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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(CRL) 2453/2018

NEERAJ SINGAL

..... Petitioner

Through: Mr. Kapil Sibal, Sr. Advocate,
Mr. Sidharth Luthra, Sr. Advocate,
Mr. Ramesh Gupta, Sr. Advocate
with Mr. Pramod Kumar Dubey,
Ms. Ranjana Roy Gawai,
Mr. Arshdeep Singh, Mr. Hemant
Shah, Mr. Aditya Pujari, Ms. Anusha
Nagarajan, Ms. Vasudha Sen,
Mr. Himanshu Gupta, Mr. Sumit
Bindal, Ms. Shivika Singh, and
Mr. Akshat Gupta, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Tushar Mehta, ASG and
Ms. Maninder Acharya, ASG with
Mr. Sanjeev Narula, CGSC, Mr. Amit
Mahajan, Mr. Narindra Mann,
Mr. Kavinder Gill, Mr. Arunendra
Singh, Mr. Abhishek Ghai, Mr. Rajat
Gava, Mr. Shravan Kumar Shukla,
Ms. Mallika Hiramath, Mr. Harshul
Choudhary, Mr. Sahil Sood,
Mr. Viplov Acharya with Ms. Mann
Kapila, Sr. Asst. Director, Mr. P.C.
Maurya, Addl. Director, Mr. S.S.
Sahnai, Addl. Director & Mr. Ajeet
Srivastava, Advocates for Respondent
Nos. 1 to 3
Mr. Satish Aggarwala & Mr. Vineet
Sharma, Advocates for Respondent
Nos.2 & 3

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

ORDER
29.08.2018

Dr. S. Muralidhar, J.:

CrI.M.A.No.30267/2018

1. The prayer in the present application is for an ad interim order for release of the Petitioner from 'illegal' judicial custody.

Background facts

2. The background facts are that the Petitioner was arrested on 8th August 2018 pursuant to an investigation being carried out by the Serious Fraud Investigation Office ('SFIO') (Respondent No.2) into the affairs of Bhushan Steel Limited ('BSL') and Bhushan Steel and Power Limited ('BSPL'). This investigation was pursuant to an order dated 3rd May 2016 issued by the Ministry of Corporate Affairs ('MCA'), Government of India under Section 212 (1) (c) of the Companies Act, 2013 ('Companies Act') which directed investigation into not only the affairs of BSL and BSPL but thirteen other group companies, twelve of BSPL and one of BSL. The transactions which were asked to be investigated were for the period between Financial Years 2007-08 to 2014-15.

3. The broad allegations against the Petitioner, as stated by the SFIO in its application dated 9th August 2018 before the Special Judge (Companies Act), Dwarka Courts seeking his remand to judicial custody, are that he and his father Mr. B.B. Singal, the promoters of BSL, in connivance with its

officials “used multitude of complex, fraudulent manoeuvres to divert/siphon off funds raised by BSL from banks using its more than 100 associate companies aimed at personal gain which led to wrongful loss to the banks and other investors in the companies.” It is further alleged that “the fraudulent activities of B.B. Singal, Neeraj Singal and his associates have extended over a long period of time. The amount diverted through these fraudulent manoeuvres would be anywhere between Rs. 2000 to Rs. 3000 crore.”

4. The remand application dated 9th August 2018 *inter alia* notes that since according to the SFIO, the Petitioner “appeared to have committed offences punishable under Section 447 of Companies Act 2013”, the Petitioner was arrested on 8th August 2017 at 1930 hours, in accordance with law. It is further averred: “He was explained the grounds of arrest. However he refused to sign the arrest memo.” Further the SFIO averred in the remand application that although the Petitioner, his father and the Chief Financial Officer appeared before the SFIO in response to summons issued to them from time to time, they did not divulge details and failed to co-operate.

5. On 9th August 2018, the Petitioner was produced before the Special Judge, who directed that he should be produced first before the Metropolitan Magistrate (MM). The Duty MM before whom he was then produced granted the SFIO judicial custody till 14th August 2018. The Petitioner was forwarded to the Special Judge in terms of the proviso to Section 436 (1) Companies Act.

6. On 14th August 2018, the SFIO filed an application for extension of

judicial remand. The Petitioner was produced before the 1st Link Additional Sessions Judge, Dwarka who granted judicial custody till 18th August 2018. A further application for extension of judicial remand was filed by the SFIO before the Special Judge on 18th August 2018. In the meanwhile the present petition was filed on 16th August 2018.

7. On the 18th August 2018 the Special Judge noted in his order that apart from the application seeking extension of judicial remand, the SFIO had filed another application “for permission to examine the accused in judicial custody.” It was specifically stated that investigation was still under progress and a “number of statements of other persons and other relevant information/documents are to be put to the accused during examination sought under Section 217 (4) of the said Act.” The Special Court observed that the file of the IO had been perused. It was noted that statements of a few persons had been recorded on 11th, 13th, 16th and 17th August 2018. Consequently, the judicial custody was extended till 1st September 2018. The Special judge then noted: “In view of this, while exercising powers u/s 167 Cr PC r/w/s 436 (1) (c) of the Companies Act 2013, judicial custody of the accused is extended for 14 days i.e. till 01.09.2018....the first application of SFIO is allowed.” However, as regards the second application, the Special Judge noted that the present petition had been filed before this Court and granted one opportunity to the defence. The application was listed for 24th August 2018.

8. Before this Court, the writ petition was first listed for hearing on 20th August 2018. Notice was issued and accepted by the Respondents, who were

already present on advance notice. The order passed by the Court on that date noted:

“3. Mr. Tushar Mehta and Ms. Maninder Acharya, learned Additional Solicitors General of India vehemently oppose the grant of any interim relief stating that the Respondents may be permitted to place their version in writing before this Court. Although both of them pray that time should be granted till 24th August 2018 for that purpose, learned Senior counsel for the Petitioner point out that it involves the issue of the Petitioner's liberty and further that 22nd August, 2018 is a holiday.

4. List on 21st August, 2018 at 2.15 pm to consider the question of interim relief. The Respondents are permitted to tender on that date their written reply to the prayer for interim relief. The Respondents will also bring the relevant records for perusal by the Court on the next date.”

9. On 21st August 2018 the arguments of Mr. Tushar Mehta, ASG on behalf of the Respondents were heard. Mr. Mehta sought to produce before the Court a large file purporting to be the record of investigation. However, it contained no file number or notings. It was not the standard government file. A query was also posed whether it was in the nature of a ‘case diary’. Mr Mehta then sought time for instructions on that aspect. On that date the counter affidavit of the SFIO was also tendered. The case was then fixed for further arguments on 23rd August 2018.

10. On 23rd August 2018 after hearing the parties, the following order was passed:

“1. The Court has heard the submissions of learned Senior Counsel Mr. Kapil Sibal appearing for the Petitioner on the prayer for interim relief. The learned Additional Solicitor General of India Ms. Maninder Acharya, who appears for the

Respondents seeks time for the reply arguments. She further states that she will not be available tomorrow at 10:30 am as she has to appear in certain other urgent matters.

2. In order to accommodate Ms. Acharya, this case is specially fixed at 12 noon tomorrow. In the event that Ms. Acharya is unable to conclude her arguments by 12:45 pm tomorrow, she can continue at 2:15 pm.

3. Ms. Acharya states on instructions that the Respondents will not press an application which is listed tomorrow before the Special Judge in which permission has been sought by the Serious Fraud Investigation Office ('SFIO') to record the statement of the Petitioner.

4. List on 24th August 2018.”

11. The arguments of Ms. Acharya, learned ASG, on behalf of the SFIO on the application for interim relief remained inconclusive on 24th August 2018. On that date a further affidavit of the SFIO was tendered with regard to the maintenance of files and records relating to the investigations in the SFIO. A separate note of submissions in 43 pages was also tendered on behalf of the SFIO. The application was further heard on 27th August 2018 on which date orders were reserved. On that date, the Petitioner tendered a reply to the affidavit dated 24th August 2018 of the SFIO

Challenge to validity of Section 212 (6) and (8)

12. One prayer in the main writ petition pertains to the constitutional validity of Sections 212(6) (ii) and 212 (7) Companies Act on the ground of their being violative of Articles 14 and 21 of the Constitution of India. Both these provisions pertain to the grant of bail to an accused under the Companies Act where in the context of the offence of fraud under Section 447

Companies Act, the offence has been made cognizable and the grant of bail made subject to a very high threshold of the arrested person having to prove that he is not guilty of the offence as a precondition to grant of regular bail. According to the Petitioner, a similarly worded provision of the PMLA, i.e. Section 45, was struck down by the Supreme Court as unconstitutional in *Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1*. It is, therefore, contended that prima facie, the Petitioner's challenge to the *vires* of Sections 212 (6) (ii) and 212(7) Companies Act should succeed.

13. The other challenge is to Section 212 (8) of the Companies Act. Inasmuch as Section 447 Companies Act has been made a cognizable offence, this power of arrest given under Section 212 (8) Companies Act, which incidentally became effective from 24th August 2017, enabled the SFIO to arrest the Petitioner on 8th August 2018 on the ground that the conditionality under Section 212(8) Companies Act stood fulfilled, i.e. the SFIO had reason to believe that the Petitioner "has been guilty" of the offence punishable under Section 447 Companies Act. Prayer B in the writ petition is that the Court should direct that Section 212 (8) Companies Act is in the nature of "a presumptive definitive opinion/conclusion which is arbitrary and violative of Articles 14, 20, and 21 of the Constitution".

Brief overview of the legal provisions

14. Before proceeding to consider whether on the basis of the above challenges, the Petitioner has made out a *prima facie* case, it is necessary to examine the relevant provisions. The Companies Act which was enacted in its present form in 2013 introduced for the first time provisions concerning

the constitution and functions of the SFIO. Section 211 concerned the establishment of the SFIO by a notification of the central government to “investigate frauds relating to a company.” The Director of the SFIO was to head it and was to be an officer not below the rank of a Joint Secretary to the Government of India. Section 212 deals with ‘Investigation into affairs of company’ by the SFIO. Relevant to this provision is Section 447 which prescribes ‘punishment for fraud’ and which reads thus:

15. Section 447 which is a penal provision was introduced for the first time in the Companies Act of 2013. It had no corresponding provision in the earlier Companies Act 1956. When it first became operative from 12th September 2013, Section 447 was not cognizable. It was explicitly made cognizable only by the amendment to Section 212 (6) by the Companies (Amendment) Act 2015 with effect from 25th May 2015. The amended Section 212 (6) reads thus:

“212 (6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), offence covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the

Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.”

16. Section 212 (7) Companies Act states that the limitation on granting of bail specified in Section 212 (6) is in addition to the limitations under the Cr PC or any other law for the time being in force on granting of bail.

17. With effect from 24th August 2017 sub-sections (8) to (10) of Section 212 Companies Act, were notified which gave the Director, Additional Director or Assistant Director of the SFIO the power of arrest.

The said provisions read thus:

“212 (8) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in

a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

(10) Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court.”

18. On the same date, i.e. 24th August 2017, the central government also notified the Companies (Arrests in Connection with Investigation by Serious Fraud Investigation Office) Rules 2017 ('the SFIO Arrest Rules'). Rules 4 and 9 of the SFIO Arrest Rules, which are relevant for the present application read thus:

“4. The Director, Additional Director or Assistant Director, while exercising powers under sub-section (8) of section 212 of the Act, shall sign the arrest order together with personal search memo in the Form appended to these Rules and shall serve it on the arrestee and obtain written acknowledgement of service

....

9. The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to arrest shall be applied *mutatis mutandis* to every arrest made under this Act.”

19. The form of the 'Arrest Order' is appended to the SFIO Arrest Rules. It is addressed to the person arrested. Column 15 thereof is titled “grounds of arrest with sections under which arrested.” It is this Arrest Order which in terms of Rule 4 is required to be served on the person arrested.

20. The preparing of the investigation report by the SFIO is to be supervised by the central government. Further, the central government has to direct the

further prosecution by the SFIO of the company that is under investigation and its officers or employees or any other person directly or indirectly connected with the affairs of the company. The said provisions read thus:

“212 (11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government.

(12) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

(13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

(14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

(15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974).”

21. Section 217 of the Companies Act deals with “Procedure, powers etc. of inspectors”. Relevant to the present application are two sub-sections i.e. (4) and (7) which read thus:

“217. Procedure, powers, etc., of inspectors.

(4) An inspector may examine on oath—

(a) any of the persons referred to in sub-section (1); and

(b) with the prior approval of the Central Government, any other person, in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally: Provided that in case of an investigation under section 212, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient under clause (b).

(7) The notes of any examination under sub-section (4) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.”

22. Section 435 of the Companies Act talks of establishment of Special Courts. Section 436 (1) (a) makes it clear that all offences under the Companies Act shall be tried only by such Special Court. The applicability of the provisions of the Code of Criminal Procedure, 1973 (Cr PC) to the proceedings before the Special Court is made clear in Section 436 (1) (a) to (d) and Section 438 which read thus:

“436. Offences triable by Special Courts

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) all offences specified under sub-section (1) of section 435 shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

(b) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) in relation to an accused person who has been forwarded to him under that section; and

(d) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

.....

438. Application of Code to proceedings before Special Court.

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.”

23. Section 439 (1) is explicit that except Section 447, i.e. the offence specified in Section 212 (6), every offence under the Act shall “be deemed

to be non-cognisable” within the meaning of the Cr PC.

Provisions pertaining to arrest

24. The above provisions of the Companies Act are yet another instance of conferment of police powers on persons who are not part of the regular police force. In other words, officers of the executive government are sought to be conferred coercive powers of searches, seizures and arrest. With effect from 24th August 2017 the senior level officers of the SFIO can arrest a person even without a warrant as in the case of Section 212 (8) read with Sections 212 (6) and 447 of the Companies Act. However, the SFIO Arrest Rules make it explicit that the Cr PC applies to such arrest. The provisions of the Constitution of India, in particular Articles 20 to 22 will undoubtedly apply to the entire gamut of penal provisions in the Companies Act.

25. Rule 4 of the SFIO Arrest Rules which mandates that the person arrested should be served with a copy of the arrest order which contains the grounds of arrest comports with the constitutional mandate as well as the law as explained in *D K Basu v. Union of India (1997) 1 SCC 416*.

26. In the present case, the grounds of arrest, even according to the SFIO, were only “explained” to the Petitioner. Nowhere is it noted that he was attempted to be served with the grounds of arrest and he refused to receive the grounds. It is only said that he refused to sign the arrest memo in acknowledgment of his having been “explained” the grounds of arrest. Although Section 212 (8) states that he should be “informed” of the grounds of arrest, Rule 4 of the SFIO Arrest rules read with the Arrest form appended thereto mandates serving upon the Petitioner the copy of the

Arrest Order containing the grounds of arrest in Column 15. Even till the filing of the present petition or even thereafter the Arrest order was not served on the Petitioner.

27. On perusing the files, the Court noticed that the proposal placed before the Director SFIO was for the arrest of the Petitioner and one other person in exercise of the powers under Section 212(8) Companies Act. This proposal was approved. Yet for some unexplained that other person has not been arrested till date. It appears *prima facie* that the SFIO was selective about whom it wanted to arrest. Further despite the names of several individuals finding mention in the notes, whose culpability is more or less similar to that of the Petitioner, the coercive provision of arrest has been exercised only *qua* the Petitioner.

Applicability of the Cr PC provisions

28. The submission on behalf of the SFIO is that Section 212 of the Companies Act is a code by itself as far as the procedure for arrest, investigation and prosecution of the offences under the Companies Act is concerned. It is submitted that there is no requirement for the registration of a case or the maintenance of case diaries as mandated by Section 172 Cr PC. It is contended just as in the cases of the officers of Customs and Directorate of Enforcement (DoE), the officers of the SFIO are also not police officers. In support of this proposition reliance is placed on the decision of the Supreme Court in ***Directorate of Enforcement v. Deepak Mahajan (1994) 3 SCC 440*** which was in the context of the provisions of the Foreign Exchange Regulation Act 1973 (FERA) and in particular the power of arrest

in Section 35 (2) thereof. In fact the said decision was read extensively by both ASGs.

29. It is further contended that although Section 212 (15) of the Companies Act contemplates the filing of the investigation report before the Special Judge, since in terms of the second proviso to Section 212 (6) the Special Judge cannot take cognisance except on a complaint by the Director SFIO or an authorised officer of the central government, the filing of such investigation report before the Special Judge without a complaint being filed “has no meaning”. According to the SFIO, till the central government takes a final decision on the investigation report, no prosecution can even be commenced. Therefore, it is contended, the investigation report under Section 212 (15) is not the final report as contemplated under Section 173 Cr PC and it is only “for the purpose of framing charges”.

30. On the other hand, both Mr. Sibal and Mr. Luthra, submit that the officer of the SFIO would be a police officer since the investigation report filed by him is deemed to be a report under Section 173 Cr PC which can only be filed by a police officer. It is contended that the power of investigation cannot be exercised by such police officer for the purpose of Section 173 Cr PC without registering a case under the Cr PC by way of an FIR. It is further pointed out that as per the second proviso to Section 212(6) Companies Act, the complaint that is envisaged for the purposes of Section 447 Companies Act would be that filed by the Director of the SFIO whereas for all other offences, it would be by any other officer of the SFIO.

31. It is pointed out by Mr. Sibal that there is confusion as to whether what

has to be filed in the Special Court is a complaint (which is the procedure envisaged under the Cr PC for non-cognizable offences) or the investigation report itself. In any event, it is submitted that even for the arrest of a person who is the subject matter of the investigation, the SFIO has to be satisfied that he is guilty of an offence and that is the very same standard that will have to be met for filing the investigation report under Section 212(15) Companies Act. Therefore, the stage at which the SFIO can go in for an arrest will have to be upon the completion of the investigation and not at its commencement.

32. The above submissions have been considered. The attempt by the SFIO to exclude the applicability of the Cr PC at this stage is *prima facie* not convincing. It appears that Section 438 Companies Act is clear that unless explicitly excluded by any provision of the Companies Act, the Cr PC would apply to the investigation and prosecution of all offences. Section 212 (6) excludes the applicability of the Cr PC only for the limited purpose of treating the offence under Section 447 cognisable and not for the entire procedure to be associated with such 'deeming' nature of the offence. In ***Deepak Mahajan*** (*supra*) it was noted in para 128 (SCC) that:

“128. To sum up, Section 4 (of the Cr PC) is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4 (2) itself limits the application of the provisions of the Code reading, “..... but subject to any

enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

33. Also, *prima facie*, it appears that the Investigating Officer (IO) of the SFIO is empowered under Section 212 (15) to file an investigation report which is deemed to be the report contemplated under Section 173 Cr PC i.e. the *challan* or charge sheet that is filed by a police officer, and on the basis of which charges can be framed by the Special Court. This power was not given to either the officers of the DoE or the Customs. Para 120 of the decision in ***Deepak Mahajan*** (supra) notes this distinction. In fact in ***Ramesh Chandra Mehta v. State of West Bengal AIR 1970 SC 940*** it was held that Customs officers are not police officers since they do not have the power to submit a charge sheet. It is, therefore, not possible at this stage to conclude that for the purposes of the penal provisions under the Companies Act the senior officers of the SFIO including the IO are not police officers.

34. In this context, it is significant that the power vested in an Inspector of the SFIO to use the signed statement of an accused as evidence against him in terms of Section 271 (4) read with Section 217 (7) *prima facie* appears to violate the fundamental right against self incrimination enshrined in Article 20 (3) of the Constitution of India.

Case diaries

35. Even the point about SFIO not having to abide by Section 172 Cr PC as regards maintenance of case diaries does not *prima facie* appear to be well founded. Even in ***Deepak Mahajan*** (supra) while seemingly agreeing with the DoE that the registration of a case and the production of a case diary was

not mandatory for the arrest of a person under Section 35 (2) FERA, the Supreme Court did observe as under:

“113. Though an authorised officer of Enforcement or Customs is not undertaking an investigation as contemplated under Chapter XII of the Code, yet those officers are enjoying some analogous powers such as arrest, seizures, interrogation etc. Besides, a statutory duty is enjoined on them to inform the arrestee of the grounds for such arrest as contemplated under Article 22(1) of the Constitution and Section 50 of the Code. **Therefore, they have necessarily to make records of their statutory functions showing the name of the informant, as well as the name of the person who violated any other provision of the Code and who has been guilty of an offence punishable under the Act, nature of information received by them, time of the arrest, seizure of the contraband if any and the statements recorded during the course of the detection of the offence/offences.**” (emphasis supplied)

36. Here in the Companies Act, the Cr PC provisions are not *per se* excluded except in a limited context of treating Section 447 as a cognisable offence. Section 438 of the Companies Act makes this clear. If the investigative report filed under Section 212 (14) read with Section 212 (15) before the Special Court, whether as an enclosure to the complaint in terms of the second proviso to Section 212 (6) or otherwise, is indeed to be treated as the final report under Section 173 Cr PC, and with the Investigative Officer (IO) of the SFIO given vast powers of arrest and interrogation, it is all the more incumbent that the discipline of Chapter XII Cr PC including Section 172 Cr PC be adhered to by such officer of the SFIO. Section 172 Cr PC requires the IO to enter his proceedings ‘day by day’ in a diary “setting forth the time at which the information reached him, the time at which he began and closed

his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.” Further Section 172 (1A) and (1B) Cr PC as inserted with effect from 31st December 2009 mandate that the statements of witnesses shall be inserted in the case diary which shall “be a volume and duly paginated.”

37. In the present case the Special Judge was approached with remand applications filed under Section 167 Cr PC. The Special Judge too noted that he was exercising his powers under Section 167 Cr PC read with Section 436 (1) (c) of the Companies Act. Under Section 167 (1) Cr PC case diaries have to be produced before remand is ordered under Section 167 (2) Cr PC. Here, only some files with a file number were purportedly produced. Further, what this Court was shown was a bunch of files, one containing the arrest memos and notes preceding the arrest, one containing the notes of investigations and so on. There was no single volume. There is merit in the contention that separate files instead of one volume, are amenable to being tampered by way of removal or addition of documents.

38. Also, the Special Judge in the present case who presumably saw the files did not append any signature thereon as he should have in terms of Rules 9 and 10 of Chapter XI of the Delhi High Court Rules applicable to the criminal courts. Production of case diary is an important step in seeking custodial remand of a prisoner. It is on going through them that the Court that is approached for remand or extension of remand is satisfied about the justification of the request. While it is correct that the accused is not entitled to see the case diary, the Court has to call for it to satisfy itself that the

remand or extension thereof is warranted. All of this is relevant to test the legality of the arrest. As explained in *State of Punjab v. Davinder Pal Singh Bhullar (2011) 14 SCC 770*:

“It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "*sublato fundamento cadit opus*" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.”

Retrospectivity of the provisions

39. Now to the point concerning retrospectivity of the provisions. It will be recalled, that it was only with effect from 25th May 2015 that Section 212 (6) Companies Act stood amended and the offence of ‘fraud’ under Section 447 Companies Act was made cognizable. Prior thereto, the offence under Section 447 Companies Act was non-cognizable and the restrictions on the grant of regular bail imposed under Section 212 (6) Companies Act did not apply thereto. The investigations into the affairs of BSL and BSPL were ordered on 3rd May 2016. At this stage Section 212 (8) to (10) which gave senior officers of the SFIO the power of arrest had not been notified. At this stage, therefore, the arrest of the Petitioner for the cognisable offence under Section 447 of the Companies Act could have been only by a police officer and he could have done so only on the registering of an FIR. It is only on 24th August 2017 that Sections 212 (8) to (10) as well as the SFIO Arrest rules became operational. The contention of the SFIO that this change was merely procedural does not *prima facie* appear to be well founded.

40. These coercive provisions that are penal in nature are in the realm of

criminal law. They affect the life and liberty of the persons against whom the powers thereunder are exercised. They have to be consistent with the fundamental rights guaranteed under the Constitution and in particular Articles 20, 21 and 22. If by the change brought about on 24th August 2017, an SFIO officer was able to arrest a person, without registering a case or even filing a complaint before a Court, and merely on the filing of an application seeking the judicial remand, it cannot be said to be a matter of mere procedure. It has a substantive element which raises an arguable question whether such provisions can be retrospectively applied to events that took place prior to those provisions becoming operational.

Company not an accused

41. The Petitioner has been arrested pursuant to the investigation commenced by the SFIO into the affairs of BSL, BSPL and their group companies. Yet till date there has been no move to prosecute any of the companies. It is contended by the SFIO that the arrest of the Petitioner, in his individual capacity, without proceeding against the companies he was promoter of or was controlling, is not illegal since the definition of 'fraud' in terms of the explanation to Section 447 of the Companies Act contemplates any 'person' committing such fraud against a company. This need not include the company which has suffered such fraudulent acts.

42. The above submission has to be examined in light of Section 212 (14) of the Companies act which states that the central government has to take a call on whether prosecution should be launched against "the company and its officers or employees, who are or have been in employment of the company

or any other person directly or indirectly connected with the affairs of the company.” It is not the disjunctive “or” that is used between the expressions ‘the company’ and ‘its officers or employees’.

Takeover by the Tata Group

43. At this juncture it requires to be noticed that in the remand application dated 9th August 2018, it is stated in para 5 that:

“The Committee of Creditors of Lenders Bank was constituted and on 18.7.2018, as per the resolution plan approved by Hon’ble NCLT, New Delhi, Bhushan Steel Ltd. was transferred to Tata Group for a consideration of around 35,000 crores.”

44. There is no mention of this fact anywhere in the notes of investigation by the SFIO that were shown to this Court. The Court finds from the noting of 1st July 2017 in the file of the SFIO, that BSL’s account was classified as ‘fraud’. Further it is seen that although in the remand application it is stated that a Resolution Professional (RP) was appointed under the Insolvency and Bankruptcy Code 2016 (IBC) by the National Company Law Tribunal (NCLT) on 26th July 2017 due to non-payment of loans, this fact does not form part of the notes of investigation.

45. Under Section 15 IBC, there has to be a public announcement of the corporate insolvency resolution process. Under Section 18 IBC, the interim RP has to collect information concerning the business operations of the company under insolvency for the past two years. In terms of Regulation 36 (2) (h) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, the information memorandum should contain “details of all material litigation

and any ongoing investigation of proceeding initiated by the Government and statutory authorities” against the company facing liquidation. Whether the fact that BSL was under investigation by the SFIO and whether this considered as part of the decision-making process of the NCLT which approved the resolution plan is a question which does not find an answer in the records shown to the Court in the process of hearing the present interim application.

46. Ms. Acharya, on instructions, confirmed that although the photocopies of the records of BSL are available with the SFIO, the original records are now under the control of the Tata Group which has taken over BSL. Considering the fact that the investigation into the affairs of BSL and its group companies is an ongoing exercise, how this is likely to impact the future investigation into the affairs of BSL is not understood. Further, the question of the criminal liability of BSL, if any, and whether that also would get transferred to and taken over by the Tata Group, does not appear to have been considered by the SFIO as it has not formed part of the investigation.

Challenge to the bail provision: Section 212 (6) (i) and (ii)

47. As regards the challenge to the validity of Section 212 (6) of the Companies Act insofar as it severely curtails the chances of a person accused of the offence under Section 447 of the Companies Act getting regular bail, Ms. Acharya pointed out the slight difference in the wording of Section 45 PMLA and Section 212(6)(ii) Companies Act. She submitted that the stringent condition for grant of bail under Section 45 PMLA was, at the relevant time, attracted when the offence was punishable with imprisonment

for three years or more, whereas under Section 212(6)(ii) Companies Act, the higher threshold is applicable only where the offence is under Section 447 Companies Act which has been made cognizable, and this is irrespective of the length of punishment. Ms. Acharya sought to contend that the offence under Section 447 Companies Act was of an extremely heinous nature and should be viewed as being as serious as the offences under the legislations to counter terrorist crimes and drug related crimes.

48. The Court finds that, notwithstanding the fact that the phraseology of Section 45 PMLA differs slightly from Section 212 (6) Companies Act, what also weighed with the Supreme Court in *Nikesh Tarachand Shah* (*supra*) was its view that Section 45 PMLA is “a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of an offence”. The Supreme Court further observed as under:

“Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature.”

49. Both the PMLA provisions and Section 447 Companies Act pertain to economic offences. It is not possible at this stage to conclude that the offence under Section 447 Companies Act is more heinous than that under Section 45 PMLA. Secondly, as far as the high threshold for grant of bail is

concerned, barring the slight difference in the language, both provisions do make it equally difficult for a person accused of an offence thereunder to obtain bail. The above observations in *Nikesh Tarachand Shah* (*supra*), *prima facie* support the challenge by the Petitioner to the constitutional validity of Section 212 (6) Companies Act. Thirdly, even at a practical level, if indeed for a valid arrest if the records have to bear out the opinion of the Director SFIO that the person arrested “has been guilty” of the offence under Section 447, then it will be virtually impossible for the Special Judge to conclude for the purpose of Section 212 (6) that the said person is not guilty of the offence.

50. For all the above reasons, the Court is of the view that the Petitioner has a *prima facie* case in his favour for the grant of interim relief.

Other factors concerning the prayer for interim relief

51. The Petitioner has continued in judicial custody since 8th August 2018. Although it is reiterated by the SFIO that the matter is presently under investigation and “is at an advanced stage,” it is not clear why despite the investigations having been commenced in May 2016, the SFIO is still not in a position to submit an investigation report. No convincing explanation has been offered by the SFIO as to why they need the judicial custody of the Petitioner to continue if they have indeed gathered all the material they need for the investigation report.

52. The refrain of Ms. Acharya is that the Petitioner should actually seek regular bail in the Special Court and not bypass that remedy by approaching this Court with an application for interim relief in a writ petition challenging

the constitutional validity of the provision concerning grant of bail, i.e. Section 212 (6) Companies Act.

53. The Petitioner would have to seek regular bail before the Special Court only under Section 212 (6) Companies Act and no other provision since he is sought to be proceeded against for commission of the offence under Section 447 Companies Act which is cognizable and non-bailable and to which Section 212 (6) Companies Act squarely applies. Where the Petitioner has a prima facie case in his challenge to the constitutional validity of Section 212 (6) Companies Act, to relegate him to the Special Court for the purposes of regular bail at this stage would frustrate the very purpose of his filing the present petition.

54. As already noticed Section 212 (6) Companies Act places an onerous burden on the Petitioner. For the purposes of arrest, the SFIO is to be satisfied that the Petitioner has been guilty of the offence under Section 447 Companies Act and yet, for the purposes Section 212(6) Companies Act, if the Petitioner has to show that he is in fact not guilty of the offence. It would be impossible for the Special Judge, if he is satisfied with the validity of the arrest under Section 212 (8) Companies Act to hold, for the purposes of Section 212 (6) (ii) Companies Act, that the Petitioner is not guilty of the offence.

55. There is another practical aspect that arises in the present case. All that has been provided to the Petitioner at this stage, even 20 days after his arrest, is a remand application which is, at best, sketchy. It only makes sweeping conclusions without specifically adverting to any material

gathered during the course of investigation. While it is true that even in a regular criminal case, at the stage of seeking bail, an accused may not know anything more than what is stated in the remand application and he would not be entitled to even peruse the case diary, there would at least be an FIR or a complaint where the precise case against the person arrested would be known. Here there is neither yet. Considering the stringent nature of Section 212(6) Companies Act, it is virtually impossible for an accused to contest the averments made in the remand application before the Special Court and make out a case of innocence. This would be an additional factor in examining the validity of Section 212(6) Companies Act.

56. Another aspect of the matter, which has been adverted to, is the applicability of Section 217 (7) Companies Act which states that the notes of an examination of an arrested person under Section 217(4) Companies Act “shall be taken down in writing and shall be read over to or signed by the person examined and may thereafter be used in evidence against him”. Considering that this very statement could be used in the criminal proceedings for the purpose of the prosecution for the offence under Section 447 Companies Act, a serious question arises as to whether this procedure envisaged under the Companies Act is consistent with Article 20 (3) of the Constitution. Considering that the SFIO has sought permission of the Special Court to examine the Petitioner, and he has a well-founded apprehension about the applicability of Section 217(7) Companies Act, it does make his position in continued judicial custody vulnerable. This is another reason in his favour for the grant of interim bail.

57. The submission that given his past track record, the Petitioner is likely to bribe, influence or win over witnesses does not appear to be based on any relevant material. In this regard, Ms. Acharya referred to the case registered by the Central Bureau of Investigation ('CBI') against the Petitioner where he has alleged to have paid a bribe of Rs.50 lakhs to the Managing Director of Syndicate Bank and in which case a charge-sheet appears to have been filed.

58. It has been clarified by Mr. Sibal, on instructions, that in that very case, the CBI Court granted regular bail to the Petitioner on 27th September 2014, subject to conditions, two of which were that (i) he should surrender his passport in the Court and (ii) he should not leave the country without the prior permission of that Court. It is submitted that in the four years since, there has not been a single instance of the Petitioner violating the conditions of bail. He is stated to have travelled abroad hundreds of times and has returned to India each time. This was in fact taken note of by the Special Judge (CBI-05) while passing an order on 27th January 2016 in an application filed by the present Petitioner seeking modification of the above two conditions.

59. The CBI Court in the above order dated 27th January 2016 noted that "the applicant has been granted permission on various occasions and he has complied with the conditions each time." The CBI Court then substituted the above conditions in the earlier order dated 27th September 2014 with the following conditions:

"(i) The applicant shall not leave the country without informing the court 03 days in advance of his visiting abroad and shall

furnish the complete itinerary stating the country/countries which he intends to visit and the period of his stay as also the addresses where he would be staying and his contact numbers. He shall also inform the court in writing about his return to India within a week thereof. Further, he shall not travel abroad during the period when the case is listed for effective hearings and his presence is required.

(ii) While intending to go abroad he shall furnish FDR in the sum of Rs. 5 lakhs which shall be kept alive till he returns and informs the court.”

60. The Petitioner has not been shown to have violated any of the above conditions. He is not shown to have in fact interfered with any investigation against him or BSL or BSPL or any of the others questioned by the SFIO, or tampered evidence or influenced witnesses. He has been in custody for more than 20 days now. Given the repeated assertions that the officer of the SFIO is satisfied that the Petitioner has been guilty of an offence, what more investigation needs to be undertaken *qua* the Petitioner is unclear. If the investigation is at an end then it should be possible to proceed to file an investigation report in terms of Sections 212 (14) and 212 (15) Companies Act. In other words, justification for the continued incarceration of the Petitioner even beyond 20 days, at this stage, for the purpose of investigation, has not been made out.

Preliminary objection as to maintainability

61. Both learned ASGs Mr. Tushar Mehta and Ms. Maninder Acharya questioned the maintainability of the main writ petition. It is submitted that the arrest in this case is in exercise of the powers of the SFIO under Section 212(8) Companies Act and therefore, the custody of the Petitioner could not be said to be illegal warranting issuance of a writ of *habeas corpus*. Reliance

was placed on the decisions in *Manubhai Ratilal Patel v. State of Gujarat (2013) 1 SCC 314* and *Rakesh Kumar v. State 1994 Cri LJ 1942 (Del)*.

62. Reliance was also placed on the order passed by this Court on 10th August 2018 in W.P.(Crl) 2384/2018 (*Poonam Malik v. Union of India*) whereby this Court declined to entertain a *habeas corpus* petition while relegating the Petitioner in that case to the learned Single Judge. Considerable reliance is also placed on the observations in the said order that as regards the interpretation of Section 19 Prevention of Money Laundering Act 2002 ('PMLA'), to the effect that the legal position concerning furnishing the person arrested the grounds of arrest would be governed by the decision of this Court in *Moin Akhtar Qureshi v. Union of India* [decision of a Division Bench of this Court in W.P. (Crl) 2465/2017 dated 1st December 2017] notwithstanding the reference of the correctness of that decision to a larger bench in *Rajbhushan Omprakash Dixit v. Union of India (2018) 1 JCC 506*. Ms. Acharya submitted that the decisions of the Co-ordinate Bench of this Court in *Vakamulla Chandrashekhar v. Directorate of Enforcement* [decision of a Division Bench of this Court dated in W.P. (Crl) 852/2017 8th May 2017] and *Moin Akhtar Qureshi (supra)* would continue to hold the field.

63. The above preliminary objection has been considered. There are several prayers in the main writ petition, one of which seeks the issuance of writ of *habeas corpus*. The other prayers in the writ petition pertain to the constitutional validity of Sections 212 (6)(ii), 212 (7) and 212 (8) of the Companies Act as being violative of Articles 14 and 21 of the Constitution

of India. This Court has already observed earlier that the Petitioner has a *prima facie* case as far as the said challenge is concerned.

64. According to Ms. Acharya, Prayer 'B' is not in the nature of the challenge to the constitutional validity of Section 212(8) Companies Act. Prima facie, the Court is unable to agree with the above submission. The reading of Prayer 'B' does indicate that the challenge is to the validity of Section 212(8) Companies Act on the ground that it is violative of Articles 14, 20, and 21 of the Constitution.

65. Therefore, the present petition cannot be viewed as a mere petition for issuance of a writ of *habeas corpus* and an attempt to bypass the regular route of obtaining regular bail. With the provision for grant of bail, i.e. Section 212(6)(ii) Companies Act and the provision concerning arrest, i.e. Section 212(8) Companies Act, themselves being challenged, and since those challenges are prima facie not frivolous, the Petitioner should also be able to seek interim relief incidental to such challenge.

Poonam Malik clarified

66. At this stage, it is also important to clarify the order of this Court in ***Poonam Malik*** (*supra*). In that case, there was no challenge to the constitutional validity of any provision. The legality of the arrest in that case was being questioned since the arrested person in that case had not been communicated the grounds of arrest in writing as opined by this Court in ***Rajbhushan Omprakash Dixit*** (*supra*). At the time when ***Poonam Malik*** (*supra*) was argued, the Court was informed that the questions referred to

the larger bench in *Rajbhushan Omprakash Dixit* (*supra*) including the correctness of the decisions in *Vakamulla Chandrashekhar* (*supra*) and *Moin Akhtar Qureshi* (*supra*) were pending consideration before the Supreme Court. However, this Court was not aware at that stage that this Court's order in *Rajbhushan Omprakash Dixit* (*supra*) had not been stayed by the Supreme Court. Thus, the Court in *Poonam Malik* (*supra*) proceeded on the footing that since the Supreme Court had withdrawn to itself the writ petition in *Rajbhushan Omprakash Dixit* (*supra*), the referral order passed by this Court had also been stayed.

67. However, learned ASG Mr. Tushar Mehta has clarified that the Supreme Court had, in fact, not stayed the order passed by this Court in *Rajbhushan Omprakash Dixit* (*supra*) which took a view contrary to that of the Coordinate Bench of this Court in *Moin Akhtar Qureshi* (*supra*) and *Vakamulla Chandrashekhar* (*supra*) and referred to the larger Bench the question as to the correctness of those very decisions. In the circumstances, this Court, which incidentally comprises the same Judges who passed the order in *Poonam Malik* (*supra*) on 10th August 2018, hereby clarifies that its observation in para 4 of the said order that the legal position concerning the need to provide an arrestee the grounds of arrest in writing stood governed by the decision in *Moin Akhtar Qureshi* (*supra*) is incorrect. That observation in para 4 of the order in *Poonam Malik* (*supra*) is hereby recalled.

68. At the highest, it could be argued that neither the decisions in *Moin Akhtar Qureshi* (*supra*) and *Vakamulla Chandrashekhar* (*supra*) on the

one hand and *Rajbhushan Omprakash Dixit (supra)* on the other, which seek to interpret Section 19 of the PMLA, should be considered while interpreting Section 212 (8) Companies Act. Going by that proposition, Section 212 (8) Companies Act would have to be interpreted on first principles without reference to the above decisions. That is the *prima facie* exercise which has been undertaken in this order earlier.

69. In any event, therefore, this would not impact the maintainability of this petition which *inter alia* challenges the constitutional validity of Section 212 (6) and (8) Companies Act in the present petition, which challenge can be considered only by a Division Bench of this Court.

70. Accordingly, the preliminary objections of the Respondents as to the maintainability of the main writ petition are hereby negated.

Conclusion

71. In that view of the matter, pending the final determination of the writ petition, the Court directs that the Petitioner shall be released on interim bail during the pendency of the present writ petition subject to the following conditions:

- (i) The Petitioner will submit a personal bond in the sum of Rs. 5 lakhs as well as two sureties in the sum of Rs.2 lakhs each to the satisfaction of the Special Judge (Companies Act) in the case (*SFIO v. Neeraj Singal*) File No. SFIO/INV/BPS/2016/480-494.
- (ii) In the event that condition (i) and (ii) in the order dated 27th January 2016 passed by Special Judge (CBI-05) in the case (CBI v. Sudhir Kumar Jain etc.) (RC. No. AC-1/2014/A0004/CBIAC-1/New Delhi)

(as extracted hereinabove in para 59) is modified and/or deleted then those very conditions shall form part of the conditions of the present order with the only substitution being the Court of the Special Judge (Companies Act) for the Court the Special Judge (CBI).

- (iii) The Petitioner will not meet any of the witnesses whose statements may have been recorded by the SFIO and will not in any manner, directly or indirectly, seek to tamper with the course of investigation or the evidence gathered thus far or to be gathered by the SFIO.
- (iv) The Petitioner will co-operate in the investigation but he shall not be compelled by the SFIO to sign his statement under Section 217 (4) read with Section 217 (7) of the Companies Act.
- (iv) The above interim bail will continue till an investigation report is filed in the Special Court in terms of Sections 212 (14) read with Section 212 (15) Companies Act, at which stage the Petitioner will, if it so necessitated, have to seek regular bail from the Special Court subject of course to the further orders in the main writ petition.

72. The application is disposed of in the above terms. It is clarified that the observations in this order are only for the purpose of grant of interim relief and will not in any manner affect the independent determination of the issues in the main writ petition.

73. Order *dasti* under signatures of the Court Master.

S. MURALIDHAR, J.

VINOD GOEL J.

AUGUST 29, 2018

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