

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CrI.O.P.No.24508 of 2015
and M.P.Nos.1 & 2 of 2015

M.S.Srinivasan

... Petitioner/Accused

Vs.

The Deputy Director (BOCW), Kanchipuram,
Industrial Safety and Health,
A-28, Thiru-vi-ka Industrial Estate,
Guindy,
Chennai 600 032

...Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records pending in C.C.No.21 of 2015 on the file of Chief Judicial Magistrate, Cuddalore and quash the same.

For Petitioner :Mr.C.Manishankhar,
Senior Counsel for
Mr.K.Krishnamoorthy

For Respondent : Mr.M.Mohamed Riyaz,
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed by the Chairman of M/s.IL & FS Tamil Nadu Power Company Limited having their registered office at B4, Navin Presidium, Nelson Manickam Road, Aminjaikarai Road, Chennai 600 029 to quash the complaint in C.C.No.21 of 2015 on the file of the learned Chief Judicial Magistrate, Cuddalore, who has taken cognizance for the offence under Section Sec.40 (1) (2) (e) - Power of appropriate Government to makes rules for the safety and health of building workers, Rule 223 (a) (ii) (iii) & 223 (C) - Certificate of Medical Examination & sec. 62(1) (2) (zc), ii.Sec.40(1) (2) (u), Rule 229 (a) (b) (c) (d) (e) - Occupational Health service & sec. 62(1) (2) (zc) and iii. Sec. 40 (1) (2) (u), Rule 226 (a) (b) (c) (d) (e) - Occupational Health service & sec. 62 (1) (2) (zc) - Power to make rules.

2. The crux of the complaint is that violations pertaining to the Buildings and Other Constructions Workers

(Regulation of Employment and Conditions of Services) Act 1996 hereinafter referred as as BOCW Act and the TN BOCW Rules made there under. The petitioner is the Chairman of M/s.IL & FS Tamil Nadu Power Company Ltd., entered into an agreement to put up construction at the project site in Cuddalore District with one M/s.Shandong Tiejun Electric Power Engineering Limited, in turn they entered into an agreement in its capacity as an employer with M/s.Larsen & Toubro Ltd. as its contractor to execute and render such services as the employer may require and for this purpose, they entered into agreement dated 06.02.2012. As per the agreement M/s.Larsen & Toubro Limited is the contractor and owner is M/s.IL & FS Tamil Nadu Power Company Ltd. The said agreement also contemplates the employer namely M/s.Shandong Tiejun Electric Power Engineering Limited to engage the services of any other Sub contractor also. As per the agreement, the contractor is the person who is solely responsible for the adequacy, suitability and safety of its operation on the site and shall also maintain such health and safety records and reports at the site. They are also liable for and shall indemnify, protect, defend and hold harmless the employer / owner. They are also liable for accidents or injuries caused to the workmen and the contractor shall all the time indemnify the employer against all claims. On 26.07.2014, an accident occurred at the project site in which three contract employers suffered serious injuries and succumbed to the injuries died on 30.07.2014. That apart three other contract labourers suffered minor injuries and they were taken to hospital and treated as out patients. On 06.08.2014, the respondent issued notice and conducted inspection on 28.07.2014. Thereafter a show cause notice was issued by the respondent to the petitioner on 18.08.2014 in respect of violation of provisions of the BOCW Act and the BOCW rules. The petitioner submitted his explanation to the show cause notice dated 18.08.2014 to the respondent on 17.09.2014. After receipt of the reply submitted by the petitioner, the respondent initiated proceedings by way of complaint before the learned Chief Judicial Magistrate, Cuddalore for the above said offences.

3. Mr.C.Manishankhar, the learned Senior Counsel appearing on behalf of Mr.K.Krishnamoorthy, the learned counsel for the petitioner submitted that no offence is made out as against the petitioner who is neither employer nor a contractor as per the said Act and Rules. Even as per the case of the complainant, the offence was committed by the company M/s.IL & FS Tamil Nadu Power Company Ltd.,. (As per Section 53 of the Act provides for offence by company). According to the said provision where an offence under this act has been committed by a company, every person, who at the time, the offence was committed, was in charge of, and 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. In the

complaint, the company is not added as accused. The learned Senior Counsel further submitted that the period of limitation for filing the complaint has been specified and according to the provision under Section 55 of the said Act, no court shall take cognizance of an offence punishable under the Act unless the complaint thereof is made within three months from the date of alleged commission of offence. He submitted that in the case on hand, the alleged occurrence took place on 26.07.2014, but the complaint was filed only on 20.10.2014 and the petitioner has been made as an accused by permitting the correction to the claim of the accused mentioned in the complaint only by order dated 09.07.2015 by which time, the limitation is expired. Therefore, he submitted that the learned Chief Judicial Magistrate have no jurisdiction to take cognizance of the offence, since it is barred by limitation.

4. The learned Senior Counsel further submitted that originally the show cause notice was issued by the respondent on 06.08.2014 to one, Mr.Milagirpattu Sundaravaradan S/o. Mr.Narayana Rao. Subsequently amended show cause notice was issued on 18.08.2014 including certain other violations of the said Act and Rules. The complaint was also filed in the said name and subsequently on the direction of the learned Chief Judicial Magistrate, Cuddalore name of the petitioner has been inserted in the complaint. It is not permissible under any Act and Rules. The learned Senior Counsel further submitted that in respect of the company and the individual is prescribed for the offence alleged to have committed by the company, then the complaint should prima facie show that the accused / individual, who is sought to be prescribed was the person incharge and responsible to the company for the conduct of the business of the company. When the basic requirements is not made out in the complaint, the petitioner cannot be prosecuted in his individual capacity for the alleged offence committed by the company under Section 53 of the said Act. As per Rule 5 (3) of the said Rules, the duties and responsibilities of the employers, employee and others are stated that where a contractor who is undertaking operations or works appoints any another person to perform any work or services under a contract for services it shall be the duty of the contractor to comply with such of the requirements of the rules as affected that artisan, tradesman or other person and for this purpose any reference in these rules to an employee shall include a reference to such artisan, tradesman or other person and the contractor shall be deemed to be his employer. Therefore, admittedly work has been undertaken by the contractor who would be deemed to be the employers and no liability either civil or criminal can be fastened on the owner.

The learned Senior Counsel has relied upon the following judgments in respect of offences allegedly committed by the company:

(i) In the case of Aneeta Hada Vs. Godfather Travels and Tours Private Limited reported in (2012) 5 SCC 661

(ii) In the case of Anil Gupta Vs. Star India Private Limited and another reported in (2014) 10 SCC 373

(iii) In the case of Ajit Balse Vs. Capt. Ranga Karkere reported in III (2015) BC 1 (SC)

In respect of amendment in Criminal Complaint, he has relied upon the following judgments:

(i) In the case of K.K.Saravana Kumar Vs. Saravanan reported in 2009 (2) LW (Crl.) 1105.

(ii) In the case of K.Velmurugan Vs. N.Ganesan reported in 2010 (3) MWN (Cr.) DCC 23

and the following judgment has been relied upon in respect of Power of Court to Recall / Process:

(i) In the case of Adalat Prasad Vs. Rooplal Jindal & Other reported in (2004) 7 SCC 338.

5. The learned Senior Counsel for the petitioner also relied upon the Order passed by the Madurai Bench of this Court in the case of Babu Bhardagond Vs. State of Tamil Nadu, Represented by the Deputy Director (BOCW) in charge, Labour Welfare and Safety, Vinayagar Nagar, Madurai reported in (2018) 4 MLJ (Crl) 225 and the Order passed in Crl.O.P.(MD)Nos.14113 of 2012 to 14115 of 2012 dated 29.06.2018 by the Madurai Bench of this Court in the case of B.Prasada Rao & another Vs. The Government of Tamil Nadu, Rep by the Inspector of Factories, Tuticorin.

6. The learned Senior Counsel for the petitioner would further submit that the impugned private complaint was originally filed as against one, Mr.Milagirpattu Sundaravaradan S/o. Mr.Narayana Raon on 20.10.2014. On direction of the learned Chief Judicial Magistrate, Cuddalore the name of the accused was corrected and the petitioner name has been inserted as an accused on 09.07.2015. It is also seen that originally the show cause notice was issued to the said Mr.Milagirpattu Sundaravaradan S/o. Mr.Narayana Rao on 06.08.2014. Subsequently amended show cause notice was issued on the same person including certain other violations and provisions under BOCW Act and the BOCW rules. Therefore, the second show cause notice was also issued to the wrong person who is not at all the Proprietor of the Company M/s.IL & FS Tamil Nadu Power Company Limited. Admittedly, without any show cause notice the complainant was permitted to insert the name of the petitioner in the complaint. That apart, the limitation to file a complaint is three months from the date of commissions of offence. It is relevant to extract the provision under Section 55 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 Act, which reads as follows:

"55.Limitation of Prosecution:- No court shall take cognizance of an offence punishable under this Act

unless the complaint thereof is made within three months from the date on which the alleged commissions of the offence came to the knowledge of the Director-General, the Chief Inspector, an office-bearer of a voluntary organisation or, as the case may be, an office-bearer of any concerned trade union."

As per those provisions, the complaint ought to have been filed within a period of three months from the date of commission of offence. In the case on hand, the alleged occurrence took place on 26.07.2014 and though the complaint was filed on 20.10.2014, the name of the petitioner was inserted only on 09.07.2015. As such the complaint is barred by limitation.

7. Per contra, Mr.M.Mohamed Riyaz, Additional Public Prosecutor appearing for the respondent contended that M/s.IL & FS Tamil Nadu Power Company Limited is a registered company and the petitioner is the proprietor of the said company and he is the employer who allotted the works to the employees on 26.07.2014, and he violated the various provisions of BOCW Act and the BOCW rules. The accident occurred at the project site in which three contract labourers sustained grievous injuries and died, and other three persons seriously injured and treated in the hospital. Therefore, the respondent complainant issued show cause notice on 18.08.2014 to the petitioner. The petitioner's explanation is not satisfied and as such he lodged complaint under the BOCW Act and the BOCW rules only because of the safety measures are violated by the petitioner regarding the rules and provisions under the BOCW Act and the BOCW rules. Therefore he vehemently opposed the petition to quash the private complaint.

8. Heard Mr.C.Manishankhar, Senior Counsel appearing on behalf of Mr.K.Krishnamoorthy, the learned counsel for the petitioner, and Mr.M.Mohamed Riyaz, Additional Public Prosecutor appearing for the respondent.

9. It is seen that the complaint has been filed against the petitioner in the capacity of employer. Admittedly the company M/s.IL & FS Tamil Nadu Power Company Limited entered into an agreement with M/s.Shandong Tiejun Electric Power Engineering Limited for the purpose of putting up construction at the project site in turn the said M/s.Shandong Tiejun Electric Power Engineering Limited entered into an agreement in its capacity as employer with M/s.Larsen & Toubro Ltd as its contractor to execute and render such services as employer by agreement dated 06.02.2012. Therefore, the petitioner though he is a chairman of M/s.IL & FS Tamil Nadu Power Company Limited, he is not the employer to the workers engaged in the construction site by the contractor namely M/s.Larsen & Toubro Ltd. It is relevant to extract the provisions under Section (2) (1) (i) (iii) of the Act, which reads follows:

"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;"

As such as per the agreement and the show cause notice issued by the respondent / complainant the complaint itself is not maintainable as against the petitioner under BOCW Act and the BOCW rules. Therefore, the learned Chief Judicial Magistrate, Cuddalore ought not to have taken cognizance of the matter as against the petitioner.

10. As per Section 53 of the said Act, which provides where an offence committed by a company, the company shall be deemed to be guilty of the offence. Even assuming that the offence committed by the petitioner's company M/s.IL &FS Tamil Nadu Power Company Limited, the complaint was not filed as against the company, and it has been filed only as against the Chairman of the said Company. In this regard, it is relevant to extract the provision under Section 53 (1) of the Building and Other Constructions Workers (Regulation of Employment and Conditions of Service) Act, 1996, which reads as follows:

"Where an offence under this Act 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 and punished accordingly."

11. The Judgment rendered by the Hon'ble Supreme Court of India in the case of Aneeta Hada Vs. Godfather Travels and Tours Private Limited reported in (2012) 5 SCC 661 is squarely applicable to this case, the relevant portion of which is as follows:

"58. 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.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V.Parekh which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

The Hon'ble Supreme Court of India has held that while dealing with the case prosecuted under the NI Act, the offence committed by the company has to be filed under Section 141 of NI Act. The same principle is applied to the present case, where the company committed offence and the company shall be shown as accused. Further it is also seen that in similar matters, the Madurai Bench of this Court in CrI.O.P.(MD).No.2938 of 2017 reported in (2018) 4 MLJ (CrI) 225 has held as follows:

"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 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.

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."

12. The above said judgments are squarely applicable to the present case. Admittedly, in the case on hand, the company

M/s.IL & FS Tamil Nadu Power Company Limited has not been included as an accused. That apart, the show cause notice was also not issued to the petitioner / accused and without any cause of action, the present complaint has been instituted as against the petitioner that too in the capacity of employer of M/s.IL & FS Tamil Nadu Power Company Limited.

13. Therefore, in view of the above discussions, the complaint is barred by limitation and it is not maintainable as against the petitioner as such this Criminal Original Petition is allowed consequently the case in C.C.No.21 of 2015 on the file of the Chief Judicial Magistrate, Cuddalore is quashed. The connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar(CS-I)

True Copy

Sub-Assistant Registrar

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To

1. The Deputy Director (BOCW), Kanchipuram,
Industrial Safety and Health,
A-28, Thiru-vi-ka Industrial Estate,
Guindy,
Chennai 600 032

2. The Chief Judicial Magistrate
Cuddalore.

3. The Additional Public Prosecutor,
High Court of Madras

सत्यमेव जयते

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