IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.09.2023

PRONOUNCED ON: 19.09.2023

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

Crl.O.P.No.2229 of 2021
and
Crl.M.P.Nos.1219 & 1221 of 2021

1.Resurgent Power Projects Ltd.,
represented by its CFO (KMP),
Krishnan Sankarasubramanian
(Formerly known as Enmas GB
Power System Projects Ltd.,)

2.Pattabhiraman
Managing Director

3.Gopinath Neelakanta Pillai Kamalam
Whole Time Director

4.Alur Chakrapani
Whole Time Director

5.Krishnan Sankarasubramanian
CFO (KMP) ... Petitioners

/vs/

The Deputy Registrar of Companies
Tamil Nadu, Chennai,
Having office at 26, Haddows Road
Nungambakkam, Chennai-600 006. ... Respondent

Prayer : Criminal Original Petition has been filed under Section 482 Cr.P.C. to call for the records in EOCC.No.69 of 2018 on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences-I), Egmore, Chennai and quash the same.

For Petitioners ... Mr.K.Maheshwaran

For Respondent ... Mr.T.L.Thirumalaisamy
Central Government Standing Counsel

ORDER

Challenging the criminal proceedings in EOCC.No.69 of 2018 on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences-I), Egmore, Chennai, the present criminal original petition has been filed.

2.The case of the complainant is that M/s.Resurgent Power Projects Limited, (formerly known as Enmas GB Power System Projects Ltd.,)/the 1st accused is a private limited company incorporated under the provisions of the Companies Act on 15.11.1995. The 2nd Accused is the Managing Director and the 3rd and 4th Accused are the Whole Time Directors and the 5th Accused is the Chief Financial Officer of the said company. As per the details of turnover and the products furnished by the 1st petitioners' company for the financial year 2014-15, the 1st petitioners' company has to maintain cost records and get the same audited for the financial year 2015-16. But the 1st petitioners' company has failed to appoint the cost auditor within the stipulated time limit as prescribed U/s.148 (3) and Rule 6 (2) of Companies (Cost Records and Audit) Rules, 2014 and thereby, the company has violated Sec.148(6) of the Companies Act. In respect of the said alleged violation, a show cause notice was issued to the company on 04.05.2016 to reason for non appointment of cost Auditor and no reply was received from the company. Then again a show cause notice was issued on 05.12.2016 and thereafter, as the 1st petitioners' company is said to fail to comply with the appointment of Cost Auditor, the company is said to have violated the mandatory provision under the companies Act. Thus, with these allegations, the complaint is filed against the petitioners, as they being the directors of the company failed to take reasonable steps to secure the compliance by the company. With such allegations, the complainant/respondent has filed the above private complaint before the learned Magistrate. Now, it is under challenge.

3.The learned counsel for the petitioners/accused contended that the impugned complaint discloses that the petitioners' Company were required to get their cost records for the financial year 2015-2016 audited but the transactions of financial year 2014-2015 were taken for charging non-appointment of Cost Auditor for the financial year ending 31.03.2016. Therefore, the said complaint is liable to be quashed on that point alone.

4.He further submitted that this case has been initiated under a wrong presumption that the Annual aggregate turnover of the company from the goods covered from the maintenance of the cost records under Companies (Cost records and Audit) Rules, 2014, is 130 crores and the total annual turnover of the company is approximately 155.04 crores. Whereas the total income of the company from manufacturing was Rs.5.67 crores and the income from services was Rs.3.01 Crores. Thus, the total income of the company for the Financial Year ending 31.03.2015, from both manufacturing and services was only Rs.8.68 crores which is lesser than Rs.35 crores being the turnover fixed for statutory cost auditing and the appointment of cost auditor for the company under the Act. But the respondent had wrongly took into consideration of even the income from trading in arriving the total turnover of the company. This wrong calculation of total turnover was clearly explained by the company in their reply dated 17.05.2016 which was not at all considered and ignored by the company. A clear explanation was given by the company that the annual turnover of the company from manufacturing and services does not exceed the limit prescribed under Companies (Cost records and Audit) Rules, 2014 and the total revenue from manufacturing is only 5.67 Crores which is well within the prescribed limits under the Act and therefore, appointment of a cost auditor for the petitioners' company is not at all necessary.

5.Further, the learned counsel for the petitioners submitted that the Directors' report filed along with financial for the said financial year 2014-15 clearly clarified as follows that the question of appointment of Cost Auditor does not arise.

> "***Cost Auditors***
>
> ***The board, subject to the approval of the Central Government, has re-appointed Ms.S.Subhashini, Practicing***

Cost Accountant, holding Membership No.22904, allotted by the Institute of Cost & works Accountants of India, as a Cost Auditor for conducting compliance and audit of cost accounting records for the financial year 2015-16, in terms of the Companies (Cost Records and Audit) Amendment Rules, 2014. The company has also received necessary certificate under Section 141 of the Act 2013 from him conveying her eligibility. A sum of Rs.1 lakhs has been fixed by the board as remuneration in addition to reimbursement of service tax, payable to her and is also required to be ratified by the members, at the ensuing AGM as per Section 148(3) of the Act 2013. The company does not require to carry out Cost Audit for the year 2014-15 and thereby filing of Cost Audit Report does not arise. As required under the Cost (Cost Accounting Records) Rules, 2011, the Company has filed the Cost Audit Report for the year 2013-14 in XBRL format along with cost compliance report."

However cost audit had been conducted for the financial year 2014-15 copy of which is attached and since its not coming under the purview of filing cost audit report based on the Turnover criteria, the same had not been filed with the dept for financial year 2014-15. It is also submitted that in fact consent had been obtained for appointment of cost auditor for subsequent financial year also and in fact the said Cost auditor had completed her report stating that we are not coming under the purview of cost audit for financial year 2015-16 and submitted her invoice for payment.

6.It is submitted by the learned counsel for the petitioners that Section 148(8) of the Companies Act speaks about the punishment for non-compliance (if any) of Section 148 and Section 148(8) (a) speaks that the company and every officer of the company who is in default shall be punishable in the manner as given in sub-section (1) of Section 147. Section 147(1) states that if any provision from section 139 to 146 both inclusive is contravened, the company shall be punishable with fine which shall not be less than 25,000 but which may extend to 5 lakh rupees and to every officer of company in default shall be punishable with imprisonment which may extend to 1 year or with fine which shall be not less than 10,000 but which may extend to 1 lakh rupees or with. The Sections 139 to 146 of the Act only speaks about appointment of regular auditors. Being so for non appointment of a Cost Auditor, no prosecution could lie u/s. 148

(6) of the Act.

7.He submitted further that a detailed statement was provided in the explanation namely, net revenue from manufacture was 567,27,265, income from services was 301,83,369. Apart from this, the company does trading which will not fall under the category manufacturing or services, and the revenue from the trading activity is approximately 146 crores. Being so, only because of the reason that the return filed by the company did not have separate columns to mention the income from trading, manufacturing and services separately and only because, the total revenue was shown as Rs.155 Crores instead of mentioning the details of the revenue in the returns by splitting up under these three heads, no prosecution could be launched on wrong presumption. The 5th petitioner was not at all associated with the company during the relevant period of time, namely for the financial year 2014-15 and during the said financial year ending 31.03.2015, he was never been appointed as CFO, only with effect from 01.08.2016. Being so, by no stretch of imagination the petitioner could be held liable for any act of violation as alleged during the year ending 31.03.2015. In such circumstances, arraying the 5th petitioner herein as an accused in the case, showing him to be responsible for the alleged violation is bad in Law and thus, pleaded to quash the criminal proceedings.

8.The learned Central Government Standing Counsel appearing for the respondent/complainant submitted that the first petitioner/A1 is the petitioners' company and the 2nd to 4th petitioners/A2 to A4 are Directors of the company, namely, Resurgent Power Projects Ltd., during the period of offence. The petitioners' company failed to get their cost audit records audited through cost auditor appointed by the company for the financial year 2015-2016. As per the details of turnover and products furnished by the petitioners' company in AOC-4/AOC-4 XBRL filed for the financial year 2014-15, the Company has to maintain cost records and get the same audited through cost auditor. However, the company failed to appoint the cost auditor within the stipulated time limit as prescribed under Section 148(3) of Companies Act 2013 read with 6(2) of Companies (Cost Records and Audit) Rules, 2014.

9.Further, he submitted that the respondent issued show cause Notice on 04.05.2016 under section 148(8) of the Companies Act, 2013 to the petitioners' company for the non-compliance of Section 148 of the Companies Act, 2013 read with Rule 6(2) of the Companies (Cost Records and Audit) Rules, 2014. However, the reply of the Company was not satisfactory. Hence, another show cause notice dated 05.12.2016 has also been sent, but no reply was received. Therefore, the Respondent had filed complaint, before the learned Additional Chief Metropolitan Magistrate, bearing E.O.C.C.No.69 of 2018 against the petitioners, for the offence which is punishable under Section 148(8) of the Companies Act, 2013 read with Rule 6 of the Companies (Cost Records and Audit) Rules, 2014. As per Form MGT-7 filed by the Company in SRN Q74309451 with the respondent's Portal – MCA 21, the turnover of the petitioners' company for the financial year 2014-15 was Rs.1,550,492,752 which is more than the threshold limit prescribed in Rule 3 of companies (Cost Record and Audit) rules 2014 (the same is annexed as Annexure A) Hence, the reply of the

Company with respect to the annual turnover is not tenable and evidently exceeds the limit prescribed by the Companies Act and Rules made thereunder. Therefore, it is mandatory that the cost audit records are to be audited as required under Section 108 of the Companies Act 2013 r/w rule 6(2) of Companies (Cost audit) rules 2014. In the present case the commencement of the financial year is on 01.04.2014 and the date on or before which cost auditor has to be appointed is 01.10.2014.

10.Further, he submitted that S.Subashini appointed as Cost Auditor for the financial Year 2015-16 under letter of appointment dated 11.06.2015, then its not possible for the Cost Auditor to give audit report for the financial year 2014-2015 and further submitted that the 5th petitioner/5th accused was appointed after the period of the offence was committed. However, it is observed from the signatory details in the MCA 21 portal available with the office of respondent, it can be seen that the 5th petitioner/5th Accused was appointed on 01.08.2016 in the capacity of Chief Financial Officer (CFO) in the petitioners' company and still continues to hold office as Chief Financial Officer (CFO) in the petitioners' company.

11.I have considered the matter in the light of the submissions made by the learned counsel for the petitioners as well as the Central Government Standing Counsel appearing for the respondent and perused the materials available on record.

12.On perusal of the records, it is seen that it is not disputed that the first petitioner/A1 is the petitioners' company and the 2nd to 4th petitioners/A2 to A4 are the Directors of the petitioners' company viz., Resurgent Power Projects Ltd., during the period of offence. It is also not disputed that the 5th petitioner/5th accused namely Krishnan Sankarasubramanian was appointed on 01.08.2016 in the capacity of Chief Financial Officer (C.F.O) in the petitioners' company. In this case, the prosecution is that the petitioners' company have threshold limit of turnover as stated in Rule 3 of Company (Cost records and Audit Rules) 2014 and failed to appoint a cost auditor within 180 days of the commencement of every financial year. In this case, the company failed to appoint a cost auditor for the financial year 2014-2015. Admittedly, the 5th petitioner was appointed as Chief Financial Officer in the petitioners' company only on

01.08.2016. Therefore, at the relevant period of offence committed, he is not in the company. Therefore, the prosecution against the 5th petitioner/5th accused is unsustainable and liable to be quashed. Accordingly, the criminal proceedings against the 5th petitioner/5th accused is hereby quashed.

13.It is not disputed that the petitioners' company involved in Generation transmission, distribution and supply of electricity regulated by the relevant regulated body or authority Act, 2003 and required to include cost records entry books of Accounts. Now, the case of the complainant is MGT-7 annual Returns form for the financial year 2014-2015 submitted by the petitioners' company reveals that a turnover of the company is 155, 04, 92, 752/-. Therefore, the petitioners' company have threshold limit as stated Rule 3 of Companies (Cost Record and Audit) Rules 2014 shall appoint a cost auditor within 180 of the commencement of every financial year, the rule came into force on 30.06.2014. Therefore, the petitioners' company ought to have appointed the cost auditor within 180 days from 30.06.2014 which falls on 27.12.2014.

14.It is also not disputed that the petitioners' company had appointed Ms.S.Subashini as cost auditor for the financial year 2015 – 2016. The case of the petitioners' company is the total income of the company from manufacturing was Rs.5.67 Crores and the Income from services was Rs.3.01 Crores. Thus, the total income of the company for the financial year ending 31.03.2015, from both manufacturing and services was only Rs.8.68 Crores which is lesser than Rs.35 Crores being the turnover fixed for statutory cost auditing and the appointment of cost auditor for the company under the Act. The respondent wrongly presumed the annual aggregate turnover of the company is 1,550,492,752/-

15.Further the contention of the petitioners' company is that the companies (Cost Records & Audit) Rules, 2014, Rule 3 was amended in the year 2016 only in the amendment over all turnover from all its products and services of Rs.35 crores or more during the immediately proceed financial year required cost records for such products or services in their books of accounts and appointment of cost auditor the turnover of this company is below 35 crores of the relevant period. Further, submitted that the Institute of Cost Accountants of India clarified the application of cost records and audit to the companies engaged in trading activity and opined that the applicability of the Maintenance of Cost Records apply to the items manufactured or produced by the company. Thus, maintenance of cost records is not applicable for trading activity. The petitioners' company trading activity cannot be included in turnover. Therefore, it does not come under the purview of Rule 3 of Companies (Cost Records and Audit) Rules, 2014.

16.The learned counsel for the respondent relied on MGT-7 Annual Return filed by the petitioners' company, it shows the annual turnover as 1,550,492,752. On perusal of this annual return, the turnover done by the company is not disputed. But there is no split up details of income from service and income from manufactures and trading activity. It is to be noted that at the relevant period i.e. 2014 -2015, this amendment not came into force. Further, as per the clarification issued by the Institute of Cost Accountants of India, the applicability of the maintenance of cost records apply to the items manufactured or produced by the company and not applicable for trading activity. The reply given by the Institute of Cost Accountants of India is reproduced herein;

*"**Query: TCMQ/021/2018-19***

I would like to know for the following scenarios whether COST RECORDS AND AUDIT is applicable. Please revert on priority.

Turnover/Companies	*Regulated TRADING ACTIVITY*	*Non regulated*	*Total Reg & Non Reg*	*Other*	*Total turnover*
A	*50.41*	*12.62*	*63.03*	*21.41*	*84.44*
B	*51.95*	*27.46*	*79.41*	*0.01*	*79.43*
C	*0.11*	*95.14*	*95.25*	*0.01*	*95.25*

Scenarios:

1.In regulated sector the company is engaged in trading activity.

2.If in regulated sector 50% is trading and 50% is manufacturing.

Whether Cost records for TRADING ACTIVITY are to be maintained and accordingly COST AUDIT.

Reply:

The Companies (Cost Records & Audit) Rules, 2014 (as amended), Rule 3 states - " For the purposes of sub-section (1) of section 148 of the Act, the class of companies, including foreign

companies defined in clause (42) of section 2 of the Act, engaged in the production of the goods or providing services, specified in the Table below..."

It should be noted that the Applicability of the Maintenance of Cost Records apply to the items manufactured /produced by the company. Thus Maintenance of Cost Records is not applicable for Trading Activity."

17.In this case, there is no material on record to show that the annual turnover of the petitioners' company for items manufactured or produced by the company is more than 1,55.0 crores. Under these circumstances, the reply submitted by the petitioners' company ought not to have been considered by the respondent before filing the private complaint. The reply is reproduced for better appreciation:

"**Respected sir,**

Sub: Response to Notice for Non-compliance of Sec 148 of the Companies Act, 2013- for the financial year ended 31.03.2016 – Your email reference dated 4th May 2016.

1.	*Name of the Company*	*ENMAS GB POWER SYSTEMS PROJECTS LIMITED*
2.	CIN of the Company	U29113TN1995PLC033528
3.	Financial Year ending on	3/31/2015

1.	***Name of the Company***	***ENMAS GB POWER SYSTEMS PROJECTS LIMITED***
4.	Annual turnover of the company during 2014-15	GROSS – Rs.155,71,81,473.50
5.	4 digit CETA heading wise annual turnover of the company during 2014-15	
6.	Response:-	***As the annual turnover of the company from manufacturing and services does not exceed the limit prescribed under Companies (Cost Records and Audit) Rules, 2014 and the total revenue from manufacturing is only Rs.5,67,27,265 (five crore sixty seven lakh twenty seven thousand two hundred and sixty five). Hence, Cost Audit is not applicable.***
(a.)	If Cost Auditor already appointed, state the SRN of CRA-2	***No***
(b.)	If Cost Auditor not yet appointed, state the reasons	***Not applicable as turnover from manufactured products has not crossed the limit as specified in Companies (cost records and audit) Rules, 2014.***
(c.)	Others, if any	***The Ministry of Corporate Affairs had notified the Companies (Cost Records and Audit) Rules, 2014 on 30th June 2014. Based on these rules, Cost Audit is applicable for a Company in the case of a company producing any one specific product or service specified in sub-clause (b) of clause (B) and sub-clause (b) of clause (C) of rule 3, the requirement for cost audit shall apply if the net worth of the company is rupees five hundred crore or more or the turnover from such product or such service is rupees one hundred crore or more.*** ***The Turnover of the Company includes income from Manufacturing, Trading & Services.***

1.	***Name of the Company***	***ENMAS GB POWER SYSTEMS PROJECTS LIMITED***
		During the financial year ended 31/3/2015 (FY 2014-15) the following is the revenue structure- ***The aggregate turnover of the individual products for which cost records are required to be maintained has not exceeded the prescribed limit under the Rules and hence applicability for Cost Audit for the Company does not arise and hence Cost Auditor has not been appointed for the financial year 2014-15.*** ***We also wish to state that in the Annual Return in AOC 4 form filed by us, the above detailed break up is not furnishable in the specified format therein and hence the detailed explanation is furnished to you to emphasise the fact that applicability for Cost Audit for the Company does not arise and hence Cost Auditor has not been appointed for the financial year 2014-15. The company has obtained Cost Compliance Report from the Cost auditor appointed by the company in compliance with the above said Rules.***

18.In view of the above fact, no offence is made out against the petitioners' company. Applying the principle of the Hon'ble Supreme Court in ***State of Haryana and others Vs. Bhajanlal*** reported in ***AIR 1992 (604),*** the criminal proceeding against the petitioners is unsustainable and misusing the process of law and it is liable to be quashed.

19.In the result, the criminal proceeding in EOCC.No.69 of 2018 on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences-I), Egmore, Chennai against the petitioners is hereby quashed and the criminal original petition is allowed. Consequently, connected miscellaneous petitions are closed.

Index : Yes/No
Internet : Yes/No **19.09.2023**
sms
To

1.The Deputy Registrar of Companies
Tamil Nadu, Chennai,
Having office at 26, Haddows Road
Nungambakkam, Chennai-600 006.

2.The Public Prosecutor,
High Court, Madras.

V.SIVAGNANAM ,J.

sms

Pre-delivery order made in
Crl.O.P.No.2229 of 2021
and
Crl.M.P.Nos.1219 & 1221 of 2021

19.09.2023