* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 14.12.2018
Pronounced on: 07.01.2019

\+ **LPA 390/2017, C.M. APPL.19101/2017 & 32231/2017**

SUNAIR HOTELS LTD. ..... Appellant

Through: Sh. Jayant Bhushan, Sr. Advocate with Sh. Nitesh Jain, Sh. Atul Sharma and Sh. Abhinav Mukhi, Advocates.

Versus

UNION OF INDIA AND ANR. ..... Respondents

Through : Ms. Maninder Acharya, ASC with Sh. Dev. P. Bhardwaj, CGSC, Sh. Sahil Sood, Sh. Harshul Choudhary and Sh. Viprav Acharya, Advocates, for Respondent No.1.

Sh. Dayan Krishnan, Sr. Advocate with Ms. Bina Gupta, Sr. Advocate, Ms. Rakhi Ray and Sh. Ashok Kumar Sharma, Advocates, for Respondent No.2.

Sh. S.S. Haque, Sr. Assistant Director, Mrs. Deepmala Bagri, Assistant Director and Sh. Piyush Kumar, Assistant Director.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant (hereafter "Sunair") impugns a judgment and order of the learned single judge, dismissing its writ petition; it had challenged the decision of the Union of India ("UOI" hereafter) dated 29.02.2016 directing investigation by the Serious Fraud Investigation Office ("SFIO", hereafter) under Section 212(1)(c) of the Companies Act, 2013.

2. Sunair is a public limited company incorporated in 1977 under the Companies Act, 1956 ("the Act" hereafter). Sunair is engaged *inter alia* in the business of establishing and managing hotels; it is not listed on any national stock exchange and is held among 44 of its shareholders. One of

Sunair's shareholders is VLS Finance Ltd. (hereafter "VLS"), a public limited company incorporated under the Companies Act, 1956. VLS is a non-banking financial company engaged *inter alia* in the business of leasing and portfolio investments in equity shares, with an expertise in funding projects. It is joined as second respondent in this case.

3. The record reveals a chequered litigious history between Sunair and VLS since 1998. In 1982, the NDMC allotted a plot of land to Sunair for a hotel project. This license was further supplemented with an additional license deed executed in 1988 and possession was subsequently received. In June 1993, pursuant to a joint-venture agreement between Sunair and M/s Aeroflot, a wholly-owned subsidiary of Sunair (Sun Aero Ltd) was set up to carry out the hotel project. In 1993 M/s Aeroflot withdrew from the joint venture and consequently Sun Aero Ltd. entered into a management contract with ACCOR Asia PTE Ltd., Singapore. In the interim, there was a dispute between the NDMC and Sunair (along with its subsidiaries) concerning the allotted land. This dispute was taken up by the Delhi High Court and in 1994 the Court ruled in favour of Sunair and it was once again given possession of the land. Under the management contract with ACCOR dated 9th September 1994, Sunair transferred the development rights of the abovementioned land to its subsidiary, for the purpose of constructing the hotel. On 11th March, 1995 VLS and Sunair signed a MOU, according to which VLS was to invest ₹7 crores as share capital in Sunair and was also to provide a sum of ₹10 crores as security deposit and the promoters of Sunair were to invest a sum of ₹22 crores by way of their contribution to the share capital. Under the terms of the MOU, VLS was to arrange a public issue of shares for ₹10 crore

and to mobilize a sum of ₹85 crore by way of loans. VLS partially fulfilled its obligations under the MOU and in 1995 invested a sum of ₹ 7 crore and a security deposit of ₹ 8 crore.

4. In 1995, Sunair decided to seek re-transfer of the developmental rights pertaining to the allotted land and accordingly sought to buy back the rights that were valued at ₹ 21 crores. The manner in which this re-purchase was carried out was through cheques for a sum of ₹ 1 crore furnished by Sunair in favour of its subsidiary, which was then rotated back to the promoters of Sunair who used that sum to subscribe for additional shares in Sunair. Thus, a sum of ₹1 crore which was with SUNAIR as share application money paid by VLS was rotated 21 times and was accounted for the share investment of ₹ 21 crores by Sunair. This transaction was perceived by VLS as fraudulent and one that prejudiced their rights under the MOU as no correspondingly proportionate shares were issued to VLS, thus diluting their shareholding in Sunair.

5. In 1998, VLS, by C.P. No. 45(ND)/98 moved the Company Law Board (hereafter "CLB") alleging that the affairs of the company were mismanaged and that the allotment of 2,09,916.00 shares of Sunair to Shri Vipul Gupta and 23 others to be fraudulent, and praying *inter alia* that the CLB should cancel the said allotment and direct an investigation into the affairs of the Company. The substance of VLS's allegation in its petition was that Sunair had allotted shares worth about ₹ 21 Crores without investing any money and the shares were allotted to them by a fraudulent rotation of funds of the company. It was additionally alleged that this was achieved through the fraudulent re-transfer of land between Sunair and one of its

wholly-owned subsidiaries. By order dated 13th June 2001, the CLB noted that none of VLS's contentions were made out and dismissed the petition noting in conclusion that "*on an overall assessment of the case, we conclude that the intention of the promoters [of SUNAIR] had always been to get shares allotted against the value of the land and that the petitioner [VLS] was also aware of the same and as such the transfer and retransfer of the developmental rights are not sham transactions.*" VLS appealed the above decision under Section 10F of the Companies Act, 1956. The appeal entitled C.O. Appeal (SB) 11/2001 was heard by a learned single judge of this Court. The learned single Judge by judgement dated 16th December 2005 noted that the CLB erred in not considering the effect of MOU between VLS and Sunair and consequently ordered that the CLB's decision be set aside and the matter be remanded back to the CLB for fresh consideration, taking into account the findings of the court.

6. The CLB heard the remanded matter, after exhaustively considering the MOU between VLS and SUNAIR dated 11th March 1995, by order of 4th September 2013, dismissed the petition on almost the same identical grounds that formed the basis of the previous decision of the CLB as recorded in its judgement dated 13th June 2001. VLS preferred an appeal, challenging the CLB's order [Co.A.(SB) 41/2013]; that is pending adjudication by this court.

7. During the pendency of the above petition with the CLB, VLS elected to simultaneously initiate criminal proceedings, alleging substantially the same circumstances that were before the CLB in deciding the abovementioned petition. Accordingly, after an investigation into the affairs of Sunair, a charge sheet was filed by the Connaught Place Police Station in

First Information Report No.90/2000. Thereafter, the criminal Court issued summons to certain Members of Sunair for prosecution under Sections 420/406/409/468/471/477-A and 120-B of the Indian Penal Code, 1860. In July 2009, VLS filed an application before the concerned criminal court under Section 451 and Section 457 claiming that the allotted shares that were in dispute to be seized and the concerned shareholders not be allowed recourse to exercise the rights that were attached to those shares. The application was allowed by order dated 25th September, 2010. The criminal court ordered that the disputed shares to be treated as tainted property until the entire matter could be heard. This court, on appeal, set aside that order by its order dated 28th September, 2010 in W.P. (CRL) No. 1497/2010 and W.P. (CRL) No. 1499/10. This court noted that the order seizing the disputed shares was a drastic measure which was taken in the absence of any demonstrable urgency and was further passed by the Trial Court without considering rival contentions and was invalid for a failure to state reasons.

8. It is also undisputed that further FIRs bearing No.99/2002 (registered at Connaught Place Police Station), No.148/2002 (registered at Defence Colony Police Station) and No. 315/2005 (registered at Naraina Police Station) were registered at the instance of VLS which has made a host of allegations ranging from fraud and misappropriation of funds to stealing government documents from the Ministry of Corporate Affairs.

Investigations under the Companies Act, 1956 and Companies Act, 2013: Investigation under Section 209A of the Companies Act, 1956:

9. In 1999, few Members of Parliament, namely Mr. Mohan Singh, M.P. (Lok Sabha) (as he was then) and Mr. Dilip Singh, M.P. (Rajya Sabha) (as

he was then) submitted complaints to the Department of Corporate Affairs alleging that SUNAIR had engaged in cheating and fraud. Accordingly an investigation under section 209A of the Act, was conducted by the then Joint Director of the Department of Corporate Affairs. Resultantly, the Deputy Registrar of Companies, acting under Section 211 of the Companies Act, 1956, issued a show cause notice dated 16th March 2000, calling upon Sunair to explain the default in the accounts of the Company for the financial years 1994-1995 to 1997-1998 related to the abovementioned disputed shares and the land allotted to Sunair by the NDMC. In its response dated 28th March 2000, Sunair apart from partially denying the allegations, admitted to certain defaults and expressed the intention to have recourse to Section 40(1) of the Company Law Board Regulations, 1991 and Section 621A of the Companies Act, 1956. Accordingly, Sunair, before the matter was proceeded upon by the Metropolitan Magistrate, applied to the CLB for compounding the enumerated offences.

10. The CLB by order dated 9th August, 2000 allowed the application and ordered that the offence pertaining to the financial years 1994-95 to 1997-98 under Section 211 of the Companies Act, 1956 be compounded against the Managing Director of the company on payment of ₹ 1,000/- for each offence each year. It was also observed that the Director shall make payment from his personal account. This order was challenged by VLS in the High Court in Co.A.(B) No. 1/2001. This court upheld the order of the CLB by judgement dated 5th November, 2003. The learned Single Judge therein clarified that the CLB did indeed have the power to compound offences under Section 621A of the Companies Act, 2013 and that the order of the CLB dated 9th August,

2000 suffered from no infirmities. That judgment was impugned before the Supreme Court in CA 2102 of 2004.The court rejected the special leave petition and affirmed this court's order.

Investigation under Section 237(b) of the Companies Act, 1956:

11. In 2003, VLS and the Union Department of Corporate Affairs filed petitions dated 25th August 2003 and 19th December 2003 respectively, praying the CLB to order an investigation to be carried out into the affairs of SUNAIR under Section 237(b) of the Companies Act, 1956. The CLB in its order dated 16th May, 2007 dismissed both the petitions. Therein, one of the members of the CLB, after perusing both the petitions noted that the allegations therein were almost identical to each other. The learned Member thereafter exhaustively examining the basis of the petition and concluded that all the allegations were either frivolous or had been considered in a different and more appropriate forum. The CLB, therefore, concluded:

> *"The facts and circumstances of the present case, to my mind, prima facie do not demonstrate and establish the existence of pre-requisite(s) necessary to form my opinion in terms of section 237(b) of the Act. Hence, I find no justification to order investigation under Section 237(b) of the Act in this case.*"

12. The validity of the above order was challenged by VLS, appealing under Section 10F of the Act, in this High Court through CO.A.(SB) 16/2007 and the matter was heard by a Single-Judge and the appeal was dismissed by judgement dated 23rd April 2012. The learned Single Judge observed that the decision of CLB on merits of the mismanagement claim of VLS, that was to be decided afresh, by the CLB as directed in the order of the this court in C.O. Appeal (SB) 11/2001, remanding the issue agitated by

VLS in C.P. No. 45/98 for reconsideration, there was no need to interfere with the order of the CLB denying to exercise its discretion to order an inquiry into the affairs of SUNAIR under Section 237(b) of the Companies Act, 1956. This order was confirmed by the Supreme Court *vide* Order dated 21st January 2013 in S.L.P. (Civil) No(s).27437/2012.

Investigations under Section 401 of the Companies Act, 1956

13. In 2005, VLS filed a Writ Petition, W.P. (C) No. 14300/2005 in this court under Article 226 of the Constitution of India, claiming for a direction to the Central Government to institute proceedings under Section 401 of the Companies Act, 1956 against Sunair. That petition was dismissed by the learned single judge by order dated 30th November, 2007. The court then noted that VLS Finance was engaging in speculative litigation with an object to coerce the Government into taking action against SUNAIR, and consequently attempting to undermine the discretion that the Act vested in the Central Government. That order was affirmed by the dismissal of an appeal, by the Division bench in a judgement dated 29.09.2008 in L.P.A No. 148/2008. In VLS's special leave petition, before the Supreme Court, a direction was issued on 22nd January 2016, by the Supreme Court to the Central Government to file an Affidavit, clarifying its position on the issue of the prayed investigation into the affairs of Sunair. An affidavit was accordingly filed (dated 12th February 2016) which stated that after the dismissal of the UOI's petition to investigate Sunair's affairs under Section 237(b) was rejected by the CLB by order dated 16th May 2007, the UOI elected not to appeal against the order. The dispute, in its opinion, was of a

private nature that did not necessitate the involvement of the Central Government.

Investigations under Section 212(1)(c) of the Companies Act, 2013

14. It was also noted in the Affidavit dated 12th February 2016 that the Central Government was receiving fresh complaints and that it may consider acting under Section 212(1)(c) of the Companies Act, 2013, ordering an investigation to be commenced by the SFIO into the affairs of SUNAIR. Upon receiving the Affidavit of the UOI, the Supreme Court by order dated 26th February 2016, listed the matter to be subsequently heard on 18th March 2016. Before the matter came to be heard again by the Supreme Court, on 29th February 2016, the Ministry of Corporate Affairs issued Order No. 03/97/2009 – CL II (NR), dated 29th February 2016 thereby ordering an investigation into the affairs of SUNAIR to be carried out by the SFIO and to submit a report to the Central Government within a period of 6 months. On being appraised of the decision of the Central Government to proceed under Section 212 of the Companies Act, 2013, the Supreme Court on 08th April 2016 posted the matter to be heard after four weeks therefrom after noting that

> "*the pendency of the special leave petition will not come in the way of the aggrieved parties challenging the said decision i.e., dated 29th February, 2016 before the appropriate Forum, if they are so inclined.*"

15. Accordingly, Sunair, filed the writ petition, seeking direction for quashing the order of the MCA dated 29th February 2016. During the pendency of the above proceedings, on 06.06.2016, the SFIO conducted a

search at the office of Sunair. The Supreme Court, that was still seized of the matter in S.L.P (C) No. 3317/09, directed on 22nd July 2016 that the investigations, which had already commenced be concluded on or before 31st October 2016 and that the report be placed before the learned single Judge that was hearing W.P. (C) 3444/2016 concerning the validity of the order of investigation. Pertinently, the Supreme Court ordered that:

> "*(ii) The High Court is requested to dispose of the writ petition challenging the order directing the aforesaid investigation by the end of November, 2016 after the report of investigation is placed before it, meaning thereby if the report of investigation is in favour of respondent No.2 (Sunair Hotels Ltd.), the High Court may not have any occasion to go into the merits of the writ petition*."

16. The material on the basis of which the investigation was ordered, comprising various complaints addressed to the Ministry of Corporate Affairs ("MCA") concerning the alleged mismanagement of Sunair, were submitted to the court in the Central Government's counter affidavit. The final judgement dismissing the writ was rendered on 26th March 2017 and is impugned in this appeal.

Contentions of parties

17. Sunair argued that order (of the MCA) directing investigation into its affairs was based on insufficient material. It relied on the decision of the Bombay High Court in *Parmeshwar Das Agarwal v Additional Director* (2016 SCC Online Bom 9276) for the proposition that in order to form an opinion that the affairs of a company must be investigated, the

> "*existence of circumstances relevant to the inference of the sine qua non for action must be demonstrated*" and that "*it is not*

reasonable to hold that the section permits the Govt to say that it has formed an opinion on circumstances which it thinks or presumes to exist"

18. Sunair also relied on the decisions of Supreme Court in the context of investigations under Section 237 of the Act in *Barium Chemicals v. Company Law Board* [(1966) Supp. SCR 311] and *Rohtas Industries v. S.D. Aggarwal* [(1969) 1 SCC 325]. It was argued that investigations were ordered solely on the basis of complaints that in effect merely reiterated previous allegations made by VLS in various FIRs and petitions to the CLB. These allegations had been considered in the various appropriate fora, that most of these complaints were held to be frivolous and that the rest of the offences were compounded. Sunair contends that in the absence of any new material with the MCA so as to alter the conclusions arrived at by the other fora and in the absence of any application of mind to differ from the conclusions so arrived, the opinion of the Government was ill-formed and the action ordering an investigation was bad in law.

19. It was finally contended that the order directing an investigation in public interest under Section 212(1)(c) must stand on its own rationale and that additional affidavits or the final report that is the outcome of the investigation cannot be used to justify the order of investigation. Sunair relied on *Ashok Kumar Agarwal v. CBI* (WP Crl. 1401/2002 (Judgement Dated 13.01.2016); Delhi HC) and *Smt. Selvi v. State of Karnataka* [(2010) 7 SCC 263] to establish this proposition.

20. The UOI, on the other hand argued that the investigation was ordered on the basis of fresh complaints received by it from various stakeholders post

2013 and that the gravity of the allegations therein levelled seriously implicated Sunair. The Supreme Court in SLP (C) No. 3317/2009, in so far that it ordered that the Final Report of the SFIO investigation be placed before this court, rendered the present Writ Petition infructuous. Further, it was argued that the order of the Supreme Court dated 22nd July 2016 in the above petition required this court to consider the findings in the Final Report in order to determine the writ challenging the validity of the order of investigation.

21. It was contended furthermore that the judgements rendered in the context of Section 237 of the Act were not apt to an order of investigation under Section 212 of the 2013 Act, owing to the difference in language between the two sections. Section 212 of the Companies Act, 2013 only required a *prima facie* opinion and that there was no requirement for conclusive proof. Finally, it was contended that the gravity of allegations in the complaints received and the violations allegedly uncovered in the SFIO's final report confirm the suspicions and justify the order of investigation.

Impugned judgment

22. Thus, the single issue framed is:

> "*whether the formation of the opinion by Respondent No. 1/Ministry of Corporate Affairs, Union of India, to order an investigation by the SFIO into the affairs of the Petitioner Company, in the public interest, is bad in law on account of the insufficiency/inadequacy of the material that forms the basis of the said opinion.*"

23. Before deciding the merits, the Learned Single Judge considered the effect of the order of the Supreme Court dated 22nd July 2016 regarding the

status of the SFIO's Final Report. The judge interpreted the abovementioned direction as authorizing the examination of the Final Report to come to a decision on the validity of the order of investigation as was required in the instant Writ Petition. The learned single judge held that,

> "*30. In other words, in the event the SFIO report is against the Petitioner Company, the present writ petition has to be determined on its merits; and after due consideration thereof, as this Court deems appropriate.*
> *31. In the alternative, the present writ petition would automatically be rendered infructuous in the event the SFIO report is in favour of the Petitioner Company.*
> *32. Therefore, in my considered view, in keeping with the directions of the Hon'ble Supreme Court, as contained in the orders dated 22.07.2016 and 05.12.2016; it would be necessary to consider the final report of investigation dated 31.10.2016, submitted by the SFIO, whilst adjudicating the present petition on its merits*."

24. Having held so, the learned single Judge opined that the investigation provision under Section 212 of the 2013 Act is similar to Section 237 of the 1956 Act and the Judge rules that the principles enunciated by the Supreme Court in *Barium Chemicals (supra)* and *Rohtas (supra)* are applicable to investigations under Sections 212 of the 2013 Act as well. After discussing the decisions above mentioned, the learned single judge astutely summarizes the law on investigations under Section 212 thus:

> "*44. On a conspectus of the aforesaid decisions, relevant paragraphs of which have been extracted hereinabove; the following legal position emerges:*
> *i. Discretionary power has been conferred upon the Central Government under the relevant provisions of the Act, to order an investigation into the affairs of the company;*

ii. The object of vesting such a power upon the Central Government, under the Statute, is to enable the Central Government to assume the power to step in where there is reason to suspect that a company may be conducting its affairs in a manner prejudicial to the interests of its shareholders or the public at large.

iii. However, the discretionary power must not be exercised by the Central Government, in a manner that, by reason of misconstruction of the statute or other reason, would lead to frustrating the object of the statute conferring the discretion.

iv. In order to exercise this discretion reasonably and lawfully, the Central Government is required to formulate an opinion that an investigation into the affairs of the company is necessary;

v. The opinion must be an honest opinion, rendered after bestowing sufficient attention to the relevant material/circumstances available before the Central Government; and

vi. The opinion must not be based on a wholly irrelevant or extraneous consideration.

vii. The materials/circumstances based on which the opinion to order an investigation has been rendered, have to prima facie, show that the inferences drawn from the facts in the materials/circumstances led to conclusions of certain definiteness. In other words, the existence of material for formation of an opinion is a sine qua non and the same must be prima facie demonstrable, in case the opinion is challenged before a Court of law.

viii. The opinion formulated is not required to be a conclusive proof of the fact that the conduct of the affairs of the company is prejudicial to the public interest, interest of the shareholders, members or any other persons, or contrary to the provisions of law.

ix. Investigation under the relevant provisions of the Act, is exploratory in nature, and in the nature of a fact-finding, and must be ordered only on satisfactory grounds.

X. Since investigation is an inroad into the functioning of a company, it has to be ordered after the facts and circumstances

in the material available with the competent authority necessitate such an investigation.
xi. Courts can consider the materials/circumstances on the basis of which the opinion to order an investigation is rendered; to ascertain whether the facts necessitating the investigation, in fact, existed, or whether extraneous considerations have weighed on the opinion formed by the Central Government.
xii. Whilst considering a challenge to an opinion of a competent authority directing an investigation into the affairs of a company, the Court has to exercise caution, inasmuch as, the Court cannot sit in appeal over the opinion and cannot substitute its opinion for that of the competent authority of the Central Government."

25. Thereafter, the impugned judgment examined the material on the basis of which the investigation was ordered and held that the opinion formation was in accordance with law:

"a *perusal of the material on record, in the present case, would show that the formation of the opinion cannot be assailed on the ground of it having being rendered without proper application of mind or in a casual manner. The opinion was formed based on cogent and creditworthy material warranting investigation in the public interest. The material justified the ordering of an investigation since the allegations levelled constituted serious violations of various provisions under the 1956 Act, 2013 Act and the IPC.*"

Analysis and Conclusions

26. Before examining the soundness of the conclusions arrived at by the learned Single Judge, it would be useful to briefly outline the statutory provisions governing the investigation of companies under both the 1956 and the 2013 Acts.

27. Section 234 of the old Act conferred a general power of superintendence over the affairs of companies upon the Registrar of Companies, who may order the production of the documents of the company or detailed written answers to queries raised where he/she has reason to believe that further explanation is required on perusing the documents submitted by the company as required under the Act or on representations made by individuals who are interested in the functioning of the company that the affairs of the company disclose irregularities. If the information obtained proves insufficient, the Registrar shall report in writing to the Central Government under Section 234(6) of the 1956 Act. The Central Government receiving the report may then direct and investigation into the affairs of the company and accordingly appoint an officer under Section 235(1) of the 1956 Act. Additionally, an investigation could be ordered by the Company Law Tribunal under 235(2) if a certain proportion of Members of the company apply, along with supporting evidence that the affairs of the company need to be looked into. Section 237 creates another procedure through with the affairs of a company may be investigated upon the order of the Central Government, it states:

> "Section 237: *Without prejudice to its powers under section 235, the Central Government:*
>
> *(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if*
>
> *(i) the company, by special resolution ; or*
>
> *(ii) the Court, by order,*
>
> *declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government ; and*

(b)may do so if, in its opinion or in the opinion of the Tribunal, there are circumstances suggesting -
(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;
(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ;or
(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director or the manager, of the company."

28. Under the 2013 Act, under Section 206 the Registrar has the power of superintendence and is empowered to call for information, to inspect books and to conduct inquiries and Section 207 further, confers powers of discovery and summons on the Registrar so as to aid with the inquiry. Under Section 208, upon the completion on the inquiry, the Registrar or Inspector thus appointed shall be required to submit a report in writing to the Central Government and if necessary he/she may include a recommendation that further investigation into the affairs of the company is necessary giving their reasons in support. Section 210 confers powers on the Central Government to investigate the affairs of a company. It stipulates that:

"Section 210. (1) Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company-

(a) on the receipt of a report of the Registrar or inspector under section 208;
(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
(c) in public interest, it may order an investigation into the affairs of the company.
(2) Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.
(3) For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct."

29. Section 211, which finds no comparable provision in the 1956 Act establishes the Serious Fraud Investigation Office that would be headed by a Director and comprise a number of experts in various fields ranging from banking, corporate affairs, taxation, forensic audit, capital market, information technology or law etc. Under Section 212, the Central Government may order an investigation to be carried out by this expert force if

"*the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—*
(a) On receipt of a report of the Registrar or inspector under section 208;
(b) On intimation of a special resolution passed by a company that its affairs are required to be investigated;
(c) In the public interest; or
(d) On request from any Department of the Central Government or a State Government, the Central Government"

30. The Central Government is entrusted with the power in Section 212 of the Companies Act, 2013 to order an investigation by the SFIO if in its discretion such an investigation is necessary to safeguard public interest. It is true that the text of the statute does not contain an explicit right to challenge the opinion of the Central Government. However, this does not mean that the power confers absolute discretion over the decision and that its decision consequently attains unassailable finality. An order of investigation is an administrative order because, as explained in *Barium Chemicals* [supra],

> "*The discretion conferred to order an investigation is administrative and not judicial since its exercise one way or the other does not affect the rights of a company nor does it lead to any serious consequences as, for instance, hampering the business of the company*."

31. Being an administrative order, it is essential that the Government must form an opinion under the section and it has been repeatedly affirmed by the jurisprudence of our courts that certain defects in the formation of opinion are justiciable.

Section 237(b) of Companies Act, 1956 and Section 212 of Companies Act, 2013

32. The court would consider previous rulings under Section 237(b) of the Companies Act, 2013 which was the provision conferring the power on the Government to initiate an investigation into the affairs of a company. Later, the court would consider the applicability of these rulings to Section 212 that is relevant to the instant matter. In *Barium Chemicals (supra)* having discussed the principles that govern the formation of opinion under

administrative law, referring to the text of Section 237(b), the court observed:

> "Para 31 […] *Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion . That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be*

ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process."

33. This proposition also received the assent of Justice Hidayatullah, who, in his opinion observed:

> " Para 28 […]*Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness.* […]
> Para 31 […] *The affidavit merely says that these reports indicated the need for a deeper probe. This is not sufficient. The material must suggest certain inferences and not the need for "a deeper probe". The former is a definite conclusion the latter a mere fishing expedition. A straight-forward affidavit that there were circumstances suggesting any of these inferences was at least necessary. There is no such affidavit and the reason is that the Chairman completely misunderstood his own powers*."

34. Justice Bachawat did not express an opinion on this issue but agreed with the conclusions arrived at by Justice Hidayatullah and Justice Shelat. It is important to note that on the other hand Sarkar, C.J., and Mudholkar, J., who were in dissent, held that the power conferred on the Central Government under Section 237 is a discretionary power and no facet of that power is open to judicial review.

35. The above discussed conclusions arrived at by the two judges in *Barium Chemicals (supra)* were subsequently affirmed by a three-judge bench of the Court in *Rohtas Industries (supra)* where the majority held that:

> "*For the reasons stated earlier we agree with the conclusion reached by Hidayatullah and Shelat, JJ. in Barium Chemicals case that the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause(1) or the persons mentioned in sub-clause (2) were guilty of fraud or misfeasance or other misconduct towards the company or towards any of its members is a condition precedent for the Government to form the required opinion and if the existence of those conditions is challenged, the courts are entitled to examine whether those circumstances were existing when the order was made. In other words, the existence of the circumstances in question is open to judicial review though the opinion formed by the Government is not amenable to review by the courts. As held earlier the required circumstances did not exist in this case.*"

36. The requirement to show the objective existence of 'circumstances suggesting' fraud or misfeasance has since become firmly entrenched in Indian jurisprudence and has been uniformly followed by various other decisions of the Supreme Court and in many of the High Courts and CLBs around the country.

37. It was contended by Sunair that the rulings in the context of Section 237(b) of the 1956 Act would also apply to an order of investigation passed under Section 212 of the 2013 Act. Reliance is placed on the ruling of a Division Bench of the Bombay High Court in *Parmeshwar Das Agarwal*(supra), which, after discussing the rulings of the Supreme Court observed in the context of Section 212 of the 2013 Act that:

> "40. *Thus, the principle is that there has to be an opinion formed. That opinion may be subjective, but the existence of circumstances relevant to the inference as to the sine qua non for action must be demonstrable. It is not reasonable to hold that the clause permits the Government to say that it has formed*

> *an opinion on circumstances which it thinks exist. Since existence of circumstances is a condition fundamental to the making of the opinion, when questioned the existence of these circumstances have to be proved at least prima facie*."

38. The learned impugned judgment has also accepted this proposition quoting with approval the following passage from *Parmeshwar Das Agrawal (supra)*:

> "31. *The Indian Companies Act, 1956 (for short "1956 Act") and The Companies Act, 2013 (for short "2013 Act") are both enacted to consolidate and amend the law relating to companies and certain other associations. As far as the 2013 Act is concerned, on its initial enactment and later on its amendment, it has been clarified that the legislation relating to incorporation and registration of companies had to be consolidated and brought in time with the current situation prevailing in the country and abroad. Several provisions had to be introduced which were hitherto not introduced. As far as the power and referable to the provisions of these two enactments are concerned, their basic foundation remains the same*,"

39. This court, however, is unable to agree with this proposition. It is a well-established principle of statutory interpretation that the primary meaning of a provision must be inferred from a proper grammatical construction of the text of the provision. From the above discussion in *Barium Chemicals (supra)* and *Rohtas Industries (supra)*, it is evident that the conclusion arrived at by the Court was primarily based on the fact that Section 237(b) of the 1956 Act required the formation of an opinion by the Central Government or the Tribunal that there were "*circumstances suggesting":*

"*(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose;*
(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ;
or
(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company."

40. Section 212 on the other hand is framed in radically different terms:

"*(1) Without prejudice to the provisions of section 210, <u>where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office</u>—*
(a) on receipt of a report of the Registrar or inspector under section 208;
(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
(c) in the public interest; or
(d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation."

41. It is quite apparent that the <u>matter on which an opinion is to be formed</u> is entirely different, on a plain juxtaposition of Section 237(b) of the 1956 Act and Section 212(1) of the 2013 Act. In the former the opinion relates to

circumstances suggesting the existence of conditions enumerated in the sub-clause (i),(ii) and (iii) of section 237(b) whereas in the latter the formation of opinion pertains to the "*necessity of investigation*" in "*public interest*". The circumstances enumerated in the above-mentioned sub-clauses finds no mention in Section 212 (or in the entire chapter regarding investigations in the 2013 Act) and to directly apply the rulings in *Barium Chemicals (supra)* and *Rohtas Industries (supra)*would in effect amount to reading into Section 212 an entire sub-section that was willfully omitted from the present statute and changing the very character of the opinion to be formed under the sub-section. Such an interpretation cannot be sustained and amounts to judicially rewriting the statute. This conclusion is in fact supported by the observation of Justice Mudholkar in *Barium Chemicals (supra)* wherein the learned Judge observed:

> "*The formation of an opinion must, therefore, be as to whether there are circumstances suggesting the existence of one or more of the matters in sub-clauses (i) to (ii) and not about anything else. […]To say that the opinion to be formed must be as to the necessity of making an investigation would be making a clear departure from the language in which Section 237(b) is couched.*" [*This view was not the basis of the learned Judge's disagreement with the majority.*]

42. The above discussion on Section 212 clarifies that the legislature has indeed decided to make the departure that Justice Mudholkar refers to. This is not to suggest that no observations that were made regarding the law governing investigations in these decisions are applicable to the new Act whatsoever.

Standard of review of discretion exercised under Section 212 of Companies Act, 2013

43. The Supreme Court in the case of *Corporation of Calcutta v Calcutta Tramways Ltd.* [1964 5 SCR 25] wherein Section 437(1)(b) of the Calcutta Municipal Corporation Act, 1951, that vested absolute power to form an opinion in the Municipal Corporation of Calcutta was challenged on the ground of violating Article 19(1)(g). Justice Wanchoo, writing on behalf of all five judges observed:

> "*…It has been urged that the Corporation which is an elected body would exercise the power conferred on it under Section 437(1)(b) reasonably and therefore the provision must be considered to be a reasonable provision. This in our opinion is no answer to the question whether the provision is reasonable or not. It is of course true that mala fide exercise of the power conferred on the Corporation would be struck down on that ground alone; but it is not easy to prove mala fide, and in many cases it may be that the Corporation may act reasonably under the provision but it may equally be that knowing that its opinion is conclusive and non-justiciable it may not so act, even though there may be no mala fides. The vice in the provision is that it makes the opinion of the Corporation, howsoever capricious or arbitrary it may be or howsoever unreasonable on the face of it may be, conclusive and non-justiciable. The conferment of such a power on a municipal body which has the effect of imposing restrictions on carrying on trade etc. cannot in our opinion be said to be a reasonable restriction within the meaning of Article 19(6).*"

44. As absolute discretion cannot be vested in a statute, it is necessary to consider on what grounds the opinion of the Central Government formed under Section 212 may be challenged.

45. It is necessary to refer again to the decision in *Barium Chemicals (supra)* where the constitutional validity of Section 237 of the Companies Act, 1956 was challenged, Justice Shelat elaborating on the standards of review applicable to the formation of an opinion before an investigation may be ordered observed that:

> "*Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the power, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.*"

46. Justice Shelat then illustrated that the interpretation of statutory provisions which confer powers on authorities to act on their opinions and the limitations thereto have to be analyzed in the context of the nature of the legislation, the nature of the powers conferred and the severity of its effects. He observed that:

> "*A recent decision in Vellukunnel v. Reserve Bank of India [(1962) Supp 3 SCR 632 : AIR 1962 SC 1371] is in point in this connection. Section 38(3)(b)(iii) of the Banking Companies Act, 1949 was assailed there as being discriminatory and an unreasonable restriction. The impugned clause provided that the High Court shall order the winding up of a banking*

company on the Reserve Bank making an application for winding up "if in the opinion of the Reserve Bank…. (iii) the continuance of the banking company is prejudicial to the interests of the depositors". The learned Attorney-General rightly pointed out that the question there was not so much on the meaning of the words "in the opinion of" as whether a law which requires the High Court to order winding up because the Reserve Bank is of that opinion is constitutional. But it is not without significance that the divergence of opinion in this Court was that according to the minority opinion the vice of the impugned provision lay in the power vested in the Reserve Bank to apply to the High Court for a winding up order exercisable solely on its subjective satisfaction while according to the majority opinion the power did not rest solely on the subjective satisfaction and that what the impugned clause did was to leave the determination of an issue to an expert body viz. whether the continuance of the banking company in question was detrimental to the interests of the depositors. In support of this view Hidayatullah, J. speaking for the majority made the following significant observation:

> *"it is enough to say that the Reserve Bank in its dealings with banking companies does not act on suspicion but on proved facts".*

And again at p. 672 he observed:

> *"But this seems certain that the action (winding up) would not be taken up without scrutinising all the evidence and checking and re-checking all the findings."*

Distinguishing a case arising from a statute like the Banking Companies Act from cases of detention and associations declared unlawful, he emphasised the fact that "the factual background will not be one of suspicion, and action will be based on concrete facts". The majority view thus vindicated the validity of the provision on the ground that under the power conferred thereby, Reserve Bank had to determine, albeit instead of the court, the issue whether the continuance of a

particular banking company was detrimental to the depositors, interests. Though the words used were "in the opinion of", the opinion, though exclusively of the Reserve Bank, was dependent on the determination by it of the aforesaid issue. Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

47. In the present case Sunair has challenged the order as being arbitrary and illegal primarily on the ground that the Central Government did not make the order on the basis of sufficient material. On this basis they contend that the application of mind in order to form an opinion was defective. It needs to be first established that an order of investigation passed under Section 212 of the Companies Act, 2013 may be challenged on such grounds before examining the veracity of the factual basis of these grounds. To elaborate on the standard of review that courts may exercise in reviewing a decision to order an investigation into the affairs of a company, it is imperative to first understand the character of the ordering authority, nature of investigation that would be conducted and effects of such an investigation on the company.

48. In *Rohtas Industries (supra)*, the majority judgment explained the substantial effect that investigations have on Companies in the following words:

> *"It may be noted that before the Central Government can take action under Section 235, certain preconditions have to be satisfied. In the case of an application by members of the company under clause (a) or (b) of Section 235, the same will have to be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have good reasons for requiring the investigation, and the Central Government may, before appointing an Inspector, require the applicant to give security for such amount not exceeding Rs 1000, as it may think fit for payment of the costs of the investigation. From the provisions contained in Sections 235 and 236, it is clear that the legislature considered that investigation into the affairs of a company is a very serious matter and it should not/ be ordered except on good grounds. It is true that the investigation under Section 237(b) is of a fact-finding nature. The report submitted by the Inspector does not bind anybody. The Government is not required to act on the basis of that report, the company has to be called upon to have its say in the matter but yet the risk—it may be a grave one—is that the appointment of an Inspector is likely to receive much press publicity as a result of which the reputation and prospects of the company may be adversely affected. It should not therefore be ordered except on satiafactory grounds.*"

49. Since an investigation into the affairs of a company is likely to have a serious impact on the confidence of its shareholders and of the general public, it is also vital that before such an investigation is ordered, the deciding authority must appraise itself of all the relevant facts. Further, as observed by in *Sri Ramdas Motor Transport Ltd. v. Tadi Adhinarayana Reddy* [(1997) 5 SCC 446]

> "*The department of the Central Government which deals with companies is presumed to be an expert body in company law matters. Therefore the standard that is prescribed under Section 237(b) is not the standard required of an ordinary citizen but that of an expert.*"

50. It was this context that *Rohtas Industries (supra)* had in mind, when it held that

> "*if it is established that there were no materials upon which the authority could form the requisite opinion the court may infer that the authority did not apply its mind to the relevant facts. The requisite opinion is then lacking and the condition precedent to the exercise of the power under Section 237(b) is not fulfilled*."

51. Sufficiency of material relates not only to the volume of material but rather also includes the quality of the material. It follows that if the Central Government receives mere allegations, no matter how serious the allegations are, there is a duty to examine those allegations so as to ascertain their veracity to a reasonable degree of certainty. The decision of the Division Bench of the Bombay High Court in *Hariganga Cement Limited v The Company Law Board* [(1987) 2 Bom CR 250] further supports this proposition. An investigation that was commenced purely on the basis of allegations, some of which pertained to alleged illegalities outside the ambit of corporate management of a Company. In striking down the order of investigation, the court observed that

> "*We do not find that such contention can be accepted at all, for the simple reason that the speaking order passed by the Board at Annexure-A clearly brushes aside the applications filed by Batra and Arora, and they have categorically concluded that most of the allegations in the applications were not substantiated, whereas the remaining allegations have been duly explained by the Company.*"

Examination of the Material upon which the impugned investigation order was rendered:

52. The court now would examine the material on the basis of which the impugned order was passed. The UOI's counter affidavit reveals that the order of investigation was passed on the basis of complaints received by the Ministry of Corporate Affairs and the complaints have been accordingly annexed. Upon considering the list of complaints, it is evident that despite having numerous complaints that were filed they essentially make the same allegations. Many of the allegations are directed against the Ministry of Corporate Affairs, accusing officials in the Ministry of suppressing information and for being in contact with the promoters of Sunair; these allegations are supported by no evidence and have no bearing on the management of Sunair whatsoever they are in our opinion entirely irrelevant. There are blatant allegations made against the auditors and promoters of the company which, in our opinion, are not substantiated at all. The following seem to be the only allegations that merits our consideration:

a. It is alleged that allotted NDMC land, which was under the ownership of the Government of India was fraudulently shown by the Sunair in its balance sheet as a "fixed tangible assets" and that at various periods of time the Company had two balance sheets.
b. It is alleged that by a fraudulent retransfer of developmental rights and rotation of funds the promoters of Sunair have allotted further shares in the company to themselves.
c. It is alleged that 21 files that were stolen from the Ministry of Corporate Affairs were later recovered within the premises of the Sunair.

53. It is evident that allegations (a) and (b)were the subject of litigation since 1999 and the CLB has twice found that there were no discrepancies in the retransfer of the land or in the allotment of shares. Most recently, CLB, hearing the remanded matter, after exhaustively considering the MOU between VLS and SUNAIR dated 11th March 1995, by order dated 4th September 2013, dismissed VLS's petition finding unequivocally that there were no infirmities in the abovementioned transaction. Further, VLS approached the CLB under Section 237(b) of the 1956 Act and prayed for an investigation into the affairs of the Sunair on these same facts in 2003. This petition was rejected by the CLB in 2006 on account of the allegations being frivolous and already addressed in various forums. This order was upheld by this Court in 2012 and by the Supreme Court in 2013.

54. As regards the alleged misstatement in the balance sheet, the Company Law Board compounded this offence under Section 211 of the 1956 Act in its order dated 09.08.2000 which was affirmed by this Court in Co. A (SB) 1 of 2001by order dated 05.11.2003. It is true that the compounding related to the misstatement during the financial years 1994-95 to 1997-98 and that the allegation relates to a persisting failure to rectify the defect.

55. As regard the allegations of the stolen files, this matter formed part of FIR No. 315/2005 registered at Police Station, Naraina, Delhi and investigation into this has been stayed by this Court. The pleadings here only contain the statement that the matter has been stayed – the order granting the stay has not been attached by the Appellant and, therefore, unable to verify this fact nor the reasons for the stay order. In any event such an act would be

punishable under the IPC and does not in any manner relate to the management of Sunair.

56. Apart from these, the original files, which were called for consideration, by the court, during the course of this appeal, suggest that after the Division Bench decision (upholding the order of the learned single judge, in 2007), an appeal by special leave was preferred to the Supreme Court, under Article 226 of the Constitution of India. The court had issued notice in the petition, which remained pending. In the meanwhile, several fresh complaints were received from diverse informants, by the UOI. These were processed, firstly at the Assistant Director's level; a detailed note was given to the Joint Director and the Director (Investigation) with a request for a special official to be deputed to look into the material, having regard to the past files and reports (noting dated 6.8.2015 and the note of discussions recorded on 10-08-2015). A file noting of 24th October, 2015 records that a case was registered and investigation was pending. In the meanwhile, the Supreme Court wished to be informed whether the Central Government was independently proceeding with any action, in accord with law. The UOI appears to have deliberated on this aspect; its noting of the Director Investigation as concurred by the Director General (dated 20 January, 2016) show that action under Sections 397/398 could not be initiated. Therefore, the possibility of exploring other options was suggested. Ultimately, on 25 February, 2016, the decision to initiate investigation under Section 212 (1) (c) was taken.

57. The above discussion illustrates that although on the face of it the allegations seem to suggest that there were serious irregularities in the

conduct of the company. Upon a perusal of the history of the various disputes between Sunair and the VLS, it clear that some allegations were restatements of allegations that have been decided in favour of the Sunair time and again. However, with passage of time, fresh allegations were levelled; the matter was given greater weight because several Members of Parliament expressed concern and sent complaints by members of the public. These ultimately led to the formation of opinion that an older course, initially suggested and contemplated could not be pursued; instead an investigation under Section 212 was favoured as feasible and necessary. Though the reasons are not elaborate, the reference to the fresh material, has to be connected with what ultimately prevailed with the government, which was also prompted to take up, having regard to the repeated queries by the court, which wished it to respond whether it was definitely saying that no investigation was necessary, and if necessary to take appropriate steps in accordance with law. Such orders of the court however, do not amount to directions; they merely prod the government into *deciding what is deemed appropriate.* So seen, the decision was taken after receipt of fresh materials, in mid-2015, ultimately by the impugned order.

58. Sunair contended that the conclusion of these disputes acts as a bar on any further investigations on these grounds as it amounts to double jeopardy, violative of Article 20 of the Constitution of India. In the case of *Raja Narayanlal Bansilal v Maneck Phiroz Mistry* [1961 SCR 417] a five-judge bench of the Supreme Court was called upon to adjudicate on the applicability of Articles 20(2) and 20(3) to investigations that were ordered into the affairs of the appellant-company. Specifically, the question before

the court was whether an investigation could be conducted into offences that were previously disclosed and raised in a different forum and whether the search and seizure provisions, requiring a company to produce documents over the course of the investigation amounted to compelled testimony, in contravention of the right against self-incrimination, the court observed:

> *"The investigation carried on by the inspectors is no more than the work of a fact-finding commission. It is true that as a result of the investigation made by the inspectors it may be discovered that the affairs of the company disclose not only irregularities and malpractices but also commission of offences, and in such a case the report would specify the relevant particulars prescribed by the circular in that behalf. If, after receiving the report, the Central Government is satisfied that any person is guilty of an offence for which he is criminally liable, it may, after taking legal advice, institute criminal proceedings against the offending person under Section 242(1); but the fact that a prosecution may ultimately be launched against the alleged offender will not retrospectively change the complexion or character of the proceedings held by the inspector when he makes the investigation. […]. The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an*

investigation which starts with an accusation contemplated in Article 20(3) of the Constitution."

59. It is, therefore, evident that the fact that the complaints on the basis of which the investigation was ordered related to offences that had already been considered in others does not by itself render the investigation illegal or in violation of Article 20. This court notes that the learned Single Judge came to the same conclusion while rejecting the Appellant's argument relying on the protection against double jeopardy. The learned Single Judge observed that:

"*60. Lastly, the submission made on behalf of the Petitioner Company that the impugned order is tantamount to double jeopardy, cannot be countenanced, inasmuch as, the formation of the opinion by the Respondent No.l was founded on fresh material received by them, post the year 2013, from other sources as well.*"

60. This court concurs with the conclusions of the learned single judge on the issue of double jeopardy. In our opinion it is the nature of investigations into the affairs of a company that render Article 20 inapplicable and not the fact that the complaints were recent. Even though the conclusion of the various disputes are not a bar on further investigations, they certainly form part of the material that would have to be examined before an order of investigation is passed under Section 212. In the opinion of this court an order of investigation under Section 212, nonetheless cannot be ordered casually. The duty to exercise discretion judiciously obliged the Central Government to examine the multiplicity of judgements that were available in the public domain (most of which the Ministry was directly a party to) relating to the allegations and to form an opinion in good faith that there was

a need for further investigation. It was imperative for the Ministry to peruse all these documents and to record reasons as to why the abovementioned judicial decisions were not conclusive of the issue, necessitating further investigation. Neither the material filed in the counter-affidavit nor the text of the order provides any evidence that the Ministry of Corporate Affairs looked into these materials. One of two possibilities, therefore, present themselves:

(a) either the Ministry failed to consider the relevant material, rendering the order illegal for insufficiency of material/failure to consider relevant material, or

(b) the Ministry considered the material and failed to provide any reasons whatsoever as to disagree with the conclusions reached therein, rendering the order illegal for a failure to apply their mind to the material.

61. The power to investigate the affairs of a company cannot be used casually.

62. In the 2013 Act however both Section 210 and Section 212 confer powers on the Central Government to order an investigation on almost similar grounds as enumerated in the three sub-clauses. An investigation under Section 210 can be conducted by investigating officers appointed by the Government, who derive their powers of investigation from Section 217. On the other hand, it is important to note that the SFIO is a body comprising experts in the field of forensic audits, taxation, banking etc. Further, the SFIO derives its powers of investigation under Section 212 and has been given far greater powers to investigate the affairs of the company, rather than that would be available to investigations conducted under Section 210. For

instance, when a case has been assigned to the SFIO, no other agency may investigate the affairs of the company and all files concerning the affairs of the company should be transferred to the SFIO. Further, certain offences if discovered in the course of an SFIO investigation, bail would only be made available at a much higher threshold than under Section 437 of the Criminal Procedure Code. The SFIO is also bestowed with greater powers of arrest. Upon completion of the investigations by the SFIO it must submit its report to the Central Government upon which the Government may direct it to initiate prosecution against the officers of the Company. Although the constitutional validity of Section 212 is not presently under challenge in the present petition, based on the above observations by Justice Shelat in *Barium Chemicals (supra)*, there ought to be a higher threshold of severity and scrutiny before the SFIO may be assigned a case. In the absence of a higher threshold Section 212 courts the risk of falling foul of Article 14 and an interpretation that renders a provision invalid ought to be avoided.

63. This court further notes that the existence of public interest in the present case is a condition precedent to the exercise of power under Section 212.One of the judges (Justice Bachawat), in his judgement in *Rohtas Industries (supra)* observed:

> *"In construing statutory provisions of this description, the actual words used and their subject-matter are of the utmost importance. Thus if the statute provides that "if in the opinion of the Provincial Government it is necessary or expedient to do so the Provincial Government may, by order in writing requisition any land for any public purpose", the existence of the public purpose but not its necessity or expediency is justiciable, see Province of Bombay v. K.S. Advani [(1950) SCR 621] . The reason is that the factual existence of the public*

purpose is by the language of the section a condition precedent of the requisition."

64. It is unnecessary in the present case to exhaustively enumerate the bounds of "public interest" in Section 212. Nevertheless, this court notices that Sunair is a private company closely held by its 44 shareholders. The UOI stated that the involvement of public institutions in furnishing loans to Sunair is sufficient to prove the existence of public interest. This could be a relevant factor, given that the allegations are connected with the use and diversion of those funds. The Bombay High Court in *Parmeshwar Das* however, took a different view.

65. The SFIO's report of 31st October 2016 is on the record. It details the various allegations levelled against Sunair, the charge sheet filed by the police with respect to allegations of forgery, conspiracy and fabrication of record and states that the funds of Sunair were siphoned off, *"by transferring them through various shell/dummy companies of Delhi & Kolkata on the basis of large-scale bogus transactions, fabricating documents and fabrication of books of accounts."* The report also indicts the statutory auditors for having dishonestly and fraudulently falsified the Annual Financial Statements of Sunair with false records of shareholders. The promoters of Sunair and family members, the report suggested, *"rotated Rs 1 crore 21 times to get the majority shares of SHL (Sunair) fictitiously held by approx. 350 shareholders* "through other intermediary companies. According to the SFIO report identities from the general public were personated to allot the shares of Sunair in fictitious names; these shares were later transferred to Trans Asia Consultants P Ltd *via* Bindal Estate Pvt. Ltd.

Further *"Loans were secured from Axis Bank Ltd, which accepts deposits from general public, after using duplicate certificates or share certificates divided from the shares lying as seized property with the Income Tax Department. Thus, these loans were secured fraudulently."* The report was given shape after going through a mass of 40,000 pages of materials, by a four-member SFIO team.

66. For the above reasons, i.e the materials which were on the record of the Central Government when it did issue the impugned order under Section 212 of the Companies Act – and given the report of the SFIO (which is, of course *post* such order) this court is of the opinion that there is no infirmity with the impugned judgment. The appeal is, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JANUARY 7, 2019