

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.Nos.4716, 4717 & 4720 of 2018

and Crl.M.P.Nos.2304, 2305, 2306, 2307, 2308 & 2309 of 2018

Giridhar Rajagopalan (Age 59),
S/o.Rajagopalan Ananthachary,
Employer/Contractor,
Transtonestroy Afcons JV.

Construction Side Address:
Chennai Metro Rail Limited Project,
Design and Construction of Underground Stations,
& Associated Tunnels from Washermanpet to Egmore,
Opp. To Chennai Central Station (adjacent to Part Station).

Office Address:
Central Office: 'Kannappar Thidal',
Choolai, Chennai-600 003. ... Petitioner in all Crl.O.Ps

Vs.

State of Tamil Nadu,
Rep. by its Deputy Director (BOCW),
Industrial Safety & Health,
No.47/1, Thiru.Vi.Ka. Industrial Estate,
Guindy, Chennai-600 032. ... Respondent in all
Crl.O.Ps

COMMON PRAYER : Criminal Original Petitions are filed under Section 482 of Cr.P.C. praying, to call for the entire records in C.C.Nos.9065, 9069 & 9126 of 2017, on the file of the Chief Metropolitan Magistrate Court, Egmore, and quash the same.

In all Crl.O.Ps.

For Petitioner : Mr.Karthik, Senior Counsel
for Mr.D.Balaraman

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

COMMON ORDER

These Criminal Original Petitions have been filed by the petitioner to quash the proceedings in C.C.Nos.9065, 9069 & 9126 of 2017, on the file of the Chief Metropolitan Magistrate Court, Egmore.

2.The learned Senior Counsel for the petitioner submitted that the respondent lodged the complaints against the petitioner for the offences under Sections 62(1)(2)(t), 30(1) read with Rule 123(1), 62(1)(2)(zc), Section 40(1)(2)(r) read with 39(1)(a)(b) and 62(1)(2)(zc), Section 40(1)(2)(u) read with Rule 46(1) of the Building and Other Constructions of Workers (Regulation of Employment & Conditions of Service Act), 1996 hereinafter referred to as "BOCW" Act. He further submitted that the allegations as against the petitioner are that the respondent inspected the Chennai Metro Rail Project on 03.07.2017 and found violations under the above said offences. Due to the said violations, the worker was succumbed to severe injuries on his head. Therefore, the petitioner is charged the allegations that the employer did not maintain the register of Employment of Building Workers employed by them at the construction site and was not produced even on demand during inspection. Further, the construction work was carried by the contractor without preparing a written statement of policy in respect of safety and health of workers containing the provisions mentioned in Rule 39(1)(a)(b) and without submitting the same to the Director of Industrial Safety and Health, Chennai. Finally alleged that, the employer/contractor of the establishment, has not provided safety helmet conforming to the national standards to the construction workers working at construction site.

3.He further submitted that, in this regard, a show cause notice was issued to the Project Manager, who is in charge of the day to day affairs of the Project. After receipt of the same, a detailed reply dated 29.07.2017 submitted to the respondent. The respondent did not satisfy with the explanation submitted by the Project Manager and lodged a complaint as against the petitioner.

4.The learned Senior Counsel further submitted that the complaint has been initiated by the respondent only as against the petitioner and on his individual capacity and not as against the Company. It is a clear violation act against the provisions of under Section 53(i) of the Building and Other Constructions of Workers (Regulation of Employment & Conditions of Service Act), 1996 hereinafter referred as as BOCW Act. Therefore, the present case is initiated against the petitioner and it is liable to be quashed.

5.He further submitted that there is absolutely no specific averments as against the petitioner relating to the charges. As far as the petitioner is concerned, he is not looking after day to day affairs of the project site of the Central Metro Rail Project and in this regard, he is also submitted the detailed representation to the show cause notice issued by the respondent. Without even considered the said explanation and without seeking any further clarification, the respondent straight away initiated the prosecution as against the petitioner. Therefore, he sought for quashment of the entire proceedings initiated as against the petitioner.

6.Per contra, the learned Additional Public Prosecutor appearing for the respondent contented that the complaint has been lodged by the respondent for the offences under Sections 62(1)(2)(t), 30(1) read with Rule 123(1), 62(1)(2)(zc), Section 40(1)(2)(r) read with 39(1)(a)(b) and 62(1)(2)(zc), Section 40(1)(2)(u) read with Rule 46(1) of the Building and Other Constructions of Workers (Regulation of Employment & Conditions of Service Act), 1996 on the allegation that the respondent inspected the Chennai Metro Rail Project at Park Station, Chennai on 03.07.2017. On inspection, it is found that the building construction was executed by the petitioner and the employer did not maintain the Register of Employment of Building Workers employed by them at the construction site and the same was not produced even on demand during inspection. Further, the construction work was carried out by the Contractor without preparing any written statement of policy in respect of safety and health of workers. The petitioner also did not provide any safety measures to the construction workers at construction site. He further contended that all the points raised by the petitioner cannot be considered under Section 482 of Cr.P.C and it has to be considered only during the trial. Therefore, he vehemently opposed to quash the complaints against the petitioner. Hence, he prayed for dismissal of these Quash Petitions.

7.Heard Mr.Karthik, learned Senior Counsel on behalf of Mr.D.Balaraman, learned counsel for the petitioner and the learned Additional Public Prosecutor appearing for the respondent Police.

8.A private complaint has been filed by the respondent as against the petitioner for the offences under Sections 62(1)(2)(t), 30(1) read with Rule 123(1), 62(1)(2)(zc), Section 40(1)(2)(r) read with 39(1)(a)(b) and 62(1)(2)(zc), Section 40(1)(2)(u) read with Rule 46(1) of the Building and Other Constructions of Workers (Regulation of Employment & Conditions of Service Act), 1996 hereinafter referred to as "BOCW" Act, on the allegations that the employer did not maintain the Register of Employment of Building Workers employed by them at the construction site and was not produced even on demand during inspection. Further, the construction work was carried by the contractor without preparing a written statement of policy in respect of safety and health of workers containing the provisions mentioned in Rule 39(1)(a)(b) and without submitting the same to the Director of Industrial Safety and Health, Chennai. Finally, alleged that the employer/contractor of the establishment, has not provided safety helmet conforming to the national standards to the construction workers working at construction site.

9.Admittedly, there is a joint Venture agreement under the name and style of M/s.Transtunnelstroy Afcons JV between the Transtunnelstroy Limited, a Russian Company and M/s.Afcons Infrastructure Limited an Indian construction company. A joint venture was awarded with a work of Design and Construction of underground stations and associated tunnels from Washermenpet to Egmore. Admittedly, the petitioner is one of the Director in the said M/s.Afcons Infrastructure Limited, the respondent has not issued

a show cause notice to other persons working in the said joint venture company. The present complaint also lodged only as against the petitioner and not as against the joint venture company. Therefore, the respondent failed to adhere with the requirement of Section 53(i) of the BOCW Act. In this regard, it is relevant to extract the provision under Section 53 (1) of the Building and Other Construction 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."

10.As per Section 53 of the said Act, which provides where an offence committed by the company shall be deemed to be a guilty of offence, even assuming that the offence committed by the petitioner/company, the 2nd respondent did not lodge a complaint as against the company and it has been only lodged as against the petitioner. In this regard, it is relevant to extract 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 drag-net 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 **Cr1.O.P. (MD).No.2938 of 2017** reported in **(2018) 4 MLJ (Cr1) 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

'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."

11. The above said judgments are squarely applicable to the present case. Admittedly, in the case on hand, a joint Venture company viz., M/s. Transtonnelstroy Afcons JV has not been included as an accused and no show cause notice was served to the said company by the respondent herein. Therefore, the above cited Judgment is squarely applicable to the present case and the impugned complaint is not sustainable as against the petitioner. Further, the petitioner is not involved in the day to day affairs and activities of the Central Metro Rail Project and there is also no specific allegations as against the petitioner to the said fact.

12.In view of the above discussion, the complaints are not maintainable as against the petitioner and it cannot be sustained further. Accordingly, these Criminal Original Petitions are allowed and the proceedings' in C.C.Nos.9065, 9069 & 9126 of 2017 on the file of the learned Chief Metropolitan Magistrate, Egmore stands quashed. Consequently, the connected miscellaneous petitions are closed.

-sd-
Assistant Registrar

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Sub Assistant Registrar

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To

- 1.The Chief Metropolitan Court,
Egmore, Chennai
- 2.The Deputy Director, (BOCW), State of Tamil Nadu,
Industrial Safety and Health-I,
A-28, Thiru-vi-Ka Industrial Estate,
Guindy, Chennai - 600 032.
- 3.The Public Prosecutor,
High Court Madras.

+1 CC to M/s.D.BALARAMAN Advocate SR.NO.39777

CRL.O.P.Nos.4716, 4717 & 4720 of 2018

RSK(CO)
cm 11/06/2019

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