IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2021

CORAM:

THE HON'BLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

Crl.O.P. No.11983 of 2016

Dilip Chandulal Parekh ...Petitioner/Accused 2

Vs.

Deputy Registrar of Companies,
Office of the Registrar of Companies,
Tamilnadu, Shastri Bhavan, IInd Floor,
26, Haddows Road,
Chennai – 600 006. ... Respondent/Complainant

PRAYER: Criminal Original Petition is filed under Section 482 Cr.P.C., to call for the records and proceedings in the complaint in EOCC No.05 of 2016 pending before the Court of Additional Chief Metropolitan Magistrate EO-I, at Allikulam Commercial Complex, Second Floor, Moor Market, Periamet, Chennai and quash the same.

For Petitioner : Mr. M.K.S. Sundar

For Respondent : Mr. K. Ramanamoorthy
(Counsel for Central Govt.)

O R D E R

This Criminal Original petition has been filed under Section 482 Cr.P.C. seeking for to call for the records and proceedings in the complaint in EOCC No.05 of 2016 pending before the Court of Additional Chief Metropolitan Magistrate EO-I, at Allikulam Commercial Complex, Second Floor, Moor Market, Periamet, Chennai and quash the same.

2. The case of the prosecution is that the petitioner herein being appointed as "Whole Time Director" in the company known as Coral Hub Limited (Hereinafter is referred to as "Company") having CIN No.U32109TN1994PLC061452, which was incorporated on 02.05.1994 having its registered office at Kingsely Chambers, Block No.136, Ramasamy Street, T. Nagar, Mambalam, Guindy Taluk, Chennai-600 017 was issued a show cause

notice dated 10.07.2015 by the respondent for the violation of Section 149(1) second proviso of the Companies Act, 2013, read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 for not appointing Women Director in the Company. Later, the respondent filed a complaint before the learned Additional Chief Judicial Magistrate, Economic Offence-I, Egmore, Chennai bearing E.O.C.C. No.5 of 2016 against the petitioner under Section 149(1) second proviso of the Companies Act, 2013, read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. After the compliant was filed by the respondent, summon dated 01.02.2016 was sent to the petitioner herein and as a result of which, the petitioner has appeared before the learned Additional Chief Metropolitan Magistrate on 05.03.2016 and the copy of the complaint was furnished under Section 207 of Cr.P.C. to the petitioner. Subsequently, the petitioner has preferred the present Criminal Original Petition praying to quash the aforesaid criminal proceedings initiated against him.

3. The learned Counsel for the petitioner would submit that the said complaint was filed against the petitioner on the allegation that the petitioner being a director of the said company failed to appoint at least one women director of the said company within one year from the commencement of the Companies Act, 2013, ie. 01.04.2014 on which date in any event, the petitioner was not a director and was not in office of the said company. The petitioner has received the summons dated 01.02.2016 on 11.02.2016 in EOCC No. 05 of 2016 issued by the Court of Additional Chief Metropolitan Magistrate, EO-I, Periamet, Chennai, without any copy of the said complaint.

4. It has been further submitted that the petitioner was appointed as a whole time Director of the said company in the Annual General Meeting of the said company held on 28.09.2006 for a period of five years w.e.f. 05.02.2006 to 04.02.2011 on a monthly remuneration of Rs.75,000/- till July, 2008 and from August, 2008 for period of two years the monthly remuneration was revised at Rs.2,25,000/- and this fact is recorded in the Annual Report of the said company for the Financial Year 2009-2010. After expiry of petitioner's term as "whole time director" of the said company on 04.02.2011, though its Chairman, Mr. G.S. Chandrsekhar orally asked the petitioner to continue as Director on the assurance that he would continue to be paid the same salary and in the next Annual General Meeting, he would get his appointment approved by passing appropriate resolution. However, no such Annual General Meeting was called by the Chairman and the Board of Directors and also the petitioner was not paid salary since , July 2010. Since the petitioner was not being paid the Salary since July 2010, the petitioner resigned from the post of Director vide his letter

dated 28.06.2012 addressed to the Chairman and other Directors of the said Company by registered Post with A/D. In the aforesaid letter, the petitioner has requested the said company to file the Form No.32. The said resignation letter dated 28.06.2012 was posted on 28.06.2012 by registered post with A/D and the company received the same on 05.07.2012 as per the said A.D. card received back by the petitioner herein. The said company also published in the news papers concerned declaring the resignation of the petitioner w.e.f. 05.07.2012. Despite the petitioner informed to the respondent about his resignation from the said company, and the failure of the said company to file the Form No.32, and requested the respondent to take appropriate legal action against the said company vide letter dated 14.09.2021 which was sent by Registered Post with A/D on 17.09.2012 and the same was duly received by the respondent on or about 20.09.2012.

5. Further, the learned counsel for the petitioner has relied on the Judgment of the Division Bench of the Hon'ble High Court in the case of "Saumil Dilip Mehta Vs. State of Maharashtra and others reported in 2002(2) Bom. C.R. 594, wherein it has held as follows:

> "6. The submissions advanced by the litigating parties are touching an point involved in this matter which make us to express out views on the point whether a director of a Public or Private Limited Company can resign unilaterally and that too by writing a letter to the Chairman of the said Company or its Secretary. Is it necessary for such a director to till up Form No.32 and is obliged to give a notice or intimation to that effect to the Registrar of Company? The question arises for our adjudication is whether that particular director is obliged to give such
> information to the Registrar of Companies with the said requirement. Keeping in view the provisions of the Companies Act, the relevant Articles of the Constitution of India, we come to the conclusion that a director of the Public Limited Company or Private Limited Company can tender his resignation unilaterally and without filing in Form No.32 and without sending a notice to the Registrar of Companies. It is clear that the filing in the said form and giving due intimation and information to the Registrar of Companies is the duty of the Company Secretary and not of an individual director. Suffice it to say that what he has to do is to send in writing a letter informing either the Chairman or the Secretary of the Company, as the case may be, his

intention to resign from the post of the Director of the said Company. Thereafter, the said letter has to be moved in the meeting of the directors of the company, may be ordinary meeting or may be extraordinary or special meeting, as the case may be, and the Board of Directors have to take a decision whether the Board is accepting his resignation or not. An intimation should be set to such director and after such resolution is passed, the Company Secretary is under the obligation to comply with the legal formalities for giving a finishing touch to the resolution which has been passed in the said meeting of the Board of Directors. It is for the Company Secretary to fill in the forms as prescribed and to give due information and intimation to the Registrar of Companies, as the law requires. Thereafter, it has to be so mentioned in all prescribed registers of the company, accounts and balance sheet of the Company and thereafter, the said fact is to be brought to the notice of the members of the Company as early as possible and at the latest in Annual General Meeting."

Without considering the aforesaid observation made by the Division Bench of the Hon'ble High Court, the respondent filed a complaint before the learned Additional Chief Judicial Magistrate, Economic Offence-I, Egmore, Chennai bearing No.E.O.C.C. No.5 of 2016 against the petitioner under Section 149(1) second proviso of the Companies Act, 2013, read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, while the Company failed to file Form No.32 with respect to his resignation as required under Companies Act, 1956 and further the Financial Statements and Annual returns of the Company were not filed before the respondent. Hence, a lapse or a dereliction in statutory duty of the Directors or Company Secretary of the said Company cannot be ground for fastening Criminal Liability upon the petitioner.

6. It has been further submitted that before issuing the said summons to the petitioner, the learned Magistrate failed to exercise the jurisdiction under Section 200 of the Code of Criminal Procedure which provides that whenever a complaint in terms of Section 200 of Cr.P.C. is laid before the Magistrate then he is duty bound to examine the Complaint on oath. Without putting any question on the complaint made by the respondent, the learned Magistrate has initiated Criminal proceedings against the petitioner. Further, in summoning the petitioner without providing copy of the complaint is in violation of the mandate of Section 204(3) of the Cr.P.C. 1973, which provides the mode of service of summons. The provision of Section 204(3) reads as under:

"Section 204(3): In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanies by a copy of such complaint."

As per the aforesaid Section, the summon was not accompanied with a copy of the complaint which means that the summon was not effectively served upon the petitioner. Hence, the complaint in E.O.C.C. No.05 of 2016 is liable to be quashed.

7. Per contra, the learned Central Government Advocate for the respondent would submit after filing counter affidavit that the respondent filed the complaint in E.O.C.C. No.5 of 2016 against the petitioner under Section 149 of the Companies Act, 2013, which reads as follows:

149. Company to have Board of Directors:

(1) Every company shall have a Board of Directors consisting of individuals as directors and shall have:-

(a) a minimum number of three directors in the case of a Public Company, two directors in the case of a Private Company, and one Director in the case of a One Person Company; and

(b) a maximum of fifteen directors;

Provided that a company may appoint more than fifteen directors after passing a special resolution ;

Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director.

As per the aforesaid rule, the petitioner should have appointed at least one Women director as on 01.04.2015. But it was observed that no Women director was appointed in the said Company as per the signatory information available in the e-records of the respondent's office. Hence, the petitioner has violated the above provision read with rules and thus is liable to be punished under Section 172 of the Companies Act, 2013.

8. It has been further submitted that a show cause notice was issued on 10.07.2015 to the petitioner herein and the subject company for violation of the Section 149 of Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rule, 2014 asking for a reply within a period of 10 days from the date of notice. But, the reply sent by the petitioner, to the respondent is not tenable.

9.It has been further submitted that the Companies Act, 1956 does not have any provisions elucidating the process of

Resignation of a Director, from the Company. According to many interpretation and precedents as set forth by the Hon'ble Supreme Court and High Court in many case laws, with respect to the question of resignation, it is inferred that, since the Companies Act, 1956 does not prescribe any specific process for the Directors to resign from a Company, the clauses established in the Articles of Association of a Company, shall be followed and in the lack of clauses regarding Resignation of the Director, in the Articles of Association of the Company, the resignation of the Director will be in accordance with the ordinary rule of common law. Due to the fact that the Articles of association of the subject company does not give any provision or process with respect to the resignation of its directors, the rule of common law or precedents should be applied in the case of the subject Company.

10. The learned Central Government Advocate would further submitted that as per the explanation given under Section 269 of the Companies Act, 1956, a whole time Director can be seen as the Director who engages his/her whole time in the affairs of the Company. A whole time Director of one Company cannot accept or hold position of a whole time director in another company. The petitioner, being the only Whole Time Director of the company during the period of his resignation, cannot disregard his liabilities and responsibilities without getting consent by way of the acceptance from the Board of Directors regarding his resignation. Further, It has been relied upon the Judgment in the case of Saumildilipmehtav Vs. State of Maharastra reported in (2003) 113 Comp. cas 443, wherein the Hon'ble High Court held as follows:

> "when a director has tendered his resignation and the Board of Directors has accepted it, such director cannot be held for liabilities incurred by the Company after the date of acceptance of his resignation, except the liability incurred by him for purchase of company's share and nothing more." It is very clear that, the director is free from all the liabilities, only after tendered his resignation, and the Board of Directors has accepted it, whereas in the subject matter, Board has not accepted his resignation, since company has not filed Form-32 with respect to his resignation, as required under Companies Act, 1956."

In another Judgment dated 15.04.2015 in the case of Smt. Dr. Renuka Datla and Others Vs. Biological E Limited and Others, it has been held as follows:

> "if there is any provision in the Article giving the

right to a Director to resign at any time, the resignation will take effect without any need for its acceptance by the Board or the Company in the General Meeting. From the aforesaid case, it can be referred that the petitioner, cannot resign by just giving a notice to the company, rather, his resignation should be accepted by the Company, as there is no specific mention regarding the process of resignation in the Articles of Association of the Subject Company. Further, the petitioner only established that he submitted a letter to the company, but there is no proof as to , if the same was accepted by the other directors of the Company or not. In addition to, either Form 35 or DIR 12, wherever applicable, is not seen filed by the Subject Company and hence the petitioner is still a Director of the subject Company."

11. It has been further submitted that according to Section 303(2) of the Companies Act, 1956, which reads as under:

> (2) The Company shall, within the periods respectively mentioned in the sub-section, send to the Registrar a return in duplicate in the prescribed form containing the particulars specified in the said register and a notification in duplicate in the prescribed form of any change among its directors, managing directors, managing agents, secretaries and treasurers, managers or secretaries specifying the date of the change. The period within which the said return is to be sent shall be a period of thirty days from the appointment of the first directors of the Company and the period within which the said notification of a change is to be sent shall be thirty days from the happening thereof.

As per MCA 21 portal, the signatory details (Annexure-A) of the subject Company includes the name of the petitioner as the whole time director till date. It is the statutory duty of the subject Company to file the Form 32 according to the aforesaid Section, but the above said procedure was not followed by the said company. Besides, the non-filing of Form-32 as mandated by the Companies Act, 1956, by the subject Company, raises the question as to whether the subject company was ready to accept the resignation of the petitioner or not. Hence, the averments made by the petitioner in the affidavit are false and baseless.

12. The learned Central Government Advocate would further submit that the respondent has followed all the due procedure of Law enshrined in the Companies Act, 1956 and Companies Act, 2013. However, the subject company has not

filled Financial Statements and Annual Returns from the Financial Year 2010-2011 to till date. Also, the Subject Company has never appointed a Women Director till date as required under Second Proviso of Section 149 of Companies Act, 2013 read with Rules 3 of Companies (Appointment and Qualification of Directors) Rule 2014. It makes clear that the present Criminal Original Petition does not have any rationality and the averments and claims of the petitioner against the respondent is not reasonable and acceptable. Hence, this Criminal Original Petition is liable to be dismissed as there is no merit in the plea of the petitioner.

13.Heard, the learned Counsel for the petitioner and the learned Central Government Advocate for the respondent as well as perused the material available on record.

14.It is relevant to rely upon the Judgment of the Hon'ble Supreme Court of India passed in Crl.A.No.579 of 2019 dated 02.04.2019 in the case of Devendra Prasad Singh Vs. State of Bihar & Anr., as follows:-

> " 12.So far as the second ground is concerned, we are of the view that the High Court while hearing the application under Section 482 of the Cr.P.C. had no jurisdiction to appreciate the statement of the witnesses and record a finding that there were inconsistencies in their statements and, therefore, there was no prima facie case made out against respondent No.2. In our view, this could be done only in the trial while deciding the issues on the merits or/and by the Appellate Court while deciding the appeal arising out of the final order passed by the Trial Court but not in Section 482 Cr.P.C. proceedings.
>
> 13.In view of the foregoing discussion, we allow the appeal, set aside the impugned order and restore the aforementioned complaint case to its original file for being proceeded with on merits in accordance with law."

15.Recently, the Hon'ble Supreme Court of India dealing in respect of the very same issue in Crl.A.No.1572 of 2019 dated 17.10.2019 in the case of Central Bureau of Invstigation Vs. Arvind Khanna, wherein, it has been held as follows:

> "19. After perusing the impugned order and on hearing the submissions made by the learned senior counsels on both sides, we are of the view that the impugned order passed by the High Court is not sustainable. In a petition filed under Section 482 of Cr.P.C., the High Court has recorded findings on several disputed facts and allowed the petition. Defence of the accused is to be tested after appreciating the evidence during trial. The very fact that the High Court, in this case, went into the most minute details, on the allegations made by the appellant-C.B.I., and the defence put-forth by the respondent, led us to a conclusion that the High Court has exceeded its power, while exercising its inherent jurisdiction under Section 482 Cr.P.C.
>
> 20.In our view, the assessment made by the High Court at this stage, when the matter has been taken cognizance by the Competent Court, is completely incorrect and uncalled for."

16.Further the Hon'ble Supreme Court of India also held in the order dated 02.12.2019 in Crl.A.No.1817 of 2019 in the case of M.Jayanthi Vs. K.R.Meenakshi & anr, as follows:

> "9. It is too late in the day to seek reference to any authority for the proposition that while invoking the power under Section 482 Cr.P.C for quashing a complaint or a charge, the Court should not embark upon an enquiry into the validity of the evidence available. All that the Court should see is as to whether there are allegations in the complaint which form the basis for the ingredients that constitute certain offences complained of. The Court may also be entitled to see (i) whether the preconditions requisite for taking cognizance have been complied with or not; and (ii) whether the allegations contained in the complaint, even if accepted in entirety, would not constitute the offence alleged.
>
> ....
>
> 13. A look at the complaint filed by the appellant would show that the appellant had incorporated the ingredients necessary for

> prosecuting the respondents for the offences alleged. The question whether the appellant will be able to prove the allegations in a manner known to law would arise only at a later stage...................."

The above judgments are squarely applicable to this case and as such, the points raised by the petitioner cannot be considered by this Court under Section 482 Cr.P.C.

17. It is alleged by the learned Counsel for the petitioner that the petitioner's term as "whole time director" of the said Company expired on 04.02.2011 and the petitioner was not paid salary since July 2010. However, it is seen from the records that the petitioner has sent a resignation letter only on 28.06.2012 addressed to the Chairman and other Directors of the said company by registered Post with A/D. Even assuming that the petitioner's term as a Director had ended on 04.02.2011, no proof of the acceptance filed herewith by the Board. The petitioner has stated that salary for performing as director was not paid since July 2010 and if that is, it is surprising as to how the petitioner has been working as a director even without salary since July 2010, but had sent his resignation letter only on 28.06.2012. It is not known whether the petitioner was working without any salary since July 2010 till resignation of his post as Director of the Company. The facts are to be proved by him. These are totally contradictory versions from the averments of the petitioner. However, according to the respondent, as per MCA 21 portal, the signatory details (Annexure-A) of the subject Company includes the name of the petitioner as the whole time director till date. Under such circumstances, the factual aspects of the case would be disclosed only after a thorough trial to be held before the Additional Chief Metropolitan Magistrate (Economic Offences-I) District Judge, Chennai.

18. In view of the aforesaid contradiction found and discussions in the present petition as well as submissions of the learned Central Government Advocate that as per the explanation given under Section 269 of the Companies Act, 1956, a whole time Director can be seen as the Director who engages his/her whole time in the affairs of the Company. A whole time Director of one Company cannot accept or hold position of a whole time director in another company. The petitioner, being the only Whole Time Director of the company during the period of his resignation, cannot disregard his liabilities and responsibilities without getting consent by way of the acceptance from the Board of Directors regarding his resignation, hence, this Court is not inclined to quash the proceedings in E.O.C.C.No.5 of 2016 on the file of the

Additional Chief Metropolitan Magistrate (Economic Offences-I) District Judge, Chennai. The petitioner is at liberty to raise all the grounds before the trial Court. The Trial Court is directed to proceed further in this case having heard pleas on either side and complete the proceedings within a period of nine months from the date of receipt of copy of this order.

19. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

Lbm

To:

1. Deputy Registrar of Companies,
Office of the Registrar of Companies,
Tamilnadu, Shastri Bhavan, IInd Floor,
26, Haddows Road,
Chennai – 600 006.

2. The Additional Public Prosecutor,
High Court of Madras,
Chennai.

Copy to:
The Additional Chief Metropolitan Magistrate
(Economic Offences-I), District Judge, Chennai.

+1cc to Mr. M.K.S. Sundar, Advocate, S.R.No.38625

Crl.O.P. No.11983 of 2016

PL(CO)
CT/12/10/2021