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CrI.O.P.[MD]Nos.16082 to 16084 of 2018 & batch etc.,

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.03.2019

PRONOUNCED ON : 25.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

CrI.O.P.[MD]Nos.16082 to 16084 of 2018

CrI.O.P.[MD]Nos.12553 to 12555 of 2018

CrI.O.P.[MD]Nos.11644 to 11646 of 2018

and

in CrI.M.P.[MD]Nos.7128 to 7133, of 2018

CrI.M.P.[MD]No.5692 to 5697 of 2018 &

CrI.M.P.[MD]No.5276 to 5281 of 2018

1. K.Ramakrishnan

.. Petitioner in CrI.O.P.[MD]Nos.16082 to 16084 of 2018

2.V.T.Bharadwaj

... Petitioner in CrI.O.P.[MD]Nos.12553 to 12555 of 2018

3.K.P.Balaraj

.. Petitioner in CrI.O.P.[MD]Nos.11644 to 11646 of 2018

Vs.

Income Tax Department

O/o. The Commissioner of Income Tax (TDS)

Coimbatore, represented by

Deputy Commissioner of Income Tax

TDS Circle, Madurai.

: Respondent in all CrI.OPs

Common Prayer in CrI.O.P.[MD]Nos.16082 to 16084 of 2018 : Criminal Original Petitions filed under Section 482 of Cr.P.C., to call for the records in C.C.No.235 of 2018, C.C.No.237 of 2018 and C.C.No.236 of 2018 respectively on the file of the Judicial Magistrate No.I, Trichy and to quash the same as against this petitioner.

Common Prayer in CrI.O.P.[MD]Nos.12553 to 12555 of 2018 : Criminal Original Petitions filed under Section 482 of Cr.P.C., to call for the records pertaining to C.C.No.235 of 2018, C.C.No.236 of 2018 and C.C.No.237 of 2018 respectively on the file of the learned Additional Judicial Magistrate No.I, Tiruchirappalli, and to quash the proceedings insofar as they pertain to the petitioner including the cognizance taken and summons issued to the petitioner.

Common Prayer in CrI.O.P.[MD]Nos.11644 to 11646 of 2018 : Criminal Original Petitions filed under Section 482 of Cr.P.C., to call for the records culminating in C.C.No.235 of 2018, C.C.No.236 of 2018 and C.C.No.237 of 2018 pending on the file of the Judicial Magistrate No.I, Tiruchirappalli, and quash the entire proceedings in respect of the petitioner, including the cognizance taken and summons issued to the petitioner.



Crl.OP(MD) Nos.16082 to 16084 of 2018 :

For Petitioner : Mr.K.P.Anantha Krishna
For Respondent : Ms.S.Srimathy
Senior Standing Counsel for Income Tax

Crl.OP(MD) Nos. 12553 to 12555 of 2018 :

For Petitioner : Mr.P.V.Balasubramanian
for M/s.BFS Legal
For Respondent : Ms.S.Srimathy
Senior Standing Counsel for Income Tax

Crl.OP(MD) Nos. 11644 to 11646 of 2018 :

For Petitioner : Mr.J.Sivanandaraj
for Mr.V.Sankaranarayanan
For Respondent : Ms.S.Srimathy
Senior Standing Counsel for Income Tax

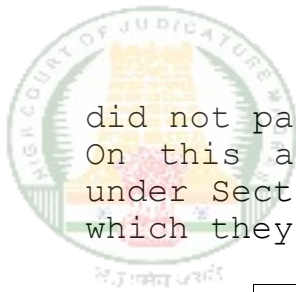
C O M M O N O R D E R

I INTORDUCTORY:

1.1 The petitioners in all these batch of petitions are all arrayed as accused in three different cases instituted by the respondent for the offences committed under Section 200 and 201(A) of the Income Tax Act. They face accusation for an offence involving non-remittance of TDS amount by the first accused, M/s.Vasan Health Care Pvt. Ltd., Trichy for three financial years. The amount involved in relation to each of the financial year/assessment year and the corresponding cases are all tabulated below :

Financial Year / (Assessment Year)	CC.No.	Unremitted TDS Amount (Rs.)	Interest Amount (Rs.)	Total Amount (Rs.)
2014 - 2015 (2015-2016)	235/2018	17,39,64,450	2,06,13,906	19,45,78,356
2015-2016 (2016-2017)	236/2018	6,39,39,954	-	
2013-2014 (2014-2015)	237/2018	15,40,39,638	-	

1.2 The petitioners are arrayed as accused on the allegation that they are the Directors of the first accused company. Broadly, their defense is that that they were all Non-Executive Directors appointed to the Board of the first accused company and that they



did not partake in the actual management/functioning of the company. On this allegation, the petitioners have laid separate petitions under Section 482 Cr.P.C. for quashing each of the criminal cases in which they have been arrayed:

Name of the Petitioner / Rank in CC.Nos.	Crl.OP.No.	C.C.No.
K.Ramakrishnan (A6 in all CC.Nos.)	16082 / 2018 16083 / 2018 16084 / 2018	235/2018 237/2018 236/2018
V.T.Bharadwaj (A5 in all CC.Nos)	12553 / 2018 12554 / 2018 12555 / 2018	235/2018 236/2018 237/2018
K.P.Balaraj (A4 in all CC.Nos)	11644 / 2018 11645 / 2018 11646 / 2018	235/2018 236/2018 237/2018

II THE FACTUAL DETAILS:

A. Thiru. Ramakrishnan (A-6 in all the cases)

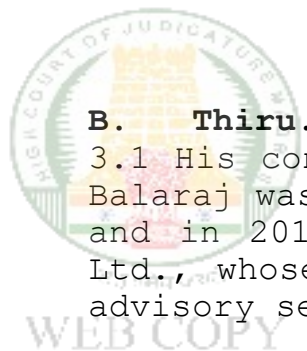
2.1 About 2008, he was functioning as an Executive Director of M/s Sparks Capital. At the request of the first respondent Company, namely Vasan Health Care Pvt. Ltd., Trichy, Sparks Capital helped it in identifying potential and prospective investors in it. Two major investors that Sparks Capital helped the first accused to obtain investments are:

(a) M/s Sequoia Investments, an American institution, which ended up investing Rs.230.12 crores in the first accused company;

(b) Government Investment Corporation, a Singapore Government undertaking, which invested Rs. 450.50 crores.

It is in these circumstances, the Board of the first Accused inducted Ramakrishnan as Promotor-nominee Vide its resolution dated 11-02-2012 as a Non-Executive Independent Director. And, he resigned on 14-05-2015.

2.2 After his resignation, the Complainant/Respondent issued a notice dated 27-02-2017 (relating to Financial year 2014-2015), and two notices, dated 29-03-2018 (relate to Financial Year 2013-2014 & 2015-2016), wherein the respondent had declared its intent to treat the petitioner as the Principal Officer of the first accused. To each of the notices, the petitioner had sent his reply informing the respondent that he had only functioned as an Executive Director, and in fact in his reply to the last two notices dated 29-03-2018, he had also extracted judicial pronouncements to fortify his contention that, he, as a mere former Non- Executive Director of the first accused, was not liable for any of the alleged misdeeds of the first accused.



B. Thiru. K.P. Balaraj (4th Accused)

3.1 His contentions are not vastly different from Ramakrishnan's. Balaraj was formerly the Managing director of Sequoia capital India, and in 2011, he co-founded WestBridge capital India Advisors Pvt. Ltd., whose core business included providing non-binding investment advisory services.

3.2 In 2009, M/s Sequoia Capital Investments, and WestBridge Ventures II Investment Holdings, invested in the first accused company. On 06-02-2009, he was nominated as a Non-Executive Nominee Director of the first accused company. It was so stated in Form 32 filed by the first accused with the Registrar of Companies. On 10-11-2015, he resigned from the Board of the first accused. As to the rest, his contentions are substantially the same.

C. Thiru. V.T.Bharatwaj (5th accused):

4. He was the Managing director of M/s Sequoia Capital India Advisors Private Ltd., Sometime, in 2009, the Sequoia Capital India Growth Investments I, and the Sequoia Capital India Investment Holdings III, had invested in the first accused company. The petitioner was therefore inducted to the Board of the first accused, as the nominee of the investors as a Nominee Non-Executive Director, Vide resolution of the first accused's Board dated 18-12-2009. And, on 18-11-2015 he resigned from the Board of the first accused. And he is in the same club as the other two petitioners.

5. The complainant/respondent had preferred its counter to all the petitions except in Crl.O.P.s 16082 of 2018 to Crl.O.P.16084 of 2018 (filed by Ramakrishnan). The quintessential contentions of the respondent as disclosed in the counter are: Though the petitioners were the Non-Executive Directors of the first accused company, yet they did have played a role, and the extent of their role would be known only after due trial. Secondly, under 278 E of the Income Tax Act, the existence of *mensrea* required for commission of the offense shall have to be presumed by the court, and the burden is on the accused to rebut it. Thirdly, in terms of sec.278-B of the Income Tax Act, besides imprisonment or imposition of fine on one who is convicted of an offence under the Act, every person, referred to in Sec.278-B(1) such as the Director of the company, Manager, Secretary, or other officer of the company, referred to in Sec.278B(2) shall be liable to be proceeded against.

III Of Arguments:

6. The core issue is, if the petitioners as Non-Executive nominee directors of the first accused company are criminally liable to be prosecuted for an offence involving non-remittance of the TDS amount

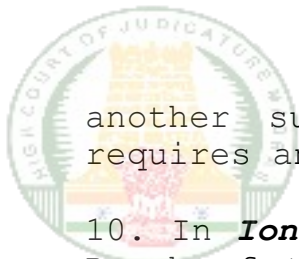
7. The learned counsel for the petitioners in unison argued: That under Sec.278B of the Income Tax Act, only he, who is in charge of, and was responsible to, the company for the conduct of the business

of the Company alone is liable for any offences committed by the Company under the Act. The petitioners were merely Non-Executive Nominee directors, nominated to the Board of the first accused more for the purpose of securing the interest of its major investors, and they had no role in the day to day affairs of the company, and hence by no stretch of interpretation can they be understood, or, as has been done by the respondent, treated as Principal officers. Again, under Sec.2(35) of the Income Tax Act, a principal officer is defined to mean one who is in charge of and responsible for the business of the company. Reliance was placed on the decision of the Division Bench of the Gujarat High court in **Ionic Metalliks Vs Union of India** [2014 SCC OnLine Guj 10066] which was relied on by the Delhi High Court in its Order dated 23-02-2017, in **Bharatwaj Thiruvankata Vengatraghavan Vs Ashok Arora** in CrI.MC 2760/2016. Their relation to the company is analogous to such Directors of the Company who are not in charge of the affairs of the company in the context of an offence committed under Sec.138 read with Sec.141 of the Negotiable Instruments Act. Given the contextual setting and similarity, Sec.141 of the Negotiable Instruments Act is worded in *pari materia* with Sec.278B (1) of the Income Tax Act, argued the counsel. To fortify his submissions, he relied on the ratio in **Pooja Ravinder Devidasani Vs State of Maharashtra & Another** [(2014)16 SCC 1], **Madhumilan Syntex Ltd., & Another Vs Union of India & Another** [(2007)11 SCC 297], **Kalanithi Maran Vs Union of India** [CDJ 2018 MHC 2663], **Kanarath Payattiyath Balrajh Vs Raja Arora** [2017 SCC OnLine 7418 (Delhi HC)], **S.N.P. Punj Vs Deputy Commissioner of Income Tax** [(2008) 301 ITR 76 : 2006 SCC OnLine Del 1439] **Homi Phiroz Ranina & Others Vs State of Maharashtra & Others** [2003(3) Mh.LJ 34], **Sri Kunnasagar Chinniah Vs the Income Tax Department & another** [of Karnataka High Court in CrI. Petition 6577/2014, dated 01-10-2015].

8. The response of the counsel for the respondent was more along predictable and classical lines: That the role of the petitioners could be known only when the cases against them go for trial.

VI Discussion & Decision:

9. Let the statement made by the respondent in defense of the petitioners' case be scanned for its merit: Notwithstanding the fact that the petitioners are Nominee Non-Executive Directors in the Board of the first accused, their role in non-remittance of the TDS by the first accused could be known only if the matter goes for trial. This is the statement. It presupposes that they have a responsibility in the commission of the alleged offense. And, this presupposition is founded on the statement of the respondent where it declares that it considers the petitioners as the Principal Officer in charge of the affairs of the company. But, is this basic premise, (this supposition of the respondent) itself is a fact which presupposes, or, is it yet another presupposition, that feed



another supposition, and that feed cause for prosecution? This requires an understanding of who a Nominee Non-Executive Director.

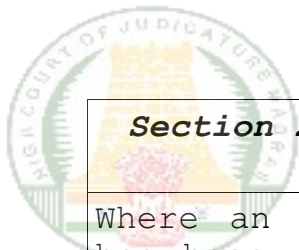
10. In ***Ionic Metalliks case*** [2014 SCC OnLine Guj 10066], a Division Bench of the Gujarat High Court has made an endeavour to classify and define the role of different class of directors of a company. To extract it:

10.

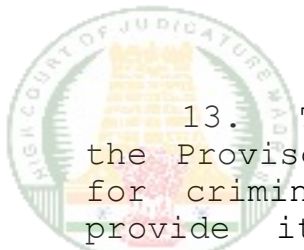
"Nominee Directors: They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the Central Government in case of oppression or mismanagement. The extent of a nominee Director's rights and the scope of supervision by the shareholders, is contained in the contract that enables such appointments, or (as appropriate) the relevant statutes applicable to such public financial institution or bank. However, nominee Directors must be particularly careful not to act only in the interest of their nominators, but must act in the best interest of the company and its shareholders as a whole.... Whether nominee directors are required by law to discharge such duties or bear such liabilities will depend on the application of the legal provisions in question, the fiduciary duties involved and whether such nominee Director is to be regarded as being in control or in charge of the company and its activities. This determination ultimately turns on the specific facts and circumstances involved in each case."

11. This Court is in agreement with this. If therefore, a criminal prosecution is contemplated against a Nominee Non-Executive Director, then it is not sufficient for the complainant to proceed on a supposition that he is a Principal Officer in charge of the affairs of the Company, or to treat him so based on some non-objective satisfaction. The Complainant ought to ascertain, if he, notwithstanding the appellation describing him a Nominee Non-Executive Director, has been enjoined with the responsibility by any contract nominating them, or by any law enabling their participation in the day to day affairs of the company. It requires little homework on the part of an official - Complainant to fix criminal liability on a Nominee director, for, to prosecute one without foundation poses a threat to their right to the dignified existence under Article 21 of the Constitution.

12. Who then is criminally liable under Sec.278B of the Income Tax. As already indicated, both Sec. 278B of the Income Tax Act and Sec. 141 of the Negotiable Instruments Act are worded almost identically. This is compared below:



Section 278B of the Income Tax Act, 1961	Section 141 of the Negotiable Instruments Act, 1881
Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due dilligence to prevent the commission of such offence. (2)Notwithstanding anything contained in sub-section(1), where an offence under this Act has been committed by a company 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, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.	Offences by companies (1)If the person committing an offence under section 138 is a company, every person, who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government of State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter. (2)Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance or, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.



13. The only difference that could be seen is that, whereas the Proviso to Sec.141 explicitly exempt those who are not liable for criminal prosecution, Sec.278B of the Income tax does not provide it. That, in the opinion of the Court, does not make any real difference in understanding the provision, for the operative portion of both the provisions in both the enactments themselves provide such necessary factors as would be sufficient to identify those who are liable for criminal prosecution. To repeat they both read: "Those who are in charge of, or responsible to the business...". Ultimately, if a nominee Directors of a financial institution, or shareholders of a company have a duty to, or responsibility to be, in charge of the affairs of the company, depends on the terms of contract or any legal provisions on the basis of which such nominee director came to be nominated. This cannot be left to any unfounded belief of the Complainant, or to his random statement that a nominee director is the Principal Officer of the company.

14. In **Pooja Ravinder Devidasani case** [(2014) 16 SCC 1], the Hon'ble supreme Court has held (in the context of the offense under sec.138 of the Negotiable Instruments Act by a Company), has held:

"There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the company will not fall into the ambit the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act."

In the same authority, in paragraph 23, the Supreme Court relies on another passage from **Gunmala Sales (P) Ltd. Vs Anu Mehta** [(2015) 1 SCC 103] which reads as below:

<https://hccservices.courts.gov.in/hccservices/>

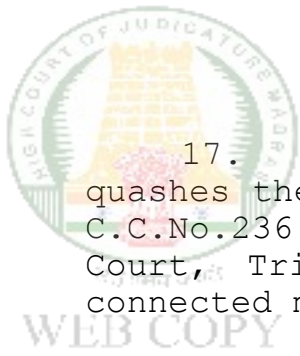


"In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such case, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactic, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out."

The other authorities substantially echo the same view.

15. **In Madhumilan Syntex case** [(2007) 11 SCC 297], a case where the accused, who are the Directors of the company (and not Nominee directors) approached the Court seeking to exclude them from criminal prosecution under sec.278B of the I.T. Act, for an offence of non remitting the TDS (exactly the same offence for which the petitioners herein are sought to be prosecuted), the Honble Supreme Court declined to grant relief to the Directors of the company, because they happened to be Directors, and proceeded to hold that their actual role via-a-vis, the company is a matter for trial. As indicated earlier, that was a case involving the Directors of the company, and not Nominee Directors. It must however, be added that the Supreme Court did not omit to emphasis that a criminal prosecution under Sec.278B of the Income Tax can lie only against those who are in charge of the affairs of, or, responsible for the business of the company.

16. This court has little hesitation to conclude that there is nothing in the complaint, that the petitioners, even as Nominee Directors were in charge of the affairs of the company and consequently they cannot be made liable to face criminal



17. In the result, this Court allows all the petitions and quashes the complaints in C.C.No.235 of 2018, C.C.No.237 of 2018 and C.C.No.236 of 2018, pending on the file of Judicial Magistrate Court, Trichy, only as against the petitioners. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

tsg

To:

1. The Judicial Magistrate No.I, Trichy.
- 2.The Deputy Commissioner of Income Tax
O/o.The Commissioner of Income Tax (TDS)
Income Tax Department
Coimbatore,
TDS Circle, Madurai.

Crl.O.P.[MD]Nos.16082 to 16084 of 2018
Crl.O.P.[MD]Nos.12553 to 12555 of 2018
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25 .10.2019

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