

**(2009) 06 BOM CK 0090**

**In the Bombay High Court**

**Case No : Writ Petition No. 4232 of 2009**

Indian Tourism Development Corporation and Others

APPELLANT

Vs

The Presiding Officer, 9th Labour Court and Another

RESPONDENT

**Date of Decision : 16-06-2009**

**Acts Referred:**

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 482

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 14A(2), 48, 48(1)

**Citation : (2009) 123 FLR 191 : (2011) 6 RCR(Criminal) 2118**

**Hon'ble Judges : V.M. Kanade, J**

**Bench : Single Bench**

**Advocate : J.P. Cama, instructed by Ramesh Ramamurthy, for the Appellant;  
N.D. Nagle, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

V.M. Kanade, J.—The petitioner by this petition which is filed under Articles 226 and 227 of the Constitution of India is challenging the issuance of process by the 9th Labour Court, Mumbai, in Misc. Criminal Complaint (ULP) No. 86/2008. Brief facts are as under:

2. The petitioner is a company incorporated under the Companies Act and they are running the business of duty free shop at the international airport at Sahar, Andheri (E), Mumbai 96. It is their case that the licence which was given to them expired in December, 2007 and after the privatization of the international airport, the licence to run duty free shops was given to a Singapore based company and it is running the duty free shops at the international airport since January 2008. It is the case of the petitioner that its corporate office is situated at New Delhi. The respondent No. 2, according to the petitioner, is a contractual employee which was initially appointed for one year.

3. Fourteen employees of the petitioner company filed complaint (ULP) No.

328/2007 before the Industrial Court, Mumbai, and an ex parte order dated 10th August, 2007 was passed restraining the petitioners from terminating the services of the said employees. The said order was partly modified after notice was given to the petitioners and on 31st August, 2007, the Industrial Court directed the petitioners not to terminate the services without following due process of law. An application was filed by the petitioners for vacating the interim order which was passed by the Industrial Court, however, the said application is still pending.

4. The petitioners on legal advice passed an order dated 17th October, 2008 in respect of six individual contractual employees in which all the facts were recorded including the fact that the interim order has been passed by the Industrial court and after stating that the establishment having been closed down from December, 2007, the services of the said contractual employees were dispensed with by giving one months pay along with the notice to each of the six contractual employees. The respondent No. 2 filed Misc. Criminal Complaint (ULP) No. 86/2008 u/s 48(1) of The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 against the petitioner No. 1 and petitioners No. 2 and 3 personally. The Labour Court was pleased to issue process against the petitioners on 19.11.2008. The petitioners had also filed applications for deletion of their names and also for exemption of appearance in the said proceedings. The Labour Court also was pleased to partly allow the applications, however, the prayer for deletion of the names of accused was rejected. Petitioner No. 2 was, however, exempted from personal appearance subject to giving an undertaking that he would appear before the Court whenever called during the course of the trial. Exemption application of petitioner No. 3, however, was rejected.

5. Shri Nagle, learned Counsel appearing on behalf of the respondent took preliminary objection regarding the maintainability of the petition against the order of issuance of process by the learned Magistrate. He submitted that the petitioner has an alternate remedy of filing revision application against the said order. In support of the said submission, he relied on the judgment of the learned Single Judge of this Court in the case of Bharat S. Dahanukar v. State of Maharashtra and Anr. reported in 2007(2) Mh.L.J. 859. He further relied on the judgment of the learned Single Judge of this Court in the case of Clifford Rebello v. Hotel Oberoi Towers reported in 2001 III CLR 805. The learned Counsel for the respondent also relied on the judgment of the learned Single Judge of this Court in the case of Engineering Employees Union Vs. Devidayal Rolling and Refineries P. Ltd., .

6. Shri Cama, learned Senior Counsel, on the other hand, submitted that the petitioner could challenge an order of issuance of summons by filing a petition under Articles 226 and 227 since it was not an interlocutory order. He submitted that availability of alternate remedy of filing revision application could not be a ground for dismissing the application for quashing and remedy of articles 226

and 227 would be available to the petitioner. He relied on the judgment of the Apex Court in *Dhariwal Tobacco Products Limited and Ors. v. State of Maharashtra and Anr.* reported in (2009) 2 SCC 370.

7. In my view, the Apex Court has clearly held in *Dhariwal's* case (supra) that the High Court could exercise its jurisdiction under Articles 226 and 227 or Section 482 and existence of alternate remedy was not a complete bar for entertaining such an application. The Apex Court in paragraphs 11 and 12 has observed as under:

11. We may furthermore notice that in *Central Bureau of Investigation Vs. Shri Ravi Shankar Srivastava, IAS and Another*, this Court while opining that the High Court in exercise of its jurisdiction u/s 482 of the Code does not function either as a court of appeal or revision, held : (SCC pp. 193-94, para 7)

7. Exercise of power u/s 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. The courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle ? *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non protest* ? (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone the courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers the court would be justified to quash any proceeding if it finds that initiation/continuation of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When

no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto..

12 It is interesting to note that the Bombay High Court itself has taken a different view. In a decision rendered by the Aurangabad Bench of the Bombay High court, a learned Single Judge in Vishwanath Ramkrishna Patil (2006) 5 Mah LJ 671, where a similar question was raised, opined as under : (Mah LJ pp.675-76, paras 10-12)

10. ...It is difficult to curtail this remedy merely because there is a revisional remedy available. The alternate remedy is no bar to invoke power under Article 227. What is required is to see the facts and circumstances of the case while entertaining such petition under Article 227 of the Constitution and/or u/s 482 of Criminal Procedure Code. The view therefore, as taken in both the cases V.K. Jain v. Pratap v. Padode, (2005) 30 Mh.LJ 778 and Saket Gore v. Aba Dhavalu Bagul 2005 All MR (Cri) 2514, no way expressed total bar. If no case is made out by the petitioner or the party to invoke the inherent power as contemplated u/s 482 of the Criminal Procedure Code and/or the discretionary or the supervisory power under Article 227 of the Constitution of India they may approach to the Revisional Court, against the order of issuance of process.

11. Taking into consideration the facts and circumstances of those cases, the learned Judge has observed in V.K. Jain v. Pratap v. Padode (2005) 30 Mh LJ 778 and Saket Gore v. Aba Dhavalu Bagul 2005 All MR (Cri) 2514 that it would be appropriate for the parties to file revision application against the order of issuance of process. There is nothing mentioned and/or even observed that there is total bar to file petition u/s 482 of the Criminal Procedure Code and/or petition under Article 227 of the Constitution of India.

12. The Apex Court's decision already referred to above, nowhere prohibited or expressly barred to invoke Section 482 of the Criminal Procedure Code or Article 227 of the Constitution of India against the order of issuance of process..

In view of the ratio of the judgment in the said case, therefore, in my view, the present petition is maintainable.

8. Shri Cama, learned Counsel appearing on behalf of the petitioner firstly submitted that there is a total non-application of mind on the part of the Labour Court in issuing process on the complaint filed by the respondent herein. He submitted that firstly, there are no averments in the complaint showing how the petitioner No. 2 was responsible for the alleged breach of order passed by the Industrial Court. He submitted that the complaint did not disclose any averment regarding violation of order of Industrial Court dated 31st August, 2007. Secondly, he submitted that the petitioner Nos. 2 and 3 who are accused Nos. 2 and 3 in the criminal complaint have not been served with the copy of the interim order dated 31.8.2007 prior to 17.10.2008 and therefore, it cannot be

said that they have committed any offence punishable u/s 48 of the said Act. Thirdly, it was submitted that petitioner No. 3 was not party to the original complaint and therefore, action of petitioner No. 3 of passing order dated 17.10.2008 in due discharge of his duty cannot be said to be in violation of any interim order. It was then submitted that the Industrial Court in its order dated 31st August, 2007 had permitted the petitioners to pass order of termination after following due process of law. It was submitted that no such averment has been made in the complaint and order of termination was passed without following due process of law. He further submitted that in fact, the order of termination which was passed by respondent No. 3 in terms had referred to in the order of the Industrial Court dated 31.8.2007 and thereafter, the circumstances under which order of termination was being passed was narrated in the order and therefore, after following due process of law, the order of termination was passed which was in consonance with the interim order passed by the Industrial Court and therefore, there was no violation inviting action u/s 48 of the said Act. It was lastly submitted that the Labour Court before issuance of process ought to have applied its mind to the interim order and order of termination and it should have first satisfy itself that prima facie order of termination was not passed without following due process of law and only, thereafter, process could have been issued. Lastly, he submitted that this Court and the Apex Court in large number of cases had held that criminal law should not set in motion unless the employee is satisfied prima facie that a case is made out for issuance of process. In support of the said submission, he relied on the judgment of this Court in the case of Transport Corporation of India Ltd. And Ors. v. R.M. Gandhi, Regional Provident Fund Commissioner of Maharashtra and Goa and Ors. reported in 1991 Mh.L.J. 1055. He also relied on the judgment of the learned Single Judge of this Court in the case of Madhav Ramkrishna Chitnis and Ors. v. State of Maharashtra and Ors. reported in 1998 II CLR 1188. He also relied on the judgment in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, and Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, .

9. Shri Nagle, learned Counsel appearing on behalf of the respondent, on the other hand, submitted that the petitioners were very well aware of the order which was passed which was evident from the order of termination which has referred to the interim order. He also invited my attention to the application for exemption and discharge filed by the petitioners No. 2 and 3 in which there is a specific reference to the interim order indicating that the petitioners No. 2 and 3 were very well aware of the said order. It was further submitted that the order was served on the company, therefore, there was presumption raised u/s 48 of the Companies Act and the burden was on the officers of the company to rebut the said presumption. It was then submitted that the petitioners had made an application for vacating interim order which was still pending in the Industrial Court. Before the said order was obtained by the petitioners, they had issued the order of termination and therefore, had violated the interim order passed by the

Industrial Court. Thirdly, he submitted that in the said petition, averments were made in the complaint in which it was stated that the petitioner Nos. 2 and 3 were responsible for the management of the company and as such, it could not be said that the said complaint is filed u/s 48 was vague in any manner. He further invited my attention to the various applications which were filed for adjournment on behalf of the petitioners herein in the Industrial Court for the purpose of filing written statement. He submitted that in the said applications, there was clear reference that instructions would be taken from the Legal Officer of the company and therefore, time was required. He submitted that the petitioner Nos. 2 and 3, therefore, were very much aware of the interim order which was passed by the Industrial Court.

10. In my view, there is much substance in the submission made by the learned Counsel for the petitioners. The petitioner No. 2 is a chairman of the company and petitioner No. 3 is the vice president. There is no averment in the complaint which is filed u/s 48 of the MRTU and PULP Act by the respondent herein that the petitioner No. 2 was responsible for day to day affairs of the company. There is no averment that the copy of the interim order was served on the petitioner Nos. 2 and 3. It is a well settled position in law that unless the interim orders are served personally, no action for contempt can be initiated against such person. It cannot be argued that on account of averments made by party in a complaint, it would be implied that the party had been served with the interim order. In the present case, no averment is made that the interim order was served on petitioner No. 2. The ratio of the judgment, therefore, in the case of Transport Corporation of India Ltd.(supra) delivered by the learned Single Judge of this Court (Justice B.N. Srikrishna, J. as he then was) and the judgment of the learned Single judge of this Court in the Madhav Ramkrishna Chitnis and others (surpa) is squarely applied to the facts of the present case. In Transport Corporation of India Ltd."s Case (Supra) , it is observed by the learned Single Judge as under:

22. In the face of these elaborate provisions, it is difficult to accept that the Provident Fund Authorities can, in a complaint filed under the provisions of the Act, make a bald averment that some person is in charge of the establishment and that would satisfy the requirements of law. The judgment of the Karnataka High Court in Anantharamaiah Woollen Factory"s case (supra) relied upon by Shri Bhogani in this connection is very apposite. The intention of the Legislature in making the elaborate provisions, reproduced hereinabove, is to ensure that, at all given times, there is readily available a person or persons who is/are directly responsible for implementation of the provisions of the Act in the establishment and, conversely, answerable for breach of the provisions thereof. In the face of these provisions, it would be futile to vaguely aver in the complaint that all the directors named in the complaint are in charge of the establishment and responsible for the conduct of its business. I am, therefore, in respectful agreement with the view taken by the Karnataka High Court in Anantharamaiah Woollen Factory"s case (supra) that it is not enough to make a bald allegation in

the complaint by reproducing the language of the section to attract the provision of Section 14-A(2) of the Act. The facts essential to constitute the offence falling u/s 14A(2) have to be alleged and in the absence of such necessary factual allegations attracting the provision of Section 14-A(2), it cannot be said that the prosecution launched and the cognizance taken thereof by the Magistrate against the accused is proper. I am, therefore, of the view that the process issued against accused 2 to 14 (present petitioners 2 to 14) is the result of total non-application of mind on the part of the learned Magistrate in disregard of the settled law on the subject, which is liable to be quashed by this Court in the exercise of its power u/s 482 of the Code of Criminal Procedure, 1973.

Similarly, in the case of Mahdavi Ramkrishna Chitnis and Ors. (supra), the learned Single Judge has observed in paras 21 and 22 as under:

21. In the instant case, inter alia, it is stated that if Accused Nos. 1 to 14, on the strength of their being the Directors, are to be held responsible, a notice served on the Bank, should be considered enough service so as to attribute the knowledge of Accused/Petitioners Nos. 1 to 14 to the extent of their being liable u/s 48 of the Act.

22. In my opinion, such deeming fiction in the absence of the statutory provision, in that regard, cannot be read into statute. What is held by my learned brother Chapalgaonkar, J with reference to Sub-s.1 & 2 of S.30 of the Act is that there can be order against a person who is not party to the complaint, and in that event, there can be a complaint of breach of order against that person. Apart from this fact situation, if it is so made out from the complaint, there cannot be any dispute. This observation of my learned brother J. finds place in paragraph 11 pg.912 of the said Report. The case before the learned Judge, as noted in paragraph 12, is that in the complaint it was alleged that the Respondents (accused petitioner) are responsible to implement the orders of the Court. Based on this, the Learned Judge has made aforesaid observations and arrived at the aforesaid conclusion.22.

The ratio of these judgments, in my view, therefore, is squarely applicable to the facts of the present case.

11. Another aspect which also has to be taken into consideration is that in the interim order passed by the Industrial Court, the Industrial Court has permitted the company to terminate the services of the employees by following due process of law. The operative part of the said order reads as under:

(i) Application for interim relief filed by the complainant union is hereby partly allowed.

(ii) The respondents are hereby directed not to terminate the services of the employees involved in the present complaint during the pendency of the main complaint and without process of law. following due

(iii) ...

(iv) ...

It is evident, therefore, that the interim order did not absolutely prohibit the petitioners from terminating the services of its employees involved in the complaint. Liberty was given to the petitioners to terminate their services by following due process of law. In the order of termination which was issued by petitioner No. 3 after referring to the interim order passed by the Industrial Court, in para 5 of the order of termination dated 17.10.78, it is stated that as per the liberty granted by the Industrial Court, the order of termination was passed. That being the position, it was the duty of the Labour court to have ascertained, *prima facie*, at least, whether the order of termination was passed without following due process of law or not. Since no such exercise appears to have been followed by the Labour Court, it is apparent that the order of issuance of process has been passed without any application of mind.

12. It is a settled position in law that the order of issuance of process has to be passed after proper application of mind as laid down in *Ch. Bhajan Lal's* case and *M/s. Pepsi Foods Ltd.'s* Case (*supra*). Lastly, no averments had been made in the complaint that the order of termination is passed without following due process of law. The impugned order of issuance of process, therefore, is liable to be quashed and set aside. The said petition, therefore, accordingly, is allowed. The impugned order of issuance of process dated 11.2.2009 passed by the 9th Labour Court, Bandra in Misc. Criminal complaint (ULP) No. 86/2008 is dismissed. Under the circumstances, there shall be no order as to costs.