



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

ORDER

The proceedings before the LIX Additional City Civil and Sessions Judge, Special Court, under the Companies Act, 2013, Bengaluru City, for offenses punishable under Sections 36 read with Section 448 and 447 of the Companies Act, 2013, and Section 68 read with Section 628 of the Companies Act, 1956, are challenged in these petitions. Hence, they are collectively addressed and resolved through this common order.

2. The Serious Fraud Investigation Officer (SFIO) filed a complaint under Section 439 read with Section 212 of the Act, 2013, and under Section 621 read with Sections 235 and 624 of the Act, 1956, along with Section 193 of the Criminal Procedure Code.

3. The prosecution's case is as follows:

a) The Ministry of Corporate Affairs, based on the Registrar of Companies' report dated 27.05.2015 highlighting irregularities by Kingfisher Airlines Limited, assigned the investigation to SFIO under Section 212(1)(c) of the Act, 2013. SFIO submitted a report dated 30.08.2017 under Section 212(12) of the Act, 2013.

b) Kingfisher Airlines Limited (KFAL) was established in 2004 under the Companies Act, 1956, under the control of accused No.5 (Mr. Vijay Mallya), primarily engaged in domestic civil aviation. The Government of India introduced the 5/20 Rules, requiring Airlines Companies to have five years of domestic commercial operation and a fleet of 20 aircraft to fly overseas.

c) KFAL, not meeting the requirements, aimed to acquire Deccan Aviation Limited (DAL), controlled by accused No.10. Accused No.5, recognizing the potential capital gain from the acquisition of DAL and considering KFAL's existing loss of Rs.1,234 crore, collaborated with other accused to cheat, produce fraudulent documents, cause loss to



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

shareholders and stakeholders of DAL, and violate various provisions of the Companies Act and the Income Tax Act.

d) The process involved three stages: pre-merger, merger, and post-merger.

e) In the pre-merger stage, the accused decided on an artificial de-merger, creating two non-existing undertakings to fulfill the condition for demerger.

f) In the merger stage, a scheme of arrangement under Sections 391(2), 394 of the Act, 1956, was presented to de-merge airline business from KFAL and merge it with DAL. The fabricated documents aimed to avoid taxation of capital gain.

g) Post-merger, KFAL incurred losses, which were not transferred to the accused No.2 - Company, but retained by KFAL, renamed as Kingfisher Training and Aviation Services Limited (accused No.1). This was done to portray the accused No.2 - Company as a profitable venture to secure additional finance.

h) After the merger, accused No.5 and his associates manipulated asset valuation and goodwill to control the allocation of shares.

i) In the post-merger stage, accused No.5 gained control of DAL, renamed as KFAL, allowing him to secure additional finance based on the brand value of the resultant entity.

4. The charges and roles of each accused, as per SFIO's investigation, are detailed as follows:

CHARGES:

i) Liability for fraudulent conduct of business of a company, liable to be prosecuted U/S 542 of the Companies Act, 1956 - Recommendation to Central Government to advise OL for initiating action.



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

ii) Proper accounts not kept in respect of erstwhile KFAL, KFAL (Combined) and DAL - liable to be prosecuted U/S 541 of the Companies Act, 1956.

The SFIO has not initiated prosecution against the accused on charge Nos.1 and 2.

iii) Failure to show a true and fair view of profit and loss account and balance sheet and non-compliance/non-disclosure liable to be prosecuted U/S 628 read with Section 211 and 211(3C) of the Companies Act, 1956 and U/S. 477A of the Indian penal Code, 1860.

The further investigation in respect of charge No.3 is being undertaken and the SFIO is in the process of submitting a supplementary investigation report.

iv) Concealment of material facts and inducing the then existing shareholders of DAL to agree for demerger of Airline Division of DAL with that of erstwhile KFAL and acquiring the control of KFAL, liable to be prosecuted U/S. 68 of the Companies Act, 1956.

v) Fraudulent inducement of banks to convert part of the debt into preference shares by deceptive projections and non-existing collateral securities by concealment of material facts, liable to be prosecuted U/S. 68 of the Companies Act, 1956.

vi) Misrepresentation in filing of returns with ROC., Bengaluru regarding allotment of equity shares to promoter VJM in erstwhile KFAL liable to be prosecuted U/S. 628 read with Section 75 of the Companies Act, 1956.

vii) Failure to show a true and fair view of profit and loss account and balance sheet and non-compliance/non-disclosure as required under accounting standard for the year 2006-07 in respect of DAL - liable to be prosecuted U/S. 628 read with Section 211 and



NC: 2024:KHC:14889
**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

211(3C) of the Companies Act, 1956 and U/S. 477A of the Indian Penal code, 1860.

The Central Government has sought certain clarifications regarding this charge. The SFIO is in the process of submitting a supplementary report.

viii) Failure to show the related party transactions in audited financials for the financial years 2008-09 to 2011-12 - liable for prosecution under Section 628 read with Section 211(3C) of the Companies Act, 1956 read with Section AS-18 of Accounting Standards.

Charges No.9 to 11 are related to various other offences committed, the SFIO has not initiated any action on the basis of the transactions.

ix) Contravention of provisions of the Companies Act, 1956 by statutory auditors of the DAL and KFAL (Combined) - liable for prosecution under Section 227 read with Section 233 of the Companies Act, 1956.

5. **ROLE OF EACH ACCUSED:**

5.1 **Accused No.1: Kingfisher Training and Aviation Services Ltd.**, original KFAL company, represented by its Director, Mr. A Raghunathan, which participated in the merger process. The fraudulent activity commenced in this company.

5.2 **Accused No.2: Kingfisher Airlines Ltd.**, erstwhile Deccan Aviation Ltd., represented by its Chairman and Managing Director, Mr. Vijay Mallya (Accused No.5), which participated in the merger process and caused loss to the Banks, its employees and Government exchequer.

5.3 **Accused No.3: Deccan Charters Ltd.** (WP 3642/2018)
(Para No.15 of the Complaint)



NC: 2024:KHC:14889

WP No. 4380 of 2018 C/W WP No. 3624 of 2018 WP No. 3625 of 2018 WP No. 3632 of 2018 WP No. 3642 of 2018 WP No. 3829 of 2018 WP No. 3943 of 2018 WP No. 4381 of 2018 WP No. 4671 of 2018 WP No. 6074 of 2018 WP No. 11889 of 2018

i) Originally Accused No.3 was known as Kingfisher Aviation Training Ltd., and the same was promoted by UB Group.

ii) Later, this particular company was renamed as Deccan Charters Ltd. The Deccan Charters Ltd., (Accused No.3) was recipient of capital and reserves from UB group through circular transactions (round-robin) which was used to pay the slump sale consideration (Rs.69.00 crores) in the scheme of arrangement.

iii) The slump sale consideration is in reference to an undertaking, which was not merged with the resultant company, remained with the demerged company and acquired by the Deccan Charters Ltd., (Accused No.3) as per the scheme of arrangement.

iv) [Chapter IV of Investigation report Volume-I & II deals with the factual matrix of Accused No.1 (till merger) and 2 (post merger). Para 4.30, page No.147 speaks about slump sale consideration. Para 4.30.3 speaks about payment of slump sale consideration. Diagram provided at page 150 provides a circular transaction(round-robin).] Page 147-156 are relevant pages.

v) Accused No.3 is one of the petitioners in WP No.3642/2018. The Accused No.3 is represented by Captain G R Gopinath(Accused No.10) in this writ petition.

5.4 **Accused No.4: United Breweries (Holding) Ltd.,**

United Breweries (Holding) Ltd., represented by its Director Mr.Vijay Mallya, is the holding/promoter company of Accused No.1 & 2 which played a major role in movement of funds to Accused No.2 and gave corporate guarantee in favour Accused No.2.

5.5 **Accused No.5: Mr. Vijay Mallya**

Mr. Vijay Mallya, Chairman of Accused No.1 entity until merger and thereafter Chairman of Accused No.2 entity has conspired with the other accused in creating fraudulent documents and non-existing divisions for the demerger process with DAL. He conspired with other accused in



NC: 2024:KHC:14889

WP No. 4380 of 2018 C/W WP No. 3624 of 2018 WP No. 3625 of 2018 WP No. 3632 of 2018 WP No. 3642 of 2018 WP No. 3829 of 2018 WP No. 3943 of 2018 WP No. 4381 of 2018 WP No. 4671 of 2018 WP No. 6074 of 2018 WP No. 11889 of 2018

borrowing additional finances from banks using the falsely valued brand as collateral security and conversion of part of existing loan from banks into shares in DRP. He conspired with A-6 and 8 to conceal the payments made by Accused No.1 and 2 entities to Force India Formula One Team Limited (controlled by Accused No.5 and 6) in the financials as related party transactions.

5.6 **Accused No.6: Mr. A K Ravi Nedungadi** (WP No. 3943-3947/2018)

Mr. A K Ravi Nedungadi, Group Chief Financial Officer of UB Group and Director in Accused No.2, played a role in all key events like demerger, raising funds through DRP and false valuation of brand.

5.7 **Accused No.7: Mr. A Harish Bhat** (WP No. 3943-3947/2018)

Mr. A Harish Bhat, Treasurer of UB Group and Director in Accused No.4 Company, played a major role in coordinating with the valuers for Share Swap Ratio at the time of merger, false valuation of brand for obtaining funds from the banks on the basis of false projections.

5.8 **Accused No.8: Mr. A Raghunathan** (WP No. 3943-3947/2018)

Mr. A Raghunathan, Chief Financial Officer of KFAL and Director of KTASL, presented financials in fraudulent ways with an intent of getting funds from banks and coordinated with Accused No.6 and 7 for the entire financial operations.

5.9 **Accused No.9: Mr. Bharath Veeraraghavan** (WP No. 3943-3947/2018)

Mr. Bharath Veeraraghavan, Company Secretariat of Accused Nos.1 and 2, who conspired for creating documents with back date during demerger. (*Page No. 52 and 53 of Executive Summary, Para No. 2.34*)



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

speaks about creation of artificial division on paper. In this executive summary, the role played by Accused No. 9 is explained).

5.10 **Accused No.10: Captain G R Gopinath** (WP 3642/2018)

Captain G R Gopinath, one of the promoters of DAL, who took the non-compete fee and conspired with Accused no.5 in the merger process, obtained illegal gratification and gained the control of Deccan Charters Ltd., in the scheme of arrangements.

5.11 **Accused No.11: Ambit Private Ltd.** (WP 3624/2018)

Ambit Private Ltd., engaged by KFAL and DAL to oversee the entire merger process carried out fraudulently.

5.12 **Accused No.12: Mr. Ashok Wadhwa** (WP 3625/2018)

Mr. Ashok Wadhwa, Chartered Accountant and Director of Accused No.11, suggested the methodology to carry forward the merger process in a fraudulent way.

5.13 **Accused No.13: Mr. Vinod Wadhwani** (WP 3632/2018)

Mr. Vinod Wadhwani, Director of Accused No.11, who suggested the demerger of KFAL by creating non-existing business divisions and coordinated with Accused No.5 and 10 with respect to payment of non-compete fee.

5.14 **Accused No. 14: Mr. Rishabh Mishra** (WP 11889/2018)

Mr. Rishabh Mishra, Chartered Accountant in Accused No. 11 company who carried out activities connected with fraudulent demerger process of KFAL with DAL.

5.15 **Accused No.15: Rajesh C Jain** (WP 4671/2018)

Rajesh C Jain, valuer in KPMG India Ltd who carried out the valuation process in fraudulent demerger without reviewing the historical financials and market data along with the projections given. He was also privy to



NC: 2024:KHC:14889
**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

the share allotment in Accused No.1 at nominal rate of Rs.30 per share just before the demerger.

5.16 **Accused No.16:Mr. Sujal A Shah**(WP 6074/2018)

Mr. Sujal A Shah, valuer in Dalal & Shah who carried out the valuation process in fraudulent demerger without reviewing the historical financials and market data along with the projections given. He was also privy to the share allotment in Accused No.1 at nominal rate of Rs.30 per share just before the demerger.

5.17 **Accused No.17: Ms. Srividya C G** (WP 4380/2018)

Ms. Srividya C G, partner in Grand Thornton who valued the brand at superficial value of Rs.3406 crore at the time of additional borrowings by Accused No.2 in 2008 and at Rs.4111 crores during DRP in 2010.

5.18 **Accused No.18: Ms. Darshana Kadakia** (WP 4381/2018)

Ms. Darshana Kadakia, partner at Grand Thornton who valued the brand at superficial value of Rs.3406 crore at the time of additional borrowings by Accused No.2 in 2008 and at Rs.4111 crores during DRP in 2010.

5.19 **Accused No.19: Mr. Supratim Sarkar** (WP 3829/2018)

i) He is the Executive Vice President of SBI Capital Markets Ltd., and group head of project advisory and structured finance, who approved the Information Memorandum which contained false projections of future profitability of the company. The Information Memorandum paved the way for getting additional bank borrowings and conversion of part of existing loans into shares of Accused No.2 entity.

ii) Charge No.5 deals with fraudulent inducement of banks. Para 5.28 (page No.345) states that IM was placed before Accused No.19 and he ordered for release of IM for use by the consortium leader



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

bank SBI and other banks. He failed to examine serious shortcomings in the IM.

6. Therefore, the accused are said to have committed the following offences under:

6.1 Section 68 of the Companies Act, 1956:

Vijay Mallya and others concealed material facts and induced the shareholders of DAL to agree for demerger of airlines division with KFAL, thereby the shareholders of DAL lost the value of shares and the shareholders of erstwhile KFAL gained higher value on demerger.

The accused persons fraudulently induced the bankers to convert part of the loan into preference shares at the time of DRP by presenting false projections of future profitability in the Information Memorandum and valuing the brand using inflated projections.

6.2 Section 628 r/w 211 and 211(3C) of the Companies Act, 1956:

Accused No.5, 6 and 8 failed to show "related party transactions" in the audited financials of Accused No.2 during the period 2008-2012, in respect of payments made to FIFOTL, a related entity of Accused No.2 KFAL.

6.3 Section 628 r/w 75 of the Companies Act, 1956:

Accused No.5 received the remittance of Airbus SAS into his account and invested the same as his equity contribution in the erstwhile KFAL. The remittance from Airbus SAS was on account of credits/incentives



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

offered by it for placing the orders for purchase of aircrafts. The remittance, if had come in the normal course, would have gone for reduction in purchase price of the aircraft or accounted as miscellaneous income in the books of erstwhile KFAL. Knowing fully well about the nature of remittances, Accused No.5 utilized the amount as his equity contribution and the officials of UB Group/erstwhile KFA i.e., Accused No. 6 and 8 also accounted the same as the equity contribution. They filed form 2 on 07.07.2006 for the equity shares allotted, knowing fully well that they were filing the return containing materially false particulars.

7. Submissions of Sri C V Nagesh, learned Senior Counsel representing the petitioner's counsel in WP Nos.3684, 3625, 3632 11889 of 2018 are as hereunder:

a) The Special Court constituted under Section 435 of Act, 2013 lacked jurisdiction to take cognizance of the offence alleged to have been committed and made penal under the provisions of Act, 1956, since the Special Court constituted can try an offender, who is said to have committed an offence, which is made penal under the provisions of Act, 2013. In support, the decision of the High Court of Judicature of Bombay in the case of Manish Rangari -vs- Union of India (2020) SCC OnLine Bombay 3226 is cited.

b) Proceeding is hypothesis that the Special Court has the jurisdiction to take cognizance of the offences complained of, Section 621(1) of Act, 1956 which is in *parimateria* with Section 439(2) of Act, 2013 postulates that the Special Court can exercise such power of cognizance only with the complaint is filed by (i) Registrar, (ii) Shareholder, and (iii) a person authorized by the Central Government in



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

that behalf. The present complaint is not filed by a person enumerated in Section 621(1) of the Act, 1956.

c) The accused No.13 is a resident of Thane which places certainly beyond the territorial jurisdiction of the Special Court. Therefore, the Special Court before issuing process against him should have conducted an enquiry or directed an investigation as contemplated under Section 202(1) of Cr.PC. Therefore, the issuance of process stands vitiated for non-compliance of mandatory provision contained in Section 202(1) of Cr.PC. In support, reliance is placed on the decisions of the Apex Court in the case of Vijay Dhanuka -vs- Najima Mamatha and others (2015) 1 SCC (Crime) 479 and in the case of Ajith Pawar -vs- Hemant Madhukar Nimbalkar and another - (2017) 2 SCC (Crime) 192.

d) Section 204 of Cr.PC mandates that the Special Court before the issuing process is required to examine the materials on record and record of finding that there are sufficient grounds to proceed against the accused. In the instant case, said requirement has been given a go-by. In support, he placed reliance on the following decisions:

- 1) M/s GHCL Employees Stock Option Trust vs M/s India Infoline Limited 2013 (3) Supreme 151 : (2013) 2 SCC (Cri) 414
- 2) Sunil Bharati Mittal vs Central Bureau Investigation: (2015) 4 SCC 609
- 3) Sunil Todi vs State of Gujarat: 2021 SCC Online SC 1174.
- 4) Rabindranath Bajpe vs Mangalore Special Economic Zone Ltd.: 2021 SCC Online SC 806



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

5) Lalankumar Singh and others -vs- State of Maharashtra :
2022 (7) Supreme 899.

e) Section 2(29)(iii) of the Companies, 2013 inter alia states that the `Court' means the Court of Sessions having jurisdiction to try any offence under this Court or under any previous Companies law. Therefore, the court of sessions as stated in Section 2(29)(iii) means a Court established by the State Government under Section 9(1) of the Cr.PC, and the Special court under Section 435 of the Act, 2013 to establish by the Central Government for providing speedy trial of the offences under this Act. Therefore, the contention of the SFIO irrespective of the quantum of punishment, the Court of sessions had the jurisdiction under Section 2(29) of the Act, 2013 is without any substance.

f) The allegations against the petitioners - accused No.13 in a nutshell is that the methodology adopted by him as a professional cost accountant for the purpose of preparation of his report is not correct and that he ought to have adopted a popular method. The statute that governs the preparation of the report by a chartered/cost account does not prescribe a particular method that ought to be adopted for and in connection with the preparation of the report, and also does not prescribe to adopt a popular method. Therefore, the allegation does not satisfy the essential element to constitute the commission of offence alleged against him.

8. Submissions by Sri Amit K Desai, learned Senior Counsel representing the petitioner in W.P. No. 3625/2018 are as below:



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

a) The alleged offense in the complaint pertains to the period between 2005 to 2012, predating the commencement of the Companies Act, 2013. Section 465 of the Act, 2013, which deals with the repeal of certain enactments and savings, was enforced from 30.01.2019. Therefore, at the time when the Special Court took cognizance of the offenses, the Companies Act, 1956, was in force. Consequently, the Special Court established to try offenses under the Act, 2013, lacked jurisdiction to try offenses under the Act, 1956.

b) Section 2(29) of the Act, 2013, defines the term "Court," which includes a Magistrate having jurisdiction to try offenses under this Act or under any previous company law. Therefore, the Judicial Magistrate of First Class was competent to try offenses under the Act, 1956, as per the proviso to the unamended Section 435 of the Act, 2013.

c) The legislative intent is clear from the usage of the term "previous Companies Law" in various provisions of the Act, 2013. Therefore, when the language is clear and unambiguous, the Court is bound to give effect to its meaning, irrespective of the consequences. The power of the Special Court, which is a Sessions Court, is limited to taking cognizance of offenses specified under Sub-Section (1) of Section 435 of the Act, 2013. Therefore, offenses not specified in Section 435(1) are subject to the bar under Section 193 of the Criminal Procedure Code (Cr.PC).

d) Furthermore, Section 212(16) of the Act, 2013, stipulates that investigations initiated under the provisions of the Act, 1956, shall continue under the said Act as if the Act, 2013, had not been passed.



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

Hence, the Special Court lacked jurisdiction to take cognizance of offenses under the Act, 1956.

e) Section 435 provides for the establishment of a Special Court for trying offenses under the Act, 2013, and not for trying offenses under the Act, 1956. Therefore, the provision contained in Section 435(1) cannot be retrospectively applied to try offenses under the Act, 1956. The scheme of the Companies Act, 1956, and the Companies Act, 2013, differs significantly. The essential elements to constitute offenses under these Acts are distinct, as are the provisions for prosecution.

f) The charge No.10, along with other charges, has been dropped, yet the petitioner continues to be charged under charge No.4 for the same act. Therefore, dropping various charges undermines the prosecution's case, even in relation to charge No.4.

g) The provisions regarding the scheme of arrangement are contained in Sections 391 to 394 of the Companies Act, 1956. Therefore, Section 68 of the Act, 1956, is not applicable.

h) The allegations against the petitioners are the same as objections raised by the Regional Director before this Court during the sanction of the scheme, which were not pressed. Therefore, the Special Court cannot reconsider issues previously raised before this Court and not pursued. If the SFIO alleges that the order was obtained by fraud, the proper recourse is to challenge the scheme sanction order before this Court, not to file a complaint before the Special Court.

i) Cognizance of an offence under Section 68 of the Companies Act, 1956, is only upon a written complaint as enumerated in



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

Sub-Section (1) or by the Securities and Exchange Board of India (SEBI) as stated under the second proviso. As the offense under Section 68 relates to the issuance of shares by DAL under the scheme, the power to administer Section 68 lies with SEBI, barring a Court from taking cognizance of a complaint not authorized by SEBI.

j) Accused No.11 was not an Officer of Kingfisher Airlines Limited but a mere Service Provider. Therefore, the sanction should be restricted to directors or officers of the Company and not extended to the petitioner, who is neither an officer nor a director.

1) (Nathi Devi -vs- Radha Devi Gupta, (2005) 2 SCC 271 (paras-13-15, 18);

2) Bharat Aluminium Company -vs- Kaiser Aluminium Technical Services Inc. & Others, (2012) 9 SCC 552 (paras-80, 81);

3) United India Insurance Company Ltd. -vs- Orient Treasures Private Limited - (1955) 2 SCC 303 (para-39).

9. Submissions of Sri Udaya Holla, learned Senior Counsel representing the petitioner in WP No.4671/2018 are as below:

a) The allegation against the petitioner in WP No.4671/2018 is that he did not carry out due diligence by verifying the correctness of the information provided by KAL and DAL, and he used only certain valuation methodologies. The validation or due diligence was not part of the scope of the petitioner, KPMG. The use of methodology is a professional decision based on facts/circumstances in each case. The petitioner is a professional and cannot be criminally prosecuted for an opinion which may not be acceptable, and the use of one valuation method instead of another does not constitute an offence. The



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

inducement to enter into an agreement in respect of share of debenture is an essential element of Section 68. The decision to undertake the merger was already taken by the parties to the merger, and the petitioner was engaged merely to recommend the swap ratio; therefore, the question of inducement does not arise (CBI -vs- K Narayanrao (2012) 9 SCC 512 (paras-20, 31), and Sunil Kumar Agarwal and others -vs- Mukhopadhyay (2009) SCC OnLine CAL 239).

b) The scheme of arrangement prepared by KFAL and DAL was sanctioned by this Court in Co.P No.45/2008 after considering the swap ratio, and the merger sanctioned by the High Court cannot be sought to be reopened through criminal proceedings.

c) (Dilip S. Dahanukar -vs- Pradam Kumar Khaitan, 1995 SCC OnLine Raj 222 at paras - 23, 26, 29 at Judgments Compilation pages 34-35). Deccan Charters Limited -vs- Nil (CoP No.45/2018); Dilip S Dahanukar -vs- Padam Kumar Khaitan (1995 SCC OnLine Raj 222); Pepsi Foods Limited -vs- Special Judicial Magistrate (1998) 5 SCC 749; Inder Mohan Goswami -vs- State of UP (2007) 12 SCC 1; Sunil Kumar Agarwal & Ors. -vs- G Mukhopadhyay (2009) SCC OnLine Cal 2391; Bhupinder Kaur Singh -vs- Registrar of Companies (2007) SCC OnLine Del 252; Wartsila India Limited -vs- Janak Mathuradas (2010 SCC OnLine Bom. 1715); Central Bureau of Investigation, Hyderabad -vs- K Narayana Rao (2012) 9 SCC 512; Mohamed Arif -vs- State of Madhya Pradesh (2016 SCC OnLine MP 1736); Kishan Singh -vs- Gural Singh (2010) 8 SCC 775; Manoj Kumar Sharma -vs- State of Chhattisgarh (2016) 9 SCC 1; State of Punjab -vs- Kailash Nath (1989) 1 SCC 321; Barai -vs- Henry AH Hoe and anr. (1983) 1 SCC 177; Nemi Chand -vs-



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

State of Rajasthan (2016 SCC OnLine SC 1715); Nimesh Tarachand Shah -vs- Union of India (2018) 11 SCC 1;

10. Submissions of Sri SatishManeshinde, learned Senior Counsel representing in WP No.3829/2018:

a) The allegation against accused No.19 is that he is the Executive Vice-President of SBI Capitals Market Limited and approved the information memorandum (referred to as 'IM') which contained false projections of the future profitability of the company. This paved the way for obtaining additional bank borrowing and conversion of part of executing loans into shares of accused No.2 entity. Consequently, he failed to examine serious shortcomings in the IM. These allegations arose during his tenure as Executive Director of the company. Since the company has not been arraigned as an accused, the petitioner cannot be held vicariously guilty.

b) The provisions of the Act, 2013 cannot be retrospectively applied to acts performed under the Act, 1956. The allegation against the petitioner pertains to recommending the swap ratio, which occurred in the year 2008. Therefore, the provisions of Act 2013 cannot be retrospectively applied. The valuation performed by accused No.15 is within his professional capacity, and different valuation methods are prescribed, reflecting professional wisdom.

11. Submissions of S Mahesh, learned counsel representing the petitioners in W.P.No.3943/2018 adopted the submissions made by the learned senior counsels and, in addition, argued that the cognizance taken of the offences under Section 447 of the Act, 2013 clearly establishes that the learned Special Judge has not applied his mind to



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

the materials on record since the offences allegedly committed were under the Act, 1956. He further argues, the direct issuance of arrest warrant by way of process without issuing summons is contrary to the guidelines laid down by the Apex Court in the case of Inder Mohan Goswamy -vs- State of Uttaranchal, 2007 12 SCC 1.

12. Submissions of Sri Amar Correa, learned counsel for the petitioners in W.P.No.4381/2018 c/w W.P.No.4380/2018 are as follows:

a) The petitioners are sought to be prosecuted for the offences alleged to have been committed under the 1956 Act. Therefore, Section 216(16) of the Act, 2013, being unambiguous in its application, the amended Act, 2013, will not be applicable, and consequently, the Special Court established under the 2013 Act lacks jurisdiction.

b) The provisions of the Companies Act, 2013, are prospective. Therefore, the Special Judge has no jurisdiction to take cognizance of the offences under Section 36 and 448 of the Act, 2013.

13. Submissions of Sri Sanjog Parab, learned Senior Counsel representing for the petitioner in WP No.11889/2018 are as below:

a) When a violation of Section 68 of the Act, 1956, is alleged, it can only be alleged against officers in default as defined under Section 5 of the Act, 1956. The Act which results in the violation of Section 68 can only be attributed to the principal accused. Therefore, the petitioners - accused do not fall under the ambit of the said definition. In the absence of any provision in the Act, 1956, in pari-materia with provisions similar to Sections 34, 129B, 109, and 114 of the Indian Penal Code



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

(IPC), the petitioners cannot be held constructively liable for the act allegedly committed by the principal accused. The same has been held in:

- 1) Shiv Kumar Jatia vs State Of Nct Of Delhi, (2019) 17SCC 193.
- 2) Sunil Bharti Mittal vs. Central Bureau of Investigation(2015) 4 Supreme Court Cases 609:
- 3) M/S. Pepsi Foods Ltd. &Anr vs Special Judicial Magistrate & Ors; (1998) 5 SCC 128
- 4) Sushil Sethi vs The State of Arunachal Pradesh, (2020) 3 SCC 240

b) The learned Judge of the Special Court has erred by not complying with the procedure under Section 202 of the Cr.PC and failing to apply his judicial mind before the issuance of the process. The report filed by the SFIO can be deemed to be a report filed by a Police officer under Section 173 only for framing of charges, as stated under Section 212(15) of the Act, 2013. However, this does not dispense with the compliance of Section 202 of the Cr.PC.

14. Submissions of Sri Prabhuling K Navagdi, learned Senior Counsel representing the respondent's (SFIO) counsel are as follows:

a) The offences were committed under the old Act, and the accused are to be charged under the old Act. Accordingly, the complaint was presented stating that the accused had committed offences under the old Act. The old Act was repealed, followed by the enactment of the Companies Act, 2013, with effect from 12.09.2013. The investigation was to be conducted under the new Act, and accordingly, the investigation



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

was conducted by SFIO as stated under Section 212 of the Act, 2013, which deals with the investigation into the affairs of the company by SFIO. Sanction was obtained under the new Act, and a complaint was submitted under the new Act before the Special Court established under Section 435 of the Act, 2013, and cognizance thereof was taken of the offence as per the new Act, 2013.

b) All these aspects are procedural matters, and the SFIO was required to follow the procedure established under the new Act. Therefore, the offence which was committed under the repealed Act would not cease to be triable after the repeal of the Act, and Section 6 of the General Clauses Act will come into play enabling the continuation of proceedings, including the investigation, as if the repealing had not been passed.

- 1) Nar Bahaddur Bhandari (AIR 1998 SC 2203);
- 2) Mohammed Abdul Raheem Kalota -vs- Union of India (2009) 2 SCC 1;
- 3) Justice K S Puttaswamy (Retd) -vs- Union of India (2019) (1) SCC 1;
- 4) Kapur Chand Phokraj -vs- State of Bombay (AIR 1958 SC 993);

c) Although Mr. N. Balasubrahmanian was authorized vide notification dated 6.12.2012 under the old Act to present the complaint, he is deemed to be competent to present the complaint under Section 439(2) of the new Act, as the repeal provision, i.e., Section 455(2) of the new Act, states that all the actions taken under the old Act are deemed to have been done or taken under the corresponding provisions under



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

the new Act, i.e., authorization issued under Section 621 of the old Act is deemed to have been done under Section 439(2) of the new Act.

d) Section 2(29) of the Act, 2013, is very clear that the court of sessions has jurisdiction to try any offence under this Act or under any previous Companies law, and irrespective of the quantum of punishment prescribed under the Act, the Court of sessions has jurisdiction under Section 2(29) of Act, 2013.

e) The Special Court established under Section 435 of the new Act is vested with the jurisdiction to try offences with imprisonment of two years or more, and the offence under Section 68 of the Act, 1956, is punishable with imprisonment for more than two years. Although under the old Act, the Magistrate had the jurisdiction to try the said offence, the change of forum after the enactment of the new Act being procedural, the amendment of the forum would operate retrospectively. Section 435 of the new Act has impliedly repealed Section 62 of the new Act. A combined reading of Sections 2(29), 435, as well as amended Section 435 of the new Act, clearly suggests that the Sessions Court has jurisdiction to try the offences under the previous Companies Law, i.e., repealed Act (Gajula Rajaih -vs- State of A.P. and others (AIR 2001 13 SCC 1), and Securities and Exchange Board of India -vs- Classic Credit Limited (2018) 13 SCC 1).

f) The restrictions contained in Section 202 of Cr.PC will not be applicable to the present case, since the SFIO, which is a statutory investigation authority under the provisions of the new Act, has conducted investigation, submitted a report, and filed the complaint.



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

g) In support, reliance is placed on the following decisions:

1. Cheminova India Limited & another v/s State of Punjab and others; 2021 SCC OnLine SC 573

2. Serdia Pharmaceuticals (India) Private Limited v/s Union of India; judgment dated 24.03.2021 rendered by the Karnataka High Court, Bangalore in Criminal Petition No.919/2020;

3. CMA CGM Asia Shipping Pte Ltd. v/s Union of India & others; judgment dated 16.09.2022 rendered by the Karnataka High Court, Bangalore in W.P.No.5895/2022 (GM-Res);

4. Smt. PavanaDibbur v/s The Directorate of Enforcement; judgment dated 27.09.2022 rendered in Criminal Petition No.3542 of 2022;

5. Shivajee Singh v/s NagendraTiwari reported in 2010 (7) 578 Rosy Vs. State of Kerala (2000) 2 SCC 230

6. National Bank of Oman v/s Barakara Abdul Aziz & another: (2013) 2 SCC 488;

7. Pradeep S. Wodeyar v/s State of Karnataka reported 2021 SCC Online SC 1140.

15. After reviewing the respective submissions made by the learned counsel for the parties, the crucial points that arise for consideration are as follows:



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

i) Whether the learned Judge of the Special Court established under Section 435 of the Companies Act, 2013, can take cognizance of an offence committed under the provisions of the Act, 1956.

ii) Whether the learned Judge of the Special Court has complied with Sections 202 and 204 of the Cr.PC before issuing the process?

iii) Whether the scheme of arrangement under Sections 391 to 394 of the Act, 1956, approved by this Court and alleged to have been obtained by fraud, can be reopened by filing a complaint before the Special Court?

iv) Whether the allegations against Accused herein constitutes an offence under Section 68 of Act, 1956?

ON POINT (i):

16. Before addressing this point, it is pertinent to cite the relevant provisions of the Act, 1956, Act, 2013, and also the provisions contained in Cr.PC, and the legal principles established by the Hon'ble Supreme Court with reference to the points raised for consideration.

17. Section 2(11) of the Act, 1956, defines the term "Court" and means, with respect to any offence under this Act, the Court of a Magistrate of First Class having jurisdiction to try such an offence.

18. Section 68 of the Act, 2013, deals with the penalty for fraudulently inducing persons to invest money, and states that any person who, either by knowingly or recklessly making any statement, promise, or forecast which is false, deceptive, or misleading, or by any dishonest concealment of material facts, induces or attempts to induce



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

another person to enter into, or to offer to enter into (a) any agreement for or with a view to acquiring, disposing of, subscribing for, or underwriting shares or debentures (b) any agreement, the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or by reference to fluctuations in the value of shares or debentures shall be punishable with imprisonment for a term which extends to five years.

19. Section 621 states that the offence against this Act to be cognizable only on a complaint by Registrar, shareholder, or government, the cognizance of which can be taken only upon a complaint in writing of the Registrar, shareholder of a company, or by a person duly authorized by the Central Government.

20. Section 622 states that no court inferior to that of a magistrate of first class shall try an offence against this Act and Section 624 states that every offence against this Act shall be deemed to be non-cognizable within the meaning of the Cr.PC.

21. Section 2(29) of the Act, 2013, defines the word "Court" and it means the Court of Sessions having jurisdiction to try any offence under this Act or under any previous Companies law.

22. Section 211 of Act, 2013 provides for the establishment of a Serious Fraud Investigation Office.

23. Section 212 of Act, 2013 deals with the investigation into the affairs of a company by SFIO. Sub-Section (14) states that on receipt of the investigation report, the Central Government after examination of the report directs the SFIO to initiate prosecution against the company or



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

its officer 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.

24. Sub-Section (15) states that 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 Cr.PC.

25. Sub-Section (16) states that notwithstanding anything contained within this Act, any investigation or other action taken or initiated by SFIO under the provisions of Companies Act, 1956, shall continue to be proceeded with under that Act as if this Act had not been passed.

26. Section 435 of the Act, 2013, provides for the establishment of Special Courts and the unamended Section which was substituted with effect from 7.5.2018, provides for the speedy trial of offences punishable under this Act with imprisonment of two years or more.

27. Proviso states that all other offences shall be tried as the case may be by a metropolitan magistrate or a judicial magistrate of the first class having jurisdiction to try any other offence under this Act or under any previous companies' law.

28. Sub-Section (2) states that a Special Court shall consist of a single judge who shall be appointed by the Central Government with



the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

29. Section 436 enumerates the offences triable by the Special Court.

30. Section 439 of the Act, 2013 states that every offence under this Act except the offences referred to in sub-section (6) of Section 212 shall be deemed to be non-cognizable within the meaning of Cr.PC. Sub-Section 2 states that no court shall take cognizance of any offence of this Act alleged to have been committed by any company or any officer thereof except on the complaint in writing of the Registrar, a shareholder, or a person authorized by the Central Court on that behalf.

31. Section 465 of the Act, 2013 deals with the repeal of certain enactments and savings and clause (h) to Sub-Section (2) states that any prosecution instituted under the repealed enactment and pending immediately before the commencement of this Act before any Court shall, subject to the provisions of this Act, continue to be heard and disposed of by the said Court.

32. Chapter-II of Cr.PC deals with the constitution of criminal courts and offices. Section 9 states that the State Government shall establish a court of sessions for every sessions division and shall be presided over by a judge to be appointed by the High Court.

33. The Hon'ble Supreme Court, in the case of **SEBI vs. Classic Credit Ltd.** (*supra*), has ruled that procedural amendments are presumed to be retrospective in nature unless the amending statute expressly or impliedly provides otherwise. It also held that generally, a



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

change of forum for trial is procedural and presumed to be retrospective unless the amending statute specifies otherwise. Therefore, the alteration of the forum has been considered procedural, and there is no hesitation in accepting the contention advanced on behalf of SEBI that the change of forum being procedural, the amendment of the forum would operate retrospectively, irrespective of whether the offence allegedly committed by the accused was prior to the amendment.

34. In the case of **Neena Aneja** (*supra*), reiterating the position taken in the case of **New Assurance Company Limited vs. Shanthi Mishra**, the Apex Court ruled that if by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise, the general rule is to make it retrospective.

35. In the case of **Nar Bahaddur Bhandari**, the Supreme Court ruled that the Special Court constituted under Section 3 of the Prevention of Corruption Act, 1988, has competence to try the offences under Act, 1947, since the said Act is repealed under Section 30(1) of the Act, 1988. Normally, Section 6 of the General Clauses Act would come into play and enable the continuation of the proceedings, including the investigation, as if the repealing Act had not been passed. However, this position will not be obtained if a different intention appears in the repealing Act.

36. In the case of **Kapur Chand Pokhraj**, the Supreme Court held that the Bombay Sales Tax Act, 1953 (repealing Sales Act), did not make any change either in the offence or in the procedure prescribed to prosecute for that offence. It expressly saved the offence committed



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

under the repealed Sales Act. Therefore, the intention can be legitimately imputed to the legislature that the procedure prescribed under the repealing Sales Act should be followed, even in respect of the offences committed under the repealed Sales Act.

37. In the case of *Kailash Nath* (supra), it was ruled that if the initial action is not in consonance with the law, all subsequent and consequential proceedings would fall through because illegality strikes at the root of the complaint. Therefore, the entire complaint and all actions which followed it are liable to be quashed and set aside.

38. What is apparent from the legal principles established by the Hon'ble Supreme Court in the aforementioned decisions can be summarized as follows:

i) Procedural amendments are generally presumed to be retrospective unless the amending statute expressly or impliedly provides otherwise. Changes in the forum for trial are typically considered procedural and are presumed to be retrospective unless specified otherwise by the amending statute.

ii) If a new forum is made available only for causes of action arising after its creation, the retrospective operation of the law is taken away. However, if no such restriction is expressly stated, the general rule is to make it retrospective.

iii) The competence of a Special Court constituted under a new Act to try offences under a repealed Act may be upheld if the new Act expressly allows for such continuity and if no conflicting intention appears in the repealing Act.



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

iv) If a repealing Act does not make any changes to the procedure prescribed for prosecuting offences under the repealed Act and expressly saves offences committed under the repealed Act, the procedure prescribed under the repealed Act should continue to be followed.

v) If the initial action is not in accordance with the law, all subsequent and consequential proceedings may be invalidated, as illegality at the outset affects the entire complaint and subsequent actions.

39. Admittedly, the offences were allegedly committed under the Act, 1956. The investigation of the offences alleged against the petitioner commenced after the enactment of the Act, 2013. The offence punishable under Section 68 of the Act, 2013 was triable by a Magistrate of First Class. The SFIO conducted an investigation in exercise of the power under Section 212 of the Act, 2013.

40. The SFIO, after investigation, filed a complaint before the Special Court established under Section 435 of the Act, 2013, presided by a Single Judge holding office as Sessions Judge appointed by the Central Government in concurrence with the Chief Justice of the High Court.

41. Section 435 clearly states that the Special Court can only try the offences under this Act with imprisonment of two or more years, which means the Act, 2013, and not the offences under the Act, 1956. For the other offences with imprisonment less than two years or offences punishable under previous company law i.e., Act, 1956, the proviso



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

states that, they shall be tried by the Judicial Magistrate of the First Class.

42. Section 465 of the Act, 2013, which deals with the repeal of certain enactments and savings, was given effect from 30.1.2019, vide notification dated 31.1.2019. The cognizance of the offences under Section 68 of the Act, 1956, was taken on 28.12.2017 by the Special Court. Therefore, as on the date when the cognizance was taken, the Act, 1956, was in force, and the cognizance of the offence under Section 68 of the Act, 1956, could have been taken only by the Judicial Magistrate First Class, as stated under Section 622 of the Act, 1956.

43. Section 2(29) of the Act, 2013, which defines the word 'Court,' means including the Court of Sessions having jurisdiction to try any offence under this Act or under any previous Companies Law as stated under Sub-Clause (iii).

44. Court of Sessions, as defined under Section 9 of Cr.PC, means a Court established by the State Government and presided by a Judge to be appointed by the High Court. Therefore, the Special Court established under Section 435 cannot be equated with the Court established under Section 9 of Cr.PC, since the power to establish and appoint a Presiding Officer is vested with the State Government insofar as it relates to the Sessions Court under Section 9 of Cr.PC, and with the Central Government insofar as it relates to the Special Court under Section 435 of the Act, 2013.

45. The Special Court established under Section 435 is vested with the jurisdiction to try the offences under this Act, i.e., Act, 2013, and the jurisdiction is not extended to the offences under the Act, 1956. The



NC: 2024:KHC:14889

WP No. 4380 of 2018 C/W WP No. 3624 of 2018 WP No. 3625 of 2018 WP No. 3632 of 2018 WP No. 3642 of 2018 WP No. 3829 of 2018 WP No. 3943 of 2018 WP No. 4381 of 2018 WP No. 4671 of 2018 WP No. 6074 of 2018 WP No. 11889 of 2018

Special Court established is made available only to try the offences under the Act, 2013, and therefore, the jurisdiction of the Special Court cannot be extended retrospectively to try the offences under the Act, 1956, and the jurisdiction of the Special Court is restricted to the Companies Act, 2013, by deliberately omitting the usage of the expression 'previous Company Law' in Section 435(1), as opposed to the proviso to Section 435(1), which states that all other offences shall be tried, as the case may be, by the Magistrate to try any offence under this Act or under any previous Company Law.

46. The cognizance of the offence under Section 68 of the Act, 1956, can be taken only on a complaint in writing by the person/s as enumerated in Section 621 of the Act, 1956, and the jurisdiction to take cognizance was vested with the Magistrate, as stated under Section 622 of the Act, 1956.

47. In view of the specific provisions contained in the Act, 1956, and the Act, 2013, the contention of the SFIO that the change of the forum of trial is only procedural, and as such, the cognizance taken by the Special Court does not stand vitiated for want of authority is unacceptable.

ON POINT (ii):

48. With reference to compliance of Sections 202 & 204 Cr.PC, the Apex Court in the following cases has ruled as follows:

49. In the case of ***Sunil Bharathi Mittal vs. Central Bureau of Investigation, (2015) 4 SCC 609***, a person ought not to be dragged to Court merely because a complaint has been filed. If a prima facie case is



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

made out, the Magistrate ought to issue a process. An opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused, and formation of such an appeal is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is a prima facie case against the accused, though the order did not contain detailed reasons.

50. In the case of ***Cheminova India Ltd. and another vs. State of Punjab and others, (2021) SCC Online 573***, the legislature in its wisdom has placed the public servant on a different pedestal, as would be evidenced from perusal of the proviso to Section 200 of Cr.PC. The object of holding an enquiry/investigation before taking cognizance, in cases where the accused resides outside the territorial jurisdiction of such Magistrate, is to ensure that innocents are not harassed unnecessarily. By virtue of the proviso to Section 200 of Cr.PC, the Magistrate, while taking cognizance, did not record the statement of such public servant who has filed the complaint in discharge of his official duty.

51. In this instance, the central government authorized the officer to file a complaint before the special court. Therefore, since the complaint was filed by a public servant duly authorized by the central government, the requirement of recording the statement of the public servant and conducting an investigation as contemplated under Section 202, sub-clause 1, does not arise. Consequently, the submission of the petitioners that the order issuing process is not preceded by an inquiry as contemplated under Section 202 of the CRPC stands vitiated is without any substance.



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

52. Section 212 clause 15 states that 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. The said provision clearly states that the investigation report submitted by the SFIO shall be deemed to be a report filed by a police officer under Section 173 of the CRPC, solely for the purpose of framing charges and not for the purpose of taking cognizance and issuing process thereafter. Therefore, it cannot be construed that the learned judge of this special court can dispense with forming an opinion before the issuing process.

53. The essence of forming an opinion before issuing a process under Section 204 of the Criminal Procedure Code is to ensure that there is sufficient basis or prima facie evidence to proceed against the accused. It entails a careful consideration of the available facts and evidence to determine whether there are reasonable grounds to believe that the accused has committed the alleged offense. This process safeguards against the arbitrary issuance of processes and helps ensure that legal proceedings are initiated only when there is a reasonable likelihood of establishing guilt during the trial.

54. In this case, the learned judge of the special court failed to form an opinion before issuing the process to determine whether there is a prima facie case to proceed against the accused. Consequently, the order issuing the process violates Section 204 of the Cr.PC. Additionally, the learned judge's decision to take cognizance of the offences under the Act 2013 also indicates a lack of consideration of the complaint



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

averments and materials presented before him. Thus, the order passed by the Learned Judge issuing the process is rendered invalid.

ON POINT (iii):

55. Chapter 4 of the Companies Act 1956 covers Arbitrations, Compromises, Arrangements, and Reconstructions. Section 391 pertains to the Authority to Settle or Make Agreements with Creditors and Members. Section 392 concerns the Authority of the Tribunal to Enforce Agreements and Arrangements. Section 393 provides Details Regarding Agreements or Arrangements with Creditors and Members. Section 394 outlines Provisions to Aid in the Reconstruction and Merger of Companies.

56. Deccan Charters Ltd., Kingfisher Airlines Ltd., and Deccan Aviation Ltd. filed petitions under Sections 391 to 394 of the Companies Act, 1956 in Company Petition No.45/2008 c/w Company Petition Nos.46/2008 and 47/2008. This court in its order dated 16.06.2008 while sanctioning the scheme of arrangement observed as follows:

i) By Order dated 23, 2008 in CA No. 208/2008, this Court ordered the meeting of equity shareholders, secured and unsecured creditors to be convened. The meeting was advertised on 27-03-2008 in Asian Age and Vijaya Karnataka newspapers, with the meeting date set for 17-04-2008. Chaired by Dr. Vijay Mallya, the meeting witnessed 98 equity shareholders, holding 9, 21, 68, 755 equity shares of Rs.10 each fully paid up, vote in favor of the scheme, while 2 shareholders, representing 58 equity shares of Rs.10 each fully paid up, voted against it, with 6 votes being invalid.



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

ii) The unsecured creditors approved the scheme by requisite majority. Subsequently, on 25-04-2008, Deccan Aviation Ltd. filed Company Petition No.47/2008. The Regional Director, Ministry of Corporate Affairs, Southern Region, Chennai, filed objections via affidavit through the Registrar of Companies, Bengaluru, in all the petitions. Though the affidavit raised 6-7 objections, the Assistant Solicitor General of India, representing the Registrar of Companies, confined objections to only 3, focusing on the valuation details of Rs.69 crore for the sale of Deccan's charter services operation to DCL. The Assistant Solicitor General also raised concerns about the confusion caused by the companies' names, suggesting compliance with Sections 21 and 23 of the Companies Act. Additionally, it was brought to attention that United Breweries Ltd. violated Section 108A of the Act by not seeking permission from the Central Government when acquiring shares.

iii) A shareholder named M. R. Ravindranath, holding one share, filed an application seeking permission to oppose the scheme, raising concerns about wage disparity among Kingfisher and Deccan's workers. Mr. Grant Thornton, a leading accounting firm, valued Deccan's charter services operation at Rs.69.10 crore, considering various relevant factors and employing methods such as cash flow, net asset value, and comparable company market multiple. This valuation, having been accepted by shareholders and creditors, this court cannot sit in appeal over commercial wisdom of the shareholders and the creditors. The petitioners assert that the amended composite scheme will benefit them and creditors, fostering competitiveness and increasing business value. Therefore, it is a fit case to sanction the amended composite scheme of arrangement, and accordingly the scheme was sanctioned.



NC: 2024:KHC:14889

WP No. 4380 of 2018 C/W WP No. 3624 of 2018 WP No. 3625 of 2018 WP No. 3632 of 2018 WP No. 3642 of 2018 WP No. 3829 of 2018 WP No. 3943 of 2018 WP No. 4381 of 2018 WP No. 4671 of 2018 WP No. 6074 of 2018 WP No. 11889 of 2018

57. The question of whether the merger process, sanctioned by this court, can be reopened due to concealment of material facts must be considered in light of the order passed by this court sanctioning the scheme of arrangement, as well as the provisions contained in Sections 391 to 394 of the Companies Act, 1956, and the ratio enunciated by the courts regarding these provisions:

i) In the case of ***Regional Director, Ministry of Company Affairs v. Cavin Plastics and Chemicals Pvt. Ltd. (2007) SCC OnLine Mad 945***, the High Court of Madras held that not only is Section 391 of the Act, 1956, a complete code in itself, but it is also intended to be in the nature of a single window clearance.

ii) In the case of ***J K (Bombay) (P) Ltd. v. New Kaiser -I-Hind Spg. and Wvg. Co. Ltd. (1968 SCC OnLine SC 32)***, the Hon'ble Supreme Court held that by virtue of the provision of Section 391 of the Act, 1956, a scheme is statutorily binding even on creditors and shareholders who dissent from or oppose its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and creditors acquiesce in such alteration.

iii) In the case of ***Mihir H Mafatlal v. Mafatlal Industries Ltd. (1997) 1 SCC 579***, the Apex Court, at para-29, held that the jurisdiction of the Company Court while sanctioning a scheme is peripheral and supervisory, and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their games according to the Rules and do not overstep the limits.



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

iv) In the case of ***Hindustan Lever Employees Union v. Hindustan Lever Limited (1995 Supp. 1 SCC 499)***, the Apex Court, at para-3, ruled that the Company Court's obligation is to be satisfied that the valuation was in accordance with the law and it was carried out by an independent body, and it is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted.

v) In the case of ***Wartsila India Limited v. Janak Mathuradas (2010) SCC OnLine Bom 1715***, the Bombay High Court ruled that Courts should not sit in judgment over the commercial wisdom of parties, which is a regularly acknowledged principle. If some other method of valuation could be resorted to, which would possibly be more favorable, that alone cannot militate against granting approval to the scheme propounded by the company. The Court's obligation is to be satisfied that the valuation was in accordance with the law and it was carried out by an independent body. Valuation is an art, not an exact science. Mathematical certainty is not demanded nor indeed if possible.

vi) In the case of the ***Central Bureau of Investigation, Hyderabad v. K Narayanrao (2012) 9 SCC 512***, it was held that a lawyer owes an unremitting loyalty to the interest of the client, and it is a lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion is not acceptable, it cannot be mulched with the criminal prosecution, particularly in the absence of tangible evidence that he associated with other conspirators. At most, he may be liable for gross negligence of professional misconduct if it is established by acceptable evidence, and cannot be



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

charged with the offence of cheating and abatement along with other conspirators.

vii) A similar view was taken by the Madhya Pradesh High Court in the case of ***Mohammad Arif v. State of Madhya Pradesh***. In the case of ***Hamza Haji v. State of Kerala (2006) 7 SCC 416***, the Apex Court, at para-27, observed that when the order of Forest Tribunal in the said case had merged in the decision rendered by the High Court, the governing decision, therefore, was the decision of the High Court, and when seeking to question the decision has been vitiated by fraud, the proper course to adopt was to move to the Court that had rendered the decision, by an application.

viii) In the case of ***Dilip S Dahanukar v. Padam Kumar Khaitan (1995 SCC OnLine Raj 222)***, the Rajasthan High Court, the learned Single Judge of the Rajasthan High Court was of the view that a question which had already been gone into in a proceeding before the High Court at Bombay under the Companies Act cannot be made subject matter of dispute by lodging the criminal complaint under the Act or Penal Code. It was further observed that no case was made out for proceeding against the petitioner therein in a criminal court on the basis of the complaint lodged by the complainant respondent therein under various Sections of the Companies Act and the Indian Penal Code regarding which cognizance has been taken only in Section 68 of the Companies Act, especially if the complainant therein suppressed the material facts at the time of the examination before the Magistrate. If the full facts had been disclosed, no order taking cognizance would have been passed at all even under Section 68 of the Companies Act.



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

58. The ratio enunciated in the aforementioned decisions are summarized as follows:

i) Section 391 of the Companies Act, 1956, serves as a comprehensive code and facilitates a single window clearance for schemes of arrangement.

ii) Schemes sanctioned under Section 391 are statutorily binding on creditors and shareholders, even if they dissent or oppose, and can only be altered with the court's sanction.

iii) The jurisdiction of the Company Court in sanctioning a scheme is supervisory, not appellate, ensuring compliance with legal provisions and preventing overstepping of limits.

iv) The Company Court's role is to ensure that valuation is conducted by an independent body in accordance with the law, rather than intervening based solely on valuation discrepancies.

v) Courts should refrain from questioning the commercial wisdom of parties involved in schemes unless there is a clear violation of legal principles.

vii) When seeking to challenge a decision tainted by fraud, the proper recourse is to apply to the court that rendered the decision.

viii) Matters already adjudicated upon in proceedings under the Companies Act cannot be reopened through criminal complaints unless there is evidence of suppression of material facts.

59. While sanctioning the scheme of arrangement, this court accepted the valuation of the business assessed by an independent



NC: 2024:KHC:14889

**WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018**

body. Additionally, the shareholders and unsecured creditors approved the scheme by requisite majority. Therefore, the merger process alleged to have been obtained fraudulently cannot be reopened by launching criminal prosecution. If the merger process is indeed obtained fraudulently, the aggrieved person or complainant has the option to approach the court in which the merger process was obtained fraudulently or challenge the scheme of arrangement sanctioned by this court before the appropriate forum. In the absence of any material to substantiate that the scheme of arrangement was obtained by suppression of material facts, except stating that the projection used for share swap ratio was skewed in favor of shareholders of erstwhile KFAL and only two methods which were in favor of erstwhile KFAL were used, the initiation of criminal prosecution against the petitioners accused will be an abuse of the process of the law.

60. The complainant has not placed on record any material to substantiate that the aggrieved shareholder or unsecured creditors have made any complaint to substantiate that the petitioners induced the shareholders to enter into an agreement fraudulently, so as to constitute an offence under Section 68 of the Companies Act, 2013.

61. The alleged offenses were purportedly committed during the period when the Companies Act of 1956 was in effect. The initiation of legal proceedings under Section 36, in conjunction with Sections 447 and 448 of the 2013 Act, lacks legal authority. The petitioners cannot be prosecuted for actions that were not deemed punishable under the provisions of the 1956 Act. This purported action violates Article 20, Sub-Clause 1 of the Constitution of India, which safeguards against retrospective criminalization.



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

62. The learned Judge of the Special court while taking cognizance simultaneously issued an arrest warrant against the accused. The Hon'ble Supreme Court in the case of Inder Mohan Goswamy supra ruled that " as far as possible, the Court is of the opinion that a summon will suffice in getting the appearance of the accused in the Court, the summon or the bailable warrant should be preferred. The warrant either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The Court must very carefully examine whether the complaint or FIR has not been filed with an oblique motive. The personal liberty is paramount and therefore the Courts at the first and second instance should refrain from issuing non-bailable warrants.

63. The present case, admittedly is a complaint case, and the report submitted by the SFIO would be deemed to be a report filed by the Police under Section 173 Cr.P.C only for the purpose of framing of charge. Therefore, the learned Judge of the Special Court, contrary to the guidelines issued by the Apex Court, issued an arrest warrant without issuing summons at the first instance to secure the presence of the accused.

64. The offence u/s 68 of act, 1956 can be invoked against any person who meets the criteria outlined in the provision. It does not specifically limit the application of the provisions to directors or officers of the company. Any individual who knowingly or recklessly makes false statements, promises, or forecasts, or conceals material facts to induce others to invest in shares or debentures can be held liable under this section. Therefore, it applies to any person involved in such fraudulent



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

activities, regardless of their position within the company, and it can be extended to persons rendering professional service to the company. The phrase “Any Person” cannot be restricted to “Officer who is in default” as defined in section 5 of the Act, 1956, and it extends to professionals serving the company.

65. The professionals providing services to the company are not liable under Section 68 of the Companies Act, 1956, if their opinions are within their commercial discretion. They can only face prosecution if they collude with an officer who is in default as stated under section 5 of the Act, 1956 to fraudulently induce shareholders into agreements.

66. From the aforesaid discussion, it is evident that the cognizance taken by the learned judge of the special court, established under the Companies Act of 2013, lacks legal authority. Furthermore, since this court has already approved the scheme of arrangement, the matter of whether the merger process was tainted by fraud cannot be revisited through the initiation of criminal prosecution. Therefore, allowing the criminal proceedings to proceed would constitute an abuse of legal process.

67. Accordingly, I pass the following:

ORDER

i) The Writ Petitions are allowed;



NC: 2024:KHC:14889
WP No. 4380 of 2018 C/W WP No. 3624 of
2018 WP No. 3625 of 2018 WP No. 3632 of
2018 WP No. 3642 of 2018 WP No. 3829 of
2018 WP No. 3943 of 2018 WP No. 4381 of
2018 WP No. 4671 of 2018 WP No. 6074 of
2018 WP No. 11889 of 2018

ii) The impugned proceedings on the file of 59th Additional City Civil and Sessions Judge and Special Court under the Companies Act, 2013 in C.C.No.12/2018 stands quashed, and the complaint filed by the respondent SFIO consequently stands dismissed.

Sd/-
JUDGE

BKM