



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDERS RESERVED ON : 04.09.2018
ORDERS PRONOUNCED ON : 07.09.2018

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THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Cr1OP(MD)No.2938 of 2017 and
Cr1MP(MD)Nos.1337 and 1338 of 2018

Babu Bhardagond ... Petitioner/Accused

Vs

The State of Tamil Nadu,
Represented by
the Deputy Director (BOCW) in charge,
Labour Welfare and Safety,
Vinayagar Nagar,
Opposite to District Court, Madurai. ... Respondent/ Complainant

PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records of the complaint filed by the respondent before the Additional Chief Judicial Magistrate, Madurai in S.T.C.No.27 of 2017 and quash the same.

For Petitioner : Mr.Karthick,
Senior Counsel,
for Mr.Ka.Govindarajan
For Respondents : Mr.M.Chandrasekaran,
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed to quash the proceedings in STC No.27 of 2017, on the file of the learned Additional Judicial Magistrate, Madurai.

2.The petitioner, who has been shown as a Principal Employer of M/s.HCL Technologies Limited, is facing the criminal proceedings instituted by the respondent for an offence under Section 40(1)(2) (u) of The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter shall be referred to as 'BOCW Act') r/w Rule 46 (Head Protection and Other Protective Apparel) and Section 62(1)(2)(zc) r/w Section 47 (1) of BOCW Act and Section 40 (1)(2)(r) of BOCW Act r/w Rule 39 (1)(2)(3) Health and Safety Policy and Section 62(1)(2)(zc) r/w 47(1) of BOCW Act.

3.It is the case of the petitioner that M/s. HCL Technologies Limited is an IT Company and it had engaged the services of M/s.G.R.Shetty Builders Private Limited to undertake the construction work of IT buildings. On 21.07.2017, the respondent



came and inspected the site. Thereafter, a show cause notice dated 21.08.2017 was issued by the respondent to the petitioner alleging, breach of certain provisions of BOCW Act and Rules. The petitioner gave a detailed reply on 22.08.2017 to the respondent, informing them that the petitioner was not in violation of any of the provisions of BOCW Act or Rules. After the receipt of the reply, the respondent had proceeded to file a complaint before the learned Additional Chief Judicial Magistrate, Madurai for the above said offences.

4.The learned Senior Counsel Mr.Karthick, appearing for the petitioner submitted that under the scheme of BOCW Act, Section 53 deals with the offences by companies. Under the said provision only those persons who, at the time offence was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. By pointing out to this provision, the learned Senior Counsel would submit that the respondent even without adding the company as an accused has straight away proceeded against the petitioner by showing him as a principal employer. The learned Senior Counsel would submit that in all the cases, where the concept of vicarious liability is extended to the officers of the Company, the company has to be necessarily made as an accused in the complaint, failing which, the complaint itself is not maintainable. In order to substantiate the above said submission, the learned Senior Counsel has relied upon the judgment of the Hon'ble Supreme Court in *Aneeta Hada Vs. Godfather Travels and Tours Private Limited* reported in AIR 2012 SC 2795.

5.The learned Senior Counsel would further submit that insofar as the employer is concerned, the same is dealt with under Section 2 (1)(i) of the BOCW Act. The learned Senior Counsel relied upon Sub Clause (iii) and submitted that in relation to the construction work carried on by or through a contractor, the contractor shall be deemed to be the employer of the workers supplied by him. The learned Senior Counsel therefore submitted that even if the offence is said to have taken place in the site where the construction work was carried out, only the contractor namely M/s.GK.Shetty can be made as an accused and not the petitioner. Incidentally, the learned Senior Counsel also brought to the notice of this Court that the said building contractor namely M/s.GK.Shetty Builders Private Limited had pleaded guilty and paid fine for the above said offence. Therefore, the respondent ought not to have proceeded against the petitioner.

6.The learned Senior Counsel further brought to the notice of this Court the judgment of the Karnataka High Court in *Sri Jitendra Virwani Vs. The State of Karnataka* reported in 2013 SCC Online 6547, wherein, the Karnataka High Court had dealt with a case of similar nature in relation to Section 53 of the BOCW Act and quashed the proceedings on the ground that the company was not made



as a principal offender and was not prosecuted and only the complaint was filed directly against the officer of the company.

7. Per Contra, the learned Additional Public Prosecutor would submit that the petitioner is a employer as per BOCW Act and therefore, he has to face the criminal complaint filed against him in the Court below. The learned Additional Public Prosecutor would further contend that a very serious accident took place in the construction site, as a result of which one Gowdhaman, lost his life due to the fact that the safety measures like wearing of helmet, was not complied with and therefore, the respondent was right in filing the complaint against the petitioner for violation of various provisions of the BOCW Act and Rules.

8. This Court has carefully considered the submissions made on either side and also the judgment relied upon by the learned Senior Counsel.

9. Admittedly in this case, the complaint has been filed against the petitioner directly by showing him as the Principal Employer. An inspection was carried out by the respondent in the construction site, where the construction was carried out by engaging the contractor. Under such circumstances, the Principal Employer insofar as the workers engaged in the construction site by the contractor, will be only the contractor namely M/s.GK.Shetty Builders Private Limited and not the petitioner. The same is clear from a reading of Section 2(1)(i)(iii) of BOCW Act, which is extracted herein under:

"2. Definitions: (1) in this Act, unless the context otherwise requires,

(i) "employer" in relation to an establishment, means the owner thereof, and includes,-

(i)

(ii)

(iii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

Therefore, the very complaint filed by the respondent against the petitioner under the BOCW Act is not maintainable.

10. Even if M/s HCL Technologies Private Limited is considered to be the employer, the respondent cannot prosecute the complaint without adding M/s.HCL Technologies Private Limited as an accused. For this purpose, it is relevant to extract the judgment of the Hon'ble Supreme Court in *Aneeta Hada Vs. Godfather Travels and Tours Private Limited* reported in AIR 2012 SC 2795, which is as follows:

"42. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company"



appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted."

11. In the above said judgment, the Supreme Court was dealing with Section 141 of The Negotiable Instruments Act, which is *in pari materia* with Section 53 of the BOCW Act. Therefore, the same principal will apply for the offence committed by the companies in this case also.

12. The Karnataka High Court had an occasion to deal with the very same issue with regard to the scope of Section 53 of the BOCW Act and the Karnataka High Court in *Sri Jitendra Virwani Vs. The State of Karnataka* reported in 2013 SCC Online 6547 has held as follows:

" 5. Thus, from reading of the aforesaid Section, it is clear that if the offence alleged is committed by the Company, then the Company as well as all other persons, who at the time of commission of offence were incharge and responsible to the Company for the conduct of the business of the company, are deemed to be guilty of such offence and they are liable to be proceeded and punished accordingly.

6. Similar provision contained in Section 141 of the Negotiable Instruments Act (in short 'the NI Act') came up for consideration before the larger Bench of Apex Court in the case of *ANEETA HADA Vs. GODFATHER TRAVELS AND TOURS PRIVATE LIMITED* reported in 2012(5) SCC 661. The Apex Court has held that to prosecute the functionaries of the Company for the offence committed by the Company, there should be specific averments in the complaint to the effect that such person/s was/is incharge of and being responsible for conduct of business of the Company and in the absence of such specific averment, the functionaries of the Company cannot be prosecuted. It is further held in the said decision that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. It is further held



that the words "as well as the company" appearing in Section make it clear that when the Company can be prosecuted, then only persons mentioned in the other categories could be vicariously liable for offence subject to the averments in the petition and proof thereof.

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7. Section 141 of the N.I. Act, is in analogous to Section 53 of the Act. Therefore, the principles of law laid down in Aneeta Hada's case squarely applies to the facts of the case. Admittedly, in the case on hand the Company which is the principal offender has not been prosecuted. The petitioner in the present case is an Executive Director of the company and he is being prosecuted in that capacity.

8. Therefore, in the light of the law laid down in the aforesaid decision, the prosecution launched against these petitioners as functionaries of the company, is not maintainable since the company is not being prosecuted. In this view of the matter, the prosecution launched against these petitioners are liable to be quashed.

9. Accordingly, the petition is allowed. The prosecution launched against these petitioners in C.C. No. 191/2013 on the file of the Metropolitan Magistrate Traffic Court - I, Mayo Hall, Bangalore City, is hereby quashed."

13. The judgment of the Karnataka High Court cited supra will squarely apply to the facts of this case. In this case admittedly M/s.HCL Technologies limited has not been made as an accused and the petitioner has been directly prosecuted by showing him as the Principal Employer. The complaint filed by the respondent is not maintainable even on this ground.

14. For the reasons stated above, the complaint dated 16.10.2017 filed by the respondent before the Additional Chief Judicial Magistrate, Madurai is hereby quashed. The criminal Original petition is allowed. Consequently, CrI MP (MD) Nos. 1337 and 1338 of 2018 are closed.

Sd/
Assistant Registrar (CS-I)

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To

1.The Additional Chief Judicial Magistrate,
Madurai.

2.The Deputy Director (BOCW),
Labour Welfare and Safety,
Vinayagar Nagar,
Opposite to District Court,
Madurai.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.K.GOVINDARAJAN, Advocate, SR.No. 83044

Crl.O.P. (MD)No.2938 of 2017
07.09.2018

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