

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 729 OF 2022

Sridhar Venkatesh S/o. Kanjirassery
Narayanan Venkatesh ...Petitioner
Versus
State Of Maharashtra And Anr. ...Respondents

....

Mr. Amit Desai a/w Mr. Gopal Krishna Shenoy a/w Mr. Kushal Mor a/w
Mr. Arvind Kumar Ray a/w Mr. Royden Fernandes and Mr. Abhijeet
Badar i/by Khaitan and Co., Advocate for Petitioner.
Mr. Meelan Topkar, Advocate for Respondent No.2.
Mr. M.G. Patil, APP for Respondent – State.

CORAM : PRAKASH D. NAIK, J.
DATE : 21st SEPTEMBER, 2022.

PER COURT:

1. The petitioner has challenged the order issuing process dated 9th November, 2021 in SCC No.13661 of 2021 pending before the Court of learned J.M.F.C., Nashik.

2. The complainant has alleged that Nashik district Security Guard Board has been established as per Section 6 of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981. The complainant has been appointed as Inspector on 2nd July, 2013 in accordance with Section 16 of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981. The opponent No.1 is the occupier and opponent No.2 is the Manager (H.R.). The establishment GlaxoSmithKline Pharmaceuticals Limited is situated at A/14, MIDC Ambad, Nashik.

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The provisions of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 and Scheme of 2002 under the said act is applicable to the said establishment. On 17th February, 2021 Board Inspector approached opponent No.2 and recorded inspection remarks. The establishment was intimated to rectify the contraventions noticed at the time of said visit. Since satisfactory explanation was not provided by establishment, show cause notice dated 18th March, 2021 was issued. As clarification given by opponent Nos. 1 and 2 in respect to remarks on visit dated 17th February, 2021 was not satisfactory, complaint was filed. In spite of opportunity being given, the opponents have not complied the provisions and contravened clause 30 and 26(8) of the Scheme and liable for punishment under clause 42 of the Scheme.

3. Vide order dated 9th November, 2021, the learned JMFC, issued process against the accused.

4. Learned counsel for the petitioner submitted that the learned Magistrate without recording its satisfaction that *prima facie* case has been made out for summoning the petitioner for alleged offences under clause 30 and 26(8) of the scheme of 2002 punishable under clause 42 of the said scheme directed issuance of

process. The petitioner is the Managing Director of GlaxoSmithKline Pharmaceutical Limited Company. The petitioner cannot be made vicariously liable for the offence committed by the said company as neither 1981 Act nor 2002 scheme contain any provision for vicarious liability. No offence is made out against the petitioner. No specific allegation is made against the petitioner. The aforesaid company is engaged in the business of manufacturing, marketing and sale of pharmaceutical and health care products. On 11th November, 2019 the company entered into a contract with G4S Secure Solutions (India) Pvt. Ltd. (G4S). As per agreement G4S agreed to provide security guards for the premises. The security service agreement was initially valid for a period of 12 months. Subsequently, the term of the agreement was extended from time to time. Vide amendment No.5 to the agreement, term was extended till 31st March, 2022. As per the agreement G4S has been providing security guards for the security of the Nashik premises of the company. The security guards are the employees of G4S. On 17th February, 2021, the Inspector Nashik District Security Guards Board visited the premises of company for inspection. During the inspection the inspector observed alleged contravention of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 and scheme of 2002 in relation to security

guards deputed at the premises by G4S. The company issued its response to the allegations vide letter dated 23rd February, 2021 alongwith documents. It was pointed out that the security guards employed at Nashik factory are paid as per the wage rate of Security Guard Board. They are paid over time by G4S. The Nashik factory is registered with Security Guard Board. G4S is giving leave with pay to security guards, weekly off etc. as per the Act. All security guards were provided identity cards by G4S. However, the respondent No.2 issued show cause notice dated 18th March, 2021. Reply was forwarded by company on 24th March, 2021. The complaint is vague. The process is issued without application of mind. The criminal prosecution against the petitioner is not maintainable without naming the company as accused. There is no averments in the complaint that the petitioner is incharge and in control of affairs of the said company. No role is attributed to the petitioner. Clause 26 of 2002 scheme provides for obligation of employer agencies. Clause 26(8) mentions that responsibility for complying the requirement of clause 26(8) rests on the employer agency i.e. G4S in the present case. There is no whisper in the complaint that the offence is committed by the employer agency with consent of petitioner or in connivance with petitioner. There is no averment in complaint that offence committed by employer

agency is on account of any neglect on the part of petitioner. There is no provisions of vicarious liability under Sub-clause(2) of clause 42 of the 2002 Scheme or under the Act of 1981.

5. Mr. Desai has relied upon the decisions of this Court in the case of i) United Helicharters Pvt. Ltd. and Others V/s S.P. Apsingekar and Another, 2014 SCC Online Bom 5055.

ii) ICICI Bank Ltd. and Others V/s State of Maharashtra and Another, 2010 SCC Online Bom 2249.

iii) Tops Security Ltd. and Another V/s. S.P. Aspingekar and Another, 2010 SCC Online Bom 2248.

6. Learned Advocate Mr. Meelan Topkar appearing for the respondent No.2 submitted that *prima facie* case is made out against the accused. It is not necessary to pass detail order while issuing process. The grounds urged by the petitioner are based on disputed questions of fact. Such grounds can be urged during trial. The Inspector of Security Guard Board visited the factory premises and noted contravention of provisions of 1981 Act and the scheme of the Act brought into force in 2002. The contravention was recorded in the inspection book and show cause notice is issued to the accused. Thus opportunity of hearing was given to the accused. The reply was not satisfactory. Hence, prosecution was initiated

against the accused. The petitioner was responsible and was having control over the affairs of factory. The petitioner has admitted that he was the Managing Director of the said establishment. The petitioner is liable to be prosecuted in accordance with clause 42 of 2002 Scheme.

7. Learned Advocate for Respondent No.2 has relied upon decision of this Court in the case of M/s. B.A. Continuum Solutions Pvt. Ltd and Ors. V/s State of Maharashtra and Anr., 2013 (4) ABR 242.

8. The complaint filed by Respondent No.2 alleges that the accused No.1 is the occupier and accused No.2 is the Manager of establishment GlaxoSmithKline Pharmaceutical Limited. The complaint is vague. It is alleged that the respondents/accused had contravened clause 30 and clause 26(8) of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme 2002. It does not specify the nature of contravention. Complaint does not mention how petitioner has contravened the provisions of Act of 1981 and Scheme of 2002. The order issuing process indicate that process is issued under Section 25 of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981. Although order issuing process need not be elaborate,

considering the fact that, complaint is vague and nature of order issuing process, reflects non application of mind by learned Magistrate. Section 25 of the Act relates to supersession of the Board. The complaint alleges contravention of clause 30 and 26(8) punishable under clause 42 of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme 2002. Process has not been issued under the said provisions. Clause 30 relates to wages allowances and other conditions of service of security guards of the Board. Clause 26(8) relates to obligations of employer agencies. It enjoins upon upon employer agency to comply provisions of minimum wages Act 1936, payment of gratuity Act, Employees Provident Fund Act etc. clause 42 relates to penalties. The petitioner is Managing Director of GlaxoSmithKline Pharmaceutical Limited. The complaint is silent about role of petitioner. The establishment GlaxoSmithKline Pharmaceutical Limited (G4S) is not an accused. The said establishment is the principal employer as defined in Section 2(8) of the Act. The establishment has entered into contract with G4S Secure Solutions (India) Pvt. Ltd. The said company is providing security guards to establishment. The relevant clauses of the said agreement are as follows:

- i. Clause 14 - It is expressly understood by the parties hereto that the Service Provider is the employer in respect of the personnel engaged by the Service Provider for fulfilling his obligations under this Agreement. The Service Provider as the employer of the personnel engaged by Service Provider for fulfilling his obligations under this Agreement will be fully responsible for payment of wages to such employees at the prescribed rate, including all allowances as applicable to such personnel.
- ii. Clause 15 - Client shall have no say on the employment of Security personnel and Service Provider has the sole and exclusive right of hiring and terminating its personnel, as well as of taking decisions on their leave and benefits.
- iii. Clause 16 - The Service Provider shall ensure its personnel maintain attendance records as per Client's attendance tracking systems for its security personnel at Site.
- iv. Clause 17 - Service Provider represents and warrants that it is compliant with applicable statutes, including but not limited to registration with the applicable government authorities, and has all the necessary licenses including the license issued under the Private Security Agencies (Regulation) Act, approvals and permissions to perform its

duties and obligations required under this Agreement. Service Provider further represents and warrants that it has obtained and continues to maintain all the approvals and licenses as required under the various labour Laws including the Arms Act 1959 and the Arms Rules 1962.

v. Clause 18 - Service Provider represents and warrants that it is and shall continue to be compliant with applicable statutes, including but not limited to Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 (“MPSG Act”) and Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme, 2002, and undertakes to procure an exemption u/s 23 of the MPSG Act within a period of 1 year from the date of this Agreement.

9. From the aforesaid agreement it is apparent that the alleged contraventions were to be complied by G4S. On 17th February, 2021, the Inspector, Security Guards Board, visited premises of GSK for inspection and observed alleged contraventions, which were reflected as inspection remarks. The Report also shows that name of G4S as security guards provider to establishment. The contraventions were, (i) Wages not being remitted as per the rates of Security Guard Board and overtime remuneration is not being remitted at double the amount of rate, Violating Act of 1981 and

Clause 30 of 2002 Scheme, **(ii)** Leave with wages, weekly off, uniform are not being provided violating clause 30 of 2002 Scheme, **(iii)** Salary of security guards not deposited in nationalized bank, **(iv)** Establishment not registered with Board, violating clause 13(1) and **(v)** Identity Card not provided to security guards. The establishment (GSK) issued response vide letter dated 23rd February, 2021 stating that all objections are complied. Show cause notice was also replied. On the ground that reply was not satisfactory complaint was filed. Clause 42 does not prescribe any penalty for contravention of clause 30 of 2002 scheme. Clause 26 provides for obligation of employer agencies. G4S was providing security guards to establishment. There is no material to invoke clause 42(2) against petitioner.

10. Clause 42 of Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme 2002 reads as follows:

- (1) Whoever contravenes the provisions of clause 13, 24(7), 25, 26, 27 or 28 shall on conviction be punished with imprisonment for a term of three months or with fine which may extend to rupees five hundred or with both, where such contravention is a first contravention; and with imprisonment for a term of six months or with fine which may extend to rupees

one thousand or with both, where such contravention is any subsequent contravention. If the contravention is continued further after conviction he shall be punished with a further fine which may extend to one hundred rupees for each day on which the contravention is so continued.

(2) Where an offence under the Act and the Scheme made thereunder has been committed by the employer agency 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 the proprietor, Partner, Director, Manager, Secretary or other officer of the employer agency, such proprietor, Manager, Secretary, Partner, Director or any officer shall also deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

11. In the case of Tops Security Ltd. And Another V/s S.P. Aspingekar and Another (Supra), this Court has dealt with the effect of clause 42 of 2002 scheme. In paragraph 11 and 12 of the said decision it was observed as follows;

“11. In the light of this legal position, let us examine the allegations made against the petitioner No.2. The only allegations against the petitioner No.2 is to be found in paragraph 2 which reads thus:

“2. Accused No.1 is an Establishment. Accused No. 2 is M. Director of Accused No.1. He is the person who is incharge of and has ultimate control over the affairs of Accused No.1.”

“12. Apart from that, there is no allegation against the petitioner No.2. As already discussed hereinabove, merely because the petitioner No.2 is the Managing Director and is incharge and in ultimate control of the affairs of the petitioner No.1 cannot be a reason for making him liable for the offence punishable against the petitioner No.1. As discussed hereinabove, unless the statute provides for vicarious liability, by legal fiction, it would not be permissible. In any case, as discussed hereinabove, sub-clause (2) of clause 42 itself provides the eventualities in which a person responsible for the affairs of the employer agency can be held liable for the offence committed by the employer-agency. There is not a whisper in the complaint that the offence committed by the employer agency has been committed with the consent of the petitioner No.2 nor is there an averment that it has been done with the connivance of the petitioner No.2 nor is there any averment of the effect that the offence committed by the employer agency is on account of any neglect on the part of the petitioner No.2.”

13. In the case of M/s. B.A. Continuum Solutions Pvt. Ltd and Ors. V/s State of Maharashtra and Anr. (Supra), it was observed that clause 42 of the Scheme will have to be read harmoniously alongwith provisions of the Act, the Rules and other clauses preceding clause 42. The penalty has to be imposed by identifying the person who has ultimate control over the affairs of the factory or establishment. Reference is made to decision in the case of Tops Security Ltd. and Another V/s. S.P. Aspingekar and Another (Supra), and it was observed that the said decision relates to contravention of clause 26(4), 26(2), 26(5) and 26(9) of the Scheme. The allegation was that the Managing Director of accused No.1 therein had contravened the scheme. The Court in that decision observed that the complaint dealt with employer agency. Once it was in relation to an employer agency, then Sub-clause (2) of clause 42 of the scheme was applicable. Than merely because accused No.2 therein is a Managing Director and incharge and in ultimate control of the affairs of accused No.1 therein, cannot be reason for making him liable for the offence. It is in that context that the principle of vicarious liability was invoked and applied. All such observations and findings are made with a complaint against employer agency. In the present case security guards are provided by G4S. It was pointed that contraventions are complied by them.

Complaint is silent about overt act of petitioner. The order issuing process reflects non application of mind. It would be an abuse of process of law to continue proceedings against the petitioner.

ORDER

- i. Criminal Writ Petition No. 729 of 2022 is allowed.
- ii. Impugned order dated 9th November, 2021 passed by the Court of learned J.M.F.C., Nashik in SCC No.13661 of 2021 and the proceedings in the said complaint are quashed and set aside against the petitioner.
- iii. Criminal Writ Petition stand disposed off.

(PRAKASH D. NAIK, J.)