

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.04.2022

PRONOUNCED ON : 27.05.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CrI.O.P.No.6714 of 2018 and CrI.M.P.Nos.3447 & 3448 of 2018
and
CrI.O.P.No.6826 of 2018 and CrI.M.P.Nos.3487 & 3488 of 2018
and
W.P.No.4529 of 2018 and W.M.P.Nos.5580 & 5581 of 2018

CrI.O.P.Nos.6714 & 6826 of 2018:

Ness Wadai,
S/o.Nusliwadia,
Occupier,
The Bombay Burmah Trading Corporation Ltd.,
Dunsandle Tea Factory,
Dunsandle Estate,
Door No.136, 8/149 S.No.257,
Sholur Village,
Dunsandle Post,
Nilgiris District.

... Petitioners

Vs.

State of Tamil Nadu,
Through its Deputy Director,
Industrial Safety and Health,
Ooty.

...Respondents

W.P.No.4529 of 2018:

Ness Wadia

... Petitioner

Vs.

1.Deputy Director,
Industrial Safety and Health,
(Inspector of Factories),
Block No.3, First Floor,
Additional Collectorate Buildings,
Fingerpost, Ooty, Nilgiris - 643 006.

2.Bombay Burmah Trading Corporation,
Dunsandle Tea Estate,
Door No.136, 8/149, Survey No.257,
Sollur Village, Nilgiris District.

... Respondents

PRAYER in Crl.O.P.Nos.6714 & 6826 of 2018: Criminal Original Petitions are filed under Section 482 of the Code of Criminal Procedure, to call for the records of the complaint filed by the respondent before the learned Chief Judicial Magistrate, Udhagamandalam in S.T.C.Nos.3 & 4 of 2017, and quash the same.

PRAYER in W.P.No.4529 of 2018: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for records of the respondent in respect of the order vide letter No.A/1020/2017, dated 5.10.2017 and quash the same.

For Petitioners in
Crl.O.P.No.6714 &
6826 of 2018 : Mr.S.Ashok Kumar, Senior Counsel for
Mr.Srinath Sridevan & Mr.A.Sasidharan

For Petitioner in
W.P.No.4529 of 2018 : Mr.Ar.L.Sundaresan, Senior Counsel for
Mr.Srinath Sridevan

For Respondent in
Crl.O.P.No.6714 & 6826 of 2018
and R1 in W.P.No.4529 of 2018 : Mr.A.Damodaran,
Additional Public Prosecutor

COMMON ORDER

Crl.O.P.Nos.6714 & 6826 of 2018 have been filed to quash the proceedings in S.T.C.Nos.3 & 4 of 2017, on the file of the Chief Judicial Magistrate Court, Udhagamandalam/trial Court.

2.W.P.No.4529 of 2018 has been filed to quash the order, vide letter No.A/1020/2017, dated 05.10.2017 passed by the 1st respondent.

3.Since the issues in all the three petitions are one and the same, this Court disposes the above petitions, by way of common order.

4.The gist of the case is that the Deputy Director, Industrial Safety and Health, Udhagamandalam/respondent in Crl.O.P.Nos.6714 & 6826 of 2018 and 1st respondent in W.P.No.4529 of 2018 conducted an inspection in M/s.Bombay Burmah Trading Company Limited, Dunsandle Tea Factory, the Nilgiris District (Hereinafter referred to as 'Factory') on 31.07.2017 and issue a show cause notice, dated 28.08.2017 mentioning the following charges:-

(i) No intimation was given to the authorities for change of Occupier during the year 2014-2018. Earlier, one Ashok Panjwani was nominated as Occupier from the year 2014 to 2018. Thereafter, the petitioner was nominated as Occupier to the Factory on 08.02.2016, which was not informed to the Deputy Director, Industrial Safety and Health, Udhagamandalam, in due form with necessary fee. Hence, there is violation of Section 6 (1)(d) sub Rule 8 of the Factories Act, 1948 (Hereinafter referred to as 'Act').

(ii) On 10.07.2017, one Selvamani, a worker, climbed on the roller machine No.1, which was 9 feet height and was cleaning the bush placed in pressure gap motor without using the movable ladder. The said Selvamani climbed over the pedestal guard, which is 3 ½ feet height and placed his leg on the roller table, which is another 2 ½ feet height. At that time, he got slipped and fell down from 6 feet height, due to which, he sustained injuries on his back head. This accident was informed to the respondent on the next day on 11.07.2017. Following the same, an inspection was conducted by the Deputy Director, Industrial Safety and Health, Udhagamandalam on 31.07.2017 in the Factory. During inspection, it was found that the management failed to provide personal protective equipment to all workers in the factory and failed to provide movable ladder. Hence, there is violation of Sections 7A and 41 Rule 61F of the Factories Act, 1948.

(iii) The Factory without getting approval of change of factory plan, installed nine machineries against the earlier approved plan. Hence, there is violation of Section 6(1) Rule 3 (5)(b) and Rule 3(2) of the Act.

(iv) The Factory failed to provide hydrant system to the workers. Hence, they violated Section 38(3) and Section 41 Rule 61(ii)(e) of the Act.

(v) The Factory failed to provide pull chord system for the entire conveyor belt, so that the conveyor belt can be controlled and stopped in case of emergency. Hence, there was violation of Section 21(2) Rule 53 Schedule XI Part A clause 4 (2) of the Act.

(vi) Once in 12 months, the conveyor belt to be inspected by the approved person in the Labour Department, who is to examine and certify the conveyor system. In this case, it is not done. Hence, there was violation of Section 21(2) Rule 53 Schedule XI Part A clause 2(8)(C) of the Act.

5. On 05.09.2017, the petitioner sent a reply to the Deputy Director, Industrial Safety and Health, Udhagamandalam for the show cause notice, dated 28.08.2017. Since the reply was not satisfactory, without any proper answer, the Deputy Director, Industrial Safety and Health, Udhagamandalam filed two complaints before the trial Court against the petitioner in S.T.C.Nos.3 & 4 of 2017 and filed one complaint in S.T.C.No.5 of 2017 against K.P.Iyyappa, Manager of the Factory. In S.T.C.No.5 of 2017, the Manager admitted the offence committed by him and pleaded guilty, recording the same, the trial Court, by judgment, dated 04.01.2018 imposed fine amount of Rs.10,000/- each for three counts, in total Rs.30,000/-. As against the cases in S.T.C.Nos.3 & 4 of 2017, the present Criminal Original Petitions are filed by the petitioner.

6. The Deputy Director, Industrial Safety and Health, Udhagamandalam not satisfied with the reply of the petitioner, dated 05.09.2017 for the show cause notice, passed an rejection order in letter No.A/1020/2017, dated 05.10.2017, as against which, the Writ Petition is filed.

7. The learned Senior Counsel appearing for the petitioner in Crl.O.P.Nos.6714 & 6826 of 2018 submitted that the two cases in S.T.C.Nos.3 & 4 of 2017 are filed against the petitioner for violation of charges mentioned in the show cause notice, dated 28.08.2017. The petitioner was called to give explanation for the six charges mentioned in the show cause notice, dated 28.08.2017. The first three charges pertain to S.T.C.No.3 of 2017 and the other three charges pertain to S.T.C.No.4 of 2017. The case against the Manager of the Factory K.P.Iyyappa in S.T.C.No.5 of 2017 pertains to charges Nos.2, 5 & 6. The learned Senior Counsel further submitted that on 11.07.2017, the petitioner informed the Deputy Director, Industrial Safety and Health, Udhagamandalam about the accident, which took place on 10.07.2017. The letter was received and acknowledged by the Deputy Director, Industrial Safety and Health, Udhagamandalam and the same is produced. In the reply, dated 05.09.2017, for charge No.1, it is clearly mentioned that the Joint Director of Industrial Safety and Health, Division II, Coimbatore was intimated for change of occupier of the Factory, vide letter, dated 30.08.2016, the copy of the same is produced. After receipt of the same, no communication was received from the Joint Director of Industrial Safety and Health, Division II, Coimbatore, hence, it was construed that the information was recorded by the authorities. For charge No.2, it is mentioned that Personal Protective Equipment was provided to all the workers in the Factory as well as movable ladder provided, the availability of movable ladder is recorded in the Inspection Report. Thus, the accident occurred purely due to the

negligence of the worker Selvamani, who failed to follow the safety procedures. For charge No.3, it is mentioned that the revised factory plan was submitted to the authorities as early as on 14.06.2017 in Form 1, the copy of the Form 1 is produced. For charge No.4, the Hydrant system in the Factory has been installed and the certificate from the Engineer will be submitted as required. For charge No.5, it is mentioned that pull chord system fixed for all conveyor belts. For charge No.6, it is mentioned that the Factory already made arrangements for all conveyor to be inspected by a qualified person authorized by the Director of Industrial Safety and Health, Chennai.

8.The primary contention of the learned Senior Counsel for the petitioner is that the accident was informed immediately on the next day on 11.07.2017, thereafter, inspection was conducted by the Deputy Director, Industrial Safety and Health, Udhagamandalam on 31.07.2017. During inspection, the change of occupier, factory plan showing the installation of new machineries and other equipments with records was informed to the officials. The inspecting authority for the reasons best known ignored the same and projected as though there have been violation of the Factories Act, 1948 and its Rules by the Factory and launched prosecution against the petitioner. The learned Senior Counsel further contended that for the alleged violation of Factories Act, 1948 and its Rules, two show cause notice were issued and two prosecutions launched against the petitioner. It is to be seen that as against the Manager of the Factory K.P.Iyyappa, a case in S.T.C.No.5 of 2017 was launched, the Manager admitted the offence and pleaded guilty, recording the same, the trial Court, by judgment, dated 04.01.2018 imposed fine amount of Rs.10,000/- each for three counts, in total Rs.30,000/-. While that being so, proceedings against the petitioner, who is only an Occupier of the Factory, is unwarranted.

9.The learned Senior Counsel further submitted that the complaints in this case are barred by limitation. In this case, the inspection took place in the Factory on 31.07.2017, prior to it, on 11.07.2017, the accident was informed to the Deputy Director, Industrial Safety and Health, Udhagamandalam, thereafter, show cause notice was issued on 28.08.2017, reply was sent on 05.09.2017, the rejection of the reply was on 05.10.2017, thereafter, the complaint was lodged on 28.10.2017. As per Section 106 of the Factories Act, 1948, no Court shall take cognizance of any offence punishable under this Act, unless the complaint thereof is made within three months on the date on which the alleged commission of offence came to the knowledge of the Inspector. In this case, the inspecting authority was informed about the accident on 11.07.2017, thereafter, took

their own time and conducted inspection on 31.07.2017 and filed the complaints on 28.10.2017, which were returned and later, the cognizance of the offence was taken only on 14.11.2017, which is beyond the period of three months of limitation period. Further, no reason given by the Deputy Director, Industrial Safety and Health, Udhagamandalam for the delay in lodging the complaint and no condonation of delay granted.

10.The learned Senior Counsel further submitted that in the complaints, there is no mention with regard to issuance of the show cause notice to the petitioner and the reply to the show cause notice. Further, there is no mention in the complaints for what reason, the reply to the show cause notice was rejected. Thus, the Deputy Director, Industrial Safety and Health, Udhagamandalam not filed complaints against the petitioner disclosing true and entire happenings. This Court in the case of "Srinivas J.Kulkarni Versus State of Tamil Nadu Rep. by the Deputy Director reported in 2020 SCC OnLine Mad 4775" held that the 'Occupier' under the Factories Act, cannot be omnipresent, in order to ensure that every requirement set out under the Rules are adhered to and complied with by everyone working in the factory.

11.In support of his submissions, the learned Senior Counsel for the petitioner relied on the decision in the case of "K.B.Kotak and another Versus State by, The Deputy Inspector of Labour, Circle V, 33, Venkatnarayana Road, Nandanam, Madras reported in 2007 SCC OnLine Mad 1624", wherein this Court had held that 'the undisputed fact remains that there is not a whisper about the show cause notice of the reply given to the petitioner's in the complaint.' Likewise in the case of "K.Masthan Rao Versus State, rep. by Inspector of Factories, First Circle, Vellore reported in 2014 (3) MWN (Cr.) 86" this Court reiterated about non mentioning of show cause notice, its reply and further the point of limitation. This Court following the decision of K.Masthan Rao (cited supra) in the case "L.Ganesh and another Versus The State of Tamil Nadu Rep. by the Inspector of Factories, Ambattur Circle, Bharathkumar Bhavan, 617, Anna Salai, Chennai in Crl.O.P.Nos.27834 & 27839 of 2014, dated 19.08.2019" had quashed the proceedings against the accused on the ground of non mentioning of show cause notice and its reply in the complaint. Hence, he prayed for quashing of the complaints against the petitioner.

12.The learned Senior Counsel appearing for the petitioner in Writ Petition submitted that the rejection order, dated 05.10.2017 is bereft of facts, no reason is given for rejection. He further submitted that the intimation about the accident was sent to the Deputy Director, Industrial Safety and Health, Udhagamandalam through Form 18(b) on 11.07.2017. The workmen

Selvamani, who got injured due to the accident, had returned back to his duty. The Deputy Director, Industrial Safety and Health, Udhagamandalam conducted inspection only on 31.07.2017. The acknowledgment card produced for intimating the change of occupier shows that the change of occupier along with the Board Resolution were sent to the Joint Director of Industrial Safety and Health, Division-II, Coimbatore, who received the same on 08.09.2016. The personal protective equipments were available at the time of the accident and inspection, it was the workmen Selvamani, who on his own, had violated the safety norms and climbed up the roller machine No.1. Likewise, the hydrant system was already installed and pull chord system for all conveyor belts were fixed.

13.The learned Senior Counsel further submitted that as against the complaints filed by the Deputy Director, Industrial Safety and Health, Udhagamandalam in S.T.C.Nos.3 & 4 of 2017, the petitioner have filed the above Criminal Original Petitions. In the event of petitioner succeeding in the above Criminal Original Petitions, this Writ Petition would become infructuous.

14.The Additional Public Prosecutor appearing for the 1st respondent in W.P.No.4529 of 2018 and respondent in Crl.O.P.Nos.6714 & 6826 of 2018 filed counter and made common submissions that the Deputy Director, Industrial Safety and Health, Udhagamandalam conducted inspection in the Factory premises on 31.07.2017 and found the management of the Factory violated the provisions of the Factories Act, 1948, hence, he issued show cause notice to the Manager and the petitioner/Occupier on 28.08.2017. He further submitted that the petitioner sent intimation for change of occupier in the Factory to the Joint Director of Industrial Safety and Health, Division-II, Coimbatore, which is a wrong address. The intimation ought to have been sent to the Joint Director of Industrial Safety and Health, Division-I, Coimbatore. As per the provisions of the Act, merely sending Board Resolution is not proper way to intimate the change of occupier. There is a provision and Form to file and intimate change of occupier with appropriate fee. The Manager of the Factory K.P.Iyyappa pleaded guilty and convicted in S.T.C.No.5 of 2017. K.P.Iyyappa admitted that the responsibility of the Occupier and Manager of the Factory is to ensure the workers' safety by providing safety gears, by giving proper instruction and by effective supervision.

15.He further submitted that the Factory management submitted the factory plan belatedly on 24.08.2017, that too not in the correct Form. Further, no hydrant system installed in the Factory and no pull chord system fixed for conveyor belts and no authorized person inspected the conveyor belts. Finding

all these infirmities and finding lagging in safety measures, the prosecution was launched against the petitioner. The contention of the petitioner that safety measure were provided and informed to the Deputy Director, Industrial Safety and Health, Udhagamandalam are hereby denied. In this case, the inspection was conducted in the Factory on 31.07.2017 and show cause notice was issued on 28.08.2017, reply from the Factory Manager was received on 05.09.2017 and on further action, a letter was sent to the petitioner on 05.10.2017, thereafter, the complaints filed on 25.10.2017, which were returned for technical reasons on 02.11.2017 and thereafter, the same was complied and resubmitted on 09.11.2017. Thus, the complaints are filed within the period of limitation of 90 days and the question of complaints being barred by limitation would not arise. Till filing of the above complaints, none of the aforesaid charges were complied with and the petitioner not to be shown leniency. The petitioner failed to adhere the safety measures. The Additional Director, Industrial Safety and Health, Coimbatore in his proceedings, dated 16.10.2017 permitted the Deputy Director, Industrial Safety and Health, Udhagamandalam to proceed in accordance with the procedure contemplated under the Factories Act, 1948. Therefore, the points raised by the petitioner are factual in nature, which ought to be decided only during trial.

16. In support of his submissions, the learned Additional Public Prosecutor relied on the decision in the case of "The State Represented by the Public Prosecutor, High Court, Madras Versus Tr.K.Kandavadivel, Managing Director/Occupier, M/s.Swamy & Swamy Plantations (Pvt) Ltd., High Field, Coonoor, the Nilgiris District in Crl.A.Nos.432 & 433 of 2016" and in the case of "Dewan Chand Chaudhry Versus R.L.Taluja and another reported in ILR (1973) II Delhi 285" and stressed on the point that 'once a complaint was filed and there is no question of its being taken to have been filed on the date when it was re-filed after it had been returned.' He further submitted that though the information about accident was received on 11.07.2017, the limitation period has to be calculated only from the date of inspection by the authorities. It is not the date of which the alleged offence ought to have been come to his knowledge, it is the date of which the alleged offence came to the knowledge of the Inspector. According to the Inspecting Authority, it was only on 31.07.2017.

17. This Court considered the rival submissions and perused the materials available on record.

18. The petitioner was nominated as Occupier of the Factory vide, board resolution, dated 08.02.2016 and the same was informed to the Deputy Director, Industrial Safety and Health, Udhagamandalam on 14.06.2017. The acknowledgement for the same is produced.

19.The primary contention of the learned Additional Public Prosecutor that the intimation for change of occupier in the Factory ought to have been sent to the Joint Director of Industrial Safety and Health, Division-I, Coimbatore and not to the Joint Director of Industrial Safety and Health, Division-II, Coimbatore, is not acceptable. In this case, the Joint Director of Industrial Safety and Health, Division-II, Coimbatore ought to have sent the intimation to the Joint Director of Industrial Safety and Health, Division-I, Coimbatore. The officials are duty bound to forward the communication received to the appropriate authority if it is wrongly addressed. More so, in this case, both the Joint Directors/Officials are from the same Department. The officials cannot take technical and hyper sensitive defence. The intimation for the accident was sent immediately to the Deputy Director, Industrial Safety and Health, Udhammandalam on the next date of the accident on 11.07.2017 in the prescribed format. Thereafter only on 31.07.2017, the inspection was conducted in the Factory, no reason given for the delay. Infact, at the time of inspection, the injured workmen Selvamani joined his duty. From the inspection report, it is seen that the movable ladder was available in the Factory and it was not used by Selvamani to climb over the roller machine. Thus, the personal protective equipments and other equipments were provided by the Factory management, it was Selvamani wantonly failed to use the same. Further, the factory plan had been submitted to the concerned authorities on 14.06.2017, the pull chord system was fixed for all conveyor belts and the qualified/authorized person inspected the conveyor and gave certificate to that effect.

20.It is seen from the show cause notice that totally six charges framed against the petitioner. The said six charges culminated to two cases. The Manager K.P.Iyyappa faced prosecution for charge Nos.2, 5 & 6, pleaded guilty and he was convicted in S.T.C.No.5 of 2017. It pertains to the role of the Manager. The role, responsibility and duty cast of Manager and Occupier are not one and the same. Further, the 'Occupier' under the Factories Act, cannot be omnipresent, in order to ensure that every requirement set out under the Rules are adhered to and complied with by everyone working in the factory.

21.On a bear reading of the complaint, it is seen that there is no reference to the show cause notice and reply to the show cause notice. This Court time and again in several cases held that non mentioning of show cause notice and reply given to the show cause notice would amount to non application of mind. This Court has not hesitation to hold that the complaints are vitiated on account of total non-application of mind. Added to it, there is no violation of law and rules and regulations. The

Factory had intimated the concerned authorities then and there for modifications, additions and provisions of safety measures. The complaints are filed belatedly.

22.In view of the above, this Court comes to the conclusion that the complaint itself is an abuse of process of Court and no useful purpose will be served by making the petitioner to undergo the ordeal of facing a trial below the trial Court.

23.In the result, the proceedings in S.T.C.Nos.3 & 4 of 2017, on the file of the Chief Judicial Magistrate Court, Udhagamandalam is hereby quashed and accordingly, both Crl.O.P.Nos.6714 & 6826 of 2018 are allowed.

24.In view of criminal cases in S.T.C.Nos.3 & 4 of 2017 itself is quashed against the petitioner, no order is required to be passed in W.P.No.4529 of 2018 and accordingly, the same is liable to be closed and, is closed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1.The Chief Judicial Magistrate Court,
Udhagamandalam.

2.The Deputy Director,
Industrial Safety and Health,
Ooty.

3.The Public Prosecutor,
High Court, Madras.

+3ccs to Mr.Srinath Sridevan, Advocate SR.No.31903, 31821

Crl.O.P.Nos.6714 & 6826 of 2018 and
W.P.No.4529 of 2018

SKM(CO)
GMY(06/06/2022)