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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

ORDERS RESERVED ON 08.04.2022	ORDERS PRONOUNCED ON 25.04.2022
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CRL.O.P.NOS.16025 AND 11345 OF 2018

&

CRL.MP.NOS.8221 AND 8145 OF 2018

1. Vikram Kapur,
Tamil Nadu Urban Infrastructure
Financial Services,
112, Thiyagaraya Road, T.Nagar,
Chennai - 600 017.
2. Ambuj Sharma
3. Kandasamy Shanmugam
4. Mangat Ram Sharma
5. MD.Nasimuddin
6. Ramachandran Thanalapathy
Krishnamoorthy,
7. Subramanian Meyyappan
8. Govindasamy Ravikumar
9. Meenakshi Sundaram Krishnan Malathi

... Petitioners
in Crl.O.P.No.16025/2018

M/s.State Industries Promotion
Corporation of Tamil Nadu Ltd.,
19-A, Marshalls Road,
Egmore, Chennai - 600 009.

... Petitioner
in Crl.O.P.No.11345/2018

Vs.

The Deputy Registrar of Companies, Tamil Nadu
Having Office at Shastri Bhavan,
26, Haddows Road,
Chennai - 600 006.

... Respondent/
Complainant in both Crl.O.Ps



Common Prayer : Criminal Original Petitions filed under Section 482 of Criminal Procedure Code

i) to call for the records in EOCC.No.68/2018 on the file of the Additional Chief Metropolitan Magistrate [E.O.1], Egmore at Allikulam Complex, Chennai-3 and quash the same. (Crl.O.P.No.16025 of 2018)

ii) to call for the records pertaining to the summons issued by the Additional Chief Metropolitan Magistrate in EOCC No.68/2018 dated 14.03.2018 quash the same (Crl.O.P.No.11345 of 2018)

For Petitioners

in both Crl.O.Ps : Mr.N.R.Elango
Senior Counsel
for Mr.Ramesh Venkatachalapathy

For Respondent

in both Crl.O.Ps : Dr.D.Simon
Central Government Standing Counsel

COMMON ORDER

Crl.O.P.No.16025 of 2018 is filed by A2 to A10 and Crl.O.P.No.11345 of 2018 is filed by A1, who are facing trial in EOCC.No.68 of 2018 for the offence under Section 148(6) r/w. 148 (8) ;of the Companies Act, 2013, pending on the file of the learned Additional Chief Metropolitan Magistrate [E.O.1], Egmore at Allikulam Complex, Chennai-3 and to quash the same.

2.The gist of the complaint is that the A1/Company is a wholly owned Tamil Nadu Government Company registered and incorporated under the Companies Act. The Company was formed by the Government of Tamil Nadu for development and promotion of industries in the State. The petitioners/A2 to A10 are the nominee Directors of A1 Company. The respondent, Registrar of Companies found A1/Company falls under the ambit of Cost Audit, not filed the Cost Audit Report for the financial year 2013-14, even beyond the last date of submission which is contravention of sub-section (6) of Section 148 of the Companies Act, 2013 [hereinafter referred to as "the Act"]. As per Section 148(6), a Company shall within thirty days from the date of receipt of a copy of the cost audit report prepared in pursuance of a direction under sub-section (2) furnish Central Government with such report along with full information and explanation on every reservation or qualification contained therein and as per sub-section (8), if any default is made in complying with the provisions of this section, the Company and every Officer of the Company who is in default shall be punishable in the manner as



provided. Since the accused have not complied with the provisions, prosecution launched.

3. The contention of the petitioners is that the Companies Act, 2013 was enacted with effect from 29.08.2013, however, under Section 1(3) of the said Act, different provisions will be notified on different dates. Section 148 of the Act was notified with effect from 01.04.2014, as per the provision, the audit shall be conducted by a Cost Accountant in practice who shall be appointed by the Board. The meeting of the Board of Directors of SIPCOT was convened on 28.06.2016, in Chennai. In that meeting, the Board noted that

- (i) As per the Companies [Cost Records and Audit] Rules, 2014, pursuant to Section 148 of the Companies Act, 2013, the maintenance of cost records and conducting of Cost Audit is applicable to Non-Regulated Sectors, Construction Industry, industrial, commercial and social development and maintenance, real estate development including an Industrial Park or Special Economic Zone when overall turnover exceeds a limit of Rs.35 Crores/Rs.100 Crores respectively during the immediately preceding financial year;
- (ii) As per Rule, maintenance of Cost Records and conducting of Cost Audit is applicable to SIPCOT from the financial year 2014-15 since the turnover for the financial years 2013-14 and 2014-15 is Rs.382.97 Crores and Rs.474.05 Crores;
- (iii) As per Rule 6(1) of Companies [Cost Records and Audit] Rules, 2014, the Cost Auditor should be appointed within 180 days of the commencement of every financial year.
- (iv) M/s.S.Jagadeesan & Co. Cost Accountant has expressed his willingness to carry out Cost Audit for three Financial Years 2014-15, 2015-16 and 2016-7 at the fee of Rs.50,000/- per each financial year towards Cost Audit inclusive of XBRL filing;
- (v) Audit Committee of the Board in its meeting held on 28.06.2016 recommended the appointment of M/s.S.Jagadeesan & Co. Cost Accountant to carry out Cost Audit for three financial years 2014-15, 2015-16 and 2016-17 at the fee of Rs.50,000/- for each financial year towards professional charges for Cost Audit inclusive of XBRL filing. These proposals were approved by the Board and a resolution was also passed.



4. Accordingly, necessary statutory declarations were made to the respondent as early as October 2016. The petitioner Company had substantially complied with the new provisions of the Companies Act, 2013 and the Rules framed thereunder. This being the case, the respondent issued a show cause notice dated 04.05.2016 calling upon the petitioner to show cause as to whether Cost Auditor has been appointed which is mandatory for the financial year 2015-16 as per Section 148 of the Act read with Sub-rule (1) of Rule 6 of the Companies [Cost Records and Audit] Rules, 2014. Further, non-compliance of the above provisions will attract penal provisions against the Company and its officers in default of the same. The Managing Director of SIPCOT informed the respondent that already M/s.S.Jagadeesan & Co., Cost Accountant was appointed as a Cost Auditor for SIPCOT to carry out cost audit for the financial years 2014-15, 2015-16 and 2016-17 vide Board Resolution No.24 dated 28.06.2016 and further ensured that filing of necessary forms will be done before 15th July 2016. After receipt of this reply, the respondent issued a show cause notice dated 29.08.2016 under Section 148(8) of the Companies Act. Immediately on 28.09.2016, the SIPCOT informed that already necessary documents were filed in Form CRA-4 for the financial year 2014-15 vide SRN G12628004 dated 28.09.2016 and the payment challan was also forwarded to them. The reason for the delay, already informed, despite the same the respondent filed the above complaint.

5. It is further submitted that in the complaint, there is no requisite averments that all the Directors and Officers of the Company had knowingly and actively taken part in the affairs of the Company and committed the offence without taking proper care. In this case, it is only a fine which can be imposed under Section 148(8) of the Companies Act, for any violation. The petitioner complied with the requirements, filed the necessary documents and made payment as early as 28.09.2016, thereafter the complaint was filed and taken on file only in the year 2018. Hence, the offence cannot be construed as continuing offence.

6. The Apex Court in the case of Gokak Patel Volkart Ltd. vs. Dundayaa Gurushiddaiah Hiremath and others reported in [1991] 2 SCC 141 referred to the dictionary meaning for 'continuing offence' and various other judgments of the Apex Court, more particularly extracted the observations made by Shelat, J. in the case of State of Bihar vs. Deokaran Nenshi [(1972) 2 SCC 890], which reads as follows:

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of



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those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an actor omission which constitutes an offence one and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

7. Further, in paragraph No.25 of the aforesaid judgment, the Apex Court held as follows:

"25. The expression 'continuing offence' has not been defined in the Code. The question whether a particular offence is a 'continuing offence' or not must, therefore, necessarily depend upon the language of the statute which creates that offence, the nature of the offence and the purpose intended to be achieved by constituting the particular act as an offence."

8. The aforesaid judgment of the Apex Court was followed by this Court in the case of Teledata Technology Solutions Limited and others vs. Deputy Registrar of Companies reported in 2022 SCC Online Mad 102.

9. Thus, looking the case on fact, that already the petitioner Company, complied and submitted the requisite statutory documents and paid the requisite fees as early as on 28.09.2016, then it cannot be stated as an continuing offence. Admittedly, in this case the violation under Section 148(8) of Companies Act, 2013 attracts only fine. Further, as per Section 468 Cr.P.C., the limitation period is six months, but in this case, the complaint was filed and taken on file only in the year 2018, which is beyond the period of limitation. In view of the same, the petitioners pray for quashing the complaint.

10. Dr. D. Simon, learned Central Government Standing Counsel appearing for the respondent submitted that the petitioners violated the statutory provisions for which explanation was initially sought for, since explanation was not proper and convincing, show cause notice was issued. After issuing of show



cause notice, reply was received and it was found that they have violated the provisions of the Companies Act, 2013. He further submitted that since the accused have not complied with the provisions under Section 148(6) of the Companies Act, 2013, another show cause notice was issued on 29.08.2016 finding that accused have committed the offence under Section 148(8) which is a continuing offence within the meaning of Section 472 Cr.P.C., hence there is no question of barred by limitation arises, complaint filed taken on file, summons issued and on receipt of the summons, the petitioners approached this Court. He fairly submitted that SIPCOT is a Government Company which was formed by the Government of Tamil Nadu for promotion and development of Industries by forming Industrial Park or Special Economic Zone. He has not disputed the fact that the accused A2 to A10 are nominee Directors and Officials of the A1 Company. He further submitted that the Government of India, Ministry of Corporate Affairs by General Circular No.1/2020 dated 02.03.2020, instructed that in case of lapses attributable to the decision taken by the Board or its Committees, all care must be taken to ensure that civil or criminal proceedings are not unnecessarily initiated against the Independent Directors or the Non-Executive Directors unless sufficient evidence exists to the contrary which includes Directors nominated by the Government in Public Sector undertakings and Public Sector Financial Institutions. He further submitted that with regard to the above case, the Registrar of Companies had taken up with the appropriate authorities, in view of the General Circular No.1/2020 soon appropriate action would be taken.

11.Considering the submissions made and on perusal of the materials, it is seen that the petitioner/A1 Company is a Public Sector Company and A2 to A10 are its nominee Directors and Officers of the A1 Company. Section 148 of the Companies Act, got notified on 01.04.2014, the Companies [Cost Records and Audit] Rules, 2014 was pursuant to Section 148 of the Companies Act. The requisite turnover attracting appointment of Cost Accountant as a Cost Auditor has been complied with by resolution dated 28.06.2016 and CRA-4 Form for the Financial Year 2014-15 filed. In this case, show cause notice issued on 29.08.2016, suitable reply sent on 28.09.2016 informing appointment of Cost Accountant and filing of the requisite statutory forms. Thereafter, it cannot be stated to be a continuing offence. Admittedly, for any violation under Section 148 of the Companies Act, only fine can be imposed, hence, any prosecution ought to have been initiated within a period of six months. Admittedly, in this case complaint was filed and taken cognizance only in the year 2018, which is beyond the period of limitation. Further, as could be seen from the General Circular No.1/2020 instructions already issued to ensure that civil or



criminal proceedings are not initiated against Independent Directors or Non-Executive Directors.

12. For better appreciation, General Circular No.1/2020 dated 02.03.2020 is extracted hereunder:
General Circular No. 1/2020

F.No.16/1/2020- Legal
Government of India
Ministry of Corporate Affairs

5th Floor, 'A' Wing, Shastri Bhawan,
Dr. R.P. Road, New Delhi
Dated: 2nd March, 2020

To,

All Regional Directors,
All Registrars of Companies, All Official Liquidators.

Subject: Clarification on prosecutions filed or internal adjudication proceedings initiated against Independent Directors, non-promoters and non-KMP non-executive directors - reg.

Sir,

Under several provisions of the Companies Act, 2013 [Act], proceedings are required to be initiated against an officer in default for violations committed under the Act. The term "officer who is in default" is defined under section 2(60) of the Act, wherein various officers of the company have been identified.

2. Ordinarily, a whole-time director [WTD] and a key managerial personnel [KMP] are associated with the day-to-day functioning of the company and accordingly such WTDs and KMPs would be liable for defaults committed by a company. In absence of a KMP, such director or directors who have expressly given their consent for incurring liability in terms of the e-form GNL-3 filed with the Registrar would be liable. Where the consent for incurring liability for any of the provisions dealing with maintenance, filing or distribution of accounts or records is submitted in e-form GNL-3 by a person under the immediate authority of the Board or any KMP, the liability of such person will arise. However, in certain cases, the penal



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provisions in the Act hold a specific director, or officer, or any other person accountable for the default, in such cases, action should be initiated only against such director, or officer, or person, as the case may be, such as disclosure of interest by directors under section 184 of the Act.

3. Section 149 (12) is a non obstante clause which provides that the liability of an independent director (ID) or a non-executive director (NED) not being promoter or key managerial personnel would be only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. In view of the express provisions of section 149(12), IDs and NEDs (non-promoter and non-KMP), should not be arrayed in any criminal or civil proceedings under the Act, unless the above mentioned criteria is met. Typically, apart from IDs, non-promoter and non-KMP, NEDs, would exist in the following cases:

- a) Directors nominated by the Government on the public sector undertakings;
- b) Directors nominated by Public Sector Financial Institutions, Financial Institutions or Banks having participation in equity of a company, or otherwise;
- c) Directors appointed in pursuance to any statutory or regulatory requirement such as directors appointed by the NCLT.

4. The nature of default is also crucial for arraigning officers of the company for defaults committed under the Act. All instances of filing of information/records with the registry, maintenance of statutory registers or minutes of the meetings, or compliance with the orders issued by the statutory authorities, including the NCLT under the Act are not the responsibility of the IDs or the NEDs, unless any specific requirement is provided in the Act or in such orders, as the case may be. The responsibility of the NEDs, ordinarily arise in such cases, where there are no WTDs and KMPs.

5. At the time of serving notices to the company, during inquiry, inspection, investigation, or adjudication proceedings, necessary documents may be sought so as to ascertain the involvement of the concerned officers of the company. In case, lapses are attributable to the decisions taken by the Board or its Committees, all care must be taken to ensure that civil or criminal proceedings are not unnecessarily



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initiated against the IDs or the NEDs, unless sufficient evidence exists to the contrary.

6.The records available in the office of the Registrar, including e-forms DIR-11 or DIR-12, along with copies of the annual returns or financial statements should also be examined so as to ascertain whether a particular director or the KMP was serving in the company as on the date of default.

7.In case of any doubts, with regard to the liability of any person, for any proceedings required to be initiated by the Registrar, guidance may be sought from the Ministry of Corporate Affairs through the office of Director General of Corporate Affairs. Consequently any such proceedings must be initiated after receiving due sanction from the Ministry.

8.All Registrars are directed to immediately and scrupulously follow the above mentioned Standard Operating Procedure with respect to all ongoing cases. Further, with respect to cases where prosecution may have been already filed but the above mentioned cases criteria is not satisfied, the same may be submitted to this Ministry for necessary examination and further direction thereon.

9.This issues with the approval of the competent authority.

Yours faithfully,

(Parvez Naikwadi)
Assistant Director
Legal & Prosecution

Copy to:-

- 1.DGCoA
- 2.E-Governance Section with a request to place this circular on the Ministry website.
- 3.Guard File

13.Thus, on the above facts of the case, this Court finds that no case made against the petitioners, warranting continuation of complaint and trial, further continuance of case would amount to abuse of process of law.

14.In view of the above, the proceedings in EOCC.No.68/2018 pending against the petitioners on the file of the Additional Chief Metropolitan Magistrate [E.O.1], Egmore at Allikulam



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Complex, Chennai-3 is hereby quashed. Accordingly, these Criminal Original Petitions are allowed. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional Chief Metropolitan Magistrate [E.O.1],
Egmore at Allikulam Complex, Chennai - 3.
2. The Deputy Registrar of Companies, Tamil Nadu
Having Office at Shastri Bhavan,
26, Haddows Road, Chennai - 600 006.
3. The Public Prosecutor,
High Court, Madras.

+2ccs to Dr.D.Simon, Advocate, S.R.No.28040, 28041

+2ccs to Mr.Ramesh Venkatachalapathy, Advocate, S.R.No.28096

Cr1.O.P.Nos.16025 and 11345 of 2018

GPL(CO)
RLP(02/05/2022)