RAJASTHAN HIGH COURT

Col. Sardar C.S. Angre

Vs.

State and another

Criminal Ref. No. 239 of 1963
(L.N. Chhangani, J.)

02.09.1964

ORDER

L.N. Chhangani, J

1. This is a reference by the Sessions Judge, Jodhpur, and arises out of a complaint filed on 7th May, 1963 by B.L. Agarwal, Inspector of Factories and Boiler against Shri I. S. Gill and Col. Sardar C.S. Angre, Manager and Proprietor respectively of the Jodhpur Cold Storage, Sojatigate, Jodhpur, in the Court of City Magistrate, Jodhpur.

2. The material allegations on which the prosecution is founded are contained in para (3) of the complaint and may be set forth as follows: That on 11-4-1963 the complainant inspected; "the premises of the Jodhpur Cold Storage and found that since 27th of August, 1962, the said cold storage had been employing 13 workers for, storing potatoes in the cold storage hall maintained with a 35 H.P. Motor Engine and for removing them from the cold storage hall, drying them grading them and refilling them in the bags. The expression "grading" has been used as the English equivalent of the Hindi word which implies sorting out of potatoes. On the basis of the above mentioned; activities carried on at the cold storage premises. It is claimed that the cold storage constitutes a factory within the meaning of Section 2(m) of the Factories Act. It is further averred that the accused did not obtain, a registration as required by Section 6 of the Act and Rule 4 of the rules, framed there under. It is further stated that the accused petitioners were guilty and punishable; under Section 92 read with Sections 6, 7 and 61, of the Factories Act.

3. The City Magistrate registered the case against the accused petitioners and issued processes for their attendance. Aggrieved by the order of the Magistrate registering a case and issuing processes the petitioner Col. Sardar C.S. Angre filed a revision application in the Court of Sessions Judge, Jodhpur. The petitioners case before the Sessions Judge was that even on the facts as stated in the complaint the business premises of the accused-petitioner did not fall within the meaning of the word "factory" and, consequently, no charge against him was sustainable. The petitioner also pleaded that the complaint was barred in view of Section 106 of the Factories Act as having been filed after the expiry of three months of the date of the commission of the offence. Both that contentions of the petitioner prevailed with the Sessions Judge and he came to the conclusion that no case was made out against the petitioner. He has, therefore, made the present reference for quashing the proceedings.

4. The reference has been opposed by the State. This case came up before a learned singly Judge of this Court on 25th of February, 1964, and the learned counsel for both the parties wanted, some time for putting in affidavits showing precisely the process, that is employed for preserving the potatoes in the cold storage. H.L. Agarwal the complainant and Abdul Hafiz Khan, who was in charge of the said cold storage on behalf of the petitioner, filed affidavits. On 21st May, 1964, the learned Judge allowed an opportunity to the parties to cross-examine the deponents of both the affidavits. It was at this stage that the case came before me. On 13th August, 1964, the cross-examination of the persons who filed the affidavits, was completed by me.

5. Now, so far as the factual position is concerned, there is, and can be, no controversy whatsoever. The petitioner has approached this Court at an initial stage of the case. His case is that, even on the facts as stated in the complaint no case is made out. Naturally, he cannot counter the allegations of facts on which the prosecution relies. It may also be conceded that it is open to the prosecution to suggest further clarification, and amplification of the facts, provided they are not altogether foreign, to the basic statements made in the complaint. Now, no doubt the affidavits filed by the parties do appear to raise a controversy. The complainant alleges (1) "That as soon as the bags of potatoes are received from countryside, they are opened in the open, field and then sorting of the potatoes is done keeping in view the quality and size. Then the potatoes are packed in the bags and then these bags are loaded in the cold storage room over the racks where the particular temperature is maintained with the help of compressor.

(2) That when there is a demand, the required number of bags are removed from the cold storage in the night. These bags are opened in the open field and again the sorting is done, keeping in view the quality and size. These potatoes are again packed and the bags are despatched for sale."

6. The petitioner, however, disputes these allegations. According to him, potatoes are not opened or sorted out at any time in the cold, storage premises before or after the bags are loaded on to the racks for preservation. According to him, it was only on one occasion that due to breakdown of the cold storage machinery the temperature could not be maintained and consequently the deterioration set in the potatoes. In order to separate the deteriorated potatoes and throw them away and dispose of the usable potatoes that the sorting and refilling the potatoes in the bags had to be resorted to."

7. However, during the course of arguments, both the parties agreed that for the purposes of the reference, the following activities should be deemed to have been carried on in the cold storage :

1. That the potatoes when brought from countryside, for preservation, are emptied, sorted, packed again and put on racks.
2. That when required, potato bags are removed and emptied. Potatoes are sorted according to quality and size and refilled in the bags.
3. That a process of drying is also adopted to remove the moisture that may be collected on the potatoes during the process of refrigeration.

It may, however, be mentioned at this stage that the arguments turned upon the processes of grading, or sorting, drying and refilling after the potatoes had been removed from the cold storage racks for use.

8. The question that calls for determination is whether any of the activities carried on in the premises are sufficient to bring the premises within the meaning of "factory". Before proceeding further, it will be necessary to set forth the relevant provisions of law bearing on the controversy arising, between the parties.

9. The factory has been defined by Section 2(m) of the Factories Act, and reads as follows:

" 'factory' means any premises including the precinct 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;"

One of the requirements of the definition is that a manufacturing process should be carried on in the premises sought to be brought within the meaning of the word "factory". The manufacturing process has been defined in Section 2(k) of the said Act. Section 2(k)(i) reads as follows :

" 'Manufacturing process' means any process for :
(i) making, altering, repairing, ornamenting. finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or"

The other four clauses of Section 2(k) are not relevant for the purposes of this reference and need not be set out.

10. The point for determination is whether any of the processes referred to in Section 2(k)(i) is v carried on in the business premises of the accused petitioner. Before the Sessions Judge, the complainant's case was that the process carried on in the accused's premises fall within the expression "otherwise treating or adapting any article or substance with a view to its use sale., transport,, delivery or disposal." In this connection, the complainant relied upon the process of grading or sorting (by whatever name it may be called) and the process of drying.

11. Dealing with the argument of the complainant with regard to grading, the learned Sessions Judge observed as follows:

"It is argued that gradation of potatoes falls within the ambit of word

> 'adapting' as used in the definition of 'manufacturing process'. I do not think that this is a correct view. As said just above, gradation means only sorting, and in *Paterson v. Hunt,* [1] it has been held that mere sorting of rags will not amount to adapting for sale."

The learned Judge further observed that the observations made in (1999) 101 LT 571 were considered in *Ardeshir v. State of Bombay,* [2] The Sessions Judge also referred to the observations made at page 467 in *Grove v. Lloyds,. British Testing Co. Ltd.,* [3] in support of his conclusion. As regards the process of drying the Sessions Judge observed that such drying neither changes the potatoes nor makes them different from what they were. His conclusion was, that the potatoes were not given treating or adapting as understood in law. The Sessions Judge also held that the offence must have been committed by the accused sometime prior to 14th January, 1963 and the complaint having been, filed more than three months after the commission of the alleged offence, was barred under Section 106 of the Factories Act. Reliance was placed in this connection upon *State v. A.H. Bhiwandiwalla,* [4]

12. Correctness of the conclusion of the Sessions Judge has been challenged by the learned counsel appearing for the State. In the first instance, it was brought to my notice that the Sessions Judge at an initial stage of the judgment referred; to some observations made in *In re A.M. Chinnialu* [5] He invited my attention, particularly to the observations detailed below :

> "To sum up, to constitute a manufacture there must be a transformation. Mere labor bestowed on an article even if the labor is applied through machinery, will not make it a manufacture, unless, it has progressed so far that a transformation ensues, and the article becomes commercially known as another and different article from that as which it begins its existence."

It was urged that this notion of the manufacturing process was the main basis upon which, the Sessions Judge was led to the conclusion to, which he arrived. The learned counsel contended that the observations made in AIR 1957 Madras 755 are not justified on a proper interpretation of clause (k) of Section 2 of the Factories Act. He pointed out that AIR 1957 Madras 755 came up for comments before the Supreme Court in AIR 1962 SC 29 where the following observations were made :

> "The case reported as *In re : Chinniah,* [6] is of no help to the appellant as there nothing definite was held about the process carried out to be a manufacturing process or not and what was stated was in connection with the word 'manufacture' in general and not with reference to 'manufacturing process'."

It is true that the decision in AIR 1957 Madras 755 depended upon the dictionary meaning of "manufacture" and not upon the consideration of the definition of the manufacturing process. In the circumstances, the Madras case in AIR 1957 Mad, 755 cannot be of much assistance in determining the controversy raised in the present case. That however, does not conclude the matter. The Sessions Judge directly or indirectly seeks support for his conclusion from the observations of certain English cases and their approval by the Supreme Court in AIR 1962 SC 29.

13. This brings me to the consideration of, the case, AIR 1962 SC 29. In that case the question was whether the processes carried out in salt works in converting the sea water into salt came, within the manufacturing process, and the decision of the Supreme Court was that the sea water, a non-commercial article has been adapted to salt, a commercial article. In arriving at the decision, their Lordships referred to certain observations, made in *Sedgwick v. Watney, Combe, Reid and Co. Ltd.,* [7] *and also in* and in *Kaye v. Burrows* [8] to support their decision., Their Lordships also noticed several English and, Indian cases including AIR 1957 Madras 755 and 1909-101 LT 571 relied upon by the Sessions Judge and distinguished them. It will be significant to notice from, the judgment in AIR 1962 SC 29 that their Lordships did not formulate any precise test for determining the question whether a particular process can be a manufacturing process or not. Indeed the definition of the "manufacturing process" is worded in most wide and flexible terms and that it will be a futile attempt to prescribe, any test and thus to limit the flexibility. A search for an uniform test in English cases will also be in vain. These cases may, however, be noticed as they do afford guidance in determining the question of the present type by indicating the modes of approach.

14. The first case noticed by the Supreme, Court was 1931 A. C. 446. There the conclusion was summed up by these words :-

> "But the point is whether the treatment that the beer undergoes in these

> premises is a mere prelude to distribution. I am clearly of opinion that it is not. The finished article that is being prepared for distribution is bottled beer. It undergoes treatment, a treatment which changes its quality and makes it from an unbootable and unmarketable article into a potable and marketable one."

Emphasis clearly was on the treatment which introduces changes in the quality and made a unpotable and unmarketable into a potable and marketable one. The treatment obviously was to bring the process employed within the meaning, of the "manufacturing process".

15. In another case, 1931 A.C. 450 (466) the words, "adapting for sale" were commented upon as follows :

> "I think 'adapting for sale' points clearly to something being done to the article in question, which, in some way, makes it in itself a little, different from what it was before."

In this case, the test was whether the article after, employment of the manufacturing process was different from what it was before.

16. Another test that may be applied has been indicated in 1931 AC 477, where it was observed as follows :-

> "The test is just as it was in the bottled beer case. You must look at what is the finished' article to be turned out. If that finished article is only put into the condition of a finished article by the processes to which it has been subjected in the hereditament, then the processes will fall within the expression 'altering or adaptation for sale.' "

In this case the guiding principle kept in view was whether the finished article is put into the condition of finished article by the process, to which it had been subjected.

17. These three cases indicate the various considerations that should be kept in view in. determining the question whether a process can. be considered a manufacturing procesections (1909) LT 571 relied by the Sessions Judge was also noticed by the Supreme Court, and it was not held applicable to the facts of the case before the Supreme Court. Incidentally, it may be pointed out that the authority of the decision in

(1909) 101 LT 571 in so far as liable to be interpreted, as laying down the proposition of wider term appears to have been considerably shaken. In 1931, A.C 477 the learned Judge stated as follows :-

> "In that case it was held by Lord Alverstone and Lord' Darling that sorting rags was not an adaptation for sale, and consequently premises where rag sorting was carried on were not a factory. It is left doubtful by the report whether what was done there was at all the same complicated process as was done in the rag case here. If the operation was not the same then the case does not apply. If it was practically the same, then it is not binding on your Lordships, and I may say that it was wrongly decided."

18. In determining whether a particular process is a manufacturing process or not, reference may also be made to the following observations in, *G.R. Kulkarni v. The State,*:- [9]

> "It is obvious enough that the process of manufacture from one article to another changes and there are so many different processes in existence that to take the analogy of any single manufacturing process is likely to cause confusion. It is better therefore to apply one's mind to the exact process employed by which one article is shaped into another and to see whether the purposes of the Act are satisfied."

These observations have been in connection with the interpretation of the provisions of the Sales, Tax Act but they are of general nature and do certainly deserve notice even when interpreting the definition of "manufacturing process" in the Factories Act, specially as the definition is in flexible terms and requires to be interpreted.

19. Reference may also be made to the observations in *Union Cold Storage Co. Ltd. v. Bancroft,* [10] where the flexibility of the definition was brought out in the following terms :-

> "It may be difficult or impossible to identify; the essential quality of the operation described in Section 149 of the Factory and Workshop Act, 1901 as the adapting for sale of any article,' nor in my view is it necessary for the purposes of this case to do so."

20. The only ultimate conclusion that can be and should be reached is that no definite or precise test can be prescribed for determining the question whether a particular process is a manufacturing process. Each case must be judged on its, own facts regard being had to the nature of the processes employed, the eventual result achieved and the prevailing business and commercial notions of the people. Guidance may also be had from the decided cases. Examining the case in the light of the considerations indicated above, it cannot be laid down as a rule that in no case grading or sorting will be a manufacturing process. If the gradation or the sorting is with a view to bring into, existence standardized goods of a particular category or variety saleable as such, I do not see any difficulty in treating grading or sorting If, on the other hand, grading is only casual and is not done with a view to achieve the object indicated earlier, grading will not be a manufacturing process. In the present case, what I find is that the grading referred to in the complaint is of a casual nature. It was not suggested in the complaint that potatoes were : graded to be converted into standardised goods of particular categories so that they become different kinds of marketable potatoes. In this view of the matter, I agree with the Sessions Judge that the grading in the present case is not a manufacturing process.

21. Taking up the process of drying, I think the view taken by the Sessions Judge is also correct and that the process of drying as employed in the accused's premises which consists merely in removing the moisture collected during the process of refrigeration, cannot amount to a manufacturing process. The process of drying has also to be, considered in relation to the adaptability of the article for sale or use. In the present case, the process of drying is adopted only to remove the moisture collected during the process of refrigeration and not with a view to adapt the potatoes for sale. In other words, it cannot be said that the process is necessary for making the potatoes saleable as such. The process of drying also in this view of the matter, cannot be considered a manufacturing process.

22. Mr. Singhi raised an additional argument to support the complainant's case that some manufacturing process was carried on in the accused's premises. He urged that the very process of keeping the potatoes under a process of refrigeration should be treated as a manufacturing process. Inasmuch as such a process as amounting to adapting potatoes to sell. It was pointed out that by this process the potatoes which otherwise could not be available for sale in an off, season, are made available. It will be interesting in this connection to refer to 1931 AC 447. It will be better to extract the

relevant observations from the judgment referring to an argument similar to one raised in the present in an elaborate manner and the decision thereon : -

> "Your Lordships however heard from counsel for the appellants an ingenious argument to support the view that the processes by which goods are frozen, maintained frozen and defrosted amount to an altering or adapting for sale of the good within Sub-Section (1)(c) of Section 149 of the Factory and Workshop Act, 1901. It is pointed out that the freezing of some articles of food alters them by. destroying tissue therein, that commercially all articles of food are altered by refrigeration in the respect that they cannot afterwards be sold as, fresh, and that the several processes of freezing,, maintaining frozen and defrosting are for the most part carried out in order that the goods may be, preserved for sale at some future time or may be made capable of transport to a distant market, or having been preserved frozen for a future market, may by defrosting be made available at the priate time for that market.
>
> Upon this it is contended that the processes are really processes by which the goods are adapted for sale, even if not altered in the freezing or defrosting processes, because without the application to the goods of the appropriate process or processes they could not be sold in the particular, market for which they are destined by their, owners.
>
> It may be difficult or impossible to identify, the essential quality of the operation described in Section 149 of the Factory and Workshop Act, 1901 "as the adapting for sale of any article," nor in, my view is it necessary for the purposes of this, case to do so.
>
> The phrase was probably introduced to secure somewhat more flexibility than is to be found in the immediately preceding terms - namely, the altering, repairing, ornamenting or finishing; of any article' - but it cannot in my judgment be stretched to cover the processes carried on by the appellants in the circumstances set out in the special case."

23. Reference may also be made to *New Taj, Mahal Cafe Ltd., Mangalore v. Inspector of Factories, Mangalore,* [11] In that case a question arose whether a premises, wherein, a refrigerator worked by electric power was being, used, was a factory or not. The learned Judges held that having regard to the fact that the refrigerator was used only for storage, that as such, would not constitute a "manufacturing process" as defined in Section 2(k) of the Factories Act. It was further pointed out that if a refrigerator was

used for treating or adapting any article with a view to its sale, then the test required by Section 2(k) would be satisfied. The essential question to be considered is whether the cold storage is used primarily, for the purposes of storage or is used for bringing, into existence commodities which may be treated as commercially different from what they were at the time they entered the premises. In the present case, the cold storage appears to be used only for storage purposes and there is nothing in the, complaint to suggest that the refrigeration was with a view to the adaptation of the potatoes to their sale.

24. An argument was also addressed that filling of the potatoes into bags should be equated with the packing of articles. The argument, in my. opinion, does not merit serious consideration. It is not the complainant's case that re-filling is done with a view to their sale in specific quantities or, in bags oil specific sizes. The process of emptying the potatoes from the bags for the purposes of placing them in the cold storage and subsequently re-filling them in bags are done only casually and, not with a view to adapting them for sale etc,

25. It was also suggested that the various, processes taken together may amount to a manufacturing process. It may be conceded that in, dealing with the question whether a particular, business premises can be treated as a factory or, not, it will not be proper to view individual processes in isolation and it is necessary that the, cumulative effect of all the processes must be taken note of in determining the question. How ever, in the facts and the circumstances of the present case clearly brought out while dealing with, the complainant's case relating to individual processes, I am not persuaded to accept the argument on behalf of the complainant that the various processes taken together have the effect of bringing the accused-petitioner's business premises into the category of a factory. The conclusion of the. Sessions Judge that no manufacturing process is carried out by the accused petitioner in his premises is correct and calls for no interference.

26. I now take up the second ground relied upon by the Sessions Judge. The Sessions Judge, has held that the failure of the accused to apply for registration and to give notice of occupation,, were not a continuing offence and, therefore, the prosecution in respect thereof launched after more than three months was barred by limitation under, Section 106 of the Factories Act.

27. So far as the above statement goes, the Sessions Judge is correct and is supported

by some observations of Bombay High Court in AIR 1955 Bombay 161. It however, appears that the Sessions. Judge seems to have simplified the position. The complainant's complaint was in essence in respect of the conduct of the business by the accused, without obtaining a license. Conduct of such a, business is a continuing offence and the prosecution cannot be barred by limitation. The Sessions, Judge did not appear to have considered the subsequent observations in the judgment of the Bombay High Court in AIR 1955 Born 161. Referring to the latter defaults as contrasted with the initial defaults,. Gajendragadkar, J. as he then was, observed as follows :-

> "In regard to the latter default, we feel no hesitation in holding that his conduct in using the, premises from day to day without obtaining a license is a continuing offence. Every time the premises are thus used as a factory, a fresh offence is committed, and no bar of limitation can, therefore, be pleaded against this charge."

The learned Judge in support of his conclusion referred to various cases in relation to commission of continuous offence. Be that as it may, the reference succeeds on the first ground relied upon by the Sessions Judge.

28. The reference is accepted, the order of the City Magistrate dated 7th May, 1963 is set aside and the proceedings are quashed.
29. Mr. Singhi prays for leave to appeal to Supreme Court. The prayer is rejected.

Reference answered accordingly.

Cases Referred.

1. (1999) 101 LT 571
2. AIR 1962 SC 29
3. 1931 AC 450
4. AIR 1955 Bom 161
5. AIR 1957 Mad 755
6. AIR 1957 Mad 755
7. 1931 AC 446, 1931 AC 450
8. 1931 AC 477 at p. 484

9. AIR 1957 Mad Prad45
10. 1931 AC 447 (488)
11. AIR 1956 Mad 600