

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 4144 OF 2019

N. Sampath GaneshPetitioner.
Versus
Union of India & Anr.Respondents.

WITH

WRIT PETITION NO. 4145 OF 2019

B S R & Associates LLP
& Anr.Petitioners
Versus
Union of India & Anr.Respondents

Mr.Navroz Seervai, Senior Advocate a/w. Mr. Sujay Kantawala, Mr.V.P. Singh, Mr.Aditya Mehta, Mr.Aditya Jalan, Raghav Seth, Ms.Anshula Laroia, Mr.Samarth Luthra, Ms.Vanya Chhabra i/b. AZB & Partners, Advocate for petitioner in WP/4144/2019.

Mr.Mukul Rohatgi, Senior Advocate a/w. Mr. Darius J. Khambata, Senior Advocate, Mr.Zal Andhyarujina, Mr.V.P. Singh, Mr.Aditya Jalan, Mr.Raghav Seth, Ms. Anshula Laroia, Mr. Samarth Luthra, Ms. Vanya Chhabra i/b. AZB & Partners, Advocate for petitioners in WP/4145/2019.

Mr.Aspi Chinoy, Senior Advocate a/w. Mr. Ashish Mehta, Mr.Animesh Bisht, Mr.Aditya Sikka, Ms. Saloni Kapadia, Ms. Drishti Das i/b. Cyril Amarchand Mangaldas for respondent No.1.

Mr. H.S. Venegaonkar a/w. Mr.Ajay L. Bhise I/b. Mr Pradeep Yadav for respondent No.2 in Cri. WP/4144/2019.

Mr. F. R. Shaikh, APP for State.

Coram : RANJIT MORE &
N. J. JAMADAR, JJ.
Date : **September 4, 2019.**

P. C. :

1. Heard Mr. Mukul Rohatgi, learned senior counsel for

the Petitioners in Writ Petition No.4145 of 2019, Mr. Seervai, learned senior counsel appearing on behalf of the Petitioner in Writ Petition No.4144 of 2019, Mr. Aspi Chinoy, learned senior counsel appearing on behalf of Respondent No.1 and Mr. Venegaonkar, learned counsel appearing on behalf of Respondent No.2.

2. The petitions are filed for the following reliefs :

“i. declare that section 140(5) of the Companies Act, 2013 is *ultra vires* the Constitution of India;

ii. issue a writ or prohibition or a writ in the nature of prohibition or any other writ, order or direction under Article 226 of Constitution of India, quashing the impugned order dated August 9, 2019 and restraining the Hon’ble NCLT from proceeding further with the Company Petition qua Petitioner No. 1 or its partners, professionals or employees.

ii a. Issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, 1950, ordering and directing the Respondent No. 1 to forthwith withdraw & cancel the Impugned Direction dated May 29, 2019 at Exhibit B, whereby, the Respondent No.2 has been directed to initiate proceedings as more particularly set out therein.

li b. In the alternative to ii a. above, this Hon’ble Court be pleased to quash the Impugned Directions dated May 29, 2019 of the Respondent No.1 as being bad in law and to further quash all proceedings initiated pursuant to the said Impugned Directions dated May 29, 2019.

ii c. Issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India, 1950, calling for records of the case and after going into

the legality and validity of the Criminal Complaint bearing CC No. 20/2019 titled SFIO v. IL&GD Ltd. & Ors. Initiated by the Respondent No.2 in the court of Ld. Additional Sessions judge-cum-Special (Companies Act) at Greater Mumbai, to quash & set aside the same.”

3. The brief facts giving rise to the filing of present writ petitions are as thus :

. In November 2017, BSR was appointed as joint statutory auditor of IFIN along with Deloitte for the financial year 2017-18. Deloitte had been the sole auditors of IFIN for ten years, i.e., for the period 2007-08 to 2016-17. On 28th May 2018, the statutory auditors of IFIN, for the period 2017-18, including the BSR rendered their audit report on the financial statements of IFIN. On 30th September 2018, Respondent No.1 vide its order directed Respondent No.2 to initiate investigation into the affairs of IL&FS and its subsidiaries. On 13th May 2019, IFIN issued a notice upon BSR under section 140(1) of the Companies Act, 2013 [for short “the Act”] for removal as auditors. On 24th May 2019, BSR furnished a written reply to notice dated 13th May 2019. On 28th May 2019, Respondent No.2 placed its second interim report with the Ministry of Corporate Affairs (Respondent No.1). On next day, i.e., on 29th May 2019, the Ministry of Corporate Affairs issued a sanction order directing the initiation

of (i) an action under section 140(5) of the Act (ii) prosecution under sections 143 and 147 of the Act and (iii) prosecution under sections 417, 420 read with 120 of the Indian Penal Code, 1860. On 30th May 2019, Respondent No. 2 filed criminal complaint bearing No. 20 of 2019 in the Court of the learned Additional Sessions Judge-cum-Special Judge (Companies Act) at Greater Mumbai. On 10th June 2019, Respondent No.1 filed Company Petition bearing C.P. No. 2062 of 2019 before the NCLT under the provisions of section 140(5) of the Act against the BSR, among others, seeking *inter alia* the removal of BSR as a statutory auditor of IFIN. Respondent No. 1 also sought a direction that BSR shall not be eligible to be appointed as auditor for a period of five years. On 19th June 2019, BSR, for the *bona fide* reasons given in its letter, tendered its resignation to IFIN as the statutory auditor of IFIN. BSR also made the requisite filing before the other authorities. On 14th July 2019, BSR filed an application bearing No.2505 of 2019 before the NCLT challenging the maintainability of the company petition filed by Respondent No.1 under section 140(5) of the Act on various grounds including but not limited to the fact that BSR is not a statutory auditor of IFIN with effect from June 19, 2019. On 9th August 2019, the NCLT

pronounced the impugned order whereby application filed by BSR challenging the maintainability of company petition under section 140(5) of the Act, was dismissed.

4. The Petitioners, in short, are challenging the constitutional validity of sub-section (5) of Section 140 of the Companies Act, 2013. The Petitioners are also challenging the sanction order dated 29th May 2019, authorising the prosecution of the Petitioners and initiation of proceedings under section 140(5) of the Act.

5. Mr. Rohatgi, learned senior counsel appearing on behalf of the Petitioner submitted that sub-section (5) of section 140 of the Act provides that NCLT, on satisfaction that the auditor has directly or indirectly acted in fraudulent manner or abetted or colluded in any fraud by or in relation to the company or its directors or officer, can direct the Company to change its auditor.

. He submitted that under the first proviso to sub-section (5), if an application is made by the Central Government under the main part of sub-section (5) of the Section 140, and the NCLT 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. Mr. Rohatgi further submitted that under second proviso to sub-section (5) of section 140 of the Act, the auditor against whom final order has been passed by the Tribunal under sub-section (5) of section 140 of the Act, shall not be eligible to be appointed as auditor of the company for five years from the date of passing of the order and the auditor shall also be liable for action under section 447 of the Act.

. Thus in other words, according to learned senior counsel Mr. Rohatgi, sub-section (5) of section 140 of the Act provides for three consequences, first removal of the auditor; second debarring such auditor for the five years; and lastly action under section 447 of the Act.

6. Mr. Rohatgi further submitted that under second proviso to sub-section (5) of Section 140 of the Act, on a plain reading, the auditor will be liable for action under section 447 of the Act and in the submission of Mr. Rohatgi this would be in breach of Article 21 of the Constitution of India.

7. Mr. Chinoy, learned senior counsel appearing on behalf of Respondent No.1 *per contra* submitted that the word “action” referred to in second proviso to sub-section (5) of section

140 of the Act means “prosecution” under section 447 in accordance with law and therefore there is no merit in the contention of the Petitioners.

8. In our *prima facie* opinion, even if contention of Mr. Chinoy is accepted at this stage, in that case also the word “action” in the second proviso to sub-section (5) of section 140 of the Act, would be required to be read down as “prosecution”.

9. The second limb of argument of learned senior counsel Mr. Rohatgi is that pending the proceedings under sub-section (5) of section 140 of the Act, the Petitioner-BSR has tendered resignation on 19th June 2019, which has been accepted by IFIN and in the circumstances, the proceedings under section 140(5) of the Act are not maintainable. We *prima facie* find merit in the contention inasmuch as the first part of sub-section (5) of section 140 of the Act deals with a direction to the company by the Tribunal to change its auditor. The first and second proviso to sub-section (5) of section 140 of the Act, *prima facie*, would come into operation only in the event of such direction of change of auditor is issued by the Tribunal to the Company.

10. Perusal of section 140 of the Act shows that it deals with the removal and resignation of the auditor. Under sub-

section (1) of section 140 of the Act, the auditor can be removed and under sub-section (2) the auditor can resign from the company after completing certain formalities. Under sub-section (5) of section 140 of the Act, the NCLT either *suo moto* or on an application made to it by the Central Government or by any persons concerned and on satisfaction that auditor has acted in fraudulent manner or abetted or colluded in any fraud, direct the company to change its auditor.

11. In the present case, the Petitioner-auditor has resigned with effect from 19th June 2019. According to the Petitioner, once resignation is given, then, there is no question of invoking procedure under sub-section (5) of section 140 of the Act. Per contra, Mr. Chinoy, learned senior counsel appearing on behalf of Respondent No. 1 submitted that the resignation by the auditor simplicitor will not absolve him and still the proceedings under sub-section (5) of section 140 of the Act can be continued. In our opinion, this issue requires consideration especially in the light of provisions of sub-section (4B) of section 132 of the Act, under which the auditor can be debarred for the period ranging from 6 months to 10 years and section 141(3)(h) of the Act, which provides for disqualification for the period of 10 years from

the date of conviction for an offence involving fraud.

12. So far as the prosecution under section 447 of the Act is concerned, Mr. Rohatgi, learned senior counsel appearing on behalf of the Petitioner invited our attention to section 212 of the Act, which deals with the investigation into the affairs of the company by Special Fraud Investigation Office. Sub-sections (11) to (15) of section 212 of the Act read thus :

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

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

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

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

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

(15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed

with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973.”

13. A composite reading of these provisions *prima facie* indicates that the prosecution can be initiated only after final report, equated with a report under the provisions of section 173 of the Code of Criminal Procedure, 1973, is made. Learned senior counsel Mr. Rohatgi inviting our attention to the sanction order, submitted that the report submitted by Respondent No.2 is not a final report, but it is an interim report and on that basis the sanction order could not have been issued and prosecution could not have been initiated against the Petitioner-auditors. In the submission of Mr. Venegaonkar, the learned counsel for Respondent No. 2, the report submitted by Respondent No.2 is final report. Mr. Rohatgi also submitted that the report was submitted on 28th May 2019 and on the very next day, i.e., on 29th May 2019, the sanction order was issued by Respondent No. 1 and on the next day prosecution is lodged under section 447 of the Act. He submitted that report of Respondent No.2 runs into 32,000 pages and Respondent No.1 could not have applied its mind to this voluminous material within such a short span of time and issued sanction order. This issue, in our *prima facie* opinion,

also requires to be dealt with elaborately. The matter thus warrants a response from Respondent No. 1 and Respondent No. 2. We find that arguable points are raised which require detailed deliberation and consideration.

14. In above circumstances, we defer the hearing on the writ petitions. Stand over to 3rd October 2019. Till next date, by way of ad-interim relief we pass following order :

(a) *The Respondents and/or their agents and /or their servants are restrained from continuing any further proceedings qua the petitioners under Section 140(5) of the Act in Company Petition No.2062 of 2019.*

(b) *No coercive action shall be taken qua the Petitioners in Criminal Complaint filed before the Special Court, being CC No. 20/2019 titled **SFIO v. IL & FS Ltd. & Ors.** in the Court of Ld. Additional Sessions Judge-cum-Special Judge (Companies Act) at Greater Mumbai.*

[N. J. JAMADAR, J.]

[RANJIT MORE, J.]