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Court : Mumbai

Decided On : Aug-27-1925

Reported in : (1925)27BOMLR1405

Judge : Fawcett and ;Madgavkar, JJ.

Appeal No. : Criminal Applications for Revision Nos. 83 and 84 of 1925

Appellant : Emperor

Respondent : B.N. Gamadia

Judgement :

Fawcett, J.

1. These two applications for revision, Nos. 83 and 81 of 1925, arise out of a fire which took place in the Gamadia Press Factory at Raver at 11 A. M. on January 81, 1924. The fire unfortunately resulted in the death of twelve women, and burns and other injuries to ten other women. The chief Inspector of Factories, after an enquiry, sanctioned the prosecution of the three applicants in Application No. 84 as being the occupiers of the factory, and of the applicant Mehenti in No. 83 as being the manager of the same factory, on a charge under Section 41, Clause (a) of the Indian Factories Act, 1911, read with Section 20 of the same Act. Under these sections the occupier and manager are jointly and severally liable to fine, if convicted, for employing or allowing to work any person contrary to any of the

provisions of the Act; and the allegation is that women were employed, or allowed to work, in contravention of Section 20, which prohibits the employment of women and children in the part of a factory where a cotton-opener is at work.

2. The trial took place before Mr. D'Souza, Magistrate, First Class, Jalgaon, and resulted on August 7, 1924, in the conviction of all the accused under these sections. The Gamadias, accused Nos. 1 to 3, were sentenced to pay a fine of Rs. 100 each, and Mehenti, accused No. 4, to pay one of Rs. 200. The Magistrate in his judgment held that the fire originated in what is called the 'press room', that is the room in which the main part of the cotton-opener is contained, and that women were actually being employed there at the time of the fire. He also held that women were employed in a room adjacent to the press room, styled the 'mixing room'; and that this was in contravention of Section 20, inasmuch as, although there was a partition separating this room from the press room, yet it had a door in it, which itself was opposed to the provisions of the section and which was open at the time of the fire. He further held that accused Nos. 1 to J5 were the occupiers of the factory liable under Section 41, as well as the manager Mehenti.

3. An appeal was made to the Sessions Judge, Khandesh, who on December 19, 1921, gave judgment, agreeing with the Magistrate on the main facts and the points of law that I have referred to and confirming the convictions and sentences in the case of all the accused.

4. In this Court an objection has been taken that the trial of the accused is vitiated by the omission of the Magistrate to examine the accused in accordance with Section 342 of the Criminal Procedure Code. It appears from the record that the accused, who were represented, wished to put in written statements. The Public Prosecutor objected to this being done and this objection was upheld by the Magistrate. Unfortunately, however, the Magistrate did not then proceed to examine the accused under Section 842, and the defence of the accused was at once opened. The Advocate General for the Crown has put in an affidavit made by the Public Prosecutor, Khandesh, to the effect that, when the Magistrate was going to take the statement of the accused under Section 342, Criminal Procedure Code, Mr. Vicaji, counsel for the first three accused, got up and said that he was

going to put in written statements on their behalf as also did the pleader for accused No. 4; that the Public Prosecutor having objected, Mr, Vicaji and the pleader for accused No. 4 said that, if written statements were not allowed to go in, they would ask their clients to refuse to make any further statements; and also that one of the accused was not present, as his attendance had been excused. Mr. Vicaji, who represents accused Nos, 1 to 3 here, denies the truth of the main allegation, and it is clear that, even if it is the case that they made the statements imputed to them, this would not prevent the trial being vitiated by the omission of the Magistrate. It has been held in many cases of which it is enough to refer to Emperor v. Fernandez I. L. R. (1920)45 Bom. 672; 22 Bom. L. R. 1040 dealing with a summons case as is this, and Emperor v. Gulabjan I. L. R.(1921) 46 Bom. 441 23 Bom. L. R. 1203 as showing that the omission to act upon the provisions of Section 342 constitutes an illegality and not a mere irregularity. Such an illegality cannot be waived by the consent of the accused or their legal representatives. Both the learned Magistrate and the Sessions Judge have written long and careful judgments, and it is unfortunate that owing to an omission of this kind the time and trouble taken by them should largely be wasted. It is also open to comment that such an omission should have occurred though the Crown was represented by the Public Prosecutor of Khandesh and the accused by counsel and pleader. However, it is clear we have no option but to set aside the convictions, and the only question to be considered is whether we should order a re-trial and and if so, whether the re-trial should be an entirely new one or merely from the stage from which the illegality crept in, as can be done under the view taken in Emperor v. Gulabjan Ibid p. 446, and as has been done by this Bench in several previous cases.

5. In regard to this question, Mr. Velinker and Mr. Vicaji for the applicants ask us to consider the various other points that they have raised at the hearing of these applications, and, therefore, although we must be careful to avoid anything which would in any way prejudice a re-trial, if ordered, we think that we should briefly indicate our views upon the other legal points that have been discussed before us. For instance, if we agree with Mr. Velinker and Mr, Vicaji that the Gamadias, accused Nos. 1 to 3, have wrongly been held to be ' occupier.'" within the meaning of the Indian Factories Act, then obviously there would be no adequate ground for

our ordering them to be re-tried. On that particular point we are clearly of opinion, on the facts found by the two lower Courts in regard to the control exercised over this factory by the Gamadias, who admittedly are its owners, that the view taken by both the lower Courts is correct. It was strongly contended that they were only controlling the business side of the factory, and not the mechanical or other detailed working on the spot. That, however, is obviously insufficient to prevent their being occupiers. It is unnecessary to discuss the various cases in which the question has been considered by this Court. Mr Velinker in particular referred to the ruling in Emperor v. Dhanji (1912) 16 Bom. L. R. 328 and said that these accused could not be said to be in control of the work of the factory within the meaning of that ruling, Of course, if you regard 'work' in the limited sense of the management of the machines and so on, that might be a good contention; but in our opinion it is clear that the word is used in general sense, and the word 'working' would perhaps express its meaning a little more clearly. I find that in Rex v. Gainsford (1913) 20 T. L. R. 359 it has been held by a Divisional Court in England that even a limited company can be 'occupiers' under the corresponding English Factories Act, which contains no definition of the word 'occupier.' Here the definition in the Indian Factories Act is not an exhaustive definition, and merely says the word includes a representative of the 'occupier.' There is nothing in it which in any way limits the normal meaning of the word 'occupier,' as indicating a person who is in actual possession and control of a factory.

6. The second point, that was discussed, was in regard to the view taken by the lower Courts that in order to comply with a 20 of the Act a partition must not have a door in it, The section runs as follows :-

No woman or child shall be employed in the part of a factory for pressing cotton in which a cotton-opener is at work :Provided that, if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending from the floor to the roof or to such height as the inspector may, in any particular case specify, women and children may be employed in the room in which the feed-end is situated.

7. The Sessions Judge has carefully considered the question and takes the view that the object of the partition is to prevent the spread of fire to a place where women may be working and that a partition in which there is a door which can be opened at will by any one is not an effectual partition. He has gone on to suggest various expedients by which a door can be provided, such as a lock, chamber with a gap in it through which people could pass from one room to the other, Now it has been pointed out that this is a penal enactment and that consequently in a case where there is a doubt about the language the Court should lean in favour of the accused. The Privy Council in *Dyke v. Elliott: 'The Gauntlets (1871) I. R. 4 P. C. 184* have made some remarks showing how the Courts should construe such enactments. They say (p.191):-

No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip that there has been a *caveat* omission. that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

8. Then with regard to the question how far the intention and object of the legislature is a legitimate aid to construction of a statute, there is another useful case, *Salomon v. Salomon & Co. [1897] A. C. 22* where Lord Watson thus indicated the nature and limits of the canon (p. 38):-

'Intention of the Legislature' is a common but very slippery phrase, which popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant

although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication.

9. Applying these remarks to Section 20, it seems to me clear that what the legislature is shown to have intended is that there should be a separation of women and children from the room in which the main body of the cotton-opener is, and that there should not be a direct means of access to that room. The learned Sessions Judge may be correct in saying that the object is to prevent the spread of fire to a place where women may be working, but it is not necessary to speculate whether exactly that is the object or not. So far as the section goes, it merely enacts that women or children should either not be in the part of the factory where the cotton-opener is at work at all, or if a woman or child is so present they should be separated, that is to say, held back from being present in the part of the room where the main part of the cotton-opener is at work. The fact that provision is made for the partition extending from the floor to the roof, or to a height allowed by the Inspector, without any corresponding provision as to the extent of the partition being possibly less than the whole breadth of the room from one side wall to the other is sufficient, in my opinion, to show without any straining of the language of the legislature, that the partition intended is one which should prevent the access of a woman or child from the room, in which is the feed-end of the cotton-opener at work, to the adjacent room in which the rest of the cotton opener is. Therefore, while we do not think it necessary to go as far as the Sessions Judge and say that a partition can never have a door made in it (at any rate, so long as the section itself does not say that and no rule under Section 37 is made to that effect), yet we do agree with the view taken by the lower Court, so far as it held that, if there is a door made in such a partition and that door is shown to be open at a particular time, or even although it is shut, yet it is not locked or other effective means taken to prevent being opened by a woman or child wishing to get into the press room, then the partition is on the same footing as if it had a gap in it, which would not effectively separate women and children from the press room, and there would be a contravention of the provisions of Section 20. The lower Court has held certain facts proved, which in that view clearly amount to an offence under Section 20

read with Section 41 (a), and the above remarks are in no way meant to cover the question whether those facts are or are not proved. But the view we take is certainly one which supports the prosecution rather than the defence, in so far as it goes against the contention that was put before us by Mr. Velinker on this particular point.

10. In regard to the finding of the learned Sessions Judge that women were actually employed in the press room objection is taken that his acceptance of the testimony of eye witnesses to the fact is based on a supposition as to what those women were doing, for which there is no support of any direct testimony, and amounts to mere conjecture, and also that in making that supposition he differed from the view which the trying Magistrate took and made out a new case which the accused had not the opportunity of meeting at the trial. I am not satisfied that that objection, at any rate in this particular case, would justify our going into questions of fact, a thing which this Court will only do for very strong reasons. For although a deduction is necessarily on a better footing if it is based on oral testimony in a case, yet it is difficult to say that a deduction may not be based upon circumstantial evidence and probabilities; and if the supposition of the learned Sessions Judge is analysed, it can probably be brought under that category. But it is unnecessary for us to consider this question in detail, for if a re-trial is ordered, the accused will have ample opportunity of meeting the particular point, which is elaborately discussed in the Sessions Judge's judgment.

11. On the main question as to what our orders should be, we think that this case cannot be dealt with as a trivial one. The case is a serious one so far as it arises out of a fire actually resulting in several deaths, and it was treated as a test case at the request of the accused, and other similar charges against them have been held over pending its decision. The Advocate General has also told us that there would be difficulties in the way of the prosecution getting all the witnesses who gave evidence at the trial, as some of them have disappeared. We think, therefore, that, under the circumstances of the case, we should direct a re-trial and that that re-trial should take place from the stage on May '26, 1924, when the trying Magistrate omitted to examine the accused, This will however be, of course, subject to the right of the accused under Section 860, if the trial takes place before

a Magistrate other than Mr. D'Souza, to demand that the prosecution witnesses should be re-summoned and re heard. We understand that Mr. D'Souza is no longer in service and, therefore, the re-trial must take place before the present First Class Magistrate, Jalgaon city, or such other First Class Magistrate as the District Magistrate, East Khandesh, may appoint

12. The conviction and fine are set aside and we order that the fine, if paid, should be refunded to the several accused.

Madgavkar, J.

13. I agree with my learned brother and desire to add a few words. The view of this Court in Emperor v. Fernandez I. L. R.(1920) . 45 Bom. 672 22 Bom. L. R. 1040 and Emperor v. Gulabjan I. L. R.(1921) 46 Bom. 4413 Bom. L. R. 1203 that Section 342 of the Code of Criminal Procedure is mandatory and that in a summons case, the omission to examine the accused is an irregularity which vitiates the trial is affirmed by all the High Courts: Gulzari Lal v. Emperor I. L. R.(1921) Cal. 522. Emperor v Alimuddin Naskar I. L. R.(1922) Cal. 1075 Varisai Rowther v. King-Emperor I. L. R.(1922) Mad. 449 Raghu Bhumij v. The King Emperor (1920) 5 P. L. J. 430and Fatu Santal v. The King Emperor (1921) 8 P. L. J. 147 . Accordingly I must also express my regret that apparently in the heat of the question raised before the trying Magistrate as to the written statement!-) which the accused are not as of right entitled to put in, this section and this ruling of 1921 were completely lost sight of by the Magistrate, and the counsel and pleaders on both sides failed to draw his attention to it. The result is still further delay in a proceeding already far too protracted.

14. Various other points of law have been raised, necessary to consider on the question of retrial. The partition must extend the whole breadth of the room and its height up to the room is expressly provided by the section. Beyond this Section 20 of the Indian Factories Act does not contain materials to enable the Courts to prescribe the quality or details of such a partition and in the absence of express words absolutely excluding a door the existence of a door ipso facto need not perhaps necessarily cause a partition to cease to be BO. But, on the other hand,

the partition may be of such materials or the door of such dimensions that for all practical purposes the safety of women and children, which is the paramount object of Section 20, may be seriously in danger, the partition but a nominal partition and the section rendered nugatory. To such a construction the Courts would not willingly lend themselves. It appears to me, therefore, that an owner who takes the risk of inserting a door must safeguard himself by so arranging it that the door would not enable women or children at their will or for the matter of that at the will of the person who supervises their working, to pass from the room where the feed-end is situated in the mixing room to the press room. In the present case, for instance, it is in evidence that until November 1923 the partition made was of bamboos and that the Factory Inspector drew the attention of the occupiers and suggested a corrugated iron partition, which the latter accepted. If, at the same time, the manager had informed the Factory Inspector of the door that he designed to make and satisfied him that the existence of the door was not contrary to the spirit of the provisions of the section and had formally obtained his sanction, it would hardly have been open to the prosecution in this case to rely upon the existence of the door as a fact in the present case against the accused.

15. On the other findings of fact in the present case, namely, that the door was open, the fire originated and the women were in the press room, which sufficed for a conviction, the question of door in the partition was not material.

16. Whether accused Nos. 1, 2 and 3 are 'occupiers' is a question of fact which the lower Courts were entitled to consider on the evidence and to prefer the forms and correspondence signed ante litem motam. by accused No. 4 that accused Nos. 1, 2 and 3 were the occupiers in preference to his present position, that he was the occupier and not the other three accused.

17. On the question of law, the wordings of Section 2, Clause (6), that the occupier includes a managing agent, of Section 33(2), and of Section 41 that the occupier and manager shall be jointly and severally liable to a fine, are a sufficient basis for the ruling of this Court in *Emperor v. Rampratap* I.L.R.(1905) . 29 Bom. 423 Bom. L.R. 454 that the manager is not necessarily an occupier. As has been laid down in *Emperor v. Taylor* (1907) 10 Bom. L.R. 38 and in *Emperor v. Dhanji* (1912) 15

Bom. L.R. 328 it is the right to regulate and control and the predominant possession, which determine the question as to who the occupier is. The lower Courts held that accused N< Section 1, 2 and 3 (owners) decided the seasons when the press was to run and controlled it. If so, they were rightly held to be the occupiers.

18. In this view of the law, I agree that the convictions must be set aside but a retrial ordered I from the point where the law rendered the examination of each accused under Section 842 of the Code of Criminal procedure necessary.

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