

* HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+ CRIMINAL PETITION No.4854 of 2015

% 29th JANUARY, 2016

CRIMINAL PETITION No.4854 of 2015

P.Trivikrama Prasad

.. Petitioner/A1

VS.

\$ The State of A.P. Rep. by its Assistant Inspector of Factories, Kakinada-1 Circle, Kakinada, East Godavari District, A.P. Rep. by its P.P. High Court, Hyderabad

.. RESPONDENT/Complainant

! Counsel for the Appellant : Sri C.Niranjan Rao

^ Counsel for the Respondent : Public Prosecutor (AP)

< Gist:

> Head Note:

? CITATIONS:

THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.4854 of 2015

ORDER:

The petitioner is 1st accused of the private complaint in C.C.NO.367 of 2014 on the file of IV Additional Judicial First Class Magistrate, Kakinada that is maintained by Assistant Inspector of Factories, Kakinada-I Circle, Kakinada against the petitioner as Managing Director and Occupier of Nava Bharat Ventures Limited (Sugar Division) and A2 managed the entity supra.

2. The private complaint was filed for the offences punishable under Sections 32(a) read with Section 41 and Rule 61-E of the Factories Act, with the averments that the Deputy Chief Inspector of Factories, Kakinada and Inspector of Factories, Kakinada, inspected the premises of Nava Bharat Ventures Limited (Sugar Division), Samarlakota Village and Mandalam, East Godavari District, which is a factory within the meaning of Section 2m(i) of the Factories Act, 1948, on 28.01.2012 at about 10.00 a.m., found that accused persons have failed to comply with the provisions of the Act and Rules supra

viz., failed to provide D-rings to the cane trally side plate to provide support to the workers for getting down safely from the trally after completion of loading with the crane up to a height of about 6 feet in the cane unloading yard; and failed to provide ladders or suitable means to get down the workers from the top of the cane trally after loading it with the cane up to a height of about 6 feet; and also failed to provide and insist to wear safety helmets to all the workers working in the cane yard including Smt Rayi Lova, unskilled worker on 26.1.2012 who met with a fatal accident due to hitting of her head with the hard surface of the ground due to fall while getting down from the loaded trally from a height of about 6 feet in the line No.2 in the cane unloading yard, which was not provided with a ladder or D-ring to the side plate for support to the workers and while in the process, she lost her balance and hence fallen on the ground and since she did not wear safety helmet, back portion of her head hit with the hard surface of the ground and sustained severe head injury and consequently died on next day i.e., 27.01.2012 at 9.50 a.m., in Apollo Hospital, Kakinada while undergoing treatment. Had the safety measures mentioned in the items 1 to 3 supra were followed, the accident would not have occurred in the premises. It is further averred that the other grounds for offences under Section 112 and 103 read with Section 2(1) read with Rule 102-A of the Act are that the accused persons failed to open and maintain a muster roll for all the contract labour working in cane unloading area in the factory in the prescribed form No.25 or attendance record and also failed to produce the same to the Deputy Chief Inspector of Factories, Kakinada during the inspection on 28.01.2012 on demand and in fact total 155 contract labour working in cane unloading area in the factory including the said person met with accident and died by name Smt.Rayi Lova, their attendance was not maintained in Form No.25 or in any other form and not produced to the Deputy Chief Inspector of Factories, Kakinada and Inspector of Factories, Kakinada-I Circle, at the time of inspection of factory on 28.01.2012 on demand and the accused having acted in contravention of the provisions of the said Act and Rules mentioned above, they are thereby liable for punishment under Section 92 of the Act and the Inspector of Factories, Kakinada-I Circle has accorded sanction to prosecute the accused persons

vide proceedings No.A/293/2012, dt.21.04.2012 and there from maintained complaint to give a direction to accused to comply with the orders under Section 102 of the Act, if convicted. The witnesses cited for the prosecution by the Deputy Chief Inspector of Factories and Assistant Inspector of Factories who claimed visited on 28.01.2012 for the said violation. It is therefrom on the office note, the learned magistrate supra endorsed as follows:

“Perused the record. This case is taken on file under Section 32 32(a) read with Section 41 and 61E of A.P. Factories Act against A1 and A2. Hence to issue summons to them to call on 23.01.2015.”

Now the same is impugned in this criminal petition by A1 to quash the taken cognizance and summoning.

3. The grounds urged for quashing the proceedings supra are that the A1 is the managing director and occupier of the entity i.e., Nava Bharat Ventures Limited (Sugar Division), Samarlakota Village and Mandalam, East Godavari District, which is engaged in the business of manufacturing and sale of sugar and he is not looking after the day-to-day affairs of the factory and the manager who is A2, is responsible and incharge of the day-to-day affairs.

4. Despite the above facts and circumstances, the respondent-Assistant Inspector of Factories filed the complaint for the offences supra that was taken cognizance by the learned magistrate without basis and the proceedings are liable to be quashed, thereby in saying respondent originally filed complaint before lower Court on 21.04.2012 that was returned with office objection that ‘provision of law should be noted correctly and respondent has not taken any steps to comply the objections for more than 2½ years and it is only on 25.11.2014 with a gap of 2 ½ years, objections were complied with, without giving reasons for delay and on resubmission stated as ‘all objections complied and hence may be taken on file’ and lower Court also without considering delay in resubmitting the complaint mechanically taken cognizance and ordered to issue summons by proceedings impugned dt.23.01.2015, and as the same is contrary to law since the alleged offence said to have been happened on 26.01.2012 and the complaint filed was on

21.04.2012 that was returned on 04.05.2012 and resubmitted on 25.11.2014, which was taken cognizance on 25.01.2015, shows the same is untenable and that Section 92 of the Factories Act deals with the punishment under which the present complaint is filed states that for the contravention of any of the provisions of the Factories Act, the occupier and manager shall each be guilty of an offence and punishable with imprisonment for a term which may be extended to two years or with fine which may be extended to one lakh rupees or with both and even imprisonment not mandatory from its reading and thereby the limitation under Section 468 and 409 Cr.P.C. is only six months and from the delay in taken cognizance, the complaint is liable to be quashed.

5. It is also one of the grounds for quash that manager has given explanation on 10.03.2012 in reply to the show cause notice issued by the respondent on 15.02.2012 showing there is no failure on the part of the entity in providing the safety measures and accident occurred because of the worker did not wear helmet even though same is provided to the worker and respondent has not at all informed or directed the petitioners to provide D-rings to the trolleys at any point of time during their inspection prior to the accident on 26.01.2012 and the respondents failed to consider the explanation of the petitioner to the show-cause notice issued by the respondent on 15.02.2012 or inspect without which the proceedings are devoid of merits and liable to be quashed. It is the further submission that the petitioner's entity is OHSAS 18001 certified company and it is mandatory to provide necessary safety equipment to all the workers working in the factory and accordingly foot ladders and helmets were provided to the workers and continuously monitoring about the safety, health and welfare measures and on the date of accident also, deceased-worker was also provided with helmet and foot ladder, but the said worker kept her helmet aside against to the repeated precautions and sign boards displayed in the factory premises and unfortunately met with an accident and breathed the last. The factory is of about 119 years old factory and never such accidents were happened but however on the humanitarian ground, the factory has

paid compensation of Rs.5,00,000/- towards exgracia and Rs.50,000/- towards medical expenses, though they are not entitled for the accident but occurred due to the negligent act of the deceased-worker and the entity has also taken all the steps to avoid such type of accidents. In addition, the factory when brought to the notice of the respondents on 10.03.2012 by detailed reply, the same was not considered and filed complaint against the petitioner and A2. petitioner/A1 is aged about 60 years, suffering from medical ailments and requires constant medical checkups and his appearance before the Court on each date is difficult and hence his presence may be dispensed with in the day-to-day hearings and that the complaint was filed alleging two offences, one is violation of Section 32(a) read with section 41 and Rule 61E of the Factories Act, but the said section deals with providing floors, stairs and means of access to all the workers and such provision already made in the factory was not in dispute and the deceased worker has not worked neither near to any of the machinery nor any machine building, but it was a open place of vehicle unloading yard and not related to any production activity and therefore 1st charge is without basis. Besides Section 112 and rule 103 read with Section 2(1) read with Rule 102A of the Factories Act deals with maintenance of Muster Roll and the registers are under the control of the manager and any non production at the time of alleged inspection is not a ground to prosecute the Managing Director for not a person Incharge and responsible. Moreover such offence is very general and does not apply to the facts on hand and the manager of the factory has brought to the notice of the respondents vide letter dt.10.03.2012 that at the time of inspection of the authorities, there was a agitation took lace by the leaders of Mala Mahanadu and there was no occasion to the manager to produce the Muster Roll and thereby it cannot be said that occupier o the factory has violated the provisions of Section 112 of the Factories Act and committed the offences of not producing the records and the same were produced before the respondents afterwards and there by alleged offence is not made out much less to sustain and it is the duty of the manager as per the Act and occupier cannot be held liable for failure of manager as also held by Bombay High Court in **State of Maharastra v. Sampatlal Mensukh**

Gothra^[1] and thereby sought for quashing the proceedings so far as petitioner/A1 is concerned.

6. Counsel for the quash petitioner reiterated the same by drawing attention of the Court to the expression of Bombay High Court in **Sampatlal's** case(1 supra) wherein the case is under Sections 62, 83 and 92 of the obligation to maintain registers i.e., second part of the offences herein and not for the 1st part of the offences, wherein it is held that obligation to maintain registers is imposed on manager and not on occupier of factory and thereby from a reading of Section s62, 83 and 92 of the Act, it can be said Occupier cannot be held liable for failure of Manager to comply the requirements of Sections 62, 83 and 92 of the Act and further in **Sampatlal's** case(1 supra), it referred to the decision of High Court of Madhya Pradesh in **State Government, Madhya Pradesh v. Maganbhai Dasaibhai**^[2] wherein it was held that Occupier will be liable for contravention, if any, of the provisions of the Act or Rules if the responsibility for observing the provisions has not been imposed on some other person and if specific duty is allotted on a particular person, the responsibility for the breach will be on him and the obligation to maintain the registers imposed on the Manager and not on a Occupier, thereby the Occupier cannot be held liable for the failure of the Manager to comply with the requirements of Section 62 read with 83 of the Factories Act. Under Section 7 of Act, Occupier before commencement of the Factory gives notice to the Chief Inspector of Factories before he begins to occupy or use the premises as a factory, including the name of the Manager o of the factory and the documents show such intimation is made of the Manager particulars and that was not considered by the lower Court in fixing liability on the Occupier despite delegated to the manager the power.

7. The other decision placed reliance is under Section 7A and 92 of the Factories Act which is a decision of the Karnataka High court in (**Major**) **D.Kumarswamy and another v. State of Karnataka**^[3] in which case an employee through a contractor operate machine unauthorizedly got injuries

and succumbed to the said injuries out of sheer negligence in sustaining injuries and therefore the petitioners therein were held not liable for violation of either provisions of the Act or the Rules in quashing the prosecution which was mainly on the ground of the worker was not engaged either for operating the machinery or for using the same but he was engaged through a contractor for masonry work, however in that he unauthorizedly used the machinery and sustained injuries out of his sheer negligence and thereby there was no violation of provisions of the Act in saying prosecution is misconceived.

8. Whereas it is the contention of the learned Public Prosecutor representing the complainant-respondent on behalf of the authorities that as per the decision of the A.P. High Court in ***A.P. State electricity Employees Union v. Commissioner of Labour***^[4] in a writ petition No.20642 of 1994 dt.21.07.1995 the electricity board is an industry and workers employed by contractor are third party agents and are not within the definition of workers under Section 2(5) of the Industrial Disputes Act, and they cannot even claim as worker under Section 2(1) of the Factories Act. It is observed that under Section 2(1) of the Factories Act, worker has been defined so as to include employees working under a contractor only with a sole and limited object of providing safety and conditions of work within the factory premises vide paras 6 and 7 of the judgment and in other respects held they fall outside the definition of workmen.

9. No doubt, from the expressions so far as to the limited object of providing safety and conditions of work within the factory premises concerned, they are within the meaning of worker, even working under a contractor though in other respects they are outside the purview of worker under the Factories Act.

10. The other submissions by the learned Public Prosecutor regarding limitation aspect is that as held by our own High Court in ***R.C.Mall A.P. Paper Mills Ltd., Rajamundry and another v. B.Sivaram Murthy***^[5] that where complaint originally filed within time even when returned with

objection without fixing time limit in re-presentation, if it was re-presented after complying with the said objections, the complaint cannot be held barred by limitation. It is the submission in support of the complaint averments that said Smt Roy Lava, who reported duty on A-shift at 4.00 a.m. on 26.01.2012 leave about other unskilled workers with her in attending the job of loading cane into trallies from the lorries in line No.2 in the cane unloading yard and as part of it, at about 8.45 a.m. they started loading empty trallies with cane from Lorry Nos.AP 05 GA 4394 and in that course at about 9.45 a.m. when she was getting down from one of the trallies after completion of loading with cane up to a height of about 6 feet, with support of its thin side plate of 44 mm thickness, her hands slipped and got unbalanced and fallen to ground and her back portion of her head hit with the hard surface of the ground and sustained severe head injury, as she did not wore the helmet provided by the factory authorities and succumbed to the injuries.

11. Heard and perused the material available on record,

12. It is not a case that the said Smt Rayi Lova is a worker under a contractor and outside the meaning of Worker. Thereby, in fact as per the A.P. High Court's expression in **APSEB Employees Union** (4 supra) even said worker employed by a contractor for the limited object of providing safety and conditions of work within the factory premises concerned is within the meaning of worker under Section 2(1) of the Factories Act.

13. The accidental fall was from the averments of complaint for not taking the precautions particularly in not providing helmet and the other precautions viz., non provision of ladders and D-rings for getting down the workers safely from the trally after completion of unloading cane from trallies in the cane yard and also failed to provide ladders or suitable means to get down from the top of the cane lorry after loading of the cane up to a height of 6 feet besides the helmet not provided or insisted to ware, it is not mere providing of helmet but also the requirement to see they war the helmet insisting the persons responsible on duty at the factory concerned. So far as the Occupier/Managing Director of the entity is concerned providing is mandatory

of the amenities and so far as the Manager is concerned, who is the person responsible for the day-to-day affairs on practical side to insist for its wearing. Here it is the case of the quash petitioner/A1 that A2 is the Manager responsible and he is the Managing Director and within the meaning of Occupier under the Act not responsible for having provided the helmet for its non wearing.

14. In fact from the two expressions placed reliance of the Maharashtra and Karnataka High Courts supra by the quash petitioner, the first one in ***Sampathlal***'s case(1 supra) of Maharashtra High Court in saying in relation to the maintenance of register under the Factories Act and the power if delegated to the manager as held by the Maharashtra in 1954 and indicated to the authorities of the Factories Act, the Manager be responsible for its maintenance. In relation to the safety measures, the facts of the case on hand and the case of High Court supra are distinct, since in the said case, the persons engaged were by a contractor for masonry works in the factory, operated the factory machine unauthorizedly for which the factory authorities either the Occupier or Manager are not liable to be prosecuted for no negligence on their part. But here the facts on hand are that it is in fact a fact finding required as to helmets are provided if so whether the 1st petitioner within the meaning of Occupier or the Managing Director of the entity though insisted for wearing by worker, the responsibility of the Manager/A2 and in the quash petition, the averments for saying helmets are provided even the complaint says not provided, there is no material placed, even any material placed by accused in the quash petition that can also be taken into consideration to say not responsible or to quash the proceedings therefrom. So far as the allegation in the quash petition para 3(l) concerned, it is averred that the deceased-worker has not worked neither nearby any of the machinery nor at any machine building but in open place i.e., vehicle unloading yard and not relating to production activity, which is not relating to production activity but the premises is within the factory area or not as defined under Section 2(m) in the Factories Act and once it is within the factory premises within the meaning of factory and the definition of Occupier as per

Section 2(h) is clear of the person who has ultimate control over the affairs of the factory, it is highly improbable to quash the proceedings for such contentions, but for left open to face the trial in the trial Court to decide on factual aspects. But, however, from considering the age of the petitioner by giving liberty to file application before the trial Court to dispense with the personal appearance either on special vakalat under Section 205 Cr.P.C. or being represented through Manager under Rule 37 of the Criminal Rules of practice including for examination under Section 251 Cr.P.C. in the summons case and also under Section 313 Cr.P.C. but for any personal hearing is required subject to that condition to appear as and when directed, for the learned Magistrate to hear and permit.

15. Accordingly, this Criminal Petition is disposed of. Consequently, miscellaneous petitions pending if any shall stand closed.

Dr. B.SIVA SANKARA RAO, J

29th January, 2016.

Note: L.R. copy to be marked.

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[1] 1992(1) Labour Law General 107

[2] 1954(1) Labour Law General 480

[3] 2014(140) FLR 670

[4] 1995 LIC 2416 = 1996 (1) LLJ 939

[5] 2004(1) ALD (Cri) 820