HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.10094 OF 2018

ORDER:

This Criminal Petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Code'), is filed by the petitioner - accused No.1 viz., Anil Kumar Chalamalashetty, to quash the proceedings against him in Calendar Case No.164 of 2018, pending on the file of the learned Special Judge for Economic Offences, Nampally, Hyderabad, Telangana State.

2. Before the Special Judge the petitioner herein is accused No.1 and respondent No.2 - Registrar of Companies is the complainant, who filed a complaint for violation of Sections 165 (1) and 165 (3) of the Companies Act, 2013 (for short 'Act, 2013').

3. Respondent No.2 herein filed a private complaint before the Special Judge for trial of Economic Offences, Hyderabad, for violation of Sections 165 (1) and 165 (3) of the Act, 2013, as the petitioner herein is continuing as a Director for more than 20 companies which is prohibited under Section 165 (3) of the Act, 2013 and requested to try the case and impose punishment in accordance with law.

4. The case was taken on file for the offence punishable under Section 165 of the Act, 2013 and issued summons to the petitioner.

5. The petitioner herein filed the present Criminal Petition on the ground that he was only a Director in 19 Companies as on the date of filing the complaint and that other three companies viz., M/s. Surya Kiran Power Projects Private Limited, M/s. Greenko Power Private Limited and M/s. K.M.S. Power Private Limited were amalgamated as per the orders passed by this Court on 19.02.2008 in Company Petition Nos.113, 114, 115 and 116 of 2007 and renamed it as M/s. Sri Balaji Biomass Power Private Limited and that the petitioner herein is not the Director of the said Company and, therefore, he is continuing as a Director in 19 companies and did not violate Section 165 (3) of the Act, 2013.

i) It is further contended that the complaint is barred by limitation in view of Section 468 of the Code as the offence punishable is only with fine and the period of one year was expired on 31.03.2015 in terms of Section 165 *(5) (b)* of the Act, 2013 and, consequently, respondent No.2 is not entitled to prosecute the petitioner herein for the above offence and requested to quash the proceedings against the petitioner herein for the offence punishable under Section 165 of the Act, 2013 in Calendar Case No.164 of 2018.

6. During hearing, learned counsel for the petitioner, Sri Milind G. Gokhale, contended that the Act, 2013 i.e., Act No.18 of 2013 came into force on 01.04.2014 and as per Section 165 *(5) (b)* of the Act, 2013, one year period is fixed to resign to any of the companies and intimate

to the Registrar of Companies of his continuation as a Director. In the present case, one year time was expired on 31.03.2015. Therefore, cause of action arose on the date when one year period was expired. The offence punishable under Section 165 (3) of the Act, 2013 is only with fine and the limitation is only one year, as per Section 468 of the Code, and on the ground of limitation, the proceedings against the petitioner in the aforesaid Calendar Case are liable to be quashed.

i) It is also contended that originally he was a Director of 21 companies and later three companies, viz., M/s. Surya Kiran Power Projects Private Limited, M/s. Greenko Power Private Limited and M/s. K.M.S. Power Private Limited were merged into one company and renamed it as M/s. Sri Balaji Biomass Power Private Limited by virtue of the order, dated 19.02.2008, in Company Petition Nos.113, 114, 115 and 116 of 2007, passed by this Court, and the petitioner is not continuing as a Director in M/s. Sri Balaji Biomass Power Private Limited, and thereby he is a Director only in 19 Companies and prohibition under Section 165 (3) of the Act, 2013 has no application and this information was available in 'Director Master Data' of the Registrar of Companies and, consequently, the petitioner cannot be prosecuted for violation of Section 165 (3) of the Act, 2013, and requested to quash the proceedings against him for the said offence.

7. The learned Assistant Solicitor General appearing for respondent No.2 supported the prosecution on the ground that according

to Section 165 (1) of the Act, 2013 the petitioner is a defaulter and violated the Section 165 (3) of the Act, 2013, accepting the appointment of a Director even after commencement of the provisions of amended Act, 2013 beyond the prescribed limit and he wishes to continue as Director in more than twenty companies as per the Registers maintained in the Registrar of Companies. As regards amalgamation of three companies, the petitioner being appointed as a Director after commencement of the provisions is falling beyond the limit prescribed under Section 165 of the Act, 2013 for being appointed as a Director for more than 20 companies at the same time. In the present case, in the aforesaid companies in which the petitioner even appointed as a Director prior to the commencement of Act, 2013 and resignation made prior to the commencement of Act, 2013, were not dealt with. Since the petitioner was a defaulter even after implementation of Section 165 of the Act, 2013, a show-cause notice was issued on 28.02.2018 complaining violation of Section 165 of the Act, 2013, and the petitioner issued a reply contending that he was Director in 19 companies, but as per the registers, he is continuing in more than 20 companies, and though amalgamation took place, the petitioner did not inform to the Registrar of Companies in terms of Section 165 of the Act, 2013 and, therefore, he is continuing as a Director in more than 20 companies as per the registers maintained with the Registrar of Companies, for failure to intimate the same in terms of Section 165 of the Act, 2013, and thereby he is liable to be prosecuted for the offence under Section 165 (3) of the Act.

i) It is also contended that the offence punishable under Section 165 of the Act, 2013 is continuing offence and, therefore, the question of limitation under Section 468 of the Code does not arise and the complaint is within limitation and requested to dismiss the petition.

8. As seen from the record, the petitioner herein was a Director of more than 20 companies as on the date of commencement of the Act, 2013. But, the contention of the petitioner herein is that M/s. Surya Kiran Power Projects Private Limited, M/s. Greenko Power Private Limited and M/s. K.M.S. Power Private Limited were amalgamated as per the orders of this Court in Company Petition Nos.113, 114, 115 and 116 of 2007, and renamed it as M/s. Sri Balaji Biomass Power Private Limited, in which, the petitioner is not a Director. The order was passed by this Court in the said Company Petitions on 19.02.2008 i.e., before commencement of Act No.18 of 2013. Section 165 of the Act, 2013 runs thus:

> **"165. Number of directorships:**
> (*1*) No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time**:**
>
> Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.
>
> *Explanation*.- For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.
>
> (*2*) Subject to the provisions of sub-section (*1*), the members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.
>
> (*3*) Any person holding office as director in companies more than the limits as specified in sub-section (*1*), immediately

before the commencement of this Act shall, within a period of one year from such commencement,-

(*a*) choose not more than the specified limit of those companies, as companies in which he wishes to continue to hold the office of director;

(*b*) resign his office as director in the other remaining companies; and

(*c*) intimate the choice made by him under clause (*a*), to each of the companies in which he was holding the office of director before such commencement and to the Registrar having jurisdiction in respect of each such company.

(*4*) Any resignation made in pursuance of clause (*b*) of sub-section (*3*) shall become effective immediately on the despatch thereof to the company concerned.

(*5*) No such person shall act as director in more than the specified number of companies,-

(*a*) after despatching the resignation of his office as director or non-executive director thereof, in pursuance of clause (*b*) of sub-section (*3*); or

(*b*) after the expiry of one year from the commencement of this Act, whichever is earlier.

(*6*) If a person accepts an appointment as a director in contravention of sub-section (*1*), he shall be punishable with fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues."

Thus, it is clear from clause (c) of sub-section (3) of Section 165 of the Act, 2013 that it is for the petitioner to intimate the choice made by him under clause (a) to each of the Companies, in which he was holding the office as a Director after commencement of the Act, 2013, and to the Registrar having jurisdiction in respect of each such company. Therefore, duty is cast upon the petitioner to intimate to each of the companies in which he is continuing as a Director and to the Registrar of Companies in compliance of clause (c) of sub-section (3) of Section 165 of the Act, 2013. But, the petitioner did not comply such provision. Thus, he is continuing as a Director for more than 20 companies as per the Data available with the Registrar of Companies. Though, the Company Petition Nos.113, 114, 115 and 116 of 2007 were filed even prior to the commencement of Act No.18 of 2013, no steps have been taken to intimate to the Registrar of Companies as required under clause (c) of sub-Section 3 of Section 165 of the Act 2013 which came into force on 01.04.2014 i.e., within a period of one year, and in the said company petitions, respondent No.2 is not a party, at least to attribute any knowledge about passing of orders of amalgamation of three companies referred supra. In the absence of any intimation, the petitioner is deemed to be continuing as a Director of more than 20 companies as per the registers maintained by the Registrar of Companies for the purpose of Section 165 of the Act, 2013, since no entry was made regarding amalgamation of three companies by virtue of order passed by this Court in the aforesaid company petitions.

9. The main grievance of the petitioner herein is that, the data with regard to amalgamation of aforesaid companies is available with the Registrar of Companies, but no material is placed on record to prove that the order was intimated including the resignation of the petitioner as a Director of M/s. Sri Balaji Biomass Power Private Limited after amalgamation.

10. In the absence of any intimation, the petitioner is deemed to be continued as a Director for more than 20 companies, as he failed to comply with the provisions of clause (c) of sub-section (3) of Section

165 of the Act 2013. Therefore, failure to comply with the said provision constitutes an offence punishable under Section 165 of the Act.

11. The other contention urged before this Court is that, the offence allegedly committed in the year 2015 i.e, 31.03.2015 after expiry of one year permitted under Section 165 of the Act, 2013 to continue as a Director for less than the limit prescribed under the provision and it is punishable with fine which shall not be less than Rs.5,000/- but which may extend to Rs.25,000/- for every day after the first during which the contravention continues. Therefore, the contravention was on 31.03.2015 and when sub-section 6 of Section 165 of the Act, 2013 prescribes punishment for the offence for every day, it is a continuing offence and, therefore, Section 468 of the Code has no application and each day default constitutes an offence and fine is to be imposed for each day contravention after expiry of one year from the date of Act came into force on 31.03.2015.

12. Section 468 of the Code deals with “bar to taking cognizance after lapse of the period of limitation’. Section 472 of the Code deals with ‘continuing offence’, according to it, in the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. Therefore, the offence punishable under Section 165 of the Act, 2013 is a continuing offence.

13. What is continuing offence and instantaneous offence is a question that would arise now. In **Balakrishna Savalram Pujari Waghmare v. Shree Dnyaneshwar Maharaj Sansthan**[1], the Hon'ble Supreme Court dealt with the said issue, and observed that a continuing offence is an act which creates a continuing source of injury, and renders the 'doer of the act responsible and liable for the continuance of the said injury. If case a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the said act may continue. If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. The distinction between the two wrongs therefore depends, upon the effect of the injury. In the said case, the Court dealt with a case of a wrongful act of forcible ouster, and held that the resulting injury caused, was complete at the date of the ouster itself, and therefore there was no scope for the application Section 23 of the Limitation Act in relation to the said case. Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue, i.e., endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e., when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue. In view of the law declared by the Apex Court in the aforesaid decision, it is difficult to uphold the contention of the petitioner while holding that

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[1]. 1959 AIR 798

the offence is a continuing offence punishable under Section 165 (6) of the Act, 2013 and every day violation constitutes afresh for every day's default after expiry of 31.03.2015 i.e., after expiry of one year period permitted under Section 165 (5) (b) of the Act. Therefore, on the ground of limitation, the proceedings against the petitioner cannot be quashed.

14. Section 482 of the Code deals with inherent jurisdiction of this Court and this Court can exercise such inherent jurisdiction to quash the proceedings to implement the orders passed by the Court, to prevent abuse of process or to secure ends of justice. Keeping in view, the limited jurisdiction of this Court under Section 482 of the Code and also the seven guidelines laid down by the Hon'ble Supreme Court in **State of Haryana v. Bhajanlal**[2], which are as under:

> "8.1. In the exercise of the extra-ordinary power under Article 226 or the inherent powers under Section 482 of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guide- ï7 myriad kinds of cases wherein such power should be exercised:
>
> (a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

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[2]. 1992 Supp (1) SCC 335

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

15. The present case do not fall in any of the aforesaid guidelines, and on the other hand, it is a continuing offence, and thereby the question of bar of limitation to take cognizance under Section 468 of the Code does not arise as the offence in the present case would fall within Section 472 of the Code i.e., continuing offence, and apart from that, the amalgamation proceedings were not communicated to respondent No.2 in writing and the petitioner also failed to inform as required under clause (c) of sub-section (3) of Section 165 of the Act, 2013 to the Registrar of Companies about his resignation as a Director of companies in more than 20 companies in number. Therefore, this question regarding intimation, if any, given, is a question of fact to be decided only during trial and at this stage the proceedings against the petitioner cannot be quashed in view of the limited jurisdiction that conferred on this Court under Section 482 of the Code. Hence, I find no ground at this stage to quash the proceedings against the petitioner in the aforesaid Calendar Case. However, it is left open to raise such objections, if any, before the trial Court and on raising such objections, the trial Court is required to answer those questions and I am sure that the learned Special Judge will pass appropriate orders uninfluenced by any of the observations or findings recorded hereinabove.

16. With the above observations, the present Criminal Petition is dismissed at the stage of admission itself.

Consequently, Miscellaneous Petitions, if any, pending in the present Criminal Petition, stand closed.

M. SATYANARAYANA MURTHY, J

October 01, 2018
Mgr