IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	15/11/2023
Delivered on	8/3/2024

C O R A M

THE HONOURABLE Dr.JUSTICE D.NAGARJUN

Writ Petition No.16272 of 2013

The Management of
Everest Industries Limited
rep. By its Factory Manager
Mr.K.Hariprasad
Podanur
Coimbatore. ... Petitioner

Vs

1. The Deputy Commissioner of Labour Authority under the Tamil Nadu Shops and Establishments Act
Coimbatore.

2. V. Gangadharan ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of certiorari to call for the records of the first respondent in T.N.S.E.Case No.15 of 2011 and quash its order dated 4/1/2013.

For petitioner	...	Mr.Anand Gopalan for Mr.T.S.Gopalan
For respondents	...	Mr.C.Sangamithirai Special Government Pleader for R.1 Mr.P.J.Rishikesh for R.2

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ORDER

This writ petition has been filed to quash the order dated 4/1/2013 passed by the first respondent in T.N.S.E.Case No.15 of 2011.

2. The facts in brief as per the affidavit are as under:-

The petitioner/Everest Industries Limited, is manufacturing fibre cements (Asbestos) sheets, having its office at Delhi and manufacturing units at Kymore in Madhra Pradesh, Nasik in Maharashtra, Podanur in Tamil Nadu, Kolkata in West Bengal and Roorkee in Utharanchal.

3. On 1/8/1990, the petitioner Management appointed the second respondent as as Works Engineer and posted him at Kymore in Madhya Pradesh. In August 1993, he was promoted as Superintendent and transferred to Podanur and posted as Assistant Engineer (Moulded

Goods). He was employed in a Supervisor position and was empowered to take independent decisions.

4. In the year 2009, his performance was assessed as very low and was not granted increment. By letter, dated 26/5/2009, Managing Director of the Company informed the second respondent that his performance was rated unsatisfactory. Since the second respondent has not shown any improvement in his performance, as per Clause 12.1 of the annexure to the appointment letter, the services of the second respondent were terminated by paying three months basic salary.

5. On 5/8/2010, the petitioner has received a cover from the second respondent containing Memorandum of Appeal, under Section 41 (2) of the Tamil Nadu Shops and Establishments Act (in short TNSE Act) accompanied by a petition to condone the delay of 11 days. Condonation of delay application was numbered as I.A.No.7 of 2010 and vide, order dated 3/10/2011, the delay of 11 days was condoned and the appeal, filed under Section 41 (2) of the TNSE Act was numbered as T.N.S.E.No.15 of 2011. On 4/1/2013, first respondent passed the orders in TNSE No.15 of 2011, holding that the petitioner has not established

that the second respondent was governed by the provisions of the Factories Act and that G.O.Ms.No.545 dated 10/2/1950 is not applicable to the second respondent. Aggrieved by the same, this writ petition is filed.

6. Heard Mr.Anand Gopalan, learned counsel for the petitioner, Ms.C.Sangamithirai, Special Government Pleader for the first respondent and Mr.P.J.Rishikesh, learned counsel for the second respondent.

7. The main contention of the learned counsel for the petitioner is that the provisions of the TNSE Act are not applicable to the facts of the case as the second respondent had been working in the factory and thereby provisions of Factories Act only applicable and hence, entertaining the appeal under Shop and Establishment Act is erroneous.

8. The learned counsel for the petitioner brought to the notice of this Court that Exs.17 to 20 filed before first respondent authority go to show that the second respondent was working within four corners of the factory premises. It is further submitted that the petitioner Company has been registered under the Factories Act. Once the second respondent

has been working in the factory, the provisions of Factories Act are applicable. He has further submitted that as per G.O.Ms.No.545, all the employees working in the factory are exempted under the Shops and Establishment Act.

9. The learned Special Government Pleader appearing for the first respondent would contend very strongly that though the petitioner is working within the premises of a factory, he has been working in the clerical department of a factory, thereby, he comes under the definition of 'Commercial Establishment' as defined under Section 2 (3) of the TNSE Act thereby provisions of Factories Act do not apply and appeal under TNSE can be entertained.

10. The learned counsel appearing for the second respondent has submitted that even though the second respondent was working petitioner factory, he will come under the definition of 2 (3) of TNSE Act, hence, Factories Act does not apply.

11. As per Section 2 (3) of the TNSE Act, "Commercial Establishment" means an Establishment which is not a shop but which

carries on the business of advertising, commission, forwarding or commercial agency, or which is a clearical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, broker's office or exchange and includes such other establishment as the State Government may by notification declare to be a commercial establishment for the purposes of this Act. Therefore, employees working in clerical Department, if a factory are governed by the provisions of Tamil Nadu Shops and Establishment Act.

12. The second respondent was appointed by the petitioner on 1/8/1990 as Works Engineer initially at Kymore in Madhya Pradesh. He was transferred to Podanur in Tamil Nadu. He was promoted as Superintendent then as Assistant Manager – Moulded Goods. The second respondent was shown as one of the workers in the register of employment maintained under Rule 25 of the Tamil Nadu Factories Rules. He was empowered to send accident report under the Factories Act, and that he was nominated to the Safety Committee and he was also nominated to participate in various product technical training programmes along with other employees in the factory. He was incharge of a quite good number of workers. He was employed in a supervisory

position. He was to take independent decisions in certain matters. He was answerable to the output to the Department. He is one of the workers in the register of employment maintained under Rule 25 of the Tamil Nadu Factories Rules. These aspects would certainly demonstrate that he is not a workman and that he is working within the factory premises. It is not the case of the second respondent that though he has been working in the petitioner factory, he is working outside the factory and not connected to the activities of the factory. Admittedly, he is working within the factory premises.

13. It is submitted by the learned counsel for the second respondent that though second respondent was working within the factory, he will come under the category of clerk working in the petitioner factory. It is to be noted that if the second respondent is working in the Clerical Department of petitioner factory, it will come under the definition of "Commercial Establishment" as per Section 2 (3) of TNSE Act. However, considering the nature of work of the second respondent and that number of workers are working under him and that he has been sending some reports and that he is empowered to take certain decisions would demonstrate that he is not working in the Clerical Department of

the petitioner factory but he is working in the supervisory cadre. Therefore, Section 2 (3) of TNSE Act is not applicable to the petitioner and that he will not be considered as working in the clerical cadre.

14. In addition to that as per Notification in G.O.Ms.No.545 Development dated 10/2/1950, the persons employed in any kind of work and governed by the provisions of the Factories Act were exempted from the provisions of the Tamil Nadu Shops and Establishment Act and the said G.O., is in force. The second respondent has been working in the supervisory capacity with a designation of Assistant Manager – Moulded Goods, within the factory premises. The second respondent who has been admittedly working is within the premises of factory and that he is not working in the Clerical Department. Once the second respondent is working not in the clerical department of petitioner factory, as per the above referred G.O.Ms.No.545 dated 1/2/1959, the provisions of the Tamil Nadu Shops and Establishment Act do not apply.

15. The learned counsel appearing for the second respondent has cited a judgments in ***M/s. LAKSHMI MACHINE WORKS LIMITED, UNIT 3, SULUR RAILWAY FEEDER ROAD,***

MUTHUGOUNDENPUDUR, COIMBATORE, Vs. 1. R. RANGANATHAN AND ANOTHER (W.A.No.1903 of 2010), at paragraph No.18, it has been held thus:-

> 18. According to the learned counsel for the first respondent, Section 2(l) 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.

16. The above authority referred by the second respondent applicable in favour of the second respondent, provided if the second respondent

makes out a case that no manufacturing activity is being carried out or that even though first respondent works within the premises of the factory is nature of work and designation is not connected with the manufacturing process. However, the designation of the second respondent is Assistant Manager – Moulded Goods and he is directly connected with the manufacturing activity and is responsible to the Management for output of the manufacturing activity. Therefore, it cannot be said that though he is working within the premises of the factory, his designation and activity are purely outside the manufacturing activity. Therefore, the above referred judgment is not helpful to the second respondent. However, in the same judgment, para No.34, runs as under:-

> "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."

17. The observations of the above referred paragraph is helpful to the petitioner. As the second respondent is not working in the clerical cadre of the petitioner factory, he will not fall within the provisions of the Tamil Nadu Shops and Establishment Act. Added to it, G.O.Ms.No.545 also applies, thereby the petitioner cannot claim benefits under the Shops and

Establishment Act.

18. In view of the above, since the provisions of Factories Act alone are applicable to the nature of work of the second respondent, the provisions of Tamil Nadu Shops and Establishment Act, 1947 cannot be applied to the facts of the case. The first respondent authority has no jurisdiction to pass impugned orders under Tamil Nadu Shops and Establishment Act, 1947 in T.N.S.E Case No.15/11 hence same is required to be quashed.

19. In the result, this writ petition is allowed and the impugned order dated 4/1/2013 passed in T.N.S.E.Case No.15 of 2011 is quashed. No costs.

8/3/2024

mvs.

Index: Yes/No

Neutral Citation: Yes/No

To

1. The Deputy Commissioner of Labour Authority
   under the Tamil Nadu Shops and
   Establishments Act
   Coimbatore.

Dr.D.NAGARJUN,J

mvs.

Pre-delivery order in
W.P.No.16272 of 2013

8/3/2024