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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **30.03.2023**
PRONOUNCED ON : **06.04.2023**

CORAM :

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Criminal Original Petition No. 30374 of 2019
and
Crl.M.P. No. 16451 of 2019

1.M/s.Shine School of Excellence Pvt.Ltd.,
having registered office at
1057, 3rd Floor, Jaya Enclave,
Aviniashi Road, Coimbatore – 641 018,
Represented by Accused Number,
Mr.Anthoniasamy Selvaraj aged about 80 years, A2,
Smt.Selvaraj Ganagam, aged about 71 years, A3.

2.Mr.Anthoniasamy Selvaraj,
Director, aged about 80 years,
son of Mr.Anthoniasamy,
No.5A, Krishna Nagar, 1st street,
Near Sowripalayam, Esisowripalayam,
Coimbatore – 641 028.

3.Smt.Selvaraj Ganagam,
Director, aged about 71 years,
D/o.Arokiasamy,
No.5A, Krishna Nagar, 1st Street,
Near Sowriopalayam, Esisowripalayam,
Coimbatore – 641 028. ... Petitioners

Versus

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Registrar of Companies,
Tamilnadu – Coimbatore,
No.7, AGI Business Park,
Phase II, I Floor, Civil Aerodrome Post,
Avinashi Road, Peelamedu,
Coimbatore – 641 014. ... Respondent

PRAYER : Criminal Original Petition filed under Section 482 of the Criminal Procedure Code seeking to call for the records and quash the proceedings in Spl.C.C. No. 34 of 2019 on the file of Additional Sessions Judge, Coimbatore.

For Petitioners : Mr. Kaushik N. Sharma for
M/s.KNS Law Chambers.

For Respondent : Mr. M.E. Saraswathi,
Senior Standing Panel Counsel.

O R D E R

The petition seeks to quash the private complaint in Spl.C.C. No. 34 of 2019 on the file of Additional Sessions Judge, Coimbatore for the offence under Sections 92 (5) and 137 (3) of the Companies Act, 2013 (herein after referred to as 'the Act' for the sake of convenience) for non-compliance of Sections 92 (4) and 137 (1) & (2) of the Act.

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2.It is alleged that the first petitioner is a company represented by second and third petitioners; that the petitioners did not file the annual returns and financial statements with the complainant for the financial year ending on 31.03.2017; that the respondent had issued a show cause notice on 28.09.2018; that the petitioners had not filed the annual return and balance sheet till date and; that the offence under Sections 92 (5) and 137 (3) of the Act are continuing offences. Hence, the complaint.

3.The learned counsel for the petitioners submitted that the impugned complaint is liable to be quashed since subsequently, the petitioners have filed the annual return and the balance sheets; that the respondent had sent a letter on 30.09.2019 stating that the offences under Sections 92 (5) and 137 (3) of the Act can be compounded on payment of a compounding fee; that they demanded compounding fee of Rs.6,72,000/- for the offence under Section 92 (5) of the Act and Rs.15,03,000/- for the offence under Section 137 (3) of the Act. The learned counsel further would submit that while filing their balance sheet

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and annual return, the complainant demanded a penalty and they had also paid a penalty of Rs.29,600/-. The learned counsel therefore submitted that the impugned prosecution would amount to double jeopardy. Alternatively, the learned counsel submitted that the offences under Section 92 (5) and 137 (3) of the Act along with other offences were decriminalised by the amendments to the Act made in the year 2019. The punishment prescribed was changed from fine to penalty thereby suggesting that the offences can no longer be tried by a learned Magistrate and it has to be adjudicated by the adjudicating authority under Section 454 of the Companies Act, 2013. The learned counsel relied upon the Judgment of the Hon'ble Supreme Court in ***T. Barai Vs Henry Ah Hoe and Another*** reported in ***(1983) 1 Supreme Court Cases 177*** in support of his submission that where the legislature had mollified the rigour of the punishment, the lesser punishment has to be imposed on the accused notwithstanding the fact that the offence took place when more severe punishment was provided under the Act.

4.The learned Senior counsel for the respondent would submit that the subsequent amendments cannot take retrospective effect and pending prosecutions have to be continued in the same manner as if the amended

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Act did not come into existence in view of 6A of the General Clauses Act, 1897. The learned Senior counsel further submitted that the payment of penalty for the delayed submission of annual return or the balance sheet would not absolve the petitioners from the offences. Hence, the learned Senior counsel prayed for dismissal of the quash petition.

5.The learned Senior counsel has also filed a counter affidavit of the respondent wherein the respondent had stated that if the petitioners are aggrieved by the quantum of compounding fee imposed by the Regional Director, they are entitled to seek for revision. The petitioners cannot seek quashing on the ground that the compounding fee is excessive. The counter further states that since the petitioners have not paid the compounding fee they are not entitled to seek for quashing of the impugned complaint.

6.This Court finds that when the alleged offence took place, the penal provisions viz., Sections 92 (5) and 137 (3) of the Act provided for imposition of fine. By virtue of the Companies Amendment Act, 2019 which came into force on 02.11.2018, the punishments provided for not

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filing the annual returns and balance sheets was changed from 'punishable with fine' to 'liable to a penalty' . The statement of objects and reasons for bringing about this amendment is provided in the Companies (Amendment) Bill, 2018 which was not passed and subsequently passed by the Companies (Amendment) 2019. However, the Statement of objects and reasons made it clear that the Act was introduced to reduce the rigour of punishments for certain lapses which are technical and procedural nature for the purpose of promoting the ease of doing business and for better corporate compliance.

7.This Court had occasion to consider a similar provision under Section 167 (5) of the Act, where also by virtue of the amendment, the punishment prescribed was changed from fine to penalty, thereby decriminalising the said violation. This court had considered the statements of objects and reasons of the Amending Act and the Judgment of the Hon'ble Supreme Court in ***T. Barai Vs Henry Ah Hoe and Another*** reported in ***(1983) 1 Supreme Court Cases 177*** in ***B.Kannan Vs. The Deputy Registrar of Companies*** in ***W.P.No.2735 of 2017*** dated ***12.12.2022*** and held as follows;

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"6. We have heard the learned counsel appearing on either side. Though the learned counsel strenuously made various submissions, he would ultimately submit that it would suffice if this Court considers the effect of the Companies Amendment Act 2020 to the pending prosecution. The only question hence to be decided by this Court is whether the amendment that was brought into force on 21.12.2020 by virtue of the Companies (Amendment) Act, 2020 can be applied to pending prosecutions.

7. In this case, the complaint is of the year 2017. The law as stood on the date of complaint for the alleged violation committed by the petitioner is as follows:

"...(6) If a person accepts an appointment as a director in contravention of sub-section (1), he shall be punishable with fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues."

8. At the relevant point of time, contravention was considered as an offence. Further, there was no Explanation II, which specifically clarified for the purpose of reckoning in the limit of Directorship of the

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20 companies, the dormant companies shall not be included. By virtue of the Companies (Amendment) Act, 2019 and the Companies (Amendment) Act 2020, the contravention is now liable for penalty by the adjudicating officer appointed by the Central Government. If the contravention is liable for fine, it is triable by a Magistrate and it is an offence and therefore, triable by a Magistrate. Penalty, however, is imposed by the adjudicating officer by the Central Government and hence, the contravention is no longer an offence. The Act not only mollifies the punishment prescribed for contravention, but also the procedure, for determining the penalty.

9.The Hon'ble Apex Court in ***T.Barai vs. Henry Ah hoe*** *reported in* ***(1983)1 SCC 177*** *had an occasion to consider the amendments made to Section 16(1)(a) of the Prevention of Food Adulteration Act, 1954. The Act originally prescribed punishment of 6 years for the said offence of the Act. In 1975, an amendment was made by the State of West Bengal by the West Bengal Amendment Act, which provided for punishment upto imprisonment for life for the said offence. Thereafter, the Parliament passed the Prevention of Food Adulteration (Amendment) Act, 1976, which provided for reduced punishment for the offence. The question*

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that was raised before the Hon'ble Supreme Court inter alia was whether the amendment would be prospective or would apply to pending prosecutions as well in the State of West Bengal. The amendment not only brought about change in the punishment, but also change in the procedure. By virtue of the amendment, the punishment prescribed was only 3 years, whereas, in the West Bengal Act, the punishment prescribed was life imprisonment. Therefore, the earlier West Bengal Act provided a trial by the Court of Sessions and by virtue of the amendments, the trial was to take place before the Magistrate. The Hon'ble Court held in such circumstances, held as follows:

“22.It is only retroactive criminal legislation that is prohibited under Art. 20(1). The prohibition contained in Art. 20(1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence prohibits nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It is quite clear that insofar as the Central Amendment Act creates new offences or enhances punishment for a particular type of offence no person can be convicted by such ex post facto law nor

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can the enhanced punishment prescribed by the amendment be applicable. But insofar as the Central Amendment Act reduces the punishment for an offence punishable under s. 16(1)(a) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common-sense. This finds support in the following passage from Craies on Statute Law, 7th edn. at pp. 387-88 :

"A retrospective statute is different from an ex post facto statute. "Every ex post facto law ..... " said Chase J. in the American case of Calder v. Bull(1) "must necessarily be retrospective, but every retrospective law is not an ex post facto law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive ; it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement : as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do

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not consider any law ex post facto within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction ..... There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime."

23.To illustrate, if Parliament were to re-enact s. 302 of the Indian Penal Code, 1860 and provide that the punishment for an offence of murder shall be sentence for imprisonment for life, instead of the present sentence of death or imprisonment for life, then it cannot be that the Courts would still award a sentence of death even in pending cases. This dictum was followed by the Hon'ble Apex Court in ***(2018)17 SCC 448*** *(cited supra).*

10. From the above extracted portion of the Judgment of the Hon'ble Apex Court, the following principles emerge:

(a) It is only retrospective criminal legislation that is prohibited under Article 20(1) of the Constitution of India.

(b) No person can be convicted by such ex post facto law nor can the enhanced punishment prescribed

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by the amendment be applicable.

(c) However, if the amendment reduces the punishment for an offence, the accused shall have benefit of such reduced punishment notwithstanding the fact that he had committed the offence prior to the amendment.

(d) In order to apply the third principle referred, the offence described under the old Act and the new Act must be one and the same. If the ingredients are different, then, the principle of awarding reduced punishment after the amendment, would not be applicable.

11. The Judgment in ***In re Athlumney vs. Exparte Wilson*** *relied to the respondent reported in* ***[1898]2 Q.B 547*** *does not deal with a case where the Amendment seeks to reduce the rigour of punishment. Hence, it is not applicable to the facts of the instant case.*

12.Applying the above principles to the instant case on hand, we find that the Parliament had made amendments for the purpose of easing the doing of business and also for reduction of prosecution that are filed in the Special Court. The relevant portion of the Statement of Objects and Reasons for the amendments

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for the Amendment Bill 2018 which sought to make the amendment to Section 165(6) of the Companies Act as well, reads as follows:

".....The Committee recommended that the existing rigour of the law should continue for serious offences, whereas the lapses that are essentially technical or procedural in nature may be shifted to in-house adjudication process. The Committee observed that this would serve the twin purposes of promoting of ease of doing business and better corporate compliance. It would also reduce the number of prosecutions filed in the Special Courts which would in turn facilitate speedier disposal of serious offences and the offenders shall be penalised...."

Though this Bill lapsed, the subsequent Act in the year 2019, 2020 brought about the same amendment in Section 165(6) of the Act. In the 2019 Amendment Act, penalty was fixed at Rs.5,000/- for each day the contravention continues. However, the 2020 Amendment Act further mollifies it by fixing Rs.2000/- per day as penalty, subject to a maximus of Rs.2,00,000/-. Therefore, the object and reason in 2018 Bill are relevant, though it had lapsed. When that being the intention of the Legislature, we find that there is no reason why the said Amendment cannot be applied in favour of the accused in the pending

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prosecution. The accused shall also be entitled to the benefit of Explanation-II to Section 165(1) of the Companies Act.

13. The Hon'ble Apex Court in the case of ***B.Manna vs. State of West Bengal*** *reported in* ***AIR 1955 SC 84****, which was quoted with approval by the Hon'ble Apex Court in* ***T.Barai's case (cited supra)****, held that where the fresh legislation is brought on the same subject, the line of enquiry would be not whether the new Act expressly keeps alive, old rights and liabilities but whether it manifests an intention to destroy them. The new Act in the instant case i.e., the Companies (Amendment) Act, 2019 clearly manifestly an intent to treat the violations which are only technical to be adjudicated by a in-house process. Further, Section 454 of the Companies Act also makes it clear that where after adjudication and person either does not pay penalty or fails to comply with the order of adjudication, he is liable for punishment, either fine or imprisonment. Therefore, the object of the amendment Act is to give an opportunity to the person to comply with the provision and only after the order of adjudicating officer directing the compliance or his payment of penalty is violated, it would become an offence.*

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14. Therefore, we are of the view that the intention of the Parliament is very clear and the since of the Amendment Act 2020 mollifies the rigour of punishment the beneficial construction has to be applied in favour of the accused in pending prosecutions and all the prosecution has to be withdrawn and transferred to the adjudicating authority appointed under Section 454 of the Companies Act for further proceedings in terms of the said provision.“

8.The above observations are squarely applicable to the facts of the instant case. It is to be noted here that subsequent to modifying the sentence from fine to penalty in the year 2019, the Companies Amendment Act 2020 also brought about change in the quantum of penalty that can be levied. Therefore, the petitioners are entitled to the benefit of the Companies Amendment Act, 2019 and the Companies Amendment Act, 2020 which further changes or mollifies the rigour of punishment for the lapses. Since the petitioner's case is similar to the case that is extracted above, the prosecution against the petitioners is transferred to the adjudicating authority appointed under the Act to adjudicate the contravention committed by the petitioners in terms of

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Section 454 read with 92 (5) and 137 (3) of the Act.

9.With the above observations, this Criminal Original Petition stands disposed of. Consequently, the connected Miscellaneous Petition is closed.

06.04.2023

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Index: Yes/No

Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

To

1.Registrar of Companies,
Tamilnadu – Coimbatore,
No.7, AGI Business Park,
Phase II, I Floor, Civil Aerodrome Post,
Avinashi Road, Peelamedu,
Coimbatore – 641 014.

2. The Additional Sessions Judge,
Coimbatore.

SUNDER MOHAN, J

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3. The Additional Public Prosecutor,

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High Court of Madras,
Chennai.

Crl.O.P. No. 30374 of 2019
and
Crl.M.P. No. 16451 of 2019

Dated: 06.04.2023

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