IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 06TH DAY OF SEPTEMBER 2019

BEFORE

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

WRIT PETITION NO.47514 OF 2017(GM-RES)

BETWEEN:

1. DR VILOO PATELL
MANAGING DIRECTOR
M/S AVESTHAGEN LIMITED
A COMPANY INCORPORATED UNDER
COMPANIES ACT, 1956 HAVING ITS
NO 43/39, 4TH FLOOR WARD NO 91,
PROMENADE ROAD, SECOND CROSS,
BANGALORE KA 560005

2. M/S AVESTHAGEN LIMITED
A COMPANY INCORPORATED UNDER
COMPANIES ACT 1956 HAVING ITS
NO 43/39, 4TH FLOOR WARD NO 91,
PROMENADE ROAD, SECOND CROSS
BANGALORE KA 560005
REPRESENTED BY ITS MANAGING DIRECTOR
DR VILLOO PATELL

... PETITIONERS

(BY SRI: HARIKRISHNA S HOLLA, ADVOCATE)

AND

THE INCOME TAX DEPARTMENT
BY DEPUTY COMMISSIONER OF INCOME TAX
TDS CIRCLE -1(1) HMT BHAVAN

BANGALORE - 560022

... RESPONDENT

(BY SRI: K V ARAVIND A/W SRI: DILIP.M., ADVOCATES)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CODE OF CIVIL PROCEDURE PRAYING TO CALL FOR RECORDS ON THE FILE OF SPECIAL JUDGE, ECONOMIC OFFENCES, BANGALORE AND SET ASIDE THE ORDER DTD 05.04.2016 TAKING COGNIZANCE OF THE COMPLAINT IN CC.NO.95/2016 VIDE ANNX-G.

THIS WRIT PETITION COMING ON FOR PRELIMINARY HEARING IN 'B' GROUP THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

Heard learned counsel for petitioners and learned Standing Counsel for respondent - Income Tax Department.

Petitioners are sought to be prosecuted under section 276-B of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for failure to remit the tax deducted at source during the financial year 2010-2011 and 2011-2012 amounting to Rs.1,57,85,655/- and Rs.1,35,54,167/- respectively.

2. The impugned action is assailed by the petitioners on the following grounds:-

First, the show-cause notice is issued in respect of nine companies whereas the prosecution is launched only against the petitioners which is legally untenable. The Company is a juristic person and in terms of section 2(35) of the Act, notice is required to be issued to each of the companies individually and not a composite notice as done in the instant case. Hence, the prosecution launched against the petitioners suffers from basic vice.

Second, the show cause notice was issued only to petitioner No.1 namely Managing Director and not to the Company – petitioner No.2 and in that view also, the prosecution launched against the petitioners are defective and contrary to section 276 of the Act.

Third, the impugned sanction in the instant case has been accorded without application of mind. Tax deducted at source by the petitioners was remitted much earlier to the issuance of sanction order, which fact is not reflected in the sanction order indicating that the sanction order has been issued without

application of mind and on this score also, the impugned proceedings are liable to be quashed.

Lastly, it is contended that the section provides for mandatory term of imprisonment coupled with fine in respect of the offences committed by a company. As held by the Hon'ble Supreme Court in the case of *THE ASSISTANT COMMISSIONER, ASSESSMENT-II, BANGALORE & Others vs. M/s.VELLIAPPA TEXTILES LTD., & Another, AIR 2004 SC 86*, no criminal prosecution could be sustained for the offences under sections 276, 277 and 278 of the Act when the offences are rendered punishable with fine and imprisonment.

3. None of the contentions urged by learned counsel for petitioners merit acceptance. Insofar as the contention based on Annexure-'B' is concerned, the said notice was not issued as a show cause notice preceding adjudication or the prosecution, rather a reading of the said notice at Annexure-'B' indicates that it was issued to Dr.Villoo Morawala Patell who was the Chairman and Managing Director of Avesthagen & Group companies. Captioned subject of the said notice was to keep the Managing

Director informed and to treat him as the Principal Officer of the Company. After narrating the circumstances of notice, it is stated therein that the said notice was issued to convey the intention of the Department to treat him as the Principal Officer of the above companies. It is not a show cause notice. On the other hand, in the complaint, it is specifically stated that show cause notice was issued to accused on 14.08.2013. Petitioner has not referred to the said document. Therefore, the argument of learned counsel for petitioners based on Annexure-'B' is totally misconceived and cannot be a ground to quash the proceedings.

4. The second contention urged by petitioners is also misconceived for the reason that the said argument is also built upon Annexure-'B'. Learned counsel has based his argument on the impression that under the said intimation, a joint notice was issued to all the Companies; but it is not so. On the other hand, order passed under section 201(1) and 201(1A) of the Act (Annexure-'E') makes it evident that the order was passed only against petitioner – Company and not against all the Companies

as contended by learned counsel for petitioners. Therefore, even this plea is liable to be rejected.

5. Coming to the next contention that the sanction order issued for prosecution of petitioners does not reflect application of mind is concerned, I have gone through the said sanction order wherein the Commissioner of Income Tax/ Sanctioning Authority has narrated the facts of the case, referred to provisions of law applicable to the facts and has observed that an opportunity was given to the assessee in default to make the payment. Para 6 of the sanction order dated 15.10.2015 reads as follows:-

> *6. Opportunity: This office has sent show cause notices dated 02.05.2014, 24.06.2014, 12.08.2014 under section 276B read with section 278B of the Income Tax Act, 1961, requiring the deductor to show cause why prosecution proceedings should not be initiated for the said default of non-remittance of TDS to Central Government Account.*

Under the said circumstances, if any amount was paid pursuant to the said show cause notice, the proof thereof could have been produced by petitioners so as to avoid criminal prosecution.

There is nothing on record to show that the remittances made by petitioners have been brought to the notice of the Central Government.

6. Learned counsel for petitioners has produced the copies of the communication obtained from the Office of Assistant Commissioner of Income Tax (TDS), Circle-I(1), Bangalore along with challan details report for making payments. It reflects that on 10.09.2014 a sum of Rs.1,52,675/- and another sum of Rs.1,69,974/- was remitted not by the petitioners herein, but by Avestha Gengraine Technologies Private Limited. The said remittances do not relate to the case in hand. As a result, even the sanction order does not reflect any errors warranting interference by this Court. Hence, this argument is also rejected.

7. The last contention, urged by learned counsel for petitioners is no more *res integra* in view of the Constitution Bench decision of the Hon'ble Supreme Court in *STANDARD CHARTERED BANK vs. DIRECTORATE OF ENFORCEMENT, (2005)*

145 Taxman 154 (SC). It may be useful to refer to paras 30 to 33 of said judgment which reads thus;

> *30. The contention of the appellants is that when an offence is punishable with imprisonment and fine, the court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed [impotentia excusat legem]. This principle can be found in Bennion's Statutory Interpretation 4th Edn. At page 969 "All civilized systems of law import the principle that lex non cogit an imposibilia……." As Patternson J. said "the law compels no*

impossibility". Bennion discussing about legal impossibility at page 970 states that, "If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element." This Court applied the doctrine of impossibility of performance [Lex non cogit ad impossibilia] in numerous cases [State of Rajasthan v. Shamsher Singh 1985 (Suppl.) SCC 416; Special Reference No.1 of 2002 under Article 143(i) of the Constitution of India [2002] 8 SCC 237].

31. As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' plea is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the Legislature is to give complete immunity from

prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of FERA Act, 1973, namely those under Section 13, clause (a) of sub-section (1) of section 18; section 18A; clause (a) of sub-section (1) of section 19; sub-section (2) of section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the Country. Ail those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rupees one lakh.

32. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far

as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the Legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

> *33. We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. We overrule the views expressed by the majority in Veiliappa Textiles Ltd.'s case (supra) on this point and answer the reference accordingly. Various other contentions have been urged in all appeals, including this appeal, they be posted for hearing before appropriate bench.*

8. In the light of these discussions, I do not find any ground to accede to the prayer made in the petition.

Consequently, petition fails and same is **dismissed.s**

Sd/-
JUDGE

Bss