
2008 eGLR_HC 10005003,2008 CC (143)8 ,2008 (33) SCL 220

Before the Hon'ble MR KAPUJ, JUSTICE

**HEMALAKANUGA (COMPANY SECRETARY) PETITIONER Vs. THE REGISTRAR OF COMPANIES,
GUJARAT RESPONDENT**

COMPANY PETITION No: 4 of 2008 , Decided On: 11/01/2008

S.N.Soparkar, Nanavati Associates, Harin P.Raval

MR.JUSTICE K.A.PUJ.,

1. Challenge made in this group of 15 petitions is against the purported show-cause notice dated 28.11.2007 issued by the respondent i.e. Registrar of Companies, Gujarat to the Officers and/or Directors of Suzlon Energy Limited alleging violation of the provisions contained in different Sections of the Companies Act, 1956. The petitioners have sought excuse in respect of any offence, if committed, by the petitioners, by invoking the provisions contained in Section 633 (2) of the Act. The petitioners are apprehending that the respondent may prosecute the petitioners for the alleged violation of the provisions contained in different Sections of the Act.

2. It is the case of the petitioners that the Companys balance sheet at the end of every financial year duly records the true and fair financial position. The profit and loss account of the said Company at the end of every financial year duly records the true and fair profit and loss position of the Company for such period. On instructions of Ministry of Corporate Affairs, the office of Regional Director under Section 209A of the Companies Act, 1956 had ordered inspection of the Books of Accounts and other records etc. of the Company. The Company duly provided free and fair inspection of the books of accounts and other records to the Regional Director. After completion of the said inspection, the Regional Director on 12.09.2007 issued a letter to the Company alleging that various irregularities of the violation of the provisions of the Act were noticed and the Company was requested to furnish explanation / reply within 10 days as to why proceedings should not be launched against it for the alleged violations of the said Act. The Company, vide its letter dated 25.09.2007 replied to all queries raise by the Regional Director where from contention of the petitioners, that they have acted honestly, reasonably, bonafide and diligently and had not violated any of the provisions of law.

3. It is also the case of the petitioners that since the Company had issued adequate replies to the queries raised by the Regional Director, the Company and the petitioners were under bonafide belief that the Regional Director had dropped the matter. However, in November 2007, the respondent issued 15 show-cause notices against the Company and the petitioners

alleging violation of different Sections of the Act. The Company tendered its reply to each of such notices. The petitioners were, therefore, of the view that they ought fairly to be excused of any criminal liability in respect of any alleged violation in this regard and should be relieved of any penal consequences of different Sections of the Act in respect of which show-cause notices were issued.

4. On 08.01.2008, after hearing learned Senior Counsel Mr.S.N. Soparkar for Nanavati Associates for the petitioners and after considering the facts stated and averments made in the petitions as well as after considering the nature of alleged offences and explanation tendered by the Company, the Court has issued notice making it returnable on 11.01.2008 and granted ad-interim relief to the effect that if the respondent has not filed prosecution by this time, he must stay his hands till the returnable date.

5. Today, Mr. Harin Rawal, learned Assistant Solicitor

General appears for the respondent and filed affidavit-in- reply. He raised preliminary issues against the maintainability of petitions and against granting of ad- interim relief. The Court, therefore, considers the preliminary issue first before deciding the matter for admission as well as granting of interim relief on merits.

6. Mr. Rawal has submitted that under Section 633 (3) of the Act, no Court shall grant any relief to any officer under sub-section (1) or sub-section (2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted. Any relief may include ex-parte ad-interim and/or interim relief. He has, therefore, submitted that exparte ad-interim relief granted by this Court on 18.01.2008 is against the statutory provisions which creates an embargo on the exercise of jurisdiction to grant any relief including exparte relief without service of notice in the manner prescribed by this Court. He has further submitted that Rule 27 of the Companies (Court) Rules, 1959 provides that notice of every petition required to be served upon any person shall be in Form No. 6, and shall, unless otherwise ordered by Court or provided by the rules, be served not less than 14 days before the date of hearing. He has, therefore, submitted that having regard to the statutory intent and the mandatory intention manifested by the use of expression "no Court shall" no exparte ad-interim relief can be granted by this Court unless this Court by notice served in the manner prescribed under Rule 27, grants opportunity to the Registrar of Companies to show cause as to why relief should not be granted. On this ground alone, ad-interim relief deserves to be vacated forthwith.

7. Mr. Rawal in support of his submissions relied on the decision of the Apex Court in the case of Rabindra Chamaria and others V/s. Registrar of Companies, West Bengal and others, AIR 1992 SC 398 wherein it is held that under Section 633 (3), the Court has to give notice to the Registrar of Companies or on such other person, if any, as it thinks necessary. He has, therefore,

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submitted that giving of notice is mandatory and since it has not been given, ad-interim relief deserves to be vacated forthwith.

8. Mr. Rawal has further submitted that power to grant relief in certain cases conferred upon this Court statutorily by virtue of sub-section (2) of Section 633 to relieve an officer in respect of any negligence, default, breach of duty, misfeasance or breach of trust on an application made to this Court is discretionary power. The said provision cannot be invoked as a matter of right. He has further submitted that the manner in which the petitioners have invoked the jurisdiction of this Court, with respect to 15 violations in all these petitions itself manifests an intention of the petitioners as if jurisdiction of this Court is invoked as a matter of right. The administrators of Company affairs are appointed for the better carrying on of a Company and fulfilling statutory requirements and obligations including complying with various provisions of the Act. These powers are to be used very sparingly and Officer of a Company cannot come to the Court as a matter of right and pray that civil or criminal proceedings could not be instituted against them for their defaults. He has further submitted that this Court is not proper forum under this sub-section for determining whether there had been a default or not or whether a particular officer was an officer in default. For getting a relief under this sub-section, an Officer must prove that he has acted honestly and reasonably and that having regard to the facts and circumstances of the case, he ought fairly to be excused. Power to relieve is placed in the hands of this Court if the conscience of this Court is convinced that person has acted reasonably and honestly and such power being discretionary power can be exercised only when this Court is satisfied that the defaulting officer has acted honestly and reasonably. This satisfaction is not mere ritual and it is not to be met by mechanical averments in the petition by an affidavit as has been done in the instant case by the petitioners. Such satisfaction must be reached after serious and careful consideration of the whole question that the officer has acted honestly and reasonably. He has further submitted that the Officers of the Company have acted in gross violation of their statutory duties and it cannot be said that they have acted honestly or reasonably or in good faith. There are series of violations of mandatory requirements of the Companies Act and, therefore, there is no question of the petitioners having acted bonafide and prima facie reason to believe that they have not acted honestly or reasonably and, therefore, the petitioners have disentitled themselves to grant of any discretionary relief under this particular provision.

9. While responding to the preliminary objections raised by Mr. Rawal, Mr. S.N. Soparkar, learned Senior Counsel appearing for the petitioners has submitted that there is no substance in any of these preliminary objections raised by Mr. Rawal. He has further submitted that reliance placed by Mr. Rawal on the provisions of Section 633 (3) of the Act as well as the judgment of the Apex Court in the case of Rabindra Chamaria and others (Supra) for the purpose of opposing the grant of ad-interim relief by this Court on 08.01.2008, is wholly unjustified and contrary to the very object of the provisions contained in Section 633 (2) of the Act as well as Rules 6 & 9 of the Companies (Court) Rules, 1959. He has further submitted that the judgment rendered by the Apex Court in the case of Rabindra Chamaria and others (Supra) is altogether in different context and it is not applicable to the facts of the present case. He has further submitted that the respondent has issued 15 show-cause notices for the alleged offences which are of trivial nature and which pertain to mere technical defaults and they are of not much significance whatsoever. It is precisely for this reason these 15 petitions were filed by the petitioners invoking the discretionary jurisdiction of this Court. He has,

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therefore, submitted that the preliminary objections raised by Mr. Rawal are required to be overruled and all these petitions are required to be admitted and allowed or in the alternative, the ad-interim relief granted by this Court is required to be confirmed till the final disposal of these petitions.

10. The Court is not convinced with the submissions made by Mr. Rawal with regard to the preliminary objections. This Court has an ample power to grant ad-interim relief and that too, without issuance of notice to the Registrar of Companies in a given case. The Court is not granting any final relief relieving the petitioners from any of the alleged offences which may be branded as any negligence, default, breach of duty, misfeasance or breach of trust. The Court has merely asked the respondent, Registrar of Companies to stay his hands till the returnable date. The time of three days was granted only with a view to see that on hearing the respondent, if the petitioners were not entitled to ad-interim relief, the same would have been immediately vacated. The Court was not averse to granting time upto 14 days and if such a request were made, the Court would not have said no to it. The judgment of the Apex Court in the case of Rabindra Chamaria and others (Supra) is altogether in a different context. In that case, there was violation of the provisions contained in the Employees Provident Fund Act and challenge was made against purported prosecution under that Act. It is in this context, the Apex Court has held that the expression "any proceeding" occurring under Section 633 cannot be read out of context and treat in isolation. It must be construed in light of the penal provisions, otherwise the penal clauses under the various other Acts would be rendered ineffective by application of Section 633. The Court further held that the relief under Section 633 cannot be extended in respect of liability or violation under any other statute and notice to the Registrar was also considered to be mandatory only in that context.

11. As far as the present case is concerned, notices have been issued by the Registrar himself and alleged offences are in respect of the Act. Section 633 (2) of the Act provides that where any such Officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for 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). On a petition being filed by invoking the jurisdiction of this Court under Section 633 (2) of the Act and in a deserving case, if notices issued to the Registrar without granting any ad-interim relief and on service of the notice to the Registrar, during this interregnum period, the Registrar files the complaint against the petitioners prosecuting them for the alleged offence, there may be a possibility of challenge to the very jurisdiction of this Court under Section 633 (2) of the Act. To avoid such complexity and multiplicity of litigations and also to sub-serve the real legislative intent behind enacting Section 633 (2) of the Act, the Court thinks it just and proper to grant ad-interim relief even without issuance of notice to the Registrar of Companies. The Court, therefore, is of the view that there is no violation of the provisions contained in Section 633 (2) of the Act while granting ad-interim relief prior to issuance of notice to the Registrar of Companies. The Court is, therefore, of the view that there is no violation of the provisions contained in Section 633 (3) of the Act while granting ad-interim relief prior to issuance of notice to the Registrar of Companies.

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12. Even otherwise, the Court has ample power to grant such ad-interim relief in view of Rule 6 & 9 of the Rules. Rule 6 deals with practice and procedure of the Court and provisions of the Code would apply. Code means the Code of Civil Procedure, 1908 as defined in Rule 2 (4) of the Rules. Rule 6 says that save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these rules. Since the provisions of the Civil Procedure Code are applicable to the practice and procedure of the Court, by virtue of Order 39, Rule 1 and 2 of Civil Procedure Code, the Court has ample power to grant ad-interim relief prior to issuance of notice to the other side. Similarly, Rule 9 talks about inherent powers of the Court. It says that nothing in this rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Considering the facts of the present case in which the notices have been issued for prosecuting the Officers of the Company despite the fact that explanation was already tendered earlier to the Regional Director, the Court was of the view that the ad-interim relief was required to be granted so as to meet with the ends of justice and/or to prevent the abuse of the process of the Court.

13. Mr. Soparkar has further submitted that it is a general practice that when Court finds some substance in the matter, ad-interim relief is granted by the Court. He invites the Courts attention to the order passed by this Court on 26.12.2002 in Company Application No. 170 of

2002 with Company Application No. 213 of 2002 in the

case of Shri Vinod Shekhar V/s. Registrar of Companies wherein the Court observed that it is true that Sec.

633 (2) of the Companies Act, 1956 empowers this court to consider the applications made by the applicants before any prosecution is launched against the applicants. However, in that case, the applicants have already given reply to the show-cause notice and the said reply was yet to be considered by the respondents-authorities. The Court was, therefore, of the view that it was rather premature to approach this Court at this stage. The apprehension shown by the applicants was without any foundation and, therefore, there was nothing on record to show that authorities were not considering their reply on merits. The Court was also of the view that it might happen that if the authorities were satisfied with the explanation tendered by the applicants, they might not launch any prosecution against the applicants. Under those circumstances, the Court directed the respondent-authority to consider the reply filed by the applicants, and/or additional reply or submissions which were to be made by the applicants, within one week from the date of the order and, thereafter, take appropriate decision in the matter. The Court further directed that the explanation which was already given and the explanation which was to be given thereafter would be considered on merits and appropriate decision would be taken within a period of one month thereafter. The Court has also made it clear that if any adverse view was taken against the applicants and the respondents-authority were inclined to launch prosecution against the applicants, the said decision must be conveyed to the

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applicants and the same should not be implemented at least for a period of 15 days from the date of communication of such decision to the applicants.

14. Mr. Soparkar has also invited another order passed by this Court on 25.07.2002 in Company Application No.213 of 2002 in the case of Ashwini Shekhar V/s. Registrar of Companies wherein notice was issued to the respondent making it returnable on 06.08.2002 and ad-interim relief in terms of paragraph B of that application was granted.

15. Since the Court has overruled the preliminary objection raised by Mr. Rawal, Mr. Soparkar has addressed the Court on the merits of the matter. He has placed on record the brief synopsis of the allegations made by the respondent in the show-cause notices and the reply submitted by the petitioners. The same is as under :-

Sr. No.		
Section	Comp Peti. No.	
Allegations		Petitioners reply

01. 303(1) 4 of
2008

The Register of Directors does not include the names of the other companies in which the directorship is held by the Directors of the Company.

The Register of Directors has been duly maintained and meets all the requirements of the said Act and all the information required have been entered therein. The Company also enclosed a copy of the Register of Directors. Sr. No.
Section Comp Peti. No.
Allegations Petitioners reply

02. 211(4) 5 of 2008 The balance sheet of 31st March, 2006 and 31st March, 2007 of the Company has not given the licensed and installed capacity in respect of Turbine generated and blades as the same was variable and subject to change depending upon the product mix and utilization of the manufacturing facilities. By not providing the licensed / installed capacity, the said Company had not complied with Schedule VI Part II requirements, for which prior approval of the Central Government is required as per the said Act. No such approval has been taken from the Central Government.

The paragraph 4C of Part II of Schedule VI requires the manufacturing companies to furnish quantitative information in respect of licensed capacity (where licence is in force), the installed capacity and the actual production. The requirement of stating quantitative details if read in conjunction with Note No.1,2 and 3 below paragraph 4C emerges that the quantitative details of goods manufactured is required to be given where the company is engaged in the business of manufacture of goods requiring licence. In cases where there are licensed capacities due to requirement of obtaining licence for producing goods requiring licence, the licensed and installed capacity becomes relevant and determinate in the context of the licence. In case of such industry where licence is not required, the licensed capacity becomes irrelevant so also the Sr. No.

Section Comp Peti. No.

Allegations Petitioners reply

03. 301(1) 6 of
2008

04. 211(1) 7 of
2008

The Company has entered into some transactions in which the Directors are directly / indirectly interested and the same has not been entered in the Contract Register. As per the Balance sheet of 31st March 2006, the Company had balances of Rs.10 Lacs in the Current Account with non-scheduled Bank and the name of such Bank and Branch and Balance with them has not been disclosed separately in the Balance sheet.

All contracts and arrangements to which Section 297 or Section 299 of the said Act applies have been duly entered in the Register of Contracts. The remaining contracts and arrangement to which Section 297 of Section 299 do not apply is not required to be entered in the Register of Contracts. The balance lying with the non-scheduled Bank is disclosed in the balance sheet. The same is with the Bank in China. The quantum wise the amount of Rs.10 Lacs as compared to the scale and volume of financial transactions of the Company is insignificant from materiality point of view. Inadvertent omission of the Chinese Bank name is insignificant and can be condoned. Sr. No.

Section Comp Peti. No.

Allegations Petitioners reply

05. 212(1) 8 of
2008

06. 372A(5) 9 of
2008

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While filing the Balance sheet, the documents referred to in Section 212 (1) (a) to (d) have not been enclosed with the Balance sheet and also during inspection the Company only furnished the Balance sheet without annexing the documents. The investments made during the period from 1st April, 2004 to 31st March, 2007 were shown in form of the list and the same was not page numbered. The register should have been produced for prior and subsequent period also and the said investment register should include the terms and purpose of investments.

The Ministry vide letter

No.47/35/2007-CL-III

dated 12th March 2007 issued under Section 212(8) of the Act exempt the Company from sub-section (1) of Section 212 of the Act. The exemption permits the Company not to attach documents referred to in sub-section (1) of Section 212 of the Act with the balance sheet. The Register of Investments has been duly maintained in computerized form, being the popular and practice now a days and accordingly having sufficiently complied in spirit the provisions of Section 372A(5) of the Act. Sr. No.

Section Comp Peti. No.

Allegations Petitioners reply

07 193(1) 10 of
2008

08 217(2A) 11 of
2008

09 297(1) 12 of
2008

The Company has not page number the Minutes of the Meeting of the Board of Directors as well as shareholders of the Company. The names and other particulars of the employees were not furnished / annexed to the Directors report for the financial year 2004- 05, 2005-06, 2006-07.

The Company had entered into some transactions with various parties / companies i.e. Suzlon Structures Pvt. Ltd. and Suzlon Generators Pvt. Ltd. in which Directors are interested and for that no prior approval of the Central Government was taken.

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The Company duly maintains the minute books of the meeting of the Board of Directors and shareholders as per the provisions of the said Act and the said minute book is kept date wise, duly records the minutes of the meetings, is signed and placed chronologically with pages consecutively numbered. A copy of the minutes book was also attached. The names and other information of the employees of the Company is under the heading "Particulars of Employees" in the Directors report. A copy of the same was also annexed. The Companies i.e. Suzlon Structures Pvt. Ltd. and Suzlon Generators Pvt. Ltd. are the subsidiaries of the Company and therefore as per definition of Public Company under Section 3 (1) (iv) (c) of the said Act, the said two Companies being a subsidiary of Public Company will come under the definition of the Public Company and will be termed as Public Company. Sr. No. Section Comp Peti. No. Allegations Petitioners reply 10 308(2) 13 of 2008

The Directors holding shares of the Company had not given notice for acquisition / disposal of the shares of the Company.

The Company duly maintained the Register of Directors Shareholding and all the entries were duly entered in the said register. The Board had duly allotted the shares of the Company to the Directors and the Company had notice of the said allotment. The Directors had not acquired or disposed off the shares from open market. Sr. No. Section Comp Peti. No. Allegations Petitioners reply 11 301(3) 14 of 2008

The balance sheet of 31st March, 2006 and 31st March, 2007 of the Company has not given the licensed and installed capacity in respect of Turbine generated and blades as the same was variable and subject to change depending upon the product mix and utilization of the manufacturing facilities. The Company had not complied with Schedule VI Part II requirements, for which prior approval of the Central Government is required as per the said Act.

The requirement of stating quantitative details if read in conjunction with note No.1, 2 and 3 below paragraph 4C emerges that the quantitative details of goods manufactured is required to be given where the Company is engaged in the business of manufacture of goods requiring licence. In cases where there are licensed capacities due to requirement of obtaining licence for producing goods requiring licence, the licensed and installed capacity becomes relevant and determinate in the context of the licence. In case of such industry where licence is not required, the licensed capacity becomes irrelevant so also the installed capacity for another reason that in such industries the installed capacity in terms of quantity become indeterminate. All relevant facts had been disclosed in the Annual Accounts and Directors Report. The installed capacity varies depending upon orders, introduction of new products and product mix

Sr. No. Section Comp Peti. No. Allegations Petitioners reply 12 220(1) 15 of 2008 13 147 (1) (a) 16 of 2008

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There was delay in filing the Balance sheet with the respondent for the years 2002, 2003 and 2004.

The name plate displaying the name and address of the Company has not been displayed at the office of the Company at Pune.

The Company had duly filed the Balance sheet upto the year 2007 and the marginal delay in filing the balance sheet for the years 2002, 2003 and 2004 was made good by filing the same with additional fees. The name Suzlon is displayed at the conspicuous part of the office at Pune. The address of the Company is also being displayed at the office at Pune.

14 192 (1) & 4 (c)

17 of
2008

The Company had not filed Form No. 23 for appointment of the petitioner No. 1 as Managing Director of the Company within the stipulated time of 30 days from the date of such appointment.

There is no default of non-filing of the said Form No.23. The said form had been filed belatedly but the additional fees had already been paid.

Sr. No.	
Section	Comp Peti. No.
Allegations	Petitioners reply

15 217 (1) (e) r.w. Companies (Disclosure of Particulars in the report of Board of Directors) Rules 1988

18 of
2008

Particulars of conversation of energy and the technology absorption have not been given in the Form No. A and B in the Directors report.

The information is fully disclosed and furnished elaborately in the body of the Directors Report for the Balance Sheet dated 31st March 2006 and by way of annexure to the Directors Report. Company does not fall in any of 21 classes of industry listed in the Schedule to the said Rules. Therefore, the format of Form A and B do not apply to the said Company.

16. In the above background of the matter, Mr. Soparkar has submitted that the Company and its Directors / Officers have always acted honestly, reasonably, bonafide and diligently. No prejudice has been suffered by any person by reason of such alleged default. No pecuniary or other benefit has been obtained by the petitioners by reason of such alleged default. He has further submitted that the petitioners have exercised due diligence in preparing the Company's accounts and have also acted with due care and caution. The respondent has sought to take a different view from that taken by the Company and the petitioners in a matter of treatment of accounts. The Company and the petitioners have been guided by the Company's reputed Auditors. The petitioners have acted at all material times diligently and to the best of their ability. No person has suffered any loss or prejudice by reason of the acts of the petitioners and no loss has been occasioned to any person on account of the alleged default. None of the shareholders or any other has complained with regard to such alleged violations as mentioned in the show-cause notices. There has been no negligence or prejudice of duty or misfeasance or breach of trust by the petitioners. Therefore, the petitioners ought fairly to be excused of any criminal liability in respect of the alleged violations as complained of in the show-cause notices and should be relieved of any penal consequences under the aforesaid provisions of the Act.

17. Mr. Soparkar has further submitted that the respondent appears to have taken a biased view against the Company and the petitioners for undisclosed reasons. Repeated notices have been issued in respect of matters of insignificance and in respect whereof opinion may differ. Sometimes there may be a minor technical mistake or omission by the Company for which criminal proceedings are neither generally instituted nor are threatened. Trivial and minor matters have been sought to be made into issues blown out of proportion by the respondent. Mr. Soparkar has further submitted that in any event, without going into any of the technicalities, the petitioners ought fairly to be excused for the acts of omission, if any, in respect of which the complaints are sought to be made. There has been no violation or the alleged violation is on the basis of a ~~contrary subjective view taken by the respondent.~~

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18. In support of his submissions, Mr. Soparkar relied on the decision of the Madras High Court in the case of M. MEYYAPPAN V/S. REGISTRAR OF COMPANIES, 112 COMPANY CASES 450 wherein it is held that under Section 633 (2) if any notice is received for negligence, breach of duty, miscompliance or breach of trust and any application is made before the High Court, the Court has the same power to decide as if it had been a Court before which a proceeding against the officer for negligence, default, breach of duty and breach of compliance has been brought under sub-section (1). The Court, therefore, took the view that the petition was maintainable. It is also held by the Court that since the petitioner had acted honestly and diligently and properly explained the delay of 24 days in submitting the cost report to the Company Law Board, the Registrar of Companies was to forbear from prosecuting the petitioner for the offence mentioned in the show cause notice.

19. Mr. Soparkar has further relied on the decision of this Court in the case of HAFEZ RUSTOM DALAL V/S. REGISTRAR OF COMPANIES, [2005] 128 COMPANY CASES 883 (GUJARAT) wherein it is held that the Registrar of Companies had not dealt in detail with the submissions made by the applicants or the company. It was merely observed that the explanation furnished by them and the submissions made by the letter under reference did not explain satisfactorily the reasons for non-fulfillment of commitments and promises made in the prospectus dated May 8, 1992 timely and completely on the basis of which the public in general was induced to invest money in the Company. The Court has also held in that case that if any action was sought to be taken without any basis, the Court had every power to entertain an application under Section 633 (2) of the Act.

20. Mr. Soparkar has further relied on the decision of Calcutta High Court in the case of CHANDRA KUMAR DHANUKA AND OTHERS V/S. REGISTRAR OF COMPANIES, WEST BENGAL [2008] 141 COMPANY CASES 101 (CALCUTTA) wherein it is held that sub-section (2) of Section 633 of the Act confers on the High Court the same power as the criminal Court in granting relief to the petitioning officer who apprehends that proceedings might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust. Further, if an officer had to admit first that there is default before invoking sub-section (2), there would be serious prejudice occasioned to such officer in the event the High Court did not exercise the discretion to relieve the officer. In such event, when the criminal proceedings were instituted by the Registrar, not only could such officer be relieved by the criminal court under sub-section (1) (as the High Court had refused it), the default would stand proven on admission. If any officer of a Company petitions the High Court under sub-section (2) of Section 633 of the Act to be relieved as there was no default committed by him, mere denial of the charge that may ultimately be brought against him, would not disentitle him to invoke sub-section (2) or force him to await the rigours of criminal proceedings before he could plead not guilty. The Court further held in that case that various charges levelled against the petitioners and in respect of which they apprehended institution of criminal proceedings against them were all matters of subjective assessment as to whether the provisions of the Accounting Standards were complied with. The Court took the view that the petitioners have acted reasonably in complying with the accepted norms. Even if there were any violation on the part of the petitioners, the petitioners ought fairly to

be excused. The petitioners were relieved of all liabilities in respect of the 12 show-cause notices being the subject matter of the said proceedings.

21. On the other hand, Mr. Rawal while opposing to confirm the ad-interim relief or to grant any further relief in the matter has submitted that looking to the various offences committed by the Officers and/or Directors of the Company, it becomes obvious that the conduct of the petitioners is indifferent coupled with the fact that on many occasions, though in reply to the notice issued by the Registrar of Companies, it is asserted that there are no violations, but factually in the earlier replies or facts, during the course of investigations under Section 209 A have disclosed these violations which stand admitted. Such conduct disentitles the petitioners from putting forth a bald assertion in the petition supported by an affidavit that they are honest and reasonable. It does not lie in the mouth of the petitioners. Hence, they do not deserve to any relief to be granted by this Court. Mr. Rawal has further submitted that even if it is assumed that no loss or prejudice is suffered by reason of the various acts of the petitioners, the same alone is not sufficient to support and sustain bonafide belief that they have acted honestly and reasonably. The discretionary powers available to the equitable Courts of original jurisdiction under the Act are not meant for such petitioners who are involved in series of violations. He has further submitted that although section is expressed in wide language, but the statutory intentions clearly appear to enable the Court to exercise its discretionary jurisdiction while granting relief only to persons who have behaved reasonably and honestly, but have nevertheless failed in some way in discharge of obligations on some particular occasions. The Court would be reluctant to believe the petitioners more particularly when a Company Secretary is a remunerated Officer and other Officers, such as Managing Director and other whole time Directors who are also getting remuneration and are entrusted with day to day affairs of complying with the statutory provisions. The fact that whether a person is an officer in default and has acted honestly and reasonably is not to be determined in proceedings under Section 633 (2) of the Act and has to be decided in the prosecution, if any, launched by the Registrar under the Companies Act. Mr. Rawal has further submitted that non-compliance of none of these statutory requirements even remotely alleged could have existed due to incidents beyond the petitioners control. Therefore, this factor would defeat the plea of the petitioners having acted bonafide and honestly. If the petitioners are allowed to flout the obligatory provisions of the Act, it would set at naught the very object for which the Parliament has enacted the law. Mr. Rawal has further submitted that the petitioners have alternative remedy in law available under Section 621-A to compound violations if compoundable in the manner prescribed by the statute and on the other hand, the petitioners, if are content with the reply of denying the violations, are free to contest prosecution, if any, launched. The very fact that the petitioners are issued show-cause notices is evident from the fact that the petitioners are acting in unreasonable manner. These show-cause notices are issued after due inspection of the records in accordance with the provisions of the Companies Act. He has further submitted that the petitions are premature as Sub-section (2) can only be confined to apprehended prosecution, meaning thereby, it can only be applied to civil liability and not to criminal prosecution. There is no statutory intention which would manifestly contemplate inference of possible prosecution and the Legislature did not empower the Court to grant relief in anticipation of prosecution for granting declaration that the Officer concerned would not be liable to be prosecuted at all. He has, therefore, submitted that the petitioners should wait till the proceedings are started and then claim relief from the Court which is seized of the proceedings. Such relief cannot be claimed in advance. He has, therefore, submitted that the petitions at this stage are not maintainable and all these petitions ~~deserve to be summarily dismissed.~~

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22. In support of his submissions, Mr. Rawal relied on the decision of the Bombay High Court in the case of TRI-SURE INDIA LTD., In re. RICHARD LAURENCE PARISH (Jr.) AND OTHERS V/s. REGISTRAR OF COMPANIES, MAHARASHTRA AND OTHERS, [1983] 54 COMPANY CASES 197 wherein it is held that Section 633 confers upon the Court somewhat exceptional power to excuse a petitioner from prosecution for and the liability of an act which has, under the Companies Act, penal consequences. The power must be circumspectly exercised. Section 633 does not contemplate adversary proceedings in the ordinary sense. Petition under Section 633 cannot be compromised nor can the Court relieve the petitioner by an order made in invitum, for the Court has to be reasonably satisfied that the petitioner had acted honestly and reasonably.

23. Mr. Rawal further relied on the decision of Punjab & Haryana High Court in the case of RAM KRISHAN DALMIA AND OTHERS V/S. REGISTRAR, JOINT STOCK COMPANIES, DELHI, [1962] 32 COMPANY CASES 341 wherein it is held that granting of relief under Section 633 is a matter of discretion of the Trial Court and the Trial Court did not exercise its powers injudiciously in declining the relief. The primary responsibility to prepare balance-sheet is on the Directors and not the Auditors, and as the Company was carrying on its business despite the seizure of books there was no conceivable reason why the petitioners failed to maintain regular accounts for subsequent years and prepare the balance-sheet.

24. Having considered the rival submissions of the parties and relevant statutory provisions contained in the Act as well as Rules and the decided case law on the subject, the Court is of the view that ad-interim relief granted earlier directing the Registrar of Companies to stay his hands is required to be confirmed till the final disposal of these petitions. Looking to the nature of offences alleged against the petitioners and explanation tendered by them in their replies, the Court is of the prima facie view that 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, those are required to be condoned. For such minor lapses and defaults of technical nature to prosecute the Company's highest ranking Officers is not just and proper. To prosecute a person is of a serious consequence. If there is no basic foundation, the person cannot be compelled to pass through the gamut of such turmoils. If at the initial stage, the Court is prima facie satisfied that the prosecution may not ultimately sustain, the Court would certainly show its indulgence so as to meet with the ends of justice or to prevent the abuse of the process of law. The Court, therefore, restrains the Registrar of Companies from launching prosecution for the alleged offences and further restrains him from proceeding further pursuant to the impugned notices challenged in all these petitions.

25. While continuing and/or confirming the ad-interim relief, the Court also takes note of the averments made in paragraph 13 of the Affidavit-in-reply wherein it is stated that the inspection has been ordered on the basis of the letter dated 06.06.2007 of the Regional Directorate. This letter of the Directorate mentions that there was element of doubt regarding proper utilization of the proceeds of the public issue in compliance of Section 297 of the Act. Since the authority had not found anything adverse in this regard, impugned notices appeared to have been issued so as to see that the Company and/or its Officers be penalised on any count. The Court does not approve this approach of the respondent and, therefore, deems it absolutely just and proper to

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exercise its discretionary power by granting the above relief. The Court is of the view that all the three essential ingredients which the Court should take into consideration while granting interim relief i.e. prima facie case, balance of convenience and irreparable loss or injury are present in this case and hence, such relief cannot be denied to the petitioners.

26.Registry is directed to place copy of this order in all connected matters.

Order accordingly

