IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 15.02.2023

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Company Petition Nos.6 to 9 of 2019

C.P.No.6 of 2019:

1, Arathi Krishna
2. Arundathi Krishna .. Petitioners

versus

The Registrar of Companies,
Tamil Nadu, Andaman & Nicobar Islands),
Shastri Bhawan, II Floor,
Chennai-600 006. .. Respondent

C.P.No.7 of 2019:

1, Arathi Krishna

2. Arundathi Krishna

3. Velamur Jaganathan Gopalan

4. Meenakshisundaram Srinivasan .. Petitioners

versus

The Registrar of Companies,
Tamil Nadu, Andaman & Nicobar Islands),
Shastri Bhawan, II Floor,
Chennai-600 006. .. Respondent

C.P.No.8 of 2019:

Suresh Krishna .. Petitioner

versus

The Registrar of Companies,
Tamil Nadu, Andaman & Nicobar Islands),
Shastri Bhawan, II Floor,
Chennai-600 006. .. Respondent

C.P.No.9 of 2019:

1. Suresh Krishna
2. Arathi Krishna
3. Arundathi Krishna .. Petitioners

versus

The Registrar of Companies,
Tamil Nadu, Andaman & Nicobar Islands),
Shastri Bhawan, II Floor,
Chennai-600 006. .. Respondent

PRAYER in all C.Ps. : Petitions are filed under Section 463 (1) and 463 (2) of the Companies Act, 2013, praying to relieve the petitioners from any liability arising from the alleged offences referred to in the respective show cause notices mentioned therein.

For Petitioners : Mr. T.K.Bhaskar

For Respondent : Mr.T.V.Krishnamachari,
Senior Panel Counsel

COMMON ORDER

Since the legal issues involved in all these petitions as well as the parties are common, these petitions are taken up together and being disposed of by this common order.

2. The petitioners in the above captioned petitions are the Managing Director, Joint Managing Director, Chief Financial Officers and Chairman cum Non-Executive Director of the Company, viz., M/s.Sundaram Fasteners Limited. Proceedings have been initiated against the petitioners for the alleged violation under Sections 129, 134, 135 and 186 of the Companies Act, 2013 r/w Companies (Corporate Social Responsibility Policy) Rules, 2014 and they were issued with show cause notices. The petitioners also gave their respective explanations. However, apprehending criminal liability at the hands of the respondent, invoking Section 463(1) and 463(2) of the

Companies Act, 2013, the petitioners have come forward with the present petitions, seeking to relieve them from any liability arising from the alleged offences referred to in the respective show cause notices issued against the petitioners.

3. Immediately upon filing of the above Company Petitions, the respondent has taken categoric stand that the present petitions are not maintainable for the simple reason that subsequent to the issuance of the above show cause notices, the respondent filed criminal complaints and the same have been numbered as EOCC Nos.51 to 59 of 2019 on the file of the Economic Offences Court, Egmore. The Criminal complaints were filed on 05.04.2019 and the present Company petitions were filed on 30.09.2019.

4. The learned Senior Panel Counsel appearing for the respondent would contend that subsequent to the filing of the complaints before the Economic Offences Court, the present Company Petitions came to be filed and hence, the same are not maintainable under Section 463 (1) and (2) of the Act as no person can claim relief who apprehends the initiation of the

prosecution, subsequent to the initiation of the criminal proceedings before this Court but before the prosecuting Court. But in the present case, after initiation of the criminal proceedings, these company petitions came to be filed, thus, the remedy available for the petitioners is only to approach the prosecuting Court and seek appropriate relief under Section 463(1) of the Act from relieving the liabilities of the petitioners from the prosecution.

5. However, the learned counsel appearing for the petitioners would submit that even after filing of the complaint, still this Court has power to pass orders and relieve the liability of the petitioners from prosecution if the Court comes to the conclusion that the petitioners are not liable and subjected to the prosecution. He would submit that the power available under Section 463(2) is in addition to the power already conferred upon the High Court under Section 463(1) of the Act and also several other provisions of the Act. Therefore, he would contend that such additional power cannot be taken to mean the imposition of a restriction or limitation on the jurisdiction of the High Court to grant relief in the pending proceedings. He

would contend that the submissions of the respondent on the aspect of preliminary objection cannot be sustained. In this regard, the learned counsel relied upon the judgment of this Court rendered by a single Judge of this Court, in ***"Visram Financial Services (P) Ltd. Versus V.Rajendran and another"*** reported in (2013) 6 CTC 183 and also a judgment rendered by a Division Bench of this Court in "***Visram Financial Services (P) Ltd. versus V.Rajendran and another"*** reported in (2018) 209 CompCas 400 (Mad) .

6. Since the learned counsel for the respondent raises preliminary objection as regards to the maintainability of the present petitions, this Court is inclined to decide this aspect first.

7. Before dealing with the issue, it would be relevant to extract the law laid down by this Court in the case of ***"Visram Financial Services (P) Ltd***" (cited supra), in para 46 as under:

> *"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 several matters prescribed under the Companies Act."

8. As against the above order of the learned single Judge, an appeal was preferred, wherein, a Division Bench of this Court, while dismissing the

appeal, has held in para 58 as under:

"58. 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."

. 9. On a perusal of the above judgments, it is clear that the power conferred upon this 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, 1956 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. The provision under Section 633(1) and (2) of the Companies Act, 1956 is *pari materia* to the provision under Section 463 (1) and (2) of the Companies Act, 2013 and the verbatim is similar in both provisions. Due to enactment of new Companies Act, 2013, the said provision under Section 633(1) and (2) contained in the erstwhile Companies Act, 1956 is reflected under Section 463(1) and (2) of the Companies Act, 2013. Therefore, the law laid down by this Court is squarely applicable to the present case. Hence, this Court holds that this Court has power to grant the relief under Section 463(1) and (2) of the Act even after initiation of criminal proceedings and pending before the Criminal Court. The conferment of the additional power under Sub Clause (2) of Section 463 to grant the relief even after initiation/commencement of criminal proceedings, cannot be interpreted in a restricted sense. Accordingly, the preliminary objection raised on behalf of the respondent, is answered in negation to the respondent.

10. Now coming to the merits of the case, it appears that the respondent issued the following show cause notices to the petitioners, viz.,

(i) F.No. 4943/206(5) Sec. 135/JTA (CL)P-10/2017 dated 31/05/2018;

(ii) F.No. 4941/20645)/Insp.followup/JTA(CL)P-18/2017 dated 25/05/2018 ;

(iii) F.No.4943/206(5)/Inspn.follow up/JTA (CL) P-28/2017 dated 25/05/2018;

(iv) F.No.4943/206(5)/Inspn.followup/JTA (CL) P-19/2017 dated 25/05/2018,

(v) F.No.4943/206(5)/SUNDARAM-SUPP/ISR/JTA(SKK)P-ix/2017dated 25/03/2019;

(vi) F.No.4943/206(5)/Inspn.followup/JTA (CL) P-20/2017 dated 25/05/2018;

(vii) F.No.4943/206(5)/Inspn.followup/JTA (CL) P-22/2017 dated 25/05/2018;

(viii) F.No. 4943/206(5)/Inspn.followup/JTA (CL) P-23/2017 dated 25/05/2018;

(xi) F.No.4943/206(5)/Inspn.followup/JTA (CL) P-26/2017 dated 25/05/2018.

11. According to the respondent, due to non-compliance of the provisions of the Companies Act, they have issued the above show cause

notices against the petitioners and the only course available to the petitioners is to compound the offence or face the trial and prove their innocence and except this, the petitioners have no other option, but to pursue the criminal proceedings pending before the Criminal Court. But on the other hand, the learned counsel for the petitioners would submit that such omissions or commissions alleged by the respondent were unintentional and they have acted honestly and reasonably and the statement of affairs and disclosures are true and fair and hence, they are entitled to the relief as sought for in the present petitions.

12. Let this Court examine each and every show cause based on the submissions made by the petitioners and the respondent.

<u>Show Cause Notice (i):</u> F.No. 4943/206(5) Sec.135/JTA (CL)/P-10/ 2017 dated 31/05/2018.

In the above show cause notice, it is alleged that it has been noticed from the Directors' Report annexed to the Balance Sheet as at 31/03/2016 that a sum of Rs.319.81 lakhs has been shown as the total amount to be spent on CSR during the year and that the said amount is the prescribed expenditure on CSR derived from the average net profit of the Company for the last three years. The respondent, has therefore alleged that the total amount to be spent on CSR during the year should be aggregate of the aforesaid amount and the amount carried forward from the previous year as unspent amounting to Rs. 81.53 lakhs and thus the amount stated is incorrect. Consequently the amount unspent disclosed in the report is incorrect. The Cumulative Expenditure up to the reporting period mentioned in the aforesaid report is also not the actual cumulative figure and hence provision of Section 135 of the Act read with Companies Social (Corporate Responsibility Policy) Rules, 2014 has been violated.

13. According to the learned counsel for the petitioners, Section 135 of the Companies Act, 2013 read with Companies (Corporate Social Responsibility Policy) Rules, 2014 ('CSR Rules') does not require the unspent amount on CSR activities for the previous years to be carried forward to the subsequent years. It is further stated that the Company has also provided the reasons for not spending 2% average net profits of the last three financial years. Further, MCA provided a set of FAQ's, whereby it has

been clarified that Board is free to decide whether any amount from out of the minimum required CSR is to be carried forward to the next year. Therefore, there is no requirement to compulsorily carry forward the unspent amount to the subsequent years. As regards cumulative expenditure up to the reporting period, it was observed from various published annual Reports that varied practices are being followed by many Companies while calculating the cumulative expenditure and hence, a suitable clarification from the MCA in this regard would facilitate uniform disclosure.

14. Upon hearing the learned counsel for the parties and on going through the entire records, it appears that the respondent has issued the above show cause notice under the pretext that the unspent has to be carried forward to the next year. The reasons for not spending 2% of the average net profits of the last three financial years, according to the petitioners is that pursuant to the provisions of the CSR Policy to extend support for special circumstances, such as, natural calamities, the Company had contributed Rs.3 Crore to Chief Minister's Public Relief Fund towards flood relief and did not seek a set off against the lower unspent amount and this contribution

shows the intent of the Company towards CSR initiatives. Further, in this regard, the learned counsel referred to the clarification issued by the respondent to Frequently Asked Questions on CSR, viz., FAQ No.17 which reads as follows:

> *"17. Can the unspent amount from out of the minimum required CSR expenditure be carried forward to the next year?*
>
> *Ans: The Board is free to decide whether any unspent amount from and out of the minimum required CSR expenditure is to be carried forward to the next year. However, the carried forward amount should be over and above the next year's CSR allocation equivalent to at leaast 2% of the average net profit of the company of the immediately preceding three years."*

15. Therefore, this Court is of the view that it is not necessary for the petitioners to carry forward the unspent amount to next year as per the then existing rules and utilize the said amount along with the allocation for the next year. However, the respondent issued the show cause notice by non-application of mind and without taking into consideration the Department's clarification issued by way of FAQs. Hence, this Court does not find any intentional or otherwise negligence breach of duty, misfeasance or breach of

trust as alleged by the respondent in the show cause notice. Therefore, this Court holds that the petitioners have acted honestly and reasonably and disclosed everything and prepared the Financial Report in terms of the provisions of the Act and CSR Policy and Rules by utilising the CSR allocations.

16. Show Cause Notice (ii) F.No. 4941/20645)/Insp.followup/ JTA(CL)P-18/2017 dated 25/05/2018:

In the above show cause notice, It has been alleged that the Inspecting Officer observed that as per Section 134(3)(g) of the Companies Act, 2013, the Directors' Report shall include particulars of loans, guarantees or investments under Section 186 of the Act. However, the Balance Sheet as at 31.03.2015 and 31.03.2016 do not disclose the said details and instead it refers to Note numbers and Notes on Accounts for reference which is not due compliance of Section 134(3)(g) of the Companies Act, 2013.

17. According to the learned counsel for the petitioners, all the particulars of loans given, investments made, guarantees given and securities provided along with the purpose for which the loan or guarantee or security was proposed to be utilized by the Company were provided in Note No. 9,10

and 18 & 29 under note 31 to the standalone financial statement for the year ended March 31, 2015 and in Note no. 9, 10 and 31 [(18) (IV) and 29 to the standalone financial statements for the year ended March, 31, 2016. The Board of Directors in order to avoid repetition and for the sake of brevity have indicated the above mentioned Note no. reference in Page 7 of the Director's Report.

18. On consideration of the submissions made by the learned counsel for the respondents and on going through the materials placed before this Court, this Court finds that the particulars of loans given, investments made, guarantees given and securities provided along with the the purpose for which the loan and guarantees/securities were proposed to be utilized by the Company have been provided in Note Nos.9,10, 18 and 29 under Note 31 to the standalone financial statement for the year ended 31 March, 2015 and in Note Nos.9, 10 and 31 (18 (IV) and 29) to the standalone financial statements for the year ended 31 March, 2016. It appears that the Board of Directors in order to avoid repetition and for the sake of brevity, have indicated the above mentioned Note no. reference in page 7 of the Directors'

Report. Therefore, it is not that the petitioners have not provided the particulars with regard to the loans given, investments made, guarantees and securities given, but they have provided all the details which were very much available in the Directors' Report and therefore, no ulterior motive can be attributed against the petitioners for the disclosures made in the balance sheet and only if any material is suppressed or not disclosed, motive can be attributed. In the present case, no material has been concealed, but everything has been disclosed. Therefore, this Court holds that the petitioners have acted honestly and reasonably while preparing and disclosing the particulars as required under Section 134(g) of the Companies Act, 2013.

19. **Show Cause Notice (iii) : F.No.4943/206(5)/Inspn.follow up/JTA (CL) P-28/2017 dated 25/05/2018;**

In the above show cause notice, it is alleged that during the course of inspection, it was observed that in the Directors' Report dated 29/05/2015, under the heading "Performance and Financial position of each of the subsidiaries, associates and joint venture" . it has been stated that Report on the performance and financial position of each of the subsidiaries, associates and joint venture companies of the company is given along with the financial statements in Form AOC-1. By referring to the statement to be furnished under Rule 5 of the Companies (Accounts) Rules, 2014, and not reporting on the Performance and Financial position of each of the subsidiaries, associates and joint venture companies, this statement is not in due compliance of the requirements of Rule 8(i) of the said Rules. Similar violation is noticed in Board's Report dated 20.05.2016 attached to Balance Sheet as at 31.03.2016.

20. The learned counsel for the petitioners would submit that the Company replied to the said show cause notice on 14/06/2018 stating that the Company has reported the details of the financial performance of each of the subsidiaries / joint ventures in the Annual Reports of the year ended March 31, 2015 and March 31, 2016 in Form AOC-1. Further, the details of the relevant disclosures as provided in the Annual Reports and reflected in the reply, viz., 1) Financial Year 2014-15- page 119 and 120 of the Annual Report; 2) Financial year 2015-16, Page 132 and 133 of the Annual Report.

He would further submit that it has been further set out in the reply that a reference to Form AOC- 1 in this regard has been indicated in the Directors' Report in page no. 8 and page no. 9 of the Annual Report for the year ended March 31, 2015 and March 31, 2016 respectively in order to avoid repetition.

21. On consideration of the submissions made by the learned counsel for the parties and on going through the reply submitted by the petitioners, it appears that in the Director's Report dated 29/05/2015, under the heading "Performance and Financial position of each of the subsidiaries, associates and joint venture", according to the respondent, the petitioners have reported on the performance and financial position of each subsidiaries associates and joint venture companies and thereby, they have violated Rule 8(1) of the Companies (Accounts) Rules, 2014. This Court perused the financial report, particularly at page 119 and 120 and also the financial report at page 132 and 133 of Annual Report and Form AOC-1 and find that the company provides all the particulars including performance and financial position of each subsidiaries, associates and joint venture companies. This Court does

not find any deliberate omission on the part of the petitioners from reporting performance and financial position in the Annual Report. Therefore, since the petitioners have furnished all the particulars in the Form AOC-1 attached to the Annual Reports as required under Section 134(3)(q)of the Companies Act, the allegations levelled in the impugned show cause notice cannot be sustained and the petitioners are entitled for the relief as sought in the petition.

22. <u>Show Cause Notice (iv)</u> : F.No.4943/206(5)/ Inspn. Followup/ JTA (CL) P-19/2017 dated 25/05/2018:

In the above show cause notice, it has been alleged that as per Section 186(4) of the Companies Act, 2013, the Company is bound to disclose to the members in the financial statement, the full particulars of the loans given, investment made or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security. But the Company has not disclosed the purpose for which loan or guarantee or security was proposed to be used by the recipient of the loan or guarantee or security in the balance sheet as at 31.03.2015 and thereby the Company has violated Section 186(4) of the Companies Act, 2013.

23. According to the learned counsel for the petitioners, a reply dated 14/06/2018 was issued to the Respondent, stating that disclosure with regard to purpose of guarantee had been furnished in Page no. 89 of the Annual Report of the year ended March 31, 2015. However, the Company was under bona fide belief that all disclosures under the Companies Act, 2013 had been made and also got a report from its Secretarial Auditor confirming the same. However, the disclosure in relation to the purpose for which loans or investments is to be utilized by the recipient was not made in the Annual Report for the year ended 31.03.2015 and the same had happened by oversight relying on the report of the secretarial auditor.

24. On consideration of the submissions made by the learned counsel for the parties and on perusal of the records, it appears that the Company has disclosed all the particulars with regard to the purpose for which loans or investments to be utilized by the company in the Balance

Sheet as on 31.03.2015. According to the petitioners, it was not reported by oversight, but they have been reporting for the subsequent years without fail. Though the purpose has not been mentioned, they have disclosed the loan/guarantee/security as provided for the financial year ended 31st March 2015 in terms of the provisions of the Companies Act. Therefore, this Court is of the view that the petitioners have acted honestly and reasonably without any mala fide intention or breach of trust while preparing the financial statement and certainly on this aspect, the Balance Sheet disclosed the true and fair affairs of the company. Hence, the allegations contained in the show cause notice cannot be sustained and the petitioners are entitled for the relief as sought in the Company Petition.

25. <u>Show Cause No.5</u>: F.No.4943/206(5)/SUNDARAM-SUPP/ISR/ JTA (SKK)P-ix/2017dated 25/03/2019:

In the above Show cause Notice, it has been alleged by the respondent that the Company has given wrong reference in its Boards report for the year ended 31.03.2016 and also stated that the Company has not given the AOC-1 statement for the year ended 31.03.2016. The Respondent has therefore alleged that there is violation of Section 129 of the Companies Act, 2013 read with rule 5 of Companies (Accounts) Rules, 2014. Section 129(3) of the Companies Act, 2013 requires that a Company having one or more subsidiaries or associate companies, shall in addition to its financial statement, prepare a consolidated financial statement of the company and all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with the applicable accounting standards.

26. The learned counsel for the petitioners would submit that the petitioners have submitted their reply to the above said show cause notice vide letter dated 17.04.2019, wherein it was clarified that the allegation that the AOC-1 statement was not given, is incorrect. The learned counsel also referred to letter dated 14.06.2018 in reply to another show cause notice dated 25/05/2018 bearing number F. No.4943/206(5)/Inspn. followup/JTA (CL) P-28/2017, wherein the Petitioners had given a detailed reply also giving reference to AOC-1 which was filed for the year ended 31.03.2016 and is available at Page 132 & 133 of the Annual Report for the year ended 31.03.2016.

27. On consideration of the submissions made by the learned counsel for the parties and on perusal of the records, this Court finds that the Board Report did not contain the AOC-1 statement but attached to the Balance sheet. Therefore, merely not attaching the said AOC-1 along with the Board report, will not amount that the petitioners have not prepared the Board Report and given correct reference in the Board report for the year ended as alleged in the show cause notice. The relevant particulars are available in the Annual Report which contains Board Report and Balance Sheet for the year ended 31.3.2016 and therefore, it would not be considered that the petitioners have concealed the material facts and violated Section 129 of the Companies Act, 2013. As rightly submitted by the learned counsel for the petitioners that it is only to avoid repetition it was attached to the Balance Sheet and to keep the annual report concise and brief. Thus, the Company has duly disclosed the particulars regarding the loans, investments and guarantees on the performance and financial position by referring to the relevant notes annexed to the financial statement. Therefore, this Court does not find any misfeasance or malfeasance that can be attributed against the

petitioners. The petitioners have acted honestly and reasonably and thereby, duly complied the provision under Section 129 of the Act. Hence, the petitioners are entitled for the relief as sought in the Company Petition.

28. <u>Show Cause Notice (vi)</u>**: F.No.4943/206(5)/Inspn. Followup/ JTA (CL) P-20/2017 dated 25/05/2018.**

In the above Show cause notice, it has been stated that the Classification of short term borrowings should be done in accordance with Para 6(F) of General Instructions for preparation of Balance Sheet as:

a) Loans repayable on demand;
(A) From banks
(B) From other parties
b) Loans and advances from related parties
c) Deposits;
d) Other loans and advances (specify nature)

while so, it has been observed that, in the Balance Sheet as at 31/03/2015 and 31/03/2016, in respect of short term borrowings, there are no details as to whether it is received from the bank or other parties and whether it is repayable on demand or otherwise.

Hence, according to the respondent, the said provision of Section

129(1) read with Para Para 6(F) of the General instructions for preparation of balance sheet given under Schedule III of the Act has been violated.

29. According to the learned counsel for the petitioners, the Company had replied to the said show cause notice on 14/06/2018 stating that in the standalone financial statement of the Company for the year ended 31/03/2015 and 31/03/2016 under Note No. 3 relating to short term borrowings, it had been indicated that such loans are for working capital purposes and are secured by hypothecation of current assets viz., stocks of raw materials, work-in-progress and finished goods. It was believed that an inference could be made from the usage of the phrase 'hypothecation' that such loans have been availed from the banks. All the working capital loans from Banks are repayable on demand and therefore it was not specifically mentioned therein. The details of the relevant disclosures with respect to short term borrowings as made in the following annual report were also set out in the reply, viz., 1) Financial year 2014-15 – **page 61 of the Annual Report** and (2) Financial Year 2015-16 – **page 71 of the Annual Report.**

30. On consideration of the submissions made by the learned counsel for the parties and on going through the materials placed on record, it appears that the respondent has alleged that the petitioners have not disclosed the particulars in the Balance Sheet regarding short term borrowings. However, a perusal of the Annual Report discloses that they have provided all the particulars, but the respondent insisted in the format prescribed in which only, the petitioners have to provide the short term loans under the four headings mentioned above. Later, subsequent to the issuance of the show cause notice, it appears that the petitioners have been following instructions as suggested by the respondent and as far as the present show cause notice is concerned, the petitioners have disclosed all short term borrowings and they have not concealed any material. Upon a perusal of the Annual Report for the financial years 2014-15 and 2015-16, this Court finds that no material has been concealed or suppressed by the petitioners in the Balance Sheet. Therefore, this Court is of the view that the petitioners have acted honestly and reasonably in preparing the Balance Sheet and thereby, they have not violated the provision under Section 129(1) of the Act r/w para 6(F) of the General Instructions given under Schedule III of the Act

and hence, the allegations contained in the impugned notice cannot be sustained.

31. **<u>Show Cause Notice (vii)</u>: F.No.4943/206(5)/Inspn.followup /JTA (CL) P-22/2017 dated 25/05/2018:**

According to the respondent, Long term Loans and advances should be classified as per Para 6(L)(i) of the General instructions for preparation of balance sheet given under Schedule III of the Act as (a) Loans and advances to related parties. While so, it has been alleged that in the balance sheet as at 31/03/2015 and 31/03/2016 in Note 10, the Company has not furnished the details of loans and advances made to related parties and instead it has referred to note on related party. It has been further alleged that on verification of the party disclosures, the said details as required have not been given and hence the provision of Section 129(1) read with Para Para 6(L) (i) of the General instructions for preparation of balance sheet given under Schedule Ill of the Act has been violated.

32. According to the learned counsel for the petitioners, the Company

has disclosed all the details of the loans and advances under note no. 10 at page 67 of the Annual Report for the year ended March 31, 2015. In note no. 10, reference is made to note on related party, the details of which have been disclosed in page 84 and 85 of the annual report for the year ended March 31, 2015. For the year ended March 31, 2016, the detail advances have been disclosed by the Company under note no. 10 at page 79 in the annual Report. In the said note 10, reference is made to note on related party, the details of which are provided at page nos. 96 and 97 of the said Annual Report. It is also submitted that the respondent has not stated as to what details about the related party is not provided in the said balance sheets for the year ended 31/03/2015 and 31/03/2016 and thus not contravened the provisions of the Act.

33. The learned further submitted that the details of loans and advances to related parties referred under note no. 10 in page 67 of the Annual Report for the year ended March 31, 2015, has been disclosed in page no 84 [III-transaction with related parties in the ordinary course of business] under the heading "Outstanding balances due to the Company'.

Further for the year ended31.03.2016, the details of loans and advances to related parties referred under Note 10 in Page 79 of the Annual Report has been disclosed in Page no. 97 (III-Transaction with related parties in the ordinary course of business) under the heading Outstanding balances due to the Company' includes loans and advances to related parties, sale of goods and services rendered.

34. On consideration of the submissions of the learned counsel for the petitioners and on perusal of the records placed, particularly, Balance Sheet and Annual Report, this Court finds that there is no substance in the allegation made by the respondent since the the petitioners have disclosed all the particulars of the loans and advances made to the related parties in Note 10. However, the respondent insisted in a particular format for which also, the petitioners submitted that they would follow in future. As far as the present show cause notice is concerned, this Court is of the view that whatever they have furnished in Note 10 would be sufficient disclosure and even if there is any procedural lapse, it can not be termed as intentional concealment and the petitioners acted dishonestly, but on the other hand, no

mala fide intention can be attributed for the present disclosure in relating to the information furnished towards loans and advances to the related parties. Therefore, this Court is of the view that the petitioners have acted honestly and reasonably in preparing the Balance Sheet and thereby, they have not violated the provision under Section 129(1) of the Act r/w para 6(L)(i) of the General Instructions given under Schedule III of the Act and thus they are entitled for the releifs as sought in the Company Petition.

35. **Show Cause Notice (viii): F.No. 4943/206(5)/Inspn. Followup/ JTA (CL) P-23/2017 dated 25/05/2018**

According to the respondent, Short term Loans and advances should be classified as per Para 6(R)(i) of the General instructions for preparation of balance sheet given under Schedule III of the Act as (a) Loans and advances to related parties. While so, in the above show cause notice, it has been alleged that in the balance Sheet as at 31/03/2015 and 31/03/2016 in Note 10, the Company has not furnished the details of loans and advances made to related parties and instead it has referred to note on related party. It has also been alleged that, on verification of the party disclosures, the said details as required have not been given and hence the said provision of Section 129(1) read with Para Para 6(R)(i) of the General instructions for preparation of balance sheet given under Schedule Ill of the Act has been violated.

36. The learned counsel for the petitioners would submit that the petitioners have disclosed all the details regarding the loans and advances under Note no. 10 in page no. 67 of the Annual Report for the year ended March 31, 2015. In note no. 10, a reference is made to the note on related party, the details of which have been disclosed in page 84 and 85 of the annual report for the year ended March 31, 2015. As regards the year ended March 31, 2016, the details of loans and advances have been detailed in Note no. 10 at page 79. In the said note 10, a reference is made to note on related party, the details of which are provided at page nos. 96 and 97 of the said annual report. The learned counsel pointed out that the Respondent has not given any particulars as to what details about the related party has not been provided in the said Balance Sheets for the year ended 31/03/2015 and 31/03/2016.

37. Upon hearing the learned counsel for both parties and on perusal of the records, this Court finds that the above show cause notice was issued against the petitioners, alleging that the in the balance sheet, they have not furnished the details of loans and advances made to related parties in accordance with the provisions under Section 129 r/w 6(R)(i) of the General Instructions for preparation of Balance Sheet given under Schedule III of the Act. A perusal of the Balance sheet reveals that the petitioners have disclosed the details of the loans and advances under Notes No.10 appended to the Annual Report for the financial years ended March 31, 2015 and 2016, but not in the prescribed format prescribed. In the present case, after commencement of the Companies Act, 2013 *vis-a-vis* new amendments with regard to the disclosure in the prescribed format, the petitioners have been following the same subsequent to the issuance of the show cause notice, but it is not that the petitioners have not at all disclosed anything. However, the petitioners were under bona fide belief that the disclosures made by way of Note No.10 appending to the Annual Report would be sufficient and as such, this Court does not find that there was any intentional concealment or

suppression of the material on the part of the petitioners when the petitioners have disclosed the particulars regarding loans and advances made to the related parties. Further, the disclosure in the prescribed format also would give the same result with any change in the information as provided in the present Balance Sheet. Hence, this Court is of the view that the petitioners have acted honestly and reasonably while preparing the Balance sheet and therefore, no mala fide motive can be attributed against the petitioners for the disclosure made in the Balance sheet. Therefore, this Court is of the view that they have not violated the provision under Section 129(1) of the Act r/w 6(R)(i) of the General Instructions as alleged by the respondent in the show cause notice.

38. **Show Cause Notice (ix)**: **F.No.4943/206(5)/inspn.followup/JTA (CL) P-26/2017 dated 25/05/2018**

According to the respondent, the Profit and Loss Account shall contain by way of a note on earnings in foreign exchange as per Para 5(viii)(e) of General Instructions for preparation of Statement of Profit and Loss account given under Schedule III of the Act, under the following heads:

a) *Export of goods calculated on F.O.B basis;*
b) Royalty, know-how, professional and consultation fees;
c) Interest and dividend;
d) Other income, indicating the nature thereof;

While so, in the above impugned show cause notice, it has been alleged that from the Balance Sheet as at 31/03/2015 and 31/03/2016, the Company has furnished the details of other income without indicating the nature of such income and hence the provisions of Section 129(1) read with Para 5(viii)(e) of General Instructions for preparation of Statement of Profit and Loss account given under Schedule III of the Act have been violated.

39. The learned counsel for the petitioners would submit that as required under Section 129(1) read with Para 5(viii)(e) of General Instructions for preparation of Statement of profit and loss given under Schedule III of the Act, the Company has provided the details of the earnings in foreign exchange and have also classified the said earnings under the heads where the earnings have accrued. However, the nature of the income has not been inadvertently indicated. Further, the petitioners made relevant disclosures in respect of Financial Years 2014-15 and 2015-16 at

page Nos.74 and 86 in the Annual Report appended to the Balance Sheet. Therefore, the learned counsel for the petitioners would submit that the petitioners have not violated the provisions of the Act as alleged in the show cause notice.

40. On consideration of the submissions made by the learned counsel for the parties and on perusal of the materials, this Court finds that as far as the present show cause notice is concerned, it was alleged that the petitioners have not disclosed the profit and loss account details by way of a note on earning in foreign exchange as classified under 4 heads mentioned in the show cause notice. However, on a perusal of the Annual Reports discloses that the petitioners have disclosed the earnings in foreign exchange under the classified heads where the earnings have accrued, but by inadvertently, the company has not indicated the nature of the income. However, all the relevant disclosures were set out in the Annual Reports 2014-15 and 2015-16. Therefore, when the petitioners have disclosed that the income derived from the foreign exchange, it cannot be alleged that petitioners have failed to disclose the details, but only the nature of the income has not been indicated by inadvertence, which, in the opinion of this

Court, cannot be construed as intentional act on the part of the petitioners. If any material is concealed intentionally with regard to the income itself, the same can be attributed against the petitioners that there was concealment of material, but in the present case, there was no such concealment of the material on the part of the petitioners. Therefore, this Court is of the view that the petitioners have acted fairly and reasonably and no mala fides can be attributed against them and as such they are entitled for the reliefs as sought in the Company Petition.

41. **Show Cause Notice (x): F.No.4943/206(5)/Inspn.followup/JTA (CL) P-32/2017, dated 25.05.2018:**

In this show cause notice, it has been alleged that in terms of Section 203(1) of the Companies Act, 2013, which has come into force on 01/04/2014, the Company is required to appoint a Whole time Chief Financial Officer as well as Company Secretary which positions requires them to discharge different duties and responsibilities under the Companies Act, 2013 In terms of the said provisions, a Whole Time managerial Personnel should be appointed for each of the above positions. While so, according to the respondent, appointing one and the same person for both the positions i.e., Company Secretary - Chief Financial Officer is not in compliance with the provisions of the Act. Mr. V.G. Jaganathan continued as such till 31/03/2016 and on 04/04/2016, the Company appointed different persons as Company Secretary and Chief Financial Officer.

42. The learned counsel for the petitioners would submit that Mr. V.G. Jaganathan was employed as the Executive Director and the Company Secretary of the Company since 1981 and has been rendering service for about 35 years. In view of the new Companies Act and the transition phase, it was considered prudent to for Mr. V.G. Jaganathan to continue in the position of Chief Financial officer and Company Secretary till a complete transition is made under the Companies Act, 2013. There is no restriction under Section 203(1) with respect to an individual holding more than one Key managerial Position in the Company. Even Schedule V of the Act dealing with the conditions to be fulfilled for appointment of Managing Director, Whole Time Director or manager, or the rules provide for no restriction on an individual being appointed as a director where the said

individual is already holding another key managerial position. The intention of the Act is not to have any absolute restriction on an individual from taking up more than one responsibility. In fact the Annual Report as of 31/03/2016 reflects that Mr. V.G.Jaganathan was the CFO and Company Secretary till 31/03/2016, and from 04/04/2016, Mr. Meenakshisundaram has been appointed as the Chief Financial Officer. Therefore, the learned counsel would submit that the petitioners have not violated Section 203(1) of the Act.

43. On consideration of the submissions made by the learned counsel and on perusal of the documents, it reveals that one Mr.V.G.Jaganathan who is a qualified Chartered Accountant, was initially appointed as Company Secretary on 6.7.1982 and later in order to fullfil the requirement as per the new Companies Act, 2013, he has been appointed as full time Company Secretary and Chief Financial Officer of the Company with effect from 30.5.2014. However, the petitioners have not appointed independent Company Secretary. But in my considered view, non-appointment of Company Secretary and advancing the argument that the Chief Financial

Officer who is also qualified to be appointed as Company Secretary is concerned, this Court is not in a position to accept the explanation submitted by the petitioners since both posts should be filled up by independent qualified persons. Section 203 of the Act lays down that Chief Financial Officer is a whole time Key Managerial Personnel and is prohibited to act other than CFO. Therefore, the said post should be appointed by an independent person. Even though the individual who was appointed by the petitioners to act as both CFO and Company Secretary since qualified, in my considered view, he cannot be appointed and permitted to hold two posts as full time key managerial personnel. However, the petitioners have appointed Company Secretary with effect from 4.4.2016 but there was no Company Secretary upto 31.3.2016. In fact, the total number of Company Secretary posts who are available for appointment for total number of companies which are required to be appointed as Company Secretaries in India, is not sufficient and this might be the reason for non-appointment of key managerial personnel in time by the petitioners. Therefore, this Court is of the view that non-appointment of Company Secretary by the petitioners is not deliberate act on the part of the petitioners, but on the basis of the assumption and misinterpretation of the provisions of the Act that the Chief Financial Officer can also act as Company Secretary since he has also been qualified to be appointed as Company Secretary and hence, no *mala fide* motive can be attributed against the petitioners for non-appointment of a separate qualified persons to the posts of Company Secretary and Chief Financial Officer so as to prosecute the petitioners. Therefore, this Court is of the view that the petitioners have acted fairly and reasonably and no *mala fides* can be attributed against them as alleged in the show cause notice.

44. For all the reasons stated above, this Court is of the considered view that the petitioners have acted honestly and reasonably and therefore, they are not liable for any contravention of any provision of law as alleged in the respective show cause notices. Therefore, in such circumstances, this Court feels it appropriate to relieve all the petitioners from the liabilities in terms of all the above 10 show cause notices issued by the respondent.

45. In the present case, Company applications were filed on 30.09.2019, whereas the criminal complaints were filed on 05.04.2019, but

the summons were issued only on 21.01.2020. Therefore, summons were served only after filing of the Company Petitions. However, the complaints were registered in EOCC Nos.51 to 59 of 2019 pending on the file of the Economic Offences Court, Egmore. As already discussed above, since the petitioners have taken all due care and caution in complying with the provisions of the Act and even if there may be minor lapses and unintentional acts on the part of the petitioners, those are required to be condoned. Therefore, since the petitioners have been managing the affairs of the company in the best possible manner, they have to be fairly excused. In fact, for such minor lapses, unintentional acts and defaults of technical nature, it is not just and proper to prosecute the company's highest ranking officers as it would be detrimental to the amelioration of the company. To prosecute a person is of a serious consequence. If there is no basic foundation, the person cannot be compelled to pass through the ordeal of the prosecution. Since this Court passed the order relieving all the petitioners from the liabilities of all the allegations levelled against them in the respective show cause notices, no prosecution can be continued as launched in EOCC Nos.51 to 59 of 2019. Therefore, upon receipt of the order passed by this Court, the learned Magistrate shall pass appropriate orders for closing the complaints pending against the petitioners in EOCC Nos.51 to 59 of 2019 in accordance with law without insisting upon the presence of the petitioners.

46. In the result, these Company Petitions are allowed. No costs.

Suk 15.02.2023

KRISHNAN RAMASAMY, J.

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C.P. Nos.6 to 9 of 2019

15.02.2023