IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.03.2019

\+ **W.P.(C) 9626/2017**

M/S S.J. OVERSEAS ..... Petitioner

versus

UNION OF INDIA & ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Pranav Rishi, Ms Astha Sharma and
: Mr Vinod Kumar,
For the Respondent : Mr Rajesh Gogna, CGSC with
: Mr Upendra Sai, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 16.08.2017 (hereafter 'the impugned order') passed by the Appellate Authority, rejecting the petitioner's appeal against an order dated 02.03.2017 passed by respondent no.2 (the Protector General, Emigration – hereafter 'PGE'). By the aforesaid order dated 02.03.2017, the PGE had upheld the decision to forfeit the bank guarantee furnished by the petitioner and had rejected the petitioner's request for revoking the said action.

2. It is the petitioner's case that it had furnished the bank guarantee in terms of Section 11(3) of The Emigration Act, 1983 (hereafter 'the Act') and the same could be forfeited for meeting the expenses for repatriation of emigrants recruited by the petitioner for meeting any claim raised by them. The petitioner submits that none of the emigrants recruited by the petitioner have raised any claims and no expenses have been incurred on such emigrants. It is contended that in the circumstances, the action of respondents in invoking the bank guarantee furnished by the petitioner and retaining the funds is illegal and ought to be set aside.

Factual Background

3. The petitioner is a sole proprietorship concern of Sh Siraj Ahmed, who was, *inter alia*, acting as a recruiting agent with his principal place of business in Kolkata. In the year 2005, the petitioner had applied and/or was granted a registration certificate as a recruiting agent under the provisions of the Act. By virtue of the said registration, the petitioner could carry on the business of recruiting and sending Indian emigrants abroad in accordance with the provisions of the Act and the Rules made thereunder.

4. The petitioner claims that in the year 2010, the petitioner leased a premises located at 3/396, Second Floor, Kings Complex, Pathanapuram, District Kollam, Kerala for operating his office. He had, accordingly, applied to the PGE for opening a branch office in Kerala. The petitioner further claims that one Mr Sudheer was his

neighbor, who had occupied an office on the first floor of the same building and carried on the business in the name and style of M/s Fast Link International. The petitioner claims that Mr Sudheer had fraudulently issued an advertisement in the newspaper inviting potential emigrants to his office for recruiting them for jobs overseas. It is alleged that he used the name and license number of the petitioner and had fraudulently collected money from such potential emigrants. The petitioner asserts that on becoming aware of the same the petitioner sent e-mails dated 29.06.2010 and 07.09.2010 informing the PGE that he had not issued any advertisement but the same had been done by someone else by fraudulently using his name and licence number.

5. Subsequently, on 04.01.2011, the petitioner withdrew his application for opening a branch office in Kerala. In April, 2011, the petitioner sent several emigrants to Malaysia.

6. The respondents received a complaint from one Sh E.P. Varghese, a resident of Kerala, complaining that his daughter Ms Lijji Varghese had remitted a sum of ₹50,000/- to the bank account of Sh Sudheer (account no. 623702010000475, Union Bank of India, Pathanapuram Branch) for securing a job in Libya. It was stated that Ms. Varghese had approached the appellant upon reading the advertisement published in Malayala Manorama for recruitment of nurses, doctors and para-medical staff for the Ministry of Health, Libya. He complained that his daughter was neither provided the job nor was refunded the amount paid by her.

7. On receipt of the aforesaid complaint, the PGE issued a show cause notice dated 25.04.2011 directing the petitioner to resolve the grievance of Ms Lijji Varghese within a period of 10 days and report compliance to the PGE. The petitioner was also called upon to show cause as to why his registration certificate should not be cancelled. It was alleged in the said show cause notice that the petitioner had, *inter alia*, charged more than the prescribed service charges and had violated Rule 25 and Rule 10 (1)(viii) of the Emigration Rules, 1983. The petitioner responded to the said show cause notice by a letter dated 26.04.2011. He claimed that he had no business relationship with Sh Sudheer and was not responsible for his actions. The petitioner also contended that Sh Sudheer had used the name of the petitioner as well as M/s Fast Link International in the advertisement issued by him.

8. The PGE did not accept the petitioner's explanation and passed an order dated 24/28.06.2011, suspending the petitioner's registration certification certificate for a period of 30 days and called upon him to show cause as to why his registration certificate not be cancelled. The said order also mentioned that the petitioner had obtained emigration clearance from the PGE, Kolkata for 13 workers by submitting a forged Demand Letter, Power of Attorney and Specimen Contract of an employer in Malaysia. The foreign employer had confirmed that the documents, on the basis of which the petitioner had applied for emigration clearance, were forged.

9. The petitioner filed another reply dated 08.08.2011, responding to both the complaints – complaint made by Sh E.P. Varghese of

Kerala and the complaint made by the PGE, Chennai – regarding forged documents submitted for emigration clearance for thirteen workers recruited for an employer in Malaysia.

10. The PGE did not accept the petitioner's contention and passed an order dated 25.08.2011, extending the suspension of the registration certificate pending determination of the question regarding cancellation of the registration certificate. The petitioner was afforded a further opportunity to file submissions in his defence within a period of 15 days from the date of the order.

11. In response to the aforesaid order, the petitioner sent a letter dated 05.09.2011, requesting the PGE to examine his response dated 08.08.2011 and cancel the order suspending his registration certificate.

12. On 04.06.2012, the PGE passed an order cancelling the petitioner's registration certificate and calling upon it to show cause as to why the bank guarantee submitted by the petitioner should not be forfeited.

13. The petitioner responded to the said notice by a letter dated 16.06.2012 requesting the PGE to review its order. The petitioner also sought copies of the letter received from the Foreign Employer M/s Aramijiya Sdn. Bhd. Malaysia. The PGE forwarded the said documents to the petitioner under cover of a letter dated 30.07.2012.

14. Thereafter, on 31.10.2012, the petitioner filed his response to the show cause notice issued earlier.

15. On 08.10.2013, the PGE passed an order forfeiting the bank guarantees furnished by the petitioner (bank guarantee dated 16.12.2006 for a sum of ₹3 lakhs and bank guarantee dated 29.04.2009 for a sum of ₹7 lakhs). The said order indicates that the said action was taken on the basis of the two complaints received earlier. However, it was also reasoned that there may be complaints that may be made in future.

16. Aggrieved by the same, the petitioner filed an appeal under Section 23 of the Act before the Appellate Authority. The said appeal was disposed of by an order dated 13.07.2015, whereby the Appellate Authority remanded the matter to the Registering Authority with a direction to issue a fresh notice indicating the specific amount of the bank guarantee proposed to be forfeited, and also clearly stating the purpose and the manner in which the forfeited amount would be utilized.

17. In compliance with the aforesaid order, respondent no.1 passed an order dated 02.03.2017, *inter alia*, holding that a sum of ₹50,000/- would be paid to Ms Varghese along with 8% annual interest and the balance amount would also be forfeited for the reasons stated therein.

18. Aggrieved by the same, the petitioner preferred an appeal under Section 23 of the Act, which was disposed of by the impugned order.

Reasons and Conclusion

19. At the outset, it would be relevant to refer to the operative part of the impugned order which reads as under:-

> "16. Now, it is clear beyond any doubt that the Applicant has, been involved in activity that is dubious and has charged more than the prescribed service charges that goes against spirits of the Emigration Act,1983 and therefore he has violated Section 24 of the Emigration Act,1983. Consequently, the-decision of the Respondent vide Order No1-11011/7146/2005-OE-1B dated 2nd March, 2017 is upheld. Since the Rule 23 of the Emigration Act, 1983 prescribes proper utilization of the seized Bank Guarantee, the same may be utilized for providing, necessary relief to the Indian workers who go to Malaysia and faced difficulties on account of fraudulent practice by Recruiting Agents and necessary action in this regard may be taken by the Respondent."

20. It is clear from the plain reading of the said order that the Appellate Authority has directed that the amount forfeited by the petitioner would be utilized in providing necessary relief to Indian workers who go to Malaysia and face difficulty on account of fraudulent practices by recruiting agents.

21. This Court had also pointedly asked whether any sum has been disbursed to Ms Lijji Varghese and it was confirmed that no amount had been paid to her.

22. In view of the above, the principal question to be addressed is whether the security provided by a recruiting agent for obtaining a registration under the Act can be forfeited for a general purpose, which

is unrelated to the violation of the Act or Rules alleged against the recruiting agent, or, for meeting expenses of any emigrants recruited by the recruiting agents.

23. Sub-section (1) of Section 11 of the Act contains provisions for making an application for registration to the Registering Authority. Sub-Section (2) and Sub-Section (3) of Section 11 of the Act are relevant and are set out below:-

> **Application for Registration**
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> xxxx xxxx xxxx xxxx
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> "(2) On receipt of such application, the registering authority shall,—(a) if the application is not in the prescribed form or does not contain any of the prescribed particulars, return the application to the applicant;
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> (b) if the application is in the prescribed form and contains the prescribed particulars, inform the applicant that he is eligible for the grant of the certificate applied for and, after giving the applicant an opportunity to be heard, determine, under sub-section (3), the amount of the security which the applicant shall furnish.
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> (3) The registering authority shall, for securing the due performance of the terms and conditions of the certificate proposed to be issued by it under sub-section (2) to an applicant and for securing compliance with the provisions of this Act and the rules made thereunder and for meeting expenses which may have to be incurred in the event of the repatriation to India of any of the emigrants who may be recruited by the applicant, determine, in accordance with the rules made in this behalf, the amount of security

> (not being in any case less than one lakh of rupees) which shall be furnished by the applicant."

24. A plain reading of Sub-Section (2) of the Act indicates that the Registering Authority is required to determine the amount of security required to be furnished by the applicant. Sub-Section (3) of Section 11 of the Act makes it amply clear that the security is for the purposes of securing compliance with the provisions of the Act and the Rules made thereunder, and for meeting expenses which may have to be incurred in the event of the repatriation to India of any of the emigrants who may be recruited by the agent.

25. It is also relevant to refer to Section 33 and 34 of the Act, which are set out below:-

> "**33. Provisions as to security.** – (1) Any security or other financial provision which may be required to be made under this Act shall be reasonable having regard to the purpose for which such security or other financial provision is required to be made.
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> (2) The prescribed authority, may, after giving notice in the prescribed manner to a person who has furnished any security for any purpose and after giving to such person an opportunity to represent his case, by order in writing, direct that the whole or any part of such security may be forfeited for being utilised for such purpose and in such manner as may be specified in the order.
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> (3) Where it appears to the prescribed authority that the security furnished by any person under this Act for any purpose has, for any reason, become inadequate, or has ceased to be available for any reason whatsoever, the prescribed authority may, after giving him an

> opportunity to represent his case, by order in writing, require such person to furnish such.
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> **34. Refund of security. –** Any security furnished under this Act shall be refunded or, as the case may be released, when no longer required for the purpose for which it has been furnished and the other circumstances in which and the manner in which any security furnished under this Act may be released or refunded shall be such as may be prescribed."

26. Sub-Section (1) of Section 33 of the Act makes it clear that the security or other financial provisions, required to be made under the Act, are required to be reasonable having regard to the purpose for which such security or other financial provisions is made. This clearly indicates that the security to be provided by an agent has to be reasonable and for a specific purpose.

27. Rule 23 of The Emigration Rules, 1983 provides for forfeiture of the security deposit. Rule 23 is set out below:-

> "**23. Forfeiture of security deposit**. – Where the competent authority or the registering authority has reason to believe that it is expedient to forfeit the whole or any part of security furnished by any person for being utilised for such purpose and in such manner as may be specified in the order, he may, after giving a notice to this effect to such person and thereafter giving him an opportunity to represent his case, by order in writing, forfeit the whole or any part of the security."

28. It is clear from the above that a security deposit can be forfeited only by a specific order indicating the purpose for which such security may be utilized.

29. In the present case, the action has been taken against the petitioner on the basis of two complaints. The first complaint related to the non-refund of ₹50,000/-, alleged to have been paid by Ms Lijji Varghese and the second complaint relates to submission of forged documents for obtaining emigration clearance for thirteen workers sent to Malaysia.

30. There is a serious controversy as to whether the petitioner would be liable to refund any amount paid by Ms Lijji Varghese. Admittedly, the said amount was not paid to the petitioner but to one Sh Sudheer. The respondents have held that the petitioner would be responsible for actions of Sh Sudheer, who has been termed as an employee of the petitioner. The said conclusion is based on the fact that the petitioner had given the telephone number of Sh Sudheer as the telephone number of his branch office. The petitioner has also been held liable since Ms Lijji Varghese had responded to an advertisement issued under the name and licence number of the petitioner. Although, the petitioner had claimed that the advertisement was fraudulently issued by Sh Sudheer, the respondents have found that the petitioner had not taken effective steps by disclaiming the same by issuing a public notice.

31. This Court is not inclined to examine the controversy whether the petitioner is responsible for the amounts paid by Ms Lijji Varghese. The learned counsel for the petitioner had also restricted his arguments to assail the decision to forfeit the bank guarantees for the general purpose of benefiting the emigrants recruited and sent to Malaysia.

32. The second allegation against the petitioner is that the petitioner had sent thirteen workers to Malaysia by obtaining emigration clearance on the basis of fraudulent documents. However, it is conceded that no claim has been made by any of the thirteen workers. Further, none of the said thirteen workers have been repatriated to India. Thus, no expenses have been incurred by the respondents for their benefit.

33. The provisions of Section 11 (3) of the Act are unambiguous and the security provided by the petitioner is only for specified purposes, that is, to secure compliance with the provisions of the Act and the Rules made thereunder and to defer the expenses which may be incurred for repatriation of the emigrants who may have been recruited by the recruiting agent. As noticed above, neither any claims have been made nor have any expenses been incurred in regard to the emigrants recruited by the petitioner. Further, the impugned order indicates that the amount of bank guarantee is to be utilized for the benefit of emigrants in general. The said purpose has no bearing with the allegations of non-compliance of the provisions of the Act, or the Rules made thereunder, on the part of the petitioner.

34. In view of the above, the impugned order cannot be sustained. The amount recovered by encashment of the bank guarantee can only be utilized for a purpose which has a direct bearing on the allegations made against the petitioner. Whereas, repayment of the amount paid by Ms Lijji Varghese has a direct relation with the allegations made against the petitioner, the order of the Competent Authority directing

that the amounts recovered from the petitioner, that is, ₹50,000/- out of the amount recovered from the petitioner, be paid to Ms Lijji Varghese along with 8% interest per annum, cannot be faulted. The direction to utilize the remaining amount for the general benefit of emigrant workers is unsustainable.

35. Although considerable time has elapsed, the respondents have not paid any amount of Ms Lijji Varghese. In the aforesaid circumstances, this Court directs the respondents to verify whether any amount is payable to Ms Lijji Varghese and, if so found, pay the sum (of ₹50,000/-) along with interest to Ms Lijji Varghese, as directed by the order dated 02.03.2017. The respondents shall refund the balance amount recovered by encashment of the bank guarantee to the petitioner within a period of two months from today.

36. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

MARCH 18, 2019
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