

(2010) 05 BOM CK 0064

In the Bombay High Court

Case No : Criminal W.P. No. 1773 of 2009

Tops Security Ltd. and Another

APPELLANT

Vs

S.P. Aspingekar, Inspector, Security Guard Board and Another

RESPONDENT

Date of Decision : 03-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A
Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act,
1981 — Section 2(3), 27, 3, 41(2)
Penal Code, 1860 (IPC) — Section 405, 406

Citation : (2011) 2 LLJ 135

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : J.P. Cama and R.S. Pai, F. Sayyed and Mayur Bhojwani, i./b., M.K. Ambalal and Co, for the Appellant; Lata Desai, Pallavi Divekar and S.A. Saste, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

B.R. Gavai, J.—Rule, returnable forthwith. The learned Counsel for the respective Respondents waive service. Heard by consent.

2. The Petitioners challenge the order passed by the learned Addl. Chief Metropolitan Magistrate's 38th Court, Ballard Estate, Mumbai, in C.C. No. 5635/SS/07 dated November 29, 2007 thereby issuing process against the Petitioners and the order passed by the learned Addl. Sessions Judge, Gr. Mumbai, in Revision Application No. 217/2008 dated July 16, 2008 thereby dismissing the Revision Application filed by the present Petitioners.

3. A complaint came to be filed by the Respondent No. 1 herein against the Petitioners alleging that they had contravened Clause 26(2), 26(4), 26(5) and 26(9) of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme, 2002 (hereinafter referred to as the said ?Scheme?) read with

Sections 2(3) and 3 of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 (hereinafter referred to as the 'said Act').

4. It is the allegation of the complainant that the accused No. 1 is an establishment and the accused No. 2 is the Managing Director of the accused No. 1. It has been averred that the accused No. 1 is an "employer" as defined in Section 2(3) of the said Act. It is the allegation of the complainant that on February 23, 2007 when he visited the establishment of M.M.T.C. Ltd. (principal employer of the accused), it was found that nine security personnel are employed by the agency. It was found that the accused have not submitted the names of the principal employer as well as the names of the guards and, therefore, the accused had contravened Clause 26(2) of the Scheme. It is also averred in the complaint that the accused have provided non-exempted security guards to the principal employer of the Board and they have contravened Clause 26(4) of the Scheme. It is further alleged that on demand, the accused have not produced records and, therefore, contravened the provisions of Clause 26(5) of the said Scheme. It is further alleged that the accused were found to be paying less wages and, therefore, contravened the provisions of Clause 26(9) of the said Scheme. In the said complaint, process came to be issued by order dated November 29, 2007. Being aggrieved thereby, a revision was preferred before the learned Sessions Judge. The same was also rejected. Hence, the present petition.

5. Mr. Cama, the learned senior Counsel appearing on behalf of the Petitioners, submitted that the complaint read as a whole does not prima facie make out the ingredients of the offence charged with. He, therefore, submitted that the order issuing process as well as the revisional order are liable to be quashed and set aside.

6. The learned Counsel further submits that the learned Magistrate has set into motion the criminal machinery on vague allegations made in the complaint and, therefore, the order of issuing process is not sustainable in view of the judgment of the Apex Court in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, . The learned Counsel further submitted that since no averments as to how the accused No. 2 can be connected with the offence charged with have been made in the complaint, the complaint is liable to be dismissed as against the accused No. 2. The learned Counsel relied on the judgment of the Apex Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, and the decision of this Court in Transport Corporation of India v. Regional P.F. Commissioner (1991) Mh LJ 1055.

7. Ms. Desai, the learned Counsel for the Respondent No. 1, submitted that both the Petitioners have been added as accused in their capacity as employers and necessary averments to that effect have already been mentioned in the complaint. She submitted that the Apex Court in the case of State of Bihar Vs. Murad Ali Khan and Others, has held that any interference by this Court would amount to an abuse of the process of law.

8. For appreciating the rival submissions, it will be necessary to refer to certain provisions of the said Act and the Scheme. Section 2(3) of the said Act reads thus:

(3) "employer", 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, means such agency or agent." Section 27 of the said Act reads thus:

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 there under, 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.

Clause 42 of the said Scheme reads thus:

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 there under 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 be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

9. The definition of Sub-section (3) of Section 2 reveals that an employer, 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, means such agency or agent. It can thus clearly be seen that the Petitioner No. 1 would clearly be covered by the said definition. A perusal of Section 27 would reveal that any person, who contravenes any of the provision of the Act or any rule made there under on conviction is liable for penal consequences. Sub-clause (1) of Clause 42 of the Scheme provides for penalties. The word used in Clause 42 is "whoever" and, therefore, the Petitioner No. 1 would also be liable for penal consequences if contravention of any of the clauses mentioned in Clause 42 is established against it. However, perusal of Clause (2) would reveal that in order to make a proprietor, Partner, Director, Manager, Secretary or other Officer of the employer agency liable for the offence committed by the employer agency, it is

necessary to prove that such Proprietor, Manager, Secretary or any other Officer has given his consent for committing such an offence or connived therefor or is attributable to any neglect. It is thus clear that in order to make any Proprietor, partner, Director or any officer of the employer liable for offence committed by the employer agency, it is necessary to establish any of the following three conditions:

(i) That the offence committed by the employer agency has been committed with the consent of the proprietor, etc.

(ii) That it has been committed with connivance of the proprietor, etc.

(iii) It is attributable to any neglect on the part of the proprietor, etc. It is thus clear that unless any of the aforesaid conditions is satisfied, a proprietor or any person mentioned in Sub-clause (2) of Clause 42 cannot be held liable for an offence committed by an employer agency.

10. It is a settled law that a Director or Managing Director of a company cannot be held vicariously liable for an offence committed, by the company unless the statute concerned by legal fiction provides for so. The Apex Court in the case of S.K. Alagh Vs. State of U.P. and Others, has observed thus at p. 1365 of MLJ (Cri:

19. As, admittedly, drafts were drawn in the name of the company, even if the Appellant was its Managing Director, he cannot be said to have committed an offence u/s 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. (See Sabitha Ramamurthy v. R.B.S. Channabasavaradhya (2006) 2 MLJ (Cri) 1152).

20. We may, in this regard, notice that the provisions of the Essential Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds (Miscellaneous Provisions) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling u/s 406 of the Indian Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. (See Maksud Saiyed v. State of Gujarat)."

11. In the light of this legal position, let us examine the allegations made against the Petitioner No. 2. The only allegations against the Petitioner No. 2 is to be

found in paragraph 2 which reads thus:

2. Accused No. 1 is an Establishment. Accused Nos. 2 is M. Director of Accused No. 1. He is the person who is incharge of and has ultimate control over the affairs of Accused No. 1.

Apart from that, there is no allegation against the Petitioner No. 2. As already discussed hereinabove, merely because the Petitioner No. 2 is the Managing Director and is incharge and in ultimate control of the affairs of the Petitioner No. 1 cannot be a reason for making him liable for the offence punishable against the Petitioner No. 1. As discussed hereinabove, unless the statute provides for vicarious liability, by legal fiction, it would not be permissible. In any case, as discussed hereinabove, Sub-clause (2) of Clause 42 itself provides the eventualities in which a person responsible for the affairs of the employer agency can be held liable for the offence committed by the employer-agency. There is not a whisper in the complaint that the offence committed by the employer agency has been committed with the consent of the Petitioner No. 2 nor is there an averment that it has been done with the connivance of the Petitioner No. 2 nor is there any averment to the effect that the offence committed by the employer agency is on account of any neglect on the part of the Petitioner No. 2.

12. Insofar as the reliance placed by the learned Counsel on the judgment of the Apex Court in the case of State of Bihar v. Murad Ali Khan (supra) is concerned, no doubt, it is settled law that powers of this Court u/s 482 are to be exercised sparingly and only to prevent the abuse of the process of law. The Court is not expected to embark upon an inquiry as to whether the allegations in the complaint are likely to be established by evidence or not. However, if the averments made in the complaint itself do not answer the necessary ingredients to constitute an offence, this Court cannot be said to be without jurisdiction to quash the order issuing process in its jurisdiction u/s 482 Code of Criminal Procedure. In my view, to permit such a complaint to proceed would amount to an abuse of the process of law.

13. In this factual background, I find that the complaint against the Petitioner No. 2 was not at all maintainable in law. I, therefore, find that the learned Magistrate has erred in issuing process and the learned revisional Court erred in dismissing the revision.

14. In that view of the matter, the petition insofar as the Petitioner No. 1 fails and is dismissed and the rule shall stand discharged as against the Petitioner No. 1. Insofar as the Petitioner No. 2 is concerned, the rule is made absolute in terms of prayer Clauses (a) and (b).