1959

Vishwanath v. The State of Uttar Pradesh

Wanchoo J.

only one below with an ordinary knife which, if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence. As has been pointed out in *Amjad Khan* v. *The State* (1), "these things cannot be weighed in too fine a set of scales or 'in golden scale'".

We, therefore, allow the appeal and hold that the appellant had the right of private defence of person under the fifth clause of s. 100 and did not cause more harm than was necessary and acquit him.

Appeal allowed.

1959

September 4

CHINUBHAI HARIDAS

v.

THE STATE OF BOMBAY

(SYED JAFER IMAM and K. N. WANCHOO, JJ.)

Factories—Precautions against dangerous fumes—Duty of occupier—Liability for accident—"Be permitted to enter", meaning of—Indian Factories Act, 1948 (LXVIII of 1948), s. 36(3) and (4).

The appellant was the occupier of a factory where there was a pit in which dangerous fumes were likely to be present. The pit was securely covered and enclosed and no one was expected to go down into it for normal work as it was worked by gadgets fixed nearby above the ground. Something went wrong with the machinery inside the pit and five workers went down without wearing suitable breathing apparatus and without wearing a belt securely attached to a rope the free end of which could be held by some person standing outside. All the workers were overcome by poisonous gases and died. It was found that suitable breathing apparatus, reviving apparatus, belts and ropes were not available anywhere in the factory and were not kept for ready use near the pit. The appellant was prosecuted as the occupier for breach of the provisions of s. 36(3) and (4) of the Indian Factories Act, 1948. The trial Court held that no offence under s. 36(3) had been made out and it was not proved that any permission, express or implied, had been given to the workmen to enter the pit, and that no offence under s. 36(4) had been made out because no permission having been given it was not necessary to keep the breathing apparatus etc., near the pit or anywhere else in the factory and consequently it acquitted the appellant. On appeal by the State, the High Court set aside the

(1) [1952] S.C.R. 567.

acquittal and directed the trial Court to decide the case against the appellant in the light of the interpretation of the law made by the High Court. The High Court was of the view that as the appellant had failed to prevent the entry of the workers he must in law be held to have permitted the entry and committed breach of s. 36(3); and that it was not sufficient compliance with s. 36(4) to provide breathing apparatus etc., only after coming to know that some person was about to enter the pit but that such apparatus must be immediately available at the pit at all times.

Held, that s. 36(3) did not cast an absolute duty on the occupier to prevent the entry into the pit and the mere fact that a person had entered the pit did not by itself prove that he had been "permitted to enter" within the meaning of that sub-section. The primary duty was on the worker prohibiting him from entering the pit. At the same time the occupier was also liable if his permission to the entry, whether express or implied, could be inferred from the facts and circumstances of the case.

Held, further, that s. 36(4) cast an absolute duty on the occupier to see that the breathing apparatus etc., was always available in the factory and was periodically examined and certified fit for use and a sufficient number of persons were trained in its use. But there was no duty to keep the apparatus at the pit at all times; such a duty arose when some person was about to enter the pit with the permission of the occupier.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 193 of 1957.

Appeal by special leave from the judgment and order dated August 1, 1957, of the Bombay High Court in Criminal Appeal No. 365 of 1957, arising out of the judgment and order dated the November 28, 1956, of Joint Civil Judge, Junior Division, and Judical Magisitrate First Class, Broach, in Summary Case No. 57 of 1956.

Rajni Patel and *M. S. K. Sastri*, for the appellant.

H. J. Umrigar, *T. M. Sen* and *R. H. Dhebar*, for the respondent.

1959. September 4. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—This appeal by special leave against the judgment of the Bombay High Court raises the question of the interpretation of sub-ss. (3) and (4) of s. 36 of the Facteries Act, (LXIII of 1948), (hereinafter called the Act). The brief facts necessary for the

1959

Chinubhai Haridas
v.
The State of Bombay

Wanchoo J.

purpose are these. The appellant is the occupier of the Gopal Mills Co. Ltd., Broach, which is a factory as defined in the Act. It appears that there is a pit in the factory in which dangerous fumes are likely to be present. This pit was securely covered as required by s. 33(1) of the Act and no one was expected to go down into the pit for the normal work of the factory as the pit was worked by gadgets fixed nearby above the ground. It appears, however, that something went wrong with the machinery inside the pit on July 4, 1955. Fakirji Dhanjishaw was the person in-charge of those who were working in the purification plant with which this pit is connected when the accident took place at about 9-30 a. m. on July 4, 1955. It seems that when something went wrong with the machinery inside the pit, a labourer named Melia Dadla was asked to go down into it to attend to it and he went down without wearing suitable breathing apparatus and a belt securely attached to a rope, the free end of which should have been held by a person standing outside the confined space. The result was that Melia Dadla was seen overcome by poisonous gases and died. Thereafter Fakirji Dhanjishaw, Maganlal Gordhandas, Chunilal Bochar and Chhotalal Nathubhai went down into the pit without wearing breathing apparatus and were overpowered with poisonous gases and died one after the other. It is not clear when the superior officers in the mill were informed of this tragedy. But it appears that after the death of these five persons the Superintendent, Municipal Fire Brigade, was sent for with breathing apparatus and other appliances and he went down into the pit to save the dying persons; but he was also attacked by the fumes and became unconscious. The mill doctor and some other doctors also came but nothing could be done to revive the five persons who were dead. The matter was reported to the Inspector of Factories and he went and made enquiries. It was then found that suitable breathing apparatus, reviving apparatus, belts and ropes were not available anywhere in the factory and were not kept ready for instant use beside the confined space. Consequently,

the appellant was prosecuted as the occupier for the breach of s. 36 (3) and (4) of the Act.

The appellant took advantage of s. 101 of the Act and filed a complaint against the manager S. D. Vashistha and the engineer H. P. Tripathi. In view of this complaint of the appellant, the first question that the magistrate had to decide was whether the commission of the offence had been proved. If the commission of the offence was proved, the magistrate would have to consider whether the appellant could be discharged from liability if he proved to the magistrate's satisfaction that he had used due diligence to enforce the Act and that the other two persons committed the offence in question without his knowledge, consent or connivance.

In considering the question whether an offence had been committed, the magistrate had to interpret sub-ss. (3) and (4) of s. 36 of the Act. He was of the view that no offence under s. 36 (3) had been made out as the prosecution had failed to prove any permission, express or implied, to Fakirji Dhanjishaw and others to enter the pit. He was further of the view that no offence under s. 36 (4) had been committed because no permission under sub-s. (3) having been granted to anybody to enter the pit, it was not necessary to keep the breathing apparatus etc., near the pit or anywhere else in the factory. He, therefore, held that no offence had been committed and acquitted the appellant as well as the manager and the engineer.

There was an appeal by the State of Bombay to the High Court against the acquittal of the appellant alone. The High Court disagreed with the interpretation of sub-ss. (3) and (4) of s. 36 by the magistrate and held that—

> "For attracting the application of sub-section (3) it is not necessary that a positive act of obtaining permission must be done by a worker or a positive act of granting permission must be done by the occupier or manager. If the occupier or manager acquiesces in the entry, he permits the entry. If he connives at the entry, then also he permits the entry. If he fails to prevent the entry, then also he permits the entry."

1959

Chinubhai Haridas
v.
The State of Bombay

Wanchoo J.

It went on to say—

"The scheme of the Act, which is a welfare legislation, is to require an employer to take precautionary measures for safeguarding the lives of his workers, prudent or imprudent, rash or careful, against all possible danger while they are working on the premises of the factory."

It therefore held that as the appellant had not taken all reasonable steps to prevent the workers from entering the pit in case of the machinery getting out of order, he had failed to prevent the entry of the workers into the pit and therefore must be held in law to have permitted the entry and committed the breach of sub-s. (3) of s. 36. As to sub-s. (4) the High Court was of the view that it was not sufficient compliance with it to provide breathing apparatus etc. only after coming to know that some person was about to enter the confined space and that the apparatus must be kept ready for instant use and must be immediately available near the confined space not only to the person who might enter the confined space with permission but even to the person who might enter the confined space without permission. The High Court, therefore, set aside the acquittal of the appellant and directed that the appellant's complaint against Vashistha and Tripathi should be first decided by the magistrate, (thus, in effect, setting aside the acquittal of Vashistha and Tripathi) and thereafter the magistrate should proceed to decide the case against the appellant in the light of the law laid down. There was then an application for a certificate to enable the appellant to appeal to this Court which was rejected. The appellant then applied to this Court for special leave to appeal which was granted; and that is how the matter has come up before us.

The relevant part of s. 36 is in these terms:—

"(3) No person in any factory shall enter or be permitted to enter any confined space such as is referred to in sub-section (1) until all practicable measures have been taken to remove any fumes which may be present and to prevent any ingress of fumes and unless either—

"(a) a certificate in writing has been given by a competent person, based on a test carried out by himself, that the space is free from dangerous fumes and fit for persons to enter, or

(b) the worker is wearing suitable breathing apparatus and a belt securely attached to a rope, the free end of which is held by a person standing outside the confined space.

(4) Suitable breathing apparatus, reviving apparatus and belts and ropes shall in every factory be kept ready for instant use beside any such confined space as aforesaid which any person has entered, and all such apparatus shall be periodically examined and certified by a competent person to be fit for use; and a sufficient number of persons employed in every factory shall be trained and practised in the use of all such apparatus and in the method of restoring respiration.

Taking sub-s. (3) first, the question that falls for consideration is the meaning of the words "be permitted to enter". The contention on behalf of the State before the High Court was that these words cast an absolute duty on the occupier to prevent the entry of any person in a pit etc. of the kind mentioned in sub-s. (1) of s. 36 and this seems to have been accepted by the High Court. Learned counsel for the appellant, however, urges that in the context of this provision, the duty cast on the occupier is not absolute and there must be some kind of permission, whether express or implied, to the person entering the pit etc. before the occupier is made liable. In other words, it is submitted that it will be for the court on the facts and circumstances of each case to infer whether there was permission, express or implied, of the occupier to the person who enters the pit etc. Mr. Umrigar appearing for the State of Bombay urges before us that this latter construction would make the provision liable to evasion by the occupier. According to him, this provision means that whenever anyone enters such a pit etc. the burden is cast on the employer to show that the entry was against the occupier's instructions. He even went to the length of saying that if a worker

1959

Chinubhai Haridas v. *The State of Bombay*

Wanchoo J.

entered the pit in order to commit suicide, it would still be for the occupier to show that the entry was against his instructions and that he did all that he could to prevent it. In this connection he drew our attention to certain other sections in the Act where similar words are used, for example, ss. 51, 52, 54, 60, 64, 67, 68, and 71. We do not think it necessary to consider these other sections in detail. It is enough to point out that there is one vital difference between the provisions of these other sections and the provision contained in s. 36(3). Section 36(3) prohibits the worker from entering the pit etc. while these other sections have no such prohibition against the worker and cast the entire duty on the employer. Section 36(3) therefore will have to be construed in the context of the words used therein. It begins with prohibiting any person from entering any such pit etc. The primary prohibition therefore is of the person working in the factory and others and the effect of this prohibition is worked out in s. 97 of the Act. Sub-section (1) of s. 97 provides that if a worker employed in a factory contravenes any provision of this Act imposing any duty or liability on workers, he shall be punishable with fine. Sub-section (2) of this section then lays down that if a worker is convicted of an offence under sub-s. (1), the occupier or manager of the factory shall not be deemed to be guilty of an offence in respect of that contravention unless it is proved that he fails to take all reasonable measures for its prevention. Reading s. 36(3) with s. 97, it is clear that the prohibition of the worker against entering any such pit etc. is absolute and if any worker enters such a pit etc. he is guilty under s. 97(1). In this case, if the five workers who are dead, were alive, they would have been guilty under s. 97(1) for contravening s. 36 (3) by entering the pit. Then s. 97 (2) would come into operation and it would be for the prosecution to prove that the occupier or the manager had failed to take all reasonable measures for preventing the entry. The burden thus is on the prosecution to prove that the occupier or the manager had not taken all reasonable steps for preventing the entry and not on the occupier or the manager to prove that he

had taken all such reasonable steps. The Court will therefore have to consider all the facts and circumstances in a particular case to see if the burden has been discharged by the prosecution. It is in this background that we have to consider the meaning to be given to the words "be permitted to enter" appearing in s. 36 (3). It seems to us that in the circumstances these words do not cast an absolute duty on the employer to prevent the entry and the mere fact that a person has entered such a pit etc., would not by itself prove that he had been permitted to enter. The Court will have to look into the facts and circumstances of the case to come to the conclusion whether the person who entered the pit was permitted to do so and mere entry would not necessarily lead to the conclusion that there was permission to enter, whether express or implied. The magistrate in this case seems to have thought that a positive act of obtaining permission must be done by the worker or a positive act of granting permission must be done by the occupier or the manager, though he has not said so in so many words. It is not necessary that there should be a positive act of obtaining permission by the worker or a positive act of granting permission by the occupier or the manager. What the court has to see is whether on the facts and circumstances of a particular case it will be reasonable to infer that the entry was with permission, whether express or implied. The High Court also, with respect, seems to have gone too far on the other side when it said that it was the duty of the employer to take all the precautionary measures for safeguarding the lives of his workers, prudent or imprudent, rash or careful, against all possible danger while they are working on the premises of the factory. This would imply that there was an absolute duty cast on the employer to prevent the entry irrespective of the considerations that might arise on the facts and circumstances of a particular case. The true view of s. 36 (3), in our opinion, is that the primary duty is cast on the worker or any other person prohibiting his entry into any such pit etc. At the same time the occupier is also liable if his permission

1959

Chinubhai Haridas v. The State of Bombay

Wanchoo J.

to the entry, whether express or implied, can be inferred on the facts and circumstances of the case; but this permission cannot in all cases be inferred by the mere fact of the entry. The High Court has remanded the case to the magistrate for retrial and in that retrial the magistrate will proceed to consider the liability of the occupier in the light of the observations made by us on the construction of s. 36 (3).

Turning now to sub-section (4), it will be found that it is in two parts. The first part provides that suitable breathing apparatus, reviving apparatus, belts and ropes shall in every factory be kept ready for instant use beside any such confined space as aforesaid which any person has entered. This to our mind means that if for any reason a person has to enter such confined space, the apparatus etc., shall be kept ready for instant use beside such space. The duty for keeping the apparatus ready beside the space arises only when a person is entering the confined space, obviously with the permission of the occupier or the manager. We do not think that sub-s. (4) contemplates that the apparatus etc., shall always be kept ready near the confined space whether there is any occasion for any person to enter it or not. The necessity of keeping the apparatus etc. ready, near the confined space arises when any person is about to enter such space, obviously with the permission of the employer.

The second part of the section provides that all such apparatus shall be periodically examined and certified by a competent person to be fit for use and a sufficient number of persons employed in every factory shall be trained and practised in the use of all such apparatus and in the method of restoring respiration. This clearly shows that the apparatus etc., must always be available in the factory, though it need not be kept near the confined space till such time as some one is about to enter it. There will be no possibility of periodical examination and training of sufficient number of persons in the use of the apparatus unless the apparatus was always available in the factory. The duty cast by sub-s. (4) is absolute. So far as the first part is concerned, the duty of keeping the apparatus

ready for instant use near the confined space arises as soon as a person is about to enter it, obviously with the permission of the occupier. So far as the second part is concerned, it is the duty of the occupier to see that the apparatus is always available in the factory and is periodically examined and certified fit for use and a sufficient number of persons are trained in its use. The view taken by the magistrate of the effect of this section is not correct and the view taken by the High Court is right except that it is not necessary to keep the apparatus all the time near the confined space. The High Court has ordered retrial with respect to the contravention of sub-s. (4) also and the magistrate who now retries the case will do so in accordance with the construction of the sub-section given by us. We have carefully refrained from saying anything on the facts of this case as there is going to be a retrial and it will be for the magistrate to consider all the facts and circumstances before coming to a decision one way or the other. The appeal is hereby dismissed.

Appeal dismissed.

RADHA PRASAD SINGH

v.

GAJADHAR SINGH & OTHERS

(S. R. DAS, C.J., M. HIDAYATULLAH and K. C. DAS GUPTA, JJ.)

Appellate Court, power of—Reversal of finding of fact arrived at by trial Court—Question of credibility of witness—Rule.

Although it is well-settled that a court of appeal should not lightly disturb a finding of fact arrived at by the trial Judge who had the opportunity of observing the demeanour of the witnesses and hearing them, that does not mean that an appellate court hearing an appeal on facts can never reverse such a finding. Where the decision on a question of fact depends on a fair consideration of matters on record, and it appears to the Appeal Court that important considerations have not been taken into account and properly weighed by the trial Judge, and such considerations clearly indicate that the view taken by the trial Judge is wrong, it is its duty to reverse the finding even if it involves the disbelieving of witnesses believed by the trial court. Where again the trial Judge omits to properly weigh or take into account