

2023:DHC:9243



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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 17th October, 2023

Pronounced on: 21st December, 2023

+ W.P.(CRL) 1891/2023 CRL.M.A. 17499/2023(Stay)

R.K. GUPTA & ORS.

..... Petitioner

Through: Mr. N. Hariharan, Senior Advocate
with Ms. Ranjana Roy Gawai, Ms.
Vashudha Sen, Mr. Vineet Wadhwa,
Mr. Sharian Mukherji, Mr. Mueed
Shah, Ms. Punya Rekha Angara and
Mr. Prateek Bhalla, Advocates.

versus

UNION OF INDIA THROUGH MINISTRY OF CORPORATE
AFFAIRS & ANR.

..... Respondents

Through: Mr. Amit Tiwari, Senior Panel Counsel
Mr. Chetanya Puri, Government
Pleader
Mr. Nitin Agnihotri, Prosecutor for the
SFIO with Mr. Shriram Tiwary,
Mr. Salman Razi, Mr. Upanshu,
Mr. Nitin Agnihotri, Advocates.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') seeks the following prayers:

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- i. Quash/set aside the Investigation Report dated 06.05.2022 submitted by respondent no. 2/Serious Fraud Investigation Office titled ‘Investigation Report of Bhushan Power & Steel Limited & Others’ and all consequent proceedings emanating therefrom.
- ii. Quash/set aside sanction letter dated 19.05.2022, i.e., F.No. LEGAL-35/15/2022 issued by respondent no. 1/Ministry of Corporate Affairs granting sanction to the Serious Fraud Investigation Office for initiating Prosecution.
- iii. Quash the complaint dated 19.05.2022 filed by the Serious Fraud Investigation Office before the Court of the learned Additional Sessions Judge – 03 and Special Judge (Companies Act), Dwarka District Courts, Delhi.
- iv. Set aside summoning order dated 20.09.2022 passed by the learned Special Judge in CC No. 374/2022 titled ‘SFIO v. Bhushan Airways Services Private Limited and Others’.
- v. Restrain the Serious Fraud Investigation Office from carrying out any further investigation into the affairs of Bhushan Power and Steel Ltd. (‘BPSL’) and Others under order F.No. 5/5/2016-CL-II dated 03.05.2016 issued by the Ministry of Corporate Affairs.

Background

2. Briefly stated, the facts of the present case, necessary for adjudication of the present petition, are as under:

- i. Respondent no. 1/Ministry of Corporate Affairs (‘MCA’), in exercise of powers under Section 212(1)(c) of the Companies Act, 2013 (‘the

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- Act’), *vide* F.No. 5/5/2016-CL-II dated 03.05.2016 ordered an investigation into the affairs of 15 companies named in the said order.
- ii. *Vide* orders dated 12.05.2016, 30.08.2019, 31.12.2020 and 28.10.2021, respondent no. 2/Serious Fraud Investigation Office (‘SFIO’), appointed/notified a team of inspectors to carry out the investigation.
 - iii. During the course of investigation, in view of the order dated 03.05.2016, the SFIO, *vide* its letter dated 27.12.2017 sought approval for investigation into the affairs of 20 additional companies, in terms of Section 219(c) of the Act. In addition to the above, the SFIO also sought approval to investigate the affairs of 46 other companies.
 - iv. On 08.01.2018, the MCA, authorized inspectors of the SFIO to investigate into the affairs of all the aforesaid 66 companies, as sought by the SFIO.
 - v. On 06.05.2022, the SFIO submitted its Investigation Report under Section 212(12) of the Act titled ‘Investigation Report of Bhushan Power & Steel Limited & Others’.
 - vi. On 19.05.2022, the MCA issued a sanction letter, directing the SFIO to initiate prosecution against the petitioners for commission of offences under the Act.
 - vii. On the same day, i.e., on 19.05.2022, the SFIO filed a complaint, i.e., CC No. 374/2022 titled ‘Serious Fraud Investigation Office v. Bhushan Airways Services Pvt. Ltd.’ before the Court of the learned Additional Sessions Judge – 03 and Special Judge (Companies Act), Dwarka District Courts, Delhi.

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- viii. In the said complaint, petitioner no. 1/R.K. Gupta was arrayed as accused no. 45 for commission of offences under Sections 447, 36(c), 448 read with Sections 447 and 129 of the Companies Act; Sections 417, 420, 120B of the Indian Penal Code, 1860 ('IPC') and Section 211 read with Section 628 of the Companies Act. Petitioner no. 2/Silver-Star Commercial Company Pvt. Ltd. was arrayed as accused no. 34 for commission of offence under Section 447 of the Companies Act. Petitioner no. 3/Decor Investment and Finance Pvt. Ltd. was arrayed as accused no. 13 for commission of offences under Sections 417, 420, 120B of the IPC and Section 447 of the Companies Act.
- ix. On 20.09.2022, the learned Special Judge took cognizance on the aforesaid complaint and issued summons to the petitioners.

Submissions on behalf of the Petitioners

No Jurisdiction or Legal Sanction/Authority with the SFIO to Investigate Petitioners No. 1 and 2

3. Learned Senior Counsel for the petitioners submitted that as far as petitioners no. 1 and 2 are concerned, the SFIO has no authority to carry out an investigation *qua* them, either in terms of Section 212(1) or Section 219 of the Act. The said provisions provide as under:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.— (1) Without prejudice to the provisions of section 210, 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—

(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;

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(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.”

“219. Power of inspector to conduct investigation into affairs of related companies, etc.— If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of—

(a) any other body corporate which is, or has at any relevant time been the company’s subsidiary company or holding company, or a subsidiary company of its holding company;

(b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;

(c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or

(d) any person who is or has at any relevant time been the company’s managing director or manager or employee, he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.”

3.1. Learned Senior Counsel submitted that the SFIO can carry out an investigation only pursuant to approval granted by the Central Government under Section 212(1) of the Act or pursuant to prior approval sought in terms of Section 219 of the said Act. Attention of this Court was drawn to the order dated 03.05.2016 issued by the MCA in exercise of powers under Section 212(1)(c) of the Act, wherein the SFIO has been authorised to conduct an

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investigation into the affairs of 15 companies. Attention of this Court was further drawn to the order dated 08.01.2018, whereby the MCA has further authorised the SFIO to investigate the affairs of 66 other companies, in terms of Sections 219(b) and 219(c) of the Act. Learned Senior Counsel submitted that petitioners no. 1 and 2 have not been named in either of the said orders and therefore, the SFIO had no authority to investigate them.

3.2. It was submitted that the specific use of the words ‘prior approval’ in Section 219 of the Act indicates that the legislature intended to incorporate a safeguard in order to protect the rights of a person/company and ensure that no investigation is carried out without following the procedure provided for in the said Act.

3.3. Learned Senior Counsel submitted that Section 212(14) of the Act provides for prosecution of a company, its officers or any other persons. It was submitted that to initiate investigation against a company/body corporate, approval is required under Section 212(1), 219(a), 219(b) or 219(c) of the Act, as the case may be and to initiate investigation against an officer of a company or a person, approval under Section 219(d) of the said Act is required. Apart from the aforesaid, there is no other provision in the Act which authorizes an investigation to be carried out by the SFIO and therefore, in absence of such authority in terms of any of the aforesaid provision, the SFIO could not have investigated petitioners no. 1 and 2.

Powers of the SFIO are Restricted to Investigate Offences Under the Companies Act Only

4. Learned Senior Counsel submitted that as per the scheme of the Act as well as the CrPC, the power of the SFIO is limited to carrying out an

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investigation under the Act only and it does not extend to offences under the IPC.

4.1. It was submitted that petitioners no. 1 and 3 have been arrayed as accused for allegedly committing offences under the Act as well as the IPC. Learned Senior Counsel submitted that as per Section 4 read with Section 154 of the CrPC, the power and the jurisdiction to investigate into offences under the IPC only lies with ‘police officer’.

4.2. Attention of this Court was drawn to Sections 212(2) and Section 212(17) of the Act, which provide as under:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.—

(2) Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.

(17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office;

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income-tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.”

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4.3. It was submitted that a perusal of the aforesaid provisions reflects that if the SFIO is investigating into an offence under the Act, no other authority can continue an investigation in respect of such offence under the Act and is further bound to share all the information gathered by it with the SFIO. It is further clear that the SFIO is duty bound to mandatorily share the information and material it has in respect of offences under any other law with such investigating agency or police authority etc. that is investigating/examining the said offence under any other law.

4.4. It was submitted that a conjoint reading of the aforesaid provisions, thus, makes it clear that the SFIO has the authority to investigate offences under the Act only and in the present case, the SFIO overreached its authority inasmuch as it has carried out an investigation in relation to petitioners no. 1 and 3 *qua* offences under the IPC as well. In support of the said contention, reliance was placed on **Manish Rangari and Others v. Union of India and Anr., 2020 SCC OnLine Bom 3226** and **Ashim Maitra and Ors. v. State of West Bengal and Ors., 2008 (3) CHN 143.**

4.5. Learned Senior Counsel for the petitioners further submitted that the Act does not expressly provide that the SFIO is empowered to carry out an investigation in relation to offences under the IPC and what has not been expressly provided in a statute cannot be read into it by way of implication or inference. Reliance was placed on **B. Shankara Rao Badami and Ors. v. State of Mysore and Anr., (1969) 1 SCC 1** (Para 14), **State of Uttar Pradesh v. Aman Mittal and Anr., (2019) 19 SCC 740** (Paras 29 and 30)

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and **Union of India and Anr. v. Tulsiram Patel, (1985) 3 SCC 398** (Para 70).

Further Investigation by the SFIO is Impermissible

5. Learned Senior Counsel for the petitioners drew the attention of this Court to Section 212(12) of the Act, which provides as under:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.—

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

5.1. It was submitted that even after submitting its Investigation Report on 06.05.2022, the SFIO is conducting a further investigation and issuing summons to various persons in the present case. Learned Senior Counsel for the petitioners submitted that the same is impermissible. It was submitted that a bare reading of Section 212(12) of the Act makes it clear that an Investigation Report can be submitted upon completion of investigation. It was submitted that the learned Special Judge has also taken cognizance of the complaint filed by the SFIO on the premise that the investigation in the present case stands complete. Learned Senior Counsel submitted that the scheme of the Act does not provide for any procedure which authorises the SFIO to continue with a further investigation after the Investigation Report has been submitted. In support of the said contention, reliance was placed on **Vinay Tyagi v. Irshad Ali and Ors., (2013) 5 SCC 762** (Paras 49 and 50).

Judgments Relied upon on behalf of the Petitioners

6. In support of his contentions, learned Senior Counsel for the petitioners placed reliance on the following judgments:

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- i. M/s Frick India Ltd. v. Union of India & Ors. , (1990) 1 SCC 400 - Para 8.
- ii. Ashok Kumar Das v. University of Burdwan, (2010) 3 SCC 616 - Paras 11 to 15.
- iii. U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd., 1995 Supp (3) SCC 456 - Para 6.
- iv. High Court of Judicature for Rajasthan v. P.P. Singh and Anr., (2003) 4 SCC 239 - Para 40.
- v. LIC v. Escorts Ltd., (1985) 1 SCC 264 - Para 63.
- vi. Opto Circuit India Ltd. v. Axis Band & Ors., (2021) 6 SCC 707 - Para 14.
- vii. Nazir Ahmad v. King Emperor, (1936) 38 BOMLR 987.
- viii. Sunny Abraham v. Union of India, 2021 SCC OnLine SC 1284 - Para 13.
- ix. Chandra Kishore Jha v. Mahavir Prasad, AIR 1999 SC 3558 - Para 17.
- x. Institute of Chartered Accountants of India v. L.K. Ratna, (1986) 4 SCC 537 - Paras 2 and 11.
- xi. State of Punjab and Anr. v. Gurdial Singh and Ors., (1980) 2 SCC 471 - Para 9.
- xii. Badrinath v. State of Tamil Nadu and Ors., AIR 2000 SC 3243 - Para 27.
- xiii. State of Kerala v. Puthenkavu N.N.S. Karayogam and Anr., (2001) 10 SCC 191 - Para 9.
- xiv. C. Albert Morris v. K. Chandrasekaran and Ors., (2006) 1 SCC 228 - Para 42.

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- xv. Upen Chandra Gogoi v. State of Assam and Ors., (1998) 3 SCC 381 - Para 6.
- xvi. State of Punjab v. Davinder Pal Singh Bhullar, AIR 2012 SC 364 - Para 107.
- xvii. Yusofalli Mulla v. King Emperor, AIR 1949 PC 264 - Para 14.
- xviii. Manish Rangari and Others v. Union of India and Anr., 2020 SCC OnLine Bom 3226 - Para 7.
- xix. State of Punjab v. Baldev Singh, (1999) 6 SCC 172 - Paras 28 and 55.
- xx. Hussein Ghadially v. State of Gujarat, (2014) 8 SCC 425 - Para 21.3.

Submissions on behalf of the Respondents

Prior Approval under Section 219 of the Companies Act Not Required to Prosecute an Individual or Entity under Section 212(14) of the said Act

7. Learned Senior Panel Counsel appearing on behalf of the SFIO submitted that in order to prosecute a person under Section 212(14) of the Act, prior approval under Section 219 of the said Act is not required.

7.1. Section 212(14) of the Act provides as under:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.—

(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.”

7.2. It was submitted that Section 219 of the Act empowers an inspector appointed under Section 212 of the said Act, to investigate into the affairs of a

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company and if he deems necessary for the purposes of that investigation, investigate also into the affairs of:

- i. any other body corporate:
 - which is or has been a subsidiary of the company
 - which is or has been managed by the same manager or managing director as the company
 - whose board of directors comprises of the nominees of the company or is accustomed to act with the directors or instruction of the company or any of its directors.
- ii. any person who is or has at any relevant time, been the company's managing director or manager or employee.

It was submitted that Section 219 of the Act further provides that such additional/further investigation can only be done with the prior approval of the Central Government.

7.3. Learned Senior Panel Counsel submitted that it has been contended on behalf of the petitioners that in absence of approval in terms of Section 212 of the Act, in order to prosecute any company or person, approval in terms of Section 219 is required. It was submitted that the said contention is incorrect. Learned Senior Panel Counsel submitted that first and foremost, it must be noted that Sections 212 and 219 of the Act operate in different fields. It was submitted that Section 212 of the Act enables an investigation into the affairs of a company which can lead to the submission of an Investigation Report under Section 212(12) of the said Act and/or prosecution under Section 212(14). Therefore, the inference that can be drawn is that approval under Section 212(1) of the Act is mandatory to commence an investigation into the

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affairs of a company. It was submitted that Section 219 enables the SFIO to carry out an investigation into the affairs of any other body corporate (linked to a company *qua* which proceedings have been initiated in terms of Section 212 of the Act), managing director, manager or employee when it is found that such investigation is necessary for the purposes of the investigation into a company in terms of Section 212 of the Act. It was submitted that therefore, Section 219 of the Act is an ancillary provision and required to be invoked only when an investigation is required to be conducted into a company/individual different from one for which approval has been given in terms of Section 212 of the Act. It was submitted that Section 212(14) of the Act, on directions of the Central Government, empowers the SFIO to prosecute a company and its officers or employees or '*any other person directly or indirectly connected with the affairs of the company*'. It was submitted that there is no stipulation for the requirement of a prior approval under Section 212(1) or Section 219 of the Act for investigation into '*any other person directly or indirectly connected with the affairs of the company*'. Therefore, learned Senior Panel Counsel submitted that it would be incorrect to state that prior approval is required for investigating each person, who is sought to be charged.

7.4. Learned Senior Panel Counsel submitted that if the contention of the petitioners regarding requirement of prior approval is accepted, it would reduce the ambit of the phrase '*affairs of the company*' employed in Section 212 of the Act. Additionally, it would also mandate that no transaction between an individual/other entity and a company (for which there is an

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approval under Section 212 of the Act) can be looked into without prior approval under Section 219 of the Act.

7.5. It was submitted that in the facts and circumstances of the case, as set out in the Investigation Report, clearly demonstrate that the decision not to investigate into the affairs of Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 was a proper one, for the following reasons:

- i. The officers of the SFIO, from the forensic reports pertaining to BPSL, noted that a large amount of money was outstanding from various parties and accounted for under the head of '*Advance to Suppliers*' and '*Capital Advances*'.
- ii. Once the money trail was followed, it was found that the parties who has outstanding balances which had been account for as per the books of the BPSL, were entities that had no business relations with BPSL. Money was received by these entities only to provide accommodation entries to BPSL. The money so received was, at the instructions of BPSL personnel, transmitted onward to entities managed and controlled by Sh. Sanjay Singhal. The relevant individuals in control of these entities, i.e, entry operators, admitted to the same in their statements recorded on oath.
- iii. The SFIO found consistent regular transactions carried out across 05 to 06 years with the aforesaid entry operators. In turn, the entry operators transferred the money received from BPSL into entities owned and controlled by Sh. Sanjay Singhal, as '*share application money*' or '*share premium*'. The money received by these entities was then used for various purposes. One such purpose was infusion of funds back into

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BPSL as ‘promoter equity’. Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 was not found to be a regular recipient and was not found to have been used to infuse funds siphoned from BPSL back into BPSL as ‘Promoter equity’.

- iv. Only one instance of a transaction amounting to Rs. 10 Crores was found involving Silver Star Commercial Company Pvt. Ltd./petitioner no. 2. In 2015-16, monies siphoned from BPSL were transferred to Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 as an unsecured loan from the entry operators and the same was then transferred onwards to another entity controlled and managed by Sh. Sanjay Singhal. Moreover, the money received by Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 was simply forwarded to the aforesaid entity. No instance was found of the said money being infused back into the ‘promoter equity’ of BPSL.
- v. However, the fact remains that Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 did receive siphoned funds, which, as per the Investigation Report, were to be used for acquiring property, which did not materialize. Therefore, it cannot be said that Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 was not a beneficiary of siphoned funds.
- vi. SFIO further deemed it irrelevant to look into the affairs of Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 in order to supplement its investigation into BPSL. Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 was only one of the beneficiaries and was therefore, rightly charged for offence under Section 447 of the Act.

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7.6. To demonstrate the difference between the position of Silver Star Commercial Company Pvt. Ltd./petitioner no. 2 and Decor Investment and Finance Pvt. Ltd./petitioner no. 3, learned Senior Panel Counsel placed the following table on record:

S. No	Particulars	Decor Investment and Finance Pvt. Ltd.	Silver Star Commercial Company Pvt. Ltd.
1.	Date of Investigation Order	Ordered <i>vide</i> Order 5/5/2016/CL-II dated 03.05.2016	N.A.
2.	Provision under which investigation was ordered	Section 212(1)(c) of the Act	N.A.
3.	Charges	a) Charge 1, Instance 2 – Siphoning of Funds from BPSL Through Capital Advances. b) Charge 1, Instance 3 – Siphoning of funds from BPSL through Advances to Suppliers. c) Charge 3 – Cheating upon banks liable to be punished under Section 120B/417/420 of the IPC	Charge 1, Instance 8 – Unsecured Loans to Silver Star Commercial Company Pvt. Ltd.
4.	Provision under which charged	Section 447 of the Act and Sections 120B, 417 and 420 of the IPC	Section 447 of the Act.
5.	Gist of the allegations	During the course of investigation, it was found that BPSL's	Silver Star Commercial Company Pvt. Ltd. received INR 10 Crores as

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		books recorded a sum of INR 2606 Crores and INR 470 Crores under the head of “<i>Capital Advances</i>” and “<i>Advances to Suppliers</i>”. • Upon investigation, it was found that the entities whose outstanding balances (payable to BPSL) had been recorded under the aforesaid accounting heads were controlled and managed by entry operators. • The entry operators, on being questioned revealed that they had no commercial relation with BPSL. They received funds from BPSL, provided accommodation entries for the same and transferred those funds to entities controlled and managed by Sh. Sanjay Singhal. • One such entity which received funds from entry operators in the aforesaid manner was Decor Investment and Finance Ltd. Funds were received by Decor	an unsecured loan from various entry operators in FY 2015-2016. These entry operators had, in turn, received monies from BPSL (which were then accounted for as “<i>Advances to Suppliers</i>” and “<i>Capital Advances</i>”). • While the initial purpose of the unsecured loan of INR 10 Crores was for purchase of property, it appears that the amount of INR 10 Crores was transferred onward to BSN Enterprises and an unsecured loan.
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		Investment and Finance Ltd. consistently between 2011-2012, 2012-2013 and 2013-2014 and recorded as infusion of share capital or as share premium. • These funds were then infused into BPSL as promoter contribution.	
6.	Involvement in Fraud	• Used as a vehicle to facilitate the round tripping of funds from BPSL. • Funds siphoned off from BPSL were received by Decor Investment and Finance Pvt. Ltd. Decor then infused the funds siphoned off from BPSL into BPSL as promoter contribution. • Consistent receipt of siphoned funds between 2011-2014 which were then infused into BPSL as promoter contribution.	• This company was a beneficiary of the siphoned funds. • This company was not found to have been consistently receiving funds from entry operators.
7.	Facets of fraud involved	• This entity not only facilitated the round tripping of money, it also duped banks by infusing funds siphoned from BPSL as promoter contribution.	• It is thus arrayed as an accused charged under Section 447 of the Act.

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7.7. It was submitted that the SFIO had approval under Section 212(1)(c) of the Act to investigate Decor Investment and Finance Pvt. Ltd./petitioner no. 3. It was submitted that as far as Mr. R.K. Gupta/petitioner no. 1 is concerned, he was a Key-Managerial Personnel and Company Secretary of BPSL, responsible for control and management of affairs of the said company and therefore, no authority *qua* him was ever required. It was submitted that the requirement of approval under Section 219 of the Act does not extend to a company secretary, who is a ‘Key Managerial Personnel’ defined in Section 2(51) of the Act, as under:

- “(51) —key managerial personnel, in relation to a company, means—
- (i) the Chief Executive Officer or the managing director or the manager;
 - (ii) the company secretary;**
 - (iii) the whole-time director;
 - (iv) the Chief Financial Officer; and
 - (v) such other officer as may be prescribed;”
- (emphasis supplied)

It was submitted that in view of the aforesaid, no approval was sought for investigation *qua* any other Key Managerial Personnel either.

7.8. Without prejudice to the aforesaid arguments, learned Senior Panel Counsel submitted that in the facts and circumstances of the present case, absence of approval, in itself, does not vitiate the investigation and consequent proceedings. Reliance was placed on **Fertico Marketing and Investment Private Limited and Others v. Central Bureau of Investigation and Another, (2021) 2 SCC 525.**

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Power of the SFIO to Investigate Offences under the IPC

8. Attention of this Court was drawn to Sections 212(2) and 436(2) of the Companies Act, which provide as under:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.—

(2) Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.”

“436. Offences triable by Special Courts.—

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.”

8.1. Learned Senior Panel Counsel submitted that the aforesaid provisions are to be constructed harmoniously, in a manner that does not restrict the powers of the SFIO to investigate offences under the Act only. It was submitted that a bare reading of Section 436(2) of the Act reflects that the offences under the Act as well as any other offence with which an accused may be charged under the CrPC, can be tried together, by the Special Court trying the offence under the Act. It was submitted that the said provision gives jurisdiction to the SFIO for investigation, as well as prosecution. Reliance was placed on a judgment of the Hon’ble High Court of Punjab and Haryana

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in **Raj Kumar Modi v. Serious Fraud Investigation Office, 2019:PHHC:133009.**

8.2. Learned Senior Panel Counsel further drew the attention of this Court to a judgment delivered by a coordinate bench in **Ashish Bhalla v. State & Anr., 2023:DHC:6808**, wherein while quashing an FIR and transferring the proceedings thereunder to the SFIO, it was observed and held as under:

“91. Consequently, coming to the end, albeit, before drawing final curtains to the present litigation and conclusions thereon, this Court would like to categorically express that after an overview of the aforesaid factual matrix and legal proposition discussed hereinabove, the investigation (to be) conducted by the EOW pursuant to registration of the subsequent impugned FIR is liable to be quashed as the prior ongoing investigation conducted in the form of SFIO proceedings is arising out of the 2013 Act, which being a Special Act will prevail over the General Act, the IPC. Further due to commonality of the allegations involved, wherein, the subsequent allegations made in the impugned FIR are already subsumed and thus shall be considered by the SFIO during the proceedings conducted by it resulting from the first complaint dated 14.06.2021 made to the MCA.

92. Therefore, the discussions entailed hereinabove has led this Court to the conclusion that the second complaint dated 15.08.2021 to the EOW resulting in registration of the impugned FIR is not maintainable in the current form, moreover, whence the first complaint dated 14.06.2021 and the second complaint dated 15.08.2021 are verbatim and are involving the same set of facts and are against the very same individual(s) and are made by the same complainant i.e., respondent no.2. Further, in view of Section 212(17)(a) read with Section 212(2) of the 2013 Act and based upon all the contentions raised by the learned (senior) counsels for the parties coupled with the documents on record, in the considered opinion of this Court, the impugned FIR is liable to be quashed and transferred to the SFIO as the proceedings thereunder are not maintainable in the eyes of law.”

8.3. In support of the aforesaid contention, learned Senior Panel Counsel for the SFIO further placed reliance on a judgment dated 31.08.2021 passed by a

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learned Single Judge of the Hon'ble High Court of Judicature at Madras in **CRL.OP. 3730/21** titled '**Ravi Parthasarathy and Others v. State and Another**' (Paras 62, 65, 74, 75 and 112). Reliance was further placed on **Serious Fraud Investigation Office v. Rahul Modi and Anr. Etc., 2019 INSC 408** (Para 29).

Rejoinder on behalf of the Petitioners

9. Learned Senior Counsel for the petitioners submitted that Section 219(d) of the Act provides for a requirement of approval in relation to '*any person*', which will include any person related to a company for which prior approval has been given under Section 212 of the Act and therefore, in order to investigate R.K. Gupta/petitioner no. 1, approval was required.

10. Learned Senior Counsel submitted that as far as the power of the SFIO to investigate offences under the IPC is concerned, Section 436(2), though provides that offences under the Act and the IPC can be tried together, but it does not give jurisdiction to the SFIO to investigate offences under the IPC. It was submitted that within the scheme of the Act, the bar on the power of the SFIO to investigate offences other than those under the Act is implicit. In support of the said contention, learned Senior Counsel drew the attention of this Court to Sections 212(15) and 212(17) of the Act.

Analysis and Findings

Jurisdiction or legal sanction/authority with the SFIO to investigate petitioners no.1 and 2

11. Learned Senior Counsel submitted that SFIO could carry out an investigation only pursuant to approval or authority granted by the Central Government under Section 212(1) of the Act or after obtaining prior approval

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in terms of Section 219 of the said Act to conduct an investigation into affairs of related companies. It was pointed out that in the order dated 03.05.2016 issued by the MCA in exercise of powers under Section 212(1)(c) of the Act, the SFIO had been authorised to conduct an investigation into the affairs of the 15 companies and *vide* order dated 08.01.2018 issued by MCA, SFIO had been authorised to conduct an investigation into affairs of 66 other companies in terms of Section 219(b)(c) of the Act. Learned Senior Counsel submitted that admittedly, petitioners no.1 and 2 have not been named in either of the aforesaid order and therefore, the SFIO had no authority to carry out an investigation *qua* them.

12. It was submitted that since the language of Section 219 clearly differentiates between a body corporate and a company. It was urged that the term ‘company’ relates to the company in respect of which a sanction is already accorded under Section 212(1) of the Act, and term ‘body corporates’ relates to explanation provided under 219(a), (b) and (c) of the Act. Thus, the person/individual referred under Section 219 (d) of Act, is to be connected to the company and not the body corporate. It was submitted that that legislative intent is to be construed from the words used in the statute, as per their plain meaning.

13. *Per contra*, learned Senior Panel Counsel for the SFIO submitted that a similar issue was raised before a learned Single Judge of the Hon’ble High Court of Punjab and Haryana in **Raj Kumar Modi v. Serious Fraud Investigation Office, 2019:PHC:133009**, and the same was rejected.

14. Attention of this Court was drawn to Section 212(13) of the Act, according to which on directions of the Central Government, SFIO can

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prosecute a company and its officer or employees or any other person *‘directly or indirectly connected with the affairs of the company’*. It was pointed out that there is no stipulation for requirement of a prior approval under Section 212(1) or Section 219 of the Act for investigation with respect to any other person *‘directly or indirectly connected with the affairs of the company’*.

15. So far as petitioner no. 2 is concerned, learned Senior Panel Counsel submitted that prior approval under Section 219 of the Act is only required with regard to affairs of the company. It was submitted that investigation by SFIO is *‘affairs centric’*. It was submitted that in the facts and circumstances of the present case, SFIO took a conscious decision not to investigate into the affairs of petitioner no. 2. It was submitted that since the affairs of petitioner no. 2 were not investigated, there was no requirement for approval under Section 219 of the Act. As regards, petitioner no. 1, it was stated that he was a *‘Key Managerial Personnel’* as the Company Secretary of BPSL and was responsible for control and management of the affairs of the said company.

16. Section 219 of the Act has the heading *‘Power of inspector to conduct investigation into affairs of related companies, etc.’*. The said provision relates to the following entities:

- a. any other body corporate which is, or has at any relevant time been the company’s subsidiary company or holding company, or a subsidiary company of its holding company;
- b. any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or

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was, at the relevant time, the managing director or the manager of the company;

- c. any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors;
- d. any person who is or has at any relevant time been the company's managing director or manager or employee.

17. The contention of learned Senior Counsel on behalf of the petitioners is that the case of petitioner no. 1 would come under Section 219(d) of the Act and therefore, prior approval in terms of the said provision was required. The heading of Section 219 of the Act, as reproduced hereinabove, reflects that the said provision relates to role of certain 'related' companies, which has surfaced during the course of investigation being conducted under Section 212 or other provisions of the Act and therefore, approval would be required in terms of Sections 219(a), (b) and (c) of the Act. The provision of Section 219(d) of the Act has to be construed by applying the rule of *ejusdem generis*. A Constitution Bench of the Hon'ble Supreme Court, in **Kavalappara Kottarathil Kochuni @ Moopil Nayar v. States of Madras and Kerala and Others, 1958 SCC OnLine SC 12**, while explaining the said rule, held as under:

“52...The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided case that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary....”

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In the present case, it is reasonable to construe the aforesaid clauses (a), (b) and (c) of Section 219 of the Act as constituting a distinct category or class, i.e., ‘related companies’. The language and the object behind the aforesaid clauses is with respect to investigation of affairs of a company other than the company for which investigation has been ordered under Section 212 of the Act. In that context, clause (d) of Section 219 of the Act will apply to a ‘Managing Director’ or ‘Manager’ or ‘Employee’ of the company referred to in clauses (a), (b) and (c) of the said Section.

18. If the argument of the learned Senior Counsel for the petitioners is accepted to the extent that Section 219(d) of the Act would apply to the Managing Director, Manager or employee of the company, for whom approval has been given under Section 212 of the Act, then in case if the inspector, if after approval being given with regard to investigation of the ‘related’ companies mentioned under Section 219(a), (b) or (c), comes across role of Managing Director, Manager or employee of the said ‘related’ companies, then no prior approval for investigation would be required. In other words, protection has been given only to the Managing Director or Manager or employee of the company being investigated under Section 212 of the Act and not for the Managing Director or Manager or Employee of the companies being investigated under Section 219 (a), (b) or (c) of the Act. The aforesaid position is not acceptable. In the considered opinion of this Court, once an approval has been given under Section 212 of Act to investigate into the affairs of a company, the same would also relate to a Managing Director or Manager or Employee of the said company. The pre-condition of a prior approval under Section 219 of the Act applies to related companies and their

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Managing Director, Manager or employees as provided for in the said Section. It is further pertinent to note that petitioner no.1, being a 'Key Managerial Personnel' in terms of Section 2(51) of the Act would not need a separate approval for purposes of investigation in terms of Section 219(d) of the Act. The provisions of Section 219(d) of the Act as explained hereinabove would not cover the case of petitioner no.1.

19. It is an admitted case that petitioner no.3 was mentioned in the original order dated 03.05.2016 issued by the MCA under Section 212 of the Act. So far as petitioner no.2 is concerned, it is the case of the SFIO that since the affairs of the company were not being investigated, therefore, no approval was required in terms of Section 219(a) of the Act. It is the case of SFIO that since there was only a single transaction in relation to BPSL with petitioner no.2, therefore, there was no need to investigate into the affairs of the said company. 'Affairs of the company' has not been defined in the Act but in the ordinary meaning of the phrase, the same would include all aspects and transactions of the company.

20. As per the complaint filed by the SFIO, the allegations with regard to petitioners no. 2 and 3 are as under:

4.13.14 On Investigation, it is found that Sanjay Singal in connivance with R.P. Goyal, Alkesh Sharma and Entry operators siphoned off the funds from BPSL in the form of Advances to Suppliers and cash generated from sale of goods siphoned off from BPSL and introduced the same in the accounts of Adarsh Infotech Pvt Ltd and BSN Enterprises Pvt Ltd. through various paper companies of Kolkata and Delhi. The funds siphoned off from BPSL were used to purchase immovable property from BPSL at Flat No. 109 to 112 at International Trade Tower, Nehru Place, New Delhi by Shree Ankleshwar Commercial Company Pvt Ltd. The directors of Shree Ankleshwar are/were employee of BPSL/Sanjay Singal.



This company is found to be managed and controlled by Sanjay Singal which he has also admitted on oath.

Similarly, Silver Star Commercial Company Pvt. Ltd. is also managed and controlled by San jay Singal. From the examination of balance sheet as on 31.03.2017 (Note-17.12), *the company has taken unsecured loan from Corporate bodies for purchase of immovable property and the payment was made as advance directly to third party on its behalf.* The company has shown receipt of loan of Rs. 10 crore during F.Y. 2015-16, details of which are as under:

Name of the party	Loan Taken by Silver-Star Commercial (amt in crore)
Bhima Agencies Pvt. Ltd.	0.20
K.G. Finvest Pvt. Ltd.	1.00
Rootstar Merchandise Pvt. Ltd.	3.00
Sarvottam Securities Pvt. Ltd.	4.00
Wincliff Technologies Pvt. Ltd.	0.80
Jagdhara Dealcom Pvt. Ltd.	1.00
Total	10.00

The aforesaid extract, as quoted hereinabove, from the complaint filed by the SFIO clearly shows that the affairs of the company were ‘investigated’ into *qua* petitioner no. 2 and the aforesaid allegation would cover the case of petitioner no. 2 under Section 219(c) of the Act. However, the effect of not taking such prior approval would not *ipso facto* render the cognizance taken *qua* petitioner no. 2 by learned Special Court as invalid. It is the case of the SFIO that prior sanction for prosecution with respect to petitioner no. 2 had been obtained under Section 212(14) of the Act. It is settled law that defective investigation would not render cognizance taken by the learned Special Court

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as invalid. In **Fertico Marketing (*supra*)**, while examining an issue with regard to validity of investigation without approval of the State Government under Section 6 of the Delhi Special Police Establishment Act, 1946, the Hon'ble Supreme Court observed and held as under:

“22. As early as in 1955, the question arose for consideration before this Court, as to whether an investigation carried out by a police officer below the rank of Deputy Superintendent of Police, under Section 5(4) of the Prevention of Corruption Act, 1947, without the order of the Magistrate of First Class, was mandatory or directory? While holding that the provision is mandatory, this Court considered a question as to whether and to what extent, the trial which follows such investigation, is vitiated. The Court in *H.N. Rishbud v. State of Delhi* [*H.N. Rishbud v. State of Delhi*, (1955) 1 SCR 1150 : AIR 1955 SC 196 : 1955 Cri LJ 526] , observed as under : (AIR p. 204, para 9)

“9. ... If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in *Parbhu v. King Emperor* [*Parbhu v. King Emperor*, 1944 SCC OnLine PC 1 : (1943-44) 71 IA 75 : AIR 1944 PC 73] and *Lumbhardar Zutshi v. R.* [*Lumbhardar Zutshi v. R.*, 1949 SCC OnLine PC 64 : (1949-50) 77 IA 62 : AIR 1950 PC 26]

These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.”



It could thus be seen that this Court has held that the cognizance and the trial cannot be set aside unless the illegality in the investigation can be shown to have brought about miscarriage of justice. It has been held that the illegality may have a bearing on the question of prejudice or miscarriage of justice but the invalidity of the investigation has no relation to the competence of the court.

23. It will also be apposite to note the following observations of this Court in *State of Karnataka v. Kuppuswamy Gownder* [*State of Karnataka v. Kuppuswamy Gownder*, (1987) 2 SCC 74 : 1987 SCC (Cri) 280] , while considering the provisions of Section 465 CrPC : (SCC pp. 79-80, para 14)

“14. The High Court, however, observed [*Kuppuswamy Gownder v. State of Karnataka*, 1981 SCC OnLine Kar 220 : (1981) 2 Kant LJ 509] that provisions of Section 465 CrPC cannot be made use of to regularise this trial. No reasons have been stated for this conclusion. Section 465 CrPC reads as under:

‘465. Finding or sentence when reversible by reason of error, omission or irregularity.—(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.’

It is provided that a finding or sentence passed by a court of competent jurisdiction could not be set aside merely on the ground of irregularity if no prejudice is caused to the accused. It is not disputed that this question was neither raised by the accused at the trial nor any prejudice was pleaded either at the trial or at the appellate stage and therefore in the absence of any prejudice such a technical objection will not affect the order or sentence passed by the



competent court. Apart from Section 465, Section 462 provides for remedy in cases of trial in wrong places. Section 462 reads as under:

‘462. Proceedings in wrong place.—No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong Sessions Division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.’

This provision even saves a decision if the trial has taken place in a wrong Sessions Division or sub-division or a district or other local area and such an error could only be of some consequence if it results in failure of justice, otherwise no finding or sentence could be set aside only on the basis of such an error.”

24. This Court in *Union of India v. Prakash P. Hinduja* [*Union of India v. Prakash P. Hinduja*, (2003) 6 SCC 195 : 2003 SCC (Cri) 1314] , while relying on the judgment of this Court in *H.N. Rishbud* [*H.N. Rishbud v. State of Delhi*, (1955) 1 SCR 1150 : AIR 1955 SC 196 : 1955 Cri LJ 526] , has observed thus : (*Prakash P. Hinduja case* [*Union of India v. Prakash P. Hinduja*, (2003) 6 SCC 195 : 2003 SCC (Cri) 1314] , SCC p. 210, para 21)

“21. ... The Court after referring to *Parbhu v. King Emperor* [*Parbhu v. King Emperor*, 1944 SCC OnLine PC 1 : (1943-44) 71 IA 75 : AIR 1944 PC 73] and *Lumbhardar Zutshi v. R.* [*Lumbhardar Zutshi v. R.*, 1949 SCC OnLine PC 64 : (1949-50) 77 IA 62 : AIR 1950 PC 26] held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial. This being the legal position, even assuming for the sake of argument that CBI committed an error or irregularity in submitting the charge-sheet without the approval of CVC, the cognizance taken by the learned Special Judge on the basis of such a charge-sheet could not be set aside nor could further proceedings in pursuance thereof be quashed. The High Court [*Prakash P. Hinduja v. Union of India*, 2002 SCC OnLine Del 679 : (2002) 64 DRJ 34] has clearly erred in setting aside the order of the learned

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Special Judge taking cognizance of the offence and in quashing further proceedings of the case.”

25. It could thus be seen that this Court held that even for the sake of argument that CBI had committed an error or irregularity in submitting the charge-sheet without the approval of CVC, the cognizance taken by the learned Special Judge on the basis of such a charge-sheet, would not be set aside nor could further proceedings in pursuance thereof be quashed.”

21. It is a matter of record that subsequent sanction has been obtained from the Central Government before filing the complaint by the SFIO in terms of Section 212(14) of the Act. Petitioner no. 2 is being prosecuted for a single transaction, as explained above. It is always open for petitioner no. 2, during the course of trial, to demonstrate that prejudice leading to a miscarriage of justice has been caused on account of not obtaining approval under Section 219(c) of the Act.

Powers of SFIO restricted to investigate offences under the Companies Act only

22. Learned Senior Counsel submitted that as per the scheme of the Act as well as the CrPC, the power of SFIO is limited to carry out an investigation for offences under the Act only and therefore, investigation and subsequent complaint filed under the various provisions of the IPC is not maintainable. Attention of this Court was drawn to Sections 4 and 154 of the CrPC, which provide as under:

“4. Trial of offences under the Indian Penal Code and other laws.—

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but



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

“**154. Information in cognizable cases.**—(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:...”

23. It was pointed out that petitioners no.1 and 3 have been arrayed as accused for alleged commission of offences under the under the IPC as well. A conjoint reading of the aforesaid provisions of the CrPC makes it apparent that only an officer in-charge of a police station can commence an investigation under the IPC. It was submitted that such a power has not been given to any of the officers of the SFIO. Reliance was placed on **Manish Rangari (supra)** wherein it has been held as under:

“7. I have carefully considered the rival submissions and perused the application and the documents placed on record by the applicants. Having done so, I am of the prima facie, view that the contentions raised by the applicants have merit. Prima facie, it appears that while passing the impugned Order dated 29/07/2019 taking cognizance of offence against the applicants, the learned Special Court failed to take judicial notice of the following legal aspects which go to the root of the matter, thus rendering the impugned Order vulnerable.

- (a) The various offences under the 2013 Act of which cognizance has been taken came into force only with effect from 12/09/2013 (Section 449) and 01/04/2014 (Section 129 and 217), whereas the underlying alleged violations at NSEL’s exchange platform have all occurred on or before 31st July 2013 as per SFIO’s own complaint filed before the learned Special Court. Prima facie, therefore, prosecution of the applicants under the 2013 Act

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appears to be impermissible under Article 20(1) of the Constitution of India.

- (b) **As per Section 212(2) of the 2013 Act, prima facie it is seen that the SFIO has jurisdiction to investigate offence under the said Act only. Hence, the SFIO's investigation and subsequent complaint for offences under the Penal Code, 1860 and under the 1956 Act prima facie appears to be without jurisdiction. A contrary interpretation would permit the SFIO to encroach upon investigating powers of other investigating agencies under other laws, which cannot be the intention of the legislature.**
- (c) For the same underlying transactions arising out of the NSEL payment defaults, the NSEL and others are already facing prosecution for offences under the Penal Code, 1860 before the learned MPID Court and the learned CBI Court, Mumbai. Similarly, for various violations under the 1956 Act discovered during inspection of NSEL by the Central Government, the NSEL and others are already facing prosecution before the learned Metropolitan Magistrate, Girgaon, Mumbai on complaints filed by the Registrar of Companies. This factual position has not been disputed by the other side. That being so, the subsequent prosecution of the NSEL and others for the same underlying transactions appears to be in breach of the embargo against "double jeopardy" under Article 20(2) of the Constitution of India and Section 300 of the Cr. P.C.
- (d) Further, prima facie, I find merits in the submission of the learned Counsel for the applicants that once the Honourable Supreme Court, vide its Judgment dated 30/04/2019 in Civil Appeal No. 4476 of 2019 in *63 Moons Technologies Ltd.* (supra) has held that there is no public interest involved in recovery of the dues of the traders who allegedly lost monies due to counter party defaults on the exchange platform of the NSEL, the entire jurisdictional basis of the SFIO investigation, which was ordered by the Central Government in the purported "public interest" vide its Order dated 28th October 2016, has ceased to exist. In view thereof, the SFIO Investigation Report dated 31st August 2018 and the subject complaint filed by the SFIO before the learned Special Court, appear to be without jurisdiction. Impugned Order, as such,

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becomes vulnerable, at least prima facie, case for consideration is, as such, made out.”

(emphasis supplied)

24. *Per contra*, learned Senior Panel Counsel on behalf of the respondent submitted that provisions of Section 212(2) and Section 436(2) of the Act are to be constructed harmoniously in a manner that does not restrict the power of SFIO to investigate offences under the Act only. It was pointed out that Section 436(2) of the Act gives power to the learned Special Court to try an offence other than the offences under the Act at the same trial and that would give jurisdiction to the SFIO for investigation as well as prosecution for offences punishable under the IPC. Reliance was placed on a judgment passed by a coordinate bench of this Court in **Ashish Bhalla (supra)**, wherein an FIR registered by the Economic Offences Wing on the basis of a similar allegations which were part of an ongoing investigation being conducted by SFIO was quashed on the ground that since the Companies Act is a special act, the same would prevail over the general act, i.e., the IPC. It was further held, in Para 91, that *“Further due to commonality of the allegations involved, wherein, the subsequent allegations made in the impugned FIR are already subsumed and thus shall be considered by the SFIO during the proceedings conducted by it resulting from the first complaint dated 14.06.2021 made to the MCA.”*

25. Learned Senior Counsel, in rejoinder, submitted that Section 436(2) of the Act does not give jurisdiction to the SFIO to investigate offences under the IPC. It was further submitted that said bar is implicit in the Act itself.

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Attention of this Court was drawn to Sections 212(15) and 212(17) of the Act, which provide as under:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.—

(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).

(17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office;

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income-tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.”

26. For the purpose of adjudication of the present issue, the relevant provisions of the Act as well as the CrPC have to be read harmoniously. Under Section 438 of the Act, it is provided that the CrPC shall apply to the proceedings before the learned Special Court. The said provision provides as under:

“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

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and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.”

Similarly, Section 436(2) of the Act, provides as under:

“436. Offences triable by Special Courts.—

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.”

Section 4 of the CrPC provides as under:

“4. Trial of offences under the Indian Penal Code and other laws.—

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.”

It is pertinent to note that Section 4(2) of the CrPC provides that investigation into offences under other statutes, like the present Act, shall be done in accordance with the CrPC unless the statute provides for otherwise. Section 212(15) of the Act provides that an investigation report filed before the learned Special Court shall be treated as a report filed by a police officer under Section 173 of the CrPC. Section 173(2) of the CrPC provides that as soon as the investigation is complete *“the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government”*.

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27. In view of the aforesaid provision, the investigation report within the scheme of the Act will be treated as a police report, therefore, the officer filing the said report shall also be considered an officer in charge of a police station, although not specifically provided for in the said Act. The said position is further fortified by the fact that if power has been given to the learned Special Court under Section 436(2) of the Act to try offences other than those under the Act, then the power of the SFIO to investigate into such offences cannot be restricted. If during course of investigation under the present Act, the concerned Investigating Officer comes across commission of offences punishable under the IPC or any other law relating to the transactions being investigated, then the same cannot give rise to distinct proceedings. Such investigation can be carried out under Section 4(1) of the CrPC. If the report which is subsequently filed is to be treated as a police report under Section 173(2) of the CrPC, then the officer, as explained hereinabove, is to be considered to be vested with powers of an ‘officer in charge of a police station’.

28. From a conjoint and harmonious reading of the aforesaid provisions of the CrPC and the present Act, it cannot be said that the SFIO is barred from investigating an offence under the IPC.

Further Investigation by the SFIO

29. In line with the aforesaid observation, the contention of learned Senior Counsel for the petitioner that there can be no further investigation and supplementary chargesheet once an investigation report is filed by the SFIO is also not tenable as Section 173(8) of the CrPC clearly provides for further investigation, as under:

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“173. Report of police officer on completion of investigation.—

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).”

It is further pertinent to note that this Court has perused the record and does not find any document to show that after the learned Special Court has taken cognizance on 20.09.2022, the petitioners herein have been asked to join any further investigation by the SFIO.

Conclusion

30. In view of the above discussion, the conclusions of this Court can be summarized as under:

- i. Petitioner no.1, being a ‘Key Managerial Personnel’ in terms of Section 2(51) of the Act would not need a separate approval for purposes of investigation in terms of Section 219(d) of the Act. The provisions of Section 219(d) of the Act as explained hereinabove would not cover the case of petitioner no.1.
- ii. Since the complaint itself reflects that investigations were conducted with respect to the affairs of petitioner no. 2, the same would be covered under the provisions of Section 219 of the Act. However, the effect of not taking such prior approval would not *ipso facto* render the cognizance taken *qua* petitioner no. 2 by learned Special Court as invalid.

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- iii. From a conjoint and harmonious reading of the relevant provisions of the CrPC and the present Act, as quoted hereinabove, it cannot be said that the SFIO is barred from investigating an offence under the IPC.
- iv. SFIO is not barred from conducting a 'further investigation' in accordance with law.
- 31. In view of the above, the present petition is dismissed and disposed of accordingly.
- 32. Pending applications, if any, also stand disposed of.
- 33. Interim order dated 19.07.2023 stands vacated.
- 34. Needless to state, nothing stated hereinabove is an opinion on the merits of the case.
- 35. Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

DECEMBER 21, 2023/sn