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IN THE SUPREME COURT OF INDIA
CRIMINAL/CIVIL APPELLATE JURISDICTION
M.R. SHAH; J., M.M. SUNDRESH; J.
CRIMINAL APPEAL NOS.2305-2307 OF 2022; MAY 03, 2023
Union of India and Another *versus* **Deloitte Haskins and Sells LLP & Anr.**

Companies Act, 2013; Section 140(5) - Challenge to the constitutional validity of section 140(5) fails - Section 140(5) is neither discriminatory, arbitrary and/or violative of Articles 14, 19(1)(g) of the Constitution of India, as alleged - The application/proceedings under section 140(5) of the Act, 2013 is held to be maintainable even after the resignation of the concerned auditors. *(Para 16)*

WITH CRIMINAL APPEAL NOS. 2302-2303 OF 2022, CIVIL APPEAL NO. 793 OF 2022, CRIMINAL APPEAL NO. 2298 OF 2022, CIVIL APPEAL NO. 801 OF 2022, CRIMINAL APPEAL NO. 2299 OF 2022, CIVIL APPEAL NO. 877 OF 2022, CRIMINAL APPEAL NO. 2300 OF 2022, CRIMINAL APPEAL NO. 2304 OF 2022

For Parties Ms. Misha Rohatgi, AOR Ms. Suveni B., Adv. Ms. Ayushi Sharma, Adv. Mr. Nakul Mohata, Adv. Mr. Bharat Monga, Adv. Mr. Devansh Shrivastava, Adv. ms. Riya Dhingra, Adv. Mr. Mohd. Ovais, Adv. Mr. Mahesh Agarwal, Adv. Mr. Rishi Agrawala, Adv. Mr. Rahul Dwarkadas, Adv. Ms. Prachi Dhanani, Adv. Ms. Rishika Harish, Adv. Ms. Niyati Kohli, Adv. Ms. Juhi Bahirwani, Adv. Mr. Pratham Vir Agarwal, Adv. Ms. Rohini Jaiswal, Adv. Ms. Manavi Agarwal, Adv. Mr. E. C. Agrawala, AOR Mr. Tushar Mehta, SG Mr. Balbir Singh, A.S.G. Mr. Aditya Sikka, Adv. Mr. Naman Tandon, Adv. Mr. Samarvir Singh, adv. Mr. Kanu Agarwal, Adv. Mr. Vikash Jha, Adv. Vasudha Vijayshree, Adv. Ritu Anand, Adv. Pratyush Srivastava, Adv. Ms. Sansriti Pathak, Adv. Ms. Bani Dikshit, Adv. Mr. Arvind Kumar Sharma, AOR Mr. Chandra Prakash, AOR Ms. Anannya Ghosh, AOR Mr. Mahesh Agarwal, Adv. Mr. Rishi Agrawala,, Adv. Mr. Rahul Dwarkadas, Adv. Ms. Prachi Dhanani, Adv. Ms. Rishika Harish, Adv. Ms. Niyati Kohli, Adv. Ms. Juhi Bahirwani, Adv. Mr. Pratham Vir Agarwal, Adv. Ms. Rohini Jaiswal, Adv. Ms. Manavi Agarwal, Adv. Mr. E. C. Agrawala, AOR Mr. Aaditya Aniruddha Pande, AOR Mr. Sachin Patil, AOR Ms. Misha Rohatgi, AOR

J U D G M E N T

M.R. SHAH, J.

Appeals under consideration:

1. This batch of Criminal Appeals/Civil Appeals raise common question(s) of law pertaining to the interpretation of Section 140(5) of the Companies Act, 2013 (hereinafter referred to as the 'Act, 2013') and the Investigation Report dated 28.05.2019 (hereinafter referred to as the 'IFIN SFIO Report') in respect of IL&FS Financial Services Limited (hereinafter referred to as the 'IFIN').

1.1 Criminal Appeal Nos. 2305-2307/2022, Criminal Appeal Nos. 2302-2303/2022 and Criminal Appeal No. 2300/2022 have been filed by the Union of India, *inter alia*, challenging the common judgment and order dated 21.04.2020 passed by the High Court of Bombay in Writ Petition Nos. 4144 & 4145 of 2019 and other companion writ petitions, by which the High Court, though upheld that Section 140(5) of the Act, 2013 is not unconstitutional, has set aside the direction under Section 212(14) of the Act, 2013 dated 29.05.2019 issued by the Union of India to the Serious Fraud Investigation Office (SFIO) and consequently set aside the prosecution lodged by the SFIO *vide* Criminal Complaint No. CC 20/2019 on the file of Special Court (Companies Act) & Additional Sessions Judge, Greater Mumbai, the Union of India and the SFIO have preferred the present appeals.

1.2 In Criminal Appeal Nos. 2302-2303/2022, the challenge pertains to the auditor of IL&FS Financial Services Limited, namely, BSR & Associates LLP (BSR) and in Criminal Appeal Nos. 2305-2307/2022 and Criminal Appeal No. 2300/2022, the challenge pertains

to another auditor of IFIN, namely, Deloitte Haskins & Sells LLP (for short, 'Deloitte') and an ex-director of IFIN, namely, Hari Sankaran.

1.3 Criminal Appeal Nos. 2298/2022, 2299/2022 & 2304/2022 have been filed by Deloitte and two of its partners challenging the impugned judgment and order passed by the High Court insofar as it upholds the constitutionality of Section 140(5) of the Act, 2013.

1.4 Civil Appeal Nos. 793/2022, 801/2022 & 877/2022 have been filed by Deloitte and two of its partners challenging the order passed by the National Company Law Appellate Tribunal dated 04.03.2020.

Factual Background:

2. The facts leading to the present proceedings in nutshell are as under:

A series of defaults by the IL&FS Group Companies, which had an aggregate debt burden of more than Rs. 91,000 crores, occurred between June to September, 2018 and threatened to collapse the money markets of India, added pressure to corporate bond yields and sparked a sell off in the stock market. The Department of Economic Affairs, Ministry of Finance issued an Office Memorandum dated 30.09.2018 in respect of IL&FS to the Ministry of Corporate Affairs, Union of India requesting it to take action under the Act, 2013. The Memorandum and Note highlighted that:

(a) the IL&FS Group was struggling with a debt contagion of approx.. Rs. 91,000 crores across the IL&FS Group against Rs. 6950 crores in equity share capital and reserves a leverage of at least 13 times. Moreover, in the year 2017-18, the IL&FS Group has shown a loss of Rs. 2670 crores;

(b) this debt contagion, *prima facie*, was on account of *inter alia* failure of corporate governance across the IL&FS Group and window dressed accounts; and

(c) any further defaults would be catastrophic for the well-being of the financial markets and the economy.

2.1 In parallel, the Ministry of Corporate Affairs, upon receipt of a report from the Registrar of Companies under Section 208 of the Act, 2013, directed the SFIO to investigate into the affairs of IL&FS and its subsidiaries.

2.2 The Ministry of Corporate Affairs filed a Company Petition on 01.10.2018 being Company Petition No. 3638/2018 against IL&FS and its the then existing Board of Directors before the National Company Law Tribunal (NCLT) seeking, amongst others, the removal of the then existing Board of Directors of IL&FS and the appointment of a new Board of Directors in place and instead thereof. The NCLT passed an interim order on the same date, i.e., 01.10.2018 superseding the then existing Board of Directors of IL&FS with a new Board of Directors. The new Board of Directors were directed to take charge of the affairs of the IL&FS. The new Board of Directors of IL&FS submitted a report dated 30.10.2018 on progress and way forward with the Ministry of Corporate Affairs which was in turn filed by the Ministry of Corporate Affairs with the NCLT on 31.10.2018, pursuant to the order passed by the NCLT on 01.10.2018.

2.3 Further to the Office Order dated 30.09.2018 directing investigation to be initiated by the SFIO and an e-mail dated 01.11.2018, SFIO submitted an interim report in respect of IL&FS and one Employees Welfare Trust pertaining to the IL&FS Group. It is required to be noted that the said interim report was submitted as Ministry of Corporate Affairs called for an "interim report", which was called in pursuance to Section 212(11) of the Act, 2013 which provides that an interim report must be called for by the Central Government.

It is to be noted that in the interim report itself, it was specifically recorded that the findings in the interim report are interim findings and the interim report concluded by setting forth "based on the above interim findings…" It is also to be noted that interim report was on the individuals who were in control of the affairs of the IL&FS Group and the illegalities and fraud perpetrated by them.

2.4 On the basis of the interim report, the Ministry of Corporate Affairs filed a Miscellaneous Application in Company Petition No. 3638/2018 against the erstwhile Directors of the companies in the IL&FS Group seeking to implead them in the said proceedings and an order to attach their immovable/movable properties.

2.5 On the basis of the interim report and a *prima facie* opinion of the Institute of Chartered Accountants dated 04.12.2018, the Ministry of Corporate Affairs filed a petition under section 130 of the Companies Act, 2018 before the NCLT praying *inter alia* that the books of accounts of IL&FS, IFIN and IL&FS Transportation Networks Limited (ITNL) may be re-opened and recast. *Vide* order dated 01.01.2019 passed in Section 130 petition, the NCLT directed that the accounts of IL&FS, IFIN & ITNL for the past 5 financial years be re-opened and recast on the ground that the affairs of IL&FS, IFIN & ITNL had been mismanaged casting a doubt on the reliability of the financial statements/accounts.

2.6 The auditors of IFIN (BSR & Deloitte) were given notice of Section 130 petition who opposed the said petition. Order dated 01.01.2019 passed by the NCLT was challenged by one of the ex-directors of IFIN before the National Company Law Appellate Tribunal, New Delhi (NCLAT), which dismissed the appeal *vide* order dated 31.01.2019. Order dated 31.01.2019 passed by the NCLAT was appealed before this Court. *Vide* order dated 04.06.2019, this Court dismissed the civil appeal filed by the said ex-director. Thus, this Court upheld initiation of the proceedings by the Ministry of Corporate Affairs under section 130 of the Companies Act, 2018.

2.7 The Reserve Bank of India (RBI) initiated an inspection of the IL&FS and IFIN under Section 45N of the RBI Act, 1934. Pursuant to the investigation/inspection, the RBI submitted an investigation/inspection report dated 22.03.2019 to IFIN. IFIN thereafter issued a notice dated 13.05.2019 under Section 140(1) of the Act, 2013 *inter alia* on BSR seeking to remove them as auditors. BSR filed a written response to the notice served by IFIN under Section 140(1) of the Act, 2013 denying the allegations in the notice. A hearing was held on 29.05.2019 by IFIN where BSR was also represented/present.

2.8 Pursuant to the Office Order dated 30.09.2018, SFIO submitted the investigation report of IL&FS Financial Services Limited (SFIO Report).

2.9 The Ministry of Corporate Affairs *vide* letter dated 29.05.2019 requested the Regional Director (Western Region) and the SFIO to initiate proceedings/prosecution. The SFIO was asked to initiate proceedings/prosecution under Section 447 and other provisions of the Companies Act, r/w Sections 417, 420 and 120B of the Indian Penal Code. The Regional Director was asked to institute a Petition under Section 140(5) of the Act, 2013.

2.10 That thereafter the SFIO filed a criminal complaint on 30.05.2019 before the Sessions Court (Special Judge – Companies Act), Mumbai against, amongst others, the auditors/ex-auditors of IFIN being CC No. 20/2019.

2.11 That thereafter the Ministry of Corporate Affairs filed a Petition under Section 140(5) of the Act, 2013 dated 10.06.2019, *inter alia*, against the auditors of the IFIN, namely, BSR & Deloitte and the engagement partners as well as their team. In the petition under Section 140(5), it was *inter alia* prayed to remove BSR as auditors of IFIN; declare that Deloitte

shall be deemed to be removed as Statutory Auditor for IL&FS for F.Y. 2012-13 to F.Y. 201718; permit the Ministry of Corporate Affairs to appoint an auditor for IFIN under the first proviso of Section 140(5) of the Act, 2013; and declare/direct that BSR, its engagement partners, Deloitte and its engagement partners shall not be eligible to be appointed as an auditor for any company for a period of five years under the second proviso of Section 140(5) of the Act, 2013.

2.12 BSR issued a letter of resignation dated 19.06.2019 to IFIN and simultaneously completed the regulatory filings pursuant to such resignation.

2.13 BSR and its engagement partners filed a reply dated 19.06.2019 to Section 140(5) petition before the NCLT, *inter alia,* contending that (i) they are not the auditors for IFIN any longer as they have tendered their resignation and therefore Section 140(5) is not applicable to them; and (ii) Section 140(5) does not demonstrate any case for fraud against BSR.

2.14 Deloitte filed an application dated 19.06.2019 challenging the maintainability of Section 140(5) petition before the NCLT on the ground that Deloitte is no longer the auditor for IFIN. BSR and its engagement partners also filed an application challenging the maintainability of Section 140(5) petition before the NCLT on the ground that BSR is no longer the auditor for IFIN.

2.15 After hearing the auditors (BSR & Deloitte) on the applications challenging the maintainability of Section 140(5) petition, the NCLT passed an order upholding the maintainability of Section 140(5) petition. That thereafter, the BSR filed a writ petition before the High Court, *inter alia*, challenging the *vires* of Section 140(5) of the Act, 2013; the directions issued and the order of the NCLT upholding the maintainability of Section 140(5) petition.

2.16 By the impugned judgment and order, though the High Court has upheld the validity of Section 140(5) of the Act, 2013, the High Court has interpreted section 140(5) of the Act, 2013 and has set aside the order passed by the NCLT upholding the maintainability of Section 140(5) petition and has quashed Section 140(5) petition and has set aside/quashed the directions issued by the Ministry of Corporate Affairs and the SFIO and also has quashed/set aside criminal proceedings instituted by the SFIO. Hence, the present appeals.

Submissions on behalf of the Union of India:

3. Shri Balbir Singh, learned Additional Solicitor General of India appearing on behalf of the Union of India has vehemently submitted that in the impugned judgment and order the High Court has misinterpreted Section 140(5) of the Act, 2013, though the High Court has upheld the constitutionality of the said provision.

3.1 It is submitted that as regards the interpretation of Section 140(5) of the Act, 2013, the High Court has explained the legislative intent as being to induce/effect a change of an auditor in a company where there is a suspected fraud. It is submitted that thereafter the High Court has erroneously proceeded to hold that the intention behind Section 140(5) of the Act, 2013 is only to break the collusion between the auditor and the company. It is submitted that accordingly, the High Court erroneously holds that if the unholy bond between the auditor and company is broken, either by removal or resignation, then Section 140(5) of the Act, 2013 fulfils its purpose. It is submitted that according to the High Court, Section 140(5) of the Act is only attracted when despite the petition by the Central Government, an auditor sets up a defence and opposes the petition frivolously and thus invites a final order as set forth in the second proviso to Section 140(5) of the Act, 2013.

It is submitted that on this basis, the High Court proceeded to hold that the petition filed by the Union of India under Section 140(5) of the Act, 2013 has been satisfied by the subsequent resignation of the auditor and therefore the petition under Section 140(5) of the Act, 2013 filed by the Union of India is no longer maintainable. It is submitted that the High Court erroneously proceeded to quash Section 140(5) petition and the order passed by the NCLT, Mumbai upholding its maintainability.

3.2 Now insofar as quashing and setting aside the criminal proceedings, it is submitted that the respondents assailed Section 212(14) direction on two grounds. Firstly, on the ground that the issuance of the direction to prosecute within 30 hours of receipt of the IFIN SFIO Report demonstrates non-application of mind. Secondly, that the IFIN SFIO Report was an incomplete report as investigation had not been completed and therefore Section 212(14) direction was incompetent. It is submitted that insofar as the first ground is concerned, the High Court erroneously holds that there is non-application of mind since it was improbable that a report of about 750 pages and 32000 pages of annexures could have been considered in 30 hours. Further, the High Court erroneously holds that the relevant facts and documents to demonstrate application of mind have not been placed on record. It is submitted that while doing so, the High court also holds that the existence of a valid sanction can be appreciated in a writ Court and need not wait trial.

3.3 As regards the IFIN SFIO Report, it is submitted that the High Court holds summarily and without even going into the same and erroneously holds that the SFIO Report is incomplete and lacking and therefore Section 212(14) direction is incorrect and/or invalid.

3.4 On interpretation of Section 140(5) of the Act, 2013, Shri Balbir Singh, learned ASG has taken us to the legislative history and legislative intent of Section 140(5) of the Act, 2013. It is submitted that Section 140 of the Act, 2013 is titled as “Removal, resignation of auditor and giving of special notice”. It appears in Chapter X of the Act which is titled as “Audit and Auditors”. Section 140(1) of the Act, 2013 provides for the procedure to remove an auditor by the company before the expiry of his term. Sections 140(2) and (3) of the Act deal with resignation of auditors and Section 140(4) of the Act deals with giving of special notice at an AGM for appointment of an auditor other than the retiring auditor and the process in that regard. It is submitted that if an auditor of a company is acting directly or indirectly in a fraudulent manner or is abetting or colluding in fraud with the management of a company, Section 140(5) of the Act, 2013 empowers either the Central Government or any person concerned to approach the NCLT for recourse. Section 140(5) of the Act also enables the NCLT to take action *suo motu* against an auditor who has acted in the aforesaid manner. It is submitted that in addition, Section 140(5) of the Act, 2013 has also two provisos and two explanations. It is submitted that therefore as per the first proviso to Section 140(5), on an application made by the Central Government and if the Tribunal is satisfied that any change of the auditor is required, the Tribunal shall within fifteen days of receipt of such application make an order that the said auditor shall not function as an auditor and the Central government may appoint another auditor in his place. It is submitted that second proviso to Section 140(5) of the Act provides that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under section 140(5) shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under Section 447. It is submitted that therefore merely because during the pendency of the proceedings under Section 140(5) of the Act the auditor resigns, the proceedings under Section 140(5) do not come to an end. Still and after the final order is passed, in that case, a further order as per second proviso to Section 140(5) can be passed to render such a auditor ineligible to be appointed as an auditor of any company

for a period of five years from the date of passing of the order and even such auditor shall also be liable for the action under section 447 of the Companies Act. It is submitted that therefore the High Court has materially erred in observing and holding that once the auditor has resigned thereafter the application under section 140(5) of the Act shall not be maintainable and/or is not required to be proceeded further.

3.5 Thereafter, Shri Balbir Singh, learned ASG has taken us and referred to the legislative history of Section 1`40(5) of the Act as under:

Legislative History of Section 140(5) of the Act, 2013

Around August 2004, the Government initiated the process of review of the Companies Act, 1956 and drafting of a new Companies Bill to replace the Companies Act, 1956. A concept paper was published on the website of the Ministry of Corporate Affairs on which various comments were received. An expert committee was also constituted by the Ministry of Corporate Affairs under the chairmanship of Dr. J.J. Irani, to make recommendations on provisions of company law.

a. Companies Bill 2008 and the Companies Bill 2009

i. After considering the report of the J.J. Irani Committee, the Ministry prepared the Companies Bill, 2008 and introduced the same before the Lok Sabha on October 23, 2008. The 2008 Bill was referred to the Department related Parliamentary Standing Committee (PSC) on Finance for their examination. However, the Lok Sabha was dissolved before the PSC could present its report and therefore the 2008 Bill lapsed as per Article 107(5) of the Constitution of India.

ii. Accordingly, the Companies Bill 2009 was introduced in the Lok Sabha on or about July 15, 2009. The 2009 Bill too was referred to the PSC. In identifying the features of the 2009 Bill, the PSC Report of August 2010 notes the salient features as being “the role, rights and duties of the auditors have been defined so as to maintain integrity and independence of the audit process.”

iii. In setting out the guiding principles underlying the 2009 Bill, the PSC, in the Report, notes that, amongst other principles, the following are the key principles underlying the 2009Bill:

“Need for sturdy systems, enhanced transparency and comprehensive disclosures based regime emphasized; as companies grow, become bigger and globalise with the number and range of stakeholders increasing by volumes, necessitating proper checks and balances.

Self-regulation through internal mechanism/procedures, to be underpinned on strong systems and procedures; Central Government to step in only when misgovernance takes place.

In the light of recent experiences in corporate misgovernance, process of audit and functioning of auditors to be made more independent and effective; stringent joint and individual liability prescribed; setting up of oversight body to set standards and supervise quality of audit recommended”

iv. Further, the report notes that various suggestions were made by the PSC during deliberations on the Bill which were incorporated by the Central Government. On a reading of these suggestions, it is essential to note that independence of the auditors was a key point.

v. Crucially, in the Report, the PSC notes that the 2009 Bill incorporates suggestions of the JPC on the 1993 Banking and Securities Market Scam and the 2002 JPC on the Stock Market Scam. This means that the 2009 Bill was a culmination of the growing corporate economy and past experiences of corporate fiascos too. One of the suggestions

were to provide for stricter accountability for auditors. Moreover, at the foot of the same page, the PSC notes that the 2009Bill has made the regulatory provisions and regime more stricter by *inter alia* providing for making statutory auditors more accountable by providing for substantial civil and criminal liability for auditors.

vi. The Report clearly demonstrates that there was a long discussion on the role, responsibility, duties and regulation of auditors and the regulatory and enforcement provisions. Particularly, the Report records that various suggestions were received to make the provisions pertaining to audit and auditors more stringent. Significantly, it was suggested that Clause 123(10) of the 2009 Bill (which provides for removal of an auditor by the NCLT on finding that there is a fraud and corresponds to Section 140(5) of the Act) should be made more stringent and should contemplate that an auditor removed by the Tribunal should not be eligible to be appointed as an auditor of any company for a period of 5 years. The relevant extracts are as follows:

"34. Suggestions have been received by the Committee that there is a need to make provisions relating to Audit and Auditors more stringent such as following:-

(d) Suitable penalty may be provided in case of contravention of these provisions.

(e) (i) Clause 123(10) of the Bill empowers the Tribunal, if it is satisfied that the auditor of a company has acted in a fraudulent manner or abetted/colluded in any fraud, to direct the company to change its auditors. Suggestions have been made that these provisions should be modified to clarify to cover act of fraud or abetment by auditor whether directly or indirectly. It has also been suggested that the Bill may provide that if auditor, whether individual or firm, against whom an order has been passed by the Tribunal under this clause should not be eligible to be appointed as an auditor of any company for a period of five years."

b. <u>The Companies Bill, 2011</u>

i. In view of the recommendations of the Standing Committee and that of various stakeholders, the Central Government withdrew the 2009 Bill with a view to introduce a fresh Bill incorporating the recommendations of the Standing Committee and various stakeholders. Consequently, the 2011 Bill was introduced in the Lok Sabha in December, 2011, accepting and incorporating most of the recommendations made by the previous Standing Committee in respect of the Companies Bill, 2009. This aspect has been recorded in the Statements of Objects and Reasons of the Companies Bill, 2011.

ii. At this juncture, it is important to bear in mid that the suggestion of the Standing Committee to Clause 123(10) of the 2009 Bill (which provides for removal of an auditor by the NCLT on finding that there is a fraud) was to:

- Make the provision more stringent; and
- To provide for consequences for an auditor when such auditor is found to have been perpetrating a fraud and is removed by the NCLT for such fraud.

iii. The 2001 Bill consolidates the provisions pertaining to removal of auditors into one clause namely Clause 140 of the 2011 Bill. Further, the 2011 Bill (like the 2009 Bill) retains the NCLT's power to remove an auditor upon finding that the auditor has perpetrated a fraud at Clause 140(5) of the 2011 Bill. Most pertinently, the 2011 Bill incorporating the recommendations of the Standing Committee as contained in the Report, provides for consequences for an auditor who is found to have perpetrated a fraud by the NCLT and is removed for such fraud by the NCLT. This has been done by way of a proviso to Clause

140(5) of the Bill (particularly the second proviso). The relevant extract of Section 140(5) of the 2011 Bill is as follows:

"(5) Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either *suo motu* or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors:

Provided that if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central government may appoint another auditor in his place:

Provided further that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447.

Explanation – For the purposes of this Chapter the word "auditor" includes a firm of auditors".

iv. Thereafter, in January 2012, the 2011 Bill was placed before the Standing Committee by the Lok Sabha. The Standing Committee has prepared and finalized its report in this regard, and insofar as the penalty and guiding principles of Clause 140(5) are concerned, there is no further guidance on the legislative intent behind the same.

v. In view of the above, the test of Clause 140(5) of the 2011 Bill has remained unchanged, the same has been enacted as the present Section 140(5) of the Companies Act, 2013.

3.6 It is submitted that therefore by way of Companies Bill, 2009 subsequently introduction the Act, for the first time it includes an obligation to an auditor to report any fraud detected to the Central Government as per Section 143(12) of the Act and incorporated in the form of the second proviso to Section 140(5) of the Act a provision to make an auditor who has been found to have been acting in a fraudulent manner or colluding from being an auditor in any company for a period of 5 years. It is submitted that therefore, the public policy behind Section 140(5) of the Act is very clear – to prevent an auditor who has been found to perpetrate fraud or colluding in it in one company from undertaking any statutory audits for a period of 5 years. Reliance is placed on the decision of this Court in the case of ***Devas Multimedia Pvt. Ltd. v. Antrix Corporation Ltd. & Anr, reported in (2023) 1 SCC 216***.

3.7 It is further submitted by Shri Balbir Singh, learned ASG that Section 140(5) appears in Chapter X of the Act. It is submitted that Chapter X specifically deals with 'Audit and Auditors'. Section 143 of the Act deals with the powers and duties of the auditors. Sub-section (12) of Section 143 specifically provides that in the event that the auditors has reason to believe that an offence of fraud is being or has been committed in the company, the auditor shall report the matter to the Central Government. The detailed procedure is provided under the Rules issued in this regard.

3.8 It is further submitted that Section 144 of the Act provides that the auditor cannot provide certain services and the relevant one for the present matter is "Management services". It is submitted that the objective is that the auditor should function as an independent person uninfluenced by any of its activities outside the scope of audit services. The auditor is prohibited from providing any management service to the

Company. It is submitted that the prohibition and restriction created under Section 144 of the Act is primarily to protect the interest of the Company in question and other stakeholders such as lenders and investors and the public at large.

3.9 It is submitted that keeping these provisions and the underlying public policy in the backdrop, Section 140 (5) of the Act, 2013 is to be considered. It is submitted that the plain words of Section 140(5) of the Act, 2013 provide for the NCLT to, either *suo motu* or on an application made by the Central Government/any person concerned, inquire into/examine the conduct of an auditor or his involvement in a fraud and reach a satisfaction as regards the auditors fraudulent conduct. The provision further prescribes that the satisfaction of the Hon'ble NCLT "may" finally result in a change of an auditor.

3.10 It is submitted that the first proviso to Section 140(5) of the Act is contemplated as an interim or pro-term measure to prevent an existing auditor from continuing and substitute him with an auditor nominated by the Central Government based on a *prima facie* satisfaction that a fraud has been perpetrated and when circumstances warrant the substitution. This is an interim order and operates akin to a temporary suspension.

3.11 It is submitted that the second proviso to Section 140(5) of the Act which is in the nature of a substantive provision activates on an order recording the Hon'ble NCLT's satisfaction of fraudulent or collusive conduct by an auditor and his consequent removal from the Company and debars him from being an auditor in any company for a period of 5 years. An order under the first proviso is not the order contemplated under the second proviso to Section 140(5) of the Act. Thus, if the NCLT finally finds no grounds to hold that there has been fraudulent conduct or collusion in fraud, then the auditor who may have been temporarily suspended under an order under the first proviso can be re-instated.

3.12 It is submitted that Section 140(5) of the Act therefore confers power onto the Hon'ble NCLT to adjudicate on or inquire into the conduct of an auditor and determine whether the auditor has conducted itself in a fraudulent manner. This is clear from the operative part of the provision which mandates the nature of inquiry required under the section. This is "directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers."

3.13 It is submitted that therefore, any final order would certainly contain either a positive or negative determination of "fraud" or "fraudulent conduct". As a consequence of finding fraud under Section 140(5) of the Act, the provision illustrates that the finding of fraud/fraudulent conduct "may" lead to an order directing change of an auditor. The second proviso further expressly provides that an auditor "against whom a final order has been passed" is in-eligible to act as an auditor of any company for a period of 5 years. Significantly, the words used in the second proviso to Section 140(5) of the Act is "final order" and not "the auditor so removed" or "changed auditor".

3.14 It is submitted that therefore the requirement or necessity of change of auditor in a company does not activate/govern the power of the NCLT under Section 140(5) of the Act, 2013. Instead, it is the inquiry into the fraudulent act by an auditor who abdicates his statutorily prescribed independent role and responsibilities and colludes with the management or otherwise perpetrates a fraud. It is submitted that the essence of the provision/section is determination of fraudulent conduct of the auditor. The consequent "removal" contemplated by Section 140(5) of the Act, 2013 is not just as acting as an auditor in one company or the company concerned but from **any** company for a period of five years.

3.15 It is submitted that therefore the interpretation of Section 140(5) of the Act, 2013 made by the High Court in the impugned judgment and order is just contrary to the object and purpose of enactment of Section 140(5) of the Act, 2013 and, as such, is contrary to the said provision.

3.16 Shri Balbir Singh, learned ASG has submitted that during the course of arguments, the submissions made on behalf of the respondents are as under:

a) Section 140(5) of the Act, in light of the other provisions of the Act, is only to incentivize a recalcitrant auditor into resigning. Therefore, if an auditor resigns after the filing of a Petition under Section 140(5) of the Act but before the Hon'ble NCLT pronounces an order on that Petition, the purpose behind Section 140(5) of the Act is fulfilled. This interpretation of Section 140(5) of the Act is, as per the Respondent's case, clear from the plain words of the provision;

b) continuing a proceeding against an auditor under Section 140(5) of the Act would despite his resignation would lead to reading in a proviso into Section 140(5) of the Act which deems his continuance till the culmination of proceedings under Section 140(5) of the Act;

c) The second proviso to Section 140(5) of the Act is arbitrary, harsh and burdensome and ought to be read down. The mandatory ineligibility to act as an auditor for a period of 5 years ought to be read as for a period up to 5 years to make the provision constitutional.

d) The ineligibility to act as an auditor of any company prescribed under the second proviso to Section 140(5) of the Act can only extend to the audit partners concerned and not to the entire firm and the other audit partners who were not connected with the fraudulent act or acts.

3.17 Meeting with the aforesaid submissions, it is submitted as under:

a) Acceptance of Respondent's contention would meanthat the jurisdiction of a quasi-judicial tribunal can be overcome merely by an act of a party. More significantly, it would lead mean that an inquiry into fraudulent conduct can be disrupted and/or stands satisfied simply by an act of a party.

b) The entire contention of the provision operating *in terrorem* or to incentivize an auditor to resign is untenable. The consequences of indulging in fraudulent activities provided for in the Act including but not limited to Section 447 of the Act itself ought to serve as a deterrent and operate "*in terrorem*".

c) The entire construction sought to be attributed to Section 140(5) of the Act by reference to the other provisions of the Act (as per paragraphs 9.17 (a) and (b) above) is to turn the provision into a dead letter [See ***NEPC Micon Ltd. v. Magma Leasing Limited*** (1999) 4 SCC 253]. Moreover, the Respondent's interpretation, if accepted, would lead to various absurdities. Pertinently, amongst other reasons:

i. given that it is accepted that the first proviso provides for a temporary suspension or removal of an auditor, if an application is filed under the first proviso and the errant auditor replaced (albeit temporarily), then an order Second Proviso can never follow. This is because the errant auditor cannot, as on date of the final order, be said to be the auditor of a company due to the first proviso order.

ii. there exists no reason for Section 140(5) of the Act to operate *in terrorrem* or to induce a recalcitrant auditor to resign. This is so since the first proviso to Section 140(5) of the Act operates immediately to effect a change of the auditor/remove the existing

auditor after filing of a Petition by the Central Government under Section 140(5) of the Act. In other words, the first proviso would thus be rendered redundant if the intention behind Section 140(5) of the Act is to induce an auditor into resigning.

d) The ineligibility to act as an auditor for any company fora period of 5 years cannot be read down to mean "for a period "up to five years". This is so since:

i. apprehension or misuse of the provision in future cannot be ground to test the constitutional validity of the provision. [***See Madras Bar Association v. Union of India 2021 SCC Online SC 463 (para 101-102)***]

ii. fraud vitiates everything and the punishment mandates in the statute cannot be varied by examining the length and breadth of the fraud.

iii. the ineligibility to act under Section 140(5) of theAct is only for acting as an auditor of any company. It does not stop the auditor concerned from practising as a chartered accountant generally. The individual or firm concerned can take up any other activity pertaining to accounts of the company (which is otherwise barred for an auditor by virtue of Section 144) such as account and book keeping service, actuarial service etc or otherwise. In fact, in the present case, the auditing firms involved have a very significant part of their business outside the audit function. The prohibition of 5 years does not affect their practise as a chartered accountant or any other area of service; and

iv. the fixed prohibition period of 5 years activates only in the event of finding of a fraud by the Hon'ble NCLT in terms of the statutory scheme and public policy. The principle of proportionality cannot be raised to a level where the extent of the fraud is required to be examined. The very deterrent effect of the provision would get diluted and more importantly, it would amount to perpetuating the fraud in connection with other companies.

v. As regards the extent of application of theineligibility prescribed under the second proviso to Section 140(5) of the Act to the firm and individuals, it is submitted that a close reading of the provisions of the Act reflects that the legislature considered every aspect relating to the consequence of Section 140(5) of the Act. An examination of the second proviso to Section 140(5) of the act shows that the Hon'ble NCLT is required to give specific findings with regard to fraud and whether the auditor is a firm or an individual. There cannot be any presumption that mere finding of fraud in connection with an individual will automatically result in the determination of fraud by the firm. This is also provided under Section 147 of the Act which is as follows:

(5) Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in this Act or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally.

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.

3.18 Now so far as the submission on behalf of the respondents that once an auditor resigns, the provisions of Section 140(5) of the Act would cease to apply. Instead, the auditor concerned can be proceeded against under Section 241(3) of the Act and the proceedings pursuant to Section 241(3) of the Act would lead to the same result and the auditor would be held not to be 'fit and proper person' to be appointed in any other office connected with the conduct and management of any company. It is submitted that:

a. Section 241(3) and its consequential provisions were introduced with effect from 14.8.2019, which authorized the Central Government to apply to the Tribunal with a request to declare that the persons mentioned in Section 241(3) of the Act are 'not fit and proper persons to hold the office of director or any other office connected with conduct and management of any company".

b. Constructing "any other office connected with the conduct and management of any company", it would be necessary to consider the consequential provisions that were enacted along with Section 241(3) of the Act. Particularly, Section 243(1A) and Section 243(2) of the Act.

(1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision

(2) Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1) or sub-section (1A), and every other director of the company who is knowingly a party to such contravention, shall be punishable with fine which may extend to five lakh rupees

Clearly, from the words of the consequential provision, it is clear that the reference in specifically Section 241(3) of the Act to "*any other office connected with the conduct and management of any company*" means those akin to manager, managing director or other director such as key managerial personnel and not an auditor.

c. Moreover, in Section 241(3) of the Act specifically, the words used are "conduct and management of the company". The auditor as the Act sets forth is an independent examiner of accounts and cannot be said to be holding an office in the conduct and management of the company. This would militate against the very fibre of the Companies Act, 2013.

3.19 Making above submissions, it is submitted that, (i) Section 140(5) of the Act, 2013 operates to enable a quasi-judicial tribunal equipped with powers of a civil court to examine the role of auditors and adjudicate on their fraudulent conduct and the abdication of their function; (ii)Section 140(5) is not a provision to merely induce/effect a change of an auditor who is not resigning. It is intended as a provision which involves a substantive determination of fraud so as to isolate or remove an auditor from the company and from any company that he/she is auditing. If construed to be a provision only to induce a change of a recalcitrant auditor, the words conferring power on the NCLT to inquire into an auditor's fraudulent conduct would be rendered meaningless; (iii) the second proviso to Section 140(5) of the Act is essentially remedial and preventive, though it might incidentally also have a punitive effect. The public purpose / object of the second proviso to Section is clearly to protect companies from being prejudicially affected, by debarring such an auditor, who has been held to have acted fraudulently, from being appointed as an auditor of any company.

3.20 It is submitted that in the facts of the present case, it is pertinent to note that:

a) Deloitte was the statutory auditor of IFIN from 2008 till 2018. Deloitte retired by efflux of time in 2018;

b) BSR was appointed as the joint statutory auditor in 2017;

c) both Deloitte and BSR jointly conducted the statutory audit of IFIN for the Financial Year 2017-2018;

d) the Petitioner i.e., the Union of India filed the Petition under Section 140(5) of the Act against both BSR and Deloitte on June 1, 2019. BSR was the statutory auditor at that time.

e) this Petition is based on the SFIO IFIN Report which alleges that both auditors i.e., Deloitte and BSR acted in a fraudulent manner. This includes the period when Deloitte was the sole auditor and for the year when the audit was jointly performed by BSR;

f) after the Petition was filed, BSR tendered its resignation and filed an application in or about July 2019 challenging the maintainability of the Union of India's Petition under Section 140(5) of the Act. Deloitte who had retired in 2018 also filed maintainability application; and

g) after leave from the Hon'ble Supreme Court, the Union of India invoked the Hon'ble NCLT's powers under the first proviso to Section 140(5) of the Act and an auditor was appointed for IFIN.

3.21 It is submitted that therefore in the facts and circumstances of the present case and on true interpretation of Section 140(5) of the Act, explained above, the High Court has erroneously quashed the NCLT's order upholding the maintainability of Union of India's petition under Section 140(5) of the Act, 2013 and the proceedings under Section 140(5) of the Act, 2013 against the auditors – BSR.

3.22 Given the interpretation of Section 140(5) of the Act submitted above, it is contended that the act of resignation of BSR after the filing of the Petition under Section 140(5) of the Act cannot be held to render the proceedings under Section 140(5) of the Act as void. The Hon'ble Bombay High Court's interpretation would render any proceedings whether against the company's management and / or its auditors for fraud completely frustrated by mere stratagem of design of a party. Under the circumstances, the Impugned Order passed by the Hon'ble Bombay High Court is unsustainable and deserves to be set aside.

3.23 As regards, Deloitte, it is submitted that the Hon'ble NCLT and the NCLAT have upheld the maintainability of the Petition under Section 140(5) of the Act. It is submitted that as set out above, Section 140(5) of the Act requires the Hon'ble NCLT to satisfy itself that the auditor of the company, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud. In order to arrive at a finding in this regard, it is important to examine the role of both auditors i.e., Deloitte and BSR especially when both were acting as auditors for the financial year 2017- 2018. Keeping in mind the interpretation of the provision set out above, the satisfaction of the Tribunal may finally result in a change of auditor i.e., the change of BSR; however, that does not take away the powers given to the Hon'ble NCLT in terms of Section 140(5) of the Act to inquire into the fraud qua Deloitte as well and if found record a satisfaction of fraud against Deloitte in its final order. Therefore, in the facts of this case, the final order and therefore the second proviso can operate against Deloitte and BSR.

3.24 Now so far as quashing and setting aside Section 212(14) direction by the Ministry of Corporate Affairs and the Criminal Complaint filed by the SFIO and the IFIN SFIO Report, it is submitted that the Bombay High Court has, in the Impugned Order, set aside/quashed the 212(14) Direction and the Criminal Complaint and the SFIO IFIN Report on the ground that:

a. SFIO IFIN Report is an incomplete report/report on an incomplete investigation and therefore the 212(14) Direction could not be given. The alleged basis of this finding is: (i) a singular paragraph in the SFIO IFIN Report; and (ii) the 212(14) Direction which calls for

a further report on certain aspects itself demonstrates that the investigation is incomplete; and

b. The 212(14) Direction was given within 30 hours of placing the SFIO IFIN Report before the Central Government and it was improbable for the Central Government to have applied its mind within such a short period.

It is submitted that the impugned order is incorrect since:

a. The SFIO IFIN Report is a report prepared by the SFIO on the completion of investigation into IFIN viz. one of the companies under investigation. The Hon'ble Bombay High Court has not appreciated the position that:

i. By an order dated September 30, 2018, an investigation was directed to be conducted by the SFIO into IL&FS and its subsidiaries (**IL&FS Group**) which aggregates to approx. 100-169 entities;

ii. The conduct of affairs of the IL&FS Group which was set out in the Interim Report of the SFIO dated November 30, 2018 clearly set forth that there were a number of interlinkages within the group, routing transactions etc;

iii. IFIN is one of the subsidiaries in the IL&FS Group and the financial services arm. It facilitated borrowings for different group companies in the IL&FS Group from third party borrowers and at times routed funding from one group company to another;

iv. Given the nature of interlinkages and overlaps between different entities in the IL&FS Group, the SFIO IFIN Report sets out that the SFIO IFIN Report is a report in respect of IFIN and is a report upon completion of investigation into IFIN; and

v. Finally, the SFIO IFIN Report sets forth, in light of the complex structure of the IL&FS Group and the interlinkages between entities etc, that if any further instances or transactions are uncovered qua IFIN during the investigation of the other group companies of IL&FS then a further report will be filed.

This does not mean that the investigation into IFIN is incomplete. In fact, even the direction to call for a further report on certain aspects (which may be related to third parties) does not detract from the position that the investigation is complete in all other respects. The Hon'ble Bombay High Court has failed to appreciate the purport of the submission and has fundamentally erred in holding that the SFIO IFIN Report is incomplete and/or that the investigation into IFIN is incomplete. In the case at hand, the SFIO IFIN Report was submitted by the SFIO after a detailed and extensive investigation of IFIN and the multiple parties involved. It is submitted that there were conclusive findings against each auditor/CA pointing out multiple breaches, violations of statutory duties and fraudulent conduct with respect to *inter alia* functioning of auditors at the relevant point of time.

b. The Bombay High Court has proceeded to accept the surface level argument of the respondents that the 212(14) direction was issued within 30 hours which demonstrates non-application of mine without considering the following:

i. The 212(14) direction itself demonstrates application of mind from the fact that the direction requests the SFIO to prosecute additional persons whose involvement was discernible from a reading of the SFIO IFIN Report. This would have been possible only if the SFIO IFIN Report had been considered. In fact, the 212(14) Direction also rectifies a typographical error by the SFIO in the charging section applied in the SFIO IFIN Report;

ii. The affidavit in reply of the UOI before the Hon'ble High Court provided an explanation/justification for the time taken to process and also set out the process leading

up to the 212(14) Direction. As against the Respondent's surface level allegation, the Union of India provided a clear, transparent and cogent response;

iii. The Respondents' contentions were self-serving and contradictory. Particularly, the contention that the Union of India did not apply its mind given the period of 30 hours taken to issue the 212(14) Direction is directly contrary to the contention that the direction (contained in the 212(14) Direction) to call for a further report demonstrates that investigation is incomplete. Notwithstanding the fact that investigation into IFIN is complete, a direction for a further report on certain aspects could only have been issued after application of mind.

iv. Legal and factual mala fides has a very high threshold –one that cannot be met with a surface level contention of speed of processing.

v. The scope of intervention before a Hon'ble Court withWrit Jurisdiction would be to determine if there was sufficiency of material before the authority granting the direction. In the present case, the SFIO IFIN Report was before the authority granting the direction to prosecute – this fact is not disputed. Therefore, it cannot be said that the relevant materials were not present before the relevant authority.

3.25 Now so far as the submission on behalf of the respondents that before the NCLT the SFIO IFIN Report was referred to as second interim report and therefore the SFIO IFIN Report being an interim report, 212(14) direction could not have been issued as the Act does not contemplate issuance of a direction under Section 212(14) of the Act on the basis of an interim report, it is submitted by Shri Balbir Singh, learned ASG that as per section 212(11) of the Act, 2013, during the course of investigation, the Central Government has been empowered to call for an interim report. It is submitted that the SFIO has not been empowered to submit an interim report without a request for an interim report from the Central Government. It is submitted that the Central Government *vide* letter dated 03.11.2018 specifically directed the SFIO to submit an interim report. Pursuant to this, the SFIO submitted an interim report dated 30.11.2018. The Interim Report, on a bare perusal, records that it is an interim report, records the Central Government's request for an interim report and classifies its findings as interim findings.

It is submitted that this is completely different from the SFIO IFIN Report which classifies itself as an Investigation Report under Section 212(12) of the Act, sets out the detailed and extensive investigation conducted and records conclusive findings against each of the Respondents in the present case. It is submitted that therefore, the stray references to the SFIO IFIN Report as an interim report cannot be accepted to classify the report as an Interim Report. It is submitted that in fact, the only reason for such reference was since the investigation into the affairs of other subsidiaries in the IL&FS Group (apart from IFIN) is on-going. It is submitted that in fact the said position has been appreciated by the Bombay High Court in the impugned order in paragraph numbers 202(VIII) and 202(XII).

3.26 Thereafter, Shri Balbir Singh, learned ASG has taken us to the findings recorded in the SFIO IFIN Report. It is submitted that based on the findings in the Investigation Report, auditors have been charged with:

a. fraud under Section 447 of the Act for colluding with the management of IFIN and falsifying the books of accounts;

b. failure in discharging duties under section 143 & 147 of the Act ; and

c. suppression of information/ facts to hide the true and fair account of the financial statements and present a rosy picture under section 211 read with section 628 & Section 129 read with section 448 of the Act.

It is submitted that the Investigation Report broadly records that the auditors despite knowledge did not point out any financial abnormality in the operation of IFIN and gave an unmodified opinion stating that the financial statements give a true and fair view in conformity with the accounting standards and other accounting principles accepted in India.

3.27 It is submitted that in the Investigation Report, there are specific findings with respect to auditing of borrowings and utilisation; audit of non-convertible debentures; audit of lendings. It is submitted that on the basis of the findings recorded in the Investigation Report, the auditors have been charged under Section 447 of the Companies Act, 2013 and Sections 417, 420 r/w 120B of the IPC. It is submitted that therefore the High Court has materially erred in quashing and setting aside the direction issued under Section 212(14) of the Act and the complaint/prosecution launched against the auditors.

3.28 Making above submissions, it is prayed to set aside the judgment and order passed by the High Court by which the High Court has quashed Section 212(14) direction and the complaint filed by the SFIO and permit the trial to continue against the accused arrayed in the complaint. It is also prayed to set aside the impugned judgment and order passed by the High Court quashing and setting aside the order passed by the NCLT/NCLAT upholding the proceedings under Section 140(5) of the Act, 2013 and permit/allow the said proceedings to be proceeded further, so as to allow the NCLT to reach to the final conclusion so that even further steps can be taken as per second proviso to Section 140(5) of the Act, 2013.

Submissions on behalf of the opposite parties:

4. While opposing the present appeals, learned senior counsel appearing on behalf of the BSR has made the following submissions:

i) It is submitted that in fact the BSR had challenged the *vires* of Section 140(5) of the Act, 2013 before the High Court being violative of Articles 14, 19(1)(g), 20 and 21 of the Constitution of India as well as being unconstitutional and void. It is submitted that however the High Court by the impugned judgment and order while upholding the constitutionality of Section 140(5) has read down Section 140(5) of the Act, 2013.

ii) It is submitted that by the impugned judgment and order, the High Court has held that the object of Section 140(5) is to remove an auditor who has neither been removed by the company, nor resigned. It is further observed that the role of the NCLT under Section 140(5) is only to examine the need to change a company's auditor and not to punish or debar the auditor. It is submitted that rejecting the Ministry's submission that the NCLT can pass an order to debar an auditor for 5 years under section 140(5) of the Act, the High Court has held that the NCLT's order under section 140(5) can only be for change of auditor of the company. It is further observed and held that the consequences of debarment in the second proviso automatically follow upon such change and NCLT does not have any discretion in it.

iii) It is submitted that before the High Court, the BSR also challenged two orders of the NCLT, namely, order dated 09.08.2019 and order dated 18.10.2019. Both these orders were passed by the NCLT purportedly under section 140(5) of the Act in proceedings commenced pursuant to the Ministry's sanction and directions dated 29.05.2019 under section 212 of the Act. It is submitted that BSR had also challenged the jurisdiction of

NCLT to pass orders under section 140(5) of the Act, 2013. It is submitted that the NCLT has not determined the merits of a section 140(5) order and the NCLT in its first order has only upheld the maintainability of section 140(5) proceedings. It is submitted that therefore the submissions on behalf of the respondents do not go into the merits at all.

iv) Now so far as on interpretation and applicability of section 140(5) of the Act, 2013, learned counsel appearing on behalf of the respective respondents – original writ petitioners has taken us to the scheme of regulation of Auditors under the Companies Act and has taken us to the various provisions relating to the regulation of Auditors under the Companies Act, more particularly Sections 132, 141, 147, 245, 447 and Sections 435 to 438 of the Companies Act. It is submitted that the Act provides a holistic scheme for regulation and punishment of Auditors, all of which have been different functions and purpose and with such matrix of sections, no auditor can get away with fraud, abetment of fraud, professional misconduct etc. It is submitted that therefore no auditor can escape by way of resignation or termination of tenure due to efflux of time.

v) It is submitted that a plain reading of Section 140 as a whole shows:

i. Section 140(1) of the Act deals with the procedure for voluntary auditor by a company.

ii. 140(2) and (3) deal with the procedure for resignation of an auditor.

iii. Section 140(4) deals with special notice. Section 140(5) deals with involuntary removal by order of NCLT.

iv. The heading of Section 140 of the Act (i.e., "Removal, resignation of auditor and giving of special notice") makes it clear that Section 140(5) only serves the purpose of removal of an auditor and is not a standalone substantive provision to disqualify auditors. It is well settled that a heading is a condensed name to collectively indicate the characteristics of the subject matter covered by a Section. Reliance is placed on the decision of this Court in the case of ***Raichurmatham Prabhakar v. Rawatmal Dugar, (2004) 4 SCC 766 (Para14).***

vi) It is submitted that Sections 132, 141, 147, 245, and 447 of the Act deal with liability of an auditor in cases of fraud:

i. Section 132 provides for the constitution of the National Financial Reporting Authority ("NFRA"). NFRA has been given ample power (including the powers of civil court) under Section 132 to impose penalty or punishment on an auditor (including debarring the auditor) to the auditors professional or other misconduct. The explanation under Section 132 provides for the terms "professional or other misconduct" to have the same meaning as prescribed under the Chartered Accountants Act, 1949 ("CA Act"). The meaning of "professional or other misconduct" entails a very wide scope as evinced from Schedule I and II of the CA Act. Therefore, if auditors are guilty of fraud or abetting in fraud, they are certainly guilty of professional misconduct, for which powers are vested with the NFRA to disqualify, suspend etc.

ii. Section 141(3)(h), which specifically deals with eligibility of auditors, provides for the ineligibility for appointment of an auditor in case such person is convicted of an offence involving fraud. Section 141(3)(h) disqualifies the auditor for 10 years from the date of conviction for an offence involving fraud. Pertinently, while the underlying offence is the same, i.e., an act involving the same fraud, the penalty under Sections 140(5) and 141(3)(h) are triggered at different times. A situation could arise where a person deemed ineligible under Section 140(5) by way of the NCLT's final order is subsequently acquitted

of the charge of fraud on the same set of facts under Section 447 of the Act by the criminal court. Further even where a person is convicted under Section 447, if he has already suffered the disqualification under Section 140(5) for 5 years he could face a further ineligibility to be appointed as an auditor for 10 years. The total period hence could extend to 15 years.

iii. Section 147(3) imposes financial liability on auditors by way of refund of remuneration or even damages where the auditor is convicted under Section 147(2) of the Act. Section 147(5) further imposes joint and several liability on audit firms and partners in case of criminal liability.

iv. Section 241(3)(a) pertains to the civil consequence of fraud and concern "any person concerned in the conduct and management of the affairs of a company". This would certainly include auditors who can be said to be concerned in the conduct and management of a company's affairs. In a proceeding under Section 241, the NCLT will determine: (i) whether there has been fraud; (ii) who the fraudsters are; (iii) who connived in or abetted the fraud; and (iv) whether the parties are fit and proper persons. The NCLT can decide that an auditor has connived in fraud and is not a fit and proper person under Section 242 (4A) which provides as follows:

"242. Powers of Tribunal. - (1) If, on any application made under section 241, the Tribunal is of the opinion-...

(44) At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company."

v. The consequence of holding that a person is not fit and proper is provided in Section 243 (1A) viz.:

"243. Consequences of termination or modification of certain agreements – (1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision: Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years...."

If a person is found not to be a fit and proper person, under Section 243 (1A), the NCLT can order that such person "shall not hold any office connected with the conduct or management of any company for 5 years.

vi. Section 245(1)(g)(ii) also provides for damages or compensation to be ordered against auditors, including an audit firm, by way of a class action suit for "Improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct. Section 245(2) permits the NCLT to impose "any suitable action"

vii. Section 447 pertains to the criminal consequences of fraud. Section 447 prescribes a punishment for the offence of 'fraud, the offence itself is created by way of an explanation appended to the said section. Section 447 of the Act provides:

"447, Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less

than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Explanation. For the purposes of this section-

(i) "fraud" in relation to affairs of a companyor any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interest of the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss:

(ii) "wrongful gain" means the gain byunlawful means of property to which the person gaining is not legally entitled,

(iii) "wrongful loss" means the loss byunlawful means of property to which the person losing is legally entitled"

vii) It is submitted that Sections 435 to 438 of the Companies Act provide a procedure in trial by a Special Court incorporating safeguards of the CrPC. A chart reflecting the comparative scheme of protections afforded to parties before the NCLT as opposed to a prosecution before the Special Court established under the Act

viii) It is submitted that even if Section 140(5) is not applicable in a given case due to the retirement or resignation of an auditor prior to an order being passed, that will not enable such an auditor to escape the vigour of law under the Companies Act, 2013, Even if an auditor resigns, he will nevertheless have to face (a) prosecution for fraud under Section 447 of the Act; (b) action before the National Financial Regulatory Authority; (c) order by the NCLT debarring auditors from acting as such in respect of any company as well can be passed under Section 243 (1A) read with Section 241 and 242(4A); and (d) disqualification under Section 141(3)(h) if the auditor is found guilty of fraud. The consequence of each of these proceedings is grave for the auditor, including debarment, and the auditor does not escape punishment.

ix) It is submitted that the operative part of Section 140(5) empowers NCLT to direct a company to “change” its auditor. NCLT can exercise this power if it is satisfied that ah auditor is guilty of acting in a fraudulent manner or in abetting or colluding in a fraud and has neither resigned nor been removed by the company. It is submitted that therefore the order that NCLT can pass under the operative part of Section 140(5) is against the company and not the auditor. It is an order to the company to change its auditor and no other order. It is submitted that the word “change” has been held to mean “replace with or exchange for another” and “the substitution of one thing for another”.

x) It is submitted that as per the non-obstante clause provided in Section 140(5), it is clear that the NCLT can direct the company and no one else to remove the auditor. The non-obstante clause needs to be read with the term “change” as provided therein. It is submitted that Section 140(5) of the Act cannot apply in circumstances where the auditor sought to be removed has ceased to hold that position as no order of change can be passed once the auditor has resigned. It is submitted that this is clear from the plain language of the provision itself.

xi) It is next submitted that under the first proviso to Section 140(5), when an application under Section 140(5) is filed by the Central Government and if NCLT is satisfied that a change in auditor is required, then within 15 days from the date of filing the

said application, NCLT can pass an urgent order that the auditor will not "function" as an auditor and that the Central Government may appoint a new auditor to replace the current auditor. It is submitted that this is in the nature of a *pro tem* order pending final order by NCLT under the operative part of Section 140(5) and to facilitate the Central Government in appointing an auditor whilst the existing auditor functioning is restrained.

xii) It is next submitted that the second proviso to subsection 5 of Section 140 contemplates that if a final order is passed against the auditor, then the auditor will not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order. Additionally, the auditor shall also be liable for action under Section 447 of the Companies Act. It is submitted that the second proviso does not contemplate any separate order by NCLT. Instead, it only provides for an automatic consequence, i.e., five years ineligibility qua an auditor whether individual or firm against whom a final order has been passed by the NCLT. It is submitted that moreover, the entire firm gets automatically disqualified for the actions of even one of its partners. There is no discretion provided to NCLT to alter the period of ineligibility. It is submitted that the debarment prescribed under the second proviso is an *in terrorem* provision imposed by operation of law, in the event an auditor chooses not to resign and forces upon himself a final order under the provision. It is submitted that the plain language of second proviso is anchored squarely on a final order being passed under the operative part of Section 140(5).

xiii) It is submitted that it is settled law that proceedings which may result in disqualification would be of a quasicriminal nature and have to be strictly construed. Since Section 140(5) results in a disqualification of an auditor, proceedings thereunder would be quasi-criminal in nature. Disqualification of a professional is akin to a death penalty. The standard of proof is therefore satisfaction beyond reasonable doubt. Reliance is placed upon the decision of this Court in the case of ***An Advocate v. Bar Council of India (1989) Supp 2 SCC 25*** *(*Para 4(1) & (11) and ***ICAI v. LK Ratna & Ors***. ***(1986) 4 SCC 537*** *(*para 18).

xiv) It is submitted that the Act needs to be read and interpreted in a holistic manner. Under the scheme of the Act, it is Section 447 which specifically provides for punishment for fraud. Section 140(5) is not a provision to punish or penalize an auditor. By treating Section 140(5) instead of Section 447 as a provision to punish for fraud, Ministry and NCLT failed to follow the well settled rule of interpretation that something may be done only in the manner prescribed by the law and in no other manner. Reliance is placed upon the decision of this Court in the case of ***Dharani Sugars and Chemicals Ltd. v. Union of India, (2019) 5 SCC 480*** (para 55).

xv) It is further submitted that expanding the scope and purpose of Section 140(5) to include punishment for fraud, would tantamount to prejudicing the defence that an auditor, in a given case, could take in any other proceedings. The summary nature in which Section 140(5) aims to determine fraud may lead to a complete redundancy of all other processes and procedures provided for under the Companies Act and materially impact an auditor's right to fair trial. As an example, the determination of guilt under Section 140(5) by way of a summary procedure could render the process of defences and appeals provided as a part of the NFRA process nugatory and a mere formality qua the auditors.

xvi) It is submitted that It is only when the language of provisions in a statute are not clear and categorical, the purpose of the same can be examined by a court to interpret the provision. It is submitted that the following principles of law are well settled with regard to the primacy of plain language interpretation over purposive interpretation:

i. The courts should now be very reluctant to hold that Parliament has achieved nothing by the language it used, when it is tolerably plain what Parliament wished to achieve. [See ***Dr. Jaishri Laxmanrao Patil v. Chief Minister and Others, (2021) 8 SCC 1*** (para 150).

ii. The courts will therefore reject that construction which will defeat the plain intention of the legislature even though there may be some in exactitude in the language used. [See ***Jaishri Laxmanrao Patil (supra)*** (para 151).

iii. Purposive interpretation can be given only when there is some ambiguity in the language of the statutory provisions or it leads to absurd results. [See ***State of Maharashtra v. Shri Vile Parle Kelvani Mandal & Ors. (2022) 2 SCC 725*** (para 16).

xvii) It is submitted that in addition, this Court has time and again upheld the principle of doubtful penalisation which requires that "if two views and reasonable constructions can be put on a provision, the court must lean in favour of construction which exempts the subject from penalty rather than one which imposes penalty". Reliance is placed on the decision of this Court in the cases of ***SEBI v. Sunil Krishna Khaitan, (2023) 2 SCC 643*** (Para 55) and ***Tolaram Relumal v. State of Bombay. (1955) 1 SCR 158*** (Para 8).

xviii) It is submitted that NCLT's jurisdiction under Section 140(5) of the Act is to direct the removal of a company's existing auditor and to allow his substitution by the Central Government. It is submitted that it is not possible to remove any person/firm from a position which whey are not holding. Accordingly, an order directing removal of BSR who had already resigned as auditor of IFIN would only be possible by way of a legal fiction of treating BSR as continuing to remain IFIN's auditor.

xix) It is next submitted that Section 140(5) of the Act does not create any legal fiction by which an auditor who has resigned would continue to be treated as an auditor. A deeming fiction can only be created by the legislature. In fact, courts and tribunals do not have the power to create a deeming fiction by judicial interpretation when the statute does not provide for it. Reliance is placed upon the decisions of this Court in the cases of ***Bhuwalka Steel Industries Ltd & Anr v. UOI, (2017) 5 SCC 598*** (Para 38) and ***Sant Lal Gupta v. Modern Cooperative Housing Society Ltd., (2010) 13 SCC 336*** (Para 14).

xx) It is submitted that the need for a deemed removal of a past auditor does not arise, since the very purpose and object of Section 140, i.e., removal and change of auditors, has been satisfied by the auditor's resignation. Such a past auditor can, despite his resignation, be prosecuted for fraud under Section 447 of the Act. Therefore, the question of removing the auditor under Section 140(5) cannot and does not arise.

xxi) It is submitted that the Ministry was aware that an order under Section 140(5) cannot be passed against a past auditor except through the device of a deeming fiction. This is evident from prayers (a), (b) and (c) of the 140(5) Company Petition sought qua Deloitte in which Ministry sought a "deemed removal" of Deloitte even though it had already rotated out as auditor. Consequently, NCLT could not have gone into the merits of the 140(5) Company Petition itself as the relief sought for was beyond NCLT's powers.

xxii) It is submitted that further, the prayers in the Company Petition sought against BSR became infructuous with its resignation on 19 June 2019. Pertinently, no "deemed removal" prayer was sought against BSR after its resignation. Despite this, NCLT proceeded to create a deeming fiction so as to clutch at its jurisdiction to pass an order under Section 140(5) against BSR.

xxiii) It is then submitted that NCLT, exercising powers under Section 140(5), cannot direct removal of past auditors or deem such auditors to have been removed at a previous date. NCLT, being a creature of a statute, has to act within the domain prescribed by the law/statutory provision. Thus, NCLT cannot exercise power which has not been expressly vested in it, by directing a "deemed change in auditors. Reliance is placed upon the decisions of this Court in the cases of ***B. Himmatlal Agrawal v Competition Commission of India, AIR 2018 SC 2804*** (para 8) and ***Cellular Operators Association of India v. Union of India, (2003) 3 SCC 186*** (para 20-21).

xxiv) It is submitted that in ***Pasupuleti Venkateswarlu v. Motor & General Traders, (1975) 1 SCC 770***, this Court held that a proceeding may not be maintainable by reasons of a post filing event. This Court observed "If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decrotal remedy." xxv) It is submitted that in the present case although BSR resigned after the filing of the 140(5) petition, the resignation rendered the petition infructuous since the reliefs sought for could no longer be granted under Section 140(5) and indeed the purpose underlying Section 140(5) stood accomplished by such resignation.

xxvi) It is submitted that reading in an implied prohibition against an auditor from resigning after the commencement of proceedings under Section 140(5) would be contrary to the plain language of the section and would require it to be re-written. Such an implied provision would also be contrary to the object of Section 140(5) as it would mean that the provision ensures that an auditor against whom allegations of fraud have: been made continues as auditor and is not permitted to resign. This would lead to an anomalous situation of compelling the continuance of an auditor, despite him having committed a fraud until the NCLT passes a final order or an interim order under the first proviso to Section 140(5).

xxvii) It is further submitted by the learned counsel appearing on behalf of the original writ petitioners that Section 140(5) is excessive and manifestly arbitrary as it provides unguided and untrammelled powers to NCLT and that too in a summary proceeding, for determination of a serious offence of fraud and consequence of mandatory disqualification with grave consequences akin to civil death. It is submitted that the penalty in the form of automatic disqualification of auditors and of the entire firm including partners who may be entirely unconnected and innocent for a predetermined period envisaged under Section 140(5) is highly disproportionate and not the least invasive method. It is submitted that Section 140(5) creates an automatic penalty of disqualification, upon summary adjudication, when such a penalty has already been provided for under section 141(3)(h) of the Act after following due process of trial under Sections 435 to 446 of the Act. The same results in contravention of the principles of double jeopardy and violation of Article 20(2) of the Constitution. It is submitted that disqualification akin to "civil death" under Section 140(5) impinges upon BSR and its partners' fundamental right to carry on its profession, as guaranteed under Article 19(1)(g) of the Constitution. The same, being unreasonable, does not fall within the protection of Article 19(6) of the Constitution of India. It is submitted that applying Section 140(5) in its plain language i.e., to change of auditors, saves it from the above serious constitutional infraction without letting auditors "off the hook" under the Companies Act.

xxviii) It is submitted that the NCLT, vide its first Order, erroneously upheld its jurisdiction to maintain the 140(5) Company Petition against past auditors of IFIN, including BSR, by

incorrectly creating a deeming fiction, in absence of any legislation to this effect or the necessary jurisdiction and power to do so. It is submitted that the NCLT wrongly assumed jurisdiction by holding that it was empowered to pass directions for a deemed change of ex-auditors and therefore the NCLT's first order is contrary to Section 140(5) as it was passed without jurisdiction and based on an incorrect assumption that the jurisdictional fact that the existing auditors of the company needed to be "changed" existed.

xxix) It is submitted that it is trite law that a "jurisdictional fact' is a sine qua non or the condition precedent to the assumption of jurisdiction by a court. A court cannot erroneously assume jurisdiction either by not deciding the jurisdictional fact or by erroneously deciding it. Reliance is placed upon the decisions of this Court in the cases of ***Carona Ltd. v. Parvathy Swaminathan & Sons, (2007) 8 SCC 559*** (Para 27, 28, 36) and ***Arun Kumar v. Union of India, (2007) 1 SCC 732*** (Para 74-76). It is submitted that this Court has clearly laid down that the foundational fact must be established before a presumption is made. Reliance is placed on the decision of this Court in the case of ***Balram Garg v. SEBI, (2022) 9 SCC 425*** (Para 45 and 51).

xxx) It is further submitted that even the NCLT's second order on the application filed by the Ministry for the appointment of MMC as the statutory auditor of IFIN under the first proviso to Section 140(5) is wholly without jurisdiction. It is submitted that once the BSR resigned as an auditor, there was no question of invoking first proviso to section 140(5) of the Act.

xxxi) It is submitted that statutory auditor appointment application was clearly contrary to law, without jurisdiction and could not have been under the first proviso to Section 140(5) since firstly, Section 140(5) itself did not apply to the past auditors, and hence no question of invoking the first proviso could arise; secondly, the first proviso is only a *pro tem* measure pending a jurisdiction order under Section 140(5); thirdly, the NCLT's second order is not in the nature of a *pro tem* order; fourthly, once the proceedings under section 140(5) of the Act are initiated, only the Central Government is authorised to appoint or change the auditors under the first proviso. Under the first proviso to section 140(5), the power given to Central Government to appoint an auditor due to urgency, does not take away the power of the concerned company to appoint an auditor of its choice; fifthly, BSR had admittedly already resigned and vacated its office, as accepted by the Ministry in its submissions before this Court and this Court noted the same in the order dated 26.09.2019. It is submitted that moreover, the Ministry withheld various key facts from the NCLT at the time of filing.

4.1 Now so far as the direction issued under Section 212(14) and the prosecution under Section 212(15), it is submitted as under:

i) Section 212(1) provides that the Central Government may direct the SPIO to investigate into the affairs of a company inter alia upon a receipt of the report of the Registrar, on intimation of a special resolution passed by a company, in public interest or on request from any Department of the Central Government or State Government;

ii) Section 212(11) provides that SFIO must submit an "interim report" to the Central Government, if the SFIO is directed to do so by the Central Government;

iii) Section 212(12) requires SFIO to submit an "investigation report" to the Central Government only upon "completion of the investigation". Therefore, an "investigation report" cannot be submitted at any time prior to the completion of the investigation, whereas an "interim report" under Section 212(11) can be submitted at any stage;

iv) Under Section 212(14), the Central Government has been empowered to direct SPIO to initiate prosecution against a company or its officers, if the Central Government considers it necessary after examination of only the "investigation report" issued under Section 212(12), i.e., after completion of the investigation. Reliance is placed on the decision of this Court in the case of ***Serious Fraud Investigation Office v Rahul Modi (2019) 5 SCC 266*** (Para 30);

v) Section 212(14) permits the Central Government to take legal advice when examining the "investigation report", which itself gives colour to the word "examination" and shows that the Central Government is to properly apply its mind to the "investigation report" before directing initiation of prosecution, Le, not to do so mechanically or for collateral purposes;

vi) Section 212(14A) provides that where the report under Section 212(11) or 212(12) stated that fraud has taken place and has been taken advantage of by a director, key managerial personnel or other officer, the Central Government may file an application before the NCLT for appropriate orders for disgorgement of asset and for holding such person liable personally; vii) Under Section 212(15), it is only the "investigation report" (submitted only upon completion of the investigation which is filed with the Special Court is deemed to be police officer's report under Section 173 of the Criminal Procedure Code, 1973. (CHPC) Significantly, Section 212(15) is a deeming fiction that is limited to only making investigation report under Section 212(12), to be the police officer's report under Section 173, CrPC;

viii) It is therefore clear that the legislature has envisaged two distinct kinds of reports, with its own specific purpose. The first kind of report is under Section 212(11). which report is an 'Interim Report' and can be issued at any point of time during the course of investigation by the SFIO. The 2nd kind of report is an 'Investigation Report" which can be issued only after completion of the investigation by the SFIO. Only the Investigation Report' can be considered by the Central Government under Section 212(14) for the purposes of commencement of prosecution. On the other hand, an action before the NCLT under Section 212(14A) can be brought on based on either the Investigation Report or even the Interim Report;

ix) It is further clear that the Central Government, under Section 212(14) is required to apply its mind, seek legal opinion (if required) and only thereafter decide whether or not a sanction order is to be issued, i.e., if in its opinion prosecution is to be initiated based on the "Investigation Report'. Further, only such 'Investigation Report', which is considered by the Central Government for the initiation of prosecution under Section 212(14), is to be the police officer's report under Section 173, CrPC;

x) It is submitted that in the present case, SFIO's 2nd Interim Report is an "Interim report" and was not issued upon "completion of the investigation". As such, the 2 Interim Report is not an "investigation report" under Section 212(12) of the Act and could not have been considered by the Central Government under Section 212(14) for the purposes of issuing the Sanction Order;

xi) The present case is not a case of invalidity/irregularity of sanction but a case of no sanction at all, since the pre-requisite to the sanction, i.e., a final investigation report, is absent;

xii) As is evident from above, where an investigation report itself states that the investigation is incomplete or that further evidence is yet to be collected, then such an investigation report does not meet the obligatory requirements of law and cannot be

considered a final investigation report under Section 173(2) of the CrPC. Reliance is placed on the following decisions in the cases of ***P.M.C Mercantile Private Ltd. v. The State 2014(3) MWN (Cr.) 454 (Para 11 and 19); Pravin Chandra Modi v. The State of Andhra Pradesh, Crl. App. No. 49, 1964; Hari Chand & Ram Pal v. State Crl. Misc. (M) 99 & 111 of 1977 (Para 14)***. Accordingly, given the language of paras 1.5 and 4.126.1 of the 2nd Interim SFIO Report, that report could never be treated as an investigation report under Section 212(12);

xiii) Even while examining the 2nd Interim Report, the MCA was of the view that the 2nd Interim Report was not a complete investigation report with respect to IFIN. Accordingly, the Ministry had directed the SFIO to carry out further investigation on aspects which were already covered in the 2nd Interim Report;

xiv) Further, the Ministry and the SFIO, despite being afforded ample opportunity, did not place on record any affidavit or argument to explain Para V of the Sanction Order or that the investigation was complete and that the 2nd Interim Report was not treated by the Ministry as an interim report. The SFIO cannot avoid the consequences of not having filed an affidavit, stating on oath, that the investigation was not complete. This is a question of fact;

xv) Section 212(12), does not permit initiation of prosecution based on a report which is issued till such time investigation has been completed. This is clear from a conjoint reading of Sections 212(12), (14) and (15). Further, though Section 173(8) of the CrPC contemplates a further investigation after filing of a report under Section 173(2), it is trite that Section 173(8) does not enable the inspector to submit an incomplete or preliminary report and later on submit a final report. Reliance is placed on the following decisions in the cases of ***Kamal Lochan Sen v. State of Orissa (1982) 54 CLT 509*** (Para 5) and ***AV Dharma Reddy v. State of A.P. & Ors., 2011 CriLJ 185*** (Para 5). Therefore, the stratagem adopted by SFIO and the Ministry in proceeding to act based on an "interim report" and simultaneously carrying on a further investigation is illegal;

xvi) Since the investigation itself was not complete and the 2nd Interim SFIO Report is merely an interim report, there was no basis for the Ministry to issue a direction under Section 212(14) to initiate prosecution. Accordingly, the Sanction Order is ultra yes. It does not constitute sanction and the prosecution is *void ab initio* and a nullity;

xvii) The Sanction Order was passed without application of mind to the relevant material and evidence;

xviii) Section 212(14) requires an "examination" by the Central Government and even contemplates "legal advice" being taken, if required. The Parliament sets out a superior degree of care that is required while passing an order under Section 212(14). Therefore, the Central Government's decision must be reasoned and must be made with proper application of mind;

xix) In law, the order of sanction must disclose both adequacy of material as well as consideration of the relevant facts, material and evidence by the sanctioning authority. Reliance is placed on the decision of this Court in the case of ***Mansukhbhai Vithaldas Chauhan v. State of Gujarat (1997) 7 SCC 622*** (Paras 17, 18 and 19);

xx) SFIO submitted the 2nd Interim SFIO Report on 28.05.2019. Admittedly, the report comprised of over 32,000 pages, with the body of the report itself forming approximately 787 pages. The 2 Interim SFIO Report was allegedly examined by a Processing Officer (Legal Section), Ministry who had prepared a processing note. This processing note was allegedly submitted to the 'Senior Officer' on an urgent priority basis. Despite the above

internal processes, Ministry issued the Sanction Order on 29.05.2019 (i.e., within one day). It is pertinent to note that a copy of the said processing note was not placed before the Bombay High Court or provided to BSR despite repeated requests for inspection vide emails dated 01.10.2019, 10.10.2019, and 14.10.2019. The Bombay High Court, in these circumstances, was correct to draw adverse inference since Ministry and SFIO failed to demonstrate due application of mind through any document or affidavit;

xxi) Given the voluminous nature of the 2nd Interim SFIO Report and the internal processes in place, it was impossible for Ministry to examine and apply its mind to the 2nd Interim SFIO Report (as required under Section 212(14) of the Act) within one day before it issued the Sanction Order. The events described above clearly show that the Sanction Order was granted in haste, without application of mind and for extraneous consideration. As such, the proceedings following such Sanction Order also stand vitiated. Reliance is placed upon the decisions of this Court in the cases of ***K.K Mishra v. State of Madhya Pradesh, (2018) 6 SCC 676*** (Para 18) and ***Anirudhsinhji Karansinhji Jadeja v. State of Gujarat*** (1995) 5 SCC 302 (Para 15);

xxii) Further, Ministry's failure to produce any evidence to demonstrate that its officers independently applied their minds to the 2nd Interim SFIO Report is also contrary to the principles relating to duty of disclosure since disclosure would protect the fairness of the proceedings and also enhance the transparency of the process. Reliance is placed upon the decision of this Court in the case of ***T.Takano v. SEBI, (2022) 8 SCC 162*** (Para 62.3);

xxiii) It is therefore submitted that the Sanction Order is bad in law and the Bombay High Court rightly quashed the same;

xxiv) A mandatory prerequisite to jurisdiction is the existence of a valid sanction. Therefore, the prosecution becomes incompetent and consequently the proceedings are vitiated and without jurisdiction where no valid sanction is granted. Reliance is placed on the decisions in the cases of ***Gokulchand Dwarkadas Morarka v. The King, (1947-48) 75 IA 30***; ***Yusofalli Mulla Noobbhoy v. The King, 1949 Cri LJ 889*** (Para 15); ***Mohd. Iqbal Ahmed v. State of Andhra Pradesh (1979) 4 SCC 172*** (Para 3);

xxv) The Sanction Order issued by MCA under Section 212(14) is invalid and non-est. In such circumstances, it is submitted that the prosecution initiated by SFIO is absent any sanction and hence a nullity and without any jurisdiction.

4.2 Learned counsel appearing on behalf of respondent No.1 in Criminal Appeal No. 2300/2011 – Hari Sankaran, in addition, has further submitted that in the present matter no final investigation report has been filed by the SFIO qua Hari Sankaran. It is submitted that the second report is not in the nature of final investigation report qua Hari Sankaran. It is submitted that since the second report was not a final investigation report qua Hari Sankaran, direction for prosecution in question could not have been issued and therefore consequently the complaint could not have been filed qua Hari Sankaran.

4.3 Making above submissions and relying upon the aforesaid decisions, it is prayed by the learned counsel appearing on behalf of the original writ petitioners to dismiss the present appeals and uphold the impugned judgment and order passed by the High Court.

Analysis and Interpretation of Section 140(5)of the Companies Act, 2013:

5. Section 140(5) of the Act, 2013 titled as "Removal, Resignation of Auditor and Giving of Special Notice" appears in Chapter X of the Act which is titled as "Audit and Auditors". Therefore, Chapter X is a special provision under the new Act with respect of "Audit and Auditors". It cannot be disputed that the auditor plays a very important role so

far as the affairs of any company are concerned and therefore he should be independent and above board. Companies Act, 2013 is the result of the culmination of detailed study after taking into consideration the Parliamentary Standing Committee on Finance Report as well as the recommendations of the Standing Committee by introducing Companies Bill, 2009 and Companies Bill, 2011. When the earlier Companies Bill, 2009 was introduced, it was a culmination of the growing corporate economy and past experiences of corporate fiascos too and one of the suggestions were to provide for stricter accountability for auditors. There was a long discussion on the role, responsibility, duties and regulation of auditors and the regulatory and enforcement provisions. Various suggestions were received to make the provisions pertaining to Audit and Auditors more stringent. It was suggested on Clause 123(10) of the 2009 Bill which provides for removal of an auditor by the NCLT on finding that there is a fraud and corresponds to Section 140(5) of the Act should be made more stringent and should contemplate that an auditor removed by the Tribunal should not be eligible to be appointed as an auditor of any company for a period of five years.

5.1 At this stage, it is required to be noted that Section 143 of the Act deals with the powers and duties of the auditors. Sub-section (12) of Section 143 specifically provides that in the event that the auditor has reason to believe that an offence of fraud is being or has been committed in the company, the auditor shall report the matter to the Central Government. The detailed procedure is provided under the Rules issued in this regard. Therefore, a statutory duty is cast upon the auditor to report the matter to the Central Government about the offence of fraud being committed in a company. To see that the auditor is not holding any post in the company and he acts independently, Section 144 of the Act provides that the auditor cannot provide certain services including the management services. The objective seems to be that the auditor should function as an independent person uninfluenced by any of its activities outside the scope of audit services. The auditor is prohibited from providing any management service to the company. Thus, the prohibition and restriction created under Section 144 of the Act is primarily to protect the interest of the company in question and other stakeholders such as lenders and investors and the public at large. Keeping inb mind the aforesaid provisions and the underlying public policy in the backdrop, Section 140(5) of the Act, 2013 is required to be interpreted and/or considered.

5.2 Section 140(1) of the Act provides for the procedure to remove an auditor by the company before the expiry of his term; section 140(2) and (3) of the Act deal with resignation of auditors and Section 140(4) of the Act deals with giving of special notice at an AGM for appointment of an auditor other than the retiring auditor and the process in that regard. However, Section 140(5) of the Act empowers the Tribunal (NCLT), either *suo motu* or on an application made to it by the Central Government or by any person concerned, to take action against the auditor who has acted in a fraudulent manner or is abetting or colluding in fraud with the management of a company. If on completion of an enquiry it is found by the Tribunal that an auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may by order direct the company to change its auditors. Therefore, powers of the NCLT in first part of Section 140(5) is quasi-judicial in nature and the Tribunal would have the powers of a civil court to examine the role of auditors and adjudicate on their fraudulent conduct and abdication of their function. The first proviso to Section 140(5) confers power upon the Tribunal on the application made by the Central Government and if the Tribunal is satisfied that any change of the auditor is required, to remove such auditor and/or pass an order that such an auditor shall not

function as an auditor (within 15 days of receipt of such application) and the Central Government may appoint another auditor in his place. Thus, the powers under the first proviso to Section 140(5) can be said to be interim or *pro tem* measure to prevent an existing auditor from continuing and substitute him with an auditor based on a *prima facie* satisfaction that a fraud has been perpetrated and when circumstances warrant the substitution. Such an order can be said to be an *interim* order akin to a temporary suspension during the pendency of the detailed enquiry as provided in Section 140(5) of the Act and before any final order is passed by the Tribunal.

5.3 Second proviso to section 140(5) of the Act further provides that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under section 140(5) shall not be eligible to be appointed as an auditor of **any** company for a period of five years from the date of passing of the order and the auditor shall also be liable of such action under section 447 of the Companies Act. Therefore, as such, second proviso to Section 140(5) can be said to be a substantive provision and it operates on the final order passed by the Tribunal under Section 140(5) (first part). At this stage, it is required to be noted that after taking into consideration the recommendations made by the previous Standing Committee in respect of Companies Bill, 2009 and the recommendations from various stakeholders, the Companies Bill, 2011 came to be introduced. The suggestion of the Standing Committee to clause 123(1) of the 2009 Bill (which provided for removal of an auditor by the NCLT on finding that there is a fraud) was to make the provision more stringent; and to provide for consequences for an auditor when such auditor is found to have been perpetrating a fraud and is removed by the NCLT for such fraud. The same has been done by way of second proviso to Section 140(5) of the Act, 2013. Therefore, the second proviso to Section 140(5) which, as observed hereinabove, is a substantive provision, is introduced after a detailed analysis and after taking into consideration the recommendations of the Standing Committee and with a view to make the provision more stringent and to provide for consequences for an auditor when such auditor is found to have been perpetrating a fraud and is removed by the NCLT for such fraud. It is required to be noted that on passing of the final order by the NCLT under first part of section 140(5) and if an auditor is found to have been indulged into fraudulent activities or abetting or colluding in a fraud with the management of the company, consequences provided under the second proviso to section 140(5) shall follow. Therefore, before second proviso of section 140(5) is attracted, there must be a detailed enquiry against an auditor of a company as per first part of section 140(5) and there must be a finding arrived at by the NCLT that the auditor of a company has, directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers.

6. By the impugned judgment and order, though the High Court has upheld the *vires* of Section 140(5) of the Act, 2013, however, the High Court has held that once the auditor resigns as an auditor or is no more an auditor on his resignation, thereafter Section 140(5) proceedings are no longer maintainable as the petition filed by the Union of India under section 140(5) has been satisfied by the subsequent resignation of the auditor. The view taken by the High Court is absolutely erroneous and is unsustainable. Subsequent resignation of an auditor after the application is filed under section 140(5) by itself shall not terminate the proceedings under section 140(5). Resignation and/or removal of an auditor cannot be said to be an end of the proceedings under section 140(5). There are further consequences also on culmination of the enquiry under section 140(5) proceedings and passing a final order by the Tribunal on the conduct of an auditor, whether such a auditor has, directly or indirectly, acted in a fraudulent manner or abetted or colluded in

any fraud by, or in relation to, the company or its directors or officers, as provided under the second proviso to section 140(5) of the Act, 2013. Therefore, the enquiry/proceedings initiated under the first part of section 140(5) has to go to its logical end and subsequent resignation and/or discontinuance of an auditor shall not terminate the enquiry/proceedings under section 140(5). If the interpretation given by the High Court that once an auditor resigns, the proceedings under section 140(5) stand terminated and are no longer further required to be proceeded, in that case, an auditor to avoid the final order and the consequence of final order as provided under the second proviso to section 140(5) may resign and avoid any final order by the Tribunal. That cannot be the intention of the legislature.

6.1 As observed hereinabove, the second proviso to section 140(5) of the Act, 2013 is a substantive provision, though it is by way of a proviso, and the same shall operate and/or depend upon the final order to be passed by the Tribunal in the first part of section 140(5). If the interpretation given by the High Court that on subsequent resignation and/or discontinuance of an auditor, proceedings under section 140(5) stand terminated and/or the petition under section 140(5) by the Central Government is no longer maintainable is accepted, in that case, second proviso to section 140(5) would become nugatory and in no case there shall be any action under the second proviso to section 140(5). If such an interpretation, as interpreted by the High Court, is accepted, in that case, the object and purpose of incorporation of second proviso to section 140(5) shall be frustrated. The object and purpose of second proviso to section 140(5), as observed hereinabove, is to make the provision more stringent and to provide for consequences for an auditor when such an auditor is found to have been perpetrating a fraud and is removed by the NCLT for such fraud. At this stage, it is required to be noted that under the second proviso to section 140(5) on the final order being passed by the Tribunal that the auditor/firm has, directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, he/it shall not be eligible to be appointed as an auditor of **any** company for a period of five years. The word "**any**" used in the second proviso to section 140(5) is significant. On the final order being passed by the Tribunal, such an auditor not only shall be removed or changed as an auditor of a company, but such an auditor/firm shall also be ineligible to be appointed as an auditor of **any** other company for a period of five years.

7. Therefore, on true interpretation and scheme of Section 140(5) of the Act, 2013, once the enquiry/proceedings is/are initiated under first part of section 140(5) of the Act, either *suo motu* by the Tribunal or on an application made to it by the Central Government or by any person concerned, it must come to its logical end and irrespective of the fact whether during such enquiry/proceedings the auditor has resigned or not, there must be a final order to be passed by the Tribunal on whether such an auditor has, in fact, directly or indirectly, acted in a fraudulent manner or not. Direction to the company to change its auditor as provided in the first part of section 140(5) is only a consequence to the finding recorded by the Tribunal that the auditor has, directly or indirectly, acted in a fraudulent manner. This is the first consequence of the final order under section 140(5) (first part). On passing the final order by the Tribunal that the auditor of a company has, directly or indirectly, acted in a fraudulent manner, the second consequence as mentioned in the second proviso to section 140(5) shall be attracted. Therefore, for any consequence as provided under the second proviso to section 140(5), there shall be a final order by the Tribunal on enquiry as per first part of section 140(5). Therefore, on true interpretation, even on resignation by an auditor of a company even during the enquiry/proceedings under section 140(5) or even prior to that, there shall not be any termination of the

proceedings under section 140(5) as observed and held by the High Court. At the cost of repetition, it is observed that in a given case, an auditor, who in fact has, directly or indirectly, acted in a fraudulent manner, to avoid any further consequence under the second proviso to section 140(5), resigns to avoid any consequence under the second proviso to section 140(5), it cannot be permitted.

8. No so far as the submission on behalf of the respective auditors that even if section 140(5) would not have been there, in that case also, no auditor can get away with fraud, abetment of fraud or professional misconduct etc. and for that purpose the reliance placed upon sections 132, 141, 147, 245 and 447 of the Act is concerned, at the outset, it is required to be noted that all the aforesaid provisions and section 140(5) operate in different field. Section 140(5) has been enacted with a special object and purpose, as observed hereinabove. Second proviso to section 140(5) specifically provides that on final order being passed by the NCLT, such an auditor shall not be eligible to become an auditor in any other company for a period of five years. Therefore, merely because the auditor can be removed as an auditor of a company including the other provisions, section 140(5) which has been enacted with a special object and purpose cannot be said to be arbitrary and/or *ultra vires*.

9. Now so far as the reliance placed upon section 241(3) of the Act and the submission that even in a case where the auditor resigns, the auditor concerned can be proceeded against under section 241(3) of the Act and therefore the proceedings pursuant to section 241(3) of the Act would lead to the same result and the auditor would be held 'not to be a fit and proper person' to be appointed in any other office connected with the conduct and management of any company is concerned, at the outset, it is required to be noted that Section 241(3) of the Act speaks about the concerned company and not any other company. Section 241(3) of the Act has been introduced w.e.f. 14.08.2019 which authorises the Central Government to apply to the Tribunal to declare that the persons mentioned in section 241(3) of the Act are "not fit and proper persons" to hold the office of a director or any other office connected with the conduct and management of any company. Section 241(3) of the Act is required to be read along with Sections 243(1A) and 243(2). On a conjoint reading of the aforesaid provisions, it is clear that the reference specifically in Section 241(3) of the Act to "any other office connected with the conduct and management of any company" means those akin to manager, managing director or other director such as key managerial personnel and not an auditor. The words used in Section 241(3) of the Act are "conduct and management of the company". As per the Scheme of the Act, 2013, more particularly Chapter X, the auditor acts as an independent examiner of accounts and cannot be said to be holding an office in the conduct and management of the company. Therefore, the submission that what could be achieved under section 140(5) of the Act, 2013 can be achieved by Section 241(3) even after the auditor has resigned has no substance.

10. At this stage, it is required to be noted that in section 140(5), it is specifically mentioned that "without prejudice to any action under the provisions of this Act or any other law for the time being in force". Therefore, the intention of the legislature while enacting section 140(5) is very clear and the powers conferred upon the Tribunal under section 140(5) shall be without prejudice to any action under the provisions of the Companies Act, 2013 or any other law for the time being in force. Therefore, irrespective of any other provisions of the Act, 2013, the Tribunal is vested with the powers under Section 140(5) of the Act to pass a final order against the auditor on the allegation that such an auditor of the company has, directly or indirectly, acted in a fraudulent manner.

11. For the reasons stated above, the High Court has materially erred in holding that on resignation of auditors – BSR & Deloitte and on appoint of new auditors, application under section 140(5) shall not be maintainable. Consequently, the High Court has erred in setting aside the order(s) passed by the NCLT/NCLAT by which the NCLT/NCLAT held that despite the resignation of the auditors, enquiry/proceedings under Section 140(5) shall be maintainable and/or continued. As observed hereinabove, despite the subsequent resignation of the auditors and/or despite the resignation of an auditor even for the purpose of second proviso to section 140(5), the enquiry/proceedings/application under section 140(5) (first part) shall be maintainable and continued and on the final order being passed by the NCLT, as provided in section 140(5), consequence as provided under the second proviso to section 140(5) shall follow. As neither the NCLT nor the High Court have gone into the merits of the allegations against the respective auditors and the decision of the NCLT and the High Court is on the maintainability of the proceedings under section 140(5) after resignation of the auditors, we refrain from considering anything on merits of the allegations against the auditors as the allegations of fraud etc. are yet to be considered by the Tribunal on merits in an application under Section 140(5) made by the Central Government.

12. Now so far as challenge to the *vires* of Section 140(5) of the Act is concerned, at the outset, it is required to be noted that the High Court, as such, has upheld the constitutional validity/*vires* of section 140(5) against which the BSR has not filed any special leave petition. Even otherwise on merits also, when some of the writ petitioners have challenged the impugned judgment and order passed by the High Court on constitutional validity/*vires* of Section 140(5), we are of the opinion that section 140(5) cannot be said to be excessive and/or manifestly arbitrary, as contended. It was the case on behalf of the original writ petitioners on the constitutionality/*vires* of section 140(5) that section 140(5) is excessive and arbitrary as it provides unguided and untrammelled powers to NCLT for determination of a serious offence of fraud and consequence of mandatory disqualification with grave consequences akin to civil death. The aforesaid has no substance. As observed hereinabove, NCLT shall exercise the quasi-judicial powers under section 140(5) with all the powers akin to civil court. Ample opportunity shall be given by the NCLT before passing any final order.

13. Now so far as another submission that section 140(5) is violative of Article 14 of the Constitution of India and discriminates against the auditors unfairly in comparison to similarly placed alleged perpetrators, such as directors, management etc. It is required to be noted that the role of auditors cannot be equated with directors and/or management. Auditors play very important role in the affairs of the company and therefore they have to act in the larger public interest and all other stakeholders including investors etc. Chapter X of the Act specifically for the "Audit and Auditors" looking to the importance of the auditors. Therefore, section 140(5) cannot be said to be discriminatory and/or violative of Article 14 of the Constitution of India.

14. Now so far as the submission that the penalty in the form of automatic disqualification of auditors and of the entire firm including partners and that too for a period of five years to become the auditor of any other company is highly disproportionate is concerned, it is ultimately for the legislature/Parliament to provide the debarment. On the principle of joint and severe liability, the auditors and the entire firm including partners shall be liable and therefore can be subjected to section 140(5) and the consequences mentioned in section 140(5) of the Act, 2013. So far as the submission that the disqualification is akin to civil death and section 140(5) impinges upon BSR and its partners' fundamental right to carry on its profession, as guaranteed under Article 19(1)(g)

of the Constitution is concerned, nobody can be permitted to say that despite acting fraudulently, directly or indirectly, they had a right to continue and/or carrying on their profession. Acting in a fraudulent manner, directly or indirectly, by an auditor is a very serious misconduct and therefore the necessary consequence of indulging into such fraudulent act shall follow. At this stage, it is required to be noted and as observed hereinabove, Section 140(5) of the Act has been enacted with the specific object and purpose as referred to hereinabove and the same has been enacted after due deliberations and taking into consideration the recommendations of the Standing Committee as well as the respective stakeholders. Therefore, taking into consideration the object and purpose for which section 140(5) of the Act is enacted, the same cannot be said to be arbitrary, excessive and violative of Article 14 of the Constitution of India and/or violative of fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India, as alleged.

15. Now far as quashing and setting aside section 212(14) direction by the High Court by its impugned judgment and order is concerned, it appears that the High Court has set aside 212(14) direction mainly on two grounds, firstly, that the direction to prosecute was issued within 30 hours of report of the IFIN SFIO Report which demonstrates non-application of mind and secondly on the ground that IFIN SFIO Report was an incomplete report as investigation had not been completed and therefore 212(14) direction was incompetent.

15.1 From the reasoning of the High Court, it appears that the High Court has set aside the direction under section 212(14) terming the same as non-application of mind since it was improbable that report of about 750 pages and 32000 pages of annexures could have been considered in 30 hours. The High Court also observed that the relevant facts and documents to demonstrate application of mind have not been placed on record. With the above conclusion, the High Court has observed that even according to the investigating agency, SFIO Report was an interim report, even asked by the Central Government.

15.2 Now so far as the observations made by the High Court that issuance of the direction to prosecute within 30 hours of the receipt of IFIN SFIO Report demonstrates non-application of mind as it was improbable that report of about 750 pages and 32000 pages of annexures could have been considered in 30 hours is concerned, the observations made by the High Court cannot be accepted. Merely because the direction to prosecute was issued within 30 hours, by that itself, it cannot be presumed that there was a non-application of mind. A detailed note was prepared by the officer which was ultimately placed before the final authority who ultimately took a decision and issued a direction to prosecute. What was required to be considered was, whether there was any material to prosecute or not and whether the direction to prosecute was properly given or not. During the trial, the accused shall be given ample opportunity to put forward their case. Therefore, on the aforesaid ground, the High Court has materially erred in setting aside the direction to prosecute issued under section 212(14) of the Act. Now so far as the observations made by the High Court that the relevant facts and documents to demonstrate application of mind have not been placed on record is concerned, it is required to be noted that a final order to prosecute was placed on record in which it has been specifically mentioned that having gone through the IFIN SFIO Report.

15.3 Now so far as another ground on which the direction/sanction to prosecute has been set aside by the High Court, namely, that it was an incomplete investigation report and therefore on such an incomplete investigation report, no direction/sanction to prosecute could have been issued is concerned, at the outset, it is required to be noted that the High

Court has not properly appreciated that the SFIO IFIN Report was a report prepared by the SFIO on the completion of the investigation into the IFIN – one of the companies under investigation. It is required to be noted that by an order dated 30.09.2018, an investigation was directed to be conducted by the SFIO into IL&FS and its subsidiaries, which comprise of approximately 100-160 entities. So far as the IFIN is concerned, it was one of the subsidiaries in the IL&FS group and the financial services arm. It is the case on behalf of the Central Government that so far as the SFIO IFIN Report is concerned, it is a record in respect of IFIN, upon completion of investigation into IFIN. Merely because so far as the investigation with respect to other subsidiary companies of IL&FS group is concerned, the same might have been going on, cannot be a ground to observe that at this stage so far as the IFIN is concerned the report was incomplete report and for which the investigation was going on. The High Court has not properly appreciated the aforesaid and has wrongly treated the report as an interim report so far as the IFIN is concerned. At this stage, it is required to be noted that in the SFIO IFIN Report itself, it is observed that in light of complex structure of the IL&FS Group and the interlinkages between entities etc, if any further instances or transactions are uncovered qua IFIN during the investigation of other group companies of IL&FS, then a further report will be filed. Therefore, the High Court has materially erred that the investigation in respect of IFIN is incomplete. It is required to be noted that as such the SFIO had submitted the report after a detailed and extensive investigation of IFIN. There are conclusive findings against each of the writ petitioners including Hari Sankaran pointing out multiple breaches, violations of statutory duties and fraudulent conduct. We are not elaborating the same in detail as the prosecution is yet to take place and the concerned persons are to be tried. The proceedings before the High Court were at the stage of direction under section 212(14) to allow the prosecution and the sanction to prosecute. Ample opportunity shall be available to the concerned accused against whom the prosecution was ordered for the offences punishable under section 447 of the Companies Act and other relevant provisions of the IPC. Therefore, the High Court has erred in setting aside the direction under section 212(14) to prosecute at this stage and on the aforesaid grounds.

Conclusion:

16. In view of the above and for the reasons stated above, challenge to the constitutional validity of section 140(5) of the Companies Act, 2013 fails and it is observed and held that section 140(5) is neither discriminatory, arbitrary and/or violative of Articles 14, 19(1)(g) of the Constitution of India, as alleged. The impugned judgment and order passed by the High Court quashing and setting aside the application/proceedings under section 140(5) on the ground that as the auditors have resigned and therefore thereafter the same is not maintainable is hereby quashed and set aside. Consequently, the impugned judgment and order passed by the High Court quashing and setting aside the NCLT order holding that even after the resignation of the auditors, the proceedings under section 140(5) shall be maintainable is hereby quashed and set aside. The application/proceedings under section 140(5) of the Act, 2013 is held to be maintainable even after the resignation of the concerned auditors and now the NCLT therefore to pass a final order on such application after holding enquiry in accordance with law and thereafter on the basis of such final order, further consequences as provided under the second proviso to section 140(5) shall follow. However, it is made clear that we have not expressed anything on merits on the allegations against the concerned auditors and it is ultimately for the NCLT/Tribunal to pass a final order on the application filed by the Central Government under section 140(5) of the Act, 2013.

17. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court quashing and setting aside the direction under Section 212(14) of the Companies Act, 2013 dated 29.05.2019 issued by the Union of India to SFIO is hereby quashed and set aside. The impugned judgment and order passed by the High Court quashing and setting aside the prosecution lodged by the SFIO vide Criminal Complaint CC No.20/2019 on the file of Special Court (Companies Act) and Additional Sessions Judge, Greater Mumbai is also hereby quashed and set aside. Now the said Criminal Complaint CC No. 20/2019 be proceeded further by the concerned Trial Court in accordance with law and on its own merits.

18. Accordingly, in view of the above, the appeals filed by the Union of India, viz., Criminal Appeal Nos. 23052307/2022; 2302-2303/2022; and 2300/2022 are allowed and Criminal Appeal Nos. 2298/2022, 2299/2022 and 2304/2022, as also, Civil Appeal Nos.793/2022; 801/2022 and 877/2022 filed by the Deloitte and its partners are hereby dismissed.