

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3747 OF 2019

Hari Sankaran

... Appellant

Versus

Union of India & Others

... Respondents

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned Order dated 31.01.2019 passed by the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) No. 29 of 2019 by which the learned Appellate Tribunal has dismissed the said appeal preferred by the appellant herein – Ex-Director of respondent No. 2 – Infrastructure Leasing & Financial Services Limited (hereinafter referred to as ‘the IL&FS’) and has confirmed the order passed by the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as ‘the learned Tribunal’) dated 01.01.2019 by which the learned Tribunal allowed the said

application preferred by the Central Government under Section 130(1) & (2) of the Companies Act, 2013 (hereinafter referred to as the 'Companies Act') and has permitted re-casting and re-opening of the accounts of IL&FS, IL&FS Financial Services Limited (hereinafter referred to as the "IFIN") and IL&FS Transportation Networks Limited (hereinafter referred as the "ITNL") for the last five years, the original appellant has preferred the present appeal.

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

That respondent No. 2 – IL&FS is a company incorporated under the provisions of the Companies Act, 1956. That the said company IL&FS has 348 group companies, including IFIN and ITNL. That the said IL&FS is a core investment company and systemically important Non-Banking Finance Company duly approved under the Reserve Bank of India Act, 1931. The said company was promoted by the Central Bank of India, HDFC Ltd., the Union Trust of India. That the said company is holding prominent infrastructure development and finance companies. Over the years, it had inducted institutional shareholders. That the said IL&FS, during the financial year 2017-18 had 169

companies, out of which, 24 companies are direct subsidiaries, 135 companies are indirect subsidiaries, 6 companies are joint ventures and 4 companies are associate companies. That the appellant herein claims to be the Vice-President/Director of IL&FS who has been suspended as the Director of IL&FS and its group companies.

2.1 That on 01.10.2018, the Central Government through the Ministry of Corporate Affairs filed a petition before the learned Appellate Tribunal under Sections 241 and 242 of the Companies Act alleging *inter alia*, mismanagement by the Board of IL&FS and that the affairs of IL&FS were being conducted in a manner prejudicial to public interest. That the Central Government prayed for the following reliefs:

1. That the existing Board of Directors of Respondent No. 1 company, comprising of R2 to R8, be suspended with immediate effect and 10 (Ten) persons be appointed as directors in terms of provisions of Section 242(2)(k) of the Act, to manage the affairs of R1 company and its group companies through their nominees, and such directors any report and function under the Hon'ble Tribunal on such matters as it may direct:

2. That the Board of Directors appointed by the Hon'ble Tribunal in terms of 242(2)(k) of the Act be authorized to replace such number of directors of subsidiaries, joint ventures and associate companies as may be required to make the R1 and its group companies as going concern.

2.2 That it was found that the management of IL&FS and other group company/companies were responsible for negligence and incompetence, and had falsely presented a rosy financial statement. To unearth the irregularities committed by IL&FS and its companies, the provisions of Section 212(1)(c) of the Companies Act were invoked for investigation into the affairs of the company. The investigation was to be carried out by the Serious Fraud Investigation Office (hereinafter referred to as 'the SFIO') in exercise of powers under Section 212 of the Companies Act. The SFIO submitted an interim report dated 30.11.2018 to the Central Government placing on record that the affairs in respect of IL&FS group Companies were mis-managed, and that the manner in which the affairs of the company were being conducted was against the public interest. The said report shall be referred to hereinbelow.

It appears that the Registrar of Companies also conducted an enquiry under Section 206 of the Companies Act, and prima facie concluded that mis-management and compromise in corporate governance norms and risk management has been perpetuated on IL&FS and its group companies by indiscriminately raising long term and short terms loans/borrowings through Public Sector Banks and financial institutions. It was also observed that IL&FS company has been presenting a rosy picture by camouflaging its financial statements, and concealing and suppressing severe mismatch between its cash flows and payment obligations, total lack of liquidity and adverse financial ratios. It was also found that IL&FS company has first defaulted on commercial paper and then on short term borrowings i.e. inter corporate deposits, negative cash flows in operating activities etc. It was further observed that the consolidated balance-sheet of IL&FS company indicated the extremely precarious financial position, and was virtually in deep red. It was found that intangible assets of approximately Rs.18,540 crores as on 31.03.2017, has increased to approximately Rs.20,004 crores as on 31.03.2018, thus

creating a serious doubt about the correctness of the financial statements. A Report dated 03.12.2018 was submitted by the Institute of Chartered Accountants of India (“ICAI”) which has been placed on the record of the Tribunal.

2.3 In this background, the Union of India approached the learned Tribunal for reliefs under Sections 241 and 242 of the Companies Act.

2.4 Thereafter, by a detailed and reasoned order, the learned Tribunal vide Order dated 01.10.2018 allowed the said prayers and suspended the Board of Directors of IL&FS, and appointed the newly constituted Board to conduct the business as per the Memorandum and Articles of the companies. That the learned Tribunal issued the following directions:

“On the basis of the foregoing discussions and after considering the facts of the case, as narrated in the Petition filed by the Union of India, this Bench is of the considered view that it is judicious to invoke the jurisdiction prescribed under Section 241(2) of the Companies Act, 2013 and the Tribunal is of the opinion that as per Section 242(1) of the Companies Act, 2013, the affairs of the IL&FS were being conducted in a manner prejudicial to public interest. The Interim prayer of suspending the present Board of Directors

and reconstitution of the new Board of Directors is hereby allowed. At present, by an additional affidavit only 6 names (supra) of Board members have proposed by the Union of India.

Further directed that the present Board of Directors be suspended with immediate effect. The six Directors as reproduced supra shall take over the R1 company immediately. Newly constituted Board shall hold a meeting on or before 8th October, 2018 and conduct business as per the Memorandum and Articles of Association of the company and the provisions of the Companies Act, 2013. Liberty is granted to the Board of Directors to select a Chairman among themselves. Thereafter, report the roadmap to NCLT, Mumbai Bench at the earliest possible not later than the next date of hearing. The suspended directors hence forth shall not represent the R1 company as a Director and shall also not exercise any powers as a director in any manner before any authority as well.

As a consequence of “Admission” of the Petition, issue notice to intimate next date of hearing. The Petition is to serve copy of this order along with Petition to all the Respondents. The Respondents in turn may file their reply by 15th October, 2018, only after serving copy to the petitioner. The Petitioner can file rejoinder, if deem fit, by 30th October, 2018.”

2.5 That thereafter the Union of India through the Ministry of Corporate Affairs approached the learned Tribunal under Section 130(1) of the Companies Act seeking permission for re-opening of the books of accounts and re-casting thereof, including the financial statements of IL&FS, IL&FS Financial Services Limited and IL&FS Transportation Networks Limited for the last five years viz. from Financial Year 2012-2013 to Financial Year 2017-2018. The learned Tribunal issued notices to the Income Tax Authorities, SEBI, and any other statutory regulatory body or authority, or other persons concerned. The learned Tribunal directed the Central Government to serve the notices upon the said parties.

At this stage, it is required to be noted that the aforesaid three companies through their new board of directors appeared through their counsel before the learned Tribunal at the time of hearing of the aforesaid application under Section 130 of the Companies Act. That, thereafter, after hearing the counsel appearing on behalf of the respective parties, including the learned counsel appearing on behalf of the erstwhile directors, who opposed the application filed under Section 130 of the

Companies Act, the learned Tribunal vide its Order dated 01.01.2019 allowed the application filed under Section 130 of the Companies Act, and permitted the said application for re-opening the books of accounts, and re-casting the financial statements of the aforesaid three companies for the last five years viz. from Financial Year 2012-2013 to Financial Year 2017-2018.

2.6 Feeling aggrieved and dissatisfied with the order passed on the application under Section 130 of the Companies Act by the learned Tribunal dated 01.01.2019, permitting the re-opening and re-casting of the financial statements of the aforesaid three companies for the last five years viz. from Financial Year 2012-2013 to Financial Year 2017-2018, the appellant herein who is a suspended Director of IL&FS alone preferred an appeal before the learned Appellate Tribunal. That by the impugned judgment and order, the learned Appellate Tribunal has dismissed the said appeal.

3. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Appellate Tribunal dismissing the said appeal, and confirming the order passed by the learned Tribunal dated 01.01.2019 allowing the application

under Section 130 of the Companies Act, the original appellant i.e. the suspended Director/erstwhile Director of IL&FS has preferred the present appeal.

4. With the consent of the learned Senior Counsel appearing on behalf of the respective parties, and in the facts and circumstances of the case, we have heard the application for vacating the interim Order along with the main Appeal finally.

5. Shri Dhruv Mehta, learned senior counsel has appeared on behalf of the appellant and Shri Maninder Singh, learned Senior Counsel has appeared on behalf of the Union of India as well as the other contesting respondents.

6. Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant has vehemently submitted that the impugned order passed by the learned Appellate Tribunal dismissing the said appeal and confirming the order passed by the learned Tribunal allowing the application under Section 130 of the Companies Act is absolutely illegal and bad in law.

6.1 Mr. Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant has submitted that the order passed by the learned Tribunal allowing the application under Section 130 of the Companies Act is absolutely illegal and as such contrary to

the provisions of Section 130 of the Companies Act. It is further submitted by Mr. Dhruv Mehta that as such the pre-conditions before passing the order under Section 130 of the Companies Act for re-opening and re-casting the statements of account of the company, namely (i) the relevant earlier accounts were prepared in a fraudulent manner; or (ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements, have not been satisfied.

6.2 Mr. Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant has submitted that as such there is no specific finding given by the learned Tribunal while allowing the application under Section 130 of the Companies Act that either the relevant earlier accounts were prepared in a fraudulent manner, or the affairs of the company were mismanaged, during the relevant period casting a doubt on the reliability of financial statements. It is submitted that in the absence of any specific finding by the learned Tribunal on the aforesaid, it was not permissible for the learned Tribunal to pass the order under Section 130 of the Companies Act permitting re-opening of the books of accounts and re-casting of financial statements of the company/companies.

6.3 It is further submitted that, on the contrary, there is a specific finding/observation by the learned Tribunal in the order under Section 130 of the Companies Act itself that the accounts were not prepared in a fraudulent manner. It is submitted that the conditions precedent for invoking the powers under Section 130 of the Companies Act were not satisfied, and the learned Tribunal was not justified in passing the impugned order under Section 130 of the Companies Act. It is further submitted that therefore the learned Appellate Tribunal ought to have quashed and set aside the order passed by the learned Tribunal.

6.4 It is further submitted by Shri Dhruv Mehta learned Senior Counsel that, even otherwise, the order passed by the learned Tribunal is in breach of natural justice inasmuch as sufficient opportunity was not given to the appellant by the learned Tribunal before passing the order under Section 130 of the Companies Act. It is submitted that the notice on the application under Section 130 of the Companies Act was issued on 27.12.2018 and the impugned order came to be passed on 01.01.2019. It is submitted that even though the appellant sought time to file the reply, the Tribunal without granting any further time to the appellant to file the reply, passed the

impugned order. It is submitted that as per the amended Section 130 of the Companies Act, before passing the order under Section 130 of the Companies Act, not only the Income Tax Authorities and other authorities were required to be heard, even the “other persons concerned”, including the Directors/Ex-Directors of the company were required to be heard. It is submitted that the order passed by the learned Tribunal was in violation of the principles of natural justice, therefore the same was required to be quashed and set aside by the learned Appellate Tribunal.

It is further submitted that though the aforesaid submission was made before the learned Appellate Tribunal, and the learned Appellate Tribunal accepted that the order passed by the learned Tribunal is in breach of the principles of natural justice, the learned Appellate Tribunal dismissed the appeal. It is submitted that, therefore, in the facts and circumstances of the case, the learned Appellate Tribunal ought to have set aside the order passed by the learned Tribunal and ought to have remanded the matter to the learned Tribunal for fresh decision after giving opportunity of hearing to the appellant. In support of the above submissions and request, Shri Dhruv Mehta, learned senior counsel appearing on behalf of the appellant has heavily relied

upon the decisions of this Court in the case of ***Mannalal Khetan v. Kedar Nath Khetan*** (1977) 2 SCC 424 and in the case of ***Swadeshi Cotton Mills v. Union of India*** (1981) 1 SCC 664. Relying upon the above decisions of this Court, it is submitted that when the Statute provides that things are required to be done in a particular manner, it ought to have been done in the same manner as provided under the Statute. It is submitted that in the present case as the Statute specifically provides that before passing the order under Section 130 of the Companies Act, an opportunity is to be given to all concerned and that two conditions, as referred to hereinabove, are to be satisfied, the same are required to be followed and complied with.

6.5 It is further submitted by Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant that, even otherwise, there is no specific finding by the learned Tribunal with respect to the mismanagement by the erstwhile Directors. So far as the reliance placed upon the observations made in the earlier order dated 01.10.2018 is concerned, it is submitted that the order dated 01.10.2018 passed under Sections 241/242 of the Companies Act cannot be said to be the final order. It is

submitted that it is an interim order/report to which the appellant has already submitted the objections, which are yet to be considered. It is submitted that, therefore, condition No. (ii) of Section 130(1) of the Companies Act is not satisfied.

6.6 It is submitted that therefore, as the condition precedent while invoking the powers under Section 130 of the Companies Act are not being met, the learned Tribunal ought not to have and could not have invoked and applied Section 130 of the Companies Act. In support of his above submission, Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant has relied upon the decision of this Court in the case of ***Calcutta Discount Company v. Income Tax Officer*** AIR 1961 SC 372.

6.7 It is further submitted by the learned Senior Counsel appearing on behalf of the appellant that all the three different provisions, namely Section 130, Sections 211/212 and Sections 241/242 of the Companies Act, operate in the different fields and in different situations and as such they are in different chapters and therefore the observations made while passing the order

under one provision cannot be made applicable to while passing the order under different provisions.

6.8 Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant has further submitted that what is required to be considered is the relevant material at the time when the learned Tribunal passed the order under Section 130 of the Companies Act. It is submitted that the respondents cannot support the order passed by the learned Tribunal under Section 130 of the Companies Act relying upon the subsequent developments/events. In support of his above submission, he has heavily relied upon the decisions of this Court in the cases of ***Mohinder Singh Gill v. Chief Election Commissioner, New Delhi*** (1978) 1 SCC 405 and ***T.P. Senkumar v. Union of India*** (2017) 6 SCC 801. It is submitted that the decision of this Court in the case of ***Chairman, All India Railway Recruitment Board v. K. Shyam Kumar*** (2010) 6 SCC 614 relied upon by the learned Counsel appearing on behalf of the Union of India shall not be applicable to the facts of the case on hand. It is submitted that in the case of ***K. Shyam Kumar*** (supra), this Court was considering the administrative decision/order and while

considering such administrative order/decision, this Court observed that the subsequent events/reports can be considered while considering the legality and validity of the original action/order in the public interest.

6.9 Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant has further submitted that, therefore, neither the condition precedent provided in Section 130(1) of the Companies Act has been complied with/satisfied, nor even Section 130(2) of the Companies Act has been complied with, and it is in violation of the provisions of Section 130(1) of the Companies Act, and as sufficient opportunity was not given to the appellant, therefore, is in violation of the principles of natural justice. It is prayed that the present appeal be allowed and the order passed by the learned Tribunal allowing the application under Section 130 of the Act be set aside.

6.10 It is further submitted by Shri Dhruv Mehta, learned Senior Counsel appearing on behalf of the appellant that so far as the impugned order passed by the learned Appellate Tribunal is concerned, it is submitted that none of the submissions/ground raised on behalf of the appellant have been dealt with and/or

considered by the Appellate Tribunal. It is submitted that the learned Appellate Tribunal was considering/deciding the statutory appeal and therefore the learned Appellate Tribunal was supposed to deal with the grounds raised on behalf of the appellant. It is submitted that though the plea of violation of principles of natural justice was specifically pleaded and even the learned Appellate Tribunal also observed that there may be violation of principles of natural justice, in that case, the learned Appellate Tribunal ought to have remanded the matter to the learned Tribunal. It is submitted that the learned Appellate Tribunal ought to have appreciated that in view of the violation of principles of natural justice, it has caused great prejudice to the appellant. It is submitted that as observed and held by this Court in the case of **Swadeshi Cotton Mills** (supra), when the principles of natural justice are prescribed by the statutory provision, no prejudice is required to be shown for invoking the ground of violation of principles of natural justice.

6.11 it is further submitted by learned Counsel appearing on behalf of the appellant that the impugned orders have far reaching consequences. It is submitted that the books of

accounts once re-opened and re-casted are deemed to be final under the provisions of Section 130(2) of the Companies Act.

6.12 Making the above submissions and relying upon the above decisions, it is prayed to quash and set aside the impugned order passed by the learned Tribunal, confirmed by the learned Appellate Tribunal.

7. The present appeal is vehemently opposed by Shri Maninder Singh, learned Senior Counsel appearing on behalf of the Union of India.

7.1 It is vehemently submitted by the learned Senior Counsel appearing on behalf of the Union of India that the impugned order passed by the learned Tribunal, confirmed by the learned Appellate Tribunal do not suffer from any vice of illegality. It is submitted that the order passed by the learned Tribunal under Section 130 of the Companies Act is absolutely in the larger public interest and absolutely in consonance with the provisions of Section 130 of the Companies Act.

7.2 It is further submitted by the learned senior Counsel appearing on behalf of the Union of India that there are very serious allegations of preparing the earlier accounts in a

fraudulent manner, and also with respect to the mismanagement of the affairs of the company during the relevant period. It is submitted that, in the present case, after having satisfied that there are serious allegations against IL&FS group of companies, the Department of Economic Affairs took a conscious decision to approach the NCLT under Section 242 of the Companies Act to order re-constitution of the Board of Directors. It is submitted that by a detailed order and considering the material on record, and having been *prima facie* satisfied with respect to the allegations of mismanagement and relating to the affairs of IL&FS group of companies, the learned Tribunal passed an order dated 01.10.2018 suspending the earlier Directors/Board of Directors of the companies and appointed a new Board of Directors. It is submitted that even the Ministry of Corporate Affairs, Government of India in exercise of powers under Section 212 of the Companies Act had issued an order directing to conduct investigation into the affairs of IL&FS group of companies. It is submitted that SFIO constituted under Section 212 of the Act has already commenced a specialized investigation into the affairs of IL&FS group of companies. It is submitted that the appellant has been arrested on 02.04.2019,

and is presently in judicial custody. It is submitted that thereafter when the Union of India through the Ministry of Corporate Affairs submitted an application before the learned Tribunal to re-open the books of accounts and to re-cast the financial statements of the three main companies for the last five years and thereafter considering the investigation reports and having been satisfied that the conditions precedent for invoking the powers exercised under Section 130 of the Companies Act are satisfied/complied with, thereafter when the learned Tribunal has passed the order, the same cannot be said to be illegal. It is submitted that all the requirements under Section 130 of the Companies Act have been complied with/satisfied.

7.3 It is further submitted that the order dated 01.10.2018 passed under Sections 241/242 of the Companies Act has attained finality inasmuch as the same is not challenged till date. It is submitted that therefore the same can be considered by passing an order under Section 130 of the Companies Act also.

7.4 It is further submitted by the learned Senior Counsel appearing on behalf of the Union of India that all the three provisions, namely Sections 211/212, Sections 241/242 and

Section 130 of the Companies Act are required to be considered and read conjointly. It is submitted that while considering the one provision and/or while passing the order under one provision, it is required to be seen that the effect of the order/orders passed in other provisions do not become nugatory and/or ineffective. It is submitted that therefore if all the aforesaid three provisions are considered and read conjointly, in that case, it can be said that the order passed under Section 130 of the Companies Act would be in the aid of the investigation going on by the SFIO under Section 212 of the Companies Act and the same shall be in the larger public interest. It is submitted that, in the present case, Justice D. K. Jain, a former Judge of this Court, has been appointed to supervise the resolution process of IL&FS group of companies. It is submitted that the re-opening of the books of accounts and re-casting the financial statements of the aforesaid three companies is very much required and necessary, since the same shall be in the larger public interest, to find out the real truth.

7.5 It is further submitted by the learned Senior Counsel appearing on behalf of the Union of India that the powers

conferred under Section 130 of the Companies Act are less stringent than the powers conferred under Sections 241/242 and/or Sections 211/212 of the Companies Act. It is submitted that while exercising powers under Section 130 of the Companies Act, there may not be any final conclusion/opinion that the relevant earlier accounts are prepared in a fraudulent manner or the affairs of the company were mismanaged during the relevant period. It is submitted that if, on the basis of the material on record, the learned Tribunal is satisfied on either of the aforesaid two eventualities, it is always open to the Tribunal to pass the order to re-open the books of accounts and to re-cast the financial statements of the company.

It is further submitted that, in the present case, before passing the order under Section 130 of the Companies Act notices were issued under the first proviso to Section 130 of the Companies Act. It is submitted that SEBI appeared and submitted that it had no objection to the accounts and financial statement of respondent Nos. 2 to 4, which are listed companies, being re-opened and re-casted.

It is submitted that, as observed by the Tribunal in the impugned order, the erstwhile directors had opposed the application under Section 130 of the Companies Act, that after hearing all parties, the impugned order has been passed by the learned Tribunal. It is submitted that therefore the impugned order passed by the learned Tribunal cannot be said to be in violation of the principles of natural justice as alleged.

7.6 Relying upon the subsequent interim investigation reports by the RBI, it is submitted that the impugned order passed by the learned Tribunal under Section 130 of the Companies Act is not required to be interfered with. It is submitted that mere perusal of the report of the RBI dated 22.3.2019 demonstrates and establishes beyond any doubt about the complete correctness, validity and legality of the order under Section 130 of the Act. In support of his submission, the learned counsel has relied upon and requested to consider the subsequent event also, more particularly the report of the RIB dated 22.03.2019. The learned counsel appearing on behalf of the Union of India has heavily relied upon the decision of this Court in the case of

K. Shyam Kumar (supra) in support of the prayer to consider the subsequent Report of RBI also.

7.7 Making the above submissions, it is prayed to dismiss the present appeal, more particularly, considering the larger public interest as, in the present case, thousands of crores of the public money is involved.

8. We have heard the learned counsel for the respective parties at length and perused the written submissions filed by them.

At the outset, it is required to be noted that by the impugned order and in exercise of powers under Section 130 of the Companies Act, the learned Tribunal has allowed the said application preferred by the Central Government and has directed/permitted re-opening of the books of accounts and re-casting the financial statements of IL&FS and other two companies for the last 5 years, viz., F.Y 2012-2013 to 2017-2018. The order passed by the learned Tribunal has been affirmed by the learned Appellate Tribunal. Therefore, the short question which is posed for consideration before this Court, whether in the facts and circumstances of the case, can it be said that the order

passed by the learned Tribunal is illegal and/or contrary to Section 130 of the Companies Act?

8.1 While considering the aforesaid question/issue, few facts and the relevant provisions of the Companies Act which are relevant for determining/considering the legality and validity of the order passed by the learned Tribunal are required to be referred to and considered, which are as under:

Section 211 of the Companies Act provides for establishment of Serious Fraud Investigation Office to investigate frauds relating to a company. Section 212 of the Companies Act provides for investigation into affairs of company by SFIO. Section 212 of the Companies Act provides that if the Central Government is of the opinion that it is necessary to investigate into the affairs of a company by SFIO....in the public interest; or on a request made by any department of the Central Government or a State Government. In the present case, the Central Government has already constituted SFIO and has also ordered investigation into the affairs of IL&FS and other group of companies and the investigation by the SFIO is under progress. It is also required to be noted that SFIO had also submitted its

preliminary report. In the preliminary SFIO report, there are specific findings with respect to mismanagement of the affairs of the aforesaid companies, and also with respect to preparing fraudulent accounts. At this stage, it is also required to be noted that ICAI had also conducted an enquiry into the accounts for the past five years, and in the preliminary report, the ICAI has mentioned that “accounts for the post five years have been prepared in a fraudulent and negligent manner by the erstwhile auditors”. That the Registrar of Companies had also conducted an enquiry under Section 206 of the Companies Act and *prima facie* concluded that mismanagement and compromise in corporate governance norms and risk management has been perpetuated on IL&FS and its group companies by indiscriminately raising long term and short term loans/borrowings through public sector banks and financial institutions. Considering the fact that thousands of crores of public money is involved, and in the public interest, the Central Government has thought it fit to handover the investigation with respect to the affairs of IL&FS and other group companies to SFIO.

8.1.1 Sub-section (2) of Section 241 of the Companies Act provides that if the Central Government is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an appropriate order under Chapter XVI, more particularly the order under Section 242 of the Companies Act. In the present case, the Central Government had approached the learned Tribunal under Section 241 of the Companies Act and for an appropriate order to suspend the existing Board of Directors of the Companies and to appoint new Directors in terms of the provisions of Section 242(2)(k) of the Companies Act, to manage the affairs of IL&FS and group companies. That by an order dated 01.10.2018, the learned Tribunal, in exercise of powers under Section 242(2) of the Companies Act, has suspended the Board of Directors of IL&FS and has further passed an order for reconstitution of the new Board of Directors. Six persons are appointed as Directors as Board members. While issuing such directions, the learned Tribunal has specifically observed that the learned Tribunal is satisfied that the affairs of the IL&FS were being conducted in a manner prejudicial to public interest. Thus, pursuant to the said order dated 01.10.2018, the erstwhile

Board Members/Directors of the IL&FS are suspended, and new Directors are appointed as Board Members and the new Board of Directors are conducting the affairs of the IL&FS and group companies. It is further ordered that the suspended Directors henceforth shall not represent the IL&FS company as Directors, and shall also not exercise any power as Directors in any manner before any authority as well. The appellant herein is the Vice President and suspended Director of the company, who alone has challenged the impugned order passed by the learned Tribunal passed under Section 130 of the Companies Act.

8.2 In between there is one another development. Pursuant to the order passed by the NCLAT, a former Judge of this Court – Hon'ble Justice (Retd.) D.K. Jain has been appointed to supervise the operation of the "Resolution Process" of the IL&FS group companies. Considering the aforesaid facts and circumstances and in the larger public interest and having found on the basis of the reports/preliminary reports of SFIO, ICAI and ROC and having observed and found that the relevant earlier accounts of IL&FS and other group companies, named hereinabove, were prepared in a fraudulent manner and the affairs of the company

were mismanaged during the relevant period, casting a doubt on the reliability of the financial statements, the Union of India/Central Government considered it fit to submit an application before the learned Tribunal under Section 130 of the Companies Act. After issuing notice to all concerned including the Central Government, Income Tax Authorities, SEBI, other Statutory Regulatory Body and even to the erstwhile Directors of IL&FS and other two companies, by the impugned order, the learned Tribunal has permitted/directed the Central Government to re-open the books of accounts and to recast the financial statements of IL&FS and other two companies, named hereinabove, of last 5 years.

8.3 Considering the aforesaid facts and circumstances, the legality and validity of the impugned order passed by the learned Tribunal passed under Section 130 of the Act, confirmed by the learned Appellate Tribunal is required to be considered.

9. On going through the order passed by the learned Tribunal passed under Section 130 of the Act, it appears that the learned Tribunal is conscious of the relevant provisions of the Act, more particularly Section 130 of the Companies Act and more

particularly the conditions precedent to be complied with/satisfied while directing/permitting re-opening of the books of accounts and re-casting of the financial statements of the company. From the order passed by the learned Tribunal under Section 130 of the Companies Act, it appears that the learned Tribunal has considered the preliminary report submitted by the ICAI and SFIO and the observations made in the aforesaid reports/preliminary reports. That thereafter having satisfied that the conditions precedent for invoking powers under Section 130 of the Companies Act, stated in Section 130 (i) OR (ii) of the Companies Act are satisfied, thereafter the learned Tribunal has passed an order allowing the application under Section 130 of the Companies Act for re-opening the books of accounts and re-casting the financial statements of IL&FS and other two companies, viz, for the last 5 years.

10. While assailing the order passed by the Tribunal under Section 130 of the Act, it is vehemently submitted on behalf of the appellant, who as such is a suspended director of the company that there is no specific finding recorded by the learned Tribunal that (i) the relevant earlier accounts were prepared in a

fraudulent manner; and (ii) the affairs of the company were mismanaged during the relevant period casting a doubt on the reliability of the financial statements. It is the case on behalf of the appellant that in the order dated 01.01.2019 passed under Section 130 of the Companies Act, learned Tribunal has specifically given a finding that the alleged accounts of the companies cannot be said to have been prepared in a fraudulent manner. However, it is required to be noted that the aforesaid observations by the Tribunal are required to be considered in the context for which the observations are made. It appears that the said observations are made with respect to role of the auditors. It is to be noted that in the same para, the learned Tribunal has specifically observed that in the earlier order dated 01.10.2018, it is observed that the affairs of the company were mismanaged during the relevant period and that the affairs of the company and subsidiary companies were being mismanaged during the relevant period, as contemplated under Sub-Section (1) and (2). At this stage, it is required to be noted that as per Section 130 of the Act, the Tribunal may pass an order of re-opening of accounts if the Tribunal is of the opinion that (i) the relevant earlier accounts were prepared in a fraudulent manner; **OR** (ii)

the affairs of the company were mismanaged during the relevant period casting a doubt on the reliability of the financial statements. Therefore, the word used is “**OR**”. Therefore, if either of the conditions precedent is satisfied, the Tribunal would be justified in passing the order under Section 130 of the Act. Considering the order passed by the Tribunal passed under Section 130 of the Companies Act, it appears that the learned Tribunal has passed the order on being satisfied with respect to the second part of Section 130 of the Companies Act. It is also required to be noted that the learned Tribunal has also taken note of the preliminary report submitted by the ICAI with respect to the earlier accounts were being prepared in a fraudulent manner. On a fair reading of Section 130 of the Companies Act, if the Tribunal is satisfied that either of the conditions precedent is satisfied, the Tribunal would be justified in passing the order under Section 130 of the Companies Act.

11. Considering the facts narrated hereinabove and the preliminary reports of SFIO and ICAI which came to be considered by the learned Tribunal and considering the specific observations made by the learned Tribunal while passing the

order under Section 241/242 of the Companies Act and considering the fact that the Central Government has entrusted the investigation of the affairs of the company to SFIO in exercise of powers under Section 242 of the Companies Act, it cannot be said that the conditions precedent while invoking the powers under Section 130 of the Act are not satisfied. We are more than satisfied that in the facts and circumstances of the case, narrated hereinabove, and also in the larger public interest and when thousands of crores of public money is involved, the Tribunal is justified in allowing the application under Section 130 of the Companies Act, which was submitted by the Central Government as provided under Section 130 of the Companies Act.

12. Now so far as the submission on behalf of the appellant that all the three provisions, viz., Section 130, Sections 211/212 and Sections 241/242 operate in different fields and in different circumstances and they are in the different Chapters and therefore any observation made while passing the order/orders with respect to a particular provision may not be considered while passing the order under relevant provisions is concerned, it is required to be noted that all the three provisions are required

to be considered conjointly. While passing an order in a particular provision, the endeavour should be to see that the order/orders passed under other provisions of the Companies Act are given effect to, and/or in furtherance of the order/orders passed under other Sections. Therefore, the observations made while passing order under Section 241/242 of the Companies Act can be said to be relevant observations for passing the order under Section 130 of the Companies Act. At this stage, it is required to be noted that even otherwise in the order passed by the Tribunal under Section 130 of the Companies Act, there is a specific observation made by the learned Tribunal with respect to mismanagement of the affairs of the company, and even with respect to the relevant earlier accounts prepared in a fraudulent manner.

13. It is next contended on behalf of the appellant that proviso to Section 130 of the Act has not been complied with and that the order passed by the learned Tribunal passed under Section 130 of the Act is in violation of the principle of natural justice. At the outset, it is required to be noted that while passing the order under Section 130 of the Companies Act, the learned counsel

appearing on behalf of the erstwhile directors appeared and opposed the application under Section 130 of the Companies Act. Therefore, the learned counsel appearing on behalf of the erstwhile directors was heard before passing the order under Section 130 of the Companies Act. Therefore, it can be said that there is a compliance/substantial compliance of the principle of natural justice to be followed. It is required to be noted that as per proviso to Section 130 of the Companies Act before passing the order under Section 130 of the Act, the Tribunal is required to issue notice to the Central Government, Income Tax Authorities, SEBI or any other statutory regulatory body or authorities concerned or any "other person concerned" and is required to take into consideration the representation, if any made. The "other person concerned" is as such not defined. Who can be said to be "other person concerned", that question is kept open. At this stage, it is required to be noted that while passing the order under Section 130 of the Act, there shall be reopening of the books of accounts and re-casting of the financial statements of the company and therefore the Board of Directors of the company may make a grievance. The erstwhile directors cannot represent the company as they are suspended pursuant

to the earlier order passed under Section 242 of the Companies Act. Be that as it may, even otherwise in the present case and as observed hereinabove the erstwhile directors of the company represented before the Tribunal and they opposed the application under Section 130 of the Act. Therefore, in the facts and circumstances of the case, it cannot be said that the order passed by the learned Tribunal is per se in violation of the principle of natural justice as alleged.

14. The submission by learned Counsel appearing on behalf of the appellant that in the impugned order passed by the learned Appellate Tribunal, the learned Appellate Tribunal has specifically observed that there is a violation of principle of natural justice and therefore the learned Appellate Tribunal ought to have remanded the matter to the Tribunal is concerned, on considering/fair reading of the impugned order passed by the learned Appellate Tribunal, as such, there is no specific finding by the learned Appellate Tribunal that there is a violation of principle of natural justice. What is observed by the learned Appellate Tribunal is that “even if it is accepted that the appellant on receipt of notice wanted to file reply” cannot be considered as

a specific finding given that the order passed by the Tribunal was in violation of principle of natural justice.

15. Now insofar as the submission on behalf of the appellant that the order dated 01.10.2018 passed under Section 241/242 of the Companies Act is an interim order and the same is not a final order suspending the directors and the erstwhile board of directors of the company, and therefore the observations made in the order dated 01.10.2018 cannot be considered, has no substance. It is required to be noted that as on today the order dated 01.10.2018 suspending the erstwhile directors of the company including the appellant stands and remains in operation. The same is not challenged by way of an appeal before an appropriate appellate Tribunal/Court.

16. Now so far as the submission on behalf of the appellant that the impugned order passed by the learned Appellate Tribunal is a non-speaking and non-reasoned order and the grounds urged before the learned Appellate Tribunal have not been dealt with by the learned Appellate Tribunal and therefore the prayer to set aside the order is concerned, in view of our specific findings

recorded hereinabove on the legality and validity of the order passed by the learned Tribunal under Section 130 of the Companies Act, we do not propose to remand the matter to the learned Appellate Tribunal. It is true that the learned Appellate Tribunal could have passed a reasoned/speaking order. But in the facts and circumstances of the case and our findings recorded hereinabove and as observed hereinabove, the order passed by the Tribunal under Section 130 of the Companies Act does not suffer from any illegality and the same is passed in the larger public interest, we have considered the order passed by the learned Tribunal under Section 130 of the Companies Act on merits.

17. In view of the aforesaid findings recorded by us, the decisions relied upon by the learned counsel appearing on behalf of the appellant shall not be applicable to the facts of the case on hand. There cannot be any dispute to the proposition of law laid down by this Court in the aforesaid decisions relied upon by the learned counsel appearing on behalf of the appellant. However, in the light of the aforesaid findings recorded by us, none of the

decisions relied upon by the learned counsel appearing on behalf of the appellant shall be applicable to the facts of the case on hand.

18. Now so far as reliance placed upon the subsequent report of the RBI and the objection by the learned counsel appearing on behalf of the appellant to rely upon the subsequent report and the reliance placed upon the decision of this Court in the case of *Mohinder Singh (supra)* is concerned, as the impugned order passed by the learned Tribunal is in the larger public interest, this Court can take note of the subsequent development/report. However, at the same time, the same shall be in support of the order under challenge. Even otherwise, it is required to be noted and as observed hereinabove, independent to the subsequent report of the RBI, there is a specific finding with respect to the mismanagement and the fraudulent accounts. Therefore subsequent Report of the RBI Report can be taken note of, while upholding the order passed by the learned Tribunal under Section 130 of the Companies Act. As observed hereinabove, a larger public interest has been involved and reopening of the

books of accounts and recasting of financial statements of the aforesaid companies is required to be carried out in the larger public interest, to find out the real truth, and as observed hereinabove both the conditions precedent while invoking power under Section 130 of the Companies Act are satisfied/complied with, therefore in the facts and circumstances of the case, we are of the opinion that the order passed by the learned Tribunal passed under Section 130 of the Companies Act, confirmed by the learned Appellate Tribunal, is not required to be interfered with.

19. In view of the above and for the reasons stated above, we see no reason to interfere with the impugned order dated 01.01.2019 passed by the learned Tribunal under Section 130 of the Companies Act for re-opening of the books of accounts and re-casting the financial statements of the Infrastructure Leasing & Financial Services Limited; IL&FS Financial Services Limited and IL&FS Transportation Networks Limited for the last five years, viz. from Financial Year 2012-13 to the Financial Year 2017-18, which came to be confirmed by the learned Appellate

Court vide impugned judgment and order dated 31.01.2019. Consequently, the present appeal fails and deserves to be dismissed and is accordingly dismissed.

All connected IAs are also disposed of.

.....J
[INDU MALHOTRA]

.....J.
[M. R. SHAH]

NEW DELHI,
JUNE 4, 2019