

PATNA HIGH COURT

Ram Chandra Prasad

Vs

State of Bihar

Misc. Judicial Case No. 404 of 1955

(Ramaswami, C.J. and Raj Kishore Prasad, J.)

23.08.1956

JUDGMENT

Raj Kishore Prasad, J.

1. This rule has been issued by the High Court, on an application, under Article 226 of the Constitution, presented by the petitioners. They have asked for a writ in the nature of certiorari to call up and quash the proceedings started by opposite party No. 3, under Section 92 of the Factories Act, 1948 (Act 63 of 1948), hereinafter referred to as "the Act". They have further prayed for a writ of mandamus against opposite party No. 2, who is the Inspector of Factories, Patna Circle, directing him not to demand any license, or license fee, under the Act, from the petitioners, in respect of their establishment. Cause has been shown against the rule by the Government Advocate on behalf of the opposite party. The Inspector of Factories, Patna Circle, opposite party No. 2, has also sent his replies on the points raised by the petitioners.

2. The petitioners' case is that they own an establishment, of Ghanies (manufacture of oil), and Chakkis (flour milling), in Mahalla Morchapur, police station Chauk, Patna City, in which only two employees work; and, as such it is not a 'factory' within the meaning of the Act, and, therefore, the provisions of the Act do not apply to it.

3. Opposite party No. 2, Inspector of Factories, inspected the petitioners' establishment on the 10th April, 1955, and sent to them a copy of his report dated the 19th April, 1955, in which he mentioned that, in course of his inspection, he found on perusal of their license that it had not been renewed since 1951, which was a contravention of R. 7 of the Bihar Factories Rules, 1950, and, therefore, they should apply for renewal of their license within five days of the receipt of this letter, after depositing Rs. 62-8-0 (being the renewal fee plus default for the years 1951 to 1955).

It was further mentioned in the letter that this inspection report was being sent to the petitioners without prejudice to any legal action that may be taken against them as occupiers of the establishment.

4. The above direction of opposite party No. 2 not having been complied with, the petitioners

were summoned by the Subdivisional Officer, Patna City, opposite party No. 3, to take their trial under Section 92 of the Act, for contravention of the provisions of R. 7 of the Bihar Factories Rules, 1950, framed under the Act. The petitioners, thereafter, moved this Court, on the 19th July, 1955, under Article 226 of the Constitution, and obtained the rule under consideration.

5. During the course of the hearing of the case, the petitioners filed a supplementary affidavit to the effect that petitioner No. 2, Ganga Prasad, was the nephew of petitioner No. 1, and both the petitioners belonged to, and lived in, the same family. They also attacked Section 85 (1) of the Act, and, the notification dated the 11th June, 1954, issued under it, as unconstitutional, ultra vires and invalid. They have also filed a copy of their reply, which they sent to the Inspector of Factories, in reply to his inspection report. This reply is annexure 'A' to the supplementary affidavit.

6. The main contention of Mr. Basudeo Prasad, appearing in support of the rule, is that the establishment, owned by the petitioners, is not a 'factory' within the meaning of the Act. He has relied, in this connection, on the definition of 'factory' as given in the Act.

7. 'Factory' has been defined, in S. 2, clause (m) of the 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 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 (XXXV of 1952), or a railway running shed."

8. From the above definition, it will appear that a factory has been defined as any premises, including the precincts thereof, wherein 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 or without the aid of 'power'. 'Manufacturing process', and 'power' have also been defined in Sections 2 (k) and 2 (g) of the Act respectively. In annexure 'A' the petitioners admitted that their establishment has got six oil Ghanies, and one wheat grinding machine, which are run by a 10 horse power electric motor. Therefore, the second condition envisaged in Section 2 (m) of the Act is satisfied, because the petitioners are carrying on a manufacturing process with the aid of power. The first condition, however, contemplated by Section 2 (m) of the Act, is that to constitute any premises, including the precincts thereof, a factory, ten or more workers must be working thereon. According to the petitioners, only two workers, namely, the petitioners alone are working. Prima facie, therefore, the establishment owned by the petitioners would not come within the definition of 'factory' as given in Section 2 (m) of the Act.

9. But, notwithstanding this definition, power is given under Section 85 (1) of the Act to the State Government, by notification in the official Gazette, to declare that all or any of the provisions of

this Act shall apply to any place wherein a manufacturing process is carried on, with or without the aid of power, or is so ordinarily carried on, notwithstanding that the number of persons employed therein is less than ten, if working with the aid of power.

10. It is advisable to reproduce, at this very stage, Section 85 of the Act. It is in these terms :

"85. (1) The State Government may, by notification in the official Gazette, declare that all or any of the provisions of this Act shall apply to any place wherein a manufacturing process is carried on with or without aid of power or is so ordinarily carried on, notwithstanding that -

(i) the number of persons employed therein is less than ten, if working with the aid of power and less than twenty if working without the aid of power, or

(ii) the persons working therein are not employed by the owner thereof but are working with the permission of, or under agreement with, such owner :

Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

(2) After a place is so declared it shall be deemed to be a factory for the purposes of this Act, and the owner shall be deemed to be the occupier, and any person working therein, a worker.

Explanation - For the purposes of this section, 'owner' shall include a lessee or mortgagee with possession of the premises."

11. Reading Section 2 (m) along with Section 85 of the Act, it is clear that a place wherein a manufacturing process is carried on with the aid of power by less than ten workers is not a factory within the meaning of Section 2 (m); but if there is a notification by the State Government under Section 85 (1) of the Act, then such a place, under Section 85 (2) of the Act, will be deemed to be a factory, for the purposes of the Act, provided the manufacturing process is not being carried on by the owner only with the aid of his family. Thus, we find that in Section 85 (2), an extended meaning has been given to the word 'factory', as defined in Section 2 (m). In S. 85, sub-section (2), there is an artificial definition of the word 'factory', and of the expression 'occupier' and 'worker'. It is evident, therefore, that there may be a factory, if it satisfies the requirements of Section 2 (m), and there may also be a factory provided the conditions of Section 85 (1) are satisfied, in which case there would be a 'factory' as contemplated by Section 85 (2) of the Act. All that Section 85 (2) says is that if the conditions mentioned in Section 85 (1) are fulfilled, then in that event the place mentioned in the notification under Section 85 (1) would be deemed to be a factory for the purposes of the Act. The above view is supported also by a Division Bench decision of the Bombay High Court in *The State v. Alisaheb Kashim Tamboli*¹, relied upon by Mr. Basudeo Prasad.

12. In the present case, in pursuance of Section 85 (1) of the Act, a notification under Section 85 (1) of the Act was issued by the Government of Bihar on the 11th June, 1954. This notification is in the following terms.

"Government of Bihar, Labour Department.

NOTIFICATION

Ranchi, the 11th June, 1954.

No. F1-1094/54LT-272. In exercise of the powers conferred by sub-section (1) of Section 85 of the Factories Act. 1948, (LXIII of 1948), and in supersession of the notification No. IV/F1-1054/51L-38, dated the 28th March, 1951, the Governor of Bihar is pleased to declare -

(a) That all the provisions of the said Act except those of Chapters III, V, VI, VII and VIII and R. 3 of the Bihar Factories Rules, 1950, shall apply to any place in the State of Bihar wherein any manufacturing process specified in the Schedule hereto annexed is carried on, and

(b) that the provisions of Chapters I, II and IV and of Sections 11 and 16 of Chapter III and Sections 42 and 50 of Chapter V of the said Act shall apply to any place in the State of Bihar wherein the manufacturing process of printing or composing is carried on, with or without the aid of power, or is so ordinarily carried on notwithstanding that

(i) the number of persons employed therein is less than ten if working with the aid of power, and less than twenty, if working without the aid of power, or

(ii) the persons working therein are not employed by owner thereof but are working with the permission of, or under agreement with, such owner;

Provided that the manufacturing process is not being carried on by the owner with the aid of his family.

SCHEDULE

1. Sawing of timber
2. Manufacture of ice
3. Manufacture of oil
4. Flour milling including grinding or breaking of any other cereal or material
5. Rice milling
6. Dal milling
7. Manufacture or repairs of machinery or machine parts or manufacture of any other metal product including metal founding
8. Repairs and maintenance of automobiles
9. Generation of electricity
10. Manufacture of tea
11. Spinning, weaving, knitting or finishing of any textile including hosiery
12. Jute bailing and pressing.

By order of the Governor of Bihar,

Sd. B. P. Singh,

Secretary to Government."

13. By virtue of this notification under Section 85 (1) of the Act, therefore, there is no doubt that items 3 and 4 of the Schedule annexed to this notification, cover the establishment of the petitioners also. By reason of the deeming provisions of Section 85 (2), the notification, under Section 85 (1), applying all the provisions of the Act, except those mentioned in the notification, to any place in the State of Bihar, wherein any manufacturing process, specified in the Schedule annexed to the notification, is carried on, as a necessary consequence, therefore, has the effect of extending partly the operation, of the Act to all those places wherein the specified manufacturing process is carried on. Section 85 (2) clearly provides that after a place is so declared under Section 85 (1) by the notification of the State Government, that place shall be deemed to be a 'factory' for the purposes of this Act. In my opinion, therefore, the establishment of the petitioners would be deemed to be a 'factory', under its extended meaning as given in Section 85 (2) of the Act, by virtue of the deeming provisions in Section 85 (2) of the Act.

14. Mr. Basudeo Prasad, however, relies on the proviso to sub-section (1), of Section 85 of the Act, and, also mentioned in the notification, and contends that as the manufacturing process in his establishment is being carried on only by two persons, namely, the petitioners, who are uncle and nephew belonging to the same family, the proviso would apply to them, and therefore, the petitioners' establishment will not be deemed to be a factory even under Section 82 (2) of the Act, in spite of the notification under Section 85 (1), as provided therein.

15. The proviso provides that if the manufacturing process is carried on 'by the owner only with the aid of his family', then in spite of the notification under Section 85, sub-section (1) of the Act, such a place will not be deemed to be a factory.

16. In the present case, nowhere in their affidavit the petitioners have mentioned that they are uncle and nephew, and that both are members of a joint family, and live in the same family. In the supplementary affidavit, no doubt, it has been mentioned that petitioner No. 1 is the uncle and petitioner No. 2 is the nephew, and both belong to and live in the same family, but it would appear from Annexure 'A' that the petitioners mentioned therein that they were brothers. This question as to whether the petitioners are brothers or uncle and nephew, and whether they are joint and members of the same family are purely questions of fact, which cannot be determined in the present proceeding; and as the petitioners have not alleged the facts necessary to bring them within the proviso to sub-section (1) of Section 85 of the Act, they cannot seek protection thereunder.

17. It will, further, appear that the petitioners in Annexure 'A' have admitted that they stated the establishment in 1950, when they had employed several labourers and, therefore, they obtained the license in that year under the Act. But they say that all the labourers have now been retrenched, and as they do not now employ any labourer, they did not consider it necessary to take out a license under the Act, because their establishment did not come under the purview of the Act. These are also questions of fact, which are not admitted by the opposite party, and, therefore, such disputed questions of fact cannot be decided on the present writ application.

18. It is well established that the High Court in a writ petition, under Article 226 of the Constitution, cannot constitute itself into a Court of appeal from the authority against which appeal is sought. The High Court will not take upon itself the determination of questions of fact

which must depend upon evidence. The question whether the proviso to sub-section (1) of Section 85 of the Act applies, or not, to a particular person or persons, or to a particular establishment owned by such person or persons, is a mixed question of fact and law both, and it is a matter of enquiry by the appropriate Tribunal created by the Statute, upon evidence to be adduced, pro and con, specially when that fact is denied on behalf of the other party. In these circumstances, the petitioners cannot take the aid of the proviso to sub-section (1) of Section 85 of the Act, and, therefore, they are not protected, or exempted, thereunder.

19. Section 85 (1) of the Act has been attacked under Article 14 of the Constitution. Mr. Basudeo Prasad invoked Article 14 in two ways, namely, (1) that the Government is granted an arbitrary and uncontrolled discretion to differentiate between several places, in that, the Government has been granted a naked and arbitrary power to pick and choose between several places, wherein a manufacturing process may be carried on with or without the aid of power; and, (2) Section 85 (1) gives an unfettered discretion to the State Government to issue or not to issue a notification with respect to a place wherein a manufacturing process is carried on with or without the aid of power.

20. The language of Section 85 (1) cannot be said to be *ex facie* discriminatory. There is no intentional and purposeful discrimination on the face of the Statute. No doubt, where the Statute is not *ex facie* discriminatory, but it is applied by the Government in a grossly discriminatory manner, the petitioners affected would be entitled to invoke the guarantee of equal protection of laws under Article 14, for, it is well established that though the Statute may be fair and impartial on its face, yet if it is applied and administered by the authority "with an evil eye and unequal hand", there is a violation of the guarantee of equal protection given under Article 14. In the present case, Mr. Basudeo Prasad was unable to show that there has been actual discrimination by the State Government in administering the provisions of Section 85 (1). On the contrary, from the notification itself, it appears that all places, wherein a manufacturing process of the nature specified in the Schedule annexed to the notification is carried on with or without the aid of power, provided that the manufacturing process is not being carried on by the owner only with the aid of his family had been notified under Section 85 (1) as the places to which the provisions of the Act mentioned in the notification had been applied. Therefore, it is manifest that there was *ex facie* no intentional discrimination made under the section nor, any discrimination was actually made in practice.

21. I now proceed to consider the next argument put forward on behalf of the petitioners, namely, that Section 85 (1) of the Act is invalid, because it is a case of excessive delegation of legislative power to the State Government. Section 85, sub-section (1) has given power to the State Government to declare that all or any of the provisions of the Act shall apply to any place wherein a manufacturing process is carried on with or without the aid of power. It was, therefore, argued that the State Government was authorized to apply some provisions of the Act to one place, and other provisions of the Act to another place, and not necessarily all or any of the provisions of this Act to any place mentioned in the notification, and therefore, there was a complete abdication of legislative power because, the State Government has been given the power to pick out the section of the Act and apply it to a place and such a power is to affect modification of the Act itself.

22. On this point, there is an elaborate discussion of the Supreme Court in the celebrated case, *In re : Article 143, Constitution of India and Delhi Laws Act (1912) etc* : (AIR 1951 SC 332), and

in two subsequent cases -- *Rajnarain Singh v. Chairman, Patna Administration Committee*², and *Edward Mills Co. Ltd., Beawar v. State of Ajmer*³, In *Rajnarain Singh's* case (Supra), the unanimous Judgment of the Court was delivered by Bose, J. It was laid down in this case that as a part of an Act can be extended by an executive authority, it follows that a section or sections also can be picked out and applied; also for the same reason that the whole or a part of an Act can be modified, it follows that a section also can be modified; but when a section of an Act is selected for application, whether it is modified or not, it must be done so as not to affect any change of policy, or any essential change in the Act as a whole.

23. Now, what exactly does Section 85 (1) of the Act authorise. It only empowers the State Government to pick any section it chooses out of the Act and apply it to any place wherein a manufacturing process of the type specified is carried on, with or without the aid of the power, by a notification in the official Gazette. In the present case the State Government has applied all the provisions of the Act, except some which are mentioned in the notification, to all the places mentioned in the notification, whereon the specified manufacturing process is carried on. These sections or provision of the Act which have been selected and applied to all the places have been selected for an application without any modification whatsoever. These provisions of the Act which have been selected and applied under Section 85 (1) of the Act have been applied not to affect any change of policy or any essential change in the Act regarded as a whole, but to carry out the objects of the Act. To alter the essential character of an Act, or to change any material particulars is to legislate, and, the power to legislate, all authorities are agreed, cannot be delegated by a Legislature which is not unfettered. But, according to the majority view in the Delhi Laws Act case (Supra), an executive authority can be authorized to modify either existing or future laws, but not in any essential feature. In the present case, however, nothing of the sort has been done. All the provisions of the Act, except some, have been picked out and applied to all the places mentioned in the notification under Section 85 (1). The legislative policy is apparent on the, face of the Act. What it aims at is to regulate labour in factories with a view to obviate the chance of exploitation of labour. The Legislature undoubtedly intended to apply this Act not to all factories, but to those factories only which were worked by persons as workers. Conditions of labour vary under different circumstances and from State to State. It is to carry out effectively the purpose of the Act that power has been given to the State Government to decide with reference to local conditions, whether it is desirable that all, or some of the provisions of the Act should be applied to a particular place wherein a particular trade or industry is carried on which is not already included in Section 2 (m) of the Act.

Section 85 (1), therefore, is neither illegal nor ultra vires provided that it is construed to mean that the State Government cannot pick out the sections or pick out the places so as to effect any essential change in the Act or alter its policy.

24. The vires of the notification, issued under Section 85 (1) of the Act, was also challenged. The argument that the notification is ultra vires and discriminatory, because it does not specify the particular premises of the persons concerned, or the particular persons, whose premises are notified, and gives a naked and arbitrary power to the State Government to select and apply the notification to any place, or person it chooses, must also be rejected for the same reasons for which Section 85 (1) has been held to be valid. In my opinion, as to notification does not travel beyond the authority which Section 85 (1) of the Act confers on the State Government, the notification must also be held to be intra vires. What the notification does is to pick out the material sections of the Act, without any modification or alteration in any respect, and apply

them all to the places mentioned in the notification. Such a procedure does not amount either to a modification of the Act or effecting any essential change in the Act or altering its policy. In my opinion, therefore, the notification dated the 11th June, 1954, issued under Section 85 (1) of the Act, which gives effect to the policy of the Act, is perfectly valid.

25. Mr. Basudeo Prasad placed a strong reliance on *In re : Arumugham Pillai*⁴, In support of his contention that the notification issued under Section 85 (1) of the Act, practically renders nugatory the definition of 'factory' under Section 2 (m) of the Act, and, as such on this ground also tile notification is illegal and ultra vires the powers conferred under Section 85 (1). In this Madras case, the notification, which had been issued was in the following terms :-

"In exercise of the powers conferred by Section 85 (1) of the Factories Act, 1948 (Central Act 63 of 1948), His Excellency the Governor of Madras declares that all the provisions of the said Act shall apply to any place wherein manufacturing process is carried on without the aid of power or is so ordinarily carried on and ten or more but less than 20 persons are employed."

26. In considering the above notification, the Madras High Court held that this notification was illegal, and ultra vires, and beyond the powers conferred under Section 85, Factories Act; the State Government would have been within its powers if they notified particular named places as factories; but instead of doing so, this notification makes "every place from Ganjam to Rameshwaram generally as a factory provided there are more than 10 and less than 20 people employed and engaged in manufacturing process without the aid of power. This practically renders nugatory the definition of a factory in Section 2 (m) of the Act."

27. In my opinion, this decision does not apply to the present case. In the Madras case, the nature of the manufacturing process was not specified, but it was left vague, and very general. In the present case, however, in the schedule annexed to the notification, the several kinds of manufacturing process have been particularized and specially mentioned therein. In such circumstances, it cannot be said that the definition of a factory in Section 2 (m) in the Act has been rendered nugatory; on the ether hand, it has been extended, and, places which did not come under Section 2 (m) have also been included by virtue of the notification under Section 85 (1). In my opinion, the special power conferred on the State Government under Section 85 (1) of the Act has been exercised in the proper manner in accordance with the policy of the Act in order to achieve its object. This contention also must, therefore, be overruled.

28. For the reasons given above, I hold that the notification of the State Government dated the 11th June, 1954, made by the authority conferred upon it under Section 85 (1) of the Act is legally valid, and, there is no case made out by the petitioner for the issue of a writ under Article 226 of the Constitution against the opposite party.

29. In the result, the application fails, the rule is discharged, and the application is dismissed with costs; hearing fee Rs. 100

Ramaswami, C.J.

30. I agree.

Application dismissed.

Cases Referred.

¹ AIR 1955 Bom 209

² AIR 1954 SC 569

³ AIR 1955 SC 25

⁴ AIR 1953 Mad 154