IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 10TH DAY OF APRIL 2015/20TH CHAITHRA, 1937

Crl.MC.No. 1870 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN CMP 1938/2008 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, PARAPPANANGADI DATED 04-02-2008

CRIME NO. 351/2008 OF TANUR POLICE STATION , MALAPPURAM

PETITIONER(S)/ACCUSED:

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1. **POLI K.AYYAMPALLY**
   S/O.A.P.KURIAN, PAST MANAGING DIRECTOR
   PEN BOOKS (P) LTD., P.B.NO.143, PALACE ROAD
   ALUVA, ERNAKULAM DISTRICT, NOW LAID UP IN COMA
   REP.BY HIS WIFE SHIBI POLY (PETITIONER NO.3)

2. **JOB AYYAMPILLY**
   PAST DIRECTOR, PEN BOOKS (P) LTD., P.B.NO.143
   PALACE ROAD, ALUVA, ERNAKULAM DISTRICT

3. **SHIBI POLY**
   W/O.POLY K, .KAYYAMPALLY, PAST DIRECTOR
   PEN BOOKS (P) LTD., P.B.NO.143, PALACE ROAD
   ALUVA, ERNAKULAM DISTRICT

4. **T.P.THANKACHAN**
   PAST DIRECTOR, PEN BOOKS (P) LTD., P.B.NO.143
   PALACE ROAD, ALUVA, ERNAKULAM DISTRICT

   BY ADVS.SRI.K.V.SOHAN
   SMT.SREEJA SOHAN.K.

RESPONDENT(S)/STATE:

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1. **STATE OF KERALA**
   S.H.O.TANUR POLICE STATION
   MALAPPURAM DISTRICT (CRIME NO.351/2008) REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN 682 031.

2. **K.ASSAINARKUTTY**
   KIZHAKKAKATH HOUSE, VIA TANUR , THAYYAL PO
   MALAPPURAM DISTRICT, PIN 676 320.

   R2 BY ADV. SRI.K.K.MOHAMED RAVUF
   R1 BY SRI.RAJESH VIJAYAN, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 10-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

ANNEXURE 1 TRUE COPY OF THE UNDERTAKING ISSUED ON BEHALF OF THE COMPANY BY PETITIONER NO.1, DATED 27/12/2006

ANNEXURE 2 TRUE COPY OF THE LETTER ISSUED BY THE COMPANY ENCLOSING THE CHEQUE FOR RS.70,000/- DATED 18/6/2007

ANNEXURE 3 TRUE COPY OF THE COMPLAINT FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, PARAPPANANGADI AS CMP 1938 OF 2008, DATED 4/2/2008

ANNEXURE 4 TRUE COPY OF THE FIR REGISTERED BY RESPONDENT NO.1 UNDER SECTION 420,406 READ WITH 34 IPC DATED 12/8/2008

ANNEXURE 5 TRUE COPY OF THE FINAL REPORT/CHARGE SHEET ALONG WITH STATEMENT 161 CR.P.C. OF THE COMPLAINANT AND WITNESSESS, DATED 9/3/2009

ANNEXURE 6 TRUE COPY OF THE CERTIFICATE ISSUED BY DR.MADHUKAR, NEURO PHYSICIAN, LITTLE FLOWER HOSPITAL, ANGAMALY, DATED 27/6/2012

ANNEXURE-7- TRUE PHOTOGRAPH SHPWING THE PRESENT STATE OF PETITIONER NO.1

ANNEXURE-8- TRUE COPY OF THE JUDGMENT IN COMPANY PETITION 21/2009 AND 22/2009 DT.19.01.2010.

RESPONDENT'S EXHIBITS: NIL
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R.AV

//TRUE COPY//

PA TO JUDGE

K.RAMAKRISHNAN, J

CRL.M.C.NO.1870 OF 2013

Dated this the 10th day of April 2015

O R D E R

Accused in CC.No.275/2009 on the file of the Judicial First Class Magistrate Court, Parappanangadi (Crime No.351/2008 of Tanur police station) have filed this petition to quash the proceedings under section 482 of the Code of Criminal Procedure.

2. It is alleged in the petition that petitioners are arrayed as accused in CC.No.275/2009 on the file of the Judicial First Class Magistrate Court, Parappanangadi. The case was taken on file on the basis of the complaint filed by the second respondent against the petitioners alleging offence under section 420 of the Indian Penal Code. The allegation in the complaint was that first petitioner was the managing director of the company with name Pen Books Private Limited, which advertised as a scheme under the name Treasure Hunt. On the basis of the advertisement, the complainant telephonically contacted accused No.1 and he informed him that if he was interested in the scheme he could join the scheme. On 01.12.2006, first accused along with accused Nos. 3 and 4 went to the house of the complainant

and explained about the scheme sponsored by the complainant and the complainant joined the scheme and handed over a cheque for Rs.5,01,750/- (Rupees Five lakh one thousand seven hundred and fifty only) including collection charges of Rs.1,750/- (Rupees One thousand seven hundred and fifty only) and the scheme was that a fixed share profit of Rs.1,40,000/- (Rupees One lakh forty thousand only) would be paid on the deposit amount of Rs.5,00,000/- (Rupees Five lakhs only). The company on realisation of the cheque issued an undertaking with the details of the scheme namely, Annexure-A1. Company paid Rs.70,000/- (Rupees Seventy thousand only) being six months profit share as per Annexure-A2 cheque dated 18.06.2007. The complainant encashed the cheque. Thereafter the profit could not be paid as undertaken. So, the complainant filed Annexure-A3 complaint as C.M.P.No.1938/2008 before the Judicial First Class Magistrate Court, Parappanangadi, which was forwarded to the police for investigation under section 156(3) of the Code of Criminal Procedure and on receipt of the same the first respondent registered Annexure-A4 First Information Report as Crime No.351/2008 against the petitioners alleging offence under section 420, 406 read with section 34 of the Indian Penal Code. They conducted the investigation and filed Annexure-A5 final report and it was taken on file as CC.No.275/2009 on the file of the Judicial First Class Magistrate Court, Parappanangadi. Petitioner No.1 is the managing director and he fell ill and suffered cardiac arrest and he is in coma from 07.07.2008 onwards evidenced by Annexure-A6 medical certificate and he was completely bedridden, which is seen from Annexure-A7 photographs. Since the company could not meet the demands of the creditors winding up proceedings were initiated and as per Annexure-A8 order in company petition Nos.21/2009 and 22/2009 winding up proceedings were initiated and the companies management was entrusted to the official liquidators by virtue of provisions of the companies Act no prosecution can be initiated against the company and so the petitioners have no other remedy except to approach this court seeking the following relief:-

> ***"to quash Annexure-5 final report/charge sheet in C.C.275 of 2009 on the file of the Judicial First Class Magistrate Court, Parappanangadi and pass appropriate orders".***

3. Heard Adv.Sri.K.V.Sohan, the counsel appearing for the petitioners and Adv.Sri.K.K.Mohamed Ravuf, the counsel appearing for the second respondent and Sri.Rajesh Vijayan, the learned public prosecutor appearing for the first respondent.

4. The counsel for the petitioner submitted that since it is an offence committed by the company, without the company on party array the complaint is not maintainable. Further, under section 446 of the companies Act 1956, further proceedings initiated against the company under winding up proceedings has to be stayed and it can be proceeded only with the leave of the company court. He had relied on the decisions reported in **Prof.Narayanankutty V.Official Liquidator 1998(1) KLJ 656 and Aneeta Hada V. Godfather Travels and Tours Pvt Ltd., 2012(2) KLT 736 (SC)** in support of his case.

5. On the other hand, the counsel for the second respondent argued that section 446 of the companies Act 1956 did not bar initiation of criminal proceedings and the company is not a necessary party in a case where mens rea has to be considered. Further, if the complainant had a case that only the persons manning the company, were the persons responsible for their act, then there is nothing wrong to file a complaint against the directors of the company alone, who were directly involved and who had induced with the dishonest intention to part with the money by the complainant. He had relied on the decision reported in **Jose Antony V Official Liquidator 2000(1) KLT 705** and **Jose Antony V Official**

Liquidator 1998 (2) KLT 176 in support of his case.

6. It is admitted fact that petitioners are the directors of the company by name Pen Books Private Limited and it is also an admitted fact that they launched a scheme under the name Treasure Hunt and made an advertisement that if persons interested in depositing R.5 lakhs with them, they would provide fixed share of profit @ Rs.1,40,000/- per year. It is also an admitted fact that on the basis of that promise, complainant had deposited with them Rs.5 lakhs and the petitioners have undertaken to pay the amount of Rs.1,40,000/- per year as per Annexure-A1 undertaking. It is also an admitted fact that they have paid only share profit of six months evidenced by Annexure-A2. Thereafter they did not pay the amount and in spite of demands made by the complainant, they had not paid the amount. So, the second respondent filed Annexure-A2 complaint against the petitioners before the Judicial First Class Magistrate Court, Parappanangadi, alleging offence under section 420, 406 read with section 34 of the Indian Penal Code and the same was forwarded to the police for investigation by the learned Magistrate under section 156(3) of the Code of Criminal Procedure and Annexure-A4 First Information Report was registered as Crime No.351/2008 of Tanur police station

against the petitioners. It is also an admitted fact that after investigation, Annexure-A5 final report was filed and it was taken on file as CC.No.275/2009 on the file of the Judicial First Class Magistrate Court, Parappanangadi and summons were issued to the petitioners. This is being challenged by the petitioners by filing this petition .

7. It is an admitted fact that as per Annexure-A8 order, winding up proceedings have been initiated as against the company of which petitioners are the directors. In the decision reported in **Prof.Narayanankutty V.Official Liquidator 1998 KHC 99,** the Division bench of this court has observed that so long as the company is an liquidation and proceedings are pending, no action can be brought against the company or its directors in any court of law except by to leave the court and subject to such terms as a court impose.

8. As regards the criminal proceedings are concerned, this court in the decision reported in **Jose Antony V Official Liquidator 1998 (2) KLT 176** has held that only those criminal proceedings which relates to assets of the company alone will come within the ambit of legal proceedings contemplated under section 446 of the Companies Act and proceedings initiated under section 138 of the Negotiable Instruments Act will not be hit by section 446 of the Companies

Act 1956. This was upheld by the Division Bench of this court in **Jose Antony V Official Liquidator 2000(1) KLT 705.** Further in the decision reported in **Susgandha Lal V.Baby Varghese [2000 (2) KLT 723]**, this court has held that High Court cannot take cognizance of all the offences under the Act and try them. All offences except the one mentioned in section 454 have to be tried on the basis of the Code of Criminal Procedure. The word 'proceeding' in S.446(2) of companies Act 1956 can only mean a proceedings similar to a suit and not criminal proceedings and held that the criminal proceedings will not be hit by section 446 (2) of the Companies Act 1956. The later Division Bench has considered the dictum laid down in the decision reported in **Pro.Narayanankutty's case (supra)** and observed that that will not applicable to criminal proceedings. So, the submission made by the counsel for the petitioners that in view of the winding up proceedings without to leave of the court further proceedings in CC.No.275/2009 has to be stayed under section 446 (2) of companies Act has no substance and on that ground the proceedings cannot be quashed.

9. Further in the decision reported in **Iridium India Telecom Ltd. V. Motorola Incorporated & Ors [AIR 2011 SC 20]** the Supreme Court has held that prospectus inviting investments from large and successful companies making

misleading statements withholding vital facts causing wrongful damage to investors will amount to cheating. In this case, it has been further observed that companies and corporate houses can no longer claim immunity from criminal proceedings on ground that they are incapable of possessing necessary mens rea. Mens rea is attributed to corporations on principle of “alter ego” of company. It may be mentioned here, though in the decision it has been observed that company can also be proceeded against for the offence of cheating, that doesn't mean that without the company the complaint is not maintainable. The dictum laid down in the decision reported in **Aneeta Hada V. Godfather Travels and Tours Pvt Ltd., 2012(2) KLT 736**, was that without the company which committed the offence under section 138 of the Negotiable Instruments Act, on accused array the directors alone cannot be proceeded against. But that was a case where the Negotiable Instruments Act itself makes a company also liable for the offence under section 138 of the Negotiable Instruments Act under section 142 of the Act and conditions for impleading the directors are also mentioned therein. But in the case of offences under the penal code apart from the company, the directors who are directly involved in the commission of the crime or inducement making false representation and committing criminal breach of trust and withholding the amount without paying the same etc can be individually proceeded against. So, in the case of offences under the Indian Penal Code invoking the aid of section 34 of the Indian penal Code apart from the company other directors who are involved in the commission of the crime can also be proceeded with. So, non impleadment of company in such cases will not be a defect as far as a criminal prosecution initiated under the provisions of the Indian Penal Code, though, it may be fatal in cases where there are specific provisions provided under the statue for statutory offences where company alone will be responsible and the directors can be made responsible only if certain conditions provided under the section in the respective statues are complied with. So, under the circumstances, the dictum laid down in **Aneeta Hada's case (supra)** is not applicable to the facts of this case. Further, on going through the allegations in the complaint, it cannot be said that it is a mere civil liability and no offence under section 420 or section 406 of Indian Penal Code are attracted. It is alleged in the complaint itself that they have done this with dishonest intention from the inception that they cannot be complied with the promise and in spite of demand, they did not pay the amount and illegally retained the amount and thereby they have committed the offence and all other matters are matter for evidence.

10. It is settled law that if same act may lead to civil liability and criminal prosecution and merely because there is civil remedy available to redress the grievance is not a ground to quash the civil proceedings, if the allegations constitute a criminal offence as well. It is also settled law that if the matter has to be decided on the basis of evidence, then it is not proper to quash the proceedings at the initial stage invoking the power under section 482 of the Code of Criminal Procedure. So, under the circumstances, there is no merit in the submission made by the counsel for the petitioners and the petitioners are not entitled to get the relief of quashing the proceedings at the initial stage under section 482 of the Code of Criminal Procedure and the petition is liable to be dismissed.

In the result, the criminal miscellaneous case is dismissed. Considering the fact that first petitioner is bedridden and identity of the accused persons are not in dispute, if the petitioners apply for personal exemption, then the court below can consider the same and dispose of the application in accordance with law.

The interim order of stay granted as per order in Crl.M.A.No.3456/2013 and extended time to time is hereby vacated and Crl.M.A.3456/2013 is dismissed. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

R.AV

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PA TO JUDGE