

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	29.11.2019
Judgment pronounced on	13.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

C.P.Nos.10 to 16 of 2017
and
Comp.A.Nos.844 to 850 of 2017
and
Comp.A.Nos.131 to 137 of 2019

- 1.Vikramjit Singh Oberoi,
Managing Director, EIH Associated Hotels Limited,
residing at Suite 150,
The Oberoi, Dr. Zahir Hussain Marg,
New Delhi – 110 00.
- 2.Ganesh Lakshminarayanan,
Director, EIH Associated Hotels Limited,
residing at Lakshmi Nivas, Plot No.14 C,
Boat Club Road, Chennai – 600 028.
- 3.Anil Kumar Nehru
Director, EIH Associated Hotels Limited,
residing at 71, Sector – 9,
Union Territory, Chandigarh – 160 009.
- 4.Sudipto Sarkar
Director, EIH Associated Hotels Limited,
residing at 31, Board Street,
Kolkata – 700 019.
- 5.Prithviraj Singh Oberoi,
Director, EIH Associated Hotels Limited,
residing at Villa Aashiana,
Kapashera Bijwasan, Delhi – 110 037.
- 6.Shib Sankar Mukherji,
Director, EIH Associated Hotels Limited,

residing at 6, Lansdowne Place,
Kolkata – 700 029.

7.Akshay Rajan Raheja,
Director, EIH Associated Hotels Limited,
residing at Raheja Bungalow,
G.B. Road, Juhu,
Mumbai – 400 049.

8.Surin Shailesh Kapadia,
Director, EIH Associated Hotels Limited,
residing at 32, Tahnee Heights,
66-D, Napean Sea Road, Mumbai – 400 006.

9.Radhika Vijay Haribhakti,
Director, EIH Associated Hotels Limited,
residing at 51, Maker Tower B,
Cuffe Parade, Mumbai – 400 005.

10.Indrani Ray,
Company Secretary,
EIH Associated Hotels Limited,
residing at Flat A3,
Narcissus, 19, Raynagar Park,
Kolkata – 700 070.

11.Samidh Das,
Chief Financial Officer,
EIH Associated Hotels Limited,
Flat No.243, Deshbandhu Apartment,
Kalkaji, New Delhi – 110 019.

Petitioners 1 to 11 herein are
rep. by their Power of Attorney Agent
Jayaraman Suresh,
Residing at A-1, Akshaya Flats,
No.7, Thirumurthy Street,
T.Nagar, Chennai – 600 017.

... Petitioners
(in C.P.Nos.10,14,15 and 16 of 2017)

Vikramjit Singh Oberoi,
Managing Director, EIH Associated Hotels Limited,
residing at Suite 150,
The Oberoi, Dr. Zahir Hussain Marg,

New Delhi – 110 00.
rep. by his Power of Attorney Agent
Jayaraman Suresh,
Residing at A-1, Akshaya Flats,
No.7, Thirumurthy Street,
T.Nagar, Chennai – 600 017.

... Petitioner
(C.P.Nos.11,12 & 13 of 2017)

Vs.

The Registrar of Companies,
Tamil Nadu,
Having his Office at
Shastri Bhavan, II Floor,
No.26, Haddows Road,
Chennai – 600 006.

... Respondent
(in all Company Petitions)

PRAYER IN C.P.NO.10 OF 2017: This Company Petition is filed under Section 463(2) of the Companies Act, 2013, to relieve the Petitioners and each of them be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notices bearing reference F.No.009903/198/JTA(CL) P-9/2017 dated 31.10.2017 issued by the Respondent.

PRAYER IN C.P.NO.11 OF 2017: This Company Petition is filed under Section 463(2) of the Companies Act, 2013, to relieve the Petitioner and the Petitioner be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notice bearing reference F.No.009903/19/JTA(CL) P-10/2017 dated 31.10.2017 issued by the Respondent.

PRAYER IN C.P.NO.12 OF 2017: This Company Petition is filed under

Section 463(2) of the Companies Act, 2013, to relieve the Petitioner and the Petitioner be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notice bearing reference F.No.009903/211/JTA(CL) P-11/2017 dated 31.10.2017 issued by the Respondent.

PRAYER IN C.P.NO.13 OF 2017: This Company Petition is filed under Section 463(2) of the Companies Act, 2013, to relieve the Petitioner and the Petitioner be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notice bearing reference F.No.009903/211/JTA(CL) P-12/2017 dated 31.10.2017 issued by the Respondent.

PRAYER IN C.P.NO.14 OF 2017: This Company Petition is filed under Section 463(2) of the Companies Act, 2013, to relieve the Petitioners and each of them be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notices bearing reference F.No.009903/297/JTA(CL) P-13/2017 dated 31.10.2017 issued by the Respondent.

PRAYER IN C.P.NO.15 OF 2017: This Company Petition is filed under Section 463(2) of the Companies Act, 2013, to relieve the Petitioners and each of them be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notices

bearing reference F.No.009903/211/JTA(CL) P-14/2017 dated 31.10.2017 issued by the Respondent.

PRAYER IN C.P.NO.16 OF 2017: This Company Petition is filed under Section 463(2) of the Companies Act, 2013, to relieve the Petitioners and each of them be excused of any criminal liability and relieved of the alleged default complained of by the respondent in the show cause notices bearing reference F.No.009903/19/JTA(CL) P-15/2017 dated 31.10.2017 issued by the Respondent.

For Petitioners : Mr.R.Murari, Senior Counsel
for M/s.Raj Kumar Jhabakh
in C.P.Nos.10 to 12 of 2017

Mr.P.H.Arvind Pandian,
Senior Counsel,
for M/s.Raj Kumar Jhabakh
in C.P.Nos.13 to 16 of 2017

For Respondent : Mr.T.V.Krishnamachari
Senior Panel Counsel
(in all C.Ps.)

COMMON ORDER

All these Petitions are filed under Section 463(2) of the Companies Act, 2013 (CA 2013) to relieve the Petitioner/s from liability in respect of threatened criminal prosecution for the alleged violation of various provisions of the Companies Act, 1956 (CA 1956) and/or CA 2013 by EIH Associated Hotels Ltd. (the Company)

and its directors or other officers. C.P. Nos.10,14,15 and 16 are filed by the same 11 persons, who were the Managing Director, Director, Company Secretary or Chief Financial Officer, as the case may be, of the Company, at the relevant time, and C.P. Nos. 11,12 and 13 are filed by the Managing Director of the Company.

2. I heard Mr.R.Murari, learned Senior Counsel for the Petitioners in C.P. Nos.10 to 12 of 2017, Mr.P.H.Arvind Pandian, learned Senior Counsel for the Petitioners in C.P.Nos.13 to 16 of 2017 and Mr.T.V. Krishnamachari, the learned Senior Panel counsel for the Registrar of Companies (the RoC) in all the Petitions.

3. The submissions of Mr.R.Murari, the learned Senior Counsel for the Petitioner in C.P.Nos.10 to 12 of 2017 are set out below:

C.P.No.10 of 2017:

Mr. Murari submitted that a show cause notice was issued by the ROC on 03.02.2017 in respect of the alleged violation of Section 56 and 81(1A) of CA 1956. In particular, he submitted that the Company allotted shares on right basis to its existing shareholders and many of the existing shareholders renounced their

entitlement in favour of others who were not shareholders. On that basis, the ROC alleged that Section 67 of CA 1956 is attracted because the renunciation is in favour of more than 50 persons. In other words, the case of the ROC is that the renunciation converts the rights issue into a public issue and that, therefore, Section 56 of CA 1956 should have been adhered to. Upon receipt of the show cause notice, the learned Senior Counsel submitted that a reply dated 21.02.2017 was issued, wherein it was explained that Section 81(1)(c) of CA 1956 mandates that the Company should grant the right of renunciation to all its existing shareholders while issuing the letter of offer to such shareholders. Thereafter, such existing shareholders are statutorily entitled to renounce their rights in favour of any person. He further submitted that the Company does not have any control over the aforesaid process and, consequently, cannot insist that such renunciation should be in favour of existing shareholders of the Company. Therefore, it cannot be said that the Company or its directors violated the relevant provisions of the CA 1956. In this connection, he also referred to the letter bearing No.8/81/56-PR dated 04.11.1957 whereby the Ministry of Company Affairs opined that the issue of further shares by a company to its

own members with the consequential statutory right to renounce their entitlement in favour of a third party does not require the issuance of a prospectus. In spite of such reply, another show cause notice dated 31.10.2017 was issued (page 336 of the typed set).

C.P.No.11 of 2017:

The alleged violation of Section 129 r/w Schedule III of CA 2013 is the subject matter of C.P.11 of 2017. In specific, the allegation of the ROC is that the Company had deposits of Rs.0.04 million with Axis Bank, Jaipur Branch and a further sum of Rs.0.07 million with Canara Bank, Chennai, aggregating to Rs.0.11 million. As regards the aforesaid fixed deposits, note 15 to the balance sheet for the financial year ended on 31.03.2015 reflects that the said fixed deposits are pledged with the Sales Tax Department. However, no charge was registered under the relevant provisions of CA 1956 or CA 2013 in respect of the pledged fixed deposits. Therefore, a show cause notice dated 03.02.2017 (page 303 of typed set of papers) was issued alleging that Section 211 of CA 1956 was violated. By reply dated 21.02.2017 (pages 307 and 308 of the typed set), it was explained that the original fixed deposit receipts (F.D. Receipts) in respect of the aforesaid deposits with Axis Bank

and Canara Bank were pledged with the Sales Tax Department by handing over the F.D. Receipts and that a pledge over F.D. Receipts is not required to be registered as a charge either under CA 1956 or CA 2013. It was also explained that CA 1956 and, in particular, Section 211 thereof does not apply because it relates to the financial year 2014-2015 when CA 2013 was in force and that Section 211 of CA 2013 is also irrelevant. In any event, he submitted that a pledge of movable assets is not required to be registered under CA 2013 by filing Form CHG-1, as would be evident on perusal of Form CHG-1. In spite of such reply, another show cause notice dated 31.10.2017 was issued (page 338 of the typed set).

C.P. No 12 of 2017:

The alleged violation of Section 78(2)(c) of CA 1956 with regard to the manner in which the rights issue related expenses of Rs.28.33 million were adjusted against the securities premium account of the Company is the subject matter of C.P. No.12 of 2017. According to the ROC, such adjustment should have been reflected in the profit and loss account and, therefore, a show cause notice dated 03.02.2017(page 303 of the typed set) was issued. By reply dated 21.02.2017(pages 308 and 309 of the typed set), the

Company explained that Section 78(2)(c) permits the utilization of the securities premium account to write-off expenses of any issue of shares or debentures of the Company. The learned Senior Counsel further submitted that the Company explained in note 3 to the accounts at internal page 39 of the Balance Sheet for the financial year ended on 31.03.2013 that a sum of Rs.979.34 million was received towards premium on rights issue of share and a sum of Rs.28.33 million was deducted as share issue expenses in connection with the said rights issue. He further submitted that it was explained that the said expenditure is a capital expenditure, which was adjusted on the liability side of the balance sheet, and therefore, was not carried into the asset side of the balance sheet. Consequently, there was no question of reflecting it in the profit and loss account for that year. He further submitted that it was pointed out that AS 26 does not have any application because it relates to intangible assets and has no connection whatsoever to the issuance of shares on rights basis. In spite of such reply, another show cause notice dated 31.10.2017 was issued by the RoC.

In support of his submissions, the learned Senior Counsel referred to and relied upon the judgment of the Calcutta High Court

in **Chandra Kumar Dhanuka and others vs Registrar of companies (2008)141 Comp Cases 101 (Cal)**, wherein, at paragraph 6, the Calcutta High Court held that "Accounting Standards are, by their very nature, subjective and what is required to be seen is whether, in the relevant accounts, there was complete disregard by the Petitioner to the Accounting Standards or whether the treatment of the relevant accounts was such as would be permissible on the basis of a possible reading of the accounts standards".

4. The learned Senior Counsel, Mr.P.H.Arvind Pandian, thereafter, made submissions in respect of C.P.Nos.13 to 16 of 2017.

C.P.No.13 of 2017:

The alleged violation of Section 211 of CA 1956 r/w AS 18 in respect of the alleged non-disclosure of royalty payment to a related party, namely, Oberoi Hotels Pvt. Ltd., and in respect of the purchase of goods from a related party, namely, M/s.Mumtaz Hotels Ltd. is the subject matter of C.P. No.13 of 2017. In this connection, the learned Senior Counsel submitted that a show cause notice was issued by the ROC on 03.02.2017 (page 303 and 304) of the typed

set of papers), wherein it was alleged that there was a violation of Section 211 of CA 1956 read with AS 18. By reply dated 21.02.2017 (pages 309 and 310 of the typed set), the Company pointed out that the payment of royalty does not constitute a sale, purchase or supply of goods or services and, therefore, Section 297 of CA 1956 does not apply. In addition, it was pointed out that services were availed from Oberoi Hotels Pvt.Ltd. in the ordinary course of business and on an arm's length basis. In this connection, the learned Senior Counsel pointed out that the proviso to Section 188(1) of CA 2013 states that "nothing in this sub-section shall apply to any transaction entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis". He further submitted that the corresponding provision in CA 1956, namely, Section 297 does not apply because there was no contract for the provision of services by M/s.Oberoi Hotels Pvt. Ltd. and that such services were provided on an "as needed" basis. Moreover, he submitted that the amount paid as royalty was disclosed in the notes to accounts in the financial statement for the financial year ended 31.03.2013 (page 137 of typed set). He also pointed out that in the following financial year,

namely, the financial year ended 31.03.2014, a disclosure was made as per AS 18 (page 187 of the typed set of papers). In support of the above submissions, the learned Senior Counsel referred to the judgment of the Hon'ble Supreme Court in **Tata Consultancy Services vs. State of A.P. (2005) 1 SCC 308** and, in particular, paragraph 81 thereof which deals with the attributes of goods. He pointed out that the Hon'ble Supreme Court held that both tangible and intangible products would become goods provided such products have the following attributes: utility; saleability; capability of being transmitted, transferred, stored and possessed. By referring to the said judgment, he contended that royalty does not have the essential attributes of goods as defined in the above judgment. He also referred to the judgment of the Calcutta High Court in Chandra Kumar Dhanuka case. He further pointed out that the amount of royalty is reasonable in proportion to the turnover of the Company.

With regard to the purchase of goods and services from Mumtaz Hotels Ltd. in the financial year 2012-2013, he submitted that it is a sale from a public company to another public company and, therefore, it does not come within the scope of Sections 297 and 299 of CA 1956. In particular, he also pointed out that none of

the Directors of the Company, individually or collectively, held more than 2% of the paid up share capital of Mumtaz Hotels Ltd.

C.P.No.14 of 2017:

The alleged violation of Section 297 of CA 1956 in respect of services availed by the company from Oberoi Hotels Pvt. Ltd. is the subject matter of C.P. No.14 of 2017. Such services were in the nature of car rentals, laundry services etc. In this regard, the learned Senior Counsel pointed out that a show cause notice dated 03.02.2017 (page 304 of the typed set) was received by the Company and this was replied to on 21.02.2017 (pages 310 and 311 of the typed set). By the said reply, the Company pointed out that the services of Oberoi Hotels Pvt. Ltd. were availed in the ordinary course of business and on arm's length basis. Besides, there was no contract for effecting supplies or providing services and such services were availed on the basis of commercial exigency. In this connection, the learned Senior Counsel pointed out that the transaction in question is within the exemptions specified in Section 297(2) of CA 1956.

C.P.No.15 of 2017:

The payment of royalty to M/s.Oberoi Hotels Pvt. Ltd.

during the financial years ended 31.03.2013, 31.03.2014 and 31.03.2015 is the subject matter of C.P. No.15 of 2017. In this connection, the learned Senior Counsel pointed out that a show cause notice dated 03.02.2017 was issued to the Company(page 304 of the typed set) and that this show cause notice was replied to on 21.02.2017(page 311 and 312 of typed set). With regard to the alleged violation, the learned Senior Counsel pointed out that Section 297 of CA 1956 only applies to contracts for the sale, purchase or supply of goods, materials or services. In this case, royalty was paid in connection with the license to use the brand/trade name owned by the Oberoi Hotels Pvt. Ltd. Consequently, it is not a contract for the sale, purchase or supply of goods, materials or services. The learned Senior Counsel further submitted that this position continues to remain the same under Section 188 of the CA 2013 and that none of the sub-clauses of Section 188 relate to licensing of a brand/trade name. He further submitted, in this regard, that licensing does not entail sale or disposal or lease of property and is merely the right to use the brand name.

C.P.No.16 of 2017:

The alleged non disclosure of related party transactions in Form AOC 2 in the Board of Directors' report dated 28.05.2015 is the subject matter of C.P. No.16 of 2017. Accordingly, by show cause notice dated 03.02.2017 (page 304 of the typed set), the RoC alleged that the Company violated Section 134 of CA 2013 r/w Rule 8 of the Companies(Accounts) Rules, 2014. By reply dated 21.02.2013 (pages 311 to 312 of the typed set), the Company pointed out that these transactions are in the ordinary course of business on an arm's length basis. Accordingly, as per the proviso of Section 188(1) of CA 2013, the section would not apply to arm's length transactions in the ordinary course of business. Consequently, Section 134(3)(h) of CA 2013 does not apply. A separate note was also provided by the Company in the Director's Report under the heading "contracts or arrangement" and filing of Form AOC-2 is not required. In this connection, the learned Senior Counsel submitted that the filing of Form AOC-2 is required only in respect of material contracts. In view of the fact that the present contract is not a material contract, neither Section 134 nor AOC 2 is violated. For the above reasons, the learned Senior Counsel submitted that the

Petitioners did not violate any of the provisions of CA 1956 or CA 2013 as alleged by the RoC. Even if there was a technical breach, such breach was committed honestly and reasonably. Therefore, a case is made out to grant relief under Section 463(2) of CA 2013.

5. The learned Senior Counsel also submitted that the show cause notices are barred by limitation. In this connection, he submitted that the date of knowledge is the starting point for computing limitation. In this case, the date of knowledge is the date of inspection. When computed from the date of inspection, all the threatened criminal proceedings are barred as per Section 468(2)(a) r/w Section 469(1)(a) of the Criminal Procedure Code. In support of this submission, the learned Senior Counsel referred to and relied upon the judgment of the Hon'ble Supreme Court in **Registrar of Companies vs Rajshree Sugar and Chemicals Limited and others (2000) 6 SCC 133 (Rajshree Sugar)**, wherein, at paragraphs 8 and 9, the Hon'ble Supreme Court took note of the limitation period specified in Section 468 of Cr.P.C. and the starting point for computing such limitation period, which is specified in Section 469 thereof. Thereafter, the Hon'ble Supreme Court

concluded that the prosecution is within the period of limitation by referring to the date of knowledge in that case. By referring to the principle laid down in that case, the learned Senior Counsel submitted that, in this case, if the date of inspection is taken as the date of knowledge, all the threatened prosecutions would be barred by limitation.

6. In response and to the contrary, Mr.Krishnamachari made submissions on behalf of the RoC. He opened his submissions with the overarching contention that the Petitioners should have admitted that they committed the offences in question as an essential pre-requisite for invoking the court's jurisdiction under Section 463(2) of CA 2013. In specific, it is his contention that Section 463(2) of CA 2013 cannot be invoked by a person who refuses or denies that he committed an offence under CA 2013. After making the above mentioned submission, in common for all the petitions, he dealt with the individual petitions.

7. With regard to the **CP No.10 of 2017**, he submitted that the company made the rights issue directly to the nominee and

not to the existing shareholders. He further submitted that once the statutory limit of 50 is exceeded, Sections 56 and 67 of the CA 1956 are attracted. In this case, he pointed out that the renunciations were in favour of 349 third parties. He further submitted that no material was made available to establish that the rights issue was made to existing shareholders.

8. With regard to **C.P.No.11 of 2017**, the learned counsel submitted that the pledge of the fixed deposit receipt with the Commercial Tax Department qualifies as a charge under section 77 of CA 2013 and, therefore, the charge should have been registered with the RoC.

9. In respect of **C.P.No.12 of 2017**, he submitted that the Company should have reflected the expenditure incurred on the rights issue in the profit and loss account for the relevant year. He further submitted that AS 26 applies to such rights issue related expenditure and, therefore, AS 26 should have been complied with.

10. In respect of **C.P.No.13 of 2017**, he submitted that a proper disclosure was made in respect of the financial year 2013-2014 whereas such disclosure was not made in respect of the financial year 2012-2013. Therefore, he submitted that there is a clear violation of the applicable provisions in respect of the financial statements for the financial year 2012-2013.

11. In respect of **C.P.Nos.14 and 15 of 2017**, he submitted that there is a clear violation of Section 297 of CA 1956 and Section 188 of CA 2013 by entering into related parties transactions without making the proper disclosure. He also referred to and relied upon Section 211(3A) of CA 1956 and AS 18 in this regard.

12. Once again, with reference to **C.P. No.16 of 2017**, he submitted that the Company and its directors violated Section 134(3)(h) of CA 2013 and Section 297(1)(a) and 297(2)(b) of CA 1956.

13. The learned counsel for the RoC refuted the contention that the threatened prosecutions are barred by limitation. In this connection, he referred to the judgment of the Karnataka High Court in the **Registrar of Companies vs. Fairgrowth Agencies Ltd. (2006) 133 Comp Cas 314(Kar) (Fairgrowth Agencies)**, wherein the Karnataka High Court held that the date of knowledge depends on the facts of each case. For instance, the Karnataka High Court held that, in a particular case, the date of knowledge would be the date when the inspecting officer detects the contravention of the Act, whereas in another case, the date of knowledge would be the date when the RoC came to know about the offence upon receipt of a communication from the officer concerned in the Department of Company Affairs.

14. By way of rejoinder submissions, the learned Senior Counsel for the Petitioners submitted that a Petition under Section 463(2) of CA 2013 could be filed on the basis of a reasonable apprehension that a person would be prosecuted for offences under CA 2013 and that it is not necessary that such persons should admit that they committed such offences. As regards the rights

issue, he pointed out that Section 81(1)(a) of CA 1956 mandates that the Company should make the rights offer to all its existing shareholders and inform them that they are entitled to renounce such shares in favour of any person. As regards the securities premium account, he pointed out that Section 78(2)(c) of CA 1956 empowers the Company to utilise the security premium account for the rights issue related expenses. He concluded by pointing out Section 188 of CA 2013 only applies from the financial year 2013-14 and, therefore, royalty payments in the financial year 2012-13 were not reflected as per AS 2018.

15. The submissions of the learned Senior Counsel for the Petitioners and the learned counsel for the Registrar of Companies were considered carefully and the relevant records were examined. The overarching contention of the learned counsel for the RoC was that the Petitions are not maintainable because the Petitioner/s did not admit that they committed the relevant offences. However, this contention cannot be countenanced for the reason that admission of guilt is not an essential pre-requisite to file a petition under Section 463(2) of CA 2013 or Section 633(2) of CA 1956. It is sufficient if

the petitioner establishes reasonable apprehension of prosecution and, on the facts of each of these petitions, such reasonable apprehension is established. Given that the overarching contention has been dealt with, I intend to deal with each petition separately because different alleged offences are the subject matter thereof.

(i)C.P.No.10 of 2017:

The alleged offence is in respect of non-compliance of public issue related requirements. It is the settled legal position that any public company should make a further issue of shares only to existing shareholders, in the same proportion, unless a special resolution is passed authorizing the company concerned to issue shares to others. Such issue is referred to as a rights issue. It is also the settled position that when a rights issue is made, the letter of offer is issued to all existing shareholders and it is mandatory that each shareholder is given the right to renounce such shares to any person. The relevant provision, in this regard, is Section 81(1)(a),(b) and (c) of CA 1956. Therefore, the Company does not have any control in respect of such renunciation, which may be in favour of any person, including 3rd parties. The learned Senior Counsel also referred to the letter dated 04.11.1957 of the Ministry

of Company Affairs, in this regard, to the effect that such renunciation does not require the issuance of a prospectus. Consequently, it cannot be said that the rights issue was converted into or metamorphosed into a public issue merely because renunciations were made in favour of more than 50 3rd parties. Therefore, I have no hesitation in concluding that the Company and the Petitioners did not commit the alleged offence of violating Sections 56 and 67 of the CA 1956. Nevertheless, the issuance of multiple show cause notices, in spite of the reply of the Company, establishes a reasonable apprehension of prosecution. Consequently, the Petitioners are entitled to relief under Section 463(2) of CA 2013.

(ii) C.P.No.11 of 2017:

C.P.No.11 of 2017 relates to the non-registration of the pledge in respect of the fixed deposits as a charge. Both under Section 125 of CA 1956 and Section 77 of CA 2013, it is not necessary to register a pledge over movable assets as a charge. This position became abundantly clear upon perusal of Form CHG-1 under CA 2013, which excludes a pledge over movable assets. Therefore, it is not necessary to register a pledge in respect of the fixed deposits as

a charge under the applicable provisions of either CA 1956 or CA 2013. Nevertheless, there is a reasonable apprehension of prosecution in view of the issuance of show cause notices even after the Company provided an explanation. Consequently, the Petitioner is entitled to relief under Section 463(2).

(iii) C.P.No.12 of 2017:

The alleged offence, in this case, is not reflecting the rights issue expenses in the profit and loss account for the relevant financial year. The case of the Company is that the rights issue expenditure constituted capital expenditure and that the Company is entitled to adjust such expenditure against the security premium account as per Section 78(2)(c) of the CA 1956. The said contention is well founded as would be evident upon a perusal of Section 78(2)(c) of CA 1956. Once the right issue related expenditure is adjusted against the security premium account, i.e. by way of an adjustment on the liability side of the balance sheet, the amounts in question do not pass through to the assets side of the balance sheet. Consequently, such amount cannot be reflected in the profit and loss account and it would be an accounting impossibility to do so. Therefore, I have no hesitation in concluding

that the Company was entitled to treat the rights issue expenditure as a capital expenditure and set it off against the security premium account in accordance with Section 78(2)(c) of CA 1956. As a corollary, such expenditure could not have been reflected in the profit and loss account for the relevant financial year. Notwithstanding the above legal position and the explanation provided, in this regard, the RoC continued to allege that there is a violation of law. Thus, the Petitioner has made out a case for the grant of relief under Section 463(2) of CA 2013.

(iv) C.P.No.13 of 2017:

C.P.No.13 of 2017 relates to the alleged non-disclosure of royalty payments to Oberoi Hotels Pvt. Ltd. and payments in respect of supply of goods by Mumtaz Hotels Limited in the financial statement for the year 2012 – 2013. In this connection, it is relevant to state that the amount paid as royalty was disclosed in the notes to accounts at Page 127 of the typed set. As regards disclosure as per AS 18, such disclosure was made only in the financial year 2013 – 2014. Can it be said that this constitutes a violation of Section 297? As correctly contended by the learned Senior Counsel for the Petitioners, Section 297 of CA 1956 only

applies to contracts relating to the sale, purchase or supply of goods, materials or services. The payment of royalty does not qualify as a contract relating to the sale, purchase or supply of goods, materials or services. It is a license fee for the use of a brand/trade name. Therefore, Section 297 was not violated. In addition, as stated above, the disclosure was made in the notes to the accounts and it is only disclosure as per AS 18, which has not been made for the financial year 2012 – 2013, whereas it was made for the financial year 2013 – 2014. Keeping in mind the fact that the CA 2013 became applicable only from the financial year 2013 – 2014, I am of the view that it is, at worst, a technical breach, and there is no indication that the non-disclosure was dishonest or that it caused prejudice to stakeholders of the Company. As regards the supply of goods by Mumtaz Hotels Ltd, it is clear that it is a supply by one public company to another and, therefore, Section 297 of CA 1956 does not apply. In spite of the above, the RoC continued to allege that the Company and the Petitioner violated the law. Consequently, the Petitioner is entitled to relief under Section 463(2) of CA 2013.

(v) C.P.No.14 of 2017:

The alleged violation as regards C.P.No.14 of 2017 is with regard to the Company availing services, such as car rentals, laundry services, etc. from Oberoi Hotels Pvt. Limited. By reply to the show cause notice, the Company pointed out that such services were availed in the ordinary course of business and on arm's length basis and that, therefore, such services are covered by the proviso to Section 188 of CA 2013. I am of the view that the said submission cannot be disregarded although it is not possible to draw definitive conclusions in this regard. Even otherwise, the Company and its officers acted honestly and reasonably and there is no evidence of prejudice to stakeholders of the Company.

(vi) C.P.No.15 of 2017:

As regards C.P.15 of 2017, once again, it is alleged that Section 297 of CA 1956 was violated in respect of the payment of royalty to a related party. As correctly pointed out by the learned Senior Counsel for the Petitioners, Section 297 of CA 1956 and the corresponding provision in CA 2013, Section 188, do not deal with the payment of royalty and instead only deal with contracts for the sale, purchase or supply of goods, materials or services. In this

connection, the judgment of the Hon'ble Supreme Court in **Tata Consulting Services** is apposite and royalty does not qualify as goods, materials or services. In any event, the Company and its officers acted honestly and reasonably.

(vii) C.P.No.16 of 2017:

C.P.No.16 of 2017 relates to the alleged violation of Section 134 of CA 2013. Once again, the company replied to the show cause notice and relied upon the proviso to Section 188(1) of CA 2013 on the basis that the transaction in question is in the ordinary course of business and on an arm's length basis. Once again, I am convinced that the breach, if any, is purely technical and a case is made out to be relieved of liability in this regard.

17. In addition to the case specific reasons for granting relief under Section 463(2) of CA 2013, I find that the inspection took place in the year 2016 pursuant to the notice of inspection dated 19.01.2016 from the Deputy Registrar of Companies, Tamil Nadu. Pursuant to the notice, the inspection was carried out on 25.01.2016 by the Assistant Registrar of Companies. Based on such inspection, show cause notices were issued on 13.02.2017,

14.07.2017 and 31.10.2017. Therefore, it is clear that the show cause notices were issued after the expiry of the six month period of limitation as per Section 468(2) of Cr.P.C. In this case, as stated above, the notice of inspection was issued by the Deputy Registrar of Companies, the inspection was carried out by the Assistant Registrar of Companies and the show cause notice was issued by the Assistant Registrar of Companies. Therefore, even if the judgment of the Karnataka High Court in **Fairgrowth Agencies** is applied, the date of knowledge would be the date of inspection, namely, 25.01.2016. Consequently, even the first show cause notice that was issued in February 2007 would be clearly beyond the period of limitation as held by the Hon'ble Supreme Court in **Rajshree Sugar**. Therefore, this is an additional reason as to why the Petitioner/s should be relieved from liability in respect of the threatened prosecution for offences under CA 2013.

18. Another generic reason for granting relief is that the breaches, if any, of disclosure requirements are technical breaches and the facts disclose that the Company and its officers acted honestly and reasonably. Moreover, there is no evidence that any

stakeholder of the Company was prejudiced. As held by a Division Bench of this Court in **Visram Financial Services Pvt. Ltd. v. V.Rajendran (2018) 209 Comp.Cas. 400**, the power under Section 633 (2) of CA 1956, which corresponds to Section 463(2) of CA 2013, is discretionary but applicable whenever there is reasonable apprehension of criminal prosecution for offences under CA 1956 or CA 2013, as the case may be, and there is no reason to read further restrictions into this power. For the reasons set out above, when the facts and circumstances are viewed holistically, I conclude that the Petitioner/s is/are entitled to be excused and relieved of liability.

19. In the result, all these Company Petitions are allowed by relieving the Petitioner/s from liability in respect of apprehended prosecution for the alleged violation of the respective provisions under CA 1956 and CA 2013. Consequently, the connected company applications are closed.

13.01.2020

Speaking/Non Speaking order

Index: Yes/No

Internet: Yes/No

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ENTHILKUMAR RAMAMOORTHY, J.

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C.P.Nos.10 to 16 of 2017

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