

(2013) 05 BOM CK 0069

In the Bombay High Court

Case No : Criminal Application No. 756 of 2012

M/s. B.A. Continuum Solutions Pvt. Ltd., Mr. Jagrant Pandher, APPELLANT
Mr. Avtar Monga and Mr. Santosh Vartak

Vs

The State of Maharashtra and Mr. R.D. Khanorkar RESPONDENT

Date of Decision : 10-05-2013

Acts Referred:

Bombay Shops And Establishments Act, 1948 — Section 2, 2(4), 2(8), 23, 26
Constitution of India, 1950 — Article 14, 19(1)(g), 20, 21, 227
Criminal Procedure Code, 1973 (CrPC) — Section 139(1), 271(1)(a), 482
Factories Act, 1948 — Section 2(m)
Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 — Section 12, 12(2), 13, 14, 15
Penal Code, 1860 (IPC) — Section 21

Citation : (2013) 4 ABR 242 : (2013) ALLMR(Cri) 2132 : (2013) 3 LLN 102

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : Amit Desai, assisted with Mr. Gopalkrishna Shenoy and Ms. Aditi Awasthy, instructed by M/s. TRI Legal, for the Appellant; A.A. Mane, Assistant Public Prosecutor for Respondent No. 1-State, Ms. Lata Desai, instructed by y Dr. Pallavi Divekar, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J.—Rule. By consent, Rule made returnable forthwith. Mrs. Mane, learned A.P.P., waives service on behalf of the Respondent-State and Mrs. Lata Desai waives service for the Respondent No. 2.

2. By this Criminal Application, the Applicants are invoking powers of this Court u/s 482 of the Criminal Procedure Code, 1973 to quash and set aside the order dated 9th May, 2012 passed by the learned Additional Sessions Judge, Court of Sessions for Greater Bombay, in Criminal Revision Application No. 388 of 2011.

3. The Applicants are also seeking to quash and set aside the proceedings in Criminal Complaint No. 6008/SS/2010 and an order dated 11th May, 2010 of the

learned Additional Chief Metropolitan Magistrate, 16th Court at Ballard Estate, Mumbai, issuing summons for appearance of the Applicants.

4. A complaint has been filed by the Respondent No. 2/Original Complainant alleging offences punishable under Clause 42 of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme, 2002, (for short "the Scheme"). The complaint alleges contravention of Clause 13(1)(c) of the Scheme read with Section 3(3) of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981, (for short referred to as "the Act"). The complaint alleges that the Respondent No. 2/Original Complainant is appointed as an Inspector u/s 16 of the said Act and thus is a "Public Servant". It is alleged in the complaint that the Applicant No. 1 is a Factory/Office/Establishment, whereas the Applicant Nos. 2 to 4 are Vice President, Managing Director and Senior Manager of Applicant No. 1/Accused No. 1. These are, thus, persons who are in-charge and have ultimate control over the affairs of Accused No. 1/Applicant No. 1 before me. The Accused are termed as "principal employers" within the meaning of the said Act and the Scheme.

5. The complaint thereafter alleges as under:-

3. The Head Office of Accused No. 1 is at Tower I, Phase II, 3rd & 4th Floor, Logitech Park, Andheri-Kurla Road, Saki-Naka, Andheri (E), Mumbai - 400 072.

4. On 28/05/2009 at 11:45 a.m. the Complainant visited the Establishment of Accused at Tower I, Phase II, 3rd & 4th Floor, Logitech Park, Andheri-Kurla Road, Saki-Naka, Andheri (E), Mumbai 400 072. At the time of the visit of the Complainant Mr. Santosh Vartak, Sr. Manager Security was present on behalf of the Accused. Complainant found 4 Security Personnel on duty by the names Mr. K. Pandharkar, Mr. Sachin Shingare, Ms. Sushma Mane & Mr. Deepak Singh. On enquiries with the said personnel on duty, it was learnt that they are engaged through Security Agency by name M/s. G4S Security Services (India) Pvt. Ltd. On further enquiries with the personnel, it was learnt that the Accused were engaging in all 38 Security Personnel (1 Security Officer + 3 Security Asst. Officer + 1 Security Supervisor + 3 Head Guards + 27 Security Guards + 3 Lady Guards) through the said agency. The Complainant noted down the salaries and particulars of the personnel on duty and obtained his/their signature/s on the Annexure A attached to the Inspection Report. The Complainant also obtained the signature of Mr. Santosh Vartak, Sr. Manager Security, present on behalf of the Accused No. 1 at the time of inspection on Inspection Report as well as Annexure A attached to the Inspection Report wherein the information and particulars of security personnel were taken. The Complainant further directed the Accused, to produce records marked on page 2 of the Inspection Report and to comply with the directions as per page 2 of Inspection Report within stipulated time. However the accused failed to produce the same & comply with the directions within the stipulated time.

5. The Accused are employing private security guards as mentioned in paragraph

4 above. They are thus the principal employers within the meaning of Section 3(8) of the said Act and under Clause 13 of the said Scheme. They are, therefore, required to get themselves register with the said Board and comply with all the provisions of the said Act and Scheme.

6. Every principal employer who had engaged private security guards before the commencement of Maharashtra Private Security Guards (Regulation of Employment) (Amendment) Scheme, 2005 shall get himself registered with the Board by applying in the Form devised by the Board within 15 days from the date of commencement of the said Scheme.

7. The Complainant thereafter issued a Show Cause Notice dated 2/09/2009 calling upon the Accused to comply with the provisions of the MPSG Act and Scheme, within seven days of receipt of notice. Failing which why penal action should not be taken against them. However, the Accused failed to comply within the stipulated period.

8. The Complainant will rely upon the following documents and crave leave to file additional documents, if necessary.

1. Inspection Remark dated 28/05/2009

2. Show Cause Notice dated 2/09/2009

3. Any other document found relevant at the time of hearing.

10. As the Accused has failed to get themselves registered, the Accused have, therefore, committed offence under Clause 42 of the said Scheme read with Section 3(3) of the said Act for the contravention of the Clause 13(1)(C) of the Scheme.

6. On perusal of the complaint and the verification statement, the learned Magistrate proceeded to issue a summons calling upon the Applicants to attend and answer the charge for the offence punishable under Clause 42 of the Scheme.

7. That order was challenged by filing a Criminal Revision Application. The said Criminal Revision Application has been dismissed on 9th May, 2012 by the learned Additional Sessions Judge, Greater Bombay being Criminal Revision Application No. 388 of 2011. These orders are under challenge in the present Criminal Application.

8. Mr. Amit Desai, learned Senior Counsel appearing on behalf of the Applicants, submitted that the order issuing process and that of the learned Additional Sessions Judge, both, are contrary to law. They are passed without considering the settled position in law that the process is not to be issued for mere asking. An order issuing process and calling upon the person to appear before the Criminal Court to face a charge is a serious matter. The learned Magistrate is expected to apply his independent mind to the material placed before him. The order issuing process could not have been issued in this case at all.

9. Mr. Amit Desai submits that the Courts below failed to notice the Act and the Rules and the Scheme. The Scheme contains Clause 42, which is entitled "penalties". The sub-clause (1) of Clause 42 of the Scheme makes contravention of the provisions of Clauses 13, 24(7), 25, 26, 27 or 28 a punishable offence. However, there is a fundamental difference inasmuch as in Clause 42(1), the Proprietor, Partner, Director, Manager are not deemed to be guilty of an offence. It is clear that the word "whoever" appearing in sub-clause (1) of Clause 42 of the Scheme, therefore, must take its colour from Clause 42(2). The obligation to register, which is set out in Clause 13(1)(c) of the Scheme, is that of a principal employer. Mr. Amit Desai submits that Clause 13 of the Scheme is entitled registration of principal employer. The term "Principal Employer" has been defined in Section 2(8) of the Act to mean the person who has ultimate control over the affairs of the factory or establishment. Therefore, the obligation to register under the Scheme is that of the Principal Employer and it cannot be said that this obligation is of any other person within the meaning of Section 2(8) of the Act to whom the affairs of such factory or establishment are entrusted. Once the principal employer is a distinct legal entity and that is required to be registered and if that is not registered, the same is an offence, therefore, the other Applicants in this case cannot be proceeded against in a criminal court. In the present case, the process has been issued against all the Applicants. The Clause 42 of the Scheme does not extend to or bring in vicarious liability. That means the obligation to comply with Clause 13(1)(C) of the Scheme is that of all officers like the Applicant Nos. 2, 3 and 4. In the present case, the Applicant No. 1 is a registered principal employer. In such circumstances, Clause 42 of the Scheme does not include persons other than the registered employer, namely, the factory or establishment. For these reasons, it is submitted that the order issuing process deserves to be quashed and set aside.

10. Mr. Amit Desai submits that the Respondent No. 2/Original Complainant has failed to disclose any specific offence/culpability on the part of the Officers and Directors of the Applicant No. 1 either in the show cause notice issued by the Respondent No. 2/Original Complainant to the Applicants or even in the Criminal Complaint filed before the learned Magistrate. The Respondent No. 2/Original Complainant has mechanically and without any application of mind included the Directors and Officers of the Applicant No. 1 as Accused and the learned Magistrate has gravely erred in his judgment to have allowed the issuance of process by the order dated 11th May, 2010.

11. Mr. Amit Desai then submits that there is no vicarious liability in Criminal Law unless the Statute specifically provides for the same. It is submitted that neither the Scheme nor the Act provides for vicarious liability of the Officers of the Principal Employer. The only vicarious liability provision is in the case of the "employer agency", which is provided for under Clause 42(2) of the Scheme. It is submitted that Clause 3(e) of the Scheme defines "Employer Agency", which is an agency which directly employs Security Guards and supplies them to principal employer. It is submitted that the Applicant No. 1 is not a employer agency and

hence there is no question of any of the Officers of Applicant No. 1 being vicariously liable for an alleged offence of Applicant No. 1. It is, therefore, submitted that prosecution of Applicant Nos. 2, 3 and 4 is bad in law.

12. Mr. Amit Desai then submits that, in any case, the averments in the complaint are not sufficient to prosecute the Applicant Nos. 2, 3 and 4. It is submitted that it is not sufficient to repeat the words of Clause 42(2) of the Scheme. The complaint does not make even a single averment or a whisper against the Applicant Nos. 2, 3 and 4 except for a bald statement "they are in-charge of and have ultimate control over the affairs of Accused No. 1". It is submitted that Clause 42(2) of the Scheme has to be strictly construed as it is a penal provision. It is important to note that unlike the other vicarious liability provisions which by a legal fiction impose penal consequences on a person in-charge of and responsible for the conduct of the business of the Company or any contravention committed by the Company, Clause 42(2) of the Scheme is applicable only in cases where an 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. It is, therefore, necessary that there are specific allegations making out the consent or connivance or neglect on the part of the Accused. It is also submitted that merely being a Director of a Company does not make a person liable for the affairs of the Company under Clause 42(2) of the Scheme. Hence the averments in the Complaint must necessarily make out all the ingredients of the contravention by Applicant Nos. 2, 3 and 4.

13. Mr. Amit Desai has relied upon the following decisions in support of his above contentions:-

- (a) Kedar Nath Goenka and Others Vs. Superintendent of Central Excise and Others, .
- (b) Rai Bahadur Seth Shreeram Durgaprasad Vs. Director of Enforcement, .
- (c) Employees State Insurance Corporation Vs. S.K. Aggarwal and Others, .
- (d) Standard Chartered Bank and Others etc. Vs. Directorate of Enforcement and Others etc., .
- (e) Tops Security Ltd. and Another Vs. S.P. Aspingekar, Inspector, Security Guard Board and Another, .

14. Mrs. Lata Desai, learned Counsel appearing on behalf of Respondent No. 2/ Original Complainant, on the other hand, supported the impugned order. She submits that, on a reading of the entire complaint, it is evident that there is enough prima facie material and to record the satisfaction that the allegations in the complaint disclose commission of an offence punishable under Clause 42 of the Scheme. She relied upon the averments in the complaint and particularly the documents, namely, the Inspection Remark dated 28th May, 2009 and the Show Cause Notice dated 2nd September, 2009. She submits that what has been set

out in the Inspection Remark and, equally, the Show Cause Notice is enough to hold that, prima facie, the offences punishable under Clause 42 of the Scheme have been committed.

15. She submits that none of the contentions raised by Mr. Amit Desai deserve acceptance. She submits that the definition of the term "Principal Employer" in Section 2(8) of the Act is inclusive. She submits that there is no question of importing the concept of vicarious liability, as understood otherwise in this provision. The first part of the definition is in relation to any class or classes of Security Guards deployed in a factory or establishment by the Agency or Agent or Board. Thus, the principal employer in relation to the class or classes of Security Guards deployed in a factory or establishment means the person who has ultimate control over the affairs of the factory or establishment and includes any other person to whom the affairs of such factory or establishment are entrusted. Therefore, the term "employer", as defined in Section 2(3) of the Act, will have to be seen. That term is defined because somebody in relation to a Security Guard in the direct employment of an agency or agent and deployed in a factory or establishment through such agency or agent had to be identified. In other words, a Security Guard, who is in the direct employment of an agency or agent may be deployed in a factory or establishment through such agency or agent and that agency or agent, therefore, is the employer of the Security Guard. The term "establishment" carries the same meaning as defined in Clause (8) of Section 2 of the Bombay Shops and Establishments Act, 1948. The term "factory" also carries the same meaning as defined in clause (m) of Section 2 of the Factories Act, 1948. The term "principal employer" had to be defined because an employer agency will depute its employee guards for security work or watch and ward on contract in a factory or establishment. When these Security Guards are posted in a factory or establishment, then, their principal employer needs to be identified and defined. It is for that purpose that the definition has been incorporated and rather substituted for the original by Maharashtra Ordinance 4 of 1996 and subsequently by Maharashtra Act 28 of 1996. The principal employer is, thus, a person who has ultimate control over the affairs of the factory or establishment. It also includes a person to whom the affairs of such factory or establishment are entrusted and he may be called authorized representative, manager or by any other name prevailing in the factory or establishment. The principal employer has to be a person who has ultimate control over the affairs of the factory or establishment and includes any other person to whom the affairs are entrusted. Thus, when the definition is all inclusive, then, there is no scope for urging that vicarious liability has been brought in a penal provision and which is unknown to Criminal Law. She submits that all the arguments proceed on the footing that Clause 42 of the Scheme imposes penalties only on a factory or establishment. The term "whoever" has been used deliberately. Clause 13 of the Scheme contemplates registration of principal employer. Every principal employer who engages registered Security Guards of the Board or Security Guards of employer agencies, whose Security Guards are granted exemption by the

Government, in his establishment, has to get himself registered with the Board. The registered principal employers of the Board on appointed day shall continue to be principal employers of the Board and the employer agencies whose Security Guards are granted exemption, shall be strictly prohibited to provide their Security Guards to such principal employers. Then, Clause (c) has been added by Maharashtra Government Notification SGA No. 152002/(91/5)/Lab. 5 dated 5th April, 2005. That is an obligation on every principal employer who had engaged Private Security Guards before the commencement of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) (Amendment) Scheme 2005, to get himself registered with the Board by applying in the form devised by the Board. If an employer of any establishment coming into existence after the commencement of the said Scheme, he shall apply for registration within a period of one month from the date of commencement of his business.

16. Mrs. Lata Desai, therefore, submits that Clause 13(1) of the Scheme talks of registration of principal employer and sub-clause (2) of Clause 13 of the Scheme speaks of registration of employer agency. Both are covered by Clause 42 of the Scheme and that is why the penalties are for contravention of the Scheme and particularly Clause 13 thereof, which applies to both. As far as the employer agency is concerned, it is no doubt liable if it contravenes Clause 13 of the Scheme. If it is proved that the offence has been committed with the consent or connivance or is attributable to any neglect on the part of the Proprietor, Partner, Director etc. or other Officer of the employer agency, then, they are also deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. That is because the employer agency in relation to a Security Guard means an individual or Body of individuals or a Body Corporate, which employs Security Guards on his employment on wages and undertakes to execute any security work or watch and ward work on contract for any factory or establishment by engaging the Security Guards in his or its employment. Therefore, in relation to such employer agency, sub clause (2) of Clause 42 of the Scheme provides for imposition of penalties not only on the employer agency but if it is proved that the offence was committed with the consent or connivance of or is attributable to any neglect on the part as Directors or Officers of such employer agency, then, they are also deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. She submits that considering the aim, object and purpose of the Act, the Legislature did not provide for any escape route. If protection is to be given to the Security Guards and the Act is enacted in their interests and for their welfare, then, anybody who exploits them or does not give them the protection envisaged by the Act and the Scheme must be held liable if the Act and the Scheme is contravened. In other words, the Act and the Scheme can be contravened by individuals and equally by Body of individuals or a Body Corporate which is in the business of providing Security Guards on contract to any factory or establishment. As far as the establishment and factory in which they are working or to which they are deployed, naturally that is liable if the Act and the Scheme is contravened.

However, that factory or establishment is identified separately and termed as a "principal employer". In such circumstances, to cover both situations and then to cover both entities, that Clause 42 of the Scheme has been worded accordingly. That does not mean that the Applicants other than Applicant No. 1 cannot be proceeded against. More so, when the complaint alleges specifically that the Applicant Nos. 2, 3 and 4 are in-charge of and have ultimate control over the affairs of Accused No. 1/Company. For all these reasons and the stage at which the matter stands, no case for interference is made out with the orders under challenge and this Criminal Application be, therefore, dismissed.

17. For properly appreciating the rival contentions, it would be necessary to bear in mind the object of the Act. It is an Act for regulating the employment of Private Security Guards employed in factories and establishment in the State of Maharashtra and for making better provisions for their terms and conditions of employment and welfare, through the establishment of a Board there-for, and for matters connected therewith.

18. I had an occasion to consider a controversy and particularly whether the Officers who are styled as Vice President, Managing Director and Senior Managing Director can be proceeded along with the factory or establishment for having committed offence punishable under Clause 42 of the Scheme. In the case of Bank of Baroda & Ors. Vs. State of Maharashtra & Anr. in Criminal Writ Petition No. 3785 of 2011, along with connected matter, decided on 16th April, 2013, this Court has observed as under:-

35. Repeatedly, this Court has underlined and impressed upon the object and purpose of the said Act and the Scheme. In the case of Maharashtra Suraksha Rakshak Aghadi and Another Vs. State of Maharashtra and Another, , this Court held as under:-

14... The provisions of the Act and Scheme show that the Act and the Scheme are together intended to regulate the employment of security guards employed in factories and establishments through the middlemen such as the agents and agencies and to make better provisions for their terms and conditions of employment and to provide for their welfare. For this purpose, such security guards are pooled together and a Board is constituted for classifying them into different categories, for assigning them to different employers, for prescribing the rates of their wages, allowances and other service conditions, for making the other benefits and amenities available to them, for ensuring that the wages and other service conditions are promptly secured to them, for recovering the costs of operating the Scheme and for defraying the expenses of the Scheme and for taking action against the security guards and employers in case of non compliance with the provisions of the Act and the Scheme. For this purpose, all security guards who are not the direct employees of any employer, are required to register themselves with the Board and they are prohibited from taking employment with any employer other than as direct recruits. The security guards are further forbidden from refusing the assignment offered to them. Likewise, all

employers who want to engage security guards otherwise than as their direct employees are required to register themselves with the Board and they are prohibited from engaging any security guard otherwise than as their direct employee. It is further enjoined upon the employers to take security guards (other than those engaged as direct employees) only from the pool of security guards registered with the Board. The registered employers are further required to pay such rates of wages and allowances and to give to the security guards such other service conditions as are decided upon and directed by the Board. The payment is made either by the Board after recovering the amount from the employers or is made directly by the employer as per the directions of the Board. The disciplinary action against the security guard including the dismissal and the termination of his employment is not left to employer, but is made the direct responsibility of the Board. The order passed by the Board in such matters is made appealable by providing that an appeal against such order will lie to the State Government. Thus the legislation is intended to eliminate the contract labour system in the field of the watch and ward and the security work. It also aims at stopping exploitation of security guards by the middlemen and ensuring them regular employment and better service conditions.

36. In *Narayanan Vaghul and Others Vs. R.K. Mhatre, Inspector, Security Guards Board and Others*, , this Court held as under:-

5... The Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 and the Scheme was enacted for regulating the employment of private security guards employed in factories and establishments in the State of Maharashtra for providing better provisions for their terms and conditions of their employment and welfare through the establishment of a Board. The Act provides security of services and safeguards the interest of the security guards employed by the factory or establishment...

6. Reading of the aforesaid provisions indicated that the Security Guards employed by the factory or establishment are covered under the Act and the Scheme... What is relevant under the Act is identity of the employer which has been defined to be a factory or an establishment as defined in section 2(8) of the Bombay Shops and Establishments Act, 1948 and also section 2(4) of the said Act. The intention of the Legislature is to safeguard the interest and the service conditions of the Security Guards employed by the factories and establishments and it is explicit that Security Guards employed by the factories and establishments are covered under the provisions of the Act and the Scheme, irrespective of the place where they have been allotted work. The mere fact that a Security Guard has been put by the factory or the establishment at the residence of an Officer or at the staff quarters is not at all relevant for the purposes of the Act. It is not the place of posting which is a relevant consideration under the Act and the Scheme. What is material is as to whether the appointment has been made by the factory or establishment. As the petitioners are the employer and the petitioners are carrying financing activities

which by nature is commercial, the business of the petitioners is fully covered under the definition of section 2(8) of the Bombay Shops and Establishments Act, 1948 and as such being employer they are amenable to the provisions of the Act and the Scheme. The Security Guards have been employed by the petitioners for providing safety to their employees. The services are incidental to the business activity carried out by the petitioners and the petitioners being a commercial establishment, are covered under the provisions of the Act and the Scheme and hence may be liable for prosecution for having contravened the provisions of the Act and the Scheme.

37. Finally, in the case of Maharashtra Suraksha Rakshak Aghadi Vs. State of Maharashtra and others, , a Division Bench of this Court held thus:

19. We have got to note that this Act is a welfare legislation. It is enacted with a view to protect the private security guards who are not much educated and, therefore, they put in hard labour in various factories and establishments. With a view to stop exploitation, a Board is created under the said Act. The provision of exemption u/s 23 of the said Act is an exception and not a rule. That being so, the State Government must zealously protect and scrutinize as to whether there is a real case for exemption after an overall examination of the facilities under a particular contracting agency. It is then only an exemption ought to be granted and not otherwise.

38. Therefore, to my mind, the Act being a welfare piece of legislation meant to make the service conditions of the security guards and protect them from exploitation, a complaint filed by the Inspector alleging violation of the provisions of the Act and the Scheme framed thereunder cannot be quashed or the order issuing process issued on such complaint cannot be set aside unless this Court is satisfied that the complaint read as whole does not disclose any offence punishable under the said Act and the Scheme. In the present case, such conclusion cannot be reached as the complaint alleges specific violation of the Scheme and consequently the Act. Once the complaint cannot be termed as an abuse of process of the Court, then, the proceedings in furtherance thereof cannot be quashed. It would be open for the Petitioners to raise all contentions and it is not as if the order issuing a process being upheld, these contentions cannot be raised. Clarifying that they can be raised at an appropriate stage, the Writ Petitions are dismissed.

19. Section 3 of the Act provides for making of Scheme for ensuring regular employment of Security Guards. That Section reads as under:-

3. Scheme for ensuring regular employment of Security Guards

1. For the purpose of ensuring an adequate supply and full and proper utilization of Security Guards in factories and establishments, and generally for making better provision for the terms and conditions of employment of such workers, the State Government may by means of one or more Schemes provide for the registration of [principal employers] and Security Guards in any factory or

establishment and provide for the terms and conditions of employment of registered Security Guards and make provision for the general welfare of such Security Guards.

2. In particular, a Scheme may provide for all or any of the following matters, that is to say:-

(a) for the application of the Scheme to such classes of registered Security Guards and [principal employers], as may be specified therein;

(b) for defining the obligations of registered Security Guards and [Principal employers], subject to the fulfillment of which the Scheme may apply to them;

(c) for regulating the recruitment and entry into the Scheme of Security Guards and the registration of Security Guards and principal employers, including the maintenance of registers, removal or restoration, either temporarily or permanently, of the names from the registers, and the imposition of fees for registration;

(d) for regulating the employment of registered Security Guards and the terms and conditions of such employment including the rates of wages, hours of work, maternity benefits, overtime payment, leave and wages, provision for gratuity and conditions as to weekly and other holidays and pay in respect thereof;

for providing the time within which registered principal employers should remit to the Board the amount of wages payable to the registered Security Guards for the work done by such workers; for requiring such principal employers who, in the opinion of the Board, make default in remitting the amount of wages in time as aforesaid to deposit with the Board, an amount equal to the monthly average of the wages to be remitted as aforesaid; if at any time the amount of such deposit falls short of such average, for requiring such principal employers who, persistently make default in making such remittances in time, to pay also, by way of penalty, a surcharge of such amount not exceeding 10 per cent of the amount to be remitted as the Board may determine;

(f) for securing that, in respect of a period during which employment or full employment is not available to registered Security Guards, though they are available for work, such Security Guards shall, subject to the conditions of the Scheme, receive a minimum guaranteed wages;

(g) for prohibiting, restricting or otherwise controlling the employment of Security Guards to whom the Scheme does not apply, and the employment of Security Guards by principal employers to whom the Scheme does not apply;

(h) for the welfare of registered Security Guards covered by the Scheme, in so far as satisfactory provision therefore does not exist apart from the Scheme;

(i) for health and safety measures in places where the registered Security Guards are engaged, in so far as satisfactory provision therefore is required but does not exist, apart from the Scheme;

(j) for the constitution of any fund or funds including provident fund for the benefits of registered Security Guards, the vesting of such funds, the payment and contributions to be made to such funds, provisions for provident fund and rates of contribution being made after taking into consideration the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, (XIX of 1952), and the Scheme framed thereunder, with suitable modifications where necessary, to suit the conditions of work of such registered Security Guards and all matters relating thereto;

(k) for the manner in which the day from which (either prospective or retrospective) and the persons by whom, the cost of operating the scheme is to be defrayed;

(l) for constituting the persons or authorities who are to be responsible for the administration of the scheme, and the administration of funds constituted for the purposes aforesaid;

(m) for specifying the powers and duties, which the persons or authorities referred to in clause (e) may exercise or perform, for providing appeals and revision applications against the decisions or orders of such persons and authorities; and for deciding such appeals and applications and for matters incidental thereto;

(n) for such other incidental and supplementary matters as may be necessary or expedient for giving effect to the purposes of the scheme.

3. The Scheme may further provide that a contravention of any provision thereof shall, on conviction, be punished with imprisonment for such term as may be specified (but in no case exceeding three months in respect of a first contravention or six months in respect of any subsequent contravention) with fine which may extend to such amount as may be specified (but in no case exceed five hundred rupees in respect of the first contravention or one thousand rupees in respect of any subsequent contravention), or with both imprisonment and fine; and if the contravention is continued after conviction, with a further fine which may extend to one hundred rupees for each day on which the contravention is so continued.

4. Notwithstanding anything contained in this Act

a) on and from the 29th June, 1981, in Greater Bombay and Thane Districts, no principal employer or agency or agent shall dismiss, discharge or retrench or otherwise terminate the appointment of any Security Guard, merely by reason of the employer's liability to register himself under a scheme framed under this section or by reason of any other liability likely to be cast on him under such scheme or by reason of the liability of the Security Guard to register himself under such scheme, during the period from the said date upto the date the whole scheme so framed is applied to such employer and Security Guard or during the period of one year from the said date, whichever is earlier;

and

b) on and from the date on which this Act or any provisions thereof are brought into force in any other area of the State, in that area, no principal employer or agency or agent shall dismiss, discharge or retrench or otherwise terminate the appointment of any Security Guard, merely for any of the reasons specified in Clause (a) during the period from the said date upto the date the whole scheme framed under this section is applied to such employer and Security Guard;

Provided that, nothing contained in this sub-section shall affect the right of the principal employer, agency or agent to dismiss, discharge or retrench or otherwise terminate the appointment of any Security Guard as a penalty imposed for disciplinary action taken against him.

20. By Section 4 of the Act, power is conferred to make, vary and revoke the Scheme. The disputes regarding application of the Scheme can be referred to the State Government even at the instance of a principal employer and that provision is to be found in Section 5 of the Act. Section 6 of the Act provides for constitution of Board. By Section 7 of the Act, the State Government is empowered to appoint a Board consisting of one person. Section 8 of the Act provides for powers and duties of Board. Sections 9 to 12 of the Act deal with various aspects of the Board, namely, accounts and audits, disqualification and removal of member of the Board, resignation and filling up of vacancy. The proceedings of the Board have been given certain protection and that is to be found in Section 13 of the Act. Section 14 of the Act confers power to determine the amount due from employers, principal employers and Security Guards. Section 15 of the Act provides for Disciplinary Committees and then comes Section 16, which reads as under:-

16. Inspectors and their powers

(1) The Board may appoint such persons as it thinks fit to be Inspectors possessing the prescribed qualifications for the purposes of this Act or any Scheme and may define the limits of their jurisdiction.

(2) Subject to any rules made by the State Government in this behalf, an Inspector may

a) enter and search at all reasonable hours, with such assistants as he thinks fit, any premises or place, where Security Guards are employed or work is given out to Security Guards in any factory or establishment, for the purpose of examining the register, record of wages or notices required to be kept or exhibited under any scheme, and require the production thereof, for inspection;

b) examine any person whom he finds in any such premises or place and who, he has reasonable cause to believe, is a Security Guard employed therein or a Security Guard to whom work is given out therein;

c) require any person giving any work to Security Guard or to a group of Security

Guards to give any information, which is in his power to give, in respect of the names and addresses of the persons to whom the work is given, and in respect of payments made, or to be made, for the said work;

d) seize or take copies of such registers, records of wages or notices or portions thereof, as he may consider relevant, in respect of an offence under this Act or any Scheme, which he has reason to believe has been committed by an employer or principal employer; and

e) exercise such other powers as may be prescribed; Provided that, no one shall be required under the provisions of this section to answer any question or make any statement tending to incriminate himself.

(3) Every Inspector appointed under this Section shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860 (XLV of 1860).

21. Section 17 of the said Act provides for cognizance of offences and reads as follows:-

17. Cognizance of offences

(1) No court shall take cognizance of any offence made punishable by a scheme or of any abatement thereof, except on a complaint in writing made by an Inspector or by a person specially authorized in this behalf by the Board or the State Government.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (II of 1974), an offence made punishable by a scheme or an abatement thereof shall be triable only by a Metropolitan Magistrate or a Magistrate of the First Class.

22. A bare perusal of these two provisions would make it clear that the persons, who are appointed as Inspectors, have been conferred powers so as to inspect the premises or place where Security Guards are employed or work is given out to them. There are other powers conferred and all this is to ensure that the Act and the Scheme is implemented for the protection and benefit of the Security Guards. Section 17 of the Act permits the Court to take cognizance of offences and by Sections 18 to 22 of the Act, application of other Acts is contemplated. Section 23 of the Act provides for exemptions and reads as under:-

23. Exemptions

The State Government may, after consulting the Advisory Committee, by notification in the Official Gazette, and subject to such conditions and for such period as may be specified in the notification, exempt from the operation of all or any of the provisions of this Act or any Scheme made thereunder, all or any class or classes of Security Guards employed 2[by the agency or agent as may be specified in the notification and deployed] in any factory or establishment or in any class or classes of factories or establishment of in the opinion of the State

Government, all such Security Guards or such class or classes of Security Guards are in the enjoyment of benefits, which are on the whole not less favourable to such Security Guards than the benefits provided by or under this Act or any Scheme made thereunder.

3[* * *]

4[Provided that], the State Government, may, by notification in the Official Gazette, at any time, for reasons to be specified, rescind the aforesaid notification.

23. There can be inquiry into working of the Board and that is dealt with by Section 24 of the Act and the Board can also be superseded vide Section 25 of the Act.

24. Sections 26 and 27 of the said Act read as under:-

26. Contracting out

Any contract or agreement, whether made before or after the commencement of this Act, whereby a registered Security Guard relinquishes any right conferred by or any privilege or concession accruing to him under this Act or any Scheme, shall be void and of no effect, in so far as it purports to deprive him of such right or privilege or concession.

27. General penalty for offences

Save as otherwise expressly provided in this Act, any person, who contravenes any of the provision of this Act, or any rule made thereunder, shall on conviction, be punished with fine, which may extend to five hundred rupees, and in case of continued contravention thereof, with an additional fine which may extend to one hundred rupees per day for every day during which such contravention continues.

25. Thus, the whole enactment is aimed at regulating the employment of Private Security Guards employed in factories and establishments in the State of Maharashtra and for making better provisions for their terms and conditions of employment and welfare through the establishment of a Board therefor. Such an Act must receive an interpretation which will advance its aim and purpose and not defeat it. It must also receive an interpretation so as to suppress the mischief and advance the remedy.

26. If the Scheme is perused in this light, what the Scheme itself provides by Clause 2 is as under:-

2. Objects and Application

1 Objects

The objects of the Scheme are to regulate employment of Private Security Guards employed in factories and establishment, and to make better provisions for their terms and conditions of employment and welfare through the

establishment of a Board therefor and for matters connected therewith;

2 Application

This Scheme shall apply to the registered Security Guards of the Board and the Security Guards in the employment of an employer agency deployed in any factory or establishment and employer agencies and registered principal employers, 3[in the State of Maharashtra] in the areas specified in the Schedule appended hereto.

27. Clause 3 of the Scheme is entitled interpretation and the term "employer agency" is defined in Clause 3(2)(e) reads as under:-

3(2)(e) "Employer Agency" means an employer agency within the meaning of the term "Employer" as defined in Section 2(3) of the Act which directly employs Security Guards and supplies them to principal employer for deploying in his factory or establishment and whose Security Guards are granted exemption by the Government.

28. Thus, the various sub-clauses in Clause 3 of the Scheme are nothing but definitions and in the light of the Scheme, the functions of the Board are enumerated by Clause 5 of the Scheme, which reads as under:-

5. Functions of the Board -

(1) The Board may take such measures as it may consider desirable for carrying out the objective of administering the Scheme set out in Clause 2 including measure for -

(i) ensuring the adequate supply and the full and proper utilization of registered Security Guards of the Board for the purpose of facilitating and doing security work or watch and ward work in any factory or establishment.

(ii) determining and keeping under review the number of registered Security Guards of the Board from time to time, on the registers or records and the increase or reduction to be made in the number of registered Security Guards of the Board;

(iii) keeping, adjusting and maintaining the registered principal employers, registers, entering there in the name of any registered principal employer in accordance with the provisions of this Scheme;

(iv) keeping, adjusting and maintaining from time to time, such registers or records as may be necessary of registered Security Guards of the Board including any registers, or records of registered Security Guards of the Board who are temporarily not available for work and whose absence has been approved by the Board; and where circumstances so require, removing from any register or record the name of any registered Security Guards of the Board either at his own request or in accordance with the provisions of the Scheme;

(v) grouping or re-grouping of all registered Security Guards of the Board into

such group as may be determined by the Board and reviewing the grouping of any registered Security Guards of the Board on the application of a registered Security Guard of the Board;

(vi) making provision, subject to availability of funds, for welfare of registered Security Guards of the Board including medical services in so far as such provision does not exist apart from this Scheme.

(vii) recovering from registered principal employers contribution in respect of the expenses of this Scheme, wages levy and other contributions under this Scheme;

(viii) disbursing of wages and other allowances to registered Security Guards of the Board;

(ix) making provision subject to availability of funds for the health and safety measures in places where Security Guards of the Board are employed in so far as such provision does not exist apart from this Scheme;

(x) maintaining and administering the Security Guards of the Board welfare fund recovering from all the registered principal employers contribution towards the fund when such fund is constituted in accordance with the rules of the fund;

(xi) maintaining and administering provident fund and gratuity fund for registered Security Guards of the Board in the Board pool when such funds are constituted;

(xii) making adequate infrastructure to provide for the physical training facilities for the registered Security Guards of the Board;

(xiii) sanctioning the creation of posts, the maximum salary of which exclusive of allowances is below Rs. 5,500 per month and to make appointment to such post.

(2) The property, fund and other assets vesting in the Board shall be held and applied by it subject to the provisions and for the purposes of this Scheme.

(3) The Board shall have and maintain its own fund to which shall be credited-

(a) all monies received by the Board from the State Government;

(b) all fees, wages and levies received by the Board under this Scheme;

(c) all monies received by the Board by way of sale and disposal of properties and other assets;

(d) interest on investment in securities and deposits, rents and all monies received by the Board in any other manner or from any other source.

(4) All monies forming part of the funds shall be kept in savings account of fixed deposit account with any nationalised bank. Such accounts shall be operated by such officers of the Board as may be authorised by the Board.

Explanation - For the purpose of this sub-clause, "nationalised bank" means a

bank specified in column 2 of the first schedule to the Banking Companies (Acquisition and transfer of Undertakings) Act, 1970 (5 of 1970) and also to the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980).

(5) The Board may, with the prevision permission of the State Government borrow money from open market or otherwise with a view to provide itself with adequate resources.

(6) The Board may, accept deposits on such conditions as it deems fit from persons, authorities or establishments with whom it has to transact any business.

(7) The Board shall make provision for such reserve and other denominated funds as may be provided in this Scheme.

(8) The Board shall have the authority to spend such sums as it thinks fit for the purpose authorised under this Scheme from and out of the general fund of the Board or from the reserve and other funds as the case may be.

(9) The Board shall cause the proper account to be kept of the cost of operating this Scheme and all receipts and expenses under this Scheme.

(10) The Board shall submit to the State Government -

(a) as soon as may be, after the first day of April, in every year and not later than the 31st day of October, an annual report on the working of the Scheme during the preceding year ending the 31st of March, together with an audited balance-sheet; and

(b) copies of proceeding of the meeting of the Board.

(11) The Board may -

(i) fix the number of Security Guards of the Board to be registered under the various categories;

(ii) increase or decrease the number of registered Security Guards of the Board in any category on the register from time to time as may be necessary after a periodical review of the register and anticipated requirements;

(iii) sanction the temporary registration of a specified number of Security Guards of the Board in any category for specific periods which shall not be more than 5% of the prescribed total registered Security Guards of the Board by following procedure of registration of Security Guards;

(iv) device forms, records registers, statements and the like required for administration of the Scheme;

(v) determine the wages, allowances and other conditions of service including age of retirement of all the pool;

(vi) determine the manner of disbursement of wages and other allowances of all

the Security Guards and the Security Guards of the employer agencies registered with the Board. The payment of all Security Guards shall be made through cheque.

(vii) fix the rate of levy under [Clause 40];

(viii) sanction the annual budget;

(ix) subject to the provisions of clause 4, appoint a Secretary, the Personnel Officer and other staff of the Board;

(x) make recommendation to the State Government about any modification in the Scheme;

(xi) settle disputes between registered principal employers and registered Security Guards of the Board;

(xii) subject to such conditions as it thinks fit, delegate in writing to the Chairman, Secretary or to any other officer of the Board any of its functions under this Scheme;

(xiii) to ensure that Employees State Insurance Scheme is made applicable to all the Security Guards.

29. Clause 6 of the Scheme provides for annual estimate and Clause 7 of the Scheme sets out responsibilities and duties of Chairman. Clause 8 of the Scheme provides for functions of Secretary, Clause 9 of the Scheme provides for function of Personnel Officer and Clause 10 of the Scheme deals with maintenance of registers. Clause 10 of the Scheme reads as under:-

10. Maintenance of registers - The following registers shall be maintained by the Board, namely, -

(1) Register of principal employers - There shall be a register of employers in the form devised by the Board wherein the names, addresses and other details of the principal employers of the Board, registered under the Scheme shall be entered.

(2) Register of registered employer agency - There shall be a register of employer agencies registered with the Board, in form devised by the Board, wherein the names, addresses and other details of the employer agencies under the Scheme shall be entered.

(3) Register of Security Guards - There shall be a register of registered Security Guards of the board and register of Security Guards of employer agencies registered with the Board in the form devised by the Board wherein the names, addresses and other details of the registered Security Guards of the Board, and Security Guards of the employer agencies registered with the Board, shall be maintained.

30. Clause 11 of the Scheme envisages classification of registered Security

Guards of the Board and Clause 12 of the Scheme provides for fixation of number of registered Security Guards of the Board on the registers. Clause 13 of the Scheme is dealt with registration of principal employer, which reads as under:-

13. (1) Registration of principal employer -

(a) Every principal employer who engages registered Security Guards of the Board or Security Guards of employer agencies, whose Security Guards are granted exemption by the Government. In his establishment, shall get himself registered with the Board, by applying in the form devised by it:

Provided that, principal employers who are already registered under the existing scheme shall be deemed to be registered under this scheme.

(b) The registered principal employers of the Board on appointed day shall continue to be principal employers of the Board and the employer agencies whose Security Guards are granted exemption, shall be strictly prohibited to provide their Security Guards to such principal employers.

[(c) Every [Principal employer] who had engaged Private Security Guards before the commencement of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) (Amendment) Scheme, 2005 shall get himself registered with the Board, by applying in the form devised by the Board, within Fifteen Days from the date of commencement of the said Scheme.

Provided that, an employer of any establishment coming into existence after the commencement of the said Scheme shall apply for registration within a period of one month from the date of commencement of his business].

(2) Registration of employer agency - Every employer agency which has directly employed private Security Guards or class or classes of Security Guards for deployment to various establishments and [factories] to whose security guards, the State Government has granted exemption, from operation of all or any of the provisions of the Act or Scheme by issuing notification u/s 23 of the Act, shall get itself registered with the Board within 15 days from the date of publication of the exemption notification by applying in the form devised by the Board, along with the number of Security Guards on its rolls.

(3) Notwithstanding anything contained in sub-clause (2) - Directorate General Resettlement, Government of India, Ministry of Defence, New Delhi, recognised sponsored employer agencies which employ only ex-serviceman as Security Guards, shall register with the Board with police verification certificate of the Security Guards enrolled with them for exemption.

31. Thus, there are complete measures for registration of principal employer, registration of existing and new Security Guards and promotion and transfer of registered Security Guards of the Board, their medical examination, a registration fee and supply of cards to them. These are dealt with by Clauses 13

to 18 of the Scheme. Then by Clauses 19 to 22 of the Scheme, there is a provision made for maintaining the records of the Security Guard and for registered principal employers. There is a provision made for surrender of Identity Cards, disappointment money, holidays.

32. Clauses 24, 25 and 26 of the Scheme read as follows:-

24. Obligations of registered Security Guards of the Board-

(1) Every registered Security Guard of the Board shall be deemed to have accepted the obligations of this Scheme;

(2) A registered Security Guard of the Board in the pool who is available for work shall not engage himself for employment under registered principal employer, unless he is allotted to that principal employer by the Secretary;

(3) A registered Security Guard of the Board in the Board pool who is available for work shall carry out direction of the Board and shall accept employment under any registered principal employer for which he is considered suitable by the Board;

(4) A registered Security Guard of the Board who is available for work when allotted by the Board for employment under a registered principal employer shall carry out his duty in accordance with the directions of such registered principal employer or his authorised representative or supervisor and the rules of the employment or place where he is working;

(5) When a registered Security Guard of the Board, resorts to any unlawful and violent method of agitation for redressal of his grievances or reversal of orders, such act on his part shall be deemed to be act of misconduct;

(6) No Security Guards of the Board shall engage or associate himself in any activities which will harm the security, discipline or any action which is contrary to the interest of the registered principal employer;

(7) Any Security Guard of the Board who has got himself registered with the Board by providing false information or by misleading, shall be for punishment prescribed under clause 42.

25. Obligations of registered principal employers -

(1) Every registered principal employer shall accept the obligations of this scheme;

(2) A registered principal employer shall not employ a Security Guard other than a Security Guard who has been allotted to him by the Secretary in accordance with provisions of clause 8(e);

Provided that prohibition contained herein not apply to the Security Guards directly employed by registered principal employers.

(3) A registered principal employer shall, in accordance with instructions as may be given by the Board, submit all available information of his current and future requirements of Security Guards;

(4) A registered principal employer shall disburse to the Security Guard the wages and other allowances directly, if so directed by the Board and send to the Board a statement of such payment within such time and in such form as may be specified by the Board;

Provided that, if so directed by the Board, a registered principal employer shall remit to the Board the amount of wages and other allowances payable to the Security Guard within such time and in such manner as may be specified by the Board;

(5) A registered principal employer shall pay to the Board in such manner and at such time as the Board may direct, the levy payable under clause 39(1) and the gross wages due to Security Guards and any other amount due to Security Guard;

(6) A registered principal employer who makes default in remitting the amount of wage of Security Guards within the time limit specified by the Board, shall, if so required by the Board, deposit with the Board an amount equal to the monthly average of the wages credited by him in the Board during the previous twelve calendar months in order to enable the Board to make payment of wages to Security Guards in time. The said amount shall be deposited with the Board within ten days from the date of order of the Secretary of the Board to that effect. If at any time the amount of such deposit falls short of the average of wages for twelve previous calendar months, then the principal employer shall make good the deficit amount.

(7) A registered principal employer, who persistently makes default in remitting the amount of wages of Security Guards within the time limit specified by the Board, shall further pay by way of penalty a surcharge of such amount not exceeding ten per cent of the amount to be remitted as may be determined by the Board. The said surcharge shall be credited to the Board within ten days from the date of the order of the Secretary of the Board to the effect.

(8) If a registered principal employer fails to make the payment of any amount due from him to the Board under aforesaid clauses within the time specified by the Board the Secretary of the Board shall, without prejudice to the right of the Board to take any to her action under the Scheme to which the principal employer may be liable for the said default, serve a notice on the employer to the effect that unless he pays his dues within three days from the date of receipt of the notice the supply of registered Security Guards to him shall be suspended. On the expiry of the notice period the Secretary shall suspend supply of registered Security Guards to the defaulting principal employer until he pays all the dues.

(9) A registered principal employer shall keep such records as the Board may require, and shall produce before the Board or such person as may be designated by the Board upon reasonable notice all such records and any other documents of any kind relating to registered Security Guard and to the work upon which they have been employed and furnish such information relating thereto as may be set out in any notice or directions issued by or on behalf of the Board.

26. Obligations of employer agencies -

(1) Every employer agency shall accept the obligations of the Scheme.

(2) Every employer agency shall file with the Board the list of their registered principal employers and the names and details of the Security Guards employed with them, working with the respective registered principal employers.

(3) An employer agency, desirous of claiming registration under the provisions of clause 13(2) of the Scheme for all or any class or classes of the Security Guards employed with them and deployed in any factory, establishment shall apply to the Board in the form prescribed by the Board along with the process fee at the rate of Rs. 100 per Security Guard at the time of application for registration and the same amount of fee at the time of renewal of registration after the expiry of the exemption period.

(4) The employer agency shall deploy the Security Guard employed by it only in the establishment, factories as per the list of the principal employer submitted by such agency to the Board and no other principal employers already registered with the Board.

(5) Employer agency shall maintain registers and records of Security Guards in their employment, relating to payment of wages and leave and other facilities provided to them under the relevant Acts and the same shall be produced before the Competent Authorities of the board, when so directed by the Board.

(6) Every employer agency shall get done the police verification of every Security Guard on its pay-roll, within a week from the date of employing of the Guard.

(7) No employer agency shall at any time, prescribe or supply to its Security Guards, Uniform which in any way resembles that of the Indian Army, or Police Force or Board.

(8) Every [xxx] employer agency shall comply with the provisions of the Minimum Wages Act, 1948, (XI of 1948); the Payment of Wages Act, 1936, (IV of 1936), the Payment of Gratuity Act, 1972, (XXXIX of 1972); the Employee's Provident Fund, Miscellaneous Provisions Act, 1952, (XIX of 1952); and the Contract Labour (Regulations and Abolition) Act, 1970, (XXXVII of 1970); or any other Act as may be applicable to them, for the time being.

(9) Every employer agency shall make payment to the exempted and registered Security Guards deployed by them, which shall not be less than the wages, other allowances and other benefits which are given to the registered Security Guards

of the Board.

(10) Every employer agency shall submit its Yearly Audit Report to the Government within a period of six months after the end of financial year.

33. Then, by Clause 27 of the Scheme, obligations of principal employers of the employer agencies have been set out. Clause 28 of the Scheme reads as under:-

28. Restriction on employment -

(1) Every registered principal employer may either engage or employment Security Guards registered with the Board or the Security Guards of the employer agency registered with the Board or may employ any person who is a direct employee of such employer.

(2) Notwithstanding the provisions of sub-clause (1) -

(a) where the Secretary is satisfied that -

(i) the work is emergently required to be done; and

(ii) it is nor reasonably practicable to obtain registered Security Guard of the Board for that work; the Secretary may, subject to any limitation imposed by the Board, allow a registered principal employer to employ a Security Guard who is not a registered Security Guard of the Board:

Provided that, whenever unregistered Security Guards have to be employed, the Secretary shall obtain, if possible, the prior approval of the chairman to the employment of such Security Guards and where this is not possible, shall report to the Chairman, within 24 hours, the full circumstances under which such Security Guards were employed and the chairman shall duly inform the Board and State Advisory committee of such employment in its next meeting;

(b) the Board may, subject to such conditions as it may specify, permit employment of Unregistered Security Guards on a holiday. If work is required to be done on that day, to the extent registered Security Guards of the Board are not available for work;

(c) in the cases referred to in items (a) and (b), the persons so employed as aforesaid by a registered principal employer shall, for the purpose of sub-clauses (4), (5) and (6) of clause 25 and of clause 30, be treated in respect of that work, as if he was a registered Security Guards of the Board.

(3) A registered Security Guard of the Board in the Board pool may, provided he fulfills fully his obligations under clause 24, take up employment elsewhere on those days on which he is not allotted work by the Board.

34. The circumstances in which the Scheme ceases to apply are set out in Clause 29. By Clause 30 of the Scheme, wages, allowances and other conditions of service of Security Guards of the Board have been listed. The disbursement of wages and other allowances to registered Security Guards of the Board is dealt

with by Clause 31 of the Scheme and by Clause 32 of the Scheme, disciplinary proceedings are permitted. Clause 33 of the Scheme provides for termination of employment of registered Security Guards, Clause 34 of the Scheme provides for deletion of names of Security Guards of employer agency registered with the Board and by Clauses 35 and 36 of the Scheme, remedies of Appeals are provided. The revisional powers of Chairman are to be found in Clause 37 of the Scheme and by Clause 38 of the Scheme, there is a provision for settlement of disputes. Clause 39 of the Scheme provides for stay of orders in certain Appeals. The cost of operating the Scheme and provision for amenities and benefits to the registered Security Guards of the Board is dealt with by Clause 40 of the Scheme and by Clause 41 of the Scheme, Provident Fund and Gratuity is made applicable to the registered Security Guards of the Board. Clause 42 of the Scheme reads as under:-

42. Penalties -

(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.

35. Thus, this is a composite, comprehensive and complete Scheme in the sense it takes care of the aims and objects of the Act, contains a mechanism for registration of Security Guards, register employers and employer agencies. There are various measures including disciplinary procedure and termination of employment. Therefore, it cannot be said that this Scheme is not in furtherance of the Act or that it contains something which is beyond the statutory mandate. In fact, it is to fulfill the mandate of the Act and serve its object and purpose, that this Scheme has been made. The Scheme cannot, therefore, be seen and considered de hors the Statute in question. In such circumstances, to urge that the Clause in question, which makes contravention of the Clauses of the Scheme an offence, should receive any narrow or restricted construction, is impermissible to say the least.

36. Sub-clause (1) of Clause 42 of the Scheme, as held above, deal with the situation where the word "whoever" contravenes the provision of Clauses 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 Rs. 500/- or with both, where such contravention is a first one. In the case of subsequent contravention, the penalty, as provided in sub-clause (1), is imposed. The word "whoever" in this case must be seen in the back-drop of the obligations which are of registered Security Guards, registered principal employers, principal employers of the employer agencies and the restrictions on employment. It is not as if the word "whoever" will only take in its import the employers and employer agencies. If one carefully peruses sub-clause (7) of Clause 24 of the Scheme, even a Security Guard of the Board who has got himself registered with the Board by providing false information or by misleading it invites punishment prescribed under Clause 42 of the said Scheme. Therefore, Mr. Amit Desai's attempt to urge that this Clause works heavily against the interest of the principal employers or that purports to deal only with them is futile. The word "whoever" has been advisedly used and in a broad sense. It takes within its fold all those on whom there are obligations and which have to be discharged by them. Their failure to discharge those obligations is an offence under the Scheme. When the Scheme provides penalties for its contravention, then, the word "whoever" must be interpreted in the context and in the back-drop of the obligations which have to be discharged in terms of the Scheme. These obligations have to be discharged by the registered Security Guards, by registered principal employers, by employer agencies and by principal employers of the employer agencies. Equally, there is a restriction on employment by Clause 28 of the Scheme and it is the duty of every registered principal employer to engage either Security Guards registered with the Board or the Security Guards of the employer agency registered with the Board or employ any person who is a direct employee of such employer. If these restrictions are not abided by, then, depending upon who has to discharge the obligations and on whom the restrictions are imposed, the penalties will have to be awarded. Thus, commencing with the duty to get registered, as set out in Clause 13 of the Scheme, failure to carry out that duty and equally failure to discharge the obligations or a contravention in discharging the same or contravention of the Clauses in that behalf have been made a punishable offence and that is how penalties have been provided by the Scheme. It is not as if the wording in the Clause 42 of the Scheme is surplusage. It is well settled that no word or sentence in the statutory provision should be considered as meaningless or futile. The Legislature is not expected to use words or employ a language merely because a provision or a Section or an Act has to be inserted. All this is with a specific purpose. In the case of *Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others*, , the Hon"ble Supreme Court sets out the guiding principles, which read as under:-

9. In considering the rival submissions of the learned counsel and in defining and construing the area and the content of the Act and its provisions, it is necessary

to make certain general observations regarding the interpretation of statutes. A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily. Again, while the words of an enactment are important, the context is no less important. For instance, "the fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute, and the context of any Act may well indicate that wide or general words should be given a restrictive meaning" (See Halsbury, 4th Edn. Vol. 44 Para 874).

37. Recently, I had an occasion to deal with somewhat similar provisions of the Maharashtra Prevention of Fire and Life Safety Measures Act, 2006. In the context of the obligations and the duties in taking preventive measures, particularly in relation to associations of individuals or companies, dealing with somewhat similar provisions, I had observed as under:-

Even a criminal statute and penal provision do not rule out placing an interpretation having regard to the subject matter of the offence and the object which the law seeks to achieve. A penal statute can be interpreted in this manner. In "Principles of Statutory Interpretation" (13th Edition 2012) by Honourable Justice G.P. Singh, what is observed by the learned Author is pertinent enough:-

LORD REID in the context of the rule of construction applicable to penal statutes said: "We are always trying to find the intention of the Legislature. Where taking into account the surrounding circumstances and the likely consequences of the various possible constructions there can be at all any doubt about the intention,

we must, where penalties are involved, require that the intention shall clearly appear from the words of the enactment construed in the light of those matters. But if we can say that those matters show that a particular result must certainly have been intended, we would, I think, be stultifying the underlying principle if we required more than that the statutory provisions are reasonably capable of an interpretation carrying out that intention." In an earlier case, LORD REID explained that the rule of restrictive interpretation of penal provisions "only applies where after full enquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings", for the imprecision of language is such that it is difficult to draft any provision which is not ambiguous in that sense. Difference of judicial opinion as to the meaning of the provision may also be not enough for applying the rule, and a judge while dealing with a question of construction of the provision must himself be in real doubt before he can call in aid the rule.

STORY, J. in agreeing to the rule in its "true and sober sense" stated the same as follows: "Penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word.

Penal statutes have also to be interpreted "having regard to the subject matter of the offence and the object of the law it seeks to achieve. The purpose of law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so."

Considerations of public policy are not foreign in interpreting and applying a criminal statute.

(See pages 919 and 929)

So in interpreting and applying a penal statute, it has to be borne in mind that respect for human rights of the accused is not the only value at stake. "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interest of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider triangulation of interests. It involves taking into consideration the position of the accused, the victim and his or her family, and the public.

(See page 923)

30 In J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers

and Others, , the Honourable Supreme Court was considering the constitutional validity of proviso (ii) to Section 2 of the Factories Act, 1948 as amended by Act 20 of 1987. The argument was that this proviso violates the mandate of Articles 14, 19(1)(g) and 21 of the Constitution of India. In considering that challenge, the Honourable Supreme Court has adverted to the principles of Interpretation of Statutes and in paragraphs 3, 40, 42, 43, 46 held as under:-

3. The basic question which requires our consideration is whether in the case of a company which owns or runs the factory, is it only a director of the company who can be notified as the occupier of the factory within the meaning of proviso (ii) to Section 2(n) of the Act, or whether the company can nominate any other employee to be the occupier by passing a resolution to the effect that the said employee shall have "ultimate control over the affairs of the factory". If the answer to the question is that in the case of a company, only a director can be notified as an occupier under the Act, the next question which would require our consideration is about the constitutional validity of proviso (ii) to Section 2(n) of the Act as introduced by the Amending Act of 1987. The answer to these questions would depend upon the interpretation of amended Section 2(n) of the Act. It would, therefore, be appropriate to first notice the provisions of Section 2(n) as it stood prior to the amendment and as it stands today.

Section 2(n) as it stood prior to Amendment of 1987.

2(n) "occupier" of a factory means the person who has ultimate control over the affairs of the factory, and where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory;

Section 2(n) as it is after Amendment of 1987.

"2(n) "Occupier" of a factory means the person, who has ultimate control over the affairs of the factory:

Provided that

(i) in the case of a firm or other association of individuals any one of the individual partners or members thereof shall be deemed to be the occupier;

(ii) in the case of a company, any one of the directors shall be deemed to be occupier;

(iii) in the case of a factory owned or controlled by the Central Government or any State Government or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier;

40. In keeping with the aim and object of the Act which is essentially to safeguard the interests of workers, stop their exploitation, and take care of their safety, hygiene and welfare at their place of work, numerous restrictions have been enacted in public interest in the Act. Providing restrictions in a statute

would be a meaningless formality unless the statute also contains a provision for penalty for the breach of the same. No restriction can be effective unless there is some sanction compelling its observance and a provision for imposition of penalty for breach of the obligations under the Act or the rules made thereunder is a concomitant and necessary incidence of the restrictions. Such a provision is contained in Section 92 of the Act, which contains a general provision for penalties for offences under the Act for which no express provision has been made elsewhere and seeks to lay down uniform penalty for all or any of the offences committed under the Act. The offences under the Act consist of contravention of (1) any provision of the Act; (2) any rules framed thereunder; and (3) any order in writing made thereunder. It comprises both acts of omission and commission...

42. The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. ...

43. What is made punishable under the Act is the "blameworthy" conduct of the occupier which resulted in the commission of the statutory offence and not his criminal intent to commit that offence. The rule of strict liability is attracted to the offences committed under the Act and the occupier is held vicariously liable alongwith the Manager and the actual offender, as the case may be. Penalty follows actus reus, mens-rea being irrelevant.

46. The object of the Act would stand defeated if for the commission of strict offences, the identified director, as the deemed occupier of the factory, is not held vicariously liable. An argument similar to the one raised before us regarding the harshness of the provision insofar as an "innocent" director is concerned, was also canvassed in M.C. Mehta's case. We may excerpt that portion which formulates the question and furnishes the answer:

So far as the undertaking to be obtained from the Chairman and Managing Director of Shriram is concerned it was pointed out by Shriram that Delhi Cloth Mills Ltd. which is the owner of Shriram has several units manufacturing different products and each of these units is headed and managed by competent and professionally qualified persons who are responsible for the day to day management of its affairs and the Chairman and Managing Director is not concerned with day to day functioning of the units and it would not therefore be fair and just to require the Chairman and Managing Director to give an undertaking that in case of death or injury resulting on account of escape of chlorine gas, the Chairman and Managing Director would be personally liable to pay compensation. We find it difficult to accept this contention urged on behalf of Shriram. We do not see any reason why the Chairman and/or Managing Director should not be required to give an undertaking to be personally liable for payment

of compensation in case of death or injury resulting on account of escape of chlorine gas...

31 This view has been followed in the case of *The Chairman, SEBI Vs. Shriram Mutual Fund and Another*, . In paragraphs 33 and 35 of this decision, the Honourable Supreme Court refers to the same principles and holds as under:-

33. This Court in a catena of decisions have held that mens rea is not an essential element for imposing penalty for breach of civil obligations:

(a) *Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others*,

8. It is thus the breach of a "civil obligation" which attracts "penalty" u/s 23(1) (a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10 FERA 1947 that would immediately attract the levy of "penalty" u/s 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary guilty intention or in other words the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA 1947. It is the delinquency of the defaulter itself which establishes his "blameworthy" conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947, without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty u/s 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law,...

12. "In *Corpus Juris Secundum*. Vol. 85 at page 580, para 1023, it is stated thus:

A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

13. We are in agreement with the aforesaid view and in our opinion what applies to "tax delinquency" equally holds good for the "blameworthy" conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens area (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty u/s 23(1) (a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted u/s 23(1) (a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence", overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by

payment of the penalty imposed u/s 23(1)(a) of the Act irrespective of the fact whether he committed the breach, with or without any guilty intention.

(b) J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, :

42. The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mens rea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, prevention of pollution etc. in India and abroad. "Absolute offences" are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty.

(c) R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, :

Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that "no mens rea, no crime" has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.

(d) Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, :

It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required u/s 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to

discourage the repetition of the offence. In the case of a proceeding u/s 271(1) (a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection, the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision.

(e) Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another, :

The provisions of Section 15-H of the Act mandate that a penalty of rupees twenty five crores may be imposed. The Board does not have any discretion in the matter and, thus the adjudication proceeding is a mere formality. Imposition of penalty upon the appellant would, thus, be a forgone conclusion. Only in the criminal proceedings initiated against the appellants, existence of mens rea on the part of the appellants will come up for consideration.

(f) Securities and Exchange Board of India Vs. Cabot International Capital Corporation, :

47. Thus, the following extracted principles are summarised:

(A) Mens rea is an essential or sine qua non for criminal offence.

(B) Strait jacket formula of mens rea cannot be blindly followed in each and every case. Scheme of particular statute may be diluted in a given case.

(C) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contra-distinction to criminal or quasi criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word "penalty" by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravener and the delinquency.

(D) Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities.

(E) There can be two distinct liabilities, civil and criminal under the same Act.

52. The SEBI Act and the Regulations are intended to regulate the Security Market and related aspects, the imposition of penalty, in the given facts and circumstances of the case, cannot be tested on the ground of "no mens rea no penalty". For breaches of provisions of SEBI Act and Regulations, according to us, which are civil in nature, mens rea is not essential. On particular facts and circumstances of the case, proper exercise or judicial discretion is a must, but

not on a foundation that mens rea is an essential to impose penalty in each and every breach of provisions of the SEBI Act.

54. However, we are not in agreement with the appellate authority in respect of the reasoning given in regard to the necessity of mens rea being essential for imposing the penalty. According to us, mens rea is not essential for imposing civil penalties under the SEBI Act and Regulations.

35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15(D)(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.

32 In the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, , the earlier judgments were referred to and followed in arriving at the conclusion that in interpreting the penal provisions and statutes, considerations of public policy and public interest are not out of place.

38. Clause 42 of the Scheme will have to be read harmoniously along with the provisions of the Act, the Rules and other Clauses preceding Clause 42. The Act being a beneficial and welfare piece of Legislation, therefore, the provisions will have to be construed so as to advance its purpose and suppress the mischief. It is well settled that in case of social and benefit oriented legislations, the provisions will have to be construed as broadly as possible. Equitable considerations may find an important place in the construction of beneficent provisions. (See Principles of Statutory Interpretation, 13th Edition, 2012 - By Justice G.P. Singh, Former Chief Justice, M.P. High Court).

39. In these circumstances, it is not possible to accept the contentions of Mr. Amit Desai, learned Counsel appearing on behalf of the Applicants, that in the absence of specific words, as are appearing in Clause 42(2) of the Scheme, Clause 42(1) of the Scheme will have to be given a restricted or a narrow meaning.

40. Thus, there is no contradiction but clear harmony in the wordings of Clause 42 of the Scheme. When there is a contravention of particular Clauses of the Scheme, the penalty has to be imposed and of imprisonment and fine. That has to be imposed in the cases of principal employers, on a person who has ultimate control over the factory or establishment. That can be imposed also on any other

person to whom the affairs of such factory or establishment are entrusted. Whether such person is called Authorized Representative, Manager or by any other name prevailing in the factory or establishment, there is no escape from the penalty for contravention of the Clauses of the Scheme providing for duties and obligations of the principal employers. The penalty has to be imposed by identifying the person who has ultimate control over the affairs of the factory or establishment. A person to whom the affairs are entrusted is also presumed to have ultimate control. Therefore, the words "ultimate control over the affairs of the factory or establishment" are wide enough and by Clause 42(1) of the Scheme, penalties can be imposed by applying the test of ultimate control. It is not as if Clause 42(2) of the Scheme only makes individuals liable. The individuals are brought in even by sub-clause (1) of Clause 42 of the Scheme and in case of everybody excluding employer agencies. However, when offence under the Act and the Scheme 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, then, such Proprietor, Manager Secretary or other Officer of the employer agency shall also deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Therefore, it is not as if any vicarious liability is being brought in. Once there is a contravention of the Scheme and the penalty has to be imposed, then, that is taken care of by Clause 42(1) of the Scheme and when an offence under the Act and the Scheme has been committed, which may include contravention thereof by an employer agency, then, that is an aspect dealt with by Clause 42(2) of the Scheme.

41. In this context, what is apparent is that there are offences, which are termed as offences under the Act, and that is an aspect dealt with by Section 27 of the Act. Section 27 of the Act reads as under:-

27. General penalty for offences -

Save as otherwise expressly provided in this Act, any person, who contravenes any of the provision of this Act, or any rule made thereunder, shall, on conviction, be punished with fine, which may extend to five hundred rupees, and in case of continued contravention thereof, with an additional fine which may extend to one hundred rupees per day for every day during which such contravention continues.

42. A bare perusal thereof would indicate that there is a general penalty for offences, namely, contravening any provisions of the Act or any rule made thereunder and equally there is a contravention of the specific Clauses of the Scheme, which is also an offence and that is dealt with by Clause 42 of the Scheme. It is not the argument of the Applicants that any person would not mean both, Natural and Artificial. Clause 42(2) of the Scheme, therefore, provides that if the offence under the Act and the Scheme has been committed by an employer agency, then, no technical plea or defence should be raised,

namely, that the agency is liable but not a person manning it. To do away with such pleas and defences and to make the provisions of the Act and the Scheme meaningful, that it has been provided that, on proof of consent or connivance or neglect of individuals, then, together with the employer agency even the individuals can be punished, that sub-clause (2) has been worded in wide terms. Beyond that, I do not see how any vicarious liability or principle of that nature is being introduced and which is stated to be absent in sub-clause (1). As rightly pointed out by Mrs. Lata Desai, all persons are included. The individuals in control of the affairs and the legal entity of which they are part of, have thus been brought within the purview of the Act and the Scheme. A construction, which will, therefore, subserve this object and purpose will have to be placed or else there is a likelihood of the enactment itself being frustrated or defeated. For these reasons, I do not find any merit in the submissions of Mr. Amit Desai, learned Senior Counsel appearing for the Applicants.

43. The reliance placed by Mr. Amit Desai on the Judgment of the Hon'ble Supreme Court in the case of Rai Bahadur Seth Shreeram Durgaprasad Vs. Director of Enforcement, , rather than supporting his contentions, would favour the view taken by me. The contravention of the Foreign Exchange Regulation Act was the issue. The language of sub-section (1) of Section 23, which is identical to Clause 42 of the Scheme, was being construed. Section 23 and Section 23(C) are reproduced in para 5, and, in para 6, the Hon'ble Supreme Court observed as under:-

6. It is clear from these provisions that the word "whoever" in sub-s. (1) of S. 23 of the Act before its amendment was comprehensive enough to include an association of persons, such as a firm, and did not connote a natural person alone. There is no reason why the word "whoever" in the section should not receive its plain and natural meaning. According to the Shorter Oxford English Dictionary, Vol. 2, P. 2543, "whoever" means "any one who, any who". The meaning given in Webster Comprehensive dictionary, International edn., Vol. 2 at p. 1437 is "any one without exception" any person who". In our judgment, the word "whoever" in the unamended S. 23(1) must be read in juxtaposition with S. 12(2) and must mean any person who commits a contravention of that section without exception. That must be the legal connotation of the word "whoever" and it necessarily takes in corporate liability and includes any association of persons such as a partnership firm. That construction of ours is borne out by the plain language of sub-s. (4) of S. 23 inserted by Act XXXIV of 1950. It provides that if the person committing an offence punishable under sub-s. (1) of S. 23 is a company or other body corporate, every director, manager, secretary or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence. The Act therefore clearly contemplated that adjudication proceedings under subs. (1) of S. 23 prior to its amendment could be initiated not only against the person who actually commits contravention but also casts vicarious liability on an association of persons such as a partnership

firm or an artificial or a legal entity like a company. It is therefore idle to contend that the appellants were not liable to pay penalty for failure to repatriate foreign exchange on 52 shipments of manganese ore effected through the years 1952 to 1958. Upon that view, the learned Single Judge was right in setting aside the order of the Foreign Exchange Regulation Appellate Board and restoring that of the Director of Enforcement levying a penalty of Rs. 15,00,000 on the appellants for failure to repatriate foreign exchange in contravention of S. 12(2) of the Act.

7. The contention of the learned counsel that recourse could not be had to the amended S. 23(1) read with S. 23C of the Act in respect of the contravention of S. 12(2) for failure on the part of the appellants to repatriate foreign exchange on shipments of manganese ore made prior to September 20, 1957, and there could be no initiation of adjudication proceedings under the amended S. 23(1) read with S. 23C or levy of penalty on the appellants must also fail for another reason. In Sukumar Pyne's case, the court reversed the decision of the Calcutta High Court in Sukumar Pyne Vs. Union of India (UOI) and Others, striking down S. 23(1)(a) as being violative of Art. 14 of the Constitution. Regarding the point, namely whether S. 23(1)(a) having been substituted by Amendment Act XXXIX of 1957 would have retrospective operation in respect of the alleged offence which took place in 1954, the High Court came to the conclusion that the petitioner had a vested right to be tried by an ordinary court of the land with such rights of appeal as were open to all and although S. 23(1)(a) was procedural, where a vested right was affected, *prima facie*, it was not a question of procedure. Therefore, the High Court came to the conclusion that the provision as to adjudication by the Director of Enforcement could not have any retrospective operation. It was held that "the impairment of a right by putting a new restriction thereupon is not a matter of procedure only." It impairs a substantive right and an enactment that does so is not retrospective unless it says so expressly or by necessary intendment. The Court reversed the High Court and held that effect of these provisions was that after the amendment of 1957, adjudication or criminal proceedings could be taken up in respect of a contravention mentioned in S. 23(1) while before the amendment only criminal proceedings before a Court could be instituted to punish the offender. In repelling the contention advanced by Shri N.C. Chatterjee that the new amendments did not apply to contraventions which took place before the Act came into force, the Court observed (at p. Seth Durgaprasad etc. Vs. H.R. Gomes,):

In our opinion, there is force in the contention of the learned Solicitor-General. As observed by this Court in Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, a person accused of the commission of an offence has no vested right to be tried by a particular court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. It is well recognised that "no person has a vested right in any course of procedure" (vide Maxwell 11th Edition, P. 216), and we see no reason why this ordinary rule should not prevail in the present case. There is no principle underlying Art. 20 of the Constitution which

makes a right to any course of procedure a vested right.

These principles are clearly attracted to the facts and circumstances of the present case and therefore the initiation of adjudication proceedings for failure to repatriate foreign exchange on shipments of manganese ore prior to September 20, 1957, the date when the Amendment Act came into force, was permissible.

44. Perusal of these observations would mean that the word "whoever" necessarily takes in its import natural person and corporate liability and includes any association of persons such as a Partnership Firm.

45. The other decisions relied upon by Mr. Amit Desai are not of much assistance to him.

46. The Division Bench Judgment of Calcutta High Court in Kedar Nath's case was concerned with the Central Excise and Salt Act. There, the complaint was filed against the Director of the Company by virtue of his office inasmuch as they were held to be responsible for the conduct of the business of the Company at the relevant time when the offence was committed. It is on that footing and because of the phraseology of Section 9 of the said Act, that the Division Bench observed that the complaint proceeds on the assumption that the Petitioners were responsible to the Company for the conduct of its business at the relevant time when the offences were committed. Therefore, such assumption was not available and specific act of omission or commission had to be alleged. The finding was rendered also because of the wording of Section 9(C)(1) of the said Act.

47. Then, the Judgment of Hon'ble Shri. Justice Gavai in the case of Tops Security Ltd. and Another Vs. S.P. Aspingekar, Inspector, Security Guard Board and Another, , cannot be of any assistance, because the learned Single Judge was concerned with a complaint alleging contravention of Clause 26(4), 26(2), 26(5) and 26(9) of the Scheme. The allegation was that the Scheme is contravened also by Accused No. 2, who is the Managing Director of Accused No. 1. In dealing with the contentions, what the learned Judge has observed is that the complaint dealt with an employer agency. Once it was in relation to an employer agency, then, sub-clause (2) of Clause 42 of the Scheme was the applicable Clause. Once that was the applicable Clause, then, merely because the Accused No. 2/Petitioner No. 2 is a Managing Director and in-charge and in ultimate control of the affairs of the Accused No. 1, cannot be a 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 in dealing with a complaint against an employer agency. On facts, therefore, this decision is clearly distinguishable.

48. Reliance placed on the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of Standard Chartered Bank and Others etc. Vs. Directorate of Enforcement and Others etc., , would support my conclusions, because the majority decision holds that there is no prohibition in Criminal Law in

proceeding against a corporate entity or a company. The company cannot be sentenced for imprisonment, but when imprisonment and fine is the prescribed punishment, the Court can impose the punishment of fine, which can be enforced against the company. The majority view also refers to a Judgment of the Hon''ble Supreme Court in the case of ANZ Grindlays Bank Ltd. and Others Vs. Directorate of Enforcement and Others, and the view taken in a Three-Judge Bench decision earlier in the case of Balram Kumawat Vs. Union of India (UOI) and Others, . In the case of Balram Kumawat, it was held as under:-

81. Another three-Judge Bench of this Court in a Judgment in Balram Kumawat Vs. Union of India (UOI) and Others, , to which I was a party, observed in the context of principles of statutory interpretation:

23. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so.

49. To my mind, the decisions that are relied upon by Mr. Amit Desai, therefore, are clearly distinguishable. As a result of the above discussion, I am of the opinion that the order issuing process and upholding of the same by the Revisional Court does not suffer from any illegality or perversity warranting interference in my jurisdiction under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973. The Criminal Application, therefore, fails and is dismissed. Rule is discharged.