

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION No. 949 OF 2017**

Man Industries (India) Ltd. & Ors. ... Applicants  
VS.  
The State of Maharashtra & Ors. ... Respondents

**CRIMINAL APPLICATION No.950 OF 2017**

Heena Vinay Kalantri & Ors. ... Applicants  
VS.  
The State of Maharashtra & Ors. ... Respondents

**CRIMINAL APPLICATION No. 411 OF 2017**

Kirit Navinitlal Damania & Ors. ... Applicants  
VS.  
The State of Maharashtra & Ors. ... Respondents

Mr.Mayur Khandeparkar a/w. Gandhar U. Raikar, Siddhesh S. Borkar I/b. Madhukar Pandurang Dalvi, Advocate for the applicants.

Mr. A.R. Patil, APP for the Respondent – State.

Mr. Kushal Mor a/w. Mr. Mayank Sharma, Advocate for the respondents.

**CORAM : Mrs.MRIDULA BHATKAR, J.**  
**RESERVED ON : MARCH 7, 2019**  
**PRONOUNCED ON : APRIL 22, 2019**

**JUDGMENT:**

By these applications, the applicants prays that the notices which are issued in Company Petition Nos.2 to 7 of 2016 i.e., OW No. 4238/4239/4241 of 2017 and the order of issuance of process dated 30<sup>th</sup> January, 2017 be quashed and set aside. The learned

Sessions Judge, Bombay by order dated 30.1.2017 has issued process and summons under section 127 of the Companies Act of 2013 against accused Nos.1 to 7 for non-payment of dividends to the complainant, who is a shareholder of the company, namely, Man Industries (India) Limited ('MIIL' for short). All the applicants are the directors of MIIL. The applicant Nos.3 and 4 are the father and son, called as RCM group; applicant Nos.1 and 2 are the independent Directors; Complainant / Respondent No.2 is the other brother of applicant No.3. Respondent Nos.2 to 4 are known as JCM group. There are various property issues between two brothers and thus, two groups JCM and RCM are at loggerheads. It is an admitted fact that the original complainant, who is from JCM group, is a shareholder in MIIL. The company had declared a dividend in the AGM dated 12.12.2015. It is an admitted fact that all the shareholders are paid dividends except the complainant. The accused RCM did not pay dividend to the complainant only on account of pendency of the dispute between the parties and, therefore, by taking protection under section 127(c) of the Companies Act, the dividends are not distributed to the complainant. Whether the process and summons issued under section 127 of the Companies Act without taking into account the

provision of section 127(c) of the Companies Act can be granted is the issue.

2. Mr.Khandeparkar, the learned Counsel appearing for the applicants, submitted that it is a dispute relating to swapping of shares between the parties which is pending in nearly 4 to 5 proceedings. He submitted that the accused have filed the suit against the original complainant, in which a Deed of Family Settlement ('DFS' for short) was entered into and signed on 11.9.2013 and in the said settlement, a scheme of merger of the companies was agreed. The company Man Infra Projects Limited ('MIPL' for short) was to go to JCM group and RCM and independent directors will be the owners of MIIL. As per the settlements, the RCM group transferred the shares of MIPL to JCM group. However, he did not transfer the shares having value of Rs.1,28,00,000/- in favour of RCM group. The complainant sold all the assets of MIIL and those shares are having a negative value in the market, although the swapping of shares was approved by the High Court by order dated 20.9.2013. He further submitted that in an Insolvency Petition filed by the complainant under the Insolvency and Bankruptcy Code, he raised the issue of payment

of dividend to him. However, the said petition was dismissed by the National Company Law Tribunal and the appeal filed before the National Company Law Appellate Tribunal challenging the said order of dismissal was also dismissed by order dated 20.2.2018. The learned Counsel heavily relied on the observations made in the order passed in Insolvency Petition wherein the Tribunal held that the Dispute is pending between the two parties. He further submitted that the Contempt Petition No.14 of 2015 filed by the accused RCM against the complainant is pending. On the point of payment of dividend, he submitted that the arbitration proceeding is also pending in the Court. Moreover, the complainant has filed the complaint under sections 397 and 398 which are equivalent to sections 241 and 242 of the new Companies Act for operational mismanagement against the company is also pending. He argued that section 127(c) gives protection from the prosecution under section 127 of the Companies Act, if the dispute is pending in respect of payment of dividend. The learned Counsel further submitted that the said amount of dividend is not spent but it is kept safe in an escrow account.

3. Mr. Khandeparkar, on the point of existence of dispute, relied

on the case of **Mobilox Innovations Private Ltd. vs. Kirusa Software Private Ltd.**<sup>1</sup>. On the point of interpretation and understanding of deeming provision in the proviso of the Section, he relied on following rulings:

- (i) **Indian Oil Corporation Ltd. vs. Chief Inspector of Factories & Ors.**, reported in **(1998) 5 SCC 738**.
- (ii) **ALI M.K. & Ors. vs. State of Kerala & Ors.**, reported in **(2003) 11 SCC 632**.
- (iii) **Maharashtra State Electricity Distribution Co. Ltd. & Anr. vs. Datar Switchgear Limited & Ors.**, **(2010) 10 SCC 479**.
- (iv) **G.Vishwanathan vs. Hon'ble Speaker Tamil Nadu Legislative Assembly, Madras & Anr.**, reported in **(1996) 2 SCC 353**.
- (v) **Kumaran vs. State of Kerala & Anr.**, reported in **(2017) 7 SCC 471**.
- (vi) **Harish Tandon vs. Additional District Magistrate, Allahabad, U.P. & Ors.**, reported in **(1995) 1 SCC 537**.

4. Mr. Mor, in reply, submitted that the dispute is pending

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<sup>1</sup> AIR 2017 SC 4532

between the parties, however, and it is an established position that this fact cannot save the accused in the criminal case because the judgment passed in civil case has no bearing over the criminal trial. So, the dispute contemplated under section 127(c) should be between the company and its shareholders and as per the finding of the NCLT, the dispute is between only two brothers and not between the shareholder and the company. He therefore, argued that the dispute cannot be used for quashing process under section 482 of Code of Criminal Procedure. The learned Counsel has further submitted in reply, that the complainant has claim of Rs.100 crores against the applicants. He submitted that in law, the Court cannot take into account the proviso under section 127 (c) while issuing process. There is a legal bar under section 105 of the Evidence Act. The learned counsel relied on following decisions:

(i) Judgment of Supreme Court in the case of **Kishan Singh (D) through L.Rs. vs. Gurpal Singh & Ors.**<sup>2</sup> on the point of relevancy.

(ii) On the point of the bar of section 105 of the Evidence Act, he relied on the case of **Sewakram Sobhani vs. R.K. Karanjiya Chief Editor Weekly Blitz & Ors.**<sup>3</sup> On

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<sup>2</sup> 2010 AIR SCW 5527

<sup>3</sup> 1981 Cri. L.J. 894

the same point, he relied on the judgment of Division Bench in the case of **Maharashtra State Electricity Board vs. The State of Maharashtra**<sup>4</sup>.

(iii) Placing reliance on the case of **Guru Granth Saheb Sthan, Meerghat Vanaras vs. Ved Prakash & Ors.**<sup>5</sup> and on the case of **Piyush Kantilal Mehta vs. Commissioner of Police, Ahmedabad City & Anr.**<sup>6</sup>, he argued that the decision of Civil Court is not relevant in criminal trial, hence cannot be used under section 482.

(iv) On the point of interpretation of deeming provision and use of the same under section 482 of Cr. P.C., relied on the case of **S.V. Muzumdar & Ors vs. Gujarat State Fertilizer Co. Ltd. and Anr**<sup>7</sup>.

(v) In the Judgment of Gujarat High Court in the case of **Pravin Kumar Patel & Ors. vs. State of Gujarat**<sup>8</sup>, the learned Single Judge of Gujarat High Court has held that for the purpose of deeming fiction coming into operation, the condition precedent is required to be fulfilled.

(vi) Judgment of Single Judge of Calcutta High Court

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4 2006 (108 (2)) Bom. M.L.R. 1764

5 AIR 2013 SC 2024

6 AIR 1989 SC 491

7 AIR 2005 SC 2346

8 (2012) 2 GLR 1758

in the case of **Nishikanta Ghosh & Anr. vs. Corporation  
of Calicut**<sup>9</sup>

5. Heard the submissions of the learned counsel for both the parties and considered the case law cited by them.

6. It is useful to reproduce Section 127 of Companies Act -

**“127. Punishment for failure to distribute dividends -**  
Where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen per cent. per annum during the period for which such default continues:

Provided that no offence under this section shall be deemed to have been committed:—

- (a) .....
- (b) .....
- (c) where there is a dispute regarding the right to receive the dividend;
- (d) ....
- (e) ....”

7. In the present case, the following issues are required to be

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9 AIR 1953 Calcutta

answered:

- (i) The Magistrate while issuing process or notice for commission of a particular offence, should take into account a proviso and deeming provision therein or it is barred under section 105 of the Evidence Act?
- (ii) Whether a dispute exists in the present matter and if exists, can it have bearing at the time of issuance of process in view of Section 127(c) of the Companies Act?

8. Let me deal with the law laid down by the Hon'ble Supreme Court and various Courts on proviso and deeming provision in the Section.

9. The Hon'ble Supreme Court has considered the proviso clause (ii) and (iii) of Section 2(n) of the Act in the case of **Indian Oil Corporation Ltd.** (*supra*). In paragraph 16 of the said judgment, the Supreme Court clarified that the proviso to the section is not in the nature of an exception but in order to avoid any ambiguity or to plug loopholes and to seal the escape routes, a deeming provision has been made in a mandatory form.

10. In the case of **ALI M.K.** (*supra*), the Supreme Court while dealing the Kerala State and Subordinate Services Rules, 1958 has considered proviso of Rule 8. Rule 8 was regarding the members absent from duty. There is a proviso which states that this Rule shall not apply in case of a member whose absent from duty in such service is by reason of its appointment to another service, solely on his own application, unless such appointment is made in the exigencies of public service. The Note 1 to proviso includes deeming provision stating meaning of exigencies in public service. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings, it may be controlled by the proviso. (**Jennings vs. Kelly** reported in **1940 AC 206** and equivalent to **(1939) 4 ALL ER 464**. Whenever there is a deeming provision, it creates a legal fiction. It means when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons, the

statutory fiction is to be resorted to.

11. In the case of **Maharashtra State Electricity Distribution Co. Ltd.** (*supra*), the Supreme Court has considered that by deeming legal fiction, whether the principle of vicarious liability is attracted especially when the persons in the Government establishment are prosecuted when the act is done in the name of the company, hence said ruling is not of any use for the purpose of this case.

12. In the case of **G. Vishwanathan** (*supra*), the Supreme Court while discussing the meaning of legal fiction has held that “a deeming provision is an admission of the non-existence of the fact deemed. It means that the Court must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which evitably flow therefrom, and give effect to the same. It also further held that “the deeming provision may be intended to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the main provision”. Thus, the Court must not permit his “imagination to boggle” when it comes to the inevitable corollaries

of that state of affairs. (**East End Dwellings Co.Ltd. vs. Finsbury Borough Council, 1952 AC 109**)

13. The Supreme Court in the case of **Kumaran** (*supra*), considered the effect of possession and recovery of fine, i.e., Sections 357, 421, 431 of Cr.P.C. read with Section 64 and 70 of Indian Penal Code, i.e., imprisonment for default, however, it is not directly applicable wherein deeming provision in context with Sections 421 and 431 of Cr.P.C. regarding recovery of fine is discussed.

14. In the case of **Harish Tandon** (*supra*), the Supreme Court dealt with the provisions of U.P. Rent Act, Sub-sections (2) and (4) of Section 12 and Explanation in Section 25 of the Act. The Supreme Court has held that full effect is to be given to the statutory legal fiction and it has to be carried to its logical conclusion. In **East End Dwellings Co.Ltd.** (*supra*), the similar view is taken.

15. The learned Single Judge of Gujarat High Court in the case of **Pravin Kumar Patel & Ors.** (*supra*) has held that for the

purpose of deeming fiction coming into operation, the condition precedent is required to be fulfilled.

16. In the case of **Piyush Kantilal Mehta** (*supra*), the Supreme Court dealt with how to interpret a deeming provision. It said that though “Sub-section (4) contains deeming provision, such deeming provision will not be attracted unless the activities of person concerned affect adversely or likely to affect adversely the maintenance of public order.

17. In the case of **S.V. Muzumdar & Ors vs. Gujarat State Fertilizer Co. Ltd. and Anr**<sup>10</sup>, while interpreting deeming provision under section 141 of Negotiable Instruments Act. The Supreme Court held that:

“8. We find that the prayers before the courts below essentially were to drop the proceedings on the ground that the allegations would not constitute a foundation for action in terms of Section 141 of the Act. These questions have to be adjudicated at the trial. Whether a person is in charge of or is responsible to the company for conduct of the business is

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<sup>10</sup> AIR 2005 SC 2346

to be adjudicated on the basis of materials to be placed by the parties. Sub-section (2) of Section 141 is a deeming provision which as noted supra operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial.”

18. These case laws show that whenever there is ambiguity in the Section and the Section is susceptible to different amendments, then the proviso controls the main section. How the proviso is worded and in what context the deeming provision is incorporated matters while giving weightage to the section as a whole. Due to the deeming provision, the Legislature wants the Court to believe the existence or non-existence of certain facts, then it undoubtedly forms a part of that section without which the Section is incomplete.

19. It is to be noted that though the proviso and exception are not synonym, they are usually taken alike. Both the proviso and

exception are defences and both while interpreting the statute provide internal aid independently. The proviso carves out certain situation from the enacting clause and thus proviso follows the enacting clause. Exception is an extended section. Exception is used to exempt something absolutely from the statute, otherwise it is a part of the statute. The proviso is subsidiary to main section. It is not addendum to the main provision.

20. Thus, both the proviso and exception help the reader to understand the enactment as a whole. Sub-section (c) of Section 127 of the Companies Act is a part of the proviso which further provides deeming provision. While interpreting deeming provision in the proviso, the Court cannot overlook the internal aids, which are made available by the legislature, i.e. context and simple meaning of the word, therefore, the completeness of Section is a decisive point while interpreting Section 127 along with proviso and deeming provision.

21. The learned counsel Mr. Mor while arguing on bar of relying on the proviso, pointed out Section 105 of the Evidence Act and also relied on the ratio down in the following cases:

In the case of **Nishikanta Ghosh** (*supra*), the matter came before the High Court where the appellant was convicted under the Calcutta Municipal Act as food was found adulterated and so the Single Judge dealt with Section 105 of the Evidence Act that states about the onus and proviso mentioned in Section 105. The Single Judge held that the onus with regard to special provisos is on the accused and it is for him to establish affirmatively the conditions thereunder in order that the special proviso must be attracted to the case and their benefits made available to him. Thus, the proviso offers a special defence to the accused. In **Nishikanta Ghosh** (*supra*), the Court was dealing with the accused who was convicted and thus the evidence was already before the Court. Hence, this cannot be applicable to the present set of facts where only notices under section 127(c) of the Companies Act are issued.

22. The case of **Maharashtra State Electricity Board** (*supra*), was under section 499 of the Indian Penal Code wherein defamatory statement was made in affidavit. The accused sought protection under exception of section 499 and prayed that it is to be quashed. However, the Division Bench of this Court held that

in view of section 105 of the Evidence Act, the accused had to bring his defence and it can be done only at the stage of trial, as it is his defence.

23. In this case of defamation, the accused wanted the Judge to consider the exception laid down under section 499 which is required to be tested by the complainant and therefore, the Division Bench held that the burden lies on accused to prove a particular fact in his defence. There is a bar for the Court to consider an exception which is a defence.

24. The overall settled law in the case of defamation while issuing process under section 499, exception cannot be considered by the Magistrate, as it needs adjudication. The proviso also puts rider in application of a main section. The purpose for bar on not considering an exception or the proviso at the time of issuance of process is that the complainant should get full opportunity to put up his case by countering the defence of proviso or exception taken by the accused. The complainant may be equipped with factual material which may destroy the defence taken under the exception or proviso. Keeping principle of fair trial

in mind, the complaint cannot be frustrated at the threshold without adjudication. However, when the complaint itself discloses the material or which is a part of the complaint leading to the proviso, then the Court is required to look into the said material and the proviso while issuing process.

25. On the point of jurisdiction and power of the High Court in quashing under section 482 of Cr. P.C., the learned counsel Mr. Mor has submitted that it is a restricted power and it cannot be used generously.

26. In the case of **Kishan Singh (D) through L.Rs. vs. Gurpal Singh & Ors. (supra)**, it was held that FIR cannot be quashed relying on the finding given in the civil Suit though in the said case, on account of delay, the High Court had quashed the criminal proceedings against the respondent and therefore, that order was not upset.

27. **Sevakram (supra)** was a case of defamation. The Supreme Court held that in the case of enquiry report, the High Court should not have quashed the proceedings itself by invoking section 482 of

the Code of Criminal Procedure because it amounted to prejudging the issue.

28. The law is settled on the point of jurisdiction and powers of the High Court under section 482 of Criminal Procedure Code in the landmark judgment of **State of Haryana & Ors. vs. Bhajan Lal & Ors.**<sup>11</sup>. The Supreme Court has made it clear that the powers should not be exercised generously but very sparingly. A reliability of the allegations made in the FIR or the complaint, is not to be examined so also the Judge should not while issuing process think about the conviction of the accused. The Supreme Court made 7 categories of the cases where inherent powers of quashing of process of the Magistrate can be exercised either to prevent the abuse of process of any Court or otherwise to secure the ends of justice, which are:

(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under [Section 156\(1\)](#) of the Code except

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11 1992 Supp 1 SCC 335.

under an order of a Magistrate within the purview of [Section 155\(2\)](#) of the Code;

c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under [Section 155\(2\)](#) of the Code;

e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

f) where there is an express legal bar engrafted in any of the provisions [of the Code](#) or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in [the Code](#) or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

29. In any matter before the Court, the law is required to be applied on the basis of the facts and the facts turn the table, as they vary. Section 105 of the Evidence Act is relied or referred to when a question of shifting of burden is raised under Part III of

Chapter on production and effect of evidence. However, at certain point in the case there is no question of shifting of burden because, the facts are explicitly clear in the complaint itself and they straight way fall within Section 58 of the Indian Evidence Act which states “facts admitted need not be proved”. Under such circumstances, bar under section 105 of the Evidence Act cannot restrict the Court to take into account the proviso and deeming section therein at the stage of issuance of process also. When no adjudication of the admitted fact is required, then it is to be taken into account at the initial stage itself. Otherwise, it is very artificial and pedantic to apply mechanically bar of Section 105 of the Evidence Act rendering Magistrate disable to look into the proviso when it very much forms a part of the complaint.

30. In the present case, the following facts are admitted:

There is a dispute regarding the right to receive dividend, as the matter was referred to National Company Appellate Law Tribunal and if the dispute regarding right to receive dividend exists, then no offence under the section shall be deemed to have been committed. Thus, non-payment of dividend to the shareholder is an offence, which invites penal action. However,

non-payment of dividend to the shareholder will not be called an offence if the payment is not made because the dispute between the parties exists. The dispute regarding entitlement to receive the dividend exists. In other words, the act of non-payment of dividend by the directors of the company can be justified because according to them, a particular shareholder is not entitled to receive dividend. Mere having opinion or holding view that a shareholder is not entitled to receive dividend is not sufficient but there should be existence of a dispute as understood by law. Therefore, mere denial of the entitlement is not enough to get the benefit of Section 127(c) but the real dispute between the parties should exist. Similarly, mere denial of existence of dispute by the shareholder after pursuing litigation against the company and its directors cannot render dispute non-existing. Indeed this can be ascertained on the basis of the facts and circumstances of each case.

31. In the case of **Mobilox Innovations Pvt. Ltd.** (*supra*), the Application was filed before the National Company Law Tribunal under sections 8 and 9 of the Code stating that operational debt was owed by the respondent and responding to that, the other

party sought stand that there is bonafide dispute between the parties and nothing was payable. It is held that -

“We have seen that a “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within inclusive definition contained in Section 5(6) of Insolvency and Bankruptcy Code.”

In the said case, the Supreme Court has discussed what type of situation or the state of affairs can be considered as existence of dispute in view of Section 5 of Insolvency and Bankruptcy Code. The Hon’ble Supreme Court held that so long as there is real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6) of Insolvency and Bankruptcy Code. The dispute is not defined under Companies Act, therefore, it is useful to refer to the definition of dispute under section 5(6) of Insolvency and Bankruptcy Code. It is further held that “Authority has to verify that “dispute” is not patently feeble legal argument or an assertion of fact unsupported by evidence. Further, “Court does not need to be satisfied that defence is likely to succeed. Court does not at this stage examine merits of dispute except to extent indicated above. So long as dispute truly exists in fact and is not spurious hypothetical or illusory, adjudicating authority has to reject Application”.

32. In the present case, admittedly the dispute exists between the shareholder and the directors and it was pending in Company Law Tribunal and National Company Appellate Law Tribunal. It was also pending before the Arbitrator. In absence of such litigations before the Company Law Tribunal and arbitrator, it would have been difficult to state that there is a dispute between the petitioner and the respondent, then the fact of dispute should have been the subject matter of trial and evidence and it would not have been considered at the stage of quashing of process.

33. Thus, on this background, let me advert to again the legality of the order passed by the Magistrate in the present case.

34. Perused the order dated 30<sup>th</sup> January, 2017 passed by the learned Judge of the issuance of process under section 127 of the Companies Act. So also perused the criminal complaint no. 2 of 2016 filed by the respondent-complainant before the City Civil & Sessions Court. In the complaint, the respondent have mentioned against the present applicant/JCM group. It also mentioned about the reply of the legal notice dated 1<sup>st</sup> February, 2016. The order of

issuance of the process passed by the learned Sessions Judge is a reasoned order wherein the Judge has referred the defence of the applicant/accused as per proviso (c) of Section 127 of the Companies Act, Director of accused no. 1 and the notice reply. It is mentioned further “on account of dispute pending the dividend on disputed shares of the complainant kept in abeyance as alleged in the notice reply, which is the matter of evidence. Therefore, I am satisfied *prima facie* case has been made against accused no. 1, accused nos. 2 to 7 and its directors for commission of an offence.

35. Thus, it is apparent from the order that the learned Judge was aware of the history of the dispute between the parties. The fact of existence of dispute is also known to the learned Judge and therefore, he has mentioned the word “dispute”. The learned Judge under such circumstances, in view of the deeming provision in the Section should not have issued process when proviso is attracted and hence the offence is not constituted. It is settled law that exception for the offences like defamation cannot be taken into account while issuing process. Similarly, proviso also may not be a consideration while issuing process. Section 105 of the

Evidence Act states about the burden of proof on the accused.

36. In the present case, the facts are totally different. The record placed before the learned trial Judge itself discloses the proviso of Section 127(c) of the Companies Act and if material placed before the Court clearly fulfills the requirement of the proviso or an exception, then it cannot be ignored and the learned trial Judge after taking into account the material placed before and the proviso, should have formed opinion that offence under section 127 is not constituted.

37. Thus, I answer the issue no. (i) as discussed above and issue no. (ii) in affirmative. The orders of issuance of process passed by the Sessions Court and the common notices issued in Company Petition are quashed and set aside as per prayer clauses (aa) and (b) in all three Criminal Applications.

38. Criminal Applications are allowed to the aforesaid extent.

39. The learned counsel Mr. Mor for the respondents submitted that he wants to challenge this order before the Hon'ble Supreme

Court and hence, prays for stay of the order.

40. The order of issuance of process is challenged and the said orders are quashed, therefore, I am of the view that there is no propriety in staying this order.

**(MRIDULA BHATKAR, J.)**