
(2013) 11 GAU CK 0049
In the Gauhati High Court
Case No : Criminal Petition No. 23 of 2010

Sri Rajiv Takru

APPELLANT

Vs

Sri R. Sahu and Sri P.K. Murari

RESPONDENT

Date of Decision : 08-11-2013

Acts Referred:

Citation : (2014) CriLJ 626 : (2014) 141 FLR 29 : (2014) 3 GLT 96

Hon'ble Judges : Prasanta Kumar Saikia, J

Bench : Single Bench

Advocate : D. Baruah, for the Appellant; B.J. Dutta, Assistant Public Prosecutor and Mr. S. Sarma, for the Respondent

Judgement

Prasanta Kumar Saikia, J.—This criminal petition is directed against the order dated 03.10.2008 and all other subsequent orders passed in CR Case No. 56C of 2008, as far as accused No. 2/ Petitioner is concerned, now, pending in the Court of Judicial Magistrate First Class, Margherita. I have heard Mr. D. Baruah, learned counsel for petitioner as well as Mr. B. J. Dutta, learned Addl. Public Prosecutor, Assam and Mr. S. Sarma, learned counsel for respondents.

2. The brief facts, necessary for disposal of the proceeding, are that the petitioner herein is one of the Directors of McLeod Russel India Limited, Kolkata, (WB), herein after referred to as Mcleod Limited, which has various tea gardens in India and abroad. The Tea Estate under the name and style of Bogapani Tea Estate, situated at Digboi, Assam is one of such gardens owned by aforesaid Mcleod Ltd.

3. The company has appointed a Manager to conduct the business of Bogapani Tea Estate and such Manager is responsible for running the plantation business. It is stated that the Directors of Mcleod Ltd. have no direct control over the day-to-day affairs of the tea gardens owned and managed by the Mcleod Limited.

4. In the petition u/s. 482 Cr.P.C., the petitioner has stated that the respondent No. 1 herein, as being complainant, filed a complaint purportedly u/s 36 of the

Plantations Labour Act of 1951 (in short, the Act of 1951) before the Sub-Divisional Judicial Magistrate, Margherita, (in short SDJM) on 25.09.2008 alleging that during the course of inspection on 28.05.2008, he found that the Director as well as Manager, who are arrayed as accused No. 1 & 2 respectively in the complaint petition, violated Section 18(1) of the Act as well as the Rule 3(2) of the Plantations (Welfares Officers) Assam Rules, 1977, (in short, the Rules of 1977).

5. Such violation occurred for not appointing the second Welfare Officer in the aforesaid Tea Estate. In that connection, it has been stated that where the number of laborers in a particular garden is more than 1200, the authority in the garden needs to appoint a second Welfare Officer. In the present case, the Garden aforesaid had more than 1700 workers at the time relevant and as such, said garden is required to appoint 2nd Welfare Officer.

8. Since under the law, the garden is to appoint 2nd Welfare Officer, the accused persons were asked to appoint the Second Welfare Officer within 90 days from the date of receipt of notice issued in that regard. Such direction was not complied with by the accused/petitioner No. 2 stating that the garden is not in the position to appoint 2nd Welfare Officer.

7. Since the Tea Estate aforesaid was duty bound to comply with the direction rendered in the notice stated above and since it refused to comply with the direction in the notice, served upon it, the accused persons committed the offence u/s 36 of the Act and as such, a regular complaint was filed before the learned SDJM, Margherita on 25.09.2008.

8. On the receipt of the aforesaid complaint, the learned SDJM, Margherita transferred the case to the file of Judicial Magistrate 1st Class, Margherita for disposal in accordance with law. On the receipt of the case on transfer, the learned Judicial Magistrate 1st Class took cognizance of the offence u/s 36 of the Act and issued process to the accused persons, vide order dated 3.10.2008.

9. In compliance of the order dated 03.10.2008 and the order dated 27.11.2009, passed in Cr. Case No. 56 of 2008, requiring the petitioners herein to appear before the Court of Judicial Magistrate 1st Class Margherita, the petitioner herein appeared before the court and prayed for dropping the case against him since he is not an employer within the meaning of Section 2(e) of the Act and also in view of law laid down by this Court in the case of R.L. Rikhye Vs. State of Assam and Another,

10. It has been pointed out that in his complainant petition, the complainant/respondent No. 1 did not indicate anything as to show that the present petitioner is responsible for the day-to-day affairs of the Garden in question. Without such allegations being made in the complaint or in other related relevant documents, it cannot be said that the petitioner is guilty of offence u/s 36 of the Act, more so, because of the fact that the Company has plantation business all over the country and abroad and as such, it is not possible for the petitioner herein to

look after all the gardens on day-to-day basis.

11. It has also been submitted by Mr. D. Baruah that the orders, under challenge, are not sustainable in law since the Learned Magistrate did not comply with the requirement of Section 202(1) of the Cr.P.C. The aforesaid provision of law requires that whenever an accused resides beyond the jurisdiction of the court issuing process against him, it is obligatory on the part of the Court to conduct an enquiry in the terms of section 202(1) Cr.P.C. The law, laid down in Section 202 Cr.P.C., is mandatory in nature and violation therefore makes the order(s) illegal.

12. In support of such a contention, the petitioner has referred me the decisions rendered by the Hon"ble Supreme Court in the case of National Bank of Oman Vs. Barakara Abdul Aziz and Another,

13. In our instant case, the petitioner herein evidently and admittedly resides in the State of West Bengal and as such, in the terms of Section 202 Cr.P.C. the Court which issued the summon to the accused/petitioner was to have held an enquiry. Despite duty bound under the law to hold such an enquiry, the learned Magistrate evidently did not hold such an enquiry thereby violating the mandatory dictum containing in section 202 Cr.P.C. Such violation of section 202 Cr.P.C., makes the order(s) in question unsustainable in law. The learned Counsel, Mr. D. Baruah has referred to the following decisions:

- (i) National Bank of Oman Vs. Barakara Abdul Aziz and Another,
- (ii) S.K. Mehra Vs. State of Assam and Another,
- (iii) R.L. Rikhye Vs. State of Assam and Another,
- (iv) S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another,
- (v) Anita Malhotra Vs. Apparel Export Promotion Council and Another,

14. Responding to the aforesaid allegations, Mr. S. Sarma, the learned counsel appearing for respondent No. 1 has submitted that the arguments, advanced by the learned counsel for the petitioner to the effect that the petitioner is not the employer and that he is no way responsible for day-to-day administration of the garden aforementioned are without any substance. In that connection, he has drawn my attention to the averments, made in Paragraph 3 & 4 of the complaint. According to the learned counsel for respondents, the above averments make it more than clear that the petitioner is not only the employer of the garden in question but is also responsible for management of such garden.

15. Regarding the violation of provision of Section 202(1) Cr.P.C. it has been contended that aforesaid provision of law is not mandatory. Rather such provision is discretionary one and unless it is shown that the prejudice has been resulted to the accused/petitioner for violation of the provision of Section 202(1) Cr.P.C. this court cannot legally overthrow the orders in question.

16. Since there is nothing on record to show that the aforesaid violation has resulted in prejudice to the accused No. 2/ petitioner, it cannot be said that only for alleged violation of the provisions of Section 202(1) Cr.P.C., the order dated 03.10.2008 and all other orders passed thereafter in so far they relate to the petitioner herein are liable to be quashed - argued by the learned Counsel of the Respondent, Shri S. Sarma.

17. I have given my anxious consideration to the arguments, so advanced by the learned counsel for the parties having regard to the materials on records as well as decisions relied on by the petitioner. But before I could proceed further, I need to know to what extent a Director of Mcleod Ltd., as being employer, is responsible for not appointing someone as 2nd Welfare Officer in the Bogapani Tea Estate, Digboi.

18. In this connection, I find it necessary to have a look at the definition of "employer" as used and defined in Section 2(e) of the Act. For ready reference Section 2(e) of the Act is reproduced below:-

(e) "employer", when used in relation to a plantation, means the person who has the ultimate control over the affairs of the plantations, and where the affairs of any plantation are entrusted to any other person (whether called a managing agent, manager, superintendent or by any other name) such other person shall be deemed to be the employer in relations to that plantation.

19. In order to know the exact meaning of the term "Employer", so employed in Section 2(e) of the Act, we may look into some of the decisions, rendered on this point by this High Court as well as Hon"ble Apex Court of the country.

20. In that connection, one may profitably peruse the judgment of this Court, rendered in the case of S.K. Mehra Vs. State of Assam and Another, The relevant part is reproduced below:-

4. I have heard Mr. P.K. Goswami, learned counsel for the petitioner. Mr. Goswami submits that for violation of the provisions of the Act the employer can be prosecuted. An employer has been defined in section 2(e) of the Act. According to Mr. Goswami, from the terms of section 2(e), it is clear that only such person who has ultimate control over the affairs of the plantation are entrusted to any other person where such other person may be deemed to be the employer in relation to the plantation. According to the Labour Inspector as well as the sanctioning authority there was a Manager of the Tea Estate. Admittedly, he was looking after the affairs of the plantation. He may be termed as a person to whom the affairs of the plantation were entrusted, and as such, he deemed to be an employer; but to term the President of the Company as an employer or to bring him under the definition of "employer, the prosecution must have materials on record to show that the President "had the ultimate control over the affairs of the plantation". Simply became a person happens to be President of the Company, it cannot be said that he is also in the control of the affairs of the plantations, more so in case of companies owning a large number of plantation,

(tea gardens) spread all over the country. In the instant case, the learned counsel for the petitioner submits that there is not even a word in the complaint or in the sanction to show that the petitioner, who was the President of the company, was having any control over the affairs of the plantation. In the absence of any such allegation on record, not to speak of evidence, it is difficult to term the President of the company as an employer.

21. Similar question was raised in *R.L. Rikhye Vs. State of Assam and Another*, On considering various authorities including *S.K. Mehra (Supra)*, this Court held as follows:

The facts in this case are quite similar. Here also the company owns a large number of plantations spread all over the country and there is nothing in the complaint or in the sanction to show that the present petitioner, who is the Director of the Company, was having any control over the affairs of the plantations and it is clear that in the instant case, the Manager is looking after the affairs of the plantation. That being so, the present petitioner who is only a Director of the Company cannot be prosecuted under the Plantation Labour Act for alleged violation of section 26 and 27 of the Act and the Rule 76 of the Assam Plantation Labour Rules, 1956.

22. In the Case of *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, , Hon"ble Supreme Court again had the occasion to consider when Director of a company can be held liable for the offence committed by the company. On considering various authorities, it comes to the finding that the criminal liability could be fastened only on those person/persons who were in charge of and were responsible for the conduct of the business of the such firm/company/other business establishment at the time relevant. The relevant part of the judgment is reproduced below:-

6... The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of an were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.

To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability u/s 141 of the Act is sought to be fastened vicariously

on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. The respondent falls within the parameters of Section 141 has to be spelled out. Complaint is to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable u/s 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what the case which is alleged against him is. This will enable him to meet the case at the trial.

In view of the above discussion, our answers to the questions posed in the reference are as under:

a) It is necessary to specifically aver in a complaint u/s 141 that at the time when the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable u/s 141 of the act. A director in accompany cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

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

23. Coming back to our case, I have found that the facts and circumstances in the present case are strikingly similar to that of S.K. Mehra (supra) as well as R.L. Rikhye & Anrs.,-versus- State of Assam. Here, also the petitioner is

admittedly one of the Directors of the Company. But then, there is no averment either in the complaint or in the sanction letter that he, being the Director, is responsible for the day-to-day administration of the aforesaid Tea Estate.

24. In this context, we may also look into the decision of this court in the case of S.K. Mehra (supra). The relevant part is reproduced below:-

So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence not anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused Nos. 4 to 7) has been made out ex-facie on the allegations made in the complaint and the proceedings against them were rightly quashed.

25. Since there is no averment/averments in the complaint, or sanction order or in other related documents that petitioner, being the Director of Mclaid Ltd. is also responsible for day to day administration of the Garden in question, it is not possible on the part of this Court to come to a clear conclusion that the accused/petitioner is an employer within the meaning of Section 2(e) of the Act.

26. It is worth noting that there is a specific statement in the complaint that the Company in question has plantations, not only in India but in abroad as well. These only show that the petitioner cannot be said to be the person responsible for day-to-day administration of the Bogapani Tea Estate and as such, this is one more testimony of the petitioner herein not being an "employer" within the meaning of the section 2(e) of the Act in relation of the affairs of the garden in question.

27. Another factor which has caught my attention is that on being charged with the allegation of violation of the provision of the Act aforesaid, Shri. P.K. Murari, Senior Manager (accused No. 1), had wrote the letter dated 09.07.2008 to the Labour Inspector & Inspector of Plantation, Govt. of Assam,----copy of which was forwarded-----not to the petitioner (the Director of Mcleod Russel India Limited)----but to the Director of Estates, Mcleod Russel Limited, Kolkata.

28. Since such a vital letter was not address to the petitioner and since the petitioner was not working as the Director of Estate Mcleod Ltd., it only shows that if any person at the level of Director is responsible for the alleged violation of the Act of 1951 and the Rules framed there-under, then, such person cannot be the petitioner but one who has been working as Director of Estate, Mcleod Ltd., to whom the accused No. 1 marked a copy of the letter dated 09.07.2008.

29. One may note here that the learned counsel for the complainant/respondent

has submitted that there is averment in the complaint that the petitioner is the employer of the garden in question. In that connection, my attention has been drawn to the averments made in Paragraph 3 and 4 of the complaint, Paragraph 3 in particular. On the perusal of the same, I have found that in the complaint at Paragraph 3, there is a bald reference to the effect the petitioner is the employer of the aforesaid Tea Estate. But such vague and unclear statements cannot make someone the employer or the owner of business establishment, responsible for the lapse on part of such establishment/firm/company.

30. In this context, we may profitably peruse the decision of the Hon''ble Supreme Court in the case of Anita Malhotra Vs. Apparel Export Promotion Council and Another, observes as follows:-

This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal.) In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed.

31. We have already found that it is the bounden duty of the complainant to show as to how the petitioner/accused No. 2, as being the Director of the Mcleod Limited, became employer within the meaning of Section 2(e) of the Act in relation to Bogapani Tea Estate and in what capacity, he became responsible for day to day affairs of the garden in question. However, except making some bald and cursory statements in the complaint petition, the complainant/respondent No. 1 did nothing to discharge the obligation, the law imposed upon him.

32. As stated above, in Anita Malhotra (Supra), Hon''ble Supreme Court has gone to the extent of saying that bald/vague reference is not enough to make a person employer of a the Company/firm/other business establishment within the meaning of section 2(e) of the Act so as to make him responsible for the wrong committed by such establishment. Unfortunately, this is what the complainant/respondent No. 1 has done in Paragraph 3 of the complaint petition as far as accused No. 2/petitioner is concerned.

33. The respondent No. 1 has referred me to the letter at Annexure 1 to the counter affidavit to contend that the petitioner is responsible for the day-to-day administration of the Tea Estate and being so, the petitioner is the employer within the meaning of Section 2(e) of the Act. To reinforce his argument, it has

been pointed out that under the letter aforementioned, the petitioner No. 1 had appointed a 2nd Welfare Officer with effect from 01.12.2008.

34. According to the learned counsel for the respondent/complainant when one reads paragraph-5 of the counter affidavit together with Annexure-1, it would appear more than clear that the petitioner is the person responsible for day-to-day administration of Bogapani Tea Estate, Digboi and as such, he is the employer within the meaning of section 2(e) of the Act in relation to the garden in question.

35. However, such an argument could not cut any ice since what is not there in the complaint petition or in the sanction letter or other connected documents, cannot be supplied to such documents by the way of subsequent affidavit or with the help of documents which came into existence long after institution of the case under consideration. Situation being such, neither the paragraph 5 of the counter affidavit nor the Annexure-1 to the aforesaid counter affidavit can make out a case against the petitioner/accused No. 2.

36. In view of what I have discussed herein above, and what have emerged there-from, I am constraint to hold that the petitioner herein is not the employer of the Bogapani Tea Estate within of the meaning of Section 2(e) of the Act.

37. Since the case against the petitioner/Accused No. 2 is found not sustainable in law for his not being the employer of the Tea Estate in question, I am not inclined to probe other allegations, leveled against the order impugned.

38. Resultantly, the criminal proceedings in question i.e. CR Case No. 56C/2008 pending in the Court of the Judicial Magistrate, 1st Class, Margherita as well as the order dated 3.10.2008, the order dated 27.11.2009 and all other subsequent orders as far as the petitioner/Accused No. 2 is concerned are found not sustainable in law and as such the impugned proceedings all those orders are quashed and set aside to the above extent.

39. Consequently, the revision is allowed. Return the LCR.