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Crl.O.P.Nos.20820 & 20822 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.11.2023

PRONOUNCED ON : 22.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.Nos.20820 & 20822 of 2021
and Crl.M.P.Nos.11320, 11321, 11314 & 11316 of 2021

Rajiv Mittal

...Petitioner in both
Crl.O.Ps.

-Vs-

The Sate,
Represented by its
Deputy Director BOCW,
Kancheepuram,
Director of Industrial
Safety and Health,
Chennai – 32.

...Respondent in
both Crl.O.Ps.

Common Prayer: Criminal Original Petitions filed under Section 482 of Code of Criminal Procedure, to call for the records pertaining to the complaint filed in C.C.Nos.195 & 200 of 2020 respectively, pending on the file of the learned Chief Judicial Magistrate, Chengalpattu and quash the same.

In both Crl.O.Ps.

For Petitioner	: Mr.C.Iyyaparaj For Ms.H.Kalpana
For Respondent	: Mr.A.Gopinath Government Advocate (Crl.Side)



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COMMON ORDER

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These petitions have been filed to quash the complaints filed by the respondent in C.C.Nos.195 & 200 of 2020 respectively, pending on the file of the learned Chief Judicial Magistrate, Chengalpattu, thereby taken cognizance for the offences under Section 40(1)(2)(q) Rule 125(a) and Section 44 Rule 5(5), Section 40(1)(2)(u) Rule 49, Section 40(1)(2)(t) Rule 223(a)(ii)&(c) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as “the BOCW Act”) and Rules 2006, respectively.

2. Though separate complaints lodged by the respondent, the occurrence was one and the same and filed two complaints as against the petitioner for two violations. The respondent lodged complaint alleging that the petitioner is the Managing Director of M/s.VA Tech Wabag Ltd., and the said company had entered into a consortium agreement with IDE Technologies Ltd., for the performance of the contract undertaken from Chennai Metropolitan Water Supply and Sewerage Board. The said contract had been entered between the parties to design and built a 45 MLD capacity tertiary treatment reverse osmosis plant at Koyambedu



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and to operate the same for 15 years including supply, laying and maintenance of MS transmission main for conveying product water to various industries.

3. While being so, on 18.08.2019, when earthmover was deployed to lay underground pipelines to transmit treated sewerage water from Koyambedu to various industries, at the site of Kundrathur Porur main road, Kundrathur, there was four feet height wall situated near the excavation. When the operator of the earthmover while filling the trench after pipes were laid, the wall situated near the pipeline collapsed and fell down over the temporary shelter raised in the pavement. Due to which, a girl child was stuck under collapsed debris and succumbed to death. On the complaint, FIR has been registered in Crime No.1030 of 2019 for the offence under Section 304(a) of IPC as against the operator of the earthmover and two others by the Inspector of Police, Kundrathur Police Station. In the said FIR alleged that, there was a complete violation of safety rules prescribed under the BOCW Act and its Rules.

4. The learned counsel appearing for the petitioner submitted that after registration of FIR, show cause notice was issued to the



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petitioner, in pursuant to the inspection conducted by the respondent on 20.08.2019. A detailed reply was given thereby denying the allegations raised by the respondent in the show cause notice. The operator of the earthmover was not a direct employee of the petitioner and he was employed through a sub-contractor. That apart, the deceased family was compensated for a sum of Rs.2,00,000/- by the settlement dated 19.08.2019.

4.1. He further submitted that the petitioner is being the Managing Director of the company, he is not responsible for the day to day supervision of the activities at the site. The company is not arrayed as accused in both the complainants. The safety policy and standard adopted or practiced by the petitioner's company in the different countries and it was awarded several awards for the safety measurement followed by the petitioner.

4.2. He also submitted that the complaints itself barred by limitation. As per Section 55 of the BOCW Act, the complaint should be filed within a period of three months from the date of knowledge of the occurrence. Even according to the respondent, the accident was known to



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him very next day viz., on 19.08.2019. However, the complaints were lodged on 19.11.2019 after the period of three months. In support of his contention, he relied upon the following orders passed by this Court :-

(i) Crl.O.P.No.24510 of 2015 dated 06.02.2019 in the case of M.S.Srinivasan Vs. The Deputy Director (BOCW)

(ii) Crl.O.P.No.17580 of 2021 dated 29.08.2022 in the case of Sylvanus King Peter Vs. The State.

5. The respondent filed counter and the learned Government Advocate (Crl. Side) appearing for the respondent submitted that after the occurrence, the respondent made inspection on 20.08.2019 and thereafter issued show cause notice to the petitioner. On perusal of the explanation submitted by the petitioner, the respondent lodged complaint on 19.11.2019. Therefore, the complaints were filed very much within the time viz., within three monts.

5.1. On inspection, it was also found that six years old girl i.e., the deceased who lived along with her parents in one of the make shift huts on the pavement of Porur-Kundrathur main road, near Parimalam cinema theater. There were around 15 other families living in the



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temporary shelters. On 18.08.2019, when the deceased girl was sleeping in the temporary shelter, the earthmover which was filling the trench after the pipes were laid, had hit the adjacent wall situated near the temporary shelter accidentally. Therefore, the wall collapsed and fell down over the temporary shelter due to which, the victim girl died.

5.2. He further submitted that the definition of “employer” includes owner, contractor and sub-contractor etc. The petitioner failed to provide safety arrangements like under-pinning, sheet piling, shoring, bracing or other similar means to support the wall adjoining the work place. As per Section 53(1) of the BOCW Act, where an offence under is Act has been committed by a company, every person who at the time of offence was committed, was in charge of, and was responsible to, shall be liable to be proceeded against and punished accordingly. Therefore, the petitioner held liability for the offence under the Act.

6. Heard the learned counsel appearing on either side and perused the material placed before this Court.

7. The petitioner is the Managing Director of M/s.VA Tech



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Wabag Limited. The said company had entered into a consortium agreement with IDE Technologies Limited for the performance of the contract undertaken from Chennai Metropolitan Water Supply and Sewerage Board. Accordingly, the petitioner's company engaged sub-contractors to lay underground pipe line to transmit treated sewerage water from Koyambedu to various industries at the site of Kundrathur Porur main road.

8. On 18.08.2019, the petitioner's company's sub-contractors engaged earthmover and its operator. After laying pipeline, while filling the trench, the earthmover viz., JCB touched the wall which was located adjacent to the pipeline and as such it was collapsed and fell down over the temporary shelter raised in the pavement. Inside the temporary shelter, a minor girl was sleeping and she succumbed to injuries. In pursuant to the death of the deceased, FIR in Crime No.1030 of 2019 was registered for the offence under Section 304(A) of IPC, as against the operator of the earthmover and two others.

9. In this case, on the submission of the learned counsel appearing for the petitioner, the following points have arisen for



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determination :-

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(i) Whether the complaints can be sustained without adding the company as an accused?

(ii) Whether the complaints can be sustained when it were filed beyond the period of three months?

10. Admittedly, the petitioner is the Managing Director of the Company called M/s.VA Tech Wabag Ltd. The company only entered into consortium agreement with IDE Technologies Ltd., for the performance of the contract undertaken from Chennai Metropolitan Water Supply and sewerage board. After the occurrence, show cause notice was issued only to the Managing Director of the company and no show cause notice issued to the company. Section 53 of the BOCW Act, which provides where an offence committed by a company, the company shall be deemed to be guilty of the offence. Even assuming that the offence committed by the petitioner, the complaint was not filed as against the company, and it has been filed only as against the petitioner viz., Managing Director of the said company.

11. In this regard, it is relevant to extract the provision under



Section 53 (1) of the BOCW Act, 1996, which reads as follows:

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“Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded and punished accordingly.”

12. Further it is also seen that in similar matters, the Madurai Bench of this Court in ***Crl.O.P.(MD).No.2938 of 2017*** reported in ***(2018) 4 MLJ (Crl) 225*** in the case of ***Babu Bhardagond Vs. The State*** has held as follows:

“9.Admittedly in this case, the complaint has been filed against the petitioner directly by showing him as the Principal Employer. An inspection was carried out by the respondent in the construction site, where the construction was carried out by engaging the contractor. Under such circumstances, the Principal Employer insofar as the workers engaged in the construction site by the contractor, will be only the contractor namely M/s.GK.Shetty Builders Private Limited and not the petitioner. The same is clear from a reading of Section 2(1)(i)(iii) of BOCW Act, which is extracted herein under:



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"2.Definitions:(1) in this Act, unless the context otherwise requires, (i)"employer" in relation to an establishment, means the owner thereof, and includes,-

(i)

(ii)

(iii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment; Therefore, the very complaint filed by the respondent against the petitioner under the BOCW Act is not maintainable. 10.Even if M/s HCL Technologies Private Limited is considered to be the employer, the respondent cannot prosecute the complaint without adding M/s.HCL Technologies Private Limited as an accused. For this purpose, it is relevant to extract the judgment of the Hon'ble Supreme Court in Aneeta Hada Vs. Godfather Travels and Tours Private Limited reported in AIR 2012 SC 2795, which is as follows:

"42. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words ? as well as the company? appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only



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the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.?

11.In the above said judgment, the Supreme Court was dealing with Section 141 of The Negotiable Instruments Act, which in pari materia with Section 53 of the BOCW Act. Therefore, the same principal will apply for the offence committed by the companies in this case also. 12.The Karnataka High Court had an occasion to deal with the very same issue with regard to the scope of Section 53 of the BOCW Act and the Karnataka High Court in Sri Jitendra Virwani Vs. The State of Karnataka reported in 2013 SCC Online 6547 has held as follows: ?

5. Thus, from reading of the aforesaid Section, it is clear that if the offence alleged is committed by the Company, then the Company as well as all other persons, who at the time of commission of offence were incharge and responsible to the Company for the conduct of the business of the company, are deemed to be guilty of such offence and they are liable to be proceeded and punished accordingly.



6. *Similar provision contained in Section 141 of the Negotiable Instruments Act (in short 'the NI Act') came up for consideration before the larger Bench of Apex Court in the case of ANEETA HADA Vs. GODFATHER TRAVELS AND TOURS PRIVATE LIMITED reported in 2012(5) SCC 661. The Apex Court has held that to prosecute the functionaries of the Company for the offence committed by the Company, there should be specific averments in the complaint to the effect that such person/s was/is incharge of and being responsible for conduct of business of the Company and in the absence of such specific averment, the functionaries of the Company cannot be prosecuted. It is further held in the said decision that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. It is further held that the words "as well as the company" appearing in Section make it clear that when the Company can be prosecuted, then only persons mentioned in the other categories could be vicariously liable for offence subject to the averments in the petition and proof thereof.*

7. *Section 141 of the N.I. Act, is in analogous to Section 53 of the Act. Therefore, the principles of law laid down in Aneeta Hada's case squarely applies to the facts of the case. Admittedly, in the case on hand the Company*



which is the principal offender has not been prosecuted.

The petitioner in the present case is an Executive Director of the company and he is being prosecuted in that capacity.

8. Therefore, in the light of the law laid down in the aforesaid decision, the prosecution launched against these petitioners as functionaries of the company, is not maintainable since the company is not being prosecuted. In this view of the matter, the prosecution launched against these petitioners are liable to be quashed.

9. Accordingly, the petition is allowed. The prosecution launched against these petitioners in C.C. No. 191/2013 on the file of the Metropolitan Magistrate Traffic Court - I, Mayo Hall, Bangalore City, is hereby quashed.”

13.The judgment of the Karnataka High Court cited supra will squarely apply to the facts of this case. In this case admittedly M/s.HCL Technologies limited has not been made as an accused and the petitioner has been directly prosecuted by showing him as the Principal Employer. The complaint filed by the respondent is not maintainable even on this ground.”

Thus it is clear that without adding the company as an accused, the other Directors including the Managing Director alone cannot be prosecuted.

Hence, the impugned complaint cannot be sustained.



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13. Insofar as the limitation is concerned, the occurrence was taken place on 18.08.2019. It was published in the Daily Thanthi newspaper on 19.08.2019. Therefore, the respondent had knowledge about the accident on 19.08.2019 itself. However, the respondent made inspection only on 20.08.2019. On the basis of the inspection, the respondent issued show cause notice on 09.09.2021 to the petitioner. Therefore, the limitation to launch prosecution starts from 20.08.2019.

14. As per Section 55 of the BOCW Act, the limitation for launching prosecution is three months from the date on which the alleged commission of offence came to the knowledge. It is relevant to extract the provision under Section 55 of the BOCW Act as follows :-

“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, an office-bearer of a voluntary organisation or, as the case may be, an office-bearer of any concerned trade union.”



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15. The Section 12 of the Limitation Act, 1963 says about the exclusion of time in legal proceedings. In sub-Section (1) there on provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. The applicability of this provision to the petitions under the BOCW Act is not excluded by the provisions of the Act.

16. Section 9 of the General Clauses Act, 1897 provides that in any Central Act, when the word “from” is used to refer to commencement of time, the first of the days in the period of time shall be excluded. Therefore, the date on which the respondent came to knowledge about the occurrence shall be excluded. Hence, the limitation commenced from 20.08.2019. A month does not refer to a period of thirty days, but it refers to the actual period of a calender month. Therefore, when the period prescribed is three months from a specified date, the said period would expire in the third month on the date corresponding to the date upon which the period starts. As a result, depending upon the months, it may mean 90 days or 91 days or 92 days or 89 days.



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17. In the case of hand, the limitation starts from 20.08.2019 and the three months time would expire on 18.11.2019. Therefore, the respondent ought to have filed complaint on or before 18.11.2019. Whereas the impugned complaints were lodged on 19.11.2019. Therefore, the complaints itself are barred by limitation.

18. In view of the above discussions, both the complaints lodged by the respondent cannot be sustained and liable to be quashed. Accordingly, the complaints filed in C.C.Nos.195 & 200 of 2020, pending on the file of the learned Chief Judicial Magistrate, Chengalpattu, are hereby quashed and both the Criminal Original Petitions stand allowed. Consequently, connected miscellaneous petitions are closed.

22.11.2023

Internet: Yes

Index : Yes/No

Speaking/Non Speaking order

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To
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1. The Chief Judicial Magistrate,
Chengalpattu.
2. The Deputy Director BOCW,
Kancheepuram,
Director of Industrial
Safety and Health,
Chennai – 32.
3. The Public Prosecutor,
Madras High Court,
Chennai.



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G.K.ILANTHIRAIYAN. J.

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ORDER IN
Crl.O.P.Nos.20820 & 20822 of 2021 and
Crl.M.P.Nos.11320, 11321, 11314 & 11316 of 2021

22.11.2023