

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 255 of 2014

Samir Sen

-Vs-

Sabuj Seal and another

For the Petitioners : **Mr. Sandipan Ganguli, Sr. Adv.**
Mr. Arkodip Bhattacharjee
Mr. Vishal Sinha

For the Opposite Party No.1 : **Mr. Ranabir Roy Chowdhury**

For the State : **Mr. Narayan Prasad Agarwala**
Mr. Pratick Bose

Heard on : 05.09.2022

Judgment on : 16.12.2022

Ananya Bandyopadhyay, J. :-

The present revisional application has been preferred for quashing of the proceeding of Case No. C-8999 of 2011, under Section 47 of the Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996 pending before the Court of the learned Chief Judicial Magistrate, South 24-Parganas At Alipore.

A complaint was filed by the Inspector of Factories, West Bengal and Inspector under the Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996 hereinafter referred to as BOCW Act under Section 47 of the said Act (as amended up-to-date) under

the provisions of Rule 54 and Rule 42(7) of the West Bengal Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Rules, 2004.

The complainant, inter alia, stated by virtue of being the Inspector of Factories, West Bengal and also the Inspector under BOCW Act, 1996, he filed the complaint in his official capacity and after receipt of notice of fatal accident in the prescribed form on 16.05.2011. He was directed by the Chief Inspector of Factories, West Bengal and the Deputy Chief Inspector of Factories, West Bengal to inspect the construction site on 24.05.2011 near ITC Sonar Bangla Hotel, E.M. By Pass, Kolkata to enquire into the causes and circumstances of the aforesaid fatal accident concerning the building worker namely Nirmal Singh designated as khalasi working under construction project named Kolkata Elevated Corridor, Panama Island at E.M. By Pass Park Circus, A.J.C. Bose Road Flyover on 21.04.2011 at about 2.20 hours. The said project was being constructed by Hindustan Construction Co. Limited bearing Registration No. Kol/STH/BOCW/REQS/00273 situated at 9 Syed Amir Ali Avenue, 4th Floor, Park Circus, Kolkata 700017 P.S. Topsia. The complainant conducted an enquiry at the office of the Directorate of Factories, West Bengal on 20.06.2011 in accordance with the Rule 221 of the West Bengal Building and Other Workers (Regulation of Employment and Conditions of Service) Rules, 2004. The complainant ascertained that the deceased fell from the steel ladder at the transverse beam on to the ground from a height of about 8.7 mt. when he was descending from the top of the transverse beam kept over the pier cap on the pier P-12. The said Nirmal Singh was taken to

Apollo Gleneagles Hospital at about 3.00 hours on 21.04.2011 and succumbed to his injuries at about 3.45 hours on the same day. The complainant further noticed the deceased building worker was allowed to perform his duties at the construction site without wearing any helmet in violation of the provisions of Rule 54 of the West Bengal Building and Other Workers (Regulation of Employment and Conditions of Service) Rules, 2004 prescribed under Section 40 of the BOCW Act (both amended up to date). Moreover, no safety net beside the pier cap (over the pier P-12) was provided and maintained by the employer despite the probability and likelihood of the building workers to fall on the said pier cap in violation of Rule 42 and 47 of the West Bengal Building and Other Workers (Regulation of Employment and Conditions of Service) Rules, 2004. The complainant had submitted a detailed inspection /inquiry report to the employer of the registered company as aforesaid through registered post with A/D vide No. 858/EO dated 28.07.2011. The complainant further contended opposite party Samir Sen was the employer of the registered construction company by virtue of being the project manager of the same. The complainant prayed for process against the opposite party under Section 47 of the West Bengal Building and Other Workers (Regulation of Employment and Conditions of Service) Act, 196 (as amended up-to-date) for contravention of the provisions of Rule 54 and Rule 42(7) of the West Bengal Building and Other Workers (Regulation of Employment and Conditions of Service) Rules, 2004 prescribed under Section 40 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (Both amended up to date).

Learned Advocate for the petitioner submits the petitioner has been wrongly impleaded as a party since he is not the employer of the company, namely, Hindustan Construction Company. Petitioner, being the project manager, does not come within the purview of the employer including the contractor. In such circumstances, he cannot be considered to be an employer himself being an employee of the company. He further submits the complaint to be devoid of averments stating that petitioner was responsible for the acts of the company and conducted the business of the company. Any lapse on the part of the petitioner company cannot be attributable to an act directly impleading the petitioner as an employer. He referred to the decision of the Hon'ble Supreme Court viz. (2012) 5 SCC Page 661 stating the company being a juristic person, unless and until impleaded cannot be vicariously liable for an act on the part of another under the provisions of West Bengal Building and Other Construction Workers (Regulation of Employment and Conditions of service) Rules 2004. He has also envisaged the intent of Rule 54 of West Bengal Building and Other Construction Workers (Regulation of Employment and Conditions of service) Rules 2004. He stressed the fact that the employer was to ensure the safety measures to be taken for the purpose of the construction or other issues. He further contented previous sanction in writing of the Director General or the Chief Inspector in compliance of Section 54 of the West Bengal Building and Other Construction Workers (Regulation of Employment and Conditions of service) Act, 1997 was not obtained. Therefore, the cognizance taken by the Ld. Trial Court was contrary to the legal provisions. He further submitted the incident came to the notice of the company on 25th of April, 2011 and

after an expiry of three months on 10th August, 2011 the complaint was lodged which was barred by limitation, being mandatory provisions of a Special Act to be complied with strictly in absence of any provision granting extension of time contrary to the provisions enumerated in Section 473 of the Cr.P.C. The following complaint was barred by limitation, therefore, Learned Trial Court committed an error in taking cognizance of the complaint beyond limitation period also in contravention of the provisions of Sections 54 and 55 of the West Bengal Building and Other Construction Workers (Regulation of Employment and Conditions of service) Act. The petitioner did not fall within the ambit of the definition “ Employer” of the said Act and also in absence of specific averments in the complaint defining his role in the company, being an employee himself, he could not be impleaded as a party as much the proceeding itself is liable to be quashed.

Learned Advocate for the Opposite specific party i.e. Inspector of Factories submitted that a certificate of registration was granted to the aforesaid registered construction company under Sub Section 3 and Section 7 of the Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Act, 1996 which stipulated M. Srinivasa Rao (Project Manager) to be the employer of the construction company for the purpose of construction of Kolkata Elevated Corridor, Panama Island E.M. By Pass Park Circus, A.J.C. Bose Road flyover. It was further informed about the change of authorization on behalf of the aforesaid registered construction company in the name of one Samir Sen who substituted the aforesaid M. Srinivasa Rao, the erstwhile authorized person being in charge of the project.

Learned Advocate for the Opposite party no. 1 submitted in view of the aforesaid document the opposite party by virtue of being the Project Manager was also the employer of the Hindustan Construction Co. Limited and was therefore liable for an offence committed by the company in accordance with the provisions enumerated in Section 53 of the said Act. It was further contended that sanction of the Chief Inspector of West Bengal was obtained before the institution of the case in question, through an official notesheet.

Learned Advocate for the Opposite party No. 1 further argued that the notice of the fatal accident in the prescribed form No.XIV signed by the personnel in-charge of the aforesaid registered construction company was submitted to the Registering Officer and Assistant Labour Commissioner. As per notification No. 539-IR/EIL/1A – 18/04 dated 27.05.2005 the Labour Commissioner was designated to be the appropriate authority having jurisdiction to deal with the provisions leading to the safety and health of the said BOCW Act along with the Chief Inspector of West Bengal. However, in the instant case the notice of fatal accident was submitted only to the Assistant Labour Commissioner which eventually reached the office of the Chief Inspector of Factories, West Bengal on 16.05.2011. Thereafter, the enquiry was conducted and copy was forwarded to the petitioner and also to the Inspector of Factories West Bengal and Deputy Chief Inspector of Factories, West Bengal 26.07.2011 and the complaint was filed on 10.08.2011 within prescribed period of limitation i.e. three months. He further stated the learned trial court did not commit any error in taking cognizance of the complaint filed by the company. As per the certificate of

registration the petitioner had been the employer. Prior sanction has been obtained from the appropriate authority to institute a complaint, within the period of limitation and, therefore, the proceeding pending before the trial court is not liable to be quashed.

Ld. Advocate for the State conceded to the submission of the Ld. Advocate for the Opposite Party the Inspector of Factories and submitted certain documents received by the Public Prosecutor, High Court at Calcutta.

At the outset it is imperative and obligatory to find out whether the complaint giving rise to Case No. C-8999 of 2011 pending before the Ld. Chief Judicial Magistrate, South 24 Parganas, Alipore was barred by limitation.

The Ld. Advocate for the petitioners submitted that the incident of fatal accident was brought to the notice of the concerned authority through a letter dated 21.04.2011 and the same was received and acknowledged by the authority on 25.04.2011 under the seal of "Directorate of Factories" duly signed. The complaint should have been filed before the Ld. Court of Chief Judicial Magistrate within three months i.e. by 25.07.2011 in accordance to the provisions enumerated in Section 55 of the said Act. The complaint was, however, filed on 10.08.2011 before the aforesaid Court of the Chief Judicial Magistrate beyond the stipulated period of limitation in contravention of the mandatory provision of a Special Act, in contrast to the provision enunciated in Section 473 of the Code of Criminal Procedure. The Ld. Trial Court committed an error in taking cognizance of the complaint which was otherwise barred by limitation.

The Ld. Advocate for the opposite party no.1 submitted that the complaint was filed within the period of limitation. He further submitted that the notice of the fatal accident was submitted to the Assistant Labour Commissioner who was not the competent authority to act upon the same. It was ultimately brought to the notice of the Chief Inspector of the Factories, West Bengal on 16.05.2011. The enquiry was initiated thereafter and Case No. C-8999 of 2011 was instituted by Ld. CJM of Alipore on 10.08.2011 within the prescribed period of limitation of three months from the date of the alleged commission of offence being brought to the knowledge of the Chief Inspector.

Section 55 of The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996:

*"55. **Limitation of Prosecutions**- 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 commission of the offence came to the knowledge of the Director-General, the Chief Inspector, and office-bearer of a voluntary organization or, as the case may be, an office-bearer of any concerned trade union."*

Section 39 of The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 is as follows:

Notice of certain accidents:

(1) Where in any establishment an accident occurs which causes death or which causes any bodily injury by reason of which the person injured is prevented from working for a period of forty-eight hours or more immediately following the accident, or which is of such a nature

as may be prescribed, the employer shall give notice thereof to such authority, in such form and within such time as may be prescribed.

(2) On receipt of a notice under sub-section (1) the authority referred to in that sub-section may make such investigation or inquiry as it considers necessary.

(3) Where a notice given under sub-section (1) relates to an accident causing death of five or more persons, the authority shall make an inquiry into such accident within one month of the receipt of the notice.

Section 42 of The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 is as follows:

Appointment of Director-General, Chief Inspector and Inspectors:

(1) The Central Government may, by notification, appoint a Gazetted Officer of that Government to be the Director General of Inspection who shall be responsible for laying down the standards of inspection and shall also exercise the powers of an Inspector throughout India in relation to all the establishments for which the Central Government is the appropriate Government.

(2) The State Government may, by notification, appoint a Gazetted Officer of that Government to be the Chief Inspector of Inspection of Building and Construction who shall be responsible for effectively carrying out the provisions of this Act in the State and shall also exercise the powers of an Inspector under this Act throughout the State in relation to establishments for which the State Government is the appropriate Government. (3) The appropriate Government may, by notification, appoint such number of its officers as it thinks fit to be Inspectors for the purposes of this Act and may assign to them such local limits as it may think fit.

(4) Every Inspector appointed under this section shall be subject to the control of the Director-General or the Chief Inspector, as the case may be, and shall exercise his powers and perform his functions under this Act subject to general control and supervision of the Director-General or the Chief Inspector.

(5) The Director-General, the Chief Inspector and every Inspector shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

Rule 220 of The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2004 is as follows: "220. Reporting of accident. –(1) Notice of any accident on the construction site which either—

- a) causes loss of life; or
- b) disables a building worker from working for a period of forty eight hours or more immediately following the accident shall forthwith be sent by telegra, telephone, fax or similar other means including special messenger within forty hours in case of fatal accidents and seventy two hours in case of other accidents involving building worker to—
 - i) The Labour Commissioner, West Bengal and the Chief Inspector of Factories, West Bengal, having jurisdiction in the area in which the establishment in which such accident or dangerous occurrences took place is located. The Labour Commissioner, West Bengal or his officers not below the rank of Deputy Labour Commissioner or the Chief Inspector of Factories, shall be the authority under Section 39 of the Act;
 - ii) Board with which the building worker involved in accident was registered as a beneficiary;
 - iii) Chief Inspector; and
 - iv) the next of kin or other relative of building worker involved in accident."

Rule 221 of The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2004 is as follows:

"221. Procedure for enquiry into causes of accident or dangerous occurrence.- 1) The enquiry under sub-section (2) of sub-Section (3) of Section 39 of the Act, as the case may be, shall be conducted by the authority referred to in sub-clause (i) of (b) of sub-rule (1) of rule 220 in the following manner, namely,

- (a) the enquiry shall be commenced as early as it may be, and in any case, within fifteen days of the receipt of notice of accident or dangerous occurrence under Rule 220.
- (b) The enquiry may be conducted by the authority referred to in sub clause (1) of clause (b) of sub-rule (1) of rule 220 himself or by an enquiry officer appointed by such authority;
- (c) The authority or enquiry officer, as the case may be shall serve or cause to be served, notices in writing, informing the date, time and place of such enquiry to all persons entitled to appear in such enquiry and whose names and addresses are known to such authority or enquiry officer;
- (d) Notwithstanding the provision of clause (b), for the purpose of notifying other persons who may in any way be concerned or be interested in such enquiry, the authority or enquiry officer,

as the case may be may publish notice of such enquiry in one or more local newspapers, informing the date, time and place of such enquiry.

*2) the person entitled to appear at the enquiry may include—
 (a) an inspector or any officer of the State Government or the Central Government or an undertaking or public body, concerned with the enforcement or compliance of safety provisions of the Act and these rules in the concerned establishment;
 (b) a trade union or a workers' association or an employers association;
 (c) the worker involved in the accident or his legal heir(s) or authorized representative;
 (d) the owner of the premises in which the accident took place;
 (e) any other person, at the discretion of the authority or the enquiring officer, as the case may be, who may be interested in or be concerned with the cause of an accident or may have knowledge.”*

A conjoint reading of the provisions under section 39 of BOCW Act, 1996 and the West Bengal and other Constructions Rules, 2004 delineates the reporting of an accident on the construction site to the Labour Commissioner, West Bengal and the Chief Inspector of Factories West Bengal having jurisdiction in the area in which the establishment in which such accident or dangerous occurrence took place is located. The Labour Commissioner, West Bengal or his officers not below the rank of Deputy Labour Commissioner or the Chief Inspector of Factories shall be the authority under Section 39 of the Act.

One Mr. Vasudevan Nambiar, Personnel Manager of Hindustan Construction Company Ltd. Vide a document Ref: HCC/KER/PM/04 dated 21-Apr-11 submitted a mission Form XIV-Report of Accident and dangerous occurrence under BOCW Act, 1996 to the Registering Officer, Under Building and other Construction Workers (Misc.) Act, 1996 and Assistant Labour Commissioner, New Secretariat Building,

11th Floor, Kolkata-700001. The reporting officer in view of the Section 39 of the aforesaid act in consonance with Rule 220 of The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2004 shall be the Labour Commissioner, West Bengal or his officers not below the rank of Deputy Labour Commissioner or the Chief Inspector of Factories and not the Assistant Labour Commissioner. The report of accident and dangerous occurrences as aforesaid was thereafter placed before Deputy Chief Inspector, West Bengal.

Through Notification No. 535-IR/EIL/1A-18/04(Pt.)—27th May, 2005 Labour Commissioner Govt. of West Bengal was appointed as Chief Inspector of Inspection of Building and Construction under BOCW Act in terms of Section 42 sub Section 2 of the said Act.

Through Notification No. 536-IR/EIL/1A-18/04(Pt.)—27th May, 2005 all Assistant Labour Commissioners have appointed to be the inspectors who shall exercise the powers conferred on Inspectors by or under the said Act, having jurisdiction as specified in column (2) of the said Schedule in respect of all the provisions of the Act and Rules thereunder **except the provisions relating to Safety and Health, with immediate effect** in terms of power conferred by Sub Section (3) of Section 42 of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) act, 1996 (27 of 1996).

It is, therefore, evident that in terms of Chapter 7 dealing with Safety and Health measures of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) act, 1996 all Assistant Labour Commissioners of West Bengal did not have any authority or role to exercise any power conferred on Inspectors under the said Act dealing with Safety and Health measures. Reporting of the alleged accident to the Registering Officer and Assistant Labour Commissioner as aforesaid cannot be construed to be a legal notice of the alleged accident upon the competent authority under the Act. An office note entrusting “*Sri T. Bandyopadhyay, Deputy CIF West Bengal for enquiring and taking necessary action please*” was endorsed on 16.05.2011 on the aforesaid report of the accident and dangerous occurrences dated 21st April, 2011. On the same date another office note was endorsed on the aforesaid report dated 21st April, 2011 endorsing “*Sri S. Seal to enquire and report early for onward transmission to LC and CIF*”. Therefore, the notice was received by the office of the Chief Inspector of the West Bengal on 16.05.2011 and the Institution of Case no. C-8999 of 2011 pending before the Ld. Chief Judicial Magistrate, South 24 Parganas, Alipore on 10.08.2011 was within three months from the date on which the alleged commission of offence was brought to the knowledge of the Chief Inspector as aforesaid and therefore, within the prescribed period of limitation as stipulated in Section 55 of the BOCW Act.

The Ld. Advocate for the petitioner contended that the Trial Court had taken cognizance of the complaint as aforesaid filed in

absence of previous sanction of the concerned authority in writing in contravention of the provision of Section 54 of the BOCW Act.

Section 54 in The Buildings And Other Construction Workers (Regulation Of Employment And Conditions Of Service) Act, 1996

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 Inspector; or

(b) made by an office- bearer of a voluntary organisation 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.

From the documents on record submitted by the Ld. Advocate for the State as received by the Ld. Public Prosecutor of the High Court at Calcutta it appeared that a note-sheet of the Directorate of the Factories was placed by the opposite party no. 1 seeking permission to prosecute on 01.08.2011 and the Chief Inspector Factories, West Bengal sanction to prosecute on 02.08.2011.

In paragraph 2 of the complaint filed before the Court of Ld. Chief Judicial Magistrate, Alipore the petitioner therein has stated “*your petitioner after receiving on 16.05.2011 a notice of fatal accident in the prescribed Form No. XIV and on being directed by the Chief Inspector of Factories, W.B. as well as by the Deputy Chief Inspector of Factories, W.B. inspected the construction site on 24.05.2011 near ITC Sonar Bangla Hotel, EM By Pass, Kolkata to inquire into the causes and circumstances leading to a fatal accident which occurred to a building*

worker named Nirmal Singh, a Khalasi by designation on 21.04.2011 at about 02:20 hrs. while working at the construction project named Kolkata Elevated Corridor, Parama Island at E.M. By Pass Park Circus A.J.C Bose Road Flyover being constructed by the establishment known and registered as Hindustan Construction Co. Ltd. registration No. KOL/STH/BOCW/REQS 00273 situated at 9, Syed Amir Ali Avenue, 4th Floor, Park Circus, Kolkata 700017, P.S. Topsia. ”

The words “on being directed by the Chief Inspector of Factories West Bengal as well as by the Deputy Chief Inspector of Factories, West Bengal” the “inspection” of the construction site in question was accomplished. In its perspicuity, the Inspector of Factories had executed the order of his superior and the direction to implement the same on the part of the concerned authority is the permission or authorization or consent granted to perform or discharge the functions accordingly in the form of sanction in its exactitude.

It is, therefore, evident from the record that necessary sanction was obtained from the competent authority to file the complaint dated 10.08.2011.

The Ld. Advocate for the petitioner submitted the petitioner cannot be termed as employer since he does not fall within the purview of the definition of an employer according to Section 2 (1) (i) of the BOCW Act. The petitioner had been an employee of Hindustan Construction Company Ltd. (HCCL) being designated as the Project

Manager of the said construction company not being the owner or the Chief Executive Officer of the said establishment.

The Ld. Advocate for the opposite party submitted that Form 2 vide memo no. KOL/STH/BOCW/REGS/00273 dated 29.01.2010 pertaining to a certificate of registration granted under Section 7 (3) of the BOCW Act, 1996 and the rules under the said Act was granted to M/s Hindustan Construction Company Ltd. which stipulated the name and address of the employer including location of the building and other construction work in serial no. 2 of the said Form as follows:

“2. Name and address of employer including location of the building and other construction work: *Shri M. Srinivasa Rao (Project Manager), Kolkata Elevated Road Corridor on Project.*

3. Name and permanent address of the establishment: *9, Syed Amir Ali Avenue, 4th Floor, Kolkata 17, Hindustan Construction Co. Ltd.*

4. Nature of work in which building workers are employed or are to be employed: *9, Syed Amir Ali Avenue, 4th Floor, Kolkata-17 Construction of Kolkata Elevated Corridor Panama Island at E.M. Bypass- Park Circus, AJC Bose Flyover.*

5. Maximum number of building workers to be employed on any day by the employer: *500 Nos.”*

Referring to the aforesaid certificate of registration the Ld. Advocate for the opposite party harped the project manager to be an

employer of the establishment namely Hindustan Construction Company Ltd.

According to **Section 2 (1)(i) of the BOCW Act**,

“(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;”

The Project Manager in an establishment is indubitably an employee not an employer in terms of Section 2(1)(i) of the Act which is evident from the document bearing Ref: HCC/KER/PM/05 dated 30th May, 2011 addressed to the Inspector of Factories, W.B. & Inspector under BOCW (RECS) Act, 2nd and 3rd Floor, Indian Overseas Bank Building, 146/1, B.B. Ganguly Street, Kolkata with regard to change of authorization. The said communication inter alia stated that *“with reference to the licence no. .KOL/STH/BOCW/REQS/00273 dated 29.01.2010”—*

“we would like to draw your kind attention that the authorized person of our company whose name is recorded in your office Mr. M. Srinivasa Rao—Project Manager has been transferred to our Lucknow

site in the month of October 2010. Now in the place of Mr. Rao, undersigned has taken over the charge of project Manager and is authorized person of Kolkata Elevated Corridor Project.

Hence, you are requested to change necessary in your record and all the future correspondence to be sent in the name of undersigned.”

The said communication was signed by present petitioner Samir Sen as Project Manager for Hindustan Construction Company Ltd. The said communication aptly justifies the status of the petitioner to be an employee and a person authorized to function as a Project Manager in place of the erstwhile Project Manager, Mr. M. Srinivasa Rao being transferred to a different site of the said construction company. The present petitioner, therefore, is neither the employer nor the owner of Hindustan Construction Company Ltd. and does not fall within the provisions enumerated in Section 2(1)(i) of the BOCW Act.

The Ld. Advocate for the petitioner emphasized the provisions under Section 53 of the BOCW Act persistently that the construction company had not been arraigned as an accused in the instant case and relied on the decision of the Supreme Court in **Aneeta Hada v. Godfather Tours and Travels Private Ltd. reported in (2012) 5 SCC 661** stating that, prosecution of any officer, director etc. without impleading the employer company is not permitted in law. In other words, the officer of a company cannot be prosecuted in his individual capacity. Section 53 of the said Act is in pari materia with Section 141 of the Negotiable Instruments Act, 1881 and therefore the ruling of law as laid down in Aneeta Hada (supra) shall squarely apply in this

case that to prosecute the functionaries of the company, impleadment of company is a condition precedent and is imperative. In the instant case, the company, HCCL has not been impleaded as accused.

The Ld. Advocate for the opposite party submitted that the present petitioner being an employer in terms of the certificate of the registration as mentioned above was in-charge of and responsible for the conduct of the company in terms of Section 53 of the BOCW Act and, therefore, it was not mandatory to implead the company as a party.

Section 53 of the BOCW Act is as follows:

“Offences by companies

(1) 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 against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purposes of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.”

Section 53 (1) of the BOCW Act stipulates every person who at the time of commission of the offence 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 against and punished accordingly. Evidently, the Hindustan Construction Company Ltd. was not impleaded as a party in Case No. C-8999 of 2011, under Section 47 of the BOCW Act, 1996, in terms of Section 53 of the BOCW Act which is a mandatory provision to be complied with.

In addition to the person who at the time of commission of the offence was in charge of and responsible to the company to conduct the business of the company, the Construction Company (HCCL) should have been impleaded as a party.

The Ld. Advocate for the petitioner further submitted to attract vicarious liability there must be specific averments in the petition of complaint that the person who is sought to be indicted as accused was the person in charge of and responsible for the day to day affairs of the company and relied on the decision of the Apex Court in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhall & Anr., (2005)8 SCC 89** is emphasizing the law that before a person is sought to be fastened vicariously connected with the company, the principal accused being the company itself it is mandatory to specifically aver in the petition of complaint that at the time of commission of offence, the person accused was in charge of and responsible for the day to day

conduct/affairs of the business of the company. Since there is no deemed liability of any director, officer, without this averment being made in the complaint, the officer, director cannot be prosecuted for the alleged offence committed by the company under Section 53 of the BOCW Act, 1996. In the instant case, there is no averment in the entire petition of complaint that the petitioner was in charge of and responsible for the day to day conduct/affairs of the business of the Company, HCCL.

In the opinion of this Court an offence under Section 138/141 of the Negotiable Instrument Act concerning dishonor of cheque for a sum of Rupees cannot be equated with the severity of the loss of life of a building worker i.e. a khalasi due to violation of the provisions of Rule 54 of the West Bengal Building and other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2004 prescribed under Section 40 of the BOCW Act (both amended up-to-date).

The intensity and gravity of a particular case is distinct from the other. The punishment for an offence under Section 323 IPC is not similar to that of an offence committed under Section 302 IPC. In the opinion of this Court considering the severity in the instant case resulting in loss of life compared to that of an offence committed under Section 138/141 of the N.I. Act absence of specific averment in the complaint explaining the petitioner to be in charge of and

responsible to the company for the day to day conduct or affairs of the business of the company should not make the complaint legally inadmissible.

Section 106 of the Evidence Act, section 106 reads thus:-

“106. Burden of proving fact especially within knowledge-When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. ”

Illustrations

- (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.*
- (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.”*

In the case of Shambhu Nath Mehra v. The State of Ajmer¹

the Hon’ble Supreme Court observed that,

Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof.

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

Illustration (a) says—

“A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.”

9. *This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case*

¹ (1956)SCR 199

the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor and Seneviratne v. R.

10. *Illustration (b) to Section 106 has obvious reference to a very special type of case, namely to offences under Sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.*

11. *We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose*

to exercise due diligence, as to the accused, the facts cannot be said to be “especially” within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts.

In the instant case whether the complainant’s claim of violation of the safety measures under the BOCW Act is justified or not needs investigation since the fact of violation of the rules if any is within the exclusive domain of the accused and the proceedings cannot be quashed at this stage without adducing evidence to consider its veracity or otherwise too. The cause of

death of an individual i.e. the building worker i.e. the Khalashi due to negligence on the part of any individual or the company is an act against the society and not against any individual or a particular company alone, as the case may be, as in the case of a complaint filed under Section 138/141 of Negotiable Instrument Act.

Section 53 (2) of the BOCW Act states,

“(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

In common parlance “a project Manager means the person in overall charge of the planning and execution of a particular project.” In the opinion of this Court execution of a project has its own peculiarities and complexities. Project manager in relation to accomplishment of a particular project has to deal with several stakeholders, supervise and monitor the work in progress at the ground level or to be precise at the grass root level to provide the ultimate deliverables within the four corners of law abiding by and adhering to the legal principles. Accordingly, a project manager being a salaried person of the company, being its officer cannot afford to be indolent and negligent in discharging his duties and abdicate his responsibilities.

At the material point of time the project manager was effectively in charge of supervision of work progress at the aforesaid construction site involving the stake holders including the contractors and the labourers as would transpire from the certificate of registration though to name him as the employer is figmentary. Therefore, the “project manager” as an officer can be proceeded against in view of Section 53(2) of the BOCW Act.

The enquiry report submitted by the opposite party no. 1 with regard to the incident of the death of the building worker at the construction site on the basis of “the report of accident and dangerous occurrences” vide as aforesaid establishes and consolidate such an accident to have occurred at the construction site and cannot absolve the company as well as the officer entrusted to manage the affairs of the company at the said site resulting in the loss of a life of a vulnerable worker, prior to the trial at such a preliminary stage.

The power of the High Court under Section 482 in order to quash a proceeding pending before the Ld. Trial Court should be used sparingly.

Section 482 in The Code Of Criminal Procedure, 1973 is as follows:

482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

In **Mrs. Dhanalakshmi v. R. Prasanna Kumar** ² it has been observed by the Hon'ble Supreme Court that,

“interference by the High Court in exercising its inherent powers under Section 482 of the Code of Criminal Procedure to quash the criminal proceedings would only be justified when complaint did not disclose any offence or was patently frivolous, vexatious or oppressive.”

In **Sharda Prasad Sinha v. State of Bihar (1977) 1 SCC 505: 1977 SCC (Cri) 132: (1977) 2 SCR 357: 1977 Cri LJ 1146** where **Bhagwati J.** speaking for the Court observed as follows: (SCC para 2, p. 506: SCC (Cri) p. 133)

“It is now settled law that where the allegations set out in the complaint or the charge-sheet do not constitute any offence, it is competent to the High Court exercising its inherent jurisdiction under Section 482 of the Code of Criminal Procedure to quash the order passed by the Magistrate taking cognizance of the offence.”

10. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present Code.”

In **Paramjeet Batra v. State of Uttrakhand**³, the Hon'ble Supreme Court held:

“12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or

² AIR 1990 SC 494

³ (2013)11 SCC 673

otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High court....”

Contrary to the circumstances observed by the Hon’ble Supreme Court in the decisions cited above, the instant complaint prima facie establishes an offence involving negligence causing death of a worker and to quash a proceeding with regard to loss of life will amount to a process of abuse of the Court and will definitely not be for securing the ends of justice. Loss of money and predicaments ancillary to it, to be sustained by any company under Section 141 of the Negotiable Instrument Act is absolutely distinct in extremity to be similarly circumstanced with the present case where there has been a loss of life due to alleged negligence on the part of the petitioner company. Recourse should be taken to avail of the provisions of Section 319 Cr.P.C. to arraign the Construction company namely Hindustan Construction Company Ltd. in the proceedings pending before the Ld. Trial Court for securing the ends of justice. To quash the proceeding pending before the Ld. Trial Court at this premature stage without a conclusive determination of the party at fault at whose negligence there has been an untimely loss of life as well as the pain and suffering of his family members will cause gross injustice contrary to the purpose of achieving fair justice.

The Criminal Revisional Application being CRR 255 of 2014 is dismissed.

There is no order as to cost. Let the copy of this judgment be sent to the learned trial court as well as the police station concerned for necessary information and compliance.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)