

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:27.06.2018

CORAM

THE HONOURABLE MR.JUSTICE M.VENUGOPAL
AND
THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

O.S.A.NO.393 OF 2013 AND
M.P. NO.1 OF 2013

Visram Financial Services (P) Ltd.,
rep. By its Director, Mr.V.Gopal,
D-1, Srishti Crescendo,
No.24, Desika Road, Mylapore,
Chennai - 600 004

.. Appellant

Vs.

1. V.Rajendran
2. Satish Raj

.. Respondents

Prayer:

Original Side Appeal filed under Order 36 Rule 9 of Original Side Rules read with Clause 15 of Letters Patent to set aside the Order dated 23.10.2013 passed in C.A.No.1072 of 2013 in C.P.No.297 of 2013.

C.A.No.1072 of 2013:-

Application under order XIV Rule of Original Side Rules read with Rules 9 and 11(b) of the companies (court) Rules to dismiss the above CP.No.297 of 2013.

CP.No.297 OF 2013:-

In the matter of section 633 of the companies Act 1956 to relieve the petitioners wholly from the alleged acts of default and liability complained by the 1st Respondent in C.C.No.107 of 2013 pending on the file of Additional Chief Metropolitan Magistrate (EOI) Egmore, Chennai.

For Appellant : Mr.Prakash Goklaney

For Respondents : Mr.H.Karthik Seshadri

J U D G M E N T

[Order of the Court was made by M.VENUGOPAL, J.]

Preamble:

The Appellant / Petitioner has filed the present Original Side Appeal (As an aggrieved person) as against the Order dated 23.10.2013 passed in C.A.No.1072 of 2013 in C.P.No.297 of 2013 by the Learned Single Judge.

2. Earlier, the Learned Single Judge while passing the Impugned Order in C.A.No.1072 of 2013 in C.P.No.297 of 2013 on 23.10.2013 at Paragraph Nos.45 and 46 had observed as under:

"45. Consequently, a proper reading of Section 633 (1) and (2) would be to say that the distinction between these two sub-sections is not court-centric, but only status - centric. In other words, the sub-sections maintain a distinction only with respect to the stage of the proceeding, whether it be at the stage of contemplation or at the stage of actual pendency. The distinction has nothing to do with Court, especially the High Court.

46. To put it differently, the jurisdiction of a Magistrate of First Class or the jurisdiction of a District Court, to grant relief, is confined only to cases, which are actually pending

before them. These courts do not have the jurisdiction to grant relief in respect of the apprehended proceedings. But, the High Court is conferred with an additional power under Section 633(2) even to take care of the contemplated proceedings also. The power under Section 633(2) is in addition to the power already available to the High Court under Section 633(1) and also under several other provisions of the Code. Such an additional power cannot be taken to mean the imposition of a restraint or limitation on the jurisdiction of the High Court to grant relief in pending proceedings. In other words, the conferment of an additional power under sub-section (2), to grant relief even in respect of anticipated proceedings, cannot be taken to mean that the power vested in sub-section (1) is taken away. Therefore, with great respect to the learned Judges of several High Courts, I am of the considered view that Section 633(2) does not limit the jurisdiction and powers of the High Court only to "apprehended proceedings". This is an additional power available to the High Court in view of the larger jurisdiction exercised by the High Court in

respect of the several matters prescribed under the Companies Act."

and ultimately, not sustained the preliminary objection raised by the Appellant / Applicant as regards the 'Maintainability' of the main proceedings and dismissed the application. Furthermore, the Learned Single Judge gave the option to the Appellant to file a Counter to the main petition on merits and show that the Petitioners [Respondents] in the main Petition are not entitled on merits to be relieved of the criminal liability.

3. Being dissatisfied with the Order dated 23.10.2013 in Company Application No.1072 of 2013 in Company Petition No.297 of 2013, the Appellant [Applicant] has preferred the present Original Side Appeal by raising a plea that the order of the Learned Single Judge in C.A.No.1072 of 2013 in C.P.No.297 of 2013 dated 23.10.2013 is against Law, Justice and Equity.

Appellant's Pleas :

4.The Learned Counsel for the Appellant brings it to the notice of this Court that the Appellant filed a private complaint in C.C.No.107 of 2013 against the Respondents and another on the file of Learned Additional Chief Metropolitan Magistrate Court, [E.O.1], Chennai [Petitioners in C.P.No.297 of 2013] for the commission of offence under Section 628 of the Companies Act, 1956. In the said complaint, the Appellant / Complainant had among other things averred that the documents of the accused set out therein were all either false and intentionally made knowing them to be false or material matters omitted to be set out knowing it to be material and as such, the accused are liable to be punished. It is represented on behalf of the Appellant that after receipt of summons, the Respondents filed C.P.No.297 of 2013 [as Petitioners] under Section 633(2) of the Companies Act, 1956 virtually to dismiss the complaint, but with a different prayer, viz., to relieve them of the alleged acts of default in the complaint. Moreover, the Appellant had filed Company Application No.1072 of 2013 [as Petitioner / Applicant] before this Court questioning the maintainability of Company Petition No.297 of 2013 [filed by the Respondents] and prayed for dismissal of the said Petition. As against the dismissal of C.A.No.1072 of 2013, the Appellant, has filed the present Original Side Appeal before this Court.

5. The Learned Counsel for the Appellant submits that the Learned Single Judge had committed an error in holding that as though the Hon'ble High Court can exercise its power under Section 633(1) of the Companies Act, 1956 to relieve a person from his liability in a proceeding pending before the Magistrate Court, which is directly contrary to the ingredients of Section 633(1), which specifically sets out that 'Power is vested only

on the Court hearing the case', meaning the Court where the proceeding is pending.

6. The Learned Counsel for the Appellant contends that the Learned Single Judge had failed to appreciate that the only question that was to be determined by the Hon'ble High Court as to whether it could exercise such power in respect of a proceeding pending not before it, but, at the Magistrate's Court and the issue before it was not whether the High Court can exercise powers under Section 633(1) of the Companies Act, 1956 to relieve a person on liability in a proceeding pending before it.

7. Continuing further, the Learned Counsel for the Appellant proceeds to point out that the Order of the Learned Single Judge in coming to a conclusion that the High Court can exercise powers under Section 633(1) of the Companies Act, 1956 to relieve a person from his liability in proceeding already pending before a Magistrate Court is even directly contrary to the ratio determined at Paragraph No.44 of the Impugned Order in C.A.No.1072 of 2013 in C.P.No.297 of 2013 dated 23.10.2013 wherein it is held that the "Power under Sub-Section (1) of Section 633 is a power vested on the Court where the proceeding is pending irrespective of the power of the said Court is a Magistrate Court of the District / High Court."

8. The Primordial stand taken on behalf of the Appellant is that the Learned Single Judge in Impugned Order dated 23.10.2013 in C.A.No.1072 of 2013 in C.P.No.297 of 2013 having held that the power under Section 633(2) of the Companies Act is exercisable only in respect of matters where there was a mere apprehension and only where there is no proceedings was initiated at the time of filing a Petition seeking relief and further, the Learned Single Judge had held that the power under Section 633(1) of the Companies Act was only for the Court where the proceedings was pending and in this regard it erred in holding that C.P.No.297 of 2013 was maintainable before this Court under Section 633(1) of the Companies Act, 1956 when proceeding was actually pending before the Learned Additional Chief Metropolitan Magistrate Court [E01], Egmore, Chennai.

9. Yet another contention advanced on behalf of the Appellant is that the Learned Single Judge had failed to take into account that C.P.No.297 of 2013 is not a Petition seeking relief under Section 633 of the Companies Act in respect of a proceeding before this Court and is a matter seeking relief in respect of a matter pending at the Learned Additional Chief Metropolitan Magistrate Court [E01], Chennai and hence could not be maintained before the High Court in view of the unambiguous

proceeding statute.

10. Expatiating his submission, the Learned Counsel for the Appellant projects an argument that the Impugned Order passed by the Learned Single Judge is wholly contrary to the position in Law set out in various decisions of different High Courts that once the proceedings for an offence punishable under the Companies Act is pending before a Court, the power to relieve under Section 633(1) of the Companies Act, 1956 can only be exercised by that Court and not by any superior Court including the Hon'ble High Court.

11. The Learned Counsel for the Appellant comes out with a plea that the Learned Single Judge had erred in not appreciating the contention of the Appellant that the Hon'ble High Court can exercise its power only under Section 633(2) of the Companies Act, 1956 in respect of an apprehension of prosecution or that it could not exercise the power under Section 633 (1) of the Companies Act in respect of prosecution pending before it directly when the case of the Appellant is only that in the present case the proceeding is pending on the file of the Learned Additional Chief Metropolitan Magistrate [EO1], Egmore and hence the 'High Court' is not the Court before which the proceeding is pending and in such a case, the High Court cannot exercise its powers under Section 633[1] of the Companies Act as that the power is vested in such a case where the proceeding is pending.

12. The Learned Counsel for the Appellant submits that Section 633(2) of the Companies Act, 1956 can be pressed into service of the Companies Act only on 'Apprehension' and once the prosecution was initiated, it is for the concerned accused to secure the relief from the Court hearing the matter.

13. The Learned Counsel for the Appellant contends that the present Original Side Appeal filed by the Appellant is perfectly maintainable because of the reason that the Impugned Order dated 23.10.2013 passed in C.A.No.1072 of 2013 in C.P.No.297 of 2013 amounts to the term 'Judgment' within the meaning of Clause 15 of Letters Patent. Further, the Learned Counsel for the Appellant points out that the Impugned Order in C.A.No.1072 of 2013 in C.P.No.297 of 2013 affects the valuable right of the Appellant and cites the decision of Hon'ble Supreme Court reported in AIR 1981 SC 1786 Shah Babulal Khimji V.Jayaben D.Kania and another at Special page 1817 wherein at Paragraph 120 [5], it is observed as under:

"120 (5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against competency of the suit against the defendant even though the suit is kept alive."

14. In this connection, the Learned Counsel for the Appellant points out that in the present case, C.P.No.297 of 2013 is filed by the Respondents before this Court [As Petitioners] is very much alive and when the competency of filing the Company Petition by the Respondents is assailed by the Appellant and when the order is passed against the Appellant in C.A.No.1072 of 2013, that order is a 'Decision', which affects the right of the Appellant and viewed in that perspective, the Order dated 23.10.2013 in C.A.No.1072 of 2013 is a 'Judgment'. Furthermore, it is projected on the side of the Appellant that the Impugned Order in C.A.No.1072 of 2013 cannot be termed as an 'Interim Order' with a view to term it as not a 'Judgment'.

15. In effect, the submission of the Learned Counsel for the Appellant is that by overruling the objections raised by the Appellant in regard to the maintainability of C.P.No.297 of 2013 filed by the Respondents and dismissing the Application viz., C.A.No.1072 of 2013, the right of the Appellant is very much affected and as such, the same has caused grave and substantial injustice to the Appellant. Therefore, the present Original Side Appeal filed by the Appellant before this Court is very much maintainable in the eye of Law.

Appellant's Decisions:

16. The Learned Counsel for the Appellant cites the decision of In re Tolaram Jalan and Others reported in AIR 1959 Bombay at Page 245 wherein at Paragraph Nos. 6 to 8, it is observed as under:

"6. It is urged that the word 'claim' would prima facie mean a civil claim such as a claim for damages which may be made by a company against a defaulting director or an officer of the company or where the company is in liquidation by the liquidator or a creditor or a contributory and not a penal proceeding contemplated by sections such as Section 162. The dictionary meaning of the word "claim" is undoubtedly an assertion of a right to something and a relief provided by statute. I have also been pointed out several sections of the Act where the Legislature has used the word "claim" such as Sections 101, 104, 429, 474 and 529 and it is clear from these sections that the meaning that can be attached to the word "claim" used in these sections must mean a demand or an assertion to a civil right. It was also urged that the Legislature could not have intended to include in the word "claim" in Sub-section (2) of Section 633 proceeding of a penal nature for otherwise the Legislature would have used the word "proceeding"

rather than the word "claim". It was further urged that inasmuch as the Legislature has given relief from criminal proceedings by separate sections in the Act such as Sections 63, 69(5), 70(5), 75(4), 207, 209, 210, 211, 217 and 393(4), the Legislature could not have contemplated of including proceedings of a penal nature in the word "claim" in Sub-section (2). It was therefore contended that the word "claim" cannot be interpreted as inclusive of proceedings described in Sub-section (1) of Section 633 and therefore no relief is provided against an anticipated proceeding under Section 633, the only relief provided being in respect of a pending proceeding and that too by the Court before which such a proceeding has commenced and is pending. But then so far as Sections 63, 69(5) and other sections, which were pointed out to me to show that the Legislature has given relief in respect of criminal proceedings, are concerned, it is clear that what those sections and provisos thereto provide are by way of substantive defences to a director or an officer of a company charged under one of the penal sections of the Act. Those are not sections like Section 633 which empower the Court to grant relief in respect of liability incurred by such a director or an officer of a Company. A comparison between those sections and Section 633 cannot therefore help in the construction of the word "claim" in Section 633(2).

7. It is true that the Legislature uses the word "proceeding" in Sub-section (1) and the word "claim" in Sub-section (2), no doubt a different phraseology. Nonetheless it does provide in Sub-section (2) that the Court on an application for relief shall have the same power to grant relief as it would have had under this section if it had been a Court before which proceeding for negligence, default etc. had been brought. It seems to me that if the word "claim" was intended to mean only a civil demand such as damages, Sub-section (2) would not have contained the word "under this section" which must also mean relief against proceedings described in Sub-section (1). Besides misfeasance is a civil remedy and yet Sub-section (1) speaks of a proceeding connected with misfeasance and even breach of trust. It seems therefore that there is no clear demarcation made in this section between proceedings of a penal nature and a civil remedy by way of a claim provided in Sub-section (2) of this section. Inasmuch as a proceeding in connection with misfeasance is included in Sub-section (1), the word "proceeding" therein used cannot be said to mean proceeding of a

penal nature only but would include proceedings also of a civil nature.

8. As I have pointed out, Section 633 is the exact replica of Section 372 of the English Act of 1929. That section came up for consideration in at least two decisions pointed out to me. In *re Barry and Stains Linoleum Ltd.*, (1934) 1 Ch 227 a director failed to obtain his qualification shares within the time fixed thinking that he had them at the date of his appointment, and having either overlooked or forgotten the definition of qualification shares in the company's articles of association. At the end of the time he ceased, in accordance with Sub-section (3) of Section 141 of the Companies Act, 1929 to be a director, but continued to act and to receive remuneration as a director, thus incurring penalties under Sub-section (5). Later he was re-appointed by the board pursuant to the company's articles of association, retired, and was re-elected by the shareholders. He applied to the Court under Sub-section (2) of Section 372 for relief against any liability which he had incurred by acting and receiving remuneration as a director after he had ceased to be a director. It is clear from the facts set out in the report that the petition was for relief not in respect of a pending proceeding but against an apprehended liability for penalty. It was in fact contended on behalf of the petitioner that where a director apprehending a claim made against him under Section 372(1) applies to the Court for relief, the Court can grant such relief having power to do so under Sub-section (2) of that section. In answer to this plea, Maugham J. at p. 232 of the report observed that Sub-section (1) of Section 372 applied inter alia to a proceeding under Section 275 which was the misfeasance section as it applied to proceedings taken in a court of summary jurisdiction to recover one of the penalties imposed on directors and others under the Act and accordingly it included power to relieve against the penalty imposed under Section 141 of the Act. Construing Section 372 the learned Judge also remarked that Sub-section (2) gave power to the Court to grant relief in cases where an application is made for it by a director who, although no proceedings such as are described in Sub-section (1) are being taken against him, apprehends that a claim may be made against him under that Sub-section. A director apprehending such a claim may apply to the Court for relief, and the Court has under Sub-section (2) "the same power to relieve him as under this section it would have had if it had

been a court before which proceedings against that person for negligence, default breach of duty or breach of trust had been brought". It is clear that Maugham J. did not make any distinction between a 'proceeding' and a 'claim' appearing in Section 372 as is sought to be urged. In fact he held that a proceeding would include a civil proceeding under the misfeasance section as it would include proceedings for penalties in both of which he held that the Court would have the jurisdiction to grant relief under Sub-section (2) although no proceeding has commenced or is pending. The only distinction that Maugham J. seems to make is between a proceeding for a fine and a penalty and a proceeding where the company might make a claim with regard to something which the director may be liable to pay to the company in which case he thought the Company Court would not readily grant relief without knowing the wishes of the shareholders."

17. The Learned Counsel for the Appellant relies on the decision of *Thakur Dan Singh Bist V. Registrar of Companies* reported in 1960 AIR [Allahabad] page 160 whereby and where under at Paragraph Nos.10 to 12, it is observed as following:

"10. The terms of Section 633 and the way in which it has been framed appear to support the contention of the learned counsel for the Registrar. Sub-section (1) of Section 633 which confers jurisdiction for granting relief on the Court before which a proceeding is pending appears to have been very widely worded. It covers all kinds of proceedings and relief under it can be granted in respect of every kind of liability -- penal as well as civil. That sub-section can, however, apply only when the proceedings become pending because it is only that Court in which the proceedings are pending which has power to grant relief under that sub-section.

11. Sub-section (2) of the section does not appear to be so wide. In the very beginning of that sub-section we find the words "has reason to apprehend that any claim will or might be made against him". Thus We find that instead of the word 'liability' which has been used in the preceding sub-section the Legislature has used the word "claim" in Sub-section (2).

The two words do not appear to be co-extensive in their meaning. "Liability" appears to be of wider connotation as it includes civil as well as penal liability. The word 'claim' cannot cover penal liability. According to the Shorter Oxford English Dictionary the word 'claim'

when used as a noun means "A demand for something as due; an assertion of a right to something; right of claiming; right or title; that which is claimed."

The meaning attributed to the word in the Webster's New International Dictionary is "A demand of a right or supposed right; a calling of another for something due or supposed to be due; a right to claim something; a title to any debt, privilege or other thing in possession of another; also, a title to anything which another should give or concede or in conformity with provisions of a Workmen's Compensation Law."

Keeping these meanings of the word 'claim' in mind it is not possible to accept the contention that its connotation is wide enough to include criminal prosecutions. The Legislature must be presumed to have known that the word 'claim' could not cover all kinds of liability. If therefore it had the intention of making the scopes of the two sub-sections of Section 633 co-extensive there appears to be no reason why instead of using the word 'liability' in subsection (2) of the section it should have used the word 'claim' there.

12. Learned counsel for the applicants referred to the case *Thangia v. Hanuman Bank Ltd.*, AIR 1958 Mad 403. Under the Banking Companies (Amendment) Act all claims by or against a Bank in liquidation have to be considered by the High Court which orders the winding up. The question that therefore arose in that case was whether actions in tort were also 'claims' which could be considered by the High Court alone.

In that connection the meaning of the word 'claim' was considered in paragraph 17 of that judgment. It was conceded that the word was a word of very extensive signification embracing every specie of legal demand. Keeping in view the fact that the word signified "a right of demand or supposed right; a calling of another to pay something due or supposed to be due as a claim for wages or services"

it was held that the word "claim" was comprehensive enough to embrace actions founded On torts as well as actions founded on contracts. This case does not therefore support the contention that the word 'claim' could include proceedings for criminal prosecution also.

In (1934) 150 LT 254 (supra), Maugham J., had before him a petition under Section 372 of the English Companies Act of 1929 which corresponds to Section 633 of the Indian Companies Act of 1956. A certain

director of the company in that case had acted as a director and performed the duties of that officer without possessing the required qualifications. During the period in which he had so acted he had received 1,000/- per annum as remuneration in accordance with the provisions of the Articles of Association of the company.

By acting as a director without possessing the necessary qualifications he had also made himself liable to a fine not exceeding 5/- for every day on which he had acted in that way under Sub-section (5) of Section 141 of the Companies Act of 1929. He therefore moved the High Court for being relieved of his liabilities and prayed that he be relieved not only of the liability for fines and penalties which he might have incurred under Section 141 but also of any liability which he might be under to the company in respect of his act or default.

The counsel for the director contended that S, 372 of the Act empowered the Court to relieve the director of both the kinds of liabilities. The learned counsel for the company apparently did not seriously object and submitted that the company would act as the Court should direct. Maugham J., conceded that the petition was of a somewhat unusual nature and that there was no precedent to guide him on the point. Without discussing the matter or considering its various aspects, at the very start he acceded to the view which had been put forward on behalf of the petitioner:

"That Section 372, Sub-section (1) of the Companies Act, 1929, applies (inter alia) to a proceeding against an officer of a company under Section 275 (the misfeasance section). It is beyond doubt that it applies also where proceedings are being taken in a court of summary jurisdiction to recover one of the penalties imposed on directors and others under the Act and accordingly, it includes power to relieve against the penalty imposed under Section 141 of the Act on directors who act as such without having obtained their qualification shares within two months of their appointment as directors or within such shorter time as may be fixed by the articles of association.

I also accept the contention that Section 372, subsection (2), gives power to the court to grant relief to cases where application is made for it by a director who, although no proceedings such as are described in Sub-section (1) are being taken against

him, apprehends that a claim may be made against him under that sub-section."

He proceeded to make a distinction between, proceedings before a Court of summary jurisdiction for a fine or penalty and proceedings either by a company to recover moneys due to the company as a going concern from one of its officers, or by a liquidator or share-holder for misfeasance. He noted that in the former kind of proceedings the company or its share-holders were not intended to have any say and the concern was mainly of the Exchequer.

In the latter kind of proceedings, however, the company or the liquidator or the share-holders were the persons mainly concerned. Under Sub-section (1) of Section 372 he relieved the director who was the petitioner before him wholly from his liability to the fine which could be imposed upon him under Section 141 of the Act but refused to grant relief under Section 372, Sub-section (2), for civil liabilities because he did not have before him the opinion of the company or its share-holders.

In this case therefore the learned Judge practically assumed that under Sub-section (1) of Section 372 he had jurisdiction to grant relief against a possible prosecution. He also overlooked that under Sub-section (1) of Section 372 under which he was granting relief jurisdiction to grant relief vested only in the Court before which the proceedings were pending and no proceedings under Section 141 were pending in this Court."

18. The Learned Counsel for the Appellant seeks in aid of Re: Muktsar Electric Supply Co., Ltd., in Liquidation V. State reported in 1966 36 Comp Cases 144 P H , wherein at Paragraph No.16, it is mentioned as under:

"16. In In re Gilt Edge Safety Glass Limited, [1940] Ch. 495 petitions were presented under Section 372 by two directors of a company, who had inadvertently continued to act as directors after they had, owing to a reduction of capital, ceased to hold qualifying shares of the minimum value required by the articles of association of the company. Actually, summary proceedings before the Magistrates had been commenced against them under Section 141(1) of the English Companies Act, 1929. It was held that Section 372 (1) made the court which heard the case the only court

which had jurisdiction to give relief in respect of the proceedings which had already been commenced and that with regard to the claim under Section 372(2) the court would make an order granting the petitioners relief from future or apprehended claims in respect of a technical defect, the summary proceedings already commenced being expressly excepted from that order. The scope of Section 281(2) came up for consideration before the Orissa Court in In the matter of Orissa Jute and Cotton Mills Ltd., [1956] 26 Comp. Cas. 218 After discussing the English cases, it was laid down that with regard to any criminal proceedings which were already pending, relief could be granted only by the court where they were pending under Sub-section (1) and under Sub-section (2) the court could relieve the petitioners from any apprehended liability for which proceedings could be taken in the future. In In re Tolaram Jalan, In re Filmistan Private Ltd. [1959] 29 . Comp. Cas. 34 ; A.I.R. 1959 Bom. 245 it was held that the word " claim " occurring in Sub-section (2) of Section 633 of the Companies Act, 1956 (equivalent to Section 281 of the Act), would also include proceedings such as penal proceedings under Section 162, read with Section 220 of the Act of 1956. Section 633 of the Companies Act of 1956 was considered by the Kerala High Court in In re Bank of Deccan Ltd., [1960] 30 Comp. Cas. 284 Following the English cases as well as the Orissa decision it has been held that under Sub-section (1) it is for the court before which the proceedings are pending to grant relief but the High Court can grant relief under Sub-section (2) and that the scope of that sub-section is wide enough to cover criminal prosecution. The word " claim " in Sub-section (2) must be construed as having been used in a special sense so as to include also criminal prosecution. The High Court has, therefore, power under Section 633(2) to grant relief against an apprehended prosecution.

19. The Learned Counsel for the Appellant adverts to the decision of Auto Link Finance Private Limited V. Registrar of Companies reported in ILR 1970 1 Delhi at Page 573: 1971 (41) CC 63 wherein at Paragraph Nos. 4 and 7, it is observed and held as under:

"4. On behalf of the Registrar of Companies it has been urged that this Court has no jurisdiction to grant relief under section 633(2) of the said Act, Section 633(2) of the Act empowers the Court to grant relief in certain cases of negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company. Section 2(11) of the Act defines the Court

with reference to any offence under the Act. The Court means the Court of the Magistrate of the First Class or, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence and with respect to any matter relating to a company (other than any offence against this Act), the Court having jurisdiction under this Act with respect to that matter relating to that company as provided in section 10. Primarily, therefore, with respect to negligence, default, breach of duty, misfeasance or breach of trust by an officer of a company, the Court is a Criminal Court and that is the Court which is referred to in sub-section (1) of section 633 of the Act which has the jurisdiction to grant relief in the cases mentioned. However, if any such officer against whom proceedings have not been instituted in a Criminal Court has reason to apprehend that any proceedings might be brought against him may also apply for relief and in the case of such apprehension, the Court will be the High Court having jurisdiction. It is, therefore, clear that the High Court will not have any jurisdiction to grant relief under sub-section (2) of section 633 of the Act if proceedings have been instituted in a Criminal Court under sub-section (1) of this section. This proposition is brought out by the cases reported in Air 1956 Orissa 205 in re. Orissa Jute and Cotton Mills Ltd. and others and 1940 (2) All England Reports 237 in re: Gilt Edge Safety Glass Ltd.

7. There is, to my mind, another aspect to the matter. If the High Court is not possessed of jurisdiction to grant relief under sub-section (2) of section 633 after the institution of criminal proceedings, I fail to see on what principle the High Court will have such jurisdiction after the termination of the criminal proceedings in respect of the defaults which were the subject matter of the criminal proceedings."

20. The Learned Counsel for the Appellant draws the attention of this Court to the decision of Omprakash Khaitan V. Keshariya Investment Limited reported in 1978 [48] Company Cases 85 wherein at Paragraph Nos. 3 and 4, it is observed as under:

"3. In his affidavit of February 19, 1977 the petitioner has given details of the defaults and breaches, which have since become subject matter of prosecutions, pending in the Magistrate's court in Baroda and Ahmedabad. In para 8 of the affidavit he has also specified the defaults and breaches in respect of which he apprehends proceedings. It was not disputed on behalf of the petitioner that this Court has no

jurisdiction with regard to the criminal liability arising out of defaults and breaches which have already become subject matter of prosecution and that for any relief in relation to such defaults etc. the proper remedy of the petitioner would be an application under sub-section (1) of Section 633 to the Court hearing the cases. The only question that, therefore, requires consideration is whether there is a case for the petitioner being excused under sub-section (2) of Section 633 of the Act of liability on account of defaults and breaches of the Company in respect of which proceedings are apprehended.

4. Section 633 of the Act empowers the Court to give relief where it is satisfied that the officer of a Company, even though technically guilty of negligence, breach of duty, misfeasance or breach of trust or otherwise liable on account of any default or breach of the Company has nevertheless acted honestly and reasonably and that having regard to all the circumstances of the case, "including those connected with his appointment", he ought fairly to be excused. The object of the section appears to be to provide against undue hardship in deserving causes and to give relief from liability to persons who, though liable in law, ought to be excused rather than be allowed to be subjected to legal proceedings."

apart from that in the aforesaid decision at Paragraph Nos.5 and 6, it is mentioned as under:

"5. It is true that when a person agrees to be appointed to the Board of Directors of a Company he is expected to exercise legitimate control over the management and the affairs of the Company and be conscious of his responsibility as such Director. It is also beyond doubt that when persons, who have distinguished themselves in various fields such as law, audit, management, financial management or who otherwise represent special interests on Boards such as the representatives of financial institutions. Government or Semi-Government bodies are appointed to the Boards it certainly gives a favorable projection to the management of the Company and holds out a tacit assurance to all those who would deal with the Company, including the prospective share-holders of the Company, that there are independent persons of eminence having specialised skill on the Board of the Company and that the affairs and management of the Company would, therefore, be properly conducted in accordance with law. Unfortunately, however, most of such persons

either do not actively participate in the management of the Company and its affairs or are unable on account of the obvious limitation of the power of a Director and the principle of limited accountability incorporated in the Act, to exercise an effective control over the management and affairs of the Company with the result that the safeguard built into the corporate system by the institution of such directors becomes almost illusory. In the circumstances it is necessary to make a distinction between the directors, who are on the Board, purely by virtue of their technical skill or because they represent certain special interests and those who are in the effective control of the management and affairs of the Company, whether or not, they have any financial stakes in it, in determining if relief from liability arising out of the breaches and defaults of the Company should be granted or not. It cannot be denied that independent directors from the professions or from among the financial consultants or those that represent different interests, such as the financial institutions, have a salutary effect on the management of a Company in spite of the various legal constraints and limitations and if such a distinction is not made it is likely to scare such persons away from any possible association with the Company as directors. It is, therefore, unreasonable to fasten liability on directors for the defaults and breaches of a Company where such directors are either the nominee directors or are appointed by virtue of their special skill or expertise. It is also unfortunate that with the limited accountability an effective control of the management of the affairs of a Company by the Board is not possible. While there is a strong case for urgent legislative action, both in the matter of widening the frontiers of accountability of a company, both to its Board of Directors and to the members, as also in relieving the special category of directors from consequences of default and breaches of the Company, judicial moderation is necessary in the administration of Section 633 of the Act so as to ensure that such categories of Directors are not subjected to the harassment of legal proceedings for breaches and defaults of a Company, which may at times be rather protracted. It would be proper in such cases to relieve such directors of consequences of the defaults and the breaches unless they are directly involved in the acts or omission complained of or have otherwise not acted honestly or reasonably or have financial involvement in the company.

6. Having regard, therefore, to the fact that the petitioner has been a Director of the Company, as indeed of a number of other Companies, by virtue of being a solicitor and did not participate in the management of the Company and had no financial involvement in it, I would relieve the petitioner of the liability arising out of breaches and defaults on the basis of which the petitioner apprehends proceedings."

21. The Learned Counsel for the Appellant points out the Decision of Sri Krishna Parshad and Others V. Registrar of Companies reported in 1978 [48] Company Cases at Page 397 [Delhi] at Paragraph Nos.5 to 7, it is observed as under:

"5. The point at issue before me is whether the power of the High Court is concurrent with the power of the Magistrate trying an offence under the Companies Act or whether it is non-simultaneous. Obviously, the two sections have to be read as being anticipatory in the case of the High Court's jurisdiction and to be exercised as a defense in the case of an actual trial in respect of the offence complained of. This meaning is brought out by a reference to the language actually used in Section 633(2) which I now proceed to reproduce. The section reads :

" Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default....."

6. The opening words of the section clearly indicate that, (a) the officer concerned must have an apprehension that a proceeding will or might be brought. The anticipation or apprehension is about the possibility of a proceeding being brought. If such an apprehension fructified into an actual bringing about of the proceedings then it is no longer an apprehension but becomes an actuality. When an actual proceeding is brought then there is no apprehension any more and hence recourse has to be had to the power of the trial court to grant similar relief under Section 633(1). The mistake made in interpreting the section as appears from the contentions of the counsel for the petitioner is that he submits that the High Court's power is the same as that of the Magistrate.

7. Undoubtedly, the power of the High Court is the same as that of the Magistrate. There is no doubt on this because the subsequent words in Sub-section (2) of Section 633 show that the power is the same. However, the power though it is the same can only be

exercised when an apprehension exists which has not yet been transformed into an actuality. The learned counsel has referred to G.D. Bhargava v. Registrar of Companies [1970] 40 Comp Case 664 (All) and P.C. Pothen, Liquidator of the Commonwealth Bank Ltd. (In Liquidation), 2nd [1966] 1 Ker 1, in which both courts have held that the powers of the High Court are the same as that of the Magistrate. As indicated above I am in perfect agreement with this conclusion. In fact, this is what the section states. These two cases do not deal with what the power of the High Court is after a proceeding has been actually initiated in a criminal court. I may also indicate that the other court covered by Section 633(1) need not necessarily be a criminal court because there may very well be a civil proceeding, criminal proceeding or even revenue proceeding in respect of which Section 633(1) may apply. In all such cases if a proceeding is anticipated, the officer concerned can move the High Court at an early stage and get relief in a suitable case. This has the great advantage of avoiding that other proceeding if the High Court grants relief. If that other proceeding has commenced then the officer concerned has no other course open but to apply to the relevant court under Section 633(1) to say that whatever negligence, default, breach of trust, misfeasance breach of duty or any other default complained of there may be, he, in fact, acted reasonably and honestly keeping in view the circumstances of the case. The court can then grant relief. Thus, the section as it were, operates in two stages. The High Court can grant anticipatory relief and if a case is actually initiated, only the court before which the complaint or trial is going on can grant relief. The preliminary objection has, therefore, to be accepted. I accordingly dismiss the petition. No costs."

22. The Learned Counsel for the Appellant cites the decision of P.S.Bedi and Others V. Registrar of Companies Delhi and Haryana reported in 1986 (60) Company Case at Page 1061 wherein at Paragraph Nos.5 to 7, it is observed as under:-

"5. I have heard the parties and given my due consideration to all the circumstances. So far as the provisions contained in section 633(1) of the Companies Act are concerned, they are quite explicit that once the prosecution has been started by filing of the complaint, the only court competent to entertain any objection to the propriety thereof is the court hearing

that case. This is also the view of different High Courts in the cases reported as Tolaram Jalan, In re [1959] 29 Comp Case 34; AIR 1959 Orissa 205, Sri Krishna Parshad v. Register of Companies [1978] 48 Comp Case 397 (Delhi) and In re Auto Link Financiers P. Ltd. [1971] 41 Comp Case 63 (Delhi). However, sub-section (2) of section 633 provides for situations where prosecutions have not been started and there are only reasons to apprehend that proceedings in that regard are likely to be brought. The question to be considered is when certain rights were available to the petitioners under sub-section (2) to get the matter of alleged negligence, breach of duty, etc., determined by the court, whether the same could be set at naught by the Registrar by moving the complaints under sub-section (1) in the meanwhile. This obviously was against the circular of the Company Law Board as referred to above. This circular though not of statutory nature, contains one of the policy decisions which the Company Law Board and the Central Government have formulated. Their operative and binding character qua the third parties may be quite doubtful. However, so far as the Registrar of Companies, who is an authority subordinate to the Company Law Board is concerned, the same did call for respect and adherence. It could not be that those directions were applied in the case of some of the companies and ignored with regard to others. When once the petitioners had moved the company court under sub-section (2) of section 633, he could have waited for the result of these proceedings or at the most required the court to expeditiously dispose of them instead of stealing a march over the petitioners and filing the complaints.

6. Mr. K. S. Bindra, appearing from the side of the interveners, has vehemently contended that these circulars have no binding character and in any case they could not be considered to have any legitimacy after the coming into force of the new Code of Criminal Procedure, 1973. He has made reference to the new provisions of the law of limitation introduced and has pointed out that any delay in the filing of the complaints by the Registrar would have resulted in the cases getting barred by time and the person holding offices of the company who had committed misfeasance and other illegal acts escaping due punishment. It is pointed out that the punishments awardable under the complaints already lodged could be up to one year and the limitation for commencing any such prosecution under section 466, Cr. PC, is one year from the date of

the occurrence or the knowledge of the complaint. However, section 470(2), Cr. PC, given protection to the complainants in such circumstances inasmuch as the time during which the institution of the prosecution lies stayed by any order has to be excluded. From the side of the petitioners it has rather been pointed out that in any case, the period of limitation never weighed with the Registrar as the complaints were filed on 13th April, 1984, while the show-cause notices which the Registrar had earlier issued to the petitioners were in February, 1983. By then, the Registrar, it is contended, had already know about the alleged misfeasance, breach of duty, etc. I would, not, however, like to dilate more on this aspect.

7. Since I have already observed that the rights available to the petitioners to get their claim under section 633(2) determined could not be affected by subsequent filing of the complaints under sub-section (1), I proceed to discuss the contentions raised by the petitioners as to how the so-called acts of misfeasance and breach of duty, etc., have no basis."

23. Apart from the aforesaid decisions, the Learned Counsel for the Appellant cites the following decisions:

(i) In the decision of S.S.Sahni V. Registrar of Companies, reported in AIR 1979 SC at page 1803 : 1990 (69) CC 556, wherein at Paragraph Nos.19 and 20, it is observed as under:

"19. Section 633(1) If in any proceedings for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or partly, from his liability on such terms as it may think fit: Provided that in a criminal proceeding under this sub-section, the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust (2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as

it would have had if it had been a court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under Sub-Section(1), (3) No court shall grant any relief to any officer under Sub-section (1) or Sub-section(2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

20. A perusal of the various provisions of the Act reveals that it imposes a number of obligations upon the officers of a company. It also makes provisions for initiating, before a court of law, proceedings against the officers of the company for negligence, default, breach of duty, misfeasance or breach of trust. The object underlying Section 633 of the Act obviously is to avoid hardship to officers of the company in deserving cases and to relieve them of their liability in cases where they are technically guilty if they are able to convince the court that they had been acting honestly and reasonably and that having regard to the circumstances of the case, they, in all fairness, ought to be excused from the charge or charges made against them. This section enables the concerned officer to apply to the court for making an order relieving him of the liability incurred by him either after the proceedings have commenced against him or by way of preventive action before commencement of the proceedings. Whereas, according to Sub-Section(1) of Section 633, in a case where the proceedings have commenced, the application for relief in this regard has to be made to, and is to be considered by the Court before which the proceedings are pending, Sub-Section (2) enables the High Court to exercise such jurisdiction in cases where the proceedings are going to be, or are likely to be, initiated. This section does not empower the High Court to grant any relief to any officer of the company in a case where the proceedings against the officer have already been initiated and are pending."

(ii) In the decision of Ashok Bhatia and others V. Registrar of Companies, Delhi and Haryana and another reported in 1992 (23) DRJ 527 : 1993 (76) CC405 and Another reported in wherein at Paragraph Nos.11 to 13, it is observed and held as under:

11. The respondents have also contended that the petition is pre-mature as the authorities had not yet made up their mind to initiate prosecution and in the absence of initiation of any prosecution, the counsel

for Department contended that no petition of the present nature could be filed. In reply to this my attention has been drawn to reply to para-19 of the petition wherein the respondents have clearly disclosed their mind that in their opinion the contravention of Section 370 of the Companies Act has taken place. If such conclusion is reached by the authorities it cannot be contended that the authorities are not contemplating any action against the petitioners for such alleged contravention. Action would normally and logically include initiation of prosecution. In these circumstances, it cannot be reasonably contended that the petitioners apprehension of any prosecution being launched is baseless. Therefore, this contention of the Department is not acceptable, because after initiation of the prosecution, application under Section 633(2) of the Companies Act cannot lie and this Court will have no jurisdiction to allow such an application. In that event an application under Section 633(1) only is contemplated. I find support for this view from an earlier pronouncement of this Court in the case of Shri Krishna Parshad and Others vs. Registrar of Companies Delhi and Haryana reported as 1978 Vol 48 Company cases, 397. The counsel for the Department has not pointed out any ruling to the contrary.

12. For the purposes of deciding the present application it is not necessary for me to express any opinion on the interpretation of or to go into the questions relating to the construction of Section 370 of the Companies Act. Such questions can be more appropriately dealt with by the Court which will be seized of the matter if any proceedings are initiated against the company after going into evidence and considering other material that may be placed before that Court.

13. For the purpose of present case, this Court is mainly concerned with the question as to whether the said Directors and the Secretary of the company who have petitioned to this Court have acted honestly and reasonably having regard to all the circumstances of the case and as to whether they in the given circumstances apprehend that any proceedings are likely to be brought against them in respect of the alleged default, breach of duty etc. As already held hereinabove that. in the circumstances of the case, the apprehension of the said Directors cannot be stated to be baseless. I have also held above that the Directors acted with ordinary prudence and had taken reasonable care to ensure that there was no conscious violation of

the provisions of law. In the circumstansess. I am of the considered opinion that petitioners 1 to 8 in C.P. 211/90 and Mr. F.R. Vevaina. petitioner No. I in C.P.13/91 have acted honestly and reasonably and that having regard to all the circumstances of the case they ought fairly to be excused and are hereby relieved from their liability in any action that may be brought by the Company Law Board or any other authority under the Companies Act, subject however to the condition that the said petitioners will render full co-operation to the authorities in investigation prior to the initiation of action against the company. As regards the company I am of the view that the protection under Section 633 of the Companies Act is not available to the company and is confined only to the officer/officers of the company. For that reason the petition to the extent seeking relief in favor of the company is dismissed."

(iii) In the decision of Jyotindra Manharlal Vakil and Another V. Registrar of Companies, Maharashtra reported in AIR 1995 [Bombay] at page 122 herein at Paragraph Nos.9 to 13, it is observed and held as under:

"9. With great respect to learned Judges I find myself unable to subscribe to the reasoning and the ratio of these judgments. The plain wording of Section 633 does not admit of any two interpretations. Section 633(1) provides that if in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of the company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or partly from his liability on such terms of as it may think fit. This provision to my mind clearly invests the Court; including the court of learned Metropolitan Magistrate, with power to excuse the accused in any proceedings before it provided the requirements of this sub-section are satisfied.

10. Provisions of sub-section 2 provides that where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for such relief and High Court on such

application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust, had been brought under sub-section (1).

11. Reading the section there is hardly any doubt that the power of the High Court to entertain the petition is only to be exercised when there is mere apprehension that any proceeding will or might be brought against the officer. The moment in fact any proceedings are initiated before the learned Magistrate, it will be the learned Magistrate alone who would be competent to grant the relief under Section 633(1) of the Companies Act,

12. I do not find any force in the submission of Shri Bharucha that in as much as there is a delay in filing the complaint; no lawful cognisance could have been taken of the complaint. Firstly it must be appreciated that Section 633 does not talk of 'taking cognisance' as such. It refers to any proceedings in respect of any negligence, default, breach of duty, misfeasance or breach of trust etc. In the light of these words and in the light of provisions of Sections 467, 468, 469 of the Cr.P.C. I find it clear enough that once the complaint is filed even an application for condonation of delay would be a proceeding in respect of the offence of default etc. In the facts and circumstances before me it is an admitted position that not only much prior to the presentation of the present petition the Registrar of Companies had lodged a complaint before the Chief Metropolitan Magistrate but in fact the process was issued prior to the presentation of the present petition. Under the circumstances I am of a clear view that the petition cannot be entertained. It is also to be noticed that the petitioners would not suffer any prejudice at all in as much as under the provisions of Section 633(I); they still have an opportunity to seek the same relief before the learned Metropolitan Magistrate.

13. In this behalf it may be mentioned that the decision of the learned single Judge of the Delhi High Court in the matter of Shri Krishna Prasad reported in (1978) 48

Com Cas 397 : (1978 Tax LR 1896) supports this view. It is laid down in the aforesaid decision that if the apprehended proceeding has already commenced then the officer concerned has no other course open but to apply

to the relevant court under Section 633(1). Similar is the ease in the matter of S.S. Sahani v. Registrar of Companies reported in (1990) 69 Com Cas 556 decided by a single Judge of Punjab and Haryana High Court."

(iv) In the Judgment dated 17.12.2004 between Sh.R.K.Narayan and Others V. Registrar of Companies wherein at Paragraph Nos.13 to 18, it is observed as under:

"13. What follows from the conjoint reading of sub sections (1) and (2) of Section 633 is ;

a) In any proceedings for negligence/default/breach of duty, misfeasance or breach of trust against an officer of the company, it would be a valid defense that he has acted honestly and reasonably and that having regard to all the circumstances of the case he should be excused from the liability.

b) Such exercise can be done even by this Court and person need not be relegated to the Court where the proceedings are filed.

14. It is a unique provision introduced in the Act with the objective to provide relief against undue hardship, in deserving cases. The purpose is to give relief from liability to persons who though technically guilty of negligence, default, breach of duty etc, are able to convince the conscious of the Court that they have acted honestly and reasonably and thus having regard to the circumstances of the case they ought fairly to be excused from the charges against them.

15. In P.S. Bedi v. Registrar of Company, Delhi 1985 2 Company Law Journal 122 DE Act this court has taken the view that:-

"Even when the Registrar of Companies filed a criminal plaint despite notice of petition for relief under Section 633(2) of the Act, the petition was maintainable and could be disposed of by the Court with appropriate order."

16. The application can be filed even when action is apprehended. No action had been initiated till the filing of the present petition. While issuing notice, this Court directed maintenance of status quo which order is still operative. Therefore, it can not be said that the present petition is not maintainable. Of course, while exercising its discretion, the court has to keep in mind that the same should not be exercised in favor of a Director who has grossly neglected his

ordinary duties over a long period or who deliberately spent money on ultra virus activities.

17. It may however, be added that this Section 633 is not available to the Companies but only the officers. Therefore this petition is entertained qua officers and not the companies.

18. Thus, I reject the submission of the ROC that this petition is not maintainable. Admittedly, at the time when the petition was filed, the complaint had not been filed by the ROC with the Metropolitan Magistrate which came to be filed only subsequently. It may be mentioned that the ROC has not disclosed as to on which date the criminal complaint was filed but at the time of arguments, it was conceded that such a complaint was filed later."

(v) In the decision of Srikumar Menon & Others V. Registrar of Companies, West Bengal reported in [2011] 164 Company Cases 382 (Cal) it is observed as under:-

"16. Now, the question is: What is the power of this court in an application under Section 633(2) of the Act, in such cases?

17. When a prosecution under the Act is apprehended, any officer may under section 633 apply to the High Court for exoneration.

18. In dealing with such application, the High Court has power under Section 633(1). That sub-section reads as follows:

"633(1) If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit: [Provided that in a criminal proceeding under this sub-section, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.]"

19. In my unreported judgment delivered on 5th April, 2011, in C.P. No. 8 of 2010 and C.A. No. 5 of 2010, Bithal D Mundra & Ors. - v- The Registrar Of Companies, West Bengal, I held that the High Court under Section 633(1) and 633(2) had the same power as the criminal court to relieve an alleged offender. The power to relieve includes the power to discharge an alleged offender when no cause of action against him is disclosed. The said provisions of the Act conferred a power upon the High Court to exonerate the accused if it appeared to it that he may be liable but had acted "honestly and reasonably" and furthermore, having regard the circumstances he ought to be excused [See section 633(1) of the Act]. Now, this power given to the High Court is part of the power given to it to relieve an accused. Such discretion is also vested in the criminal court to relieve an offender, if similar circumstances exist. In passing that judgment I had relied upon two decisions of our court in SBI Home Finance Ltd. - v - Regional Director, Department of Company Affairs, reported in (2007)138 Company Cases 106(Cal) and Chandra Kumar Dhanuka & Ors. - v - Registrar of Companies, reported in (2008) 141 Company Cases 101.

20. I read the following passage from the said unreported judgment delivered by me on 5th April, 2011, in the case of Bithal D Mundra & Ors. - v- The Registrar Of Companies, West Bengal (Supra) :

"Section 633(1) relates to the powers of the court, in which proceedings have already been instituted for any violation of the Companies Act. It says that when it appears to such court that an officer is or is likely to be liable for contravention of the Act, but nevertheless, according to the court, he has acted honestly and reasonably, it might exonerate him.

The High Court has been given the same power. While granting such power to the High Court, Parliament has enacted a provision which is part of Section 633(2) and which is in the following terms:

"633(2)..... the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court, before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1)."

It says that the High Court will have the same power to relieve an alleged offender as the Criminal Court has under 633(1).

Now, the criminal court proceeds on such complaint as if it is a criminal complaint. Therefore, as in other criminal proceedings, on receipt of a complaint a Criminal court is to examine whether it should take cognizance of the offence under Section 190 of the Code of Criminal Procedure. Thereafter, it is to examine whether any case has been made out against the accused. If it decides that no case has been made out, it is to discharge the accused. When a prima facie case has been established against him, the trial proceeds by framing of charges and so on. If the charge cannot be established at the trial the accused is acquitted. These are the elementary principles of our criminal procedure.

A very relevant consideration in initiating criminal proceedings is the law of limitation. Section 468 of the Code enacts that no court is to take cognizance of an offence after expiry of the period of limitation. The court takes such cognizance when, inter alia, a complaint petition is filed before it under Section

190. Considering S. 468, the Magistrate has the power under Section 203 to dismiss the complaint on the ground of limitation.

Therefore, the powers of the magistrate under Section 633(1) to exonerate the accused in case he is of the opinion that the accused is likely to have committed the offence but there are grounds for his exoneration are in my judgment in addition to his powers to take cognizance and proceed with the trial and not an isolated power.

Therefore, the High Court is also invested with similar powers. First, to ascertain whether there is cause for proceeding with the complaint and then to consider whether the accused should be exonerated [see SBI Home Finance Ltd. - v - Regional Director, Department of Company Affairs, reported in (2007)138 Company Cases 106(Cal), see also Chandra Kumar Dhanuka & Ors. - v - Registrar of Companies, reported in (2008) 141 Company Cases 101]"

21.I would elucidate upon my above judgment by clarifying that the power to relieve, includes the power to dismiss the complaint and to discharge the accused. This power can be exercised before exercising the power to exonerate the accused exoneration is

ordered after the Court is satisfied that the accused is likely to be guilty. The High Court has no power to try and sentence the accused, in my opinion.

22. Furthermore, when a S. 633(2) application is pending in the High Court, within the period of limitation, the Central Government should seek an injunction under Section 470(2) of the Code of Criminal Procedure, instead of allowing limitation to set in, particularly so, when it follows the practice of not prosecuting an accused during the pendency of a section 633(2) proceeding. I also observe that in this case the offences if proved were minor.

23. Nevertheless, in my judgment the Central Government has deliberately, not chosen to take steps within the period of limitation.

24. The order of injunction made by this Court on 28th July, 2010, in my opinion, does not help the Central Government under Section 470(2) of the Code of Criminal Procedure 1973, because on the date the order of injunction was passed, cognizance of the alleged offence had become hopelessly barred. It became hopelessly barred even assuming that time began to run from 20th July 2009.

25. As the offences are minor and as no arguments were advanced in this behalf, I am not in favour of exercising powers extending the period of limitation under section 473 of the Code.

26. Therefore, on the basis of the above authorities I am of the view that the petitioners ought to be discharged from the accusation on the ground of limitation. Since the petitioners are being discharged on the ground of limitation there is no need for the court to probe into the alleged offences.

27. This application is accordingly allowed by discharging the petitioners...."

(vi) In the decision Progressive Aluminium Limited V. Registrar of Companies, 1997 (89) Comp Cases 147 (AP), wherein at Paragraph Nos. 27 and 28 it is observed as under:

"27. It was argued on behalf of the respondent-Registrar of Companies that this court was deprived of its jurisdiction to entertain the petition under section 633(2) of the Act on account of the fact that the apprehension of launching prosecution against the petitioners had in fact become a reality, because

the prosecution had already been launched against petitioners Nos. 2 to 10 by the time when the High Court's orders restraining the respondents-Registrar of Companies from launching prosecution was received. This arguments, however, does not hold goods, having regard to the fact that on the date on which the company petition was made, the petitioners legitimately carried an apprehension that the prosecution would be launched against them. If the launching of prosecution is an earlier event, it would frustrate the petitioners' right to move the court for orders under section 633 (2) of the Act. In the present company petition, this High Court had passed an order on April 30, 1993, not to take any final decision in the matter of launching prosecution. The said order was received by the Registrar of Companies only on June 7, 1993, and, therefore, the respondent-Registrar of Companies was not aware of the same till that day. This situation makes it clear that on the date on which this company petition was made, the cause for moving the court under section 633 of the Act did exist, and, therefore, the petition cannot be dismissed merely on the ground that subsequent to the filing of the petition, the prosecution had been launched.

28. Adverting now to the liability of the petitioners to be prosecuted under section 63 of the Act, the main ingredient of the provision is that every person who authorised the issue of the prospectus is liable to be punished with imprisonment and fine if it is shown and established that the prospectus included any untrue statement. The above discussion throws ample light on the proposition whether the statement with regard to two and a half decades' experience included in the prospectus could be termed as an untrue statement, and we have already recorded a finding that it could not be termed as an untrue statement mainly because it was not besmeared with any mala fide intention of practising fraud upon the subscribers apart from the fact that the statement cannot be altogether branded as a false statement, having regard to the fact that the partners of PEC, who were the promoters of the first petitioner-company did have the necessary experience in the field spread over a period of two and a half decades. The statement, therefore, cannot be branded as wholly untrue. It suffered only from want of a clarification that the experience was that of the persons manning the partnership firm and not the firm itself. In fact, even the omission of such clarification cannot be treated as rendering any

credibility to the substratum of the statement because it is a matter of ordinary prudence that the experience of a body corporate is always that of the persons manning the body corporate and not of the body corporate itself. I am, therefore, not in agreement with the submissions made by learned counsel for the Registrar of Companies that any cause existed to believe that the statements in question made in the prospectus were untrue statements so as to believe that the offence punishable under section 63 of the Act had been committed, and for that matter, the petitioners had become liable to be prosecuted for the alleged offence. In that view of the matter, therefore, not only are the petitioners entitled to protection under section 633(2) of the Act, but they can also not be treated as having incurred any liability for the offence punishable under section 63 of the Act. Therefore, the prosecution deserves to be quashed at the threshold."

(vii) In the decision Y.B.Chatturvedi V. Hope Textile Limited and Others 1990 (68) Company cases 713 [M.P.] at Paragraph Nos.12 to 15 it is observed as under:

"12. Learned counsel for the said respondent also placed reliance on the decisions in Trisure India Ltd., In re : Richard Laurence Parish v. Registrar of Companies [1983] 54 Comp Cas 197 (Bom), Suresh Tulsidas Kilachand v. Collector of Bombay [1980] 2 LLJ 81 (Bom), Suresh Tulsidas Kilachand v. Collector of Bombay [1984] 64 FJR 399 ; [1984] Lab IC 1614, State of U.P. v. Lalaram Gupta [1974] Lab IC 963 (All), Khetramohan Nayak v. Sri Sidha Kamal Nayana Ramanuj Das, AIR 1956 Orissa 206, B.M. Chatterjee v. State of West Bengal, AIR 1970 Cal 290 and Nathulal Govardhan v. Regional Provident Fund Commissioner [1984] MPLJ 340 ; [1985] 66 FJR 66 (MP). Learned counsel, therefore, submitted that as the prosecutions have already been lodged against the petitioner also, he is not entitled to get any relief from this court and he is at liberty to raise any defence that may be available to him before the criminal court in which prosecutions have already been filed.

13. Learned counsel for respondent No. 3 submitted that a criminal case before the Employees' Insurance Court under the Employees' State Insurance Act has already been filed against the petitioner also bearing No. 15 of 1982 for the earlier period. Learned counsel further submitted that under Section 2(15), (17) of the Employees' State Insurance Act, the petitioner is an

occupier as defined therein being admittedly a director of the respondent-company. Learned counsel further submitted that the questions raised by the petitioner in this court are debatable questions of fact and whether the petitioner can be said to be the principal employer or not has to be decided by the Employees Insurance Court on the basis of the evidence adduced before it and, therefore, the petitioner is not entitled to seek any indulgence from this court at this stage. Learned counsel further submitted that like offences under the Employees' Provident Funds Act and the Employees State Insurance Act are deemed to be continuing offences and in support of this submission, learned counsel, while adopting the arguments submitted by learned counsel for respondent No. 2, placed reliance on the decisions in *Bhagirath Kanoria v. State of M. P.*, AIR 1984 SC 1688; [1986] 68 FJR 98, *Bombay Metal Works P. Ltd. v. Regional Director, Employees' State Insurance Corporation* [1985] Lab IC 1318 (P & H), *B.M. Chatterjee v. State of West Bengal*, AIR 1970 Cal 290 and *Nathulal Govardhan v. Regional Provident Fund Commissioner* [1984] MPLJ 340; [1985] 66 FJR 66 (MP), wherein it has been held that the director of a limited company is an owner and, therefore, the principal employer within the meaning of Section 2(17) of the Employees' State Insurance Act. He, therefore, submitted that the petitioner is not entitled to seek any relief from this court in this manner. Learned counsel also submitted that, admittedly, even the employees' contributions deducted from their wages has also admittedly not been deposited and, therefore, according to Explanations 1 and 2, added to Section 405, Indian Penal Code, the same amounts to criminal breach of trust.

14. No reply has been filed on behalf of respondent No. 1, namely, Hope Textile Ltd. nor has any one appeared on their behalf at the hearing of this petition.

15. Thus, after hearing learned counsel and after going through the record as also the case-law cited, I am of opinion that there is no merit in this petition which deserves to be dismissed as prosecutions under the Employees' Provident Funds Act have already been filed against the petitioner as also under the Employees' State Insurance Act, and as the cases are already pending, it is not necessary for me to consider the pleas as also the grounds taken by the petitioner in support of his defence as it is not for this company court but it is for the courts where the prosecutions have already been lodged, which have to consider the

same. Therefore, I am not expressing any opinion regarding the merits of those cases which are yet to be decided on merits after recording evidence thereon. That apart, there appears nothing on record to indicate that prosecutions have been lodged against the petitioner also with a view to only harass him as alleged by him because it cannot be disputed that the petitioner being a director of the company is also an occupier. Therefore, he is at liberty to take whatever defences are available to him before those courts and consequently I do not find any valid ground to allow this petition, as the judgment of the Delhi High Court, on which learned counsel for the petitioner has placed reliance, has only made certain observations regarding such directors.

(viii) In the decision *Farouk Irani and Another V. Board for Industrial and Financial Reconstruction*, 2002 [110] Company Cases at page 64, it is observed as under :

"Under Section 633(2), this Court has the power to grant relief as a trial court, provided the conditions laid down under Section 633(1) are satisfied and the offence/s being,

(a) the lapse or offence alleged must be one of the kinds mentioned in Section 633(1).

(b) The applicant must be shown to have acted honestly and reasonably.

(c) The court is in a position to conclude or render the finding with regard to all the circumstances of the case, that the officer ought to be excused fairly.

Exercise of power under Section 633(2) is discretionary. On the facts of the case and in the light of the imputations set out in the inspection report, read with the show-cause notice, this Court is not inclined to exercise its discretion in favour of the applicants. As in my view, the violations, as pointed out in the inspection report, are violations of the statutory provisions and some of them are mandatory in nature and in respect of such mandatory provisions, the question of bona fides or not being wilful or dishonest may not have a bearing at all. That apart, for the purpose of disposal of this petition and when the same being taken as a finding, this Court will be justified in proceeding on the basis that the applicants have not acted honestly or reasonably, having regard to the facts and circumstances of the case. In *Rabindra Chamarla v. Registrar of Companies*, their Lordships of the Apex Court had an occasion to

consider the scope of Section 633 and held that Sub-section (2) of Section 633 is intended to restrict its operation only to the proceedings arising out of the default, breach of trust, misfeasance or breach of duty in respect of the duties prescribed under the provisions of the Act. Unless this Court comes to the conclusion that the applicants have acted honestly or reasonably, this Court will not be justified in going to the rescue of the applicants. The only other alternative open to the applicants is to contest the proceedings before the judicial magistrate before whom the complaint is instituted.

The material question for consideration is whether the applicants have acted honestly or in good faith or whether the applicants have any justifiable reason to escape from liability, in such cases, criminal intention is irrelevant as has been held by this Court in *Amara Pictures (P.) Ltd., In re* [1970] 40 Comp. Cas. 130.

On a consideration of the show-cause notice read with the inspection report, this is not a fit case where this Court would be justified to relieve the petitioners by exercising its discretionary jurisdiction under Section 633. It is made clear that any observation or finding recorded in this order is only for the limited purpose of this company petition and the criminal court before whom the complaints may be made, against the petitioners herein, shall decide the complaints on the merits and on the evidence that may be let in without reference to any observations or findings, if any, recorded by this Court for the purpose of this petition."

(ix) In the decision *M.Meyyappan V. Registrar of Companies*, 2012 (112) Company Cases 450 [Madras] at Paragraph Nos.13 and 15, it is observed as under:

"13. Learned counsel for the petitioner has relied on the following decisions in support of his claim that by virtue of the above-referred provisions this court in a appropriate case relieve the person concerned from the prosecution :

(1) In the case of *Muktsar Electric Supply Co. Ltd., In re* (In Liquidation) [1966] 36 Comp Cas 144 (Punj) ;

(2) *East India Hotels Ltd., In re* [1980] 50 Comp Cas 381 (Cal);

(3) G. M. Mohan v. Registrar of Companies [1984] 56 Comp Cas 265 (Karn) ; and (4) P. Vaman Rao v. Secretary to Government [1998] 93 Comp Cas 486 (AP).

14. Almost in similar circumstances and while considering Section 633(2) of the Act, the courts have granted the relief as claimed. After going through the factual details in those cases and the statutory provisions referred to therein, I am in respectful agreement with the conclusion arrived at therein and I am of the view that these decisions are applicable to our case.

15. Therefore, in the circumstances made out in this case, this court under Section 633(2) of the Act directs the Registrar of Companies to forebear from prosecuting the petitioner for the offence mentioned in the show-cause notice. Accordingly, the company petition is allowed. No costs. Consequently, connected company application is closed."

Respondents' Contentions and Citation:

24. Conversely, it is the submission of the Learned Counsel for the Respondents that the present Appeal filed by the Appellant is an abuse of Process and that the Appellant has no locus to even initiate a complaint under the Companies Act, 1956. Further, the Respondents [Petitioners in C.P.No.297 of 2013] were served with the notice based on the criminal complaint initiated by the Appellant before the Economic Offences Court, No.1, Egmore, and soon after receipt of notice, the Respondents had approached this Court by filing C.P.No.297 of 2013 under Section 633 of the Companies Act, 1956.

25. The Learned Counsel for the Respondents submits that the Impugned Order dated 23.10.2013 passed in C.A.No.1072 of 2013 in C.P.No.297 of 2013 is a well reasoned order passed by the Learned Single Judge and further that the Company Petition in C.P.No.297 of 2013 was held to be maintainable and in fact, the Learned Single Judge had permitted the Appellant to contest the main C.P.No.297 of 2013 on merits.

26. It is represented by the Learned Counsel for the Respondents that the offence complained off is an offence under the Companies Act, 1956 and in fact, Section 10 of the said Act under the caption 'Jurisdiction of Courts' reads as under:

"(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate so that High Court in pursuance of sub Section(2); and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district."

27. It is also represented on behalf of the Respondents that the other Respondents and the Registrar of Companies in Company Petition have not preferred any Appeal against the Order dated 23.10.2013 passed in C.A.No.1072 of 2013 in C.P.No.297 of 2013.

28. The Learned Counsel for the Respondents points out that the issue that crops up for ruminations is that whether the Hon'ble High Court is barred from entertaining a Petition under Section 633 (2) of the Companies Act by an Officer of a Company against whom any proceeding that is brought before any Court. In this regard, the Learned Counsel for the Respondents emphatically projects an argument that the power conferred under Section 633 of the Companies Act upon the High Court is an additional power and cannot be read in a restricted manner.

29. The Learned Counsel for the Respondents submits that the Learned Single Judge had extensively analysed various provisions of the Companies Act, 1956 and came to the resultant conclusion that the power granted to the High Court is in addition to the powers already available with the High Court with an exempt / relief persons.

30. The Learned Counsel for the Respondents takes a plea that the Learned Magistrate of a Criminal Court has a power to relieve a person [persons] under Section 633(1) of the Companies Act and that the High Court can relieve the concerned persons even in respect of apprehended cases. Moreover, it is submitted on behalf of the Respondents that the Hon'ble High Court has a wider power and to support this contention, the Learned Counsel for the Respondents refers to the decision of this Court P.V.R.S.Manikumar V. The Official Liquidator reported in 2013 (1) CTC at Page 759, wherein at Special Page 770 at Paragraph No.27 and at Special Page 773 at Paragraph No.36, it is observed as under:-

"27. Sub-section (5) of Section 454 has to be read in the light of Section 633 of the Companies Act. Section 633 of the Act permits the Court to consider over all circumstances of the case and to arrive at a conclusion as to whether the accused has acted honestly and reasonably and the default was beyond his control. In case the Court is satisfied that the accused acted reasonably and there was no dishonesty on his part, necessarily, he should be relieved of the liability

subject to reasonable terms. Sub-section (2) of Section 633 also makes the position very clear that the High Court shall have the power to relieve him, as if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1) of Section 633 of the Companies Act.

36. The learned Single Judge found merit in the contention taken by the appellant that he had actually no access to the records. The learned Judge also indicated a doubt as to whether the Official Liquidator has discharged his obligation of proving the offence. When it is made out, that the Official Liquidator himself has not discharged his obligation, the question of convicting the appellant does not arise. Since the learned Judge has found merit in the contention raised by the appellant that he has no access to the records and entertained a doubt with regard to the discharge of obligation by the Official Liquidator, necessarily the benefit of doubt should have been given to the appellant. Section 633 gives wide powers to the Court to grant relief in appropriate cases, provided the Court is convinced that the accused acted honestly and reasonably."

31. The Learned Counsel for the Respondents submits that the Impugned order dated 23.10.2013 passed in C.A.No.1072 of 2013 in C.P.No.297 of 2013 passed by the Learned Single Judge is not a 'Judgment' within the meaning of Clause 15 of the Letters Patent and in short, the impugned order does not affect any rights of the Appellant adversely. Furthermore, the Appellant is wary of facing a contest in C.P.No.297 of 2013 and there are Respondents including the Registrar of Companies and added further, the Appellant does not mention in which status / capacity he claims to be an aggrieved. Besides the above, the Appellant is not a Share Holder or Contributory as per order in TCP No.101 of 2016 in C.P.No.62 of 2012 dated 22.06.2018 passed by the National Company Law Tribunal, Division Bench, Chennai Branch between M/s Vis-Ram Financial Services Pvt., Ltd., V. M/s Metafilms India Limited and 33 Others.

32. The Learned Counsel for the Respondents by referring to Section 621 of the Companies Act, 1956 contends that the ingredients of said Section restricts the power of the Court to take cognizance of an offence against the Companies Act, 1956 in respect of written complaints by certain category of persons, alone, viz., Shareholder, Registrar of Companies, Contributory or SEBI. In short, it is the plea of the Respondents that the Appellant with malice and vexations intent / launched the criminal proceedings against the Respondents [Petitioners in

C.P.No.297 of 2013]. Also that the Hon'ble High Court has the requisite power to protect the affected / aggrieved persons after hearing the main C.P.No.297 of 2013 on merits.

33. The Learned Counsel for the Respondents relies on the decision of the Hon'ble Supreme Court in Shah Babulal Khimji V. Jayaben D.Kania and Another AIR 1981 SC at Special Page 817 at Paragraph No.120 wherein under some Illustrations, particularly, in the said 15th Illustration, the Impugned Order dated 23.10.2013 in C.A.No.1072 of 2013 in C.P.No.297 of 2013 does not fit in, as such, the Impugned Order of the Learned Single Judge in C.A.No.1072 of 2013 in C.P.No.297 of 2013 cannot be characterised as 'Judgment' within Clause 15 of Letters Patent.

An Appraisal:

34. At the outset, this Court pertinently points out that in Law, an 'Order' will amount to a 'Judgment', if that Order finally determines some right of an affected litigant notwithstanding the fact that the said order is passed in the main cause / case or suit or in ancillary proceedings thereto. In the present case, the Order dated 23.10.2013 in Company Application No.1072 of 2013 in Company Petition No.297 of 2013 (filed by the Appellant, as Complainant) passed by the Learned Single Judge, whereby and whereunder, the Appellant's Preliminary objection was not sustained affects the prime and valuable right of the Appellant materially and directly and causes prejudice or inconvenience to it. Therefore, the said Order, in reality, is a 'Judgment' for the purpose of Clause 15 under the Letters Patent, in the considered opinion of this Court. Viewed in that perspective present Original Side Appeal filed by the Appellant is 'Maintainable'.

35. It is not in dispute that the Appellant had filed a private complaint under Section 200 of Cr.P.C., [for an offence under Section 628 of the Companies Act 1 of 1956] on the file of the Learned Additional Chief Metropolitan Magistrate, (E.O.1), Egmore, Chennai as against the Respondents 1 and 2 and another G.Sivaprakash, Chartered Accountant, Chennai - 30, which was taken up on file by the Learned Additional Chief Metropolitan Magistrate, EO1, Egmore.

36. The Respondents 1 and 2 in the present Appeal upon receipt of summons had entered appearance through the Learned Counsel, later the Respondents had filed C.P.No.297 of 2013 before this Court [under Section 633 of the Companies Act, 1956 r/w Rule 9, 11 of the Company Court Rules, 1958] against the present Appellant [who figured as 1st Respondent one R.Subramanian, as 2nd Respondent and the Registrar of Companies, Chennai, viz., 3rd Respondent. As a matter of fact, the Respondents [Petitioners in C.P.No.297 of 2013] prayed for

passing of an order by this Court to relieve them wholly from the alleged acts of default and liability complained by the 1st Respondent [Appellant] in C.C.No.107 of 2013 pending on the file of the Learned Additional Chief Metropolitan Magistrate, E01, Egmore, Chennai.

37. It appears that the Respondents [Petitioners in C.P.No.297 of 2013] had obtained an order of Stay of the Criminal Proceedings in Comp.A.Nos.995 and 996 of 2013 on 19.09.2013. It comes to be known that the Appellant filed C.A.No.1072 of 2013 in C.P.No.297 of 2013 before this Court praying for passing of an order by this Court to dismiss the C.P.No.297 of 2013 in 'Limine as Not Maintainable' filed by the Respondents, (As Petitioners), both on admitted facts and settled position in Law. Further, the Appellant in C.A.No.1072 of 2013 has reserved its rights to file a detailed counter on merits, at a later stage in case the same was felt necessary etc.,

38. A glance of the contents of an affidavit in C.A.No.1072 of 2013 in C.P.No.297 of 2013 filed by the Appellant, as Applicant, shows that the Appellant took a plea that upon notification of Section 463 of the Companies Act, 2013, the provisions of Section 633 have ceased to operate from 12.09.2013 and no relief could be sought for from this Court on or after 12.09.2013 under the Provisions of Section 633 of the Companies Act, 1956. Furthermore, according to the Appellant, the provisions of Section 633(1) and Section 633(2) of the Companies Act operate in distinct spheres and further that Section 633(2) of the Companies Act, applies only prior to the initiation of proceedings and Sub Section (1) of Section 633 of the Companies Act, will alone apply, once the proceedings are initiated. That apart, the right of the Respondents / Petitioners in C.P.No.297 of 2013 to approach the Hon'ble High Court under Sub-Section 2 of 633 of the Companies Act will lie only when the proceedings have not been initiated.

39. In the instant case, the C.C.No.107 of 2013 filed by the Appellant, as Complainant, before the trial Court was taken on record and according to the Appellant, if the Respondents are desirous of seeking any relief under Section 633 of the Companies Act, their only option is to approach the trial Court where the C.C.No.107 of 2013 is pending. The Appellant in C.C.No.107 of 2013, as Complainant had averred that the Share Certificate issued in the form of Letters of Allotment are as per Section 84 of the Companies Act, constituting the prima facie evidence of ownership of the said shares. The Appellant had filed the Complaint under Section 200 of Cr.P.C., in C.C.No.107 of 2013 for an offence under Section 628 of the Companies Act 1 of 1956.

40. Be it noted, that by virtue of the Companies [Second Amendment] Act, 2002, the Civil Courts to a vast extent were deprived of their jurisdiction because of the formation of National Law Tribunal and National Company Law Appellate Tribunal. Apart from that, it is seen from the Order dated 22.06.2018 in T.C.P.No.101 of 2010 passed by the National Company Law Tribunal [Division Bench, Chennai] in C.P.No.62 of 2012 [between M/s Vis-Ram Financial Services Pvt., Ltd., Limited V. M/s Metafilms India Limited and 33 Others] wherein and

whereunder it is observed as under:

"The Petitioner is not a member of the Respondent Company. Except providing letter of allotment, no share certificate has been produced. Letter of allotment is purportedly issued on 28.07.1997. No steps or claim ever made for the share certificates since 1997.

The petitioner has never asserted his right as shareholder for 15 years. The petition is barred by limitation. The petitioner is pawn in the hands of R.Subramamiam who has been engaged in series of disputes and the present petition is one more attempt to harass the applicants. The petition is abuse of process. Having failed to obtain orders through various parties like Thamaraiparani Investments Ltd., Citrex Products Ltd., represented by Rathinakumar etc., R.Subramaniam is filing the present petition through Vis Ram Financial Service Limited" and ultimately, the Tribunal opined that the Petitioner [Appellant] were not entitled to claim any relief under any relief under the Company Act, especially, under Sections 111, 111A, 235(2), 397/398 r/w Section 402, 403, 408 and 539-544 r/w 406 of the Companies Act and TCP No.101 of 2016 in C.P.No.62/2012 and all connected Company Applications and Interlocutory Applications were dismissed without costs.

41. Section 621 of the Companies Act, 1956 enjoins that ;
(a) the Registrar;
(b) a person authorised by the Securities and Exchange Board of India;
(c) any shareholder of the company;
(d) a person authorised by the Central Government can initiate a complaint can initiate a complaint.

42. It is to be borne in mind that the object of Section 633 of the Companies Act is to grant relief against undue hardship

in a given case and grant relief from liability to a person who though technically guilty of negligence, default, breach of duty, misfeasance or breach of trust, are able to satisfy the subjective conscience of the Court that they had acted honestly and reasonably and having regard to the attendant facts and circumstances of their case they ought to be fairly excused / relieved from the charge or charges levelled against them.

43. One cannot ignore a very vital fact that Section 633(2) of the Companies Act, 1956 confers a larger / wider ambit to the Hon'ble High Court to grant an 'Apprehended' / 'Anticipatory relief' in regard to the Apprehended / Anticipatory criminal proceedings also, as per decision in Re, S.P. Chopra and Company (1966) 1 Company Law Journal page 214 and (1966) 36 Company Cases 144 (Punj) Muktsar Electric Supply Co., Ltd.,

44. As per Section 633(2) of the Companies Act, 1956 the power to grant relief to the Hon'ble High Court, is a discretionary power and the same should be exercised by the Court only where it is satisfied that the concerned person had acted honestly and reasonably and that considering the circumstances of a given case, he should be excused. The only issue for consideration under Section 633 (1) or (2) is that whether a person had acted in good faith [honestly] and whether he had any reason to escape from the liability.

45. It is to be pointed out that in the decision Progressive Aluminium Limited V. Registrar of Companies reported in (1997) 4 Company Law Journal at Page 215(AP), it is held that the prosecution was not a bar to the continuation of the Relief Petition. Also that, as per Section 633 (3) of the Companies Act, 1956 whether it is a criminal proceeding or a relief of civil liability is claimed under Section 633(2) of the Act, in all these cases, notice is to be given to the Registrar of Companies, as per Section 633(3) of the Act. The power to relieve is in the hands of the Court, when it is convinced that an individual had acted reasonably and honestly, as per Division Bench Decision D.Doss V. C.P. Connell (1937) 7 Company Cases at Page 429. The subjective satisfaction of the Court in granting relief in a given case must be reached after a careful and meticulous rumination of the entire subject matter in issue to the effect that the person concerned had acted honestly and reasonably and that by taking note of all circumstances of the case, he must be excused. In short, the power under Section 633 of the Companies Act, 1956 is not to be exercised in a casual and cavalier and loose fashion, mainly resting upon the pleadings or mechanical averments in the Petition or an Affidavit. Further, in the decision S.P. Punj V. Registrar of Companies reported in [1991] 71 Company cases at page 509 (Delhi), the High Court has the power to grant the relief under Section 633(2) of the

Companies Act.

A Panoramic Spectrum of Case Laws :

46. To put it precisely, in the decision of Punjab at Chandigarh S.P.Chopra and Company and Another, reported in 1996 (1) Company Law Journal at Page 215, it is held as under:

"(1) In view of the fact that (a) the Registrar had completely supported the case of the petitioner, (b) all the relevant records of the company had been destroyed (c) the complaint had been withdrawn unconditionally, and (d) most of the material witnesses were not alive, the explanation which had been furnished by the petitioner in the matter of showing an amount of Rs.30,000 as having been paid to the custodian of the Enemy Property must be accepted. The petitioner is entitled to apply under section 281(2) of the Act of 1913 (Section 633(2) of the Act of 1956) and he deserved to get relief under the relevant provisions of the Companies Act;

(2) Section 281(2), Companies Act, 1913 (Section 633(2) Companies Act, 1956) cover prosecutions also. The word "claim" must be construed as having been used in a special sense in Section 281(2) (Section 633(2) (Section 633(2) so as to include also criminal prosecution"

47. Also that, in the decision of Bank of Deccan Limited, In re, it is observed and held that at Special Page 285, as under:

"...Sub-Section (I) of Section 633 refers to any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, and the word "proceeding" there is undoubtedly wide enough to cover a criminal prosecution. But under that sub-section it is for the court before which the proceeding is pending and not for this Court to grant relief. This Court can grant relief only under sub-Section(2) and here the word used is "Claim" and not "proceeding", a word which at first sight certainly seems inappropriate if it is to comprehend a criminal prosecution. But reading the two sub-sections together, it is obvious that the scope of Sub-Section (2) is co-extensive with that of sub-section (I), and no intention is apparent to confine the scope of Sub-section(2) to those only of the proceedings covered by sub-section (I) that can properly be designated as claims. It would therefore follow that if the word "proceeding" in sub section(I) is wide enough to cover a criminal prosecution, the word "claim" in sub-section (2) must be construed as having been used in a special sense so as to include also a criminal prosecution. In other words you are to look upon a criminal prosecution

as a claim that the offender be punished in accordance with law. The wording of sub-section(I) and (2) of section 633 of the Act is, for the present purpose, identical with the wording of sub-sections(I) and (2) of section 372 of the English Act of 1929, and with reference to sub-section(2) of that Act, it was held in *Barry and Staines Linoleum Limited, Inre*(1934) 1 Ch.227; (1934) 4 Company Cases 196. I therefore hold that sub-section(2) of Section 633 is wide enough for this Court to grant relief against an apprehended criminal prosecution..."

48. Further, in the decision in the matter of *Muktsar Electric Supply Co., Ltd.*, reported in 1966 (Vol.36) the Company Cases at page 144, at Special Pages 156 and 157, it is observed as under:

"Actually, summary proceedings before the Magistrates had been commenced against them under Section 141(1) of the English Companies Act, 1929. It was held that Section 372(1) made the court which heard the case the only court which had jurisdiction to give relief in respect of the proceedings which had already been commenced and that with regard to the claim under Section 372(2) the court would make an order granting the petitioners relief from future or apprehended claims in respect of a technical defect, the summary proceedings already commenced being expressly expected from that order. The scope of Section 281(2) came up for consideration before the Orissa Court in *In the matter of Orissa Jute and Cotton Mills Ltd.*, (1956) 26 Company Cases 218. After discussing the English cases, it was laid down that with regard to any criminal proceedings which were already pending, relief could be granted only by the court where they were pending under sub-section(1) and under sub-section(2) the court could relieve the petitioners from any apprehended liability for which proceedings could be taken in the future. In *InreTolaram Jalan (Inre Filmstan Private Limited)* (1959) 29 it was held that the word "claim" occurring in sub-section(2) of section(2) of section 633 of the Companies, Act, 1956 (equivalent to section 281 of the Act) would also include proceedings such as penal proceedings under Section 162, read with Section 220 of the Act of 1956. Section 633 of the Companies Act of 1956 was considered by the Kerala High Court in *InreBank of Deccan Ltd.*, (1960) 30 Company Cases 284. Following the English cases as well as the Orissa decision, it has been held that under sub-section(1) it is for the court before which the proceedings are pending to grant relief but the High Court can grant relief under Sub-Section is wide enough to cover

criminal prosecution. The word "claim" in sub-section (2) must be construed as having been used in a special sense so as to include also criminal prosecution. The High Court has, therefore, power under section 633(2) to grant relief against an apprehended prosecution.

The learned Advocate-General has relied on Thakur Dan Singh Bist V. Registrar of Companies (1960) 30 Comp. Cases 405 in which a contrary opinion has been expressed with regard to the scope of Section 633(2) of the Act of 1956. According to A.P.Srivastava J., sub-section (1) is wide enough to cover all kinds of liabilities, both penal and civil, but sub-section(2) applies only to apprehended claims, ie., claims for civil liability, and does not cover penal liabilities or prosecutions. I have carefully perused this judgment but with great respect, I am unable to agree with the view of the English Courts as also the Orissa, Bombay and Kerala High Courts that relief can be granted against possible criminal prosecution under sub-section(2) of section 633 of the Act of 1956 or Section 281(2) of the Act, as under Section 372(2) of the English Act."

49. It may be useful to refer to the decision of this Court Y.Venkanna Chowdry [died] and another V. G.Lakshmidewaamma and 20 others reported in 1994 1 L.W. at Page 112 and at Special Page 113, wherein at Paragraph Nos.18 and 19, it is mentioned as under:

"18. We have seen from the facts and of the adjudications that have been made in the process of preparation of the final decree including the impugned order under which all issues as to the objections of defendants 7, 8, 10 and 19 in particular have been disposed of except that the total amount realised from the two pictures by the first defendant and the rate of interest are left to be determined, for which purpose, the learned trial Judge has accounted the statement given on behalf of the contending defendants on the total realisation of the pictures as reflected in Exhibits C-62 and C-63 and on the interest permitted a statement on the outstanding amount due with effect from 29-6-1963 at the rate of 12% with yearly rests till the date of the judgment by the contesting defendants. If the statement to the said effect is received and accordingly if formal order is made, the preliminary decree shall become final. There can be no manner of doubt that a decree on becoming final shall be appealable under S. 96 of the Code of Civil Procedure and so under clause 15 of the Letters Patent of this Court. A 'judgment', however, for the purpose

of clause ! 5 of the Letters Patent has no limitation of the order being a decree. Under the code of Civil Procedure, a 'judgment' consists of the reasons and grounds for a decree passed by a Court. As judgment constitutes reasons for the decree it follows as a matter of course, that the judgment must be a formal adjudication, which conclusively determines the right of the parties with regard to all or any of the matters in controversy. But the Supreme Court has said in the case of Shah Babulal Khimji V. Jayaben, " The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted' by sub-sec. (2) of S. 2 cannot be physically imported into the definition of the word "judgement" as used in cl. 15 of the Letters patent because the Letters Patent he advisedly not used the term 'order' or decree anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word "judgment" used in the Code of Civil Procedure."

That, however, does not mean, the Supreme Court cautions, "At the same, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word "Judgment" undoubtedly a concept of finality in a broader and not a narrower sense."

Thereafter, the court has stated that there can be judgments of three kinds; a final judgment, a preliminary judgment and an intermediary or Interlocutory judgment, the later being such orders which contain the quality of finality such as orders specified in clauses (1) to (w) of Order 43 Rule 1 of the Code of Civil Procedure, which are judgments within the meaning of the Letters Patent as well, and therefore appealable and added, "There may also be interlocutory orders which are not covered by Order 43. Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote."

The second of the types of judgment enlisted in the judgment of the Supreme Court are of two forms : (1) Where the trial judge by an order dismisses the suit

without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable, and (2) where the trial judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, etc. in the latter category, the Supreme Court has pointed out.

"such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger bench."

19. The court has given instances on the one hand of the orders, which are not judgments because the grievance on such a score can be corrected by the appellate court in appeal against the final judgment and also instances of the orders, which appear not to decide a suit or a proceeding in any aspect finally, are judgments for the purpose of the Letters Patent.

and further in the aforesaid decision, at Paragraph No.21 it is observed as under :

"21. The test indeed as to when a certain order of the court is a judgment although variously referred to, has always been the same after the above judgment of the Supreme Court. A Bench of this Court has taken all these principles in one of its recent judgments in the case of Radhika Konel Parekh V Konel Parekh, in a Full Bench judgment of this court in Loyal Textile Mills Ltd. v. Allcnberg Cotton Co. Ltd. (1993) 1 Mad LW 132 and in an unreported judgment of a bench of this court in O.S.A. Nos. 8 and 25 of 1987 (judgment dated 19-11-1992) in which the judgment of the Supreme Court in Jugal Kishore Paliwal v. Satjit Singh, (1984) 1 SCC 358 has also been noticed to say that every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned and that similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment".

50. It is to be relevantly pointed out by this Court that in the decision of S.B.I. Home Finance Limited, In Re (2007) 138 Comp Cases 106 [Calcutta]; (2007) 77 CLA 283, it is held as

under:

" There is, in my view, no misdeclaration that would attract the penalty under Section 628 of the Act. I do not see any false or misleading statement having been made. Notwithstanding the show cause notice not having relied on the second limb of Section 628 inasmuch as the same has been urged, I take that into consideration. In the context of the report, there is no material concealment of information by such statement. In any event, the directors report is contained in reports which detailed the financial position of the company and anyone interested could have skipped over the pages to come to the schedule to be balance-sheet in order to ascertain the financial status of the company...

Upon an application being filed under Section 633 (2) of the Act, the High Court assumes the power and jurisdiction as the court before which the proceedings threatened to be instituted may have been brought. In such a case, the criminal court would have the jurisdiction to acquit the accused, to exonerate the accused or to find him guilty and to sentence him. Section 633(2) does not merely give the discretion to the High Court to pardon a person upon his admission of negligence or breach of trust or misfeasance or default or breach of duty. Upon the High Court coming to the conclusion that the apprehension referred to in the opening words of sub-section(2) was genuine, the High Court, willy-nilly becomes the criminal court in which the complaint against the petitioner may have been brought. The jurisdiction of the High Court in such a case is not limited to pardon the defaulter upon default being admitted or being found. The High Court in such a case may acquit or exonerate the petitioner upon arriving at a conclusion that there was no offence committed. In this case, I find that there was no false or misleading statement contained in the sentence, which has been made the subject-matter of the notice relating to the violation under Section 628 of the Act."

51. Further, in the decision Bithal D.Mundra and Others V. Registrar of Companies, West Bengal, reported in (2011) 164 Comp. Cases 375, it is held as under:-

"According to Section 633(1) of the Companies Act, 1956, if an officer is or likely to be liable for contravention of the Act, but, according to the court, he has acted honestly and reasonably, it might exonerate him. The High Court will have the same power

to relieve an alleged offender as the criminal court has under Section 633(1) of the Act. The power of the Magistrate under section 633(1) to exonerate the accused in case he is of the opinion that the accused is likely to have committed the offence, but there are grounds for his exoneration are in addition to his powers to take cognizance and proceed with the trial and not an isolated power. The High Court is also invested with similar powers, first to ascertain whether there is cause for proceeding with the complaint and then to consider whether the accused should be exonerated. A relevant consideration in initiating criminal proceedings is the law of limitation. Section 468 of the Code of Criminal Procedure, 1973, enacts that no court is to take cognizance of an offence after expiry of the period of limitation. The court takes such cognizance when, inter alia, a complaint is filed before it under section 190 of the Code. Considering section 468, the Magistrate has the power under Section 203 to dismiss the complaint on the ground of limitation."

52. In the decision of Chandra Kumar Dhanuka and Ors. V Registrar of Companies reported in (2008) 141 Company Cases 101 (Cal) at Paragraph Nos.4 and 5, it is held as under:

4. Sub-Section(2) confers on the High Court the same power as the criminal court in granting relief to the petitioning officer who apprehends that proceedings might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust. Sub-Section (2), in its closing part, identifies the criminal court and provides that the High Court will have the same powers as the criminal court to relieve a petitioning officer. The expression "if it had been a court before which a proceeding against that officer... had been brought under Sub-Section (1)" makes it clear that the High Court in exercise of powers under Sub-section (2) will have the same powers as the court receiving the criminal proceedings. Such expression does not imply that the High Court will exercise only such powers under Sub-Section(2) that the criminal court may, upon the criminal court finding the charged officer guilty. For the criminal court to relieve the charged officer, such court may or may not conclude that the charged officer is liable. There can be no other meaning to the expression 'he is or may be liable' found in Sub-section(1). If the criminal court can relieve a charged officer without coming to any conclusion that

the charged officer is actually guilty or is liable for the offence, so can the High Court. In taking into account the surrounding circumstances, the criminal court may form a tentative opinion, without a full-fledged trial, as to whether there may not have been any offence at all. In considering whether a charged officer should be relieved, and before conducting the trial at which guilt may be established, the surrounding circumstances that the criminal court can look into would include a tentative view of the likelihood of the charge being established.

5. Nothing in Sub-section(2) limits the authority of the High Court there under to not consider whether the petitioning officer against whom proceedings are threatened has committed no offence at all. If an officer has to admit first that there is default before invoking Sub-Section(2) there would be serious prejudice occasioned to such officer in the event the High Court did not exercise the discretion to relieve the officer. In such event, when the criminal proceedings are instituted by the Registrar, not only can such officer no longer be relieved by the criminal court under sub Section(1) (as the High Court has refused it), the default stands proven on admission. There is nothing so harsh as suggested by the Registrar that appears in Sub-Section(2).

53. Also in the decision of Rabindra Chamria V. Registrar of Companies reported in 1992 Supplement (2) Supreme Court Cases at Page 10 and at Special Page 12, it is held as under:-

"Under Section 633 of the Companies Act relief cannot be extended in respect of any liability under any Act other than the Companies Act. The expression 'any proceeding in Section 633 cannot be read out of context and treated in isolation. It must be construed in the light of the penal provisions. Otherwise the penal clauses under the various other acts would be rendered ineffective by application of Section 633. Again, if parliament intended S.633 to have a coverage wider than the act, it would have specifically provided for it as, otherwise, it is a sound rule of construction to confine the provisions of a statute to itself. The powers under Sub-s (2) of S.633 must be restricted in respect of proceedings arising out of the violation of the Companies Act. Sub-Section(2) cannot apply to proceedings instituted against the officer of the company to enforce the liability arising out of violation of provisions of other statutes. Under sub-s.(3) it is mandatory for the court to give notice to the Registrar of Companies or such other person, if

any, as it thinks necessary. Therefore, if S.633 is interpreted as to include proceedings under Acts other than the Companies Act it will be open to the Court to give such relief under S.633 without giving notice to the authority competent to prosecute in respect of liabilities under the other laws or upon giving notice to others concerned and not the Registrar. Thus the mandatory requirement of sub-section(3) of S.633 can easily be bypassed."

54. Further, in the aforesaid decision at Pages 18 and 19 at Paragraph Nos.23 and 24, it is observed as under:

"23. Under the Companies Act of 1956 (similarly under the Old Act of 1913) various duties and liabilities have been imposed; equally offences have been created for the non-performance of such duties. These offences are offences in relation to the performance of certain duties under the Act. the various offences are mentioned under Sections 59, 62, 63, 68, 142, 162, 207, 218, 272, 374, 420, 423, 538 to 545 & 606.

24. The expression 'any proceeding' occurring under Section 633 cannot be read out of context and treated in isolation. It must be construed in the light of the penal provisions. Otherwise what will happen is the penal clauses under the various other Acts would be rendered ineffective by application of Section 633. Again, if parliament intended Section 633 to have a coverage wider than the Act, it would have specifically provided for it as, otherwise, it is a sound rule of Construction to confine the provisions of a statute to itself."

55. In the decision *Thomas Philip V. Assistant Registrar* reported in 2005 M.L.J. (Crl.) 972 (Kerala) at Special Page 975, it is stated as follows:

10. I have no quarrel with the stipulations in Reg. 17 or the stipulations in the Circular. But in order to agree that the period of limitation has started running as stipulated under Section 469(1) (b) of the Code, it must certainly be shown that the commission of the offence was known to the person aggrieved. An offence like the one alleged in this case - fictitious entries in the balance sheet - cannot be said to have come to the notice of the Registrar actually or constructively on the date when the balance sheet was delivered at his office as to hold that the period of limitation has started running under Section 469(1) (b). The balance sheet and the annexures, as rightly observed by the Andhra Pradesh High Court in the decision referred

above, are usually voluminous and the receipt of the balance sheet or even a cursory perusal of the balance sheet cannot and may not bring to the knowledge of the Registrar and his officials information about the commission of the offence. Detailed consideration and application of mind appears to be necessary and the law appears to have alertly taken note of this contingency when it stipulated that the period of limitation under Section 469 will start running only when commission of the offence is known to the person aggrieved.

Discussions:

56. It is to be relevantly pointed out that in terms of ingredients of Section 633 of the Companies Act, 1956, the Criminal and the Civil Court can accord relief to the affected persons. Indeed, the decision of *In re Tolaram Jalan and Others* reported in AIR 1959 Bombay 245 at Special Page 246 wherein at Paragraph Nos.4 and 6, it is observed as under:

"4. Section 633 under which the relief is sought is identical with Section 372 of the English Companies Act of 1929. Sub-section (1) of Section (1) of Section 633 contemplates proceedings for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company and gives power to the Court hearing the case in certain circumstances to grant relief. Sub-section (2) gives power on the other hand to the High Court to grant relief against a prospective liability in respect of a claim that an officer of a company apprehends might be made against him in regard to negligence, default, breach of duty misfeasance or breach of trust. Now, it is clear that whereas Sub-section (1) refers to proceedings already commenced, Sub-section (2) contemplates a claim which is anticipated as one which might be made in future. Under Sub-section (1) the important words are "the Court hearing the case" which obviously mean the Court before which a proceeding is pending. These words, therefore, mean that it would not be this Court which can grant relief under Sub-section (1) but the Court before whom the proceeding has commenced and is pending. Sub-section (2) on the other hand creates a fiction and provides that in respect of an apprehended claim this Court shall have the same power to grant relief as it would have had under this section if it had been the Court before which proceedings for negligence default, breach of duty, misfeasance or breach of trust had been brought.

5. The question then is what meaning should be attached to the word "claim" occurring in Sub-section

(2) and whether the word "claim" would also include proceedings such as penal proceedings under Section 162 read with Section 220 of the Act.

6. It is urged that the word 'claim' would prima facie mean a civil claim such as a claim for damages which may be made by a company against a defaulting director or an officer of the company or where the company is in liquidation by the liquidator or a creditor or a contributory and not a penal proceeding contemplated by sections such as Section 162. The dictionary meaning of the word "claim" is undoubtedly an assertion of a right to something and a relief provided by statute. I have also been pointed out several sections of the Act where the Legislature has used the word "claim" such as Sections 101, 104, 429, 474 and 529 and it is clear from these sections that the meaning that can be attached to the word "claim" used in these sections must mean a demand or an assertion to a civil right. It was also urged that the Legislature could not have intended to include in the word "claim" in Sub-section (2) of Section 633 proceeding of a penal nature for otherwise the Legislature would have used the word "proceeding" rather than the word "claim". It was further urged that inasmuch as the Legislature has given relief from criminal proceedings by separate sections in the Act such as Sections 63, 69(5), 70(5), 75(4), 207, 209, 210, 211, 217 and 393(4), the Legislature could not have contemplated of including proceedings of a penal nature in the word "claim" in Sub-section (2). It was therefore contended that the word "claim" cannot be interpreted as inclusive of proceedings described in Sub-section (1) of Section 633 and therefore no relief is provided against an anticipated proceeding under Section 633, the only relief provided being in respect of a pending proceeding and that too by the Court before which such a proceeding has commenced and is pending. But then so far as Sections 63, 69(5) and other sections, which were pointed out to me to show that the Legislature has given relief in respect of criminal proceedings, are concerned, it is clear that what those sections and provisos thereto provide are by way of substantive defences to a director or an officer of a company charged under one of the penal sections of the Act. Those are not sections like Section 633 which empower the Court to grant relief in respect of liability incurred by such a director or an officer of a Company. A comparison between those sections

and Section 633 cannot therefore help in the construction of the word "claim" in Section 633(2)".

Further, in the aforesaid decision at Special Page 247 wherein at Paragraph No.10 it is observed as follows:

"10. As already pointed out, the important words in Sub-section (2) of Section 633 are "the Court shall have the same power to relieve him as it would have had under this section if it had been a Court before which proceedings against that person for negligence had been brought." These words, in my view mean proceedings described in Sub-section (1) including proceedings involving fines and penalties in respect of which, if already commenced only the Court which they are pending has the authority to grant relief but which if not pending or already commenced it would be this Court which would have jurisdiction to grant as if it had been a Court before which proceedings had been brought. In this view I have no difficulty in holding that I have the jurisdiction to grant relief under Sub-section (2) of Section 633 in respect of a proceeding which the petitioners apprehend might be adopted against them for their omission to file the balance sheet and profit and loss account for the year 1955-56.

57. A glimpse of Section 633(1) of the Companies Act, 1956 unerringly points out that in the criminal proceedings, the Court shall have no power to give relieve from any civil liability, which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust. However, this Court, on going through the ingredients of Section 633(2) of the Companies Act, 1956, which reads as under:

'[(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section(1)']

is of the considered view that they unhesitatingly speak of an Aggrieved / Affected person to apply to the High Court for seeking relief in respect of any negligence / default, misfeasance, etc., and this invocation of Section 633 (2) can be pressed into service by the Aggrieved person[s], even after initiation / commencement of criminal proceedings by the concerned complainant. Even after receipt of the summons in a

criminal complaint, the affected parties can approach the High Court and the filing of a Company Petition by them seeking necessary relief to relieve the concerned persons from civil liability is not a bar. To put it succinctly, the power conferred upon the Hon'ble High Court under Section 633(2) of the Companies Act, 1956 is an additional one showered by the Companies Act, 1956 and the said power of the High Court cannot be interpreted in a parochial / narrow / restricted sense. In short, the additional power, as per Section 633(2) of the Companies Act conferred upon the High Court to give relief in respect of 'Apprehended Proceedings' does not wipe out the powers envisaged under Section 633(1) of the Act. As such, the plea taken on behalf of the Appellant to the effect that the Respondents cannot contend in C.A.No.1072 of 2013 in C.P.No.297 of 2013 that the High Court can grant them relief under Section 633(2) of the Company Act, is legally untenable one. Further, this Court, in the present Intra Court Appeal is not traversing upon the merits of the controversies / disputes between the parties and also not expressing any opinion on the merits of the controversies in pending Company Petition No.297 of 2013, on the file of this Court.

58. Also, this Court points out that the decisions of various High Court cited on behalf of the Appellant in the present O.S.A.No.393 of 2013 where the criminal prosecutions were initiated by Registrar of Companies / Statutory Authority after issuance of show cause notices to the concerned person(s) and thereby making them aware / bringing it to their knowledge well in advance about the anticipated / apprehended / prospective / contemplated proceedings. But in the present case on hand, the Appellant is the complainant in C.C.No.107 of 2013 on the file of trial Court.

59. There is no Second Opinion of a very significant fact that the power under Section 633(2) of the Companies Act can be exercised by the High Court with great care, caution and circumspection based on the facts and circumstances of the given case, which float on the surface.

60. In view of the aforesaid qualitative and quantitative discussions, after carefully considering the respective contentions advanced on either side and also this Court, on going through the Impugned Order of the Learned Single Judge passed in Company Application No.1072 of 2013 in C.P.No.297 of 2013 dated 23.10.2013, comes to an inevitable conclusion that the view taken by the Learned Single Judge in not upholding preliminary objection raised by the Appellant [as Applicant in C.A.No.1072 of 2013] as regards the 'Maintainability' of the main Company Petition is free from any Legal Flaw. Looking at from any angle, the present Original Side Appeal fails.

In fine, the present Original Side Appeal is dismissed.

Resultantly, the Order dated 23.10.2013 in Company Application No.1072 of 2013 in Company Petition No.297 of 2013 is affirmed by this Court for the reasons assigned in this Appeal. Before parting with the case, this Court grants liberty to the Appellant to contest the main Company Petition No.297 of 2013 pending on the file of this Court, of course, on merits, raising all factual and legal pleas for redressal of its grievances, if it so desires / advised. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

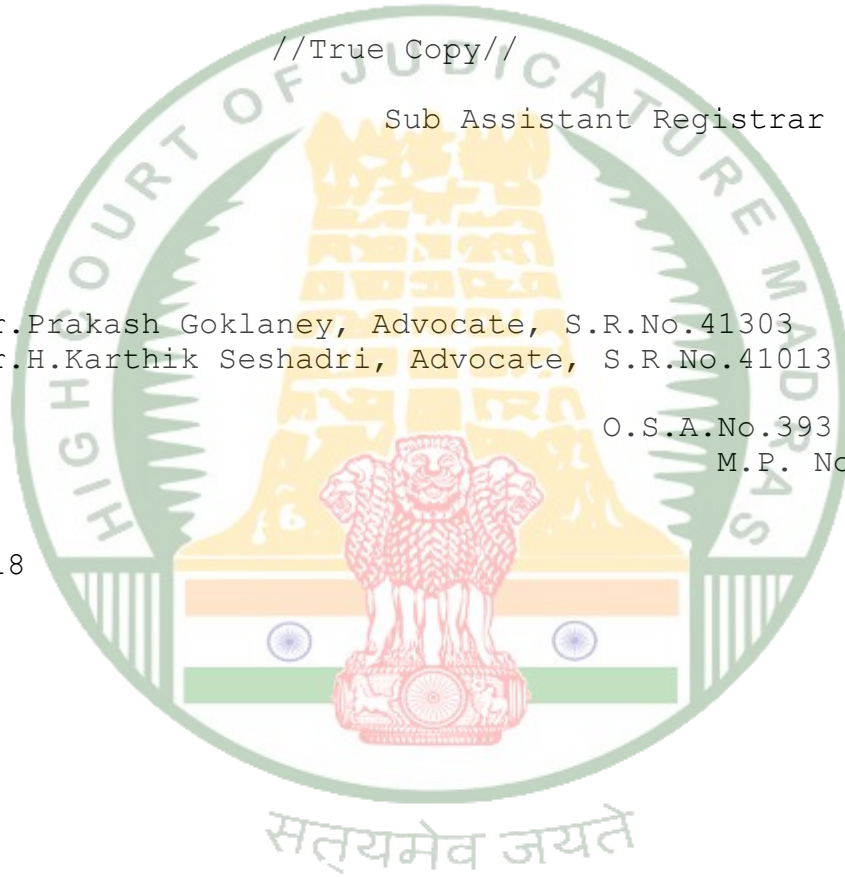
ssd

To

+2cc to Mr.Prakash Goklaney, Advocate, S.R.No.41303
+1cc to Mr.H.Karthik Seshadri, Advocate, S.R.No.41013

O.S.A.No.393 of 2013 and
M.P. No.1 of 2013

VBA(CO)
CS/06/08/18



WEB COPY