IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.10.2021

PRONOUNCED ON : 25.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.R.C.No.408 of 2018

S.Kanagam ... Petitioner/Accused No.4

Vs.

The State represented by
The Inspector of Police,
EOW II Wing, Namakkal District.
(Crime No.133 of 2013)
... Respondent/Complainant

Prayer: This Criminal Revision Case has been filed under Section 397 and 401 of Cr.P.C., to call for the records in Crl.M.P.No.3724 of 2017 in C.C.No.31 of 2013, on the file of the learned Special Judge for TNPID cases at Coimbatore and to set aside the order dated 16.03.2018 in Crl.M.P.No.3724 of 2017.

For Petitioner : Mr.R.Vivekananthan

For Respondent : Mr.S.Vinoth Kumar
Public Prosecutor

O R D E R

The accused No.4 is the revision petitioner herein.

2.The revision petitioner herein has filed a petition under Section 239 of Cr.P.C to discharge her from the offence under Sections 120(B), 406, 420, 467, 468 of IPC and Section 5 of the Tamil Nadu protection of Interests of Depositors, in Cr.M.P.No.3724 of 2017, which was dismissed. Hence, the present Criminal Revision Case.

3.The brief facts leading to file of this Criminal Revision Case are as under:

(a)the case of the prosecution is that on 12.02.2013 the defacto complainant namely Tamilarasi lodged a complaint by alleging that A1/Chellam Emu firms Director, A2/Sivakumar had lured her to invest Rs.2,00,000/- in the Emu Firm, by which she would get a monthly incentive of Rs.22,000/- and a vacant house site in return but the accused persons failed to fulfil their promise and closed the Firm. Based on that the present FIR was registered.

(b)After the investigation, the respondent police has filed the final report as against the accused persons for the alleged offence u/s 120(B), 406, 420, 467, 468 of IPC and Section 5 of Tamil Nadu protection of Interests of Depositors, 1997.

(c)It is alleged that during the investigation it was revealed that first accused/M/s.Chellam Emu Farms and Velaval Garden City Developments were started and registered by A2/Sivakumar and A3/R.Gangadevi. A1 concern was run by A2 & A3 along with the revision petitioner/A4 viz., Kangam, who is the mother of A2. A10/Saranya was worked as a Manager. It is further alleged that they have induced and collected the deposit amount from the investors and cheated them and further, the revision petitioner/A4 had purchased two Route Buses from the funds of financial institutions.

(d)The respondent police has filed two final reports before the Trial Court. Total number of witnesses and default amount summarized as follows:

	Witnesses	Investors	Default Amount
1st Charge Sheet	1 to 427	1 to 392 (392 investors)	6,80,38,840/-
2nd Charge Sheet	428 to 485	428 to 484 (57 investors)	1,23,83,100/-
Total		449 Investors	8,04,21,940/-

(e)The respondent police originally filed the charge sheet against the 10 accused persons and this Court quashed the charges against the four accused persons. Details of the accused as per prosecution case as follows.

A1Firm		
A2 - Sivakumar	Partner of the firm	
A3 Ganga Devi	Partner of the firm	
A4 Kanagam	Mother of 2nd accused	
A5 Kanagaraj		

A1Firm		
A6 Shanthi	Sister of 2nd accused	Charges quashed by this Court in Crl.OP.No. 33156 of 2013
A7 Baskar		Charges quashed by this Court in Crl.OP.No. 24420 of 2014
A8 Pari vallal		Charges quashed by this Court in Crl.OP.No. 1979 of 2014
A9 Ragunathan		Charges quashed by this Court in Crl.OP.No. 1141 of 2014
A10 Saranya		

The respondent police has produced 485 documents along with the Final Report.

4.Heard both the learned counsels and perused the materials placed on record.

5.The learned counsel for the revision petitioner herein/fourth accused would contend that there is no allegation constituting any material to frame the charges and that the Trial Court has rejected the discharge petition on the ground that LW400, LW401, LW402 LW406 gave statement to the effect that the fourth accused came to the office of the defaulted A1 (partnership firm) and also collected the deposit amount to home and none of the witnesses have whispered nothing against the accused.

6.Per contra, the learned Public Prosecutor appearing for the appellant would relied upon the judgement reported in 2017 SCC online Madras 22970 - in Crl.R.C.No.185 of 2013 - K.A.Gunasekaran Vs. The State Inspector of Police, Economic Offence Wing II, Vellore District and others and contend that the statement of listed witnesses viz., LW400, LW401, LW402 and LW406, recorded by the Investigating Officer is sufficient enough to frame the charge under Section 5 of Tamil Nadu protection of Interests of Depositors Act. He would also relied upon the decision of the Madurai Bench of this Court in Crl.RC (MD).No.447 of 2013 - (Bharatharaj Vs. The State represented by: the Inspector of Police, District Crime Branch, Theni District and another).

7.After hearing rival submissions made by the respective parties and perusing the statement of LW400, LW401, LW402 & LW406, I find that they are all allegations attached to the first accused firm and their statement is with regard to functioning of the firm and there is one line which appears to have been used to roped in the accused that the fourth accused, who is the mother of the first accused, at the age of 65 used to come to office of the defaulted A1 partnership firm and at times she used to carry money from the firm to the house. Except this content there is no other material available in the above said statement of listed witnesses.

8.On factual grounds, the respondent police has produced 485 documents filed along with final report; 449 persons have been examined, who are all investors. The investors totalling 449, none of them have mentioned the name of the revision petitioner herein/A4 viz.,. Kanagam either in the complaint or in the statement recorded under Section 161 of Cr.P.C., assumes significance.

9.The revision petitioner herein/A4 has not signed in any one of the documents produced by the investors. It is not the case of the respondent police that the accused is a partner. Admittedly, the revision petitioner/A4 is neither a partner nor worked in the firm, she happens to be the mother of A2.

10.It is needless to say that for framing the charge a prima facie case against the revision petitioner herein/accused No.4 would raise only when either in the complaint or in the form of statement from the depositors to the effect that are the necessary for the offence alleged by the prosecution. In the absence of the same, a person cannot be asked to face the trial. The obligation of the respondent police is to prove that at the time of the offence was committed, the revision petitioner herein/4th accused was in charge and responsible for the firm for conduct of business.

11.It is so reflected in the decision of this Court in Crl.R.C(MD).No.447 of 2013 (Bharatharaj Vs. The State represented by the Inspector of Police, District Crime Branch Theni Distruct and another,

> Wherein, this Court dealt with the distinction between the words "Every person responsible for the management of the affairs of the financial establishment" found in Sec.5 of TNPID Act"
>
> Wherein, it has been clearly held under Section 5 of TNPID Act, the word "Every person responsible for the management of the affairs of

> the financial Establishment means and includes "The person concerned is responsible for the management of the company without involving himself in the business of the company. Similarly, a person may be responsible for the management as well as the business of the company"

Wherein, the phrase over person has been given effect to the word "Every Person" provided under Section 5 of TNPID Act includes, "Every person responsible for the management of the Company either involving himself in day to day affairs of the company or firm or without involving himself in day-to-day affairs of the company or firm"

12.It remains to be stated that to say a person is involved in day to day affairs of the Company or a firm with or without involving himself is to be ascertain from the statement available under Section 161 of Cr.P.C.

13.In the decision reported in 2017 SCC online Madras 22970 as cited supra, wherein, I had an occasion to deal with the similar circumstances, and had held that in the absence of any positive evidence to infer about the alleged responsibility in conduct of the firm a person cannot be roped in by virtue of Section 5 of TNPID Act, which reads as follows:

> "What is required under Section 5 of TNPID Act is that "every person responsible for the management of the affairs of the financial establishment". All the accused are family members. They had not participated in the affairs of the chit fund. But no such records have been produced by the investigating Agency sating that A.5, A.6 and A.7 were actively participated in the day-to-day affairs of the establishment."

14.Admittedly, the present revision petitioner herein/4th accused is only a family member viz., mother of A2. Even the statement recorded from the above said witnesses viz., LW400, LW401, LW402 & LW406 as extracted supra, does not indicate any role wither with or without involving herself in the day to day affairs of the Company.

15(a).As a mother of one of the partner, the revision petitioner herein/4th accused used to visit A1 firm during lunch hours and on two occasions she had carried some amount from the firm to her house. Hence, I find that the revision petitioner herein/4th accused is not liable, cannot be made to face the trial under the principles of constructive criminal liability.

She being the mother of one of the partner, who was arrayed as accused, is not a ground to fastened her with criminal liability when the revision petitioner herein/4th accused may not know anything about the business of the firm. It can be a traipse of justice to prosecute merely because she happens to be the mother of one of the partner and ask them to prove the offence, which was committed without their knowledge.

15(b).It is significant to note that the obligation of the revision petitioner herein/4th accused to prove that the offence took place without her knowledge, that exercise of due diligence to prevent such offence only when the prosecution accepts that the requested condition mentioned in Section 5 of TNPID Act is established.

15(c).The request condition is that the partner is responsible in carrying the business and was during the relevant point of time in charge of the business either with or without involving herself". In the absence of any such proof merely because the revision petitioner herein/4th accused is happened to be mother of the second accused, she cannot be invited to face the trial.

16.In the decision reported in AIR 2004 SC 4274 (Monaben Ketanbha Shah v. State of Gujarat), it has been held as follows:-

> "Section 141 does not make all partners liable for the offence. Criminal liability has been fastened on those who, at the time of commission of offence, was in charge of and was responsible to firm for conduct of business of firm. These may be sleeping partners. Primary responsibility is on complaint to make necessary averments in complaint so as to make accused vicariously liable. For fastening criminal liability, there is no presumption that every partner knows about the transaction. The obligation of appellants to prove that at the time of offence was committed they were not in charge of and were not responsible to the firm for conduct of business of firm, would arise only when complainant makes necessary averments in complaint and establishes that fact. The instant case is of total absence of requisite averments in complaint. Therefore, order of Magistrate directing discharge of accused persons, holding that there are no allegations in complaint making out offence against them is proper."

17.Yet another allegation is that the revision petitioner/A4 had purchased two Route Buses from the funds of financial institutions in her favour. Admittedly, no document was produced in support of the said allegation.

18.In the decision reported in 2009 (3) MWN Crl 32 (Prasannadei Vs. State of Tamil Nadu represented by Deputy Superintendent of Police (Economic Offence Wing), Cuddalore, Cuddalore District, wherein, this Court has held as follows:

> "The fact remains that the Petitioner was not a partner of the partnership firm charged in this case under Section 5 of the TNPID Act. The only allegation levelled by the witnesses examined on the side of the prosecuting agency is that the Petitioner canvassed for deposits for the financial institution. To invoke the penal provision under Section 5 of the TNPID Act, one should shoulder the responsibility of managing the affairs of the financial Firm or Company. I find that the provision under Section 5 of the TNPID Act has been drafted very carefully. A person who merely manages the affairs of a Firm or a Company viz., Clerks, Accountants, Office Assistants, who are just paid servants would not be responsible for the management in the sense that they are not answerable to the claim made against the financial firm. In other words, a person, who simply manages the affairs of a Firm, cannot be said to have taken the responsibility of answering the allegation of mis-management of the affairs of the firm. The Clerks, Accountants and Office Assistants come under the said category. They have been given a role to manage the affairs of the partnership Fir, but they are not responsible for the mis-management of the Firm when the same is under challenge by a third party. All the persons who manage the affairs of the financial institution need not necessarily be responsible for the management of the affairs of the institution. What is required under Section 5 of the TNPID Act is that the person charged should have been responsible for the management of the affairs of the institution. The persons who simply manages the affairs of the financial institution as paid servant fall out the ambit and scope of the aforesaid provision of law."

19.Hence, I find that "it is the test that is required at the stage of Section 227 of Criminal Procedure Code as held by the Supreme Court in the case of Yogesh Alias Sachin Jagdish

Joshi v. State of Maharashtra reported in ((2008) 10 SCC 394), wherein, while dealing with Sections 227, 228 and 209 Cr.P.C., and its scope and ambit of powers of trial Court under Section 227, the Supreme Court has held that if two views are equally possible and the Judge is satisfied that evidence produced gives rise to suspicion only, as distinguished from grave suspicion, he would be fully within his right to discharge the accused and at this state, he is not to see whether the trial will end in conviction or not and expression "not sufficient ground for proceeding against the accused" appearing in Section 227, is explained".

20.Thus, I find that there is no material available on record calling upon the revision petitioner herein/A4 to face the trial and she cannot be roped in, under Section 5 of TNPID Act, for the reasons stated supra. Accordingly, I find that in the absence of any positive evidence, she cannot be called upon to face the trial and I am inclined to allow this Criminal Revision Case.

21.Accordingly, this Criminal Revision Case is allowed and the order passed in discharge petition viz., Crl.M.P.No 3724 of 2017, by the learned Special Judge for TNPID cases at Coimbatore, dated 16.03.2018 is hereby set aside and the fourth accused is discharged. As per the earlier order passed by this Court in Crl.O.P.Nos.33156 of 2013, 1979 & 1141 of 2014, charges against the accused Nos.. 6, 9 & 8 have been closed and accordingly, the sessions Judge is hereby directed to relink the remaining accused and proceed with the case.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

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To:

1. The Special Judge for TNPID cases,
   Coimbatore.

2. The Inspector of Police,
   EOW II Wing,
   Namakkal District.

3. The Public Prosecutor,
High Court,
Madras.

+1cc to Mr.R.Vivekananthan, Advocate, S.R.No.54521

Pre-delivery order made in
Crl.R.C.No.408 of 2018

GPL(CO)
SU(12/11/2021)