appropriate to consider Section 2(17) of the ESI Act, which defines the 'principal employer'. Section 2(17) of the ESI Act reads as follows:

"Section 2. Definitions.--In this Act, unless there is anything repugnant in the subject or context,--

....

(17) "Principal employer" means--

(i) in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment."

15. It is true that the first respondent is M/s.Vasam Spinning Mills P. Ltd. and the second respondent is the Director of the first respondent-Mills.

16. It is appropriate to consider the evidence of D.W.1 (Second respondent-A.2). In his evidence, D.W.1 has stated that before he joined the first respondent-Mills as a Director, he was in the Military. He further stated that as an Engineer, he purchased the defective machineries and rectified the defects and to carry out the work, he appointed only temporary workers and only four or five persons were working under him. He further stated that he has not registered the first respondent-Mills under the ESI Act. He further stated that since only four members are working, the first respondent-Mills is not coming under the purview of the ESI Act. D.W.1 further stated that before filing the complaint, he has not received any notice. He also stated that the documents filed by the appellant-ESI before Court did not contain D.W.1's signature.

18. As already discussed in paragraph 12 of this judgment, the appellant-ESI has not proved that the first respondent-Mills is a 'factory' as defined under Section 2(12) of the ESI Act. The first respondent-Mills would not attract the provisions of the ESI Act. So, it is immaterial to decide as to whether the respondents-accused are the 'principal employers' as defined under Section 2(17) of the ESI Act."

15. So, it is clear that even as per the counter filed by the respondent complainant, no manufacturing process has been carried on in the premises inspected. Apart from that it is the fact that though it is a company registered under the companies Act and the registered office is in Kolkatta, the head of the institution has not been added as party in the proceedings initiated under the Factories Act. In this connection, perusal of the counter does not show any explanation by the Assistant Director of Industrial Safety and Health.

16. In addition to that while lodging a complaint before the court of law, the complainant is expected to furnish almost all the information. Here, in the instant case, the Petitioner/Accused would not come under the definition of occupier as he is not the competent person to have ultimate control over affairs of the factory as contemplated under the Factories Act.

17. Since the contraventions pointed out and in fact from which the prosecution has been launched have not made out any case substantially, as against the petitioner in the premises inspected. The complainant is not able to substantiate that the premises inspected was used for any manufacturing process

as defined under 2(k) of the Factories Act, 1948. Further, the maintenance of muster roll will not arise at all for the reason that they are the service providers from an agency called as S.M.S Power Tech and the said SMS Power Tech is not been arrayed as party in the complaint filed by the Complainant. This would be a flaw in the prosecution case which would affect the root of the case in respect of section 112 Rule 103 read with Section 5 of the Factories Act.

18.Apart from that in both cases, the respondent/complainant has alleged that the petitioner/respondent without adopting legal process occupied the premises, especially, without sending the prescribed format for occupation, commenced his activities as contemplated under the Factories Act. But this contention has not been substantiated by the respondent/complainant and no material is furnished that in the said premises process of manufacturing is carried on. So, this court is constrained to hold that the case of the respondent/complainant are failed.

19.For the foregoing discussions, this court is constrained to come to a conclusion that learned trial court has failed to consider these prima facie requisites to proceed with further. Therefore, I am of the view that the case of the petitioner is having substantial legal force and accordingly the criminal original petition is allowed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Deputy Registrar (CS)

//True Copy//

Sub Assistant Registrar

vs
To

The Chief Judicial Magistrate,
Thiruvallur

+ 2 ccs to Mr.N. Manokaran, Advocate Sr.79239

CrI.O.P Nos.5932 & 6080 of 2011
and
M.P.Nos.1 and 1 of 2011

(CS-DR)
EU (02/11/2018)