

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2019

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.A.NO.1903 OF 2010
AND M.P.NO.1 OF 2010

M/s.Lakshmi Machine Works Limited, Unit - 3
Sulur Railway Feeder Road,
Muthugoundenpudur,
Coimbatore - 641 406.
(Cause title amended vide
order dated 09.01.2017 made in
CMP No.401/2017 in W.A.No.1903/2010) ..Appellant /Petitioner

VS.

1.R.Ranganathan

2.The Appellate Authority under
Tamil Nadu Shops & Establishments Act
(Dy. Commissioner of Labour)
Dr.Balasundaram Road,
Coimbatore - 641 018. ..Respondents/Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters
Patent against the order dated 08.06.2010 passed by this Court
in W.P.No.16196 of 2000.

W.P.No.16196 of 2000:- Writ Petition preferred under Article
226 of the Constitution of India praying for the issue of a Writ
of Certiorari to call for the records connected with order dated
13.09.2000 passed by the second Respondent in T.N.S.E.No.3 of
1999 and to quash the same.

For Appellant : Mr.Sanjay Mohan

For Respondent-1: Mr.V.Ajoy Khose

J U D G M E N T
(JUDGMENT OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

This writ appeal is filed against the order dated 08.06.2010
passed by this Court in W.P.No.16196 of 2000. The appellant /

writ petitioner has challenged the order dated 13.09.2000, passed in T.N.S.E.No.3 of 1999, by the second respondent Appellate Authority under the Tamil Nadu Shops and Establishments Act, 1947.

2. The appellant / writ petitioner is a Factory established at Sulur Railway Feeder Road, Coimbatore. The first respondent was appointed as a Technical Officer-II under the writ petitioner Management on 15.11.1993. He was terminated from service with effect from 27.02.1999. The first respondent has filed an appeal against the order of termination, wherein it was alleged that he was forced to submit his resignation and quit his employment with three months' salary and was not allowed to work beyond 18.02.1999. In spite of his representation, he was terminated from service. Therefore, he filed an appeal under Section 41(2) of the Tamil Nadu Shops and Establishments Act before the second respondent appellate authority.

3. The second respondent Appellate Authority has taken up the appeal on file as T.N.S.E. Case No.3 / 1999. The appellant / writ petitioner Management has filed a counter taking preliminary objection regarding the maintainability of the appeal. In their counter, it was stated that the appeal is not maintainable. The appellate authority has framed two issues viz., (i) whether the first respondent is entitled to file an appeal under the Tamil Nadu Shops and Establishments Act; and (ii) whether the order of termination is fair and reasonable.

4. The first respondent and one Balakrishnan on behalf of the writ petitioner Management had let in evidence and marked documents. The first respondent has marked five documents on his side and the writ petitioner Management has marked 15 documents on its side.

5. The second respondent Appellate Authority relying on a Division Bench judgment of this Court in THE MANAGEMENT OF AUTOMAC (M) (P) LTD. VS. DEPUTY COMMISSIONER OF LABOUR AND ANOTHER [1992 (I) LLJ 15] has held that as it was not proved by the writ petitioner Management that the first respondent was not engaged in manufacturing process in the factory and the first respondent has proved that he was working in the administrative side, the provisions of the Tamil Nadu Shops and Establishment Act is applicable to the first respondent and the appeal filed under Section 41(2) is maintainable. In so far as the second issued is concerned, it was held that the termination order came to be passed in violation of principles of natural justice and therefore, reinstatement was ordered by setting aside the termination order.

6. Against which, the writ petition in W.P.No.16196 of 2010 was filed by the Management. The learned Single Judge after

relying on the judgment has held that even though the first respondent was employed in the premises for which there is a Factory licence, there is no evidence to show that he was governed by the provisions of the Factories Act. The first respondent was appointed as a Technical Officer like many other persons whose primary job was to do various clerical duties as set out in the list of duties furnished by the Management. Therefore, it is not a case where Tamil Nadu Shops and Establishments Act can be said to be not applicable to the case of the first respondent as he is not an employee governed by the provisions of the Factories Act. When once the finding went against the petitioner Management, the termination order is clearly an ultra vires to the provisions of Section 41(2) of the Tamil Nadu Shops and Establishment Act. Ultimately, the learned Single Judge has upheld the order of the second respondent appellate authority. Aggrieved by the said order, the writ petitioner Management has filed the present writ appeal.

7. The learned counsel for the appellant would contend that the first respondent was appointed as a Technical Officer - II and was governed by the Factories Act. In such circumstances, the finding of the appellate authority as well as the learned Single Judge that the first respondent was not governed by the Factories Act is factually wrong. The contents of G.O.Ms.No.545, Development, dated 10.02.1950, reads as follows:

"In exercise of the powers conferred by Section 6 of the Madras Shops and Establishments Act, 1947 (Madras Act 34 of 1947) and in supersession of the Development Department notification No.1085 dated November 5, 1948 published at page 1101 of Part I of the Fort St. George Gazette, dated November 16, Governor of Madras hereby exempts permanently all persons employed in any kind of work in factories and governed by the Factories Act, 1948 (Central Act LXII of 1948) from all provisions of the Madras Shops and Establishments Act, 1947. "

8. According to the said Government Order, all persons employed in any kind of work in factories and governed by Factories Act, 1948 are exempted from all provisions of the Madras Shops and Establishments Act, 1947. Since it has been clearly found by the learned Single Judge that the premises is licensed under the Factories Act and all persons working in any kind of work including the first respondent shall be construed as being governed by Factories Act. The first respondent was recruited in the Electrical Department, which is the lifeline of the manufacturing process. Without electricity, manufacturing process cannot be conducted.

9. The learned counsel for the appellant would further contend that the nature of duties and responsibilities are incidental to the manufacturing process as defined under Section 2(k) of the Factories Act. In so far as the first respondent is concerned, the nature of duties and responsibilities includes maintenance of electrical equipments, power house, break down, providing posting and job training for his subordinates, evaluation of performance and regulating power supplies etc. These works are interconnected with the manufacturing process and therefore, the first respondent is governed by the Factories Act. Ever since his employment, he was governed by the Factories Act, which can be proved by the exhibits marked before the appellate authority.

10. As per Section 2(1) of the Factories Act, the term "worker" is defined, as per which, the first respondent will clearly fall under the Factories Act and a perusal of the appointment order issued to the first respondent and the nomination executed by him in Form 34 pursuant to his appointment will show that the first respondent is governed by Factories Act only. The learned counsel would rely on the administrative structure of the factory, which would also show that the first respondent is a part and parcel of the manufacturing process and further, his attendance register, sanctioning leave to his subordinates in Electrical Department would go to prove that he was governed by Factories Act. Further, Form 12 under Rule 80 and Form 25 under Rule 103 of the Factories Act would go to show that the first respondent was governed by Factories Act only and not by any other statute. Therefore, he would contend that the designation is irrelevant and what is relevant is the applicability of the rules of the Factories Act and the provisions of Factories Act.

11. The nature of duties and responsibilities, appointment order, organisation chart, attendance register and other documents marked as exhibits, would go to show that the first respondent was un-assailably an employee governed by Factories Act. Therefore, the finding of the second respondent appellate authority and the learned Single Judge are not sustainable. Further, the first respondent ought to have filed an appeal under Factories Act and ought not to have preferred an appeal before the second respondent Appellate Authority.

12. In support of his contention, the learned counsel for the appellant would rely on a Division Bench judgment of this Court in MANAGEMENT OF E.I.D. PARRY (INDIA) LTD. VS. COMMISSIONER OF LABOUR AND OTHERS [2001 (2) LLJ 1074] wherein this Court has held that in view of the exemption made in G.O.Ms.No.545, Development, dated 10.02.1950, the person

employed therein was exempted from the application of provisions of the Tamil Nadu Shops and Establishments Act. The Division Bench has placed its reliance on the judgment of the Hon'ble Supreme Court in ROHTAS INDUSTRIES VS. RAMLAKHAN SINGH [MANU/SC/0274/1978].

13. The learned counsel for the appellant would further draw our attention to a Division Bench judgment of this Court in R.GANAPATHY SUBRAMANIAM VS. ENFIELD INDIA LTD., MADRAS [1984 (97) LW 651] wherein it has been that the Factory shall be considered as one unit and there cannot be any separation of various departments and therefore, the workman working within the provisions of the Factories Act shall be construed to be governed by the provisions of the Tamil Nadu Shops and Establishments Act.

14. In MANAGEMENT OF BINNY LTD. (B&C MILLS) MADRAS VS. K.ELUMALAI AND ANOTHER [1988 (I) LLJ 398 MAD] this Court has held that as long as the exemption granted under G.O.Ms.No.545, Development, dated 10.02.1950 continues to be in force, there is no right to prefer an appeal under Section 41(2) of the Tamil Nadu Shops and Establishments Act.

15. The argument that the nature of duty is not connected to the manufacturing process cannot be put against the Management. Therefore, it is the contention that when the learned Single Judge had found that the entire premises is licensed under the Factories Act, the question as to whether the first respondent is governed by the provisions of the Factories Act is not correct and it was categorically proved by the Management that the first respondent has been governed under the Factories Act ever since his employment, through documents marked as exhibits before the appellate authority. Therefore, the learned counsel for the appellant would submit that the order of the learned Single Judge upholding the order of the second respondent appellate authority setting aside the order of termination is liable to be quashed.

16. Per contra, the learned counsel appearing for the first respondent would contend that unless a worker involved in manufacturing process is proved, he will not fall under the provisions of Factories Act. The factum that as to whether a worker is involved in manufacturing process or not has to be proved before the fact finding authority in a manner known to law. Until it is proved by adducing evidence by marking documents, it cannot be held that the worker is governed by the Factories Act. In the instant case, the writ petitioner Management had not proved that the first respondent worker is governed by the provisions of the Factories Act and there is no evidence to show that the documents were marked in the manner known to law. More so, the nature of duties and responsibilities were not at all marked before the second respondent appellate authority.

17. The learned counsel appearing for the first respondent would further contend that during cross examination it was admitted by the Management as well as from the records marked as exhibits M14 and M15, namely log book of genset and powerhouse log book that the first respondent has signed as Section Head. Therefore, it was categorically admitted by the Management that he was given the designation as Technical Officer, as it is a Foreign company, but he was working in the administrative side and there is no connection between the first respondent and the powerhouse. Further, the documents marked as Exs.M12 and M13 cannot be relied on, as it is simply a nomination form and that will not prove that the first respondent was governed by the provisions of the Factories Act.

18. According to the learned counsel for the first respondent, Section 2(1) of the Factories Act will not apply to the first respondent as the Explanation-II under Section 2(m) of the Factories Act would clearly show that the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises of part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such terms or part thereof. Therefore, as per explanation 2 it should be construed that even though the first respondent worked within the premises of the factory so long as the work and designation of the first respondent is not connected to manufacturing process, it shall not be construed that he is governed by the Factories Act.

19. The learned counsel for the first respondent would further contend that Section 2(7) of the Tamil Nadu Shops and Establishments Act, 1947, borrows the definition of "factory" from the Factories Act.

20. Section 2(3) of the Tamil Nadu Shops and Establishments Act, 1947, defines "commercial establishment" as an establishment which is not a shop but which carries on business of advertising, commission, forwarding or commercial agency or which is a clerical department of a factory or industrial undertaking etc., and includes such other establishment as the State Government may by notification declare to be a commercial establishment for the purposes of this Act.

21. Therefore, Section 2(3) of the Tamil Nadu Shops and Establishments Act, 1947, includes the Clerical Department of a factory or industrial establishment. As the definition for "factory" borrowed from the Factories Act and Section 2(3) of the Tamil Nadu Shops and Establishments Act categorically exclude the Clerical Department of a factory, the first respondent, being on administrative side, can only exercise his right under Tamil Nadu Shops and Establishments Act and will not fall under the definition of "worker" under the Factories Act

and there is no evidence adduced or documents marked in the manner known to law by the writ petitioner Management that the first respondent was governed by Factories Act. Therefore, it cannot be said that the writ petitioner Management has proved that the first respondent workman is a "worker" as defined under Section 2(1) of the Factories Act. Therefore, the judgment of the learned Single Judge is well reasoned and shall not be interfered with.

22. The learned counsel appearing for the first respondent had taken support of the judgment of the Supreme Court in LANCO ANPARA POWER LIMITED VS. STATE OF UTTAR PRADESH AND OTHERS [2016 (10) SCC 329] wherein it has been held that the worker engaged in manufacturing process and the worker engaged in construction of a building are two different categories. Construction of a building is not the business activity of the factory or manufacturing process. Therefore, those engaged in construction of building do not fall under the definition of "worker" under the Factories Act. Therefore, first respondent shall not be construed as "worker" falling under the Factories Act.

23. In so far as the marking of documents are concerned, mere admission of documents in evidence does not amount to its proof. The documents shall be proved by adducing evidence and without proving the same, it cannot be construed that the pleading is proved. In so far as the termination of the first respondent is concerned, the writ petitioner Management has grossly failed to prove that the first respondent is a "worker" under the Factories Act and the termination is not unreasonable. Therefore, the well considered order passed by the learned Single Judge shall be upheld.

24. We have heard the submissions made by the learned counsel appearing on either side and perused the materials available on record.

25. When the predominant issue in this case is as to whether the first respondent workman is governed by the provisions of the Factories Act or not, the learned Single Judge has held as follows:-

"... It may be true that he was employed in the premises for which there is a Factory License. But there is no evidence to show that he was governed by the provisions of the Factories Act. He was only appointed as a Technical Officer like many other persons whose primary job was to do various clerical duties as set out in the list of duties furnished by the Management. Therefore, it is not a case where the Act can be said to be not applicable to the case of the first respondent, as he is

not an employee governed by the provisions of the Factories Act....."

26. Section 2(l) of the Factories Act, 1948, defines "worker" as under : -

"worker" means a person employed directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process but does not include any member of the armed forces of the union."

27. Section 2(m) of the Factories Act, 1948, defines "factory" as under :

"(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, a railway running shed or a hotel, restaurant or eating place].

[Explanation [I]: For computing the number of workers for the purposes of this clause all the workers in [different groups and relays] in a day shall be taken into account;]

[Explanation II: For the purposes 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;]"

28. The admitted fact is that the first respondent workman was appointed by the appellant / writ petitioner Management

pursuant to an application made by him and qualified in Diploma in Electrical and Electronics Engineering and had previous experience as Electrical Supervisor. He was taken as a Trainee, since he had no relevant experience. By a letter of appointment dated 15.11.1993, he was selected for the post of Technical Officer - II. Pursuant to the appointment in the Factory, the first respondent has executed Form No.34 as prescribed under Rule 93 of the Tamil Nadu Factories Rules, 1950. Form No.12 under Rule 80 of the Tamil Nadu Factories Rules and Form No.25 arises under Rule 103 of the Tamil Nadu Factories Rules bears the name of the first respondent as Technical Officer. Rule 80 of the Tamil Nadu Factories Rules reads as under:

"80. Register of adult workers. - The Register of adult workers shall be in Form No.12."

29. Form 25 under Rule 103 of the Factories Rules pertains to the muster roll in the Factory. From these documents and from the nature of duties and responsibilities of the first respondent, the organisation structure relied on by the petitioner Management, it can be construed that the first respondent was engaged on the technical side as Technical Officer in the factory.

30. Section 2(1) of the Factories Act clearly defines "worker" as involved in manufacturing process or in any other kind of work incidental thereto or connected with the manufacturing process.

31. As contended by the learned counsel for the appellant / writ petitioner, without electricity, manufacturing process cannot go on. Electricity is the lifeline of the factories existence. Therefore, electricity department shall be construed as part and parcel of the manufacturing process lest incidental to the manufacturing process. Further, G.O.Ms.No.545, Development, dated 10.02.1950 clearly exempts permanently all persons employed in any kind of work in factories and governed by the Factories Act, 1948 from all provisions of the Madras Shops Establishments Act, 1947. The learned Single Judge has also found that the premises in which the first respondent worked is licensed under the Factories Act. The only point as to whether the first respondent was governed by the Factories Act has to be decided.

32. In THE MANAGEMENT OF AUTOMAC (M) (P) LTD's case (cited supra), a Division Bench of this Court has observed that a Clerk or an Accountant may be found physically working in the administrative block inside the factory campus, but it must also be shown that the provisions of the Factories Act had been

applied to those persons. Unless the Management shows that the persons who are working in a factory registered under that Act are "governed" by the provisions of the Factories Act, the said Government Order cannot be invoked by the Management.

33. In LANCO ANPARA POWER LIMITED VS. STATE OF UTTAR PRADESH AND OTHERS [2016 (10) SCC 329] the Supreme Court has observed that the workers who are engaged in manufacturing process and the workers who are engaged in construction of a building within the premises are two different categories. In a factory, construction of building is not the business activity or manufacturing process. Therefore, the definition of "worker" under Factories Act will not cover all the persons, who are working within the premises. It is the nature of the work that decides as to whether the employee of the factory is governed by Factories Act or not.

34. In so far as the contention as to whether the first respondent is governed by the Factories Act or not, as discussed above, the nature of duties of the first respondent was not clerical and the first respondent has also has not proved that he was engaged only in clerical work and not on technical side. The findings of the second respondent appellate authority had found fault with the termination order on the proof of involvement of the first respondent in manufacturing process. The documents marked as Exs.M2, M3, M5, M6 to M10, M12 and M13 clearly shows that the first respondent was, in fact, employed in the technical side of the factory in Electrical Department and the Forms executed by him under the provisions of Rules 80, 93 and 103 of the Factories Rules and the particulars displayed in Forms 12 and 23 under Rules 80 and 103 clearly shows that he was governed by the Factories Act. More so, G.O.Ms.No.545 clearly exempts all persons doing any kind of work in a factory from the provisions of Tamil Nadu Shops and Establishments Act. Therefore, we have no hesitation to hold that the first respondent is governed by the Factories Act and he cannot claim exemption under Explanation II of Section 2(m) of the Factories Act.

35. The further contention of the learned counsel for the respondent is that mere admission of a document in evidence does not amount to disproof. There shall be oral evidence proving the veracity of the document. In fact, we are unable to distinguish as to whether parties before the second respondent appellate authority have let in elaborate evidence or not. The appellate authority had clearly omitted to discuss the documents marked by the writ petitioner and the respondents therein. But the appellate authority had only found fault with the writ petitioner Management that it had not proved that the first respondent was involved in the manufacturing process and thereby he is covered under the provisions of the Tamil Nadu Shops and

Establishments Act. There is no discussion about the Forms submitted by the writ petitioner Management and the evidence adduced on the basis of the Act.

36. In view of ambiguity, in respect of proof of the documents, we take into account that marking of documents and reliance of the selective documents by the appellate authority to come to a conclusion that the parties have been given opportunity and have marked documents in the manner known to law, bears evidenciary value. Therefore, from the documents marked as exhibits, the findings of the learned Single Judge that even though the first respondent workman was employed in the premises for which there was a factory licence, there is no evidence to show that he was governed by the provisions of the Factories Act, is set aside and the contention of the appellant that the first respondent was governed by the provisions of the Factories Act ever since his appointment is upheld. Therefore, we hold that the first respondent is governed only by the Factories Act and ought to have worked out his remedy under the Factories Act and he is not entitled to avail the appeal remedy under Section 41(2) of the Tamil Nadu Shops and Establishments Act.

37. In fine, the order dated 13.09.2000 passed in T.N.S.E.No.3 of 1999 by the second respondent appellate authority and the order dated 08.06.2010 passed by this Court in W.P.No.16196 of 2000 is set aside and the writ appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

TK

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Appellate Authority under
Tamil Nadu Shops & Establishments Act
(Dy. Commissioner of Labour)
Dr.Balasundaram Road,
Coimbatore - 641 018.

+1cc to Mr.V.Ajoy Khose, Advocate, SR.No.76797

W.A.NO.1903 OF 2010

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