

(2008) 12 BOM CK 0003

In the Bombay High Court

Case No : Writ Petition No. 2739 of 2006

Sesa Goa Limited and Others

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Companies Act, 1956 — Section 2(36), 5, 63, 64, 65
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 319, 468, 472
Penal Code, 1860 (IPC) — Section 120B, 34, 403, 405, 406
Securities Contracts (Regulation) Act, 1956 — Section 22

Citation : (2008) 111 BOMLR 261 : (2009) 151 CompCas 358 : (2009) 89 SCL 169

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : Amit Desai, P.R. Jehangir and Gopal Krishna Shenoy, instructed by Udwadia and Udeshi, for the Appellant; P.A. Pol, APP for Resp. No. 1 and Z.T. Andhyarujina, instructed by . V.M. Sharma and V.M. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Nishita Mhatre, J.—These petitions impugn the order passed on 4.10.2006 by the additional Chief These petitions impugn the order passed on 4.10.2006 by the additional Chief Metropolitan Magistrate, 40th Court, Girgaum and by the Sessions Court in Criminal Revision Application No. 509 of 2004. After the Writ Petition No. 2739 of 2006 was argued, an application was made on behalf of Respondent No. 2 in Writ Petition No. 254 of 2008 that the writ petition should be adjourned in order to permit the Counsel appearing for Respondent No. 2 to address the Court. The petitions involve the same issue. The parties were aware that they were being heard together and therefore, ought to have been ready to argue the matter immediately after the first petition was over. I have, therefore, refused the adjournment.

2. The Petitioner Nos. 1 and 2 are public limited companies; Petitioner No. 2,

being a subsidiary of Petitioner No. 1. Petitioner No. 2 (for short, hereinafter referred to as the `SIL") was incorporated in 1993 whereas Petitioner No. 1 (for short, hereinafter referred to as the `SGL") has been in existence for well over two decades. SGL currently holds 88.25% of the shares of SIL.

3. Respondent No. 2 claims to own 57450 shares of SIL and contends that she is a shareholder of both SGL and SIL. She filed a complaint on 8.7.2003 against both the companies and the Directors of SGL, some of whom were also on the Board of SIL. The allegations made in the complaint were that the Companies had committed offences u/s 73 of the Companies Act, 1956 as well as u/s 403 and 406 r/w Section 34 of the Indian Penal Code. Four transactions have been set out in the complaint on the basis of which the allegations have been made. It is contended that monies were paid by the complainant to SIL in 1993 pursuant to a "preferential offer" document dated 28.8.1993. It is contended that the ? Preferential Offer" document indicated that the shares of SIL would be listed on the stock exchange. The complainant had believed the promise held out in the preferential offer document issued by SIL in 1993 and was induced into purchasing its shares. It is alleged that SIL had breached this promise and had thereby committed criminal misappropriation and criminal breach of trust. Besides that, according to the complainant, these acts or omissions of the petitioners" amount to a violation of Section 73 of the Companies Act (for short, hereinafter referred to as "Section 73"). The second transaction spoken of in the complaint is that on 5.6.2003, SGL had sought to buy the shares of SIL at a price of Rs. 30/- knowing full well that SIL had failed to list its shares on the stock exchange. This according to the complainant was in breach of the statutory requirements of Section 73 as that section contemplates return of monies with interest @ 15%, in case of failure to list the shares on the stock exchange. This meant that the rate ought to have been approximately Rs. 57/- per share instead of which shares were purchased at a value of Rs. 30/- by SGL. The third transaction which is objected to by the complainant is the sale of pig iron and the iron ore plant of SGL to SIL at an exaggerated price. The complainant claimed that money was siphoned out from SIL into SGL, resulting in offences of criminal misappropriation and criminal breach of trust. The fourth transaction which is objected to is the sale of pig iron ore by SGL to SIL at a price which according to the complainant was steep, resulting in siphoning of monies from SIL to SGL which constituted offences u/s 403, 406 r/w Section 34 of the Indian Penal Code. The Directors of SGL, some of whom were also the Directors of SIL have been accused by the complainant as they were "officers in default" within the meaning of the Companies Act which could be seen by piercing the corporate veil of the two companies, SGL and SIL.

4. It has been mentioned in this complaint that Respondent No. 2 has also filed criminal complaint No. 4/S/2000 currently numbered as C.C. No. 111/SW/2005 pending in the same Court. This complaint was filed on 15.1.2000. The complainant has alleged that offences under Sections 63, 68 r/w 64, 65 and 67 of the Companies Act and Sections 403, 406, 420 and 120B of the Indian Penal

Code have been committed. Cognizance was taken of this complaint and the learned Magistrate has issued process under Sections 63 and 69 of the Companies Act and Section 415 r/w 420 of the Indian Penal Code against the accused Nos. 1 to 4, some of whom are the Directors on the Boards of SIL and SGL. The order issuing process was challenged unsuccessfully by the Petitioners up to the Supreme Court.

5. The learned Magistrate has issued process in the second complaint i.e. the complaint filed in 2003 and that order has been confirmed by the Sessions Court. It is this order which is challenged in the present petition.

6. Counsel have advanced arguments on five main issues viz: (i) the powers of the high court u/s 482 CrPC; (ii) limitation; (iii) whether the acts or omissions of the petitioners constitute offences u/s 403 and u/s 406 IPC; (iv) whether any offence has been committed u/s 73 of the Companies Act; (v) whether the directors who have allegedly committed offences are "officers in default" u/s 5 of the Companies Act; and (vi) whether the directors are vicariously liable for the offences, if any, committed by the companies.

The powers of this Court u/s 482

7. It is well settled in a catena of judgments that the High Courts should refrain from using their powers u/s 482 of the CrPC. In case such powers are to be used they should be used sparingly and in the rarest of rare cases, not to stifle a legitimate prosecution. The Court must consider whether the uncontroverted allegations contained in the complaint, prima facie, constitute offences. The submission of Mr. Andhyarujina, the learned Counsel for the Respondent is that the powers of this Court u/s 482 are to be exercised under extraordinary circumstances. The quashing of a complaint under extraordinary powers of the High Court u/s 482 of the CrPC is not a normal relief which should be granted by the High court. The learned Counsel relies on the decision in the case *Som Mittal v. Government of Karnataka* 2008 Cr.L.J. 1927 of the 3-Member bench of the apex court. He also relies on the judgment in the case of *State of Haryana and others Vs. Ch. Bhajan Lal and others*, where the apex Court has enunciated 7 categories of cases in which the High Court ought to exercise its powers vested under 482 of the CrPC. It is submitted that the present case does not fall into any of the categories enlisted in *Bhajan Lal's* case (supra) and, therefore, the petitions ought to be dismissed. Apart from this, the learned Counsel submits that when this Court considers a matter u/s 482 of the CrPC it is not necessary to determine whether the charges alleged in the complaint would end in conviction. Reliance is placed on the judgment in the case of *Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia and Another*, .

8. On the other hand, the learned Counsel for the Petitioners, Mr. Desai submits that the complaint smacks of malafides and it is well settled that the powers of this Court u/s 482 of the Code are sufficiently wide to quash prosecutions which are founded on malafides. The learned Counsel submits that the complaint is an

abuse of the process of law and is an attempt to coerce SGL/SIL to pay to the Respondent huge amounts of money in respect of the shares that she holds in SIL. It is submitted that although the shares of SIL were allotted to the Respondent in 1993 she took no action in connection with her grievances till late 1999 by which time the management of the companies had changed thrice. It is also submitted that in Writ Petition No. 1280 of 1999 filed by the Respondent, the Division Bench of this Court while dismissing the Writ Petition, observed that if there was a breach of promise to list the securities, as alleged by the Petitioners i.e. the Respondent herein, she would have remedies under the Contract Act or under the provisions of the Companies Act. The learned Counsel points out that no action has been initiated by the Respondent under the provisions of the Indian Contract Act. Criminal Complaint No. 4/S/2000 alleging violation of the provisions of Section 63 and 68 of the companies Act and various other sections with respect to the alleged misstatements contained in the preferential offer document of 28.8.1993 has already been filed in January 2000. He submits that the malafides of Respondent No. 2 are apparent from the fact that she has impleaded the Directors who had joined the Board of Directors of the Companies between February 1993 and April 2003, none of whom had anything to do with the preferential offer document or transactions prior to their joining the Board. The learned Counsel draws my attention to the fact that the Respondents have voluntarily accepted the offer by tendering merely 531950 shares to SGL at a price of Rs. 30/- out of her entire shareholding. She has held on to 57450 shares only to maintain actions against the companies, according to the learned Counsel. The learned Counsel then submits that although originally only 57450 shares of SIL were allotted to Respondent No. 2, she acquired additional shares through off-mark transactions resulting in an aggregate holding of 589400 shares. He also submits that no civil remedy has been initiated by the complainant till today.

9. In the case of Bhajan Lal (*supra*), the Supreme Court has enlisted by way of illustrations 7 categories of cases in which High Court ought to exercise its jurisdiction u/s 482 of the CrPC, thus:

102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers u/s 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused. Where the

allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

Where an uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. Where the allegation in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

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

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

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

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.

10. In the present case, the submission of the learned Counsel for the petitioner is that the present criminal proceedings fall within the ambit of the illustration contained in the 7th category of cases. It must be noted here that the earlier complaint filed by Respondent No. 2 i.e. cc No. 4/S/2000 is with respect to offences committed u/s 63 and 68 of the Companies Act. They relate to the same preferential offer document of 28.8.1993. The contentions raised in the present complaint could thus have been incorporated in the earlier complaint. However, the Respondent for the reasons best known to her has chosen to file two separate complaints with respect to the same document, three years apart. The earlier complaint significantly alleges that offences have been committed by the Petitioners u/s 403 and 406 of the Indian Penal Code in respect of the application monies, apart from them having committed offences u/s 420 Indian Penal Code. No process was issued under 403, 406 and that order has not been challenged

by the Respondent. In the earlier complaint again, the provisions of Section 73 of the Companies Act have been invoked in response to an application made by one of the Directors to challenge the order u/s 319 of the CrPC. No charges have been framed u/s 73 as yet although it appears that Respondent No. 2, through her constituted attorney, had insisted that charges be framed under this provision of law. The malafides are also evident from the fact that the Respondent instead of having additional charges framed in the earlier complaint has filed a fresh complaint against the Petitioners. In fact it must be noted that the foundation of the earlier complaint filed in the year 2000 and that of the present one is the same: the preferential offer document of 1993. Although the respondent had tried to establish that offences had been committed by the petitioners under Sections 403 and 406 IPC as also u/s 73 of the Companies Act, process was not issued with regard to the alleged offence under these sections. Significantly, the respondent has not challenged the order refusing to issue process under these sections. Instead, the respondent has abused the process of law by filing a second complaint in 2003 for the same offences. This act of the respondent is apparently actuated by malafides. In my view, therefore, the submissions of the learned Counsel for the Petitioners must be accepted.

11. This is an eminently fit case in which the powers vested in this Court u/s 482 of the CrPC should be exercised. Apart from this, the offences have not been established as I shall presently discuss and therefore, the complaint must be quashed.

LIMITATION

12. The next question which must be considered is that of limitation. Section 468 of the CrPC contemplates a bar to taking cognizance of an offence after expiry of the period of limitation. The offences alleged in the complaint are u/s 73 of the Companies Act and Sections 403 and 406 of the Indian Penal Code. The limitation prescribed for taking cognizance of offences committed u/s 73 is one year, whereas for Sections 403 and 406 of the Indian Penal Code it is three years. The learned Counsel for the Petitioners has urged that if Section 73 is made applicable to the preferential offer document of August 1993, the complaint is barred by nearly nine years for which there is absolutely no explanation in the complaint. He submits that the alleged offence described in the complaint is not a continuing offence and, therefore, the complaint is barred by limitation. As regards Sections 403 and 406, he submits that the alleged entrustment of monies and non-repayment of the same resulting in an alleged conversion are not continuing offences. The offence allegedly has taken place in 1993 when the Respondent has sold her shares of SIL to SGL @ Rs. 30 on the basis of the preferential offer document of 1993. He therefore submits that the complaint is barred by limitation. He relies on the judgments of the Supreme Court in the cases of *State of Punjab v. Saran Singh* AIR 1981 SC 105, *Mahipal Singh v. State* 1986 Cr.L.J. 1851 and *Dinbandhu Banerjee v. Nandini Mukherjee* 1994 Cr.L.J. 422. The learned Counsel also points out that the delay in filing the

complaint cannot be condoned u/s 473 much after cognizance has been taken of the complaint. He urges that delay can be condoned only prior to taking cognizance of the offence. He relies on the judgment of the learned Single Judge of this Court in the case *Kirloskar Cumins v. Mayur Jamnadas* in Criminal Revision Application No. 178 of 1997 delivered in January 2007.

13. Per contra, the learned Counsel for the Respondent has submitted that the offences alleged against the petitioners are continuing offences as contemplated under the provisions of Section 472 of the CrPC. He submits that the very fact that the Petitioners had not complied with their promise contained in the preferential offer document to list the shares of SIL, and the shares were unlisted at least till 5.6.2003, would indicate that the offences u/s 73 and Section 406 were continuing offence. He submits that the monies of the shareholders of SIL had been entrusted to the company in a separate account and therefore they amount to continuing offences. The learned Counsel then urges that the provisions of Section 73 are akin to the provisions of the Employees Provident Fund and Miscellaneous Provisions Act which is social welfare legislation as construed by the apex Court. The learned Counsel buttresses his arguments by relying on the judgments in the case of *Bhagirath Kanoria and Others Vs. State of M. P.*, and *Japani Sahoo v. Chandra Sekhar Mohanty* AIR 2007 SC 841. He contends that the judgments relied on by the learned Counsel for the Petitioners, in fact support his case that the offences alleged against the Petitioners are continuing offences for which there is no prescribed period of limitation. He submits further that in the light of the allegations contained in the complaint that there is a possibility that the trial Court would frame charges against the Petitioners under the provisions of Section 409 of the Indian Penal Code and in such an event the provisions of limitation contained in Section 468 of the CrPC can never be made applicable. He places reliance on the judgment in the case of the Supreme Court in the *State of West Bengal and Another Vs. Laisal Haque and Others*, where it has been held that issuance of a summons under specific sections cannot be a ground for dismissal of a complaint on the ground of limitation since a person summoned under that section of the Indian Penal Code could be charged under any other section which does not attract the provisions of limitation.

14. In my opinion, the complaint is clearly barred by limitation. The offences alleged against the Petitioners relate to the preferential offer document issued in 1993. The Respondent has claimed that there is a promise contained in that offer document to list the shares of SIL on the stock exchange. This has not been done till date and, therefore, the provisions of Section 73 have been breached. A perusal of the offer document indicates that Clause D of 2.2 which contains one of the objects and purposes of the offer stipulates that it was initially envisaged by SIL that its shares would be listed on the Stock Exchange through a public issue within a time frame of 12 to 18 months. Since this was not possible, the shareholders were given an option to sell their shares of SIL to SGL at a price of Rs. 30/- per share. Thus, the period during which the shares of SIL were to be

listed, was within 12 to 18 months. Undisputedly, the complainant had acquired the shares of SIL in 1993 and therefore, at best, going by the offer document the shares should have been listed on the Stock Exchange after 12 to 18 months. Admittedly, this was done. Therefore, the alleged offence was complete 18 months after the shares of SIL were purchased by the respondent. Undoubtedly, this offer document was only limited to the shareholders of SGL and Respondent No. 2 being one such shareholder, had accepted the offer made to purchase the shares of SIL in 1993 itself. The non-listing of the shares according to the complainant amounts to an offence. If that is accepted then the offence has been completed in mid 1995. The present complaint has been filed in 2003, well beyond the period of limitation.

15. The other allegation against the Petitioners is that they had committed an offence u/s 73 of the Act when SGL and its Directors had sought to buy the shares of SIL from the shareholders of SIL at a price of Rs. 30 in breach of the statutory requirements of Section 73. Again, this breach relates to the preferential offer document of 1993 and therefore, the complaint with regard to that offence is barred by limitation. As regards offences under Sections 403, 406, the allegations in the complaint relate to the sale of pig iron plant by SGL to SIL at an exaggerated price and the sale of iron ore by SGL to SIL at a very high price. These acts, according to the respondent, resulted in the siphoning of monies of SIL to SGL constituting offences of criminal misappropriation and criminal breach of trust. Apart from this, the Petitioners have not returned the monies of the Respondent used for the purchase of shares of SIL, with interest @15% as stipulated in Section 73 and, therefore, it amounts to criminal misappropriation and criminal breach of trust, urges the learned Counsel for the respondent. Assuming these allegations are well founded, they all relate to incidents which occurred in 1993 and, therefore, the complaint is barred by limitation. It is well settled that the purpose of specifying the period of limitation in the Criminal Procedure Code is to prevent parties from abusing the process of law by filing vexatious and belated prosecutions when material evidence may not be available for effectively disposing of the case.

16. The submission of the learned Counsel for the Respondent that these are continuing offences also cannot be accepted. While dealing with the offence u/s 406 of the Indian Penal Code, the Calcutta High Court in the case of Mahipal Bahadur Singh (supra), was dealing with a case where the allegations against the Petitioners were in respect of an offence u/s 406 Indian Penal Code, based on audit reports for the year ending 31.3.1975 and 31.3.1976. The Calcutta High Court held that these offences of criminal breach of trust had been committed once and for all. There was no question of further disobedience or non-compliance and therefore, the offence u/s 406 could not be considered to be a continuing offence on the ground that had the deposits been made in the scheduled banks within the stipulated time they would continue to earn interest. Similarly, in the case of Deenbandhu Banerjee (supra), the Calcutta High Court has observed thus:

10. Now let us look to the language of the relevant parts of Section 403 and Section 405 of the Indian Penal Code for ascertaining whether the offence of dishonest misappropriation or for that matter, criminal breach of trust is a continuing offence. Dishonest misappropriation or conversion to one's own use is the crux of the offence of dishonest misappropriation punishable u/s 403, I.P.C. Now, the dictionary meaning of the word 'misappropriate' is 'to put to a wrong use; to take dishonestly for oneself' (vide, Chambers Twentieth Century Dictionary). The dictionary meaning of the word 'appropriate' is 'to make to be the private property of anyone, to take to oneself as one's own' (ibid). It is thus evident that every wrong use will not necessarily be misappropriation. Misappropriation rather marks the point where the transition takes place from nonoffending possession, control or use to offending or dishonest possession, control or use. It is this transitional phenomenon and this process of transformation which converts the possession or use of a property to dishonest misappropriation. Once this transitional phenomenon, that is, the process of transformation is complete and dishonest misappropriation takes place the subsequent wrong user of the property or the continuance of such wrong user is not a part of the phenomenon of misappropriation although such continuance of user or repetition of user may be also morally and legally wrong. But then such subsequent wrong user or continuance or repetition of the offence of dishonest misappropriation as defined in Section 403. The same feature of transitional phenomenon of converting the complexion of the possession or user marks the precipitation and completion of the offence of criminal breach of trust must be tainted at the point of its commission by a process of transformation, by a transitional phenomenon converting the complexion of the possession, user or dealing of the property and once that transitional phenomenon is over and the conversion is complete by answering at that amount the definition of dishonest misappropriation or criminal breach of trust as contained in the relevant section of the Indian Penal Code, the subsequent continuance of the possession, user or dealing of the property even if it is morally wrong and legally untenable will be lacking the transitional factor of contemporaneous conversion of the complexion of the user from one type to a different type and therefore it cannot be said that the subsequent user is a continuing offence of the same type which was initially committed in changing the complexion of user. In order to constitute a continuing offence the acts complained of must at every moment of continuance reflect all the ingredients necessary for constituting the offence. As we have seen conversion or transitional phenomenon of complexional change of the user being one of the salient ingredients of the offence of dishonest misappropriation or for that matter, criminal breach of trust, such transitional phenomenon obviously cannot recur or endure after the conversion or change of complexion of the user is complete. In the circumstances it cannot be said that retention or subsequent dealing of the misappropriated property, although wrong, will constitute any such offence as stated above because the definition of such offence does not make such wrongful subsequent use a continued part or a repetition of the offence. I have therefore no hesitation to hold that the offence of dishonest

misappropriation defined in Section 403 or the offence of criminal breach of trust defined in Section 405, I.P.C. is not a continuing offence because such offence, by definition, takes place where an act is committed once and for all.

11. In this connection, the learned Advocate for the petitioner has referred to the decision of the Supreme Court in *State of Punjab Vs. Sarwan Singh*, where the Supreme Court upheld a finding that a prosecution for an offence u/s 406, I.P.C. was barred by limitation. It has been submitted by the learned Advocate for the petitioner that had an offence punishable u/s 406, I.P.C. been a continuing offence the Supreme Court in that case would not have held that the prosecution in respect of the offence punishable u/s 406 was barred by limitation. The learned Advocate for the opposite party, on the other hand, very strenuously argued that the Supreme Court in that decision did not in fact at all consider or decide whether an offence u/s 406, I.P.C. was a continuing offence or not and that the Supreme Court rather proceeded on a priori assumption that the said offence was not a continuing offence and as such the said decision cannot be considered to be an authority on the question whether an offence u/s 406, I.P.C. is a continuing offence or not. It is further submitted on behalf of the opposite party that nothing in the said decision also should be taken as an obiter dictum of the Supreme Court. In this connection, he also referred to the Full Bench decision of the Punjab and Haryana High Court in *Balram Singh Vs. Sukhwant Kaur and Another*, in support of his argument that the offence of criminal breach of trust is a continuing offence. I have however already elaborately discussed, supported by reasons, as to why an offence of dishonest misappropriation or criminal breach of trust is not a continuing offence and I have held this independently even without taking any support from the Supreme Court decision in *State of Punjab Vs. Sarwan Singh*, . In spite of the view taken by the Punjab and Haryana High Court in *Balram Singh* (supra) I am inclined to hold for reasons discussed earlier that the offence of dishonest misappropriation or criminal breach of trust is not a continuing offence and in this regard I receive support from another Singh Bench decision of this Court in *Mohipal v. State* 1986 Cri LR 1. I, therefore, find that the prosecution in this case is barred by limitation and for this reason the proceeding in the Court below must be quashed. The other questions raised in this revisional application are however not considered or decided by me as I find that on ground of limitation the proceeding in the Court below must be quashed. The revisional application is accordingly allowed and the proceeding in the Court below is quashed.

17. I am in respectful agreement with views expressed in the aforesaid judgements. Moreover the contention of the learned Counsel for the respondent that the complaint ought not to be dismissed because there is likelihood that a charge would be framed u/s 409 IPC which would then mean that the complaint was filed within limitation is without merit. Whether a complaint has been filed within the prescribed period of limitation cannot be decided on a hypothesis or conjecture that an additional charge could be framed at some point in time. The issue of limitation must be decided on the basis of the complaint as it is filed. I

find that the complaint is barred by limitation and therefore, ought to be dismissed. The issuance of process against the Petitioners is bad in law and is required to be quashed.

18. Although it would not be necessary for me to consider the matter on merits, once I have taken the view that the complaint is barred by limitation, in my opinion, it would be appropriate to decide all the issues raised by Counsel for the parties. Sections 403, 406 of the Indian Penal Code:

19. Mr. Desai urges that the allegations in the complaint do not fulfil the essential ingredients of these sections of the Indian Penal Code and therefore, no offence has been committed by the Petitioners under the aforesaid sections. The learned Counsel submits that the scope of Section 403 is that a person who has dishonestly misappropriated the property must convert it for his own use. Section 406 is the punishing section for the offence of criminal breach of trust. Criminal breach of trust has been defined u/s 405 of the Indian Penal Code. The learned Counsel points out that the essential ingredient of Section 405 is that a person must be entrusted with property or have dominion over the property before it is dishonestly misappropriated or converted to his own use. He relies on the judgments in the cases of *U. Dhar and Another Vs. The State of Jharkhand and Another*, ; *Chelloor Mankkal Narayan Ittiravi Nambudiri Vs. State of Travancore-Cochin*, ; *The State of Gujarat Vs. Jaswantlal Nathalal*, ; *Velji Raghavji Patel Vs. State of Maharashtra*, , etc. besides the judgment of the Assam High Court in the case of *Mahabir Prasad Goradia v. The State of Assam* 1961 (2) Cr.L.J. 457 and of the Madhya Pradesh High Court in the case of *State of M.P. v. Pramode Mategaonkar* 1965 Cr.L.J. 562 to highlight the scope of the word "entrustment" used in Section 405 of the Indian Penal Code.

20. In *U. Dhar (supra)*, the Supreme Court has held as follows:

5. In our view, what is relevant is that the contract between TCPL and the complainant is an independent contract regarding execution of certain works and even assuming the case of the complainant to be correct, at best it is a matter of recovery of money on account of failure of TCPL to pay the amount said to be due under the contract. The complainant has alleged that TCPL has already received the money from SAIL for the work in question and it has misappropriated the same for its own use instead of paying it to the complainant and it is for this reason that the offences are alleged under Sections 403, 406 and 420 etc.

6. The courts below have overlooked the fact that the contract between Bokaro Steel (a unit of SAIL) and TCPL is a separate and independent contract. The contract between the complainant and TCPL is altogether a different contract. The contractual obligations under both the contracts are separate and independent of each other. The rights and obligations of the parties i.e. the complainant and TCPL are to be governed by the contract between them for which the contract between TCPL and Bokaro Steel (SAIL) has no relevance.

Therefore, even if Bokaro Steel has made the payment to TCPL under its contract with the latter, it will not give rise to plea of misappropriation of money because that money is not money or movable property of the complainant.

7. Further, Section 403 uses the words "dishonestly" and "misappropriate". These are necessary ingredients of an offence u/s 403 IPC. Neither of these ingredients is satisfied in the facts and circumstances of the case. In para 14 of the complaint, the complainant has stated as under:

... Release of payments to the complainant was never dependent on the payment released by Bokaro Steel Plant, a unit of SAIL to TISCO growth shop and TCPL.

8. Thus, admittedly, the two contracts are independent of each other and payment under one has no relevance qua the other. It cannot be said that there is any dishonest intention on the part of the appellants nor can it be said that TCPL or the appellants have misappropriated or converted the movable property of the complainant to their own use. Since the basic ingredients of the relevant section in the Indian Penal Code are not satisfied, the order taking cognizance of the offence as well as the issue of summons to the appellants is wholly uncalled for. Such an order brings about serious repercussions. So far as the appellants are concerned, when no case is made out for the alleged offences even as per the complaint filed by the complainant, there is no reason to permit the appellants to be subjected to trial for the alleged offences. Hence, the appeal is allowed. The impugned orders of the High Court as well as of the Chief Judicial Magistrate are hereby ordered to be quashed.

21. In C.M. Narayanan (supra), the Supreme Court has observed:

... to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

22. In Jaswantlal Nathalal's case (supra), the Supreme Court has observed that there must be a trust or an obligation annexed to the ownership of the property and confidence reposed in and accepted by the owner for the benefits of another before there can be any entrustment or dominion over the property. It has been observed thus:

8. The term "entrusted" found in Section 405 IPC governs not only the words "with the property" immediately following it but also the words "or with any

dominion over the property" occurring thereafter - see *Velji Raghvaji Patel v. State of Maharashtra* 1. Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust - see *Jaswantraji Manilal Akhaney v. State of Bombay*. The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. It is true that the Government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the Government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust.

9. A case somewhat similar to the one before us came up for consideration before a Division Bench of the Calcutta High Court in *Satyendra Nath Mukherji v. Emperor*. These are the facts of that case. One Satya Sunder Mitra was a contractor. He was granted a permit by the Executive Engineer, A.R.P. (Shelters), construction division, to purchase seven tons of cement from Balmer Lawrie and Company. The permit was granted on the condition that the cement was to be used in the work connected with the construction of shelters, which work he had contracted to do for the Executive Engineer. The finding in the case was that with the help of an employee of Mitra and Chaudhuri who were banians of Balmer Lawrie and Company, six tons of cement were diverted and disposed of for another purpose. The trial court convicted Satya Sunder Mitra u/s 406 IPC and another for abetting the offence committed by Satya Sunder Mitra. The High Court allowed their appeal, holding that there was no entrustment of the cement in question within the meaning of the term as used in Section 405 of Indian Penal Code. In the course of the judgment it was observed:

The permit was granted in accordance with the system of control established under the Defence of India Rules, under which an order has been issued by the Government of India preventing selling agents such as Balmer Lawrie and Company from delivering any cement except under instructions from the Government or from the Cement Adviser. The transaction, so far as the contractor is concerned, was one of purchase and the property in the cement clearly passed to him. No doubt he could not have obtained the permit through the Executive Engineer if it had not been intended that the cement should be used for the purpose directed by the Engineer, but, in our opinion, in no sense

can it be said that there was any entrustment either of the property or of any dominion over the property." We are of the opinion that the legal position is as explained in that decision.

23. In Velji Raghavji Patel's case (supra), the Supreme Court was considering a case under the provisions of Section 405 and 409. The Supreme Court observed that before a person can be said to have committed an offence of criminal breach of trust, it must be established that he was either entrusted with the property or entrusted with the dominion over the property which he is said to have converted to his own use. The mere existence of a person's dominion over the property is not enough. It must further be shown that his dominion was the result of entrustment.

24. The learned Counsel for the Respondent has contended that the provisions of Section 403, 406/409 are applicable to the facts of the present case as SGL and its Directors have systematically siphoned off monies from SIL so as to cause a wrongful gain to the Board of Directors and loss to the shareholders of SIL. The learned Counsel submits that wrongful use of the property need not be for the person's own use but he may use it for the benefit of somebody else. According to the learned Counsel, SGL and its Directors, knowing full well that they had defaulted in listing the shares of SIL on the stock exchange, used the money invested by original subscribers of the shares of SIL. This money, according to him, was entrusted to the Company by its shareholders and remained so, owing to the shares of SIL being unlisted over a period of time. He submits that the Directors had complete dominion over the unlisted shares of SIL and since the shares remained entrusted with them, they had committed offences punishable u/s 406 as they had converted the money to their own use. According to him, the transactions between the companies and its initial subscribers of shares is not a simple transaction of purchase/sale of shares but is a transaction of entrustment of funds and continues to remain so till the shares are allotted to the subscribers and these shares are then listed on the stock exchange which have been specified. The learned Counsel places reliance on the judgment of the apex Court in the case of Jaikrishnadas Manohardas Desai and Another Vs. The State of Bombay, where it has been held that to establish a charge of criminal breach of trust, the prosecution is not obliged to prove to the hilt the precise mode of conversion, misappropriation or misapplication of the property entrusted to him or over which he has dominion. The learned Counsel then places reliance on the judgment in the case of Turner Morrison and Co., Bombay Vs. K.N. Tapuria and others, which according to him reiterates the proposition laid down by the Supreme Court in J.M. Desai (supra). He then relies on the judgment in the case of Jaswantraji Manilal Akhaney Vs. The State of Bombay, . Special emphasis is laid by the learned Counsel for the respondent on the ratio in the judgment of R.K. Dalmia Vs. Delhi Administration, . He then contends that the judgement in the case of Radhey Shyam Khemka and Another Vs. State of Bihar, is applicable to the facts in the present case. Although process has not been issued u/s 34 of the Indian Penal Code, the learned Counsel for the Respondent submits that this

provision can be made applicable to the present Petitioners since they had assumed their respective posts as Directors of SGL and had developed a common intention to cause a wrongful gain to SGL and wrongful loss to the shareholders of SIL by wilfully authorising the non-listing of the shares of SIL on the exchange. The learned Counsel then points out that the transfer of the glass furnace from SGL to SIL was at the cost of the shareholders of SIL. This submission has been made essentially on the assumption that the property of the Company is the property of the shareholders of the Company.

25. In the case of *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, , the Supreme Court has held that the assets of the Company belonged to the Company and are not held in trust for the shareholders; the shareholders have no right to interfere with the utilisation of its assets except as provided under the Companies Act. It has been held thus:

7...that a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word "assets" in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the *Sholapur Mills Case*. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the, sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in *Buckley's Companies Act (12th Edn.)*, p. 894 where the etymological meaning of dividend is given as dividends the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company. The proper approach to the solution of the Question 1s to concentrate on the plain words of the definition of agricultural income which connects in no uncertain language revenue with the land from which it directly springs and a stray observation in a case which has no bearing upon the present question does not advance the solution of the question.

There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole as Lord Anderson puts it.

26. Thus, once the shares were allotted to Respondent No. 2 by SIL, the Respondent ceased to have any control over the money she utilised to purchase those shares. The only interest that she acquired after the purchase of the shares was in the shares themselves. She did not have any right over the money which was utilised for purchase of the shares as that amount became part of the capital of SIL and consequently, the asset of the Company. The Company was not entrusted with any property by Respondent No. 2 and if there is no entrustment, there is no question of the property being wrongly converted to the use of the Petitioners to the disadvantage of Respondent No. 2. Significantly, the offer document indicates that the shares of SIL were offered only to shareholders of SGL. Respondent No. 2 was thus a shareholder of both SGL and SIL. She had in fact traded in the shares of SIL and had acquired 589400 shares initially allotted to her. She has sold a part of her shareholding in SGL. Thus, the Respondent had no ownership over the application money that was paid to the Company in respect of the allotted shares. The element of entrustment being absent, no offence can be said to have been committed under Sections 405/406 of the Indian Penal Code and, therefore, the complaint must be quashed on that ground. All the judgments cited by the learned Counsel for the Respondent indicate that a transaction which constitutes criminal misappropriation requires conversion of any movable property dishonestly by misappropriating for the use of the person accused. In the present case, the question of misappropriation of the amount which was paid towards the purchase of shares of SIL does not arise as once shares were allotted to the Respondent the monies became the property of the Company over which she had no right. As already observed there was no entrustment of the property nor was there entrustment of any dominion over the property. Once the shares are allotted the money paid for the purchase of the shares becomes part of the assets/property of the Company. The only interest that a shareholder could have is to the dividend in respect of his shareholding, the right to attend meetings of the shareholders and to vote at such meetings.

27. As regards the pig iron plant and the sale of iron ore as well, these are transactions which have taken place between 2 legal entities i.e. 2 independent companies SGL and SIL. They were dealing with the properties as owners of the properties. A shareholder of SGL cannot in any manner question the purchase price paid by SGL to acquire the assets of SIL nor can a shareholder of SIL

question the decision of the sale of its company's property at a certain price in a criminal action such as the present one. Respondent No. 2 could have taken recourse to her civil remedies in order to ensure that SIL had not purchased the pig iron plant from SGL at a price which she claims is absurdly high. The Company cannot be held liable for an offence under Sections 403 and 406 of the Indian Penal Code since the offences required mens rea on the part of the Company. As held in the case of *Motorola Inc. v. Iridium India Telecom Limited* 2004 Cr.L.J. 1576, an offence like cheating as defined u/s 415 IPC, which involves the criminal intention to deceive others cannot be perpetrated by a corporate body like a Company or association. Although such a body can be a victim of deception it can be only a natural person who is capable of having mens rea to commit an offence and who can be a perpetrator of the offence. Similarly, under Sections 403 and 406, it is difficult to accept the proposition that the Company can commit an offence under these sections. Thus, in my opinion, the offences under Sections 403 and 406 are not made out in the complaint.

28. The essential element of an offence under Sections 403 and 406 is that property must be dishonestly misappropriated. The word "dishonestly" connotes an act done with the intention to cause wrongful gain to the person committing the act or wrongful loss to another. The terms "wrongful gain" and "wrongful loss" are defined in the Code. They encompass a gain of property by unlawful means in order to benefit a person not legally entitled to it or loss of it by unlawful means to deprive a person legally entitled to it. Thus the allegations in the complaint must establish prima facie that the petitioners had wrongfully gained property with the intention to cause wrongful loss to the Respondent, dishonestly. It is only then that one could ascertain whether there is a dishonest misappropriation. For the offences under Sections 403 and 406 to be established, there must be a pleading in the complaint to indicate that the property which has been wrongfully gained has been put to the petitioners own use. However the complaint in this case falls woefully short.

OFFENCE u/s 73 OF THE COMPANIES ACT:

29. It has been argued by the learned Counsel for the Respondent that the Petitioners have committed a breach of Section 73 of the Companies Act, and have thereby committed an offence punishable under the provisions of law. It is submitted that the Preferential Offer document of 28.8.1993 is a prospectus and if there is no listing of the shares on the stock exchange then such money has to be repaid within 8 days. The non listing of the shares could be either because permission had not been applied for under Sub-section (1) of Section 73 or the permission having been applied for has not been granted. The Company is expected to repay the money received from the applicants in pursuance of the prospectus along with interest urges the learned Counsel. It is submitted that if the money is not repaid within 8 days after the liability arises, the Company and every Director of the Company who is an officer in default shall on expiry of the 8th day, be jointly and severally liable to pay the money with interest. According

to the learned Counsel, the Petitioners had not sought permission for listing the shares issued to the public, pursuant to the prospectus. Therefore, submits the learned Counsel, the money paid by Respondent No. 2 for the purchase of shares ought to have been repaid within 8 days from the liability having arisen. He submits that admittedly, this amount has not been returned and, therefore, the Company and its Directors who are "officers in default" are jointly and severally liable to return the amount along with interest. He submits that the provisions of Section 73(1A) any prospectus whether issued to the public or to a class section of the public would attract the provisions of Section 73 of the Companies Act. It is also urged that besides allotting the shares to the shareholders of SGL, SIL had also allotted shares to people who are rank outsiders and not shareholders of SGL. Therefore, it would mean that the document of 28.8.1993 was an offer to the public and the provisions of Section 73 were squarely applicable. The learned Counsel submits that the Petitions and the SLPs filed in the Supreme Court against the issuance of process in respect of the earlier complainant were dismissed. He points out that as a consequence the contention of the Petitioners that the document dated 28.8.1993 is not a prospectus but a private confidential document meant for subscription only by the shareholders of SGL, has not been accepted by the Court.

30. On the other hand, the learned Counsel for the Petitioners has submitted that the shareholders of the SGL had been offered the shares of the SIL on a preferential basis. The learned Counsel submits that the offer was never intended to be a public offer but was a preferential offer made only to the Indian shareholders of SGL, the employees, the Directors and Business Associates of the Company and other Associate Companies. He submits that the offer document of 28.8.1993 made it very clear that the equity shares of the Company are not being listed on any of the stock exchanges and that the Company proposes to list the shares thereafter in the next 12 to 18 months. He submits that the provisions of Section 73 are not applicable to the present case since the shares were not offered to the public by issuing of the prospectus. The learned Counsel has invited my attention to the definition of prospectus contained in Section 2(36) of the Companies Act. He submits that although SIL intended to list its shares at some further point in time they could not be listed for certain weighty reasons. The learned Counsel submits that the dismissal of the earlier writ petition filed by the Petitioners being criminal Writ Petition No. 125 of 2005 is not a final determination of the issue as to whether Section 73 is attracted to the facts of this case. He submits that the findings of the learned Single judge of this Court were prima facie. The Supreme Court while rejecting the SLP against that order has observed that the order did not call for any interference at that stage. He submits further that the offer document of 5.6.2003 does not attract the provisions of Section 73 as there was no offer of shares to the public for subscription. The offer was for buying shares of SIL and not to issue its shares. The learned Counsel submits that a bare reading of Section 73 which is penal in nature does not indicate that an offence has been committed under this section.

31. In my view, merely because the earlier Writ Petition has been dismissed at the stage of admission and a SLP has upheld the order of the dismissal it would not necessarily mean that the issue regarding the breach of Section 73 of the Companies Act qua the preferential offer letter of 28.8.1993 and the offer of 5.6.2003 was finally concluded. Section 73 reads as under:

73. Allotment of shares and debentures to be dealt in on stock exchange. - (1) Every company, intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt within the stock exchanges or each such stock exchange. (1-A) Where a prospectus, whether issued generally or not, states that an application under Sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the shares of or debentures to be dealt in on that stock exchange has been preferred u/s 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(2) Where the permission has not been applied under Sub-section (1) or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than 15 per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(2-A) Where permission has been granted by the recognised stock exchange or stock exchanges for dealing in any shares or debentures in such stock exchange or each such stock exchange and the moneys received from applicants for shares or debentures are in excess of the aggregate of the application moneys relating to the shares or debentures in respect of which allotments have been made, the company shall repay the moneys to the extent of such excess forthwith without interest, and if such money is not repaid within eight days, from the day the company becomes liable to pay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth

day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than 15 per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(2-B) If default is made in complying with the provisions of Sub-section (2- A), the company and every officer of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees, and where repayment is not made within six months from the expiry of the eighth day, also with imprisonment for a term which may extend to one year.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a scheduled bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in Sub-section (2); and if default is made in complying with this sub-section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

(3-A) Moneys standing to the credit of the separate bank account referred to in Sub-section (3) shall not be utilised for any purpose other than the following purposes, namely:

a. adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus; or

b. repayment of moneys received from applicants in pursuance of the prospectus where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share.

(4) Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of this section shall be void.

(5) For the purposes of this section, it shall be deemed that permission has not been granted if the application for permission, where made, has not been disposed of within the time specified in Sub-section (1).

(6) This section shall have effect-

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus, as if he had applied therefore in pursuance of the prospectus; and

(b) in relation to a prospectus offering shares for sale, with the following modifications, namely-

- (i) references to sale shall be substituted for references to allotment;
 - (ii) the persons by whom the offer is made, and not the company, shall be liable under Sub-section (2) to repay money received from applicants, and references to the company's liability under that sub-section shall be construed accordingly; and
 - (iii) for the reference in Sub-section (3) to the company and every officer of the company who is in default, there shall be substituted a reference to any person by or through whom the offer is made and who is knowingly guilty of, or wilfully authorises or permits, the default.
- (7) No prospectus shall state that application has been made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognised stock exchange.

32. This section relates to a Company intending to offer shares or debentures to the public for subscription by issuance of a prospectus. The word "prospectus" has been defined u/s 2(36) of the Companies Act to mean any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for subscription or purchase of shares in or debentures of a body corporate. Mr. Desai submits that the offer document of 28.8.1993 can by no means be considered as a prospectus. According to the learned Counsel, unless deposits were invited from the public, the Preferential Offer document was not a prospectus. There is no doubt that this document offered shares to the shareholders of SGL only. There was no involvement of the general public in the purchase/allotment of the shares. Therefore, the submission of the learned Counsel for the Respondent that this is a prospectus cannot be accepted. The letter of 5.7.1993 also is not a prospectus. An indication of the offer only for the shareholders of SGL is brought out from the fact that the renunciation of the shares was not permitted. Reliance has been placed on several judgments by the learned Counsel for the Petitioner in support of his submission that an offer of shares in a new company to members of an old Company in respect of the shares in the new Company is not an offer to the public. He relies on the observations made by the Court of Appeals in *Booth v. New Afrikander Gold Mining Co. Ltd.* 1903 I Cha 298.

33. Apart from this, there is no application on the part of the public limited Company to have its shares listed on the stock exchange. As held in the case of *Raymonds Synthetics Ltd. v. Union of India* AIR 1992 SC 647, it is only if a Company intends to offer its shares to the public for subscription by issue of a prospectus that it must apply to the stock exchange for permission to list its shares in terms of Section 73, before issuing such a prospectus. It is only when the offer is made to the public and the shares are not listed on the stock exchanges in accordance with Section 73, that a Company has no right to receive or retain any amount by way of subscription in pursuance of such prospectus.

The letter of offer dated 5.6.2003 was issued for the purpose of acquiring the shares of SIL from the shareholders of SGL, giving the shareholders of SIL an option to sell their shares to the shareholders of SGL. It appears that challenge to this offer document by some of the shareholders of SIL has been rejected being a pure commercial dealing. In my opinion, therefore, Section 73 would have no application in the facts and circumstances of this case. The emphasis laid by Mr. Andhyarujina on the case of Barclays Bank Ltd. v. Quistclose Investments Ltd. (1970) AC 567 is also misplaced. The submission of the learned Counsel is that a Director of a Corporation acts in a fiduciary capacity when he transacts with the funds lying to the credit of the Company of which he is a Director. He has dominion over the same and, therefore, the funds stand entrusted to him as in the present proceeding. This submission also cannot be accepted as held in Bacha Gazdar's case (supra). Once a shareholder purchases shares of the Company the money becomes an asset of the Company and the shareholder has only the right to receive dividend, attend meetings, etc. The Director of the Company does not hold the monies in a fiduciary capacity and therefore he would not be entrusted with the dominion over the same.

OFFICER IN DEFAULT" AND LIFTING OF THE CORPORATE VEIL:

34. The learned Counsel for the Petitioners has submitted that unless a Director is an officer in default he would not be liable for committing of the offence u/s 73 of the Companies Act. An "officer in default" has been defined in that Act as follows:

5. - Meaning of officer who is in default. - For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression officer who is in default means all the following officers of the company, namely:

- a) the managing director or managing directors: in relation to any provision referred to in Section 5, has the meaning specified in that section;
- b) the whole time director or whole time directors;
- c) the whole time director or whole time directors;
- d) the Manager;
- e) any Secretary;
- f) any person in accordance with whose directions or instructions the Board of Directors of the Company is accustomed to act;

35. Criminal liability cannot be attached to a person unless there is both mens rea and actus reus attributable to the person. Some of the directors like Petitioner Nos. 5, 9, 10 and 11 in Writ Petition No. 2739 of 2006 are Directors of both the Companies SGL as well as SIL whereas the others are Directors of SGL. The criminal liability of a Director would arise only when he is an officer in default

as defined in Section 5 of the Companies Act. None of the petitioners are officers in default within the meaning of Section 5 of the Companies Act. Therefore, they cannot be accused of having committed a breach of Section 73 of the Companies Act. Moreover unless the criminal liability is stipulated in a particular statute, a person cannot be made liable vicariously. The submission of the learned Counsel for the Respondent that by lifting of the corporation veil, this Court should go beyond the Company and reach out to bring within its ambit the true persons behind the Company is not a principle which would apply in a case such as the present one. There is no dispute that the shares of SIL have been sold to the shareholders of SGL. Nor is there any dispute that the pig iron plant and the iron ore have been sold by SGL to SIL. Therefore, in my opinion, there is no need to pierce the corporate veil to ascertain which entity is behind the transactions. In fact, if the submission of the learned Counsel for the Respondent No. 2 is to be accepted and the corporate veil should be pierced in order to fix criminal liability on account of the sale of pig iron plant of SGL to SIL it would defeat the very submission made by the learned Counsel that SGL has siphoned off money from SIL by selling the pig iron plant to SIL for an exorbitant amount. Admittedly the Respondent is also a shareholder of SGL and has thus benefitted by the transaction.

36. Apart from this, the submission of the learned Counsel for the Respondent that the Directors are vicariously liable for the offences committed by the Companies Act cannot be accepted. As observed by the Supreme Court in *Maksud Saiyed Vs. State of Gujarat and Others*, , the Indian Penal Code does not contain any provisions for attaching vicarious liability on the part of the Managing Director or Directors of a Company when the accused is the Company. It is only when a statute provides for fixing vicarious liability on a Director for an offence committed by the Company that a Director can be said to be vicariously liable. A similar view has been taken by the Supreme Court in *S.K. Alagh v. State of U.P.* (2008) 42 C C 228 . Besides this, a perusal of the complaint shows that no specific role is attributed to any of the Directors. They have been roped in only because they happen to be Directors of the Company. The complaint does not describe the actus reus besides the mens rea to make out an offence against the Directors under the Indian Penal Code. In case of *Shi Yang @ Sang v. A. Kannagi* 2008 Cr.L.J. 617, the Madras High Court has held that if a person is alleged to be guilty of an offence there must be necessary averments incorporated in the complaint. The particular acts which are attributable to the accused person must spelt out in any complaint accurately and unequivocally pointing to the criminality of the accused person. There must be a specific pleading to the effect that a particular Director, personally, has committed an offence. It is now well settled that in the absence of a particularization as to the role of an accused it would not be appropriate to accept an omnibus allegation for implication of a person in the offence. Besides this, the offences alleged are in respect of events which have taken place prior to 2003. In *Ajay Mitra Vs. State of M.P. and Others*, , the Supreme Court has observed that no liability can be fastened on

persons who have become Directors after the alleged offences have been committed. It is now well settled that for a person to be liable of criminal breach of trust and inducement, mens rea is required to be established from the inception. The Directors who have been arraigned as accused were not on the Board of Directors when the alleged misrepresentations were made in the preferential offer document of 1993. They were neither Directors of SIL nor SGL at that time and, therefore, could not have been involved in either the inducement or entrustment. The knowledge relevant for attributing criminal liability must be contemporaneous knowledge. A Director cannot be implicated by the mere fact that he obtained knowledge much later of the alleged offence having been committed.

37. Therefore, in my opinion, the submission of the learned Counsel for the Respondent that the Directors are vicariously liable for the offences committed by the Company cannot be accepted. Reliance has been placed by the learned Counsel for the Respondent on the case of *R.K. Dalmiya v. Delhi Administration* (supra) in support of his submission that the petitioner - Directors were officers in default. He also relied on the judgment of the Supreme Court in the case of *Laxmi N. Joshi v. State of Maharashtra* AIR 1986 SC 439.

38. It has been argued on behalf of the Respondent that by lifting the corporate veil, the Court would be able to ascertain whether the Directors had committed any offences. It is submitted that on lifting the corporate veil it would be discernible that the financial health of SIL and the reason for not listing of its shares on any of the stock exchanges was the direct result of decisions taken by the Board of SGL. It is submitted that several decisions of SIL were taken at the behest of SGL and, therefore, the Directors of SGL were in complete control of the day to day affairs of SIL. According to Mr. Andhyarujina, they were "the head and brain" of the SIL and thus directly responsible for the fraud by SGL and SIL on the shareholders of SIL. In the case of *DDA v. Skipper Foods* (1997) 89 C C 362, the corporate veil was lifted in order to reach the assets of the shareholder/promoter group. This was in order to protect the revenue and assets which legitimately belonged to the corporate entity. In the case of *State of U.P. and Others Vs. Renusagar Power Co. and Others*, on which the Respondent's Counsel has laid great emphasis, the Supreme Court was dealing with a matter under the U.P. Electricity (Duty) Act and the Electricity Act 1910 as well as the Companies Act. It was observed by the Supreme Court that after taking into consideration the functioning of the subsidiary company and the holding company and by lifting the corporate veil it was possible to ascertain that Renusagar had in reality no separate existence as a subsidiary company, apart from and independent of Hindalco. It was observed that the persons generating and consuming the energy were the same and therefore by lifting the corporate veil the Supreme Court held that Hindalco and Renusagar should be treated as one concern and that the power plant of Renusagar should be treated as the source of generation of electricity by Hindalco. The submission of the learned Counsel for the Respondent does not appeal to me. If one is to accept the submission that the SGL was "the

head and brain" of SIL and that by lifting the corporate veil the liability of SIL and SGL was the same then the Respondent can have no grievance. She owned shares in both SGL and SIL and therefore even if one accepts the submissions on behalf of the Respondent, she would be equally benefitted by SGL having purchased the pig iron plant at a lower rate. In my opinion, in the present case there is no need to pierce the veil as admittedly there are two different companies against which the Respondent has made two different sets of allegations.

39. In the case of R.K. Dalmiya (supra), the Supreme Court considered whether R.K. Dalmiya who was the Chairman of the Company could be held liable and convicted under Sections 405, 409 of the Indian Penal Code amongst others. The Supreme Court came to the conclusion on the evidence before it that Dalmiya had knowledge of the transactions in question and therefore was liable in the facts and circumstances of the case. The Supreme Court therefore, upheld the conviction against Dalmiya. The Supreme Court observed in the facts and circumstances of the case that the Directors were not only agents but in some sense and to some extent were in a position of trustees.

40. The principle of vicarious liability is well recognised in civil law. However, in criminal law, it is well settled that unless a provision for vicarious liability exists in a statute, the managing director or directors of the company cannot be accused for any offences committed by the company. In Maksud Saiyed v. State of Gujarat (supra), the Supreme Court has held that the Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the managing director or directors of the company when the accused is the company. It has been further held that since the bank is a body corporate, vicarious liability of the managing director and the director would arise provided there exists a provision in that behalf in the statute. A similar view has been expressed by the Supreme Court in the case of S.K. Alagh v. State of U.P. (supra) while considering the provisions of Section 406, Indian Penal Code. In the complaint as it stands, there are no specific allegations made out against the Directors of the company inasmuch as no specific role has been attributed to each of the Directors. There must be an overt act described in the complaint which can be attributed to the Directors that constitutes an offence under Sections 403 and 406. In case of some of the petitioners, they were not Directors at the time when the offence was allegedly committed in 1993 when the offer document was issued. Therefore, the question of entrustment of any property to them or inducement by them would not arise. Mens rea must be present from inception and the contention of the Respondent that all the Directors of the Company were equally liable cannot be accepted. Furthermore, it cannot be presumed that the present Directors had knowledge of any offence having been committed by the Company. Assuming they had such knowledge, it would not be sufficient to make them liable for the alleged offences. As noted above, R.K. Dalmiya's case (supra) dealt with Section 409 under which Dalmiya was convicted. The Supreme Court on the basis of the evidence on record did not accept the contentions put forth

on behalf of Dalmiya that he could not be convicted under the aforesaid section merely because he was the Chairman of the company. The Supreme Court in its detailed judgment has observed that Dalmiya actually looked after the share business and had knowledge of the losses of the company union agencies.

41. The contention of the learned Counsel for the Respondent is that the Petitioner-Directors would not be absolved of their culpability merely because they assumed office in the years subsequent to 1995 when the shares were required to be listed. He has placed reliance on the judgement in *Laxmi N. Joshi v. State of Maharashtra* AIR 1986 SC 439. The cases cited by the learned Counsel for the Respondent to buttress his submission that the Directors are vicariously liable for offences committed by the company indicate that the vicarious liability was provided for in the relevant provisions of law applicable to those cases. Therefore, in my view, the submission of the learned Counsel for the Respondent that the Directors both past and present are vicariously liable for the offences committed by the company under Sections 403 and 406 is unsustainable.

42. One more issue which was raised by the learned Counsel for the respondent to urge that this Court should not interfere with the impugned order is that the report of the Department of Company Affairs prima facie, concludes that the companies and its directors have committed several offences and therefore must be prosecuted. I need not refer to this report for deciding the present petition. It is trite that while issuing process in a criminal complaint the magistrate has only to ascertain whether the allegations in the complaint constitute the ingredients of the offences complained of, prima facie. No other material needs to be considered at the stage of issuing process. In any event, the report is a preliminary report and the Ministry of Company Affairs would adopt such proceedings as are necessary against the petitioners.

43. To sum up, the powers of this Court must be exercised in this case to quash the complaint which is actuated by malafides. The complaint has been filed beyond the prescribed period of limitation. The allegations contained in the complaint do not constitute offences under Sections 403, 406 IPC or u/s 73 of the Companies Act. The Directors of the Companies cannot be prosecuted by attributing vicarious liability to them for the acts of the companies.

44. In these circumstances, the petitions are allowed. No order as to costs.