

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 204 OF 2018**

1. M/s M.R.F. Limited, a Company registered under the Companies Act, 1936, with its registered office at 124, Greams Road, Chennai-600 006. Having its factory at P.B. No. 1, No. 258, Tisk, Usgao, Ponda, Goa-403 401. Represented by its Authorised Representative, Shri A. Anthony Joseph, s/o Late D. Antonimuthu, aged 56 years, General Manager.
2. Mr. E.M. Mathai, M/s M.R.F. Limited 124, Greams Road, Chennai-600 006.
3. Mr. George Ninan, M.R.F. Limited, Ponda, Goa.
4. Mr. S.B. Naik, Brindavan Society, Bunglow No. 2-A, Chanda-Vadda Ambaji Nagar, Arlem, Fatorda-Goa.

Petitioner Nos. 2, 3 and 4 represented by the duly constituted Power of Attorney Holder, Mr. A. Anthony Joseph, General Manager, M.R.F. Limited, Ponda-Goa.

.... Petitioners

Versus

Goa M.R.F. Employees Union, representing its workmen, with its registered office at Saidham, Dhavalimol, Ponda, Goa, represented by its President, Mr. Rohidas Naik, resident of Dhaulimol, Ponda-Goa.

.... Respondent

Mr. Girish K. Sardessai with Mr. A. Carvalho, Advocates for the Petitioners.

Mr. Valmiki Menezes with Mr. Akshay Shirodkar, Advocates for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 25th February, 2019

PRONOUNCED ON: 12th March, 2019

JUDGMENT:

Rule made returnable forthwith. Mr. Menezes, the learned Counsel for the respondent, waives service. Heard finally by consent of parties.

2. Whether, Section 135-B of the Representation of the People Act, 1951 (Act, for short), creates a vicarious liability on the Directors, where the employer is a Company incorporated under the Companies Act, is the question which falls for determination in this petition.

3. The Government of Goa by a notification dated 27.05.1999, declared 04.06.1999 as a paid holiday, in view of the general elections to the Legislative Assembly of Goa and by a notification dated 30.08.1999, declared 05.09.1999 as a paid holiday, in view of the Lok Sabha Elections in the State. The notification *inter alia* applied to all employees of the commercial and industrial workers of private establishments in Goa.

4. The respondent, Goa M.R.F. Employees Union, representing the workmen of the petitioner no. 1-Company, filed a private criminal complaint before the Judicial Magistrate

First Class at Ponda, being criminal case no. 563/2005/C, against the petitioners, alleging commission of the offence, under Section 135-B of the Act, on the ground that the petitioners, in breach of Section 135-B of the said Act and the notification of the Government of Goa (declaring the two polling dates as paid holiday), have failed to grant a paid holiday to the workmen for the whole day. At the relevant time, petitioner no. 2 was a Senior General Manager, the petitioner no. 3 was a Plant Human Resource Manager and the petitioner no. 4 was the Manager of the Industrial Engineering Department of the petitioner no. 1-Company.

5. According to the petitioners, the Election Commission of India, by a circular dated 06.04.1999 and in particular para 4 thereof, had clarified that where there are industrial undertakings/ establishments, which are working on shift basis, the holiday may be declared only for the shift during which the polling is to be taken. The circular stipulated that however, it should be ensured that there should be sufficient time gap between the close of the poll and commencement of the shift duty. Based on this circular, the petitioner's interpretation was that the holiday needs to be declared only for the relevant shift, during which the polling was taken.

6. It may be mentioned that the said circular was challenged by the respondent, before this Court in Writ Petition No. 283/1999 and this Court vide judgment and order dated 23.02.2004 had quashed para 4 of the said circular. This Court found that Section 135-B of the Act, in its terms does not make any discretion between the establishment, which is working in shifts and therefore, held that the Election Commission, in its discretion, could not have clarified that the word “day” as used in Section 135-B of the Act, to be only restricted to the shift during which the polling is held. This Court found that the use of the word “day” of the poll would mean full 24 hours and the industries, which are working in shift basis cannot declare a holiday only for the shift, during which the polling is held.

7. Be that as it may, the circumstances as set out above, may not be strictly relevant to decide the issue. However, they are mentioned only to show the chronology of the events and to set the record straight.

8. The learned Magistrate recorded the statement of Mr. Rohidas Naik, the President of the respondent-Union and by the impugned order dated 14.09.2011, issued process against the petitioners for the offence punishable under Section 135-B

of the Act, which was unsuccessfully challenged by the petitioners before the learned Sessions Judge in Criminal Revision Application No. 96/2011, which was dismissed on 30.06.2018. Hence, this petition.

9. I have heard Mr. Sardesai, the learned Counsel for the petitioners and Mr. Menezes, the learned Counsel for the respondent. Perused record.

10. Although, there are several contentions raised in the petition while challenging the impugned order, Mr. Sardesai, the learned Counsel for the petitioners, has restricted the challenge to the issuance of process against the petitioner nos. 2, 3 and 4, on the ground that Section 135-B of the Act, does not create any vicarious liability on the Directors or the employees, who are incharge of the factory or management of the Company. It is submitted that in the absence of Section 135-B of Act, creating any vicarious liability of such employees or Directors, the learned Magistrate was in error in issuing process against the petitioner nos. 2, 3 and 4.

11. Mr. Menezes, the learned Counsel for the respondent has supported the impugned order. It is submitted that the

learned Magistrate, after threadbare consideration of the matter, including the ground as now raised, has held that the petitioner no. 1 (accused no. 1) being a Company, “by fiction of law”, the persons responsible for the affairs of the Company would be liable, which finding has been confirmed by the learned Sessions Judge. It is submitted that the complaint, which is filed way back in the year 2005, is still at initial stage of issuance of process and this Court may not interfere, as even otherwise, the petitioners would get an opportunity to defend the case before the Magistrate at the trial.

12. I have carefully considered the circumstances and the submissions made. Normally, this Court would be slow in interfering with the concurrent findings of the two Courts below, issuing process against the petitioners, in a private criminal complaint. At one stage, it was also suggested to the petitioners that they can go back to the Magistrate and raise all such contentions in law and facts as are available at the trial. However, the learned Counsel for the petitioners submitted that the matter involves a pure question of law and therefore, this Court may decide the same.

13. In order to appreciate the rival contentions, it is necessary to note Section 135-B of the Act, which reads thus:

“135-B. Grant of paid holiday to employees on the day of poll.— (1) Every person employed in any business, trade, industrial undertaking or any other establishment and entitled to vote at an election to the House of the People or the Legislative Assembly of a State shall, on the day of poll, be granted a holiday.

(2) No deduction or abatement of the wages of any such person shall be made on account of a holiday having been granted in accordance with sub-section (1) and if such person is employed on the basis that he would not ordinarily receive wages for such a day, he shall nonetheless be paid for such day the wages he would have drawn had not a holiday been granted to him on that day.

(3) If an employer contravenes the provisions of sub-section (1) or sub-section (2), then such employer shall be punishable with fine which may extend to five hundred rupees.

(4) This section shall not apply to any elector whose absence may cause danger or substantial loss in respect of the employment in which he is engaged.”

14. We are presently concerned with sub-section 3 of Section 135-B of the Act, which provides that where an employer contravenes the provisions of sub-section (1) or sub-

section (2), then such “employer”, shall be punishable with fine which may extend to five hundred rupees. The question is whether, the section creates any vicarious liability, where the “employer” is a juristic entity as a “Company”, incorporated under the Companies Act. It was not disputed during the course of the arguments at bar that the “employer”, in the present case, would be the Company, which is an independent legal entity, than the Directors, employees and the individual share holders. It may be mentioned that the word “employer” is neither defined under the Act nor in the General Clauses Act, as has been noticed by the learned Magistrate. It is now well settled and as has been rightly noticed by the learned Magistrate, that a penal provision, creating an offence, needs to be strictly construed and there is no scope for any liberal interpretation being placed on such a penal provision. Thus, in the absence of there being any indication in sub-section (3) of Section 135-B of the Act, creating a vicarious liability, it is not possible to accept that where the Company, as an employer commits the offence, the individual Director and/or its employees can be tried for the same.

15. There are several enactments which provide for offences by Company and at the same time, they specifically

provide that apart from the Company, every person, who at the relevant time, was incharge of and was responsible for the conduct of the 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 accordingly. The nearest of such example can be found in Sections 126-A and 126-B of the Act, which fall under the very Chapter III in which Section 135-B falls.

16. Sections 126-A and B read as under:

“126-A. Restriction on publication and dissemination of result of exit polls, etc. —(1)

No person shall conduct any exit poll and publish or publicise by means of the print or electronic media or disseminate in any other manner, whatsoever, the result of any exit poll during such period, as may be notified by the Election Commission in this regard.

(2) For the purposes of sub-section (1), the Election Commission shall, by a general order, notify the date and time having due regard to the following, namely: —

(a) in case of a general election, the period may commence from the beginning of the hours fixed for poll on the first day of poll and continue till half an hour after closing of the poll in all the States and Union territories;

(b) in case of a bye-election or a number of bye-election held together, the period may commence from the beginning of the hours fixed for poll on and from the first day of poll and continue till half an hour after closing of the poll :

Provided that in case of a number of bye-elections held together on different days, the period may commence from the beginning of the hours fixed for poll on the first day of poll and continue till half an hour after closing of the last poll.

(3) Any person who contravenes the provisions of this section shall be punishable with imprisonment for a term which may extend to two years or with fine or with both."

"126-B. Offences by companies.—(1) Where an offence under sub-section (2) of section 126A has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the 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 accordingly:

Provided the nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

(Emphasis supplied)

It can thus clearly be seen that where the Act intended that even the persons, who are incharge and are responsible for the conduct of the business of the Company should be held responsible, it has provided accordingly. A useful reference in this regard can also be made to a similar provision under Section 141 of the Negotiable Instruments Act, which also provides that where the offence is committed by a Company, every person, who at the time of commission of the offence was incharge of and was responsible to the Company, for the conduct of the business of the Company, as well as the Company, shall be liable to be proceeded against and punished accordingly. It is not necessary to multiply similar provisions in some other enactments. It hardly needs to be stressed that a

penal provision has to be strictly construed. Having regard to the provisions of Section 135-B of the Act, as they stand, in my considered view, do not create any vicarious liability on the Directors/ employees, who may be responsible for the affairs of the Company.

17. The learned Magistrate has considered this aspect in para 42 of the impugned order, which reads thus:

“42. The third question arises as to whether all the accused named herein have committed the offence alleged above. In the instant case accused nos. 2, 3 and 4 are the employees of the accused no. 1 and have been acting on behalf of accused no. 1. As accused no. 1 is a company by fiction of law the person responsible for the affairs of the company would be liable. It is categorically alleged in the complaint and duly stated on oath by the complainant in verification, the role played by each of the accused and their designation in accused no. 1 in committing the offence as they were acting on behalf of the company, accused no. 1 also becomes liable. The act uses the terminology employer. The term employer is not defined in the Act nor in the General Clauses Act. When construed strictly it would mean the accused no. 1 alone. However, this construction would automatically rope in accused nos. 2, 3 and 4 as it is categorically averred that these accused

were in charge of the business and management of accused no. 3 and have actively participated in commission of the offence.”

18. It is not possible to accept that a legal fiction can be imported while holding the petitioner nos. 2, 3 and 4 responsible for the offence. The Company being a juristic person, has to act through some natural person such as its Director or an employee and therefore, there is bound to be a role played by some natural person in commission of the offence. However, that also, in my considered view, would not be sufficient to import a legal fiction, particularly, in view of Section 135-B of the Act as it stands. It cannot be presumed that the legislature is oblivious of the situation that in a given case, a juristic entity, such a Company incorporated under the Companies Act, would be the employer, still as the section stands, the legislature in its wisdom has not provided for any vicarious liability. Nothing prevented the legislature from incorporating in Section 135-B of the Act, a provision akin to the one contained in Section 126-B of the Act.

19. The Courts below have also considered whether, mens rea is part of Section 135-B of the Act. However, it is neither necessary nor appropriate to go into the said question

at this stage. However, *prima facie*, (and I say so, because, the trial is still pending before the learned Magistrate), the offence as envisaged by Section 135-B of Act, to my mind, does not require any mens rea and it creates what is called as a strict offence. However, this may not be taken as final and binding opinion and it would be open to the learned Magistrate to consider this issue at the trial. The learned Sessions Judge while dealing with the said issue has also observed in para 35 that admittedly, the accused no. 1 is a Company, for whose acts the Officers and Directors are responsible. Here again, in my considered view, the learned Sessions Judge has lost sight that going by strict interpretation and only because the Company acts through its Officers/Directors, it cannot be said that such Officers and/or Directors would also be responsible for the offence alongwith the Company.

20. It was submitted by Mr. Menezes, the learned Counsel for the respondent that if the contention, as urged on behalf of the petitioners is accepted, it will take away the deterrent effect of Section 135-B of the Act. The contention, in my considered view, cannot be accepted for two reasons. First, the offence only imposes a fine of five hundred rupees and even if the Directors/employees, at the relevant time of the offence,

are held responsible, they can get out of the trial by depositing the fine of Rs.500/- each. Secondly, even assuming that the view as is being taken will take away the deterrent effect of the offence, the same cannot be a reason to take a view that Section 135-B creates a vicarious liability on the Director or employee of the Company, when it is not specifically spelt out by Section 135-B of the Act. This is something which is for the legislature to consider.

21. In that view of the matter, the impugned order to the extent issuing process against the petitioner nos. 2 to 4 is liable to be set aside. It is made clear that the other contentions about the locus standi of the Union to file the complaint or whether, it ought to be filed by the workmen, who were entitled to vote and were deprived from voting, on account of refusal to grant a paid holiday and whether, mens rea is a part of the offence is left open for consideration of the trial Court. Insofar as the aspect of mens rea is concerned, I have stated earlier that it is only a *prima facie* opinion. Hence, the issue as framed above, is answered in the negative.

22. It transpired during the course of the arguments at bar that the Company has taken action against several

workmen for not reporting to work, which is subject matter of challenge before the Industrial Tribunal. Evidently, the said dispute will have to be decided on its own merits and this judgment will have no bearing insofar as responsibility of the petitioner nos. 2, 3 and 4, for taking action against the workmen is concerned, which action is sub judice before the Tribunal.

23. In the result, the following order is passed:

ORDER

- (i) The petition is partly allowed.
- (ii) The impugned order to the extent issuing process against the petitioner nos. 2, 3 and 4 is hereby quashed and set aside.
- (iii) Rule is partly made absolute in the aforesaid terms.

C. V. BHADANG, J.

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