



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Crl. O.P. Nos.20373 and 20374 of 2017
and
Crl.M.P.Nos.12214 to 12217 of 2017

S.Sridhar ...Petitioner/Accused in both Crl.OPs

Vs.

State,
Rep. by Ms.S.Suriya,
Deputy Director (BOCW) - II
Industrial Safety and Health,
47/1, Thiru.V.Ka. Industrial Estate,
Guindy, Chennai- 600 032.

...Respondent/Complainant in both Crl.ops

PRAYER in Crl.OP.No.20373 of 2017: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for records and to quash the proceedings in S.T.C.No.1999 of 2017 on the file of Learned Judicial Magistrate, Ambattur as against the petitioner.

PRAYER in Crl.OP.No.20374 of 2017: Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for records and to quash the proceedings in S.T.C.No.1998 of 2017 on the file of Learned Judicial Magistrate, Ambattur as against the petitioner.

For Petitioner	: Mr.Abdul Saleem
For Respondent	: Mr.S.Vinoth Kumar
	Government Advocate (Crl. Side)

COMMON ORDER

Two complaints have been filed by the Deputy Director, Industrial Safety and Health Department for violation of the provisions of Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act).

2. It is the case of the prosecution that on 15.02.2017,



one worker viz., Elumalai was employed in the Second Floor of the building owned by the petitioner herein, while mixing the cement, fell down from the second floor and succumbed to injury. Thereupon, the Respondent has conducted an enquiry and found that the employer has not sent notice of accident immediately and violated the provisions of the Section 39(1) r/w Rule 210(1) (a) (b) and Rule 210(7) of the BOCW Act and the Tamil Nadu Building and other Construction Workers (Regulation of Employment and Conditions of Services) Rules, 2006.

3. Similarly, it is also alleged that the petitioner being an employer, has not provided constant and adequate supervision of any building or other construction work in his establishment, therefore, violated the Section 44 Rule 5(5) of the Act and Rules. That they violated Section 34 rule 5 and other violations alleged that he has not maintained the Muster Roll in Form XVI and Register of Wages in Form XVII under Schedule XIII for the workers employed in the above construction. Thereby, violated the provisions of the Section 62(1)(2)(t) Section 30(1) Rule 241(1)(a)(9) of the Act and Rules. Another complaint was also lodged under Section 62(1)(2) (zc) Section 40(1)(2)(u) Rules 42(5) of the Act and Rules.

4. The learned counsel appearing for the petitioner mainly contended that the prosecution launched against the petitioner is not according to law and in fact the Petitioner will not come under the definition of the employer as per the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act).

5. It is the further contention of the learned counsel for the Petitioner that as per the definition 2(1)(i) of the BOCW Act referred above, only the contractor would be the employer and it is his further contention that in the similar matter, this Court has quashed the proceedings in the judgement in Babu Bhardagond vs. The State Rep.by the Deputy Director (BOCW) [Crl.O.P.(MD) NO.2938 of 2017 Dated 07.09.2018]. Learned Counsel for the Petitioner also contended that even in the inspection report filed by the authorities clearly indicated that the entire building construction work was given to a contractor. Such being the position, launching the prosecution against the person, who is no way connected to the alleged violation is not sustainable in law. At the worst case even assuming that the company can be prosecuted under Section 53 of the Act even then the only person who was incharge of day to day affairs of the company would be prosecuted. But herein, the prosecution simply filed the complaint against the petitioner who is not a company. Learned counsel further submitted that when the entire construction work was carried away through



contractor as per the Act itself, only the contractor alone would be construed as an employer. Therefore, submitted that the prosecution launched by the Respondent is nothing but abuse of process of law and cannot be sustained. It is also submitted that the prosecution has already launched against the contractor in STC.No.1996 and 1997 of 2017 for the similar provisions for the same violations, wherein the contractor has already admitted the guilt and paid fine.

6. The learned Government Advocate (Crl.Side) admitted that the contractor has already paid fine and thereafter two private complaints have been filed against him. It is his contention that the definition of the employer covers the owner also. Therefore, there is no bar for lodging a complaint against the owner of the building. Hence, opposed to order these Petitions.

7. I have perused the entire materials. As indicate above, for various violations, the private complaint has been filed and taken on file. It is to be noted that Section 2(i) (iii) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act)., the definition of the "employer" reads as follows:

2(i) "employer", in relation to an establishment, means the owner thereof, and includes,-

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) 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;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor."

8. Section 2(i)(iii) makes it very clear that in respect



of any building or other construction work carried on by or through a contractor or by the employment of building workers supplied by a contractor, apart from the owner the Contractor is also to be considered as employer. The meaning of the employer assigning in the definition is inclusive one. However it is to be noted that though above provision includes owner, when the owner was not incharge of the building and in full control of construction, contractor alone to be considered as employer.

9. Be that as it may. The Petitioner was prosecuted individual capacity. But the inspection report filed by the authorities available in the typed set clearly indicate that the entire building was under the control of the contractor and it is also not disputed that the contractor also prosecuted for the same violations in STC No.1996 and 1997 of 2017 which has already disposed of by payment of the fine by the contractor. It is to be noted that the prosecution has not even whispered in the complaint as to whether the petitioner alone is the owner of the property, to bring the petitioner within the definition of Section 2 of the Act. There is a provision under Section 53 of the Act to maintain the prosecution against the company. Section 53 is an analogous provision of Section 141 of the Negotiable Instruments Act. To prosecute any of the Directors of the company, it must be shown by the prosecution that at the time of the offence, the person to be prosecuted was incharge of the affairs of the company or he was responsible for any act. It is not shown by the prosecution in the complaint that the petitioner was actually incharge of the company at the relevant point of time and he was responsible for the alleged violations. Further, the company has also not been made as an accused. Therefore without company being made an accused, without showing any materials that the petitioner was also responsible for all the day to day affairs of the company, the prosecution initiated against the person in his individual capacity cannot be sustained in the eye of law. In the similar set of facts, this Court in Crl.O.P.(MD)No.2938 of 2017 (cited supra) quashed similar prosecution.

10. This Court is also referred the judgment of the Karnataka High Court in Sri Jitendra Virwani vs. The State of Karnataka [2013 SCC Online 6547] wherein, the Karnataka High Court has quashed the proceedings on the ground that the company was not made as a principal offender and was not prosecuted and only the complaint was filed directly against the officer of the company. Taking note of the fact that the person was directly prosecuted without any averments or materials to show that he was individual owner of the property without making the



company as an accused and without establishing the fact that the person prosecuted was actually incharge of the company affairs or responsible for any act. The prosecution launched against the present petitioner is not maintainable. Hence, the proceedings are liable to be quashed.

11. It is also stated that similar violation, the contractor has already prosecuted and he has already admitted and paid fine. Therefore, for the same violation, there cannot be a prosecution once again. On that ground also the proceedings are liable to be quashed. Accordingly the Proceedings in S.T.C.Nos.1998 and 1999 of 2017 on the file of Learned Judicial Magistrate, Ambattur as against the petitioner are quashed.

12. In view of the same, the Criminal Original Petitions are ordered. Consequently, connected M.Ps. are closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

nr/ggs

TO

1.The Judicial Magistrate,
Ambattur.

2.The Chief Judicial Magistrate,
Tiruvallur.

3.The Deputy Director (BOCW) II,
Industrial Safety & Health
47/1, Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai 600 032.

4.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.AAV Partners, Advocate SR.No.58632

CrI. O.P. Nos.20373 and 20374 of 2017
and

CrI.M.P.Nos.12214 to 12217 of 2017

GJ (CO)
GN (30/11/2021)