



Crl.O.P.No.16374 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.09.2022

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.16374 of 2022
and Crl.M.P.No.9487 of 2022

Vasantha Kumar Ayyavu Palanichamy

...Petitioner

-Vs-

Securities and Exchange Board of India,
Overseas Towers,
No 756, Anna Salai,
Chennai-600 002.
Represented by its Assistant General Manager,
Mr.Deepu Anandan

... Respondent

Prayer: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to call for the records and quash the prosecution, as against the petitioner, in C.C.No.44 of 2021 on the file of the Principal Sessions Judge at Chennai for offences under Sections 24(1) of Securities and Exchange Board of India Act, 1992, Section 207 of the Companies Act, 1956 and Section 127 of the Companies Act, 2013.

For Petitioner : Mr.C.Arun Kumar

For Respondent : M/s.Sivakumar and Suresh



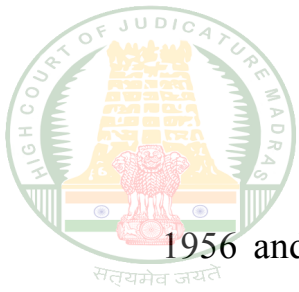
CrI.O.P.No.16374 of 2022

ORDER

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This Criminal Original Petition has been filed to quash the proceedings in C.C.No.44 of 2021 on the file of the learned Principal Sessions Judge at Chennai having been taken cognizance for the offences under Sections 24(1) of Securities and Exchange Board of India Act, 1992, Section 207 of the Companies Act, 1956 and Section 127 of the Companies Act, 2013.

2. The case of the prosecution is that the respondent lodged a complaint for the offences under Sections 24(1) of Securities and Exchange Board of India Act, 1992, (herein after called as “SEBI Act”), Section 207 of the Companies Act, 1956 and Section 127 of the Companies Act, 2013 as against the petitioner. There are totally seven accused in which the petitioner is arrayed as A7. On 01.06.1995, the Company called “Zylog Systems Limited” was incorporated. All the accused persons were in-charge and responsible for the conduct of the business of the company. While being so, on 25.09.2012, the company declared a dividend to the tune of Rs.16,44,64,200/-. It was not paid to the shareholders within the stipulated time. On 13.02.2013, the respondent sought for information as required under Section 11(2) (i) of the SEBI Act from the company regarding non-payment of dividend. On 20.02.2013, the company admitted that it had failed to comply with the provisions of the Companies Act,



Crl.O.P.No.16374 of 2022

1956 and also assured that payments will be made on or before 30.04.2013.

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The respondent sought for the details of the company relating to failure of payments of the declared dividend from the National Stock Exchange of India. On the reply, found that the company has not responded to the enquiries. Thereafter, the Competent Authority accorded sanction to prosecute against the accused persons and lodged a complaint.

3. Heard both sides.

4. It is seen that the petitioner is a Nominee Director appointed to the Board of Directors of the Company. At no point of time, he was in-charge and responsible for the conduct of the business of the company nor was he a signatory to any bank account of the company. Further, there is no averment, much less a legal one, to show how the petitioner is in-charge and responsible for the conduct of the business of the company. The respondent failed to issue any show cause notice to the petitioner herein. He was not given any opportunity to respond to the alleged allegations.

5. The learned counsel for the petitioner mainly relied upon Section 27 of the SEBI Act. It deals with “Offences by Companies”. On reading the proviso clause of Section 27(1) of the SEBI Act, clearly states that if a person is able to



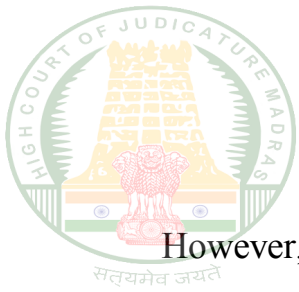
CrI.O.P.No.16374 of 2022

prove that the offence had been committed without his knowledge, then such a person cannot be rendered liable. It is relevant to extract the proviso to Section 27(1) of the SEBI Act, which is extracted hereunder,

“Provided that nothing contained in this Sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.”

6. Thus, it is clear that it is trite law that the complainant should have addressed a Show Cause Notice separately and properly to the petitioner and should have sought for an explanation. Only after considering the explanation, the Competent Authority should have accorded sanction to prosecute the petitioner. Admittedly, the petitioner was not served with any Show Cause Notice and he was not given an opportunity to explain for controversies.

7. A perusal of the complaint revealed that the company had declared dividend and failed to pay the dividend as mandated under provisions of the Companies Act. Further, the respondent had addressed a notice to the company seeking explanation as to why the dividend had not been paid as mandated under the provisions of the Companies Act. It is only the company, which had primarily taken the role of defaulter as per the version of the respondent.



CrI.O.P.No.16374 of 2022

However, the respondent failed to prosecute the company and without adding the company as an accused, the Trial Court had taken cognizance as against the Directors and issued summons.

8. The Hon'ble Supreme Court of India and this Court had time and again held that the company should be added as an accused and in the absence of the same, the Managing Director or the representative of the company cannot be proceeded with.

9. It is relevant to extract the provisions under Section 27 of the SEBI Act, as follows,

“(1) Where an offence under this act has been committed by a company, every person who at the time of the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this Sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.”

10. The Hon'ble Supreme Court of India held in the case of “ **Dayle De'souza and Government of India through Deputy Chief Labour Commissioner (C) and Ors**” reported in **AIR 2021 SC 5626**, as follows,



CrI.O.P.No.16374 of 2022

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“27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.”

11. Thus, it is clear that the prosecution of the company is mandatory.

Exception would possibly be, when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. Such exceptions are of no relevance in the case on hand. The respondent had miserably failed to array the company called “Zylog Systems Limited” as an accused. In the absence of arraying the company as an accused, prosecuting the instrumentalities of the company vicariously is nothing but an abuse of process of law. Further, there is no specific averment as against the petitioner, who is a Nominee Director, except the vague and bald assertion. There is no specific averment as against the petitioner to attract any of the offences. Therefore, the entire complaint is a clear abuse of process of law and it cannot be sustained as against the petitioner.

12. In view of the above, the proceedings in C.C.No.44 of 2021 on the file of the learned Principal Sessions Judge at Chennai, is hereby quashed.



Crl.O.P.No.16374 of 2022

Accordingly, this Criminal Original Petition stands allowed. Consequently,

connected miscellaneous petition is closed.

09.09.2022

Internet: Yes

Index : Yes/No

Speaking/Non Speaking order

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G.K.ILANTHIRAIYAN. J.

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To

The Principal Sessions Judge at Chennai,



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Crl.O.P.No.16374 of 2022

Crl.O.P.No.16374 of 2022
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09.09.2022