

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2019

DELIVERED ON : 30.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.P.No.1293 of 2019
and W.M.P.No.1451 of 2019

Portonovo Maritime Limited
KPR Tower, Old No.21, New No.2,
Subba Rao Avenue
1st Street, College Road
Chennai-600 006,
rep. by its Authorised Signatory ... Petitioner

Vs

Deputy Director (BOCW)
Industrial Safety and Health
Kancheepuram,
at 47/1, Thiru.Vi.Ka.Industrial Estate
Guindy, Chennai-600 032 ...
Respondent

Prayer:- This Writ Petition is filed, under the Article 226 of Constitution of India, to issue a writ of Certiorarified Mandamus calling for the records of the Respondent in Proceedings No.A/64/2018 dated 11.10.2018, quash the same, and direct the respondent to pass a speaking order after considering the reply of the petitioner dated 10.10.2018 and pass such or further orders as this court may deem fit in the interest of justice.

For Petitioner : Mr.Anand Gopalan
for M/s.T.S.Gopalan & Co.

For Respondent : Mr.M.Karthikeyan,
Additional Government Pleader

ORDER

This Writ Petition is filed challenging the proceedings of the Respondent-Deputy Director (BOCW), Industrial Safety and Health, dated 11.10.2018 and for a consequential direction to the respondent to pass a speaking order after considering the reply of the petitioner dated 10.10.2018.

2. The Petitioner is a company, registered under the Companies Act in the year 2012. The Petitioner is developing a Port near Parangipettai, Cuddalore, and in the year 2017, the petitioner began construction of the said Port.

3. The Petitioner being the Licensee of the Parangipettai Port, engaged the services of a company called ITD Cementation India Ltd., through its Parent Company IL&FS Maritime Infrastructure Limited which had the expertise to build such ports. The aforesaid ITD Cementation India Ltd., had in turn engaged certain specialized agencies for carrying out the construction activities.

4. The Petitioner/Portonovo Maritime Limited as well as ITD Cementation Ltd., had registered themselves as an employee in respect of the project, as mandated under Building and other Construction Workers Act, 1996 (BOCW Act). M/s.IL&FS Maritime Infrastructure Limited (IMICL) has also been included as "Existing Contractors" in the Form-II R.C.No.CL/CDR-02/2017 dated 04.01.2018.

5. On 01.08.2018 around 7.25 a.m., while Sudarshan Mondal (deceased) was allowed to position himself in between the first and second liner, and standing in between metallic liners, a sudden huge wave caused the barge to tumble and Sudarshan Mondal suffered serious bodily injuries. He was taken to Cuddalore Government Hospital, where he was declared as dead by the doctors.

6. The Deputy Director (BOCW), Industrial Safety and Health, Kancheepuram, issued a show cause notice dated 06.08.2018 to the Petitioner asking to show cause in writing within 7 days, why you should not be prosecuted for the irregularities noticed on 02.08.2018 at the time of inspection and if no reply is received within the due date, suitable action will be taken against the Employer, Portonovo Maritime Limited. The Respondent also issued a separate show cause notice to the ITD Cementation India Ltd.

7. The Petitioner submitted his reply on 10th October 2018 stating that for the same accident holding ITD Cementation India Limited as an employer, a show cause notice has already been issued to them and reply also given by them on September 28, 2018. In such circumstances, for the same accident, the

Petitioner cannot be issued a show cause notice on the same charges. In paragraph 6, it is stated that ITD Cementation India Limited is the employer for the work that was done on August 01, 2018, which resulted in the unfortunate accident; as proceedings have been initiated for the aforesaid accident against ITD Cementation India Limited, in the capacity of the "Employer", requested to drop the proceedings initiated against them.

8. In paragraphs 8, 9 and 10, reply with regard to each of the charge, is given as under:-

"The entire activity was the responsibility of ITD Cementation; we are being charge based on a provision which is extremely wide and for non-compliance of any specific requirement specified under the Act.

The steel liners were being transported with well supported in compliance with the provisions of the Act.

The responsibility of maintaining muster roll in Form XVI is on ITD."

9. However, the Deputy Director (BOCW), Industrial Safety and Health, Kancheepuram, by the impugned order dated 11.10.2018, stated that reply submitted by the Petitioner for certain contraventions is not satisfactory; hence, it is informed that further legal action is being initiated for those contraventions under Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

10. Challenging the said impugned order, the Petitioner has come forward with this Writ Petition.

11. The respondent filed a counter affidavit. In the counter affidavit, in paragraph 5, it is submitted that the replies sent by the Petitioner along with the investigation report conducted by the respondent was submitted before the Chief Inspector as per Section 54 of the Act for getting sanction for prosecution. Hence as per the Act, there is no provisions for the respondent to pass any orders and the same is communicated to the Petitioner and the respondent is acting only as an investigating agency. Further, in paragraph 6, it is stated that the communication of the respondent regarding filing of complaint before the concerned Judicial Magistrate is a convention which is followed by respondent office, whereby the petitioner was informed beforehand regarding the action being taken. Thus, it is submitted that the petitioner cannot challenge a mere communication sent to him by the respondent.

12. It is further reiterated in paragraph 7 of the counter that as per the Act and Rules, there is no power given to the respondent to pass any orders. The respondent is not a quasi-judicial authority. The respondent has investigated the accident and submitted a report to the Chief Inspector to accord sanction for prosecution. The concerned Judicial Magistrate will take cognizance of the offence, when the complaint is filed and trial will be conducted as per law. It is further clarified that the petitioner can make submissions on merit before the concerned Judicial Magistrate Court as per the procedure of law.

13. Along with the counter affidavit, the Deputy Director (BOCW), Kanchipuram, Industrial Safety and Health, has filed dates and description of events, wherein, it is seen that in Sl.No.5, Reply letters dated 10th October 2018 from Principal Employer viz., "Porto Novo Maritime Limited" and contractor ITD Cementations India Ltd Received, by letter dated 11th October 2018, it is informed to both Principal Employer and Contractor that further legal action is being initiated, which is the impugned order in this writ petition. Thereafter, on the same day i.e., 11th October 2018, Proposals for Prosecution is being sent to Director, Industrial Safety and Health, Chennai, thereby, on 24th September, 2018, sanction for prosecution has been issued by the Director, Industrial Safety and Health, Chennai, vide letter dated 24.10.2018 for Principal Employer as well as Contractor. On 25th October 2018, complaints were prepared and filed before Chief Judicial Magistrate, Cuddalore, against Principal Employer and Contractor.

14. The Points for consideration in this writ petition is as to Whether the respondent has to pass a reasoned order based on the reply submitted by the petitioner dated 10th October 2018.

15. It is relevant to rely on Section 54 of the BOCW Act.

"54. Cognizance of offences:- (1) No court shall take cognizance of any offence punishable under this Act except on a complaint-

(a) Made by, or with the previous sanction in writing of, the Director-General or the Chief Registration Act, 1860 (21 of 1860) ; or

(b) Made by an office bearer of a voluntary organization registered under the Societies Registration Act, 1860 (21 of 1860); or

(c) Made by an office-bearer of any concerned trade union registered under the Trade Unions Act, 1926 (16 of 1926).

(2) No court inferior to that of a Metropolitan magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

16. The learned counsel for the petitioner relied on the decision of this Court reported in 2014 (3) MWN (cr.)86 [K.Masthan Rao, Deputy Chief Engineer/Occupier, Engineering Workshop, Southern Railway, Arakkonam, Vellore vs State rep. by Inspector of Factories, First Circle, Vellore] (Crl.O.P.No.15980 to 15984 of 2014 and 15374 to 15379 of 2014 and 13624 to 13627 of 2014), in support of his contention that legal proceedings initiated against the Employer, is unwarranted. The Petitioner (s) therein is the Occupier of Engineering Workshop, Southern Railway, Arakkonam, Vellore, and he has challenged the criminal proceedings initiated by the Inspector of Factories, first Circle, Vellore. The said criminal complaint has been filed by the Respondent, the Inspector of Factories, Vellore, against the Petitioners for alleged violation of the provisions of the Factories Act, 1948 and the Tamil Nadu Factories Rules, 1950. The Complaint was filed under Section 105(1) of the Act to punish the Petitioner under Section 92 of the Act before which a Show Cause Notice was issued to the Petitioners calling upon them to explain the contraventions noticed at the time of inspection. The Petitioners submitted their reply, which according to them is well within the period of seven days, as stipulated in the Show Cause Notice. The complaints which are subject matter of those cases were quashed and the Criminal Original Petitions are allowed on more than one ground and mainly by pointing out that the complaint being vitiated for total non-application of mind.

17. Taking into consideration the submissions made by both sides and while analysing the facts and circumstances of the case, it is relevant to refer to Section 50 of the BOCW Act.

"50. Penalty for other offences.- (1) Whoever contravenes any other provision of this Act or any rules made thereunder or who fails to comply with any provision of this Act or any rules made thereunder shall, where no express penalty is elsewhere provided for such contravention or failure, be punishable with fine which may extend to one thousand rupees for every such contravention or failure, as the case may be, and in the case of a continuing contravention or failure, as the case

may be, with an additional fine which may extend to one hundred rupees for every day during which such contravention or failure continues after the conviction for the first such contravention or failure.

(2) A penalty under sub-section (1) may be imposed-

(a) by the Director-General where the contravention or failure relates to a matter to which the appropriate Government is the Central Government; and

(b) by the Chief Inspector where the contravention or failure relates to a matter to which the appropriate Government is the State Government.

(3) No penalty shall be imposed unless the person concerned is given a notice in writing-

(a) informing him of the grounds on which it is proposed to impose a penalty; and

(b) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the imposition of penalty mentioned therein, and, if he so desires, of being heard in the matter.

(4) Without prejudice to any other provision contained in this Act, the Director-General and the Chief Inspector shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while exercising any powers under this section, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of witnesses;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record or copy thereof from any court or office;

(d) receiving evidence on affidavits; and

(e) issuing commissions for the examination of witnesses or documents.

(5) Nothing contained in this section shall be construed to prevent the person concerned from being prosecuted under any other provision of this

Act or any other law for any offence made punishable by this Act or by that other law, as the case may be, or for being liable under this Act or any such law to any other or higher penalty or punishment than is provided for such offence by this section:

Provided that no person shall be punished twice for the same offence. "

18. Admittedly, in the instant case, show cause notices had been issued to both Principal Employer as well as Contractor, for which, Reply letters dated 10 October 2018 is sent by the Principal Employer as well as Contractor. The order impugned in this writ petition is the proceedings dated 11.10.2018 of the Deputy Director (BOCW), wherein, it is informed that further legal action is being initiated for those contraventions under Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, at which stage, this Writ Petition is filed.

19. At the time of admission of this Writ Petition, this court directed the learned Additional Government Pleader to take notice for the respondents. On the next hearing, i.e., 21.01.2019, learned Additional Government Pleader was directed to file status report and further directed to produce records pertaining to the impugned proceedings. As such, the respondent filed counter affidavit along with status report furnishing details regarding proposals for prosecution sent to Director Industrial Safety and Health, Chennai; upon which the Director, Industrial Safety and Health, Chennai issued Sanction for Prosecution on 24.10.2018 for both Principal Employer and Contractor. The next day, i.e., 25.10.2018, complaints were prepared and filed before Chief Judicial Magistrate, Cuddalore, against Principal Employer and Contractor.

20. It is pertinent to note that in the said show cause notice, the Deputy Director (BOCW) pointed out the irregularities noticed at the time of inspection carried out in the Construction Site. Contravention of provisions of the BOCW Act has been mentioned in the said Notice as follows:-

- (1) Section 44 Rule 5(1)(b).
- (2) Section 40(1)(2)(u) Rule 64 (i)(p) (Operation of lifting appliances)
- (3) Section 62(1)(2)(t) Section 30(1) Rule 241 (1)(a)(9).

It is seen that even while pointing out the contraventions of

the provisions of the Act, the respondent has not stated the relevant provision of the Act in the show cause notice, by which, the Writ Petitioner was asked to show cause and to submit the explanation.

21. The learned Additional Government Pleader appearing for the respondent referring to Section 54, Cognizance of Offences and Section 50 Penalty for other offences, submitted that as per the Act and the Rules, the Chief Inspector is empowered to take action by levying penalty under Section 50 for penalty related to other offences. He further submits that Inspector is a investigating agency whereby the investigation report and the reply to the show cause notice by the offender is submitted to the Chief Inspector for getting sanction for prosecution and the Chief Inspector accords sanction for prosecution as per Section 54 of the Act. Thereafter, the concerned Judicial Magistrate takes cognizance of the offences and conducts trial as per law.

22. The Respondent has submitted in their counter affidavit that Chief Inspector is to accord sanction for prosecution as there is no provisions warranting the respondent to pass any orders for sanctioning the prosecution under Section 54 of the Act. But on perusal of the show cause notice, there is no reference of relevant provision of law under which the said notice issued to the Petitioner.

23. In such circumstances, this court comes to the conclusion that the respondent failed to furnish the relevant provision of law in the notice seeking action against the Petitioner, therefore, the impugned order is liable to be interfered with. In the event of the contraventions of the provisions of the Act or any rules, it is for the respondent to proceed afresh under Section 50 of the Act, by exercising the ample power vested on them and for such contravention, the respondent may impose penalty, by following the procedure as contemplated under the Act.

24. In the light of the above discussion, this court has no hesitation to quash the impugned order. Accordingly, the Writ Petition is allowed. The impugned order dated 11.10.2018 is quashed. It is open to the respondent to proceed afresh in accordance with law, as contemplated under the Act. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

nvsri

To

Deputy Director (BOCW)
Industrial Safety and Health
Kancheepuram,
at 47/1, Thiru.Vi.Ka.Industrial Estate
Guindy, Chennai-600 032

+1 cc to M/s.T.S.Gopalan & Co., Advocate, Sr.No. 42140
+1 cc to The Government Pleader, Sr.No. 43161

Order in
WP NO.1293 of 2019

CSL/26.06.2019



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