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Ct. No. 237

C.R.R. 2460 of 2019
Nepal Das
Vs.
Debasish Shannigrahi & Anr.

Mr. Sandipan Ganguly
Mr. Somopriyo Chowdhury
Mr. Soumitra Dutta
Mr. M.P. Das ...*For the Petitioner*

Mr. Debasis Roy
Mr. Madhusudan Sur
Ms. Puspita Saha ...*For the State/Opposite Party No. 2*

Petitioner alleged that he has been falsely implicated on the basis of a complaint filed by the opposite party, herein who inter alia alleged violations of Rule 4(a), 4(b), 4(c) and 5 of the Payment of Bonus Rules, 1975 whereas he was summoned by Magistrate under Sections 22/22A of the Contract Labour Act, 1970.

Mr. Sandipan Ganguly, learned Counsel appearing on behalf of the petitioner submits that there is no existence of Section 22A in the Payment of Bonus Act, 1965 and Section 22 of Bonus Act does not pertain to any penal liability but comes with the heading "Reference of disputes under the Act". Therefore this complaint was lodged on the basis of prosecution under non-existence and non-applicable provision of law and as such it is liable to be dismissed in limine. After taking cognizance and also after issuance of process by the Chief Judicial Magistrate, under non-existence and non-applicable provision of law the matter was transmitted to the Court of Judicial Magistrate, 3rd Court at Bankura. However, transferee Magistrate by his order dated 19th

March, 2019 was pleased to take cognizance afresh under Section 28 of the Payment of Bonus Act, 1965.

Mr. Ganguly in this context submits that the order of taking cognizance for the second time is also bad in law, as the learned Magistrate does not have the power to review its own order and to take cognizance in connection with the same allegation for the second time.

It is further submitted on behalf of the petitioner that the order of taking cognizance is also bad in law and the learned Magistrate overlooked the fact that the complaint was lodged by an incompetent person, who is not authorized to do so under the Act.

Mr. Madhusudan Sur, learned Counsel appearing on behalf of the State submits that there is sufficient materials in the matter for further continuance of the present proceedings and this is not a fit case to quash the proceeding and the truth will reveal only after conclusion of the trial.

Upon hearing learned counsel appearing on behalf of the parties it appears that :-

(a) The petitioner is sought to be prosecuted in terms of section 29 of the payment of Bonus Act, 1965 (in short Act of 1965) for an alleged act or omission on the part of the company i.e. ABP Pvt. Ltd. Section 30 of the said Act provides that no court can take cognizance for an offence under the Act of 1965 except for a complaint made by an officer not below the rank of Labour Commission or an officer under the authority of the appropriate government specially authorized in this behalf by the government. Here the impugned complaint has been filed by an inspector appointed under the Act of 1965 and not by an officer in the rank of Labour commissioner, nor the complaint discloses that the said inspector was specially authorized by the state Government to file the said complaint. It is stated in the complaint that complainant/inspector has been appointed under section 19(1) of the Act of 1965 but section 19(1) has no existence in the Act and section 19 deals with "time – limit for payment of Bonus" and accordingly such statement has got no applicability to cure the defect and as such very initiation of the proceeding is bad in law.

(b) According to contents of complaint, though the petitioner is sought to be prosecuted under section 29 of the Act of 1965, but chief Judicial Magistrate took the complaint as a complaint under section 22/22A of the contract Labour Act, 1970 (in short Act of 1970) and he took cognizance under those two sections holding that prima facie case under section 22/22A of the Act of 1970 is made out and he issued summon against the present petitioner only under section 22/22A of the Act of 1970. It is worthy to be mentioned that section 22A does not exist ether under the Act of 1965 or in the Act of 1970. Section 22 of the Act of 1965 does not deal with any penal Provision. Infact section 22 of the Act of 1965 deals with “reference of dispute under the Act”. Accordingly it is clear that while the complaint is under the payment of Bonus Act, 1965, Magistrate took cognizance and issued process under the contract Labour (regulation and abolition)Act, 1970, though the entire complain no where discloses any offence under the Act of 1970.Accordingly cognizance taken by Magistrate on 29.06.2018 under section 22/22A of the Act of 1970 is bad in law. In this context the observation made by Apex Court in **Sunil Bharti Mittal Vs. CBI** reported in **(2015) 4 SCC 609** may be quoted below:-

*“**53.** However, the words “sufficient ground for proceeding” appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.”.*

In the instant proceeding also, the Magistrate while issued process under the Act of 1970 by the self –same order, failed to record any satisfaction regarding the role played by the petitioner and in fact said order is devoid of any reason when the complaint was under the Act of 1965 and as such said order by which Magistrate took cognizance and issued process is liable to be set aside.

(c) It further appears that chief Judicial Magistrate after taking cognizance and issuing process either under non-existence provision or under non-applicable provision, transmitted the case to another Magistrate, who by an order dated 19.03.2019 again took cognizance under section 28 of the payment of Bonus Act, when the petitioner already appeared after receiving summon under the said sections of the Act of 1970. Now the question is whether Magistrate has suo moto power to take cognizance by implied recalling or revising his earlier order. The answer in clear terms is no. In **Adalat prosad Vs. Roop Lal Jindal & others**, reported in **(2004)7 SCC 338**, Supreme Court while dealt with the issue as to whether trial court was justified in recalling the order of issuance of summon held:-

> *"**15.** It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an*

aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code."

*" **16.** Therefore, in our opinion the observation of this Court in the case of Mathew [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."*

(d) there is no denial of the fact that employer in the instant case under the Act of 1965 is the company namely ABP Pvt. Ltd, but no summon has been issued against said company and on the other hand summon issued against present petitioner under non existence or non-applicable provision of law on the basis of the complain, which does not disclose the role played by present petitioner in committing the alleged offence. In fact the petitioner is sought to be prosecuted vicariously in the absence of the company against whom the alleged act or omission has been attributed and also in the absence of requisite averment in the complaint attracting vicarious liability. It is true that under section 29 of the Act of 1965 if an offence is committed under the Act by a company, every person, who at the time of the offence was in change of and responsible to the company for the conduct of it's business shall be vicariously liable. But there must be requisite averment in the complaint to that effect. The impugned complaint does not reflect any averment to that effect in compliance with section 29 of the Act of 1965 stating that the petitioner was in change of or responsible for the conduct of business of the company. section 29 of the Act of1965 is pari materia with section 141 of Negotiable instrument Act, 1881 and while dealing with the similar issue in ***SMS Pharmaceuticals Ltd Vs. Neeta Bhalla*** reported **(2005) 8 SCC 89**, the supreme Court held:-

> ***19.*** *In view of the above discussion, our answers to the questions posed in the reference are as under:*
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> *(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.*
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> *(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not*

sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

In view of above discussion, I am constrained to conclude that grave mis carriage of justice would be committed if the trial is allowed to proceed, where the petitioner would be harassed unnecessarily, if the trial is allowed for another few more years, when prima facie it appears that the trial would be likely to be ended in acquittal for the reasons stated above.

In such view of the matter, the application, being C.R.R. 2460 of 2019 is allowed. The impugned proceeding, being Complaint Case No. 447C of 2018, which is presently pending before the learned Judicial Magistrate, 3rd Court at Bankura is hereby quashed.

Urgent Photostat certified copy of this order, if applied for, be given to the parties, on priority basis, upon compliance of all necessary formalities.

(Dr. Ajoy Kumar Mukherjee, J.)