HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Cr. Writ Petition NO. 4144 OF 2019

N Sampath Ganesh ,
Aged 53 years, C-2304, Oberoi
Splendor, Jogeshwari Vikhroli Link
Road, Andheri (East),
Mumbai 400 060 ...Petitioner

Versus

1. Union Of India,
Ministry of Corporate Affairs, Through
Regional Director (Western Region),
Everest (5th Floor), 100, Marine Driver,
Mumbai 400 002.

2. Serious Fraud Investigation Office,
Through Director,
7th Floor, Fountain Telecom Building,
MG Road, Mumbai 400 005 ...Respondents

WITH
Cr. Writ Petition NO. 4145 OF 2019

B S R And Associates Llp And Anr ..... Petitioner(s)
Versus
Union Of India And Anr ..... Respondent(s)

WITH
Cr. Writ Petition NO. 5023 OF 2019

Deloitte Haskins And Sells LLP
32nd Floor, India Bulls Finance Centre,
Elophinstone Mills Compound,
Elphinstone, Mumbai 400 013..... Petitioner

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HIGH COURT OF JUDICATURE AT BOMBAY

Versus

1. Union Of India,
Ministry of Corporate Affairs,
Through Regional Director (Western Region), Everest (5th Floor), 100, Marine Driver, Mumbai 400 002.

2. Serious Fraud Investigation Office,
Through Director,
7th Floor, Fountain Telecom Building, MG Road, Mumbai 400 005
Union Of India And Ors.

3. State of Maharashtra ...Respondents

WITH
Cr. Writ Petition NO. 5035 OF 2019

Kalpesh Mehta,
603, Ronit Arcade, S.V. Road,
Opposite Kandivali Telephone Exchange,
Kandivali (West),
Mumbai 400 067 ...Petitioner

Versus

1. Union Of India,
Ministry of Corporate Affairs, Through Regional Director (Western Region), Everest (5th Floor), 100, Marine Driver, Mumbai 400 002.

2. Serious Fraud Investigation Office,
Through Director,
7th Floor, Fountain Telecom Building, MG Road, Mumbai 400 005
Union Of India And Ors.

3. State of Maharashtra ...Respondents

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HIGH COURT OF JUDICATURE AT BOMBAY

WITH
Cr. Writ Petition NO. 5036 OF 2019

Udayan Sen,
Flat No. 1802, A Wing, 18th Floor,
Lodha Bellissimo, N.M. Joshi Marg,
Mahalaxmi (East), Mumbai, Mumbai
City, Jacob Circle,
Maharashtra ...Petitioner

Versus

1. Union Of India,
Ministry of Corporate Affairs, Through
Regional Director (Western Region),
Everest (5th Floor), 100, Marine Driver,
Mumbai 400 002.

2. Serious Fraud Investigation Office,
Through Director,
7th Floor, Fountain Telecom Building, MG
Road, Mumbai 400 005
Union Of India And Ors.

3. State of Maharashtra ...Respondents

WITH
Cr. Writ Petition NO. 5263 OF 2019

Hari Sankaran,
Everglades, Shobhasagar CHS, 21st
Road, Bandra West,
Mumbai 400050 ...Petitioner

Versus

1. Union Of India,
Ministry of Corporate Affairs,

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HIGH COURT OF JUDICATURE AT BOMBAY

Through Regional Director (Western Region), Everest (5th Floor), 100, Marine Driver, Mumbai 400 002.

2. Serious Fraud Investigation Office, Through Director, 7th Floor, Fountain Telecom Building, MG Road, Mumbai 400 005 Union Of India And Ors.

3. State of Maharashtra ...Respondents

Mr. Navroz Seervai, Sr. Counsel a/w Mr. Zal Andhyarujina, Dr. Sujay Kantawala, Mr. V.P. Singh, Mr. Aditya Jalan, Raghav Seth, Mr.Aman Sharma, Ms.Anshula L. Bakhru, Ms. Vanya Chhabra and Mr.Hursh Meghani, Mr. Samarth K. Luthre and Mr. Ayush Chaddha i/b AZB & Partners, Advocate for the Petitioner in WP No.4144/2019 & WP 4145/2019.

Mr. Darius J. Khambata, Senior Advocate i/b AZB & Partners, Advocate for the Petitioners in WP No.4145/2019.

Mr. Janak Dwarkadas, Sr.counsel a/w Mr. Mustafa Doctor, Sr. counsel, Mr.Pranav Badheka, Ms.Rhishika Harish, Rahul Dwarkadas, Ms. Prachi Dhanani, Ms.Rohini Jaiswal, Ms. Juhi Bahirwani i/by Veritas Legal for the Petitioner in WP No.5023/2019.

Mr. Robin Jaisinghani i/by Dastur Kalambi & Associates for the petitioner in WP No.5035/2019.

Mr. Amit Desai, Sr. counsel & Mr. Gopalakrishna Shenoy i/b Dastur Kalambi & Associates for petitioner in WP 5036/2019.

Adv.Aabad Ponda a/w Vikran Negi, Ekta Tyagi, Pratik Thakkar, Bhomesh & Anjali Shah i/b DSK Legal for petitioner in WP 5263/2019.

Mr. Aspi Chinoy, Senior Advocate a/w Mr. Animesh Bisht, Mr.Aditya Sikka, Adv. Ashish Mehta Saloni Kapadia, Ms.Drishti Das, i/b Cyril Amarchand Mangaldas, for Respondent no.1 in WP Nos.4144/2019, 4145/2019, 5023/2019,5035/2019, 5036/2019 and 5263/2019.

Shri H.S.Venegaokar a/w Sneha Prabhu and Ajay Bhise for TR.No. 2 SFIO.

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HIGH COURT OF JUDICATURE AT BOMBAY

CORAM : B.P. DHARMADHIKARI, CJ &
NITIN R. BORKAR,J.
RESERVED ON : 14/01/2020
PRONOUNCED ON : 21/04/2020

JUDGMENT (Per B.P. Dharmadhikari, CJ.):

1 A prayer made under S. 140(5) of the Companies Act,2013 or 2013 Act against the statutory auditors by the Union of India through Ministry of the Corporate Affairs (MCA) in an investigation/dispute regarding constant ever- greening of debts extended to its subsidiary Companies & third parties/companies by IL & FS Financial Services Limited (hereinafter referred to as "IFIN") and alleged dubious role played by its CAs ie company auditors before National Company Law Tribunal ie NCLT and orders passed therein, gives rise to the present bunch of petitions. Petitioners state that said S. 140(5) is unconstitutional and in any case, can not be invoked against the ex-statutory auditors. In WP 5263 of 2019, direction to lodge prosecution issued under S.212(14) of 2013 Act is questioned. Since only law points are argued, we need not refer to the facts which are not crystallized as yet.

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HIGH COURT OF JUDICATURE AT BOMBAY

2. In Writ petition No.4144 of 2019, petitioner is a partner of M/s. BSR and Associates which is a Limited Liability Partnership (LLP) of Indian Chartered Accountants. He has questioned validity of section 140(5) of the Companies Act, 2013. He has also challenged the order dated 9/8/2019 passed by the National Company Law Tribunal, Mumbai Bench whereby his objection to maintainability of Company Petition No. 2062 of 2019 raised by him vide Misc Application No. 2506 of 2019 has been dismissed and that company petition is held to be maintainable under section 140(5). Objection raised vide Misc Application No. 2505 of 2019 filed by M/s. BSR Associates challenging said maintainability also came to be rejected. M/s. BSR Associates has challenged it vide WP 4145 of 2019. Misc. Application No.2258 of 2019 was filed by Petitioners in WP No. 5023 of 2019 M/s. Deloitte Haskins & Sells, another (LLP), Misc. Application No.2506 of 2019 was filed by the Chartered Accountant Sampat Ganesh, Misc. Application No. 2268 of 2019 was filed by Chartered Accountant Udayan Sen and Misc. Application No. 2270 of 2019 was filed by Chartered Accountant Kalpesh J. Mehta. All these Misc. Applications

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HIGH COURT OF JUDICATURE AT BOMBAY

questioning the maintainability of Company Petition No. 2062 of 2019 were dismissed by common order and the company petition filed by Union of India through Ministry of Corporate Affairs was held maintainable. The petitioners mainly stated that because of resignation tendered by the Chartered Accountants, proceedings under section 140(5) do not survive. The other persons/concerns have filed criminal petitions for challenging the rejection of preliminary objection vide WP No.4145 of 2019, WP No. 5023 of 2019, WP No.5035 of 2019, WP No. 5036 of 2019.

3. The NCLT has also passed an order on Misc. Application No. 3254 of 2019 filed in connection with Company Petition No. 2062 of 2019 under section 140(5) of the Companies Act, 2013 for appointment of statutory auditors for IL & FS Financial Services Limited ("IFIN") under first proviso to section 140(5) of the Companies Act,2013. This application was moved by the Union of India through its Ministry of Corporate Affairs, the NCLT has found that under section 140(5) only, the Union of India is authorized to appoint or change the auditor. The

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HIGH COURT OF JUDICATURE AT BOMBAY

auditor appointed by the Company IFIN namely Mukund M. Chitale & Co. (MMC) has been treated as appointment of statutory auditors under section 140(5) by NCLT on 18.10.2019.

4. The other order or direction challenged in this group of petitions is dated 29/5/2019. By this order, the Assistant Director, Legal and Prosecution has asked the SFIO to file complaint ie prosecution under S. 212(14) of 2013 Act by 30/05/2019 without fail and to submit compliance report.

5. In Criminal Writ Petition No. 5023 of 2017, the petitioner DeoLitte Haskins & Sells (LLP) has questioned the constitutionality of section 140(5) supra and also prays to quash and set aside the criminal complaint Case No. 20 of 2019 initiated against it.

6. Writ Petition No. 5035 of 2019 is filed by one Kalpesh Mehta who is chartered accountant and he has questioned the constitutionality of section 140(5) supra, direction dated 29/5/2019 supra and Criminal Case No. 20 of 2019 instituted on

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HIGH COURT OF JUDICATURE AT BOMBAY

its basis.

7. Writ Petition No. 5036 of 2019 is filed by Mr. Udayan Sen, Chartered Accountant assailing constitutional validity of section 140(5) supra, direction dated 29/5/2019 and Criminal Complaint Case No. 20 of 2019 supra.

8. Writ Petition No. 5263 of 2019 is filed by Mr. Hari Shankaran who claims to be Director of Company against whom direction dated 29/5/2019 has been executed and thereafter complaint has been filed on 30/5/2019.

9. Parties have argued Criminal Writ Petition No. 4144 of 2019 and 4145 of 2019 as the lead petitions.

10. The discussion below will show that we are not required to record any finding on factual dispute. The facts below necessary to explain the legal dispute are borrowed mostly from the order of NCLT dated 09/08/2019 which is impugned herein. This order is a common order on Misc. Application No.

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HIGH COURT OF JUDICATURE AT BOMBAY

2258 of 2019 filed by Deloitte Haskin & Sells LLP, Misc Application No. 2505 of 2019 filed by M/s. BSR and Associates LLP, Misc. Application No. 2506 of 2019 filed by Chartered Accountant Sampath Ganesh, Misc. Application No. 2268 of 2019 filed by Chartered Accountant Udayan Sen and Misc. Application No. 2270 of 2019 filed by Chartered Accountant Kalpesh J. Mehta.

11. Company Petition No.2062 of 2019 was filed by the Union of India against the above mentioned applicants along with others It was under section 140(5) and sought a declaration that the Deloitte Haskins be deemed to be removed as statutory auditor of IL & FS (IFIN) Financial Services Limited for the year 2012-13 to Financial Year 2017-18 in the light of its vacation of the office on rotation at the end of Financial year 2017-18.

12. It also requested for declaration that M/s. BSR & Associates ceased to be statutory auditors of IL & FS (IFIN) with immediate effect. Permission was also sought to appoint

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HIGH COURT OF JUDICATURE AT BOMBAY

independent auditor for IL & FS (IFIN) so as to replace M/s. BSR & Associates in terms of first proviso to section 140(5) of the Companies Act read with explanation (ii) thereto. The Union of India also sought relief in terms of the said second proviso read with explanation (I) that respondent no.1 in those proceedings namely Deloitte Haskins was not eligible to be appointed as an auditor of any company for the period of five years from the order passed by NCLT in view of serious fraud committed which required intervention of the MCA to prevent the destabilization impact on the company at the request of the department of Economic Affairs and sought debarment for the period of five years. Similar relief was sought for against the other respondents i.e. applicants mentioned supra.

13. The maintainability of these proceedings was questioned on various grounds including contention that when the statutory auditor had factually ceased to be company auditor ie CA of the particular company and another auditor namely M/s.M.M. Chitale & Co. had stepped into the shoes and assumed that responsibility, provisions of section 140(5) could

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HIGH COURT OF JUDICATURE AT BOMBAY

not have been invoked. We are required to refer to this contention and other allied grounds little later in the body of this judgment. NCLT has by impugned order rejected these objections and held Company Petition No. 2062 of 2019 presented by Union of India to be maintainable.

14. In this connection only on 30/09/2018 the Union of India through its Ministry of Corporate Affairs appointed inspectors with the Director SFIO to inquire into the affairs of the company namely Infrastructure Leasing and Financial Services Limited and its subsidiary companies. The inspectors were given time of three months to submit the report to Central Government.

15. The SFIO accordingly submitted a report which was looked into by the Union of India, Ministry of Corporate Affairs (MCA) and on 29/5/2019 in exercise of the powers available to it under section 212 (14) of the Companies Act, 2013, it directed the SFIO and Regional Director (Western Region) to proceed further. This communication recommends prosecution of

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HIGH COURT OF JUDICATURE AT BOMBAY

petitioners under various provisions and SFIO has been directed to file a complaint by next day i.e. 30/05/2019 without fail and to submit the compliance report. This order has been questioned on the ground that the report which runs into more than 750 pages & has annexures running into 32,000 pages, has been alleged to be examined in about 30 hours by Union of India and filing of prosecution has been ordered. Petitioners submit that this shows non application of mind. It is also contended that the report submitted by SFIO was not a final report but an interim report and as such prosecution cannot be filed on its strength.

16. By later order dated 18/10/2019, the NCLT has allowed Misc. Application No. 3254 of 2019 filed by Union of India. Misc. Application No. 3254 of 2019 was filed after liberty was given to it by Hon'ble Apex Court.for appointment of statutory auditor for IFIN under section 140(5). The NCLT has after considering the facts presented to it, found that Mukund M. Chitale & Co. (MMC) was already appointed by IFIN as its statutory auditor. But in the proviso to section 140(5) only, Union of India is

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HIGH COURT OF JUDICATURE AT BOMBAY

authorized to appoint or change the auditor. MMC had shown its inability to accept the assignment without sanction of Union of India and IFIN could not have remained without the statutory auditor. NCLT therefore, declared that the appointment of MMC as statutory auditor made by the company shall be considered as an appointment of statutory auditor under the first proviso to section 140(5) of the Companies Act, 2013. The facts disclosed in this order show that the order of NCLT dated 9/8/2019 dismissing the objection to maintainability of Company Petition No. 2062 of 2019 was questioned by respondent nos. 3, 4 and 1 before NCLAT in Company Appeal No. 222 of 2019, Company Appeal No. 223 of 2019 and Company Appeal No. 224 of 2019. In those appeals, NCLAT permitted NCLT to proceed with the hearing of the petition to restrain it from passing any order against the appellants before it.

17. After filing of the Company Petition No.2062 of 2019, respondent no.2 therein viz. M/s. BSR and Associates who were statutory auditors for IFIN for the year 2019-20 resigned on

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HIGH COURT OF JUDICATURE AT BOMBAY

19/6/2019. Respondent nos. 2 and 5 in Company Petition No. 2062 of 2019 moved High Court in Criminal Writ Petition No.4144 of 2019 (present petition) as also Criminal Writ Petition No.4145 of 2019 challenging the vires of section 140(5). High Court on 4/9/2019 while issuing notice passed the following order :

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

18. Aggrieved by this order of High Court dated 4/9/2019, the petitioners moved SLP before the Hon'ble Apex Court. The Hon'ble Apex Court on 26/9/2019 passed the following order :

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HIGH COURT OF JUDICATURE AT BOMBAY

> "Mr. Mehta, learned Solicitor General submitted that after the resignation of the original writ petitioners, the Company had passed a resolution on 11.07.2019 appointing M/s. Mukund M. Chitale & Co., Chartered Accountants as Statutory Auditors of the Company, to fill the resultant vacancy but said M/s. Mukund M. Chitale & Co., Chartered Accountants have expressed their inability to take up the assignment which would in turn mean that fresh appointment is required to be made to fill up the vacancy.
>
> We see no reason why steps in that behalf could not be undertaken with promptitude so that the interest of the company is not prejudiced on any count.
>
> Learned Solicitor General submits that appropriate application shall be moved before the NCLT. We grant liberty for moving such an application. If such an application is moved, the matter shall be dealt with in accordance with law."

19--- In exercise of liberty given by Hon'ble Apex Court and under first proviso to section 140(5), Misc. Application No. 3254 of 2019 came to be filed for seeking permission for appointment of M/s. M.M.Chitale & Co. as statutory auditors of IFIN for the financial year 2018-19 onwards. As seen above, this order dated 18/10/2019 has not been assailed by any of the petitioners. The orders passed by NCLT are already briefly mentioned by us supra.

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HIGH COURT OF JUDICATURE AT BOMBAY

20-- Adv. Khambata, the learned Senior Advocate states that this High Court has on 4/9/2019 granted interim relief and stayed the proceedings before NCLT. The said order was questioned unsuccessfully before the Hon'ble Apex Court. When the Hon'ble Apex Court was disposing of the SLP, according to petitioners at eleventh hour, some documents were shown to Hon'ble Apex Court with submission that the MMC had declined to accept the responsibility and leave was sought to move appropriate application before NCLT to appoint new auditor. Hon'ble Apex Court granted that leave. Adv. Khambata submits that grant of this leave by the Hon'ble Apex Court and dismissal of the SLP cannot be construed as dilution of the High Court order dated 4/9/2019 and action of respondents in moving the application in very same proceedings which were stayed because of liberty given by the Hon'ble Apex Court is unwarranted. The NCLT could not have proceeded further and allowed that application.

21-- Attention of the Court is invited to provisions of section 140 of 2013 Act to show that it appears in a chapter

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HIGH COURT OF JUDICATURE AT BOMBAY

which does not deal with the discipline and therefore, punishment to be inflicted upon the auditors. Removal in the said chapter is termination simplicitor without casting any stigma and therefore, it cannot be seen as disqualification. Contention is disqualification envisaged under section 140(5) operates only against the recalcitrant auditors who do not abide by the orders passed by the NCLT or defy the procedure. It is therefore, a sanction to guarantee the procedural discipline thereunder or the orders passed by NCLT under that section. Second proviso to section 140(5) cannot be seen as 'stand alone' provision. Such treatment extended to that sub section would vitiate the entire scheme of the chapter of Companies Act and also the purpose of section 140.

22-- Our attention is drawn to the fact that the company auditor must be Chartered Accountant and as such is already regulated by the Institute of Chartered Accountants and its disciplinary rules in so far as professional conduct or misconduct is concerned. There proper procedure has been prescribed in accordance with the principles of natural justice

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HIGH COURT OF JUDICATURE AT BOMBAY

before the Chartered Accountant is punished for his professional misconduct.

23-- Apart from the provisions of IPC under which delinquent Chartered Accountant can always be prosecuted, it is submitted that in Companies Act there exists special provision in the shape of section 447. The Directors or the other office bearers of the company or other persons found to have indulged in financial irregularities or fraud can be punished thereunder. It is submitted that the words “any person” employed in explanation (I) thereto also includes the auditor of the company. Such auditor is debarred from functioning as company auditor for two terms. Thus for fraud under section 140(5) the punishment of debarring the auditor for one term is provided. Under section 447 at the end of the trial, the guilty auditor is debarred for two terms. The law does not contemplate two punishments for the same offence or misconduct. Learned counsel argues that if the auditor is debarred for one term of five years under section 140(5) and is subsequently acquitted under section 447, he would have still

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HIGH COURT OF JUDICATURE AT BOMBAY

suffered irreparable loss because of loss of reputation, loss of business etc. It is urged that during the trial under section 447 of Companies Act, the provisions of Cr.P.C. apply and those being tried get full opportunity in accordance with the law of land to defend himself. Such liberty is not protected & procedure is not prescribed under section 140(5).

24-- The provisions of section 212 of Companies Act dealing with the Serious Fraud Investigation (SFI) are also pressed into service for this purpose. The provisions of the said section show that the enquiry therein is at par with the investigation under Cr.P.C. and hence, the provisions of section 173 of Cr.P.C. are attracted. Serious Fraud Investigating Officer (SFIO) has to submit report after completion of investigation under section 212(12) and then under section 212(14), the prosecution under section 447 of the Companies Act can be initiated. Section 212(15) gives this investigation report status of report filed by police officer under S.173 of Cr.P.C. The provisions of section 212(11) contemplates even an interim report, but no prosecution can be initiated on the basis of such interim

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HIGH COURT OF JUDICATURE AT BOMBAY

reports.

25-- Provisions of section 223(4) and (5) are relied upon to show that these provisions which permit inspection of documents or accounts are not attracted where section 212 of Companies Act is invoked. Section 435(1) of the Companies Act prescribes prosecution before Special Court and under section 436 and 438(1), provisions of Cr.P.C. regulate that prosecution.

26-- This elaborate procedure which results in conviction of the auditor and his disqualification for the period of two terms is relied upon to point out how section 140 cannot be understood to contain the scheme for disqualification or debarment of the auditor. Even sections 141 and 142 of the said Act are relied upon for this purpose. It is submitted that section 140 therefore is summary procedure which is not aimed at fastening any guilt upon the auditor but only for his removal during further proceedings so that the concerned company can substitute him by new auditor and its functioning can continue smoothly.

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HIGH COURT OF JUDICATURE AT BOMBAY

27-- Mr. Khambata states that the petitioners M/s. BSR became auditor of IFIN company on 27/11/2017 jointly with its earlier auditor Deloite till 31/3/2018. After 01/04/2018 petitioner BSR continued as sole company auditor for about 16 months when it resigned on 19/06/2019.

28-- In this backdrop, it is submitted that the SFIO who was conducting enquriy of M/s. IFIN submitted second interim report in terms of section 212 (14) and on that basis section 447 of Companies Act has been invoked. It is submitted that the Government Order dated 29/05/2019 is based upon the report of which copy is not given to the petitioners despite demand. The new Board of Directors is looking after the affairs of M/s. IFIN since 1/10/2018 and second interim report has been submitted under section 212 on 28/5/2019. This second interim report runs into 32732 pages out of which 732 pages is actual report while the remaining 32000 pages are relevant annextures. This huge report has been looked into by two officers one after the other in the period of less than thirty hours and on 29/5/2019 the prosecution has been ordered

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HIGH COURT OF JUDICATURE AT BOMBAY

against M/s. BSR. It is claimed that the perusal of the such a bulky report and its appreciation could not have been over in such a short time . It is claimed that this has been done hurriedly with undue haste.

29-- Advocate Khambata relied upon ***Shri Ram Krishna Dalmia and Ors. vs. Shri Justice S. R. Tendolkar and Ors.***

: ***AIR 1958 SC 538*** paragraph Nos.11 and 12, ***Ameerunnissa Begum and Ors. :AIR 1953 SC 91*** paragraph No.11, 13 and 14 as also ***R. L. Bansal and Ors. vs. Union of India and Ors.:1992 Suppl. SCC (2) 398*** paragraph Nos.21 and 24 to buttress his arguments that there is unwarranted classification between company auditors on one hand and directors/office bearer of the company on the other hand. He has invited our attention to justification pleaded by respondents in reply paragraph Nos.5(i) (D)(E) to urge that this justification does not explain and bring on record any tangible differentia. There is manifest unreasonableness and that by itself is sufficient to quash the provision as unconstitutional. ***Swiss Ribbons***

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HIGH COURT OF JUDICATURE AT BOMBAY

Private Limited and Another vs. Union of India and Ors.: (2019) 4 Supreme Court Cases 17 paragraph no.38 is cited for this purpose. He has also submitted that this disqualification is civil death for the company auditor and this penalty which is mandatory penalty of debarment for 5 years, is bad. He has relied upon ***Modern Dental College and Research Centre and Ors. vs. State of Madhya Pradesh and Ors. : (2016) 7 Supreme Court Cases 353 paragraph 59 to 65*** to point out the need of balancing rights & obligations and to adopt doctrine of proportionality in said matters. He contends that if only object behind enacting section 140(5) is removal of said company auditor, mandatory civil death becomes disproportionate and unwarranted.

30-- He adds that it also constitutes double jeopardy. ***Gagan Harsh Sharma and Anr. vs. State of Maharashtra: 2019 Cri. L. J. 1398*** is relied upon for this purpose.

31-- He submits that when the petitioner applied for

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HIGH COURT OF JUDICATURE AT BOMBAY

documents to find out truth in defence that the report submitted by the SFIO is not an interim report and that before directing him to institute prosecution, the Central Governanment had applied its mind duly on 29.5.2019 to the said report; those documents were not made available and they also did not get opportunity to cross examine. According to him in proceedings before NCLT there is no scope for such cross examination. To explain relevance of the need to supply documents and to cross examine witnesses he cites ***P. Sanjeeva Rao vs. State of Andhra Pradesh:(2010) 6 SCC 1 (2012) 7 SCC 56.*** He also explains impact of non-supply of vital documents & denial of opportunity to cross-examine since such report might have influenced NCLI.

32--- Senior Advocate Seervahi adopting arguments of advocate Khambata has raised additional contentions in Writ Petition No.4144/2019. He pointed out that removal of any company auditor results in irrevocable and irreparable damage to his reputation. In support he relies upon **Institute of Chartered Accountants Of India vs. L.K. Ratna &**

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HIGH COURT OF JUDICATURE AT BOMBAY

Others-- (1986) 4 SCC 537 para *18*. The consequences resulting from said removal are very drastic for company auditor, his firm and also for his family. ***State of Rajasthan v. Mukan Chand,***---***AIR 1964 SC 1633*** *paragraph Nos.4,7 and 8* are pressed into service to show how twin test needs to be used for the purpose of Article 14. This ruling is followed in **Leelabai Gajanan Pansare vs. Central Insurance Company- (2008) 9 SCC 720 ,** paragraph 75. Inviting our attention to order of NCLT, he submits that the jurisdictional fact that company auditor to be substituted must be “in office” has been lost sight of. He states that when Hon’ble Apex Court has refused to intervene in SLP, prayers made by Respondent No.1 could not have been entertained in very same matter before NCLT. According to him the date on which MCA-Ministry of Corporate Affairs moved application before NCLT, there was no need for Central Government to do it and there was no power with it to appoint company auditor for IFIN.

33--- Senior Advocate Dwarkadas appearing in Writ Petition No.5023/2019 has advanced arguments on the basis of a

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HIGH COURT OF JUDICATURE AT BOMBAY

written note. He submits that first question to be looked into is constitutionality of section 140(5) of the Companies Act 2013. While the other question is validity of order dated 29/5/2019 which grants SFIO sanction to prosecute.

34-- Our attention is invited to paragraph Nos. 1 to 10 in his note. He has briefly explained facts and stated that in these facts, when language of section 140(5) is unambiguous, an attempt made by NCLT to artificially twist that language cannot be countenanced. **Nathi Devi vs. Radha Devi Gupta-- (2005) 2 SCC 271** is relied upon by him for this purpose.

35--- He has further submitted that respondents attempted to add words in proviso to this section in an effort to get rid of its unconstitutionality and said attempt is again bad in law. He relies upon sections 132 and 447 of 2013 Act to urge that section 140(5) must be understood in the light of this provision.

36--- The procedure for dealing with the Company Auditor

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HIGH COURT OF JUDICATURE AT BOMBAY

who has committed professional misconduct is relied upon by him with submission that National Financial Reporting Authority (NFRA for short) has a detailed procedure in this respect and therefore adequate safeguards for CA. He submits that there if misconduct is established and company auditor is punished, that order is stayed automatically for period of 30 days to enable him to avail remedy of appeal to NCLAT.

37--- Rules framed under Chartered Accountancy Act 1949 are also relied upon for this purpose. He states that section 21(2) and section 21(A) (2) deal with minor as also major professional misconducts and lay down the procedure therefor. He has invited our attention to section 21 (A) (3), 21(B) and section 22 to show that there is uniformity and established procedure to deal with such misconduct. Rule 9 of Rules framed under Chartered Accountants Act for said purpose is also relied upon.

38--- He contends that when misconduct is looked into by NFRA or by the Institute of Chartered Accountants, because of

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HIGH COURT OF JUDICATURE AT BOMBAY

settled and established uniform procedure known beforehand, the company auditor gets effective opportunity. This provision therefore safeguards his right to practice and also his reputation. Rules 14 and 18 are cited for this purpose. To explain importance of a settled and uniform procedure he draws support from – **Maneka Gandhi vs. Union Of India**--- ***1978(1) SCC 248*** paragraph No.1 179, 180, 143 and 147, 5,6 , 201, 202, 82, 84 and 173.

39-- He has submitted that under section 140(5) direction is to be issued to Company to change auditor and the final order envisaged therein needs to be understood accordingly. To explain how said proviso needs to be interpreted he has relied upon **Union of India vs. Sanjay Kumar Jain**-***(2004) 6 SCC 708*** paragraph No.11. He has also submitted that ***AIR 1961 SC 794-Jeahnanda & Sona vs. State of U.P.*** also throws light in this respect.

40-- He invited our attention to section 212 of 2013 Act. He submits that the procedure stipulated therein has been

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HIGH COURT OF JUDICATURE AT BOMBAY

circumvented.

41-- Inviting our attention to note at page 19, he argues that first explanation to S. 140(5) is inherently inconsistent since it overlooks provision of sections 27, 28 and 30 of the Limited Liability Partnership Act. He further submits that debarment of entire firm of Company Auditor is an exception in this situation.

42-- Senior Advocate Mr. Desai taking up the challenge on the ground of double jeopardy, submitted that in such matters where the reputation of company auditor is at stake, procedural safety must exist. Though the report submitted by SFIO is expressly titled as interim report, in the petition filed by BSR defence has been taken that the investigation is complete. The same agency however, states that the investigation qua the partners is still incomplete. He invites attention to the stand taken on 20/6/2019 in paragraph 15 for this purpose before NCLT.

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HIGH COURT OF JUDICATURE AT BOMBAY

43--- He Also states that as per the affidavit reply and the annexures filed thereto the Ministry of Corporate Affairs needed information and the interim report itself states that the investigation is going on. In this backdrop, he invites attention to section 173 Cr.P.C. to show how the scheme therein is different than one in section 212 of the Companies Act. He also invites attention to the stand in reply and contends that the MCA has shown undue haste with a view to defeat the statutory right of bail which might have accrued to one of the directors.

44-- **Rakesh Kumar Paul vs. State of Assam --(2017) 15 SCC 67**.. paragraphs 11, 16, 28, 29, 32,38 and 39 are relied upon by him to submit that the steps hurriedly taken to defeat the provisions regarding default bail are mala fide and illegal.***Kamlapati Trivedi vs. State of West Bengal: (1980) 2 SCC 91*** , paragraph 50 and 52 are relied upon to state that the cognizance can be taken only of complete investigation.

45--- Advocate Desai while advancing the arguments on 17/12/2019 stated that the sanction granted on 29/5/2019 to

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HIGH COURT OF JUDICATURE AT BOMBAY

launch prosecution is vitiated. He handed over to court a copy of Company Application No.2017/2019 moved before the NCLT by the Union of India to show that there in paragraph 15, the Union of India (MCA) has submitted on 8/6/2019 that the investigation was incomplete. Because respondents realized the impact of section 4(2) of Cr.P.C. on their action and on section 212 of the Companies Act, they have taken a plea that the investigation is complete by way of afterthought. Section 212(12) of the Companies Act envisages final report and therefore, it is deviation from Cr.P.C. Unlike Cr.P.C. the Companies Act does not contemplate the final report. He submits that it is after section 212(14) stage that the investigation can be carried by SFIO.

46-- He in this backdrop, relies upon the judgment of the Hon'ble Apex Court reported at ***State of Punjab and Anr. vs. Gurdial Singh and Ors.:*** **(1980) 2 SCC 471** paragraph 9 to point out what is fraud on power and its impact. He submits that the order dated 29/5/2019 therefore, does not exist and it is void.

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HIGH COURT OF JUDICATURE AT BOMBAY

47-- Inviting attention to letter dated 29/5/2019, he states that the purpose behind it is debarment of the company auditor and it is the hidden motive. Briefly he explains the three procedures in 2013 Act which are aimed at debarring the company auditor.

48-- Again inviting attention to the investigation report of SFIO he points out that therein the recommendation is about removal of existing auditor. He submits that there is distinction between the existing auditor and those who have ceased to be company auditors as they have been rotated out. He further adds that the report submitted on 28/5/2019 again strengthens the arguments that it was ongoing investigation.

49--- He submits that 15 days time available to NCLT to pass suitable orders is not directory as per stand of respondents in their reply affidavit. According to him in the instant matter, the procedure established by law has been circumvented and deliberately section 140(5) of Companies Act

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HIGH COURT OF JUDICATURE AT BOMBAY

has been invoked though there was no such need and though there are no sufficient procedural safeguards.***Vinubhai Ranchhodbhai Patel vs. Rajivbhai Dudabhai Patel and Ors.:*** **(2018) 7 SCC 743** paragraph 16 is relied upon to show how the framing of charge is imperative part of procedural safeguards. He contends that the petitioners are expected to answer interim report of SFIO which runs into 752 pages and which has more than 36,000 pages annexures within 15 days, though there is no specific charge framed against them. According to him there is violation of fair procedure envisaged in such matters.

50-- According to him, while considering the challenge under Article 20, the nature of proceedings as also the forum which decides it is irrelevant. **Supreme Court Bar Association vs. Union Of India -- 1998(4) SCC 409** paragraph 40 is relied upon to buttress this submission and to demonstrate how the punishment of cancelling the licence of an advocate in contempt-action has been viewed. **Institute of Chartered Accountants Of India vs. L.K. Ratna &**

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HIGH COURT OF JUDICATURE AT BOMBAY

Others-- (1986) 4 SCC 537 para 18 is also cited by him to point out how it considers the case of damage of reputation.

51--- The Judgment of Supreme Court of United States in the case of **Hudsun Vs. United States** followed by the Supreme Court of India is also relied upon by him to urge that article 20 of the Constitution or section 26 of the General Clauses Act does not require that both actions must be under the criminal law. To support this, he also relies upon the history and object behind section 140(5) explained by respondent no.1 in paragraph 5 of its reply affidavit.

52--- On 18/12/2019, Advocate Desai submitted that the question whether such debarment of company auditor constitutes penalty or not is answered by the United States Supreme Court in **Hudsun Vs. United States** (supra) and he also points out the reply affidavit in Writ Petition No. 4145 of 2019- particularly paragraph 17 to 19.

53--- To stress the Indian Law on the point, he draws

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HIGH COURT OF JUDICATURE AT BOMBAY

support from **AIR 1953 SC 325 : Maqbool Hussain Versus State of Bombay,** paragraph 3, 11 and 17, **(2015) 3 SCC 779 : Union of India and another Vs. Purushottam**, paragraphs, 7,8 and 9. The later judgment also considers the above mentioned judgment of the United States Supreme Court.

54--- He submits that the NCLT is a judicial tribunal. Paragraph 54 and 57 in Writ Petition No. 3250 of 2019 are relied upon by him to buttress his submission. Section 408, 409, 419, 420, 424(4), 425, 430 and 432 of the Companies Act are also pointed out by him. **Union of India vs. R. Gandhi, Madras Bar Association (2010) 11 SCC 1** paragraphs, 106, 121 are relied upon by him to show that the NCLT is a judicial tribunal.

55--- NCLT rules particularly rule 34, 39, 40,47 and 52 are pressed into service to point out the powers akin to court given to NCLT for this purpose. **(2015) 8 SCC 583 : Madras Bar Association Vs. Union of India and another**, paragraphs 15

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HIGH COURT OF JUDICATURE AT BOMBAY

and 16 are also relied upon to show that the NCLT constituted under 2013 Act is also held to be a tribunal by the Ho'ble Apex Court.

56--- To explain the meaning of collusion and to show that it implies criminal conspiracy, he draws support from **(2004) 9 SCC 83 : State of Goa and another Vs. Colfax Laboratories Ltd. And another** paragraph 18 and contends that section 140(5) which precedes on criminal conspiracy therefore is against Article 20(2).

57-- Dealing with the aspect of proportionality of such disqualification for 10 years, he adopts the arguments of Advocate Khambata and submits that those who commit offence are not visited with such drastic consequences by 2013 Act.

58--- Sr. Advocate Desai submitted that the status of report of Serious Fraud Investigation Office (SFIO) as interim report has been admitted by Respondent-Union of India in its reply

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HIGH COURT OF JUDICATURE AT BOMBAY

affidavit before NCLT. Our attention is invited to paragraph 15 of reply filed on 20/6/2019 to show that there it is expressly mentioned that investigation qua the partners sought to be added was incomplete as on that day. The affidavit reply filed in Writ Petition No.4145/2019 is also relied upon to show that Ministry of Corporate Affairs (MCA) has disclosed that it had noted certain information in very same report which pointed out that investigation was continued. The fact that action on report of SFIO was expedited and directed to be completed in time bound manner is also relied upon to urge that only purpose was to defeat statutory bail which the other directors were entitled to in default.

59-- Advocate Desai has relied upon judgment reported at ***Ramesh Kumar Paul vs. State of Assam:(2017) 15 SCC 67*** to show how the provision in relation to default bail is dealt by Hon'ble Apex Court. He claims that it is important part of right of liberty and has highlighted its breach in the present matter by acting upon the interim report. ***Kamlapati Trivedi vs. State of West Bengal: (1980) 2 SCC 91*** is also strongly

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HIGH COURT OF JUDICATURE AT BOMBAY

relied upon by him to urge that law permits cognizance to be taken only if investigation is complete and not before that.

60-- Our attention is invited to Company Application No.2070/2019 preferred by Union of India before NCLT to point out that on 8/6/2019 also the fact that investigation is not complete, has been accepted.

61-- Respondent realized impact of section 4(ii) of Cr.P.C. on section 212 of Companies Act,2013 and special provision therein regarding completion of investigation and therefore inorder to defeat it, they have decided to act upon interim report. He contends that section 212 (12) also envisages final report only. It is further submitted that if report under section 212 (14) is received, it is open to the Central Government to order further investigation by SFIO.

62-- ***State of Punjab and Anr. vs. Gurdial Singh and Ors.: (1980) 2 SCC 471*** paragraph 9 is relied upon to urge that order dated 29/5/2019 is void and non existent since

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HIGH COURT OF JUDICATURE AT BOMBAY

power is abused or its colourable exercise is apparent,

63--- Our attention is invited to said communication dated 29/5/2019 to state that debarment i.e. punishment to said auditor is real but hidden motive. There are total three proceedings that can be initiated against the auditor for debarment i.e. one by the Institute of Chartered Accountant, other under section 447 of the Companies Act and the third under section 140(5) of the Companies Act. The investigation report received by the Ministry of Corporate Affairs shows that recommendation of removal can be acted upon if it is issued against existing auditor. The law makes distinction between auditors who are retired and those who are existing auditors. Letter dated 28/5/2019 shows that no action is possible against Chartered Accountant who is no longer a company auditor.

64-- Learned Senior Advocate has invited our attention to the fact that time of 15 days envisaged under section 140(4) is stated to be mandatory by respondents in their reply affidavit. He submits that debarment of auditor is his civil death and is

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HIGH COURT OF JUDICATURE AT BOMBAY

not recommended in the SFIO report. Despite this Ministry of Corporate Affairs has preferred to use section 140(5) as it wanted to victimize the petitioners. He submits that such punishment can be inflicted only in accordance with the procedure established by law and under section 140(5) there is no such procedure. ***Vinubhai Ranchhodbhai Patel vs. Rajivbhai Dudabhai Patel and Ors.: (2018) 7 SCC 743*** is again relied upon to explain importance of process of framing of charge and procedural safeguards implied in it. He argued that the petitioners were made to answer within 15 days though there was no charge framed. Thus highhanded procedure has been followed in the matter.

65--- While dealing with ground of double jeopardy, he submits that section 447 of the Companies Act and section 140(5) both spring into action after fraud is detected. It is therefore same offence for which two different actions are provided for. Fraud is defined under section 447 only and it cannot be given different meaning under section 140. ***State of Bombay vs. S. L. Apte and Another: AIR 1961 SC 578*** is

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HIGH COURT OF JUDICATURE AT BOMBAY

relied upon for this purpose.

66-- The basis for initiation of action under section 447 and under section 140(5) is the same. It is based on same report, application of mind thereafter, same witnesses and same evidence.

67-- Learned Senior Advocate states that while examining the concept of double jeopardy, punishments under both these provisions are not required to be same. Section 141 (1) (h) prescribes debarment for 10 years while punishment under section 140(5) is of debarment for 5 years.

68--- Practitioners like auditor, Chartered Accountant, advocate and professionals constitute a class by themselves. Hon'ble Apex Court has considered the civil death which they suffer because of debarment and has prescribed the standard or requirement of proof beyond reasonable doubt in disciplinary matters. Proceedings for debarment are therefore criminal in nature.

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HIGH COURT OF JUDICATURE AT BOMBAY

69-- **An Advocate vs. Bar Council of India -1989 (supp) 2 SCC 25** is relied upon to show that proceedings are quasi criminal in nature and accordingly standards and procedure relevant in criminal jurisprudence are required to be used while debarring the auditors also. For Article 20 of the Constitution of India and S. 26 of General Clauses Act, nature of proceeding is irrelevant. (**1998) 4 SCC 409- Supreme Court Bar Association vs. UOI & another** and **Institute of Chartered Accountants Of India vs. L.K. Ratna & Others-- (1986) 4 SCC 537** are relied upon by him to substantiate this contention. Judgment of S.C. of Unites States in case of **Hudson vs. United States –522 US 93 (1997)** followed by Indian Courts in **(2015) 3 SCC 779 : Union of India and another Vs. Purushottam** & other cases is also relied upon for this purpose.

70--- Reply affidavit filed by MCA is relied upon to explain how measure of debarment came to be added to section 140(5) as punishment and as an interim measure.

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HIGH COURT OF JUDICATURE AT BOMBAY

71-- The recent judgment dated 29/11/2019 delivered at Mumbai in Writ Petition No. 3250 of 2019 and paragraphs 54 and 57 therein are relied upon to urge that NCLT is a judicial tribunal. **(2010) 11 SCC Page 1 : Union of India Vs. R. Gandhi** is also pressed into service to show that under old Companies Act, NCLT has been held to be Judicial Tribunal. **(2015) 8 SCC 583 : Madras Bar Association Vs. Union of India and another** is cited for buttressing the submission that even in 2013 Companies Act, NCLT is recognized as a judicial tribunal.

72-- In this backdrop, contention is second proviso to section 140(5) mandates second punishment and debarment without leaving any discretion in the judicial Tribunal. This is therefore, contrary to Article 14 and Article 21 of the Constitution of India. The decision given by NCLT must operate as res judicata in the proceedings before NFRA u/S. 132 where the company auditor would be barred for ten years and hence, this is nothing but in breach of protection against

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HIGH COURT OF JUDICATURE AT BOMBAY

double prosecution.

73--- He adds that the role of the company auditor is only limited to audit the accounts of transactions which are already made and therefore, fraud or tampering if any, has already taken place. As such, the. principal offender is somebody else and CA is not party to it. Hence, punishment of debarment or civil death imposed upon such auditor is grossly disproportionate.

74--- **(2001) 6 SCC 181 : T.T.Antony Vs. State of Kerala and Ors. (para 27)** and **(2013) 6 SCC 384 : Anju Chaudhary Vs. State of Uttar Pradesh and another** para

14 are relied upon to submit that Article 21 also confers protection against multiple criminal proceedings. Principle akin to double jeopardy has been used by the Hon'e Apex Court to quash the second FIR at the initial stages. According to him section 210 CrP.C. also adopts the same principle. The Division Bench judgment of this court reported at **(2017) 3 Mah.L.J. 929 : Tulsi Dass S/O. Suraj Prakash Vs. Union OF India**

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HIGH COURT OF JUDICATURE AT BOMBAY

and Ors. para 29 is relied upon to show that even in departmental enquiries, because of Article 21, this principle has been extended.

75--- With the leave of the Court, Advocate Dwarkadas submits that the debarment under section 140(5) cannot be seen as interim or protem measure because there is no power to pass final orders in relation to it in the scheme of section
140. He submits that the auditor needs to be removed by the company while debarment as the punishment is to be imposed by some other authority.

76--- Appearing for the petitioners in WP No. 5035 of 2019 Advocate Robin Jaisinghani submitted that the petitioners are partners in the firm Deloite which has independently filed another petition.

77-- He adopted the arguments advanced by others but clarified that this partner has also questioned the order of NCLT before the appellate tribunal and hence, the question raised in

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HIGH COURT OF JUDICATURE AT BOMBAY

Writ Petition is only about the constitutional validity of section 140(5) of Companies Act and about violation of Article 14 and 21 of the Constitution of India.

78--- To add to the arguments already advanced on Article 14 of the Constitution of India, learned counsel has invited our attention to the provisions of section 167 (ii)(e) and (f) of 2013 Act as also proviso thereto. He states that this section and provisions gives the Director of Company time of thirty days after the order to his prejudice is passed. If in the meanwhile such director files an appeal, he cannot be removed and protection statutorily granted continues for the period of seven days more after the appeal is dismissed. Thus the Director has been treated differently than the company auditor. Section 164 which prescribes disqualification for the company director is also relied upon to urge that the disqualification specified therein arises after the conviction and sentencing. Thus the company auditor gets disqualified even before the conviction and before he is sentenced. He does not get any breathing period while the director who is more at fault in the fraud, is

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HIGH COURT OF JUDICATURE AT BOMBAY

treated more leniently.

79--- Section 177 of the Companies Act is also relied upon to show that the important function as watchdog which the company auditor performs is also to be performed by the Audit Monitoring Committee. The said Audit Monitoring Committee consists of experts and there are majority of independent directors on it. This is with a view to introduce transparency and to monitor the financial matters more scrupulously. This Audit Committee or Directors on it, are not dealt with in summary manner. The auditors appointed under section 139 of the Companies Act can only be dealt with in the manner prescribed in section 140 thereof. The internal auditors are not similarly dealt with. For this purpose, he makes reference to section 138 of the Companies Act.

80-- Rule 13 of the Rules framed under the Companies Act for internal audit, rule 14 and rule 18 are also cited for this purpose. The procedure prescribed is also pointed out. Rule 19 is relied upon to show that it contemplates opportunity of

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HIGH COURT OF JUDICATURE AT BOMBAY

hearing to the person found guilty even after he is convicted.

81-- Provisions of section 21B of the Chartered Accountants Act are relied upon to point out how the said Act also prescribes opportunity of hearing before the punishment. He then points out the amendments made recently to first schedule and second schedule of the said Act to introduce the concept of deemed conviction. He contends that CA (company auditor) visited with debarment under section 140(5) suffers deemed convict under these schedules and therefore, can be punished directly by the Institute of the Chartered Accountants. He argues that this amendment is high handed and unconstitutional. Rule 34 and rule 51 of the NCLT Rules is relied upon to show that while proceeding against the company auditor, NCLT has been permitted to evolve its own procedure. Thus there is no pre-set or well established procedure and company auditors can be subjected to different procedures as per its whim by NCLT. Such a provision needs to be struck down on account of procedural inequality. He draws support from **AIR 1952 SC 75 : The State of West Bengal Vs. Anwar**

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HIGH COURT OF JUDICATURE AT BOMBAY

Ali Sarkar and another, paragraph nos. 20(1), 38 and para

45. To explain the importance of the procedure in such matters and relevance of Article 21 of the Constitution of India, he draws support from the observations of the Hon'ble Apex Court in paragraph 21 and 266 in **AIR 1950 SC 27 : A.K. Gopalan Vs. State of Madras.**

82-- Advocate Ponda appearing for the petitioner Director in WP No. 5263 of 2019 submits that the said petitioner is not concerned with the provisions of section 140 of the Companies Act. He states that the said Director has been made accused no. 3 in Criminal Complaint instituted after report of SFIO. He submits that he has been arrested on 01/04/2019 and the period of 60 days expired on 30/05/2019.

83-- Learned counsel submits that at several places in its reply the Ministry of Corporate Affairs has accepted the report of SFIO as an interim report and also the need of further investigation. The provisions of section 212 of the Companies Act do not permit initiation of action against the petitioner on

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HIGH COURT OF JUDICATURE AT BOMBAY

the basis of such interim report. With the aid of judgment of the DB of Allahabad High Court reported at **1975 SCC Online All 195 Lakshmi Brahman & another vs. State,** paragraphs 9 & 10; he submits that the power to remand under S. 309 was not available here. He argues that the report which enables the Magistrate to frame charge can only be seen as a final report. All other reports are therefore, legally not in existence. He has relied upon **2018 SCC Online 1638 : Achpal Vs. State of Rajasthan,** paragraphs 15, 16, 17 and 18 to explain the importance of procedure added through section 167 of Cr.P.C. He contends that the interim report could not have been used to deny this statutory right of default bail which had become available to the petitioner Director.

84--- Relying upon the reply affidavit of MCA, he submits that the respondent MCA admits that the competent court has still not taken cognizance of the offences. As such section 309 of Cr.P.C. is also not attracted and there is no question of remanding the petitioner Director in this situation. His continuation in the custody is therefore, in violation of Article

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HIGH COURT OF JUDICATURE AT BOMBAY

21 and 22 of the Constitution of India.

85--- He submits that the interim report submitted by SFIO runs into more than 750 pages and with relevant documents it is more than 32000 pages. The claim that two officers of MCA have applied their mind to these documents in less than 24 hours is therefore, ridiculous and the directions issued to file complaint on next day are unsustainable. The directions could have been issued after due application of mind, that too after a final report. Here, there is no application of mind. Our attention is invited to the mention of fact in the said direction dated 28/5/2019 that if the complaint is not filed before 31/5/2019, the petitioner Director would get a default bail. Learned counsel submits that thus power is being abused to illegally detain the petitioner Director in Jail.

86--- Adv. Ponda has taken us through various judgments to substantiate his contentions.

87--- For the convenience of the Court learned Senior

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HIGH COURT OF JUDICATURE AT BOMBAY

Advocate Chinoy handed over written submission. Orally he has submitted that second proviso to section 140(5) is not intended to prompt or aimed at inducing the CA-company auditor to resign. It is a substantive provision essentially intended to see that said auditor who is found involved in fraud or has colluded for that purpose with directors or officers of company, should not continue to monitor accounts of any company atleast for next 5 years. He submits that first proviso to that section can be seen as an interim measure because there action is envisaged within 15 days of receipt of application and hence, consequential final order is also envisaged in second proviso. Said auditor against whom final order has been made therefore can not be reappointed for next 5 years as auditor in the company. This provision is remedial as also preventive in nature and must be construed accordingly to further its object.

88--- Accordingly, he has relied upon judgment of Hon'ble Apex Court to urge that it is not a rule that proviso must be seen as subservient to main section. Clear language of said provision can establish that it is not a qualifying clause but a

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HIGH COURT OF JUDICATURE AT BOMBAY

substantive provision in itself. **Commissioner of Commercial Taxes vs. Ramkrishan Shrikrishan Jhaver- *AIR 1968 S.C. 59*** paragraphs No.8 & 9 are pressed into service for this purpose. He adds that clear language in second proviso to section 140(5) shows that it is not controlled by substantive part of section 140(5).

89---- He further submits that in view of clear scheme, interpretation of section 140(5) cannot be controlled by the heading of section 140 and plain language and substantive proviso needs to be given full effect. He submits that the judgment in the case of ***Raichurmatham Prabhakar and Another vs. Rawatmal Dugar--(2004) 4 SCC 766*** relied upon by the petitioner itself lays down this proposition.

90--- According to him resignation of auditors against whom proceedings are initiated under section 140(5) is out of question since law does not permit company auditor to resign at his free will and he has to complete certain formalities. The public purpose behind second proviso to section 140(5) cannot

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HIGH COURT OF JUDICATURE AT BOMBAY

be allowed to be defeated by putting any such interpretation and permitting the auditor to escape from disqualification under said proviso, thereby permitting continuing to take care of accounts of other companies. Law can not countenance such a paradoxical situation.

91--- He further submits that first proviso to section 140(5) operates only after a superior body like NCLT which has substituted High Court, is satisfied about fraud or collusion. The said authority though quasi Judicial Tribunal has to follow principles of natural justice and has to pass final order which itself is sufficient safeguard against abuse or misuse of provision. He relies upon judgment reported at – **Subramanium Swamy vs. CBI (2014) 8 SCC 682** and **Swiss Ribbons P ltd. vs. UOI (2019) 4 SCC 17** to contend that there is presumption of constitutionality, petitioners have to make out a clear case of transgression of constitutional principles. He also relies upon **Union of India vs. R. Gandhi, Madras Bar Association-- (2010) 11 SCC 1** to show the higher position at which NCLT has been placed. NCLT therefore

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HIGH COURT OF JUDICATURE AT BOMBAY

exercises powers and jurisdiction vested earlier in High Court under old Companies Act.

92--- The proceedings before High Court under Companies Act 1950 were essentially civil in nature and proceedings before NCLT are also civil proceedings. They are distinct from trial of offence under section 435 and 436 of the Companies Act 2013. He contends that merely because the company auditor cannot be reappointed for period of 5 years, the proceedings under section 140(5) do not become either criminal or quasi criminal. He states that judgment of Hon'ble Apex Court in **An Advocate vs. Bar Council of India** -**1989 (supp) 2 SCC 25** considers proceeding under section 35 of Advocates Act where right to practice the profession as advocate is taken away. He claims that barring Chartered Accountant from acting and practicing for short duration does not make proceedings in NCLT, a criminal proceeding. He relies upon **Director of Enforcement vs. M.C.T.M. Corp. (P) Ltd. - (1996) 2 Supreme Court Cases 471** for this purpose.

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HIGH COURT OF JUDICATURE AT BOMBAY

93-- Sr. Advocate also states that judgment reported at **An Advocate vs. Bar Council of India** -**1989 (supp) 2 SCC 25** supra has been rendered without looking into the larger Bench judgment reported at **P.J. Ratnam vs. D. Kanikram—AIR 1964 SC 244,** and other judgments like **S.A. Venkataraman vs. Union Of India-- AIR 1954 SC 375, Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra – (1984) 2 SCC 556, Gulabchand vs. Kudilal-- AIR 1966 SC 1734**.

94-- He draws support from judgment in the case of ***Hudson vs. United States*** to explain why proceedings under section 140(5) cannot be seen as prosecution and punishiment. He also pointed out that this judgment has been cited by Supreme Court of India in **Union of India vs. Purushottam – (2015) 3 SCC 779**.

95-- He submits that the procedure stipulated in NCLT Rules 2016 is not arbitrary & does not result in any or violation of Articles 14, 19 and 21. **Union of India vs. Madras Bar**

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HIGH COURT OF JUDICATURE AT BOMBAY

Association-- (2010) 11 SCC 1 is cited in support.

96-- To urge that procedure followed by NCLT cannot be faulted with, he invited our attention to section 132 (4) of the Companies Act,2013 to show that NFRA can also take action against Chartered Accountant and Rule 11(5) of National Financial Reporting Authority Rules 2018 also contemplates only a summary procedure. Section 14(1) of the Chartered Accountant Act 1941 also prescribes summary disposal procedure in such disciplinary matters against Chartered Accountants.

97--- Dealing with argument of proportionality advanced by the petitioner, he states that section 140(5) springs into life when a fraud or collusion is perceived which is wrong/misconduct of superior degree than mere negligence & said section is not attracted in case of mere negligence. The satisfaction to that effect on part of NCLT is must therefor.

98-- He adds that Article 20(2) of the Constitution of India

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HIGH COURT OF JUDICATURE AT BOMBAY

is attracted when the prisoner is prosecuted and punished with reference to offence. When there is no such offence or prosecution, there is no punishment. He relies upon paragraph No.12 of the judgment in **AIR 1953 SC 325--Maqbool Hussain Versus State of Bombay** and judgment in **S.A. Venkataraman vs. Union Of India-- AIR 1954 SC 375**. He also submits that in latter judgment, in paragraph No.16, Hon'ble Apex Court has pointed out how action of Bar Council in striking of name of advocate for professional misconduct is not a punishment or an offence.

99-- He submits that role of Company Auditor or Chartered Accountant is independent and they are representatives who have to protect interest of shareholders. They are not employees of company or subordinates of directors of company. He has explained their role by inviting our attention to judgment of Bombay High Court reported in the case of **Sales Tax Practioners Association of Maharashtra and ors. vs. State of Maharashtra-- 2008 SCC Online Bom 337,** paragraph 12 and **Deputy Secretary to the**

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HIGH COURT OF JUDICATURE AT BOMBAY

Government Vs. S.N. Das Gupta -AIR 1956 CAL 4. Thus, according to him, stand that role of Company Auditor must be seen as subordinate or secondary to role of Director of Company or Officers of Company is itself erroneous. He also invited our attention to provisions contained in Section 243 (1)

(A) and 242 (4) (A) to show that in similar circumstances, the Director of the company also cannot hold office.

100--- While dealing with the challenge in Writ Petition No. 4145 of 2019 to order dated 9/8/2019 passed by the NCLT, learned senior counsel points out that the petitioner has resigned as an auditor 9 days after the NCLT issued notice to it. The Union of India filed Company Petition No.2062 of 2019 for his removal under section 140(5) and for further action as per its proviso, on 9/6/2019 which came to be admitted by the NCLT on 10/6/2019. It was to be placed again on 21/06/2019 and on 10/06/2019, advocate for the BSR was present before the NCLT. On 19/06/2019, petitioner BSR and Associates submitted their resignation as an auditor of IFIN. IFIN appointed M.M. Chitale & Co. as its statutory auditors on

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HIGH COURT OF JUDICATURE AT BOMBAY

11/07/2019 wef 19/06/2019. Thereafter on 14/07/2019, BSR filed Misc. Application No. 2505 of 2019 and prayed for dismissal of the company Petition No.2062 of 2019 contending that the NCLT had no jurisdiction since BSR and Associates were no longer company auditors of IFIN. Learned senior counsel submits that in this backdrop, the reasons recorded by NCLT that by subsequent resignation, the jurisdiction invoked earlier could not have been taken away, are valid. He submits that the BSR and Associates exercised option and chose to raise their contention before NCLT and as such, adverse order of NCLT needs to be questioned in further appeal as per the provisions of Companies Act, 2013 in NCLAT. He further states that after the appeal is decided by the appellate tribunal, statute provides further appeal to Hon'ble Apex Court, that too only on the question of law. This statutory scheme cannot be allowed to be bypassed or defeated by BSR in this manner.

101--- He points out that similar objection was raised by the another petitioner in WP No.5023 of 2019 namely M/s. Deloitte and it has filed appeal against same order and that petitioner

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HIGH COURT OF JUDICATURE AT BOMBAY

has not questioned this order of NCLT before this court. Contention is as the appellate tribunal is already bound to look into the challenge before it, the availability of alternative remedy to BSR and Associates must be taken note of and held as a bar.

102-- He submits that the BSR & Associates have challenged the constitutional validity of section 140(5). If that challenge is upheld, order of NCLT automatically falls to ground. However, if the challenge is rejected, the availability of alternate remedy must be used to deny intervention by this Court, and BSR and Associates should be asked to file statutory appeal.

103--- To buttress his submission that right of the parties crystallize on the date on which the Company Petition No. 2062 of 2019 was filed before NCLT, he has relied upon **(2004) 3 SCC 178 : Union Umbrella Manufacturing Co. and Ors. Vs. Bhagabandel Agarwalla and Ors., (2006) 2 SCC 724 : Mohinder Prasad Jain Vs. Manohar Lal Jain** and **(2003) 1**

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HIGH COURT OF JUDICATURE AT BOMBAY

SCC 726 : Beg Raj Singh Vs. State of U.P. and Ors.

104--- Without prejudice to this preliminary objection, learned counsel has submitted that the order of NCLT dated 09/08/2019 is just and valid. It has given appropriate reasons for holding that the resignation submitted after filing of the proceedings by UOI cannot be used to defeat the scheme of section 140(5) which is preventive as also remedial in nature. The purpose of the said provision is to deny to the company auditor involved in fraud or collusion, further participation in the affairs of company or in audit work. This object would be defeated if by submitting resignation such auditor is permitted to continue with that work. He further submits that after passing of the final order, as envisaged in second proviso, the company auditor cannot be reappointed to undertake audit work of any company. This object also will be defeated if the interpretation of petitioner is accepted. The strategy adopted by the petitioners is against the public interest and should not be countenanced to.

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HIGH COURT OF JUDICATURE AT BOMBAY

105--- While dealing with the order dated 18/10/2019 by NCLT under first proviso to section 140(5), learned senior counsel submits that the contention about the NCLT loosing jurisdiction since M/s. BSR Associates had resigned and IFIN accepted that resignation and appointed M/s. M. Chitale as its auditors is liable to be discarded.

106-- He points out the provisions of section 140(5) to urge that resignation of auditor proceeded against or any appointment purported to be made to substitute him is legally inoperative and cannot be pressed into service before the NCLT to deny it the jurisdiction.

107-- While dealing with the submission that the first respondents could not have on 29/05/2019 directed SFIO to initiate prosecution under section 212(14) of the Companies Act, 2013, he submits that the act of respondents in using the words “interim report” while describing the report of SFIO is legally irrelevant since it is not interim report at all as envisaged under section 212(11). He argues that reliance

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HIGH COURT OF JUDICATURE AT BOMBAY

placed upon the judgment reported at **(1974) 1 SCC 242- Nagindas Ramdas vs. Dalpatram Ichharam**, by the petitioners is erroneous since here the nomenclature and status of the report is decided by section 212(11). He has drawn our attention to the fact that along with the reply, copy of one more SFIO report on financial affairs has been filed and there it has been expressly described as interim report. It also mentions direction of Central Government with reference to which said report came to be filed. As against this the report which forms subject matter of the challenge before this court, nowhere describes itself as interim report and it has not been submitted in furtherance of any direction of Central Government as required by section 212(11) of the Companies Act, 2013. Thus act of parties loosely describing that report as interim report does not make it an interim or an incomplete report. It is a final report and on its basis, action has been rightly taken. According to him, the letter written by the first respondent on 30/05/2019 directing SFIO to initiate prosecution against officers/persons mentioned therein, therefore, cannot be faulted with on this ground.

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HIGH COURT OF JUDICATURE AT BOMBAY

108--- He explains that the SFIO report no doubt runs into more than 700 pages and has large number of annexures, but that does not mean that mind could not have been applied to it within 24/30 hours. The requirement of a valid sanction needs to be looked into by finding out whether the authority granting the sanction had before it relevant material justifying the grant and whether it has been looked into. The order dated 29/05/2019 does not disclose any non-application of mind. Petitioners have not pointed out to this court lack of material before the first respondent so as to vitiate the order dated 29/05/2019. He contends that this mere hypothetical contention that the report could not have been looked into within 30 hours, is liable to be rejected.

109-- Shri Chinoy adds that even otherwise, no Government sanction is as such required to initiate action under section 140(5) of the Companies Act, 2013.

110-- Advocate Venegaonkar, appearing for SFIO who is

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HIGH COURT OF JUDICATURE AT BOMBAY

respondent no. 2 in all the writ petitions, invites attention to the prayer clause (iic) added by amendment in WP No. 4145 of 2019 to urge that there prayer is to quash and set aside the Criminal Case No.20 of 2019 instituted by SFIO before the competent court.

111-- According to him, this prayer and writ petition is not maintainable to that extent as that court ie trial court has still not taken cognizance and the process has still not been issued. He submits that after report to police or Investigating Officer and till accrual of right, if any in favour of the accused, the matter proceeds through three stages. He has relied upon **(2014) 3 SCC 92 : Hardeep Singh Vs. State of Punjab and Ors.** to demonstrate this. The accused like petitioner can intervene only when the cognizance is taken and till then, he has no right to challenge the proceedings. He also draws support from **(2012) 10 SCC 517 : Manharibhai Muljibhai Kakadia and another Vs. Shaileshbhai Mohanbhai Patel and Ors**. for this purpose. Petitioner is not entitled to be heard on the question whether process should be issued against it or

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HIGH COURT OF JUDICATURE AT BOMBAY

not.

112-- Our attention is also invited to the judgment of the Hon'ble Apex Court reported in **AIR 1963 SCC 1430 : Chandra Deo Singh Vs. Prokash Chandra Bose alias Chabi Bose and another** to contend that when the court of learned JMFC cannot hear or extend an opportunity to petitioner, the High Court also cannot do it and hence, the petition as filed is liable to be dismissed. The grounds like non application of mind in direction or sanction order or about report under section 212 of 2013 Act being interim report, cannot be raised at this stage.

113-- To explain the status of office of SFIO, learned advocate has relied upon **(2019) 5 SCC 266 : Serious Fraud Investigation Office Vs. Rahul Modi and another**. He submits that the SFIO headed by Director is a compact and complete unit consisting of experts in different fields/domains. He relies upon paragraphs 28 and 29 of the said judgment for this purpose. He also draws support from use of the word

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HIGH COURT OF JUDICATURE AT BOMBAY

"assigned" in section 212(3) to explain that the other investigating agencies are completely denuded of any power to conduct the investigation in respect of the offences mentioned in this section. He supports the arguments of the learned senior counsel Mr. Chinoy that the SFIO has not described his report as an interim report. He adds that the status of the report as interim report will have to be determined with reference to direction in section 212(11) and as there is no such direction of Central Government, the report submitted on 29/05/2019 cannot be seen as an interim report. According to him, it is a final report which is complete in all respects. He states that there are various transactions with other companies and cross linkages which need to be looked into, and a separate report in relation to said connections can be filed after the investigation into their affairs.

114--- Learned advocate has invited our attention to his brief written note on point no. 4 to contend that the report dated 28/5/2019 is complete and it is in relation to IFIN only. He placed heavy reliance on certain paragraphs in the said report

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HIGH COURT OF JUDICATURE AT BOMBAY

for this purposes. He further adds that this report has been prepared on “stand alone” basis and needs to be appreciated accordingly. Learned counsel states that the effort to demonstrate that the report is interim or incomplete, cannot succeed. Nine points identified by investigation in paragraph 1 and 4 of the said report are also read out to the court.

115--- In this backdrop, he submits that the said report is not under section 173 of Cr.P.C. and the deeming fiction under section 212(15) in 2013 Act is only for the limited purpose i.e. for the purposes of framing of the charge. This limited fiction cannot be enlarged further. He draws support from **(1998) 6 SCC 183 : State Bank of India Vs. D. Hanumantha Rao and another** paragraph 5.

116--- Dealing with the issue of sanction/direction under section 212(14) he submits that in all the petitions filed before this court, the grounds assailing it show that the same accept existance of order/sanction dated 28/05/2019. In view of this position and as such document exists, all grounds raise the

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HIGH COURT OF JUDICATURE AT BOMBAY

questions of facts and therefore, cannot be considered by this court. The same need to be answered by the trial court when the trial proceeds.

117-- According to Shri Venegaonkar, all precedents cited by the petitioners in this respect deal with the cases of “no sanction” and hence, are not relevant. He has relied upon **(2007) 1 SCC 1 : Prakash Singh Badal and another Vs. State of Punjab and another, (2012) 1 SCC 532 : Dinesh Kumar Vs. Chairman, Airport Authorty of India and another, (2015) 16 SCC 163 : Director, Central Bureau of Investigation and another Vs. Ashok Kumar Aswal and another** and **(1974) 3 SCC 72 : The State of Rajasthan Vs. Tarachand Jain.** On the strength of last 2 rulings, he claims that the accused has to prove the prejudice caused by alleged lacunae in the sanction during the trial. Not only this, the prosecution also gets opportunity to lead evidence to bring on record the material looked into & application of mind during the trial.

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HIGH COURT OF JUDICATURE AT BOMBAY

118-- While dealing with the Writ Petition No. 5263 of 2019, learned counsel relies upon point 8 of his notes and reads out prayer clauses (C) and (D) in the writ petition. He states that the trial court has passed orders of remand judicially and those orders have not been questioned by the petitioner. These orders have attained finality and hence, such challenge at the instance of the petitioner at this stage should not be entertained.

119--- He reads out section 309 CrPC particularly sub section 2 thereof and argues that it deliberately employs word “enquiry” as also “trial”. Thus after filing of the chargesheet by the prosecution before the trial commences, the court has to hold the enquiry and for that purpose, it can order remand. He submits that the law on the point including Full Bench Judgments and Judgments of the Hon’ble Apex Court is considered by the learned Single Judge of Karnataka High Court in **ILR 1994 KAR 2391 : Dorai Vs. State of Karnataka** paragraphs 19, 21, 23 and 24. He submits that these paragraphs actually contain the arguments of SFIO in the

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HIGH COURT OF JUDICATURE AT BOMBAY

present matter. He therefore, prays for dismissal of all the petitions.

120--- With the leave of the court, senior advocate Mr. Chinoy submitted that the contention about the accused requiring to disclose his defence in the enquiry under section 140(5) of 2013 Act and suffering a prejudice in trial, is misconceived. He relies upon **(1981) 2 SCC 277 : Capt. Dushyant Somal Vs. Smt. Sushma Somal and another,** paragraphs 1, 2 and 5 thereof.

121----- Advocate Khambata has in rejoinder submitted that the efforts made by the petitioner BSR to procure the directions under section 212(14) have not succeeded and despite directions of this Court, the SFIO has not filed any affidavit asserting that his report is a final report. The assertion of the petitioner on oath therefore has not been rebutted. He submits that the negligence even of the highest degree does not tantamount to fraud under section 447 of 2013 Act and this

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HIGH COURT OF JUDICATURE AT BOMBAY

aspect has been lost sight by SFIO as also by the Central Government. Petitioner, therefore, demanded email dated 07/03/2019 but it has not been supplied. Hence, the adverse inference that it contains direction of central Government to SFIO as per section 212(11) needs to be drawn. He relies upon **(1973) 3 SCC 581 : Union of India and Ors. Vs. Messrs. Rai Singh Dev Singh Bist and Ors** (paragraph 6).

122--- He also reads out certain portions of the said report to show that the report itself points out need for the further investigation. There is express observation to that effect and respondents have not filed any reply on oath to urge that the said investigation has not been undertaken. According to him there is no scope in the scheme of section 212 for such further investigation. If it is a further investigation, the report dated 28/05/2018 is not a complete report under section 212 (12) of 2013 Act.

123--- Advocate Khambata submits that when the Ministry of Corporate Affairs applied to NCLT on 10/06/2019, they have

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HIGH COURT OF JUDICATURE AT BOMBAY

approached it on the basis of interim report and MCA has not filed any affidavit in the present matter to explain that in their pleadings there, words “interim report” are loosely used. The deponent who submitted said plea before NCLT has not even chosen to file any reply affidavit before this court.

124--- Dealing with the issue of sanctions/directions, he adds that the so called processing note prepared by the officer for convenience has not been made available though demanded. He therefore, requests the Court to draw an adverse inference. He relies upon **(1997) 7 SCC 622: Mansukhlal Vithaldas Chauhan Vs. State of Gujarat** (paragraphs 18 and 19) to demonstrate non-application of mind and to show that the respondents have not made out any case. He accepts that the petitioner BSR worked as joint auditor with Deloitte only for four months. The issue regarding ever-greening of loans was going on between IFIN and RBI since last more than two years. The RBI did not agree with the ever-greening and also did not accept the cases relied upon for that purpose. According to him, there was confusion over scope & impact of ever-

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HIGH COURT OF JUDICATURE AT BOMBAY

greening, and this is supported by the observations of SFIO. The RBI was aware about it and hence, it was not at all the concealed position.

125--- He has produced compilation which contains master circular of RBI dated 01/09/2016. He relies upon Regulation 13 therein. He points out that the RBI notice dated 22/03/2019 shows that it had knowledge. In this backdrop he submits in the entire report of SFIO there is no whisper and finding of fraud against the petitioner. The Central Government before issuing sanction/direction on 29/05/2019 ought to have considered it. He invites attention to the relevant extracts to show that the RBI itself on 01/11/2017 gave time to IFIN to give roadmap by 31/3/2019. Learned counsel adds that in this situation, the grievance of fraud against the petitioner BSR which has acted only for four months is misconceived.

126--- Mr. Khambata has drawn our attention to explanation to section 447 of the Companies Act 2013 to urge that ingredients of fraud as specified therein are not even examined

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HIGH COURT OF JUDICATURE AT BOMBAY

by respondents. The report submitted by SFIO contains some exculpatory material that has not been perused. Annual report on IFIN itself shows that it was given time till 31/3/2019. In this situation neither SFIO nor the Central Government has considered its impact. Processing note as alleged therefore becomes important. He also invited our attention to reply filed by respondents to show that there is no inference of collusion in it and above aspects have been overlooked. The fact that SFIO asked RBI to hold internal inquiry has also been ignored. According to him, this implies some participation in collusion even by RBI officers. In this situation, the petitioner who worked as Chartered Accountant for about 4 months could not have been seen as involved in any fraud. Section 212(14) makes provision for legal advise and respondents ought to have procured it in present facts.

127--- While dealing with contention of advocate Venegaonkar that challenge to prosecution is premature, he distinguishes judgments relied upon by advocate Venegaonkar with submission that even those judgments support the view in

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HIGH COURT OF JUDICATURE AT BOMBAY

favour of the petitioner.

128--- He submits that section 141 (3) of Companies Act 2013 envisages 9 contingencies in which the Chartered Accountant may be disqualified to become Company Auditor. Section 140 (5) cannot be seen as an additional ground. He urges that substantive part of section 140(5) uses word “may” and discretion conferred thereby cannot be lost sight of.

129--- Commenting upon order of NCLT rejecting objection raised by the petitioner, he submits that line of argument before this Court in present challenge and reasons recorded in said order are inconsistent. The interpretation put by Respondents during arguments or by NCLT in its order results in adding words to that sub-section. He submits a draft in which these words are added in red ink. Advocate Khambata submits that such an exercise cannot be undertaken in an attempt to show that subsequent event of resignation is irrelevant. Learned counsel submits that plain language of section 140(5) and object behind it has to prevail. The auditor therefore must

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HIGH COURT OF JUDICATURE AT BOMBAY

be continuing in office even on the date of passing of the order by NCLT. Facts prevalent on the date of filing of company petition become irrelevant due to subsequent events. He draws support from ***Pasupuleti Venkateswarlu vs. The Motor and General Traders:(1975) 1 Supreme Court Cases 770,*** (paragraph No.2 and 4); ***Ramesh Kumar vs. Kesho Ram: 1992 Supp (2) Supreme Court Cases 623,*** (paragraph 6). He also distinguished judgment cited by Advocate Chinoy for this purpose. ***Beg Raj Singh vs. State of U.P. and Ors: (2003) 1 Supreme Court Cases 726; Mohinder Prasad Jain vs. Manohar Lal Jain: (2006) 2 Supreme Court Cases 724.***

130--- While commenting upon the order dated 18/10/2019 he submits that after liberty given by Hon'ble Apex Court, the Ministry of Corporate Affairs did not point out to NCLT that appointment of M/s. Mukund M.Chitale & Co. was inoperative in law.

131--- He further adds that alternate remedy cannot operate

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HIGH COURT OF JUDICATURE AT BOMBAY

as bar in the present matter when impugned orders are consequential to jurisdictional challenge being looked into by this Court. ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Ors. :(1998) 8 Supreme Court Cases 1,*** *(paragraph 15);* ***Maharashtra Chess Association vs. Union of India and Others: 2019 SCC Online SC 932,*** *(paragraph 20 to 24)* and Division Bench Judgment of this Court in ***Writ Petition (L) No.3250/2019 dated 29/11/2019*** are pressed into service for this purpose. He also adds that since writ of prohibition has been sought the said objection is relevant. He cites ***Isha Beevi on behalf of the minor Umaiben Beevi and Others vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Ors.:(1976) 1 Supreme Court Cases 70,*** (paragraph 5) in support. Lastly, he relies upon ***Bengal Immunity Company Limited vs. State of Bihar and Ors.: AIR 1955 SC 661***, (paragraph 8) to urge that all orders passed in said matters by NCLT can be assailed before this Court since constitutional validity has been questioned.

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HIGH COURT OF JUDICATURE AT BOMBAY

132---- He submits that before the petitioner became auditor, RBI had already entered into correspondence with IFIN and this correspondence was going on for 2 years. Annual report contains necessary disclosures and as such; taking action against petitioner under section 140(5) is unwarranted. Our attention is invited to scheme of section 241, 242 and 243 of Companies Act 2013 to urge that the action is possible if very higher degree of implicating material exists and only after rigorous preconditions are complied with. The adverse order against the director therefore cannot be obtained easily. As against this, for invoking action under section 140(5) there are no such pre-condition of higher degree compliances. Section 140(5) therefore permits authorities to pick and choose between even company auditors (CA) and this discretion conferred upon authorities is constitutionally unsustainable.

133--- Advocate Seervai urged that bar of alternate remedy cannot operate when jurisdictional issues are to be decided ***Competition Commission of India vs. Bharti Airtel Limited and Ors.:(2019) 2 SCC 521***, *(paragraph 115 to 120)*

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HIGH COURT OF JUDICATURE AT BOMBAY

and ***Arun Kumar and Ors. vs. Union of India and Ors.: (2007) 1 Supreme Court Cases 732*** are relied upon for this purpose. He further states that the auditor cannot be changed only under section 140(5) and there are other provisions. Change of auditor cannot be equated with appointment of auditor. He invited our attention to stand taken in written submissions by Advocate Chinoy at page 29, clause (i) and (iv). He contends that this stand in written submission/arguments is misconceived.

134--- Senior Advocate Mr. Seervai has submitted that accepting arguments of advocate Chinoy results in adding words and proviso to section 140(5) which prohibit an auditor from resigning or prohibit appointment of any other auditor in his place during pendency of action. To buttress his submission that second provision cannot be read in isolation and must be seen as part and parcel of section 140(5), he has relied upon heavily on paragraph 18 of judgment reported in the case of ***Dwarka Prasad vs. Dwarka Das Saraf: (1976) 1 Supreme Court Cases 128*** and has also accordingly attempted to

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HIGH COURT OF JUDICATURE AT BOMBAY

distinguish judgments relied upon by Advocate Chinoy. He has submitted that judgment of Hon'ble Apex Court reported at ***Commissioner of Commercial Taxes, Board of Revenue, Madras and Another vs. Ramkishan Shrikishan Jhaver: AIR 1968 SC 59 paragraph 8*** is more germane here.

135-- Senior Advocate Dwarkadas handed over a fresh submission (written note) inter alia contending that as there is no settled and established procedure to be followed by NCLT, section 140(5) is rendered arbitrary and violative of Article 14. He also states that Rule 34 of NCLT Rules does not contain any settled procedure and contention that NCLT has substituted High Court and therefore, must be seen as equally competent and responsible body, is not legally sound for this purpose. Provisions of Appellate Side Rules, Company Court Rules and NCLT Rules guided High Court while functioning under Companies Act,1956 and as such, there was established procedure.

136--- He further added that first proviso to section 140(5)

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HIGH COURT OF JUDICATURE AT BOMBAY

cannot be seen as an interim measure. He has pointed out object which prompted the parliament to incorporate section 140(5) and relies upon the discussion on purpose of criminal justice, punishments in chapter dealing with administration of justice, contained in SALMOND on Jurisprudence.

137--- According to him proviso to 140(5) militates with Limited Liability Partnership Act and therefore it needs to be construed properly in the wake of substantive provision in S. 140(5).

138--- He further argues that the contention that second proviso is lenient since the CA is not debarred from continuing with ongoing work of other companies and has been disqualified only for fresh term or continuation; is erroneous since the stigma cast is final and cannot be avoided anywhere. The punishment possible after full trial under section 447 is imposed highhandedly and unilaterally under S. 140(5) with undue haste. Once order is passed by NCLT, other companies of repute may be induced to initiate steps for removal of such

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HIGH COURT OF JUDICATURE AT BOMBAY

CA. The second proviso to section 140(5) therefore cannot be seen as an independent provision.

139--- Mr. Desai, Sr. Advocate contended that criminal case No.20/2019 moved by MCA and more particularly paragraph Nos.4, 62 and 63 show that it is not based upon completed investigation and therefore on a complete report. Leave to produce additional material reserved therein supports this. Our attention is invited to the fact that report of SFIO indicates collusion even by bank officers. In prosecution, therefore bank officers or officers of company and its directors are necessary parties. He has relied upon Section 223 of Cr.P.C. for this purpose. He highlighted that the contention of petitioners that interim report has been prepared & used to deny bail to one of the directors, has not been rebutted in reply arguments.

140--- He has relied upon prayer clause (c) in Writ Petition No.5023/2019 and submitted that it is because of void direction or sanction under section 212(15) of Companies Act 2013.

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HIGH COURT OF JUDICATURE AT BOMBAY

141--- To meet contention that there has to be essentially a difference in case of “no sanction” and “invalid sanction”, he has drawn support from judgment of Division Bench of this Court reported at **2017 SCC Online Bom. 9434—para 16-- Ashok Chavan vs. CBI.** He submits that earlier view of Hon’ble Apex Court in case of **(2000) 8 SCC 500- Abdul Wahab Ansari vs. State of Bihar** has been reaffirmed.

142--- ***State of Punjab vs. Davinder Pal Singh Bhullar and Ors.: (2011) 14 Supreme Court Cases 770.*** Paragraph Nos. 107 to 111 are pressed into service to urge that when primary order is shown to be bad, consequential order also falls.

143-- He submits that as seen in paragraph 102(6) of judgment of Hon’ble Apex Court reported at ***State of Haryana and Ors. vs. Bhajanlal and Ors.:1992 Supp (1) Supreme Court Cases 335,*** challenge raised in the present petition to prosecution cannot be seen as premature.

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HIGH COURT OF JUDICATURE AT BOMBAY

144--- According to him, proceedings under section 447 of 2013 Act and under section 140(5) thereof deal with fraud and as NCLT is performing adjudicatory function, ingredients of Article 20 are satisfied. Proceedings before NCLT are also therefore affected by principle of double jeopardy. He has drawn support from ***L. D. Jaisinghani vs. Naraindas N. Punjabi: (1976) 1 Supreme Court Cases 354*** and ***R. D. Bhatia (Mrs.) vs. Rajinder Kaur (Smt.) and Ors.: (1996) 6 Supreme Court Cases 627*** to demonstrate that in such matters before NCLT, required standard of proof is beyond reasonable doubt only. These standards are applicable even in matters pertaining to professional misconduct.

145--- Advocate Desai has cited ***Prahlad Saran Gupta vs. Bar Council of India and Another: (1997) 3 Supreme Court Cases 585***, (paragraph 9); **Pawan Kumar Sharma vs. Gurdial Singh:(1998) 7 Supreme Court Cases 24**, (paragraph 7); ***H.V. Panchaksharappa vs. K. G. Eshwar: (2000) 6 Supreme Court Cases 721,*** (paragraph 6), ***Bhupinder Kumar Sharma vs. Bar Association,***

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HIGH COURT OF JUDICATURE AT BOMBAY

Pathankot: (2002) 1 Supreme Court Cases 470, ***Stateof Punjab vs. Davinder Pal Singh Bhullar and Ors.:(2011)***

14 Supreme Court Cases, paragraph Nos.107 to 111 and ***Nirmala J. Jhala vs. State of Gujrat and Another:(2013) 4 Supreme Court Cases 301***, (paragraph 11 to 17) to demonstrate that when question is of misconduct by professionals, higher degree of proof is always envisaged and it is not preponderance of probability. He states that **An Advocate vs. Bar Council of India -1989 (supp) 2 SCC 25-** ***(***paragraph 4) also follows same law. ***Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra, Bombay and Ors.*** *(cited supra)* relied upon by Advocate Chinoy has not considered said 4 Judges view. He also distinguishes other judgments cited by Advocate Chinoy on the ground that they consider burden of proof in suit for specific performance or in civil proceedings.

146---- ***Ram Singh and Ors. vs. Col. Ram Singh: 1985 (Supp) Supreme Court Cases 611,*** (paragraph Nos. 222, 223) and ***Ram Sharan Yadav vs. Thakur Muneshwar Nath***

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HIGH COURT OF JUDICATURE AT BOMBAY

Singh and Ors.: (1984) 4 Supreme Court Cases 649, (paragraph Nos.2 and 3) are relied upon by him to show what is quasi criminal proceeding. He contends that sections 132, 140, 147 deal with fraud and same degree of proof must apply. He submits that **State of U.P. & another vs. Synthetics & Chemicals Ltd. (1991) 4 SCC 139** – para 41 points out what is a precedent and if a particular legal provision or settled position is ignored, resulting judgment is liable to be discarded as sub- silentio. He submits that **Director of Enforcement vs. M.C.T.M. Corp. (P) Ltd. - (1996) 2 Supreme Court Cases 471** used by Ad. Chinoy has been considered in **Bharjatiya Steel Industries vs. Commissioner, Slaes Tax, U.P.- (2008) 11 Supreme Court Cases 617**, (paragraph 17 & 18) to declare that question whether mens-rea is an essential ingredient or not will depend upon the nature of the right of the parties & the purpose for which the penalty is sought to be imposed. Thus, 1996 judgment had no occasion to consider constitutional Bench judgment in **Shanti Prasad Jain vs. Director of Enforcement, FERA-- AIR 62 SC 1754** where in para 35, Hon. Constitution Bench observes that the

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HIGH COURT OF JUDICATURE AT BOMBAY

proceedings under the FERA are quasi-criminal in character & it is the duty of the respondents to prove violation of law beyond reasonable doubt.

147--- Advocate Desai argues that respondents do not dispute the debarment prescribed by second proviso to section 140(5) as punishment and hence it not very material whether it falls in realm of criminal law or civil law. He submits that removal or substitution of Chartered Accountant under scheme of section 140(5) can be seen as remedial but then debarment ordered by second proviso is a punishment. Final order against Chartered Accountant springs from the finding of involvement in fraud.

148--- 1966 edition of Salmond is cited to explain what is civil and criminal justice. Debarment of Chartered Accountant from all companies cannot be seen as remedial at all. He also invited our attention to section 22 and Schedule III of the Chartered Accountants Act 1949 with its section 8 to show that removal of name of Chartered Accountant from roll of

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HIGH COURT OF JUDICATURE AT BOMBAY

Chartered Accountant is nothing but death penalty.

149--- He has relied upon **K.C. Sareen vs. CBI, Chandigarh (2001) 6 SCC 584** (paragraph 12 to 14) to show that Hon'ble Apex Court does not stay conviction and how conviction affects carrier of a person. For latter proposition, he also takes help of **Sanjay Dutt vs. State Of Maharashtra-- (2009) 5 SCC 787**.

150-- To explain what constitutes prejudice, he takes help of **M.S. Sheriff vs. State of Madra –AIR 1954 SC 397** He submits that in such matters under section 140(5) issue of embarrassment to Chartered Accountant proceeded against definitely arises. He draws support from **Capt. M. Paul Anthony vs. Bharat Gold Mines-- (1999) 3 SCC 679** He further submits that ***Union of India and Another vs. Purushottam*** *(cited supra)* by Advocate Chinoy does not look into professional misconduct and it deals with departmental proceedings.

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HIGH COURT OF JUDICATURE AT BOMBAY

151-- Advocate Robin Jaisinghani has in rejoinder submitted that NCLT has no fixed procedure and in its absence prejudice caused is apparent. ***Suraj Mall Mohta and Co. vs. A. V. Visvanatha:AIR 1954 SC 545,*** (paragraph Nos.2, 14 and 15) is relied upon to highlight importance of uniform procedure. He also states that in petition filed before NCLT, institution of Chartered Accountant is already a respondent and a direction to it to proceed against Chartered Accountant sought to be removed, has also been sought.

152-- Thus, in this backdrop he explains importance of provision like S. 167 of the Companies Act and its absence in case of chartered accountant. He reiterates that the director proceeded against gets breathing time of 30 days to assail impugned order/ proceeding in appeal during which there is automatic stay in his favour.

153--- In rejoinder to arguments of Advocate Venegaonkar, learned counsel Mr. Ponda reiterated that no complaint can be filed without final report and invited attention to the rulings

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HIGH COURT OF JUDICATURE AT BOMBAY

earlier cited by him. He also distinguished the rulings cited by Advocate Venegaonkar and points out that here even as per respondents, the trial court has still not taken cognizance. He submits that **(1983) 2 SCC 372 : State of Uttar Pradesh Vs. Lakshmi Brahman and another** cited by Advocate Venegaonkar is not approved in **(1996) 4 SCC 495 : Raj Kishore Prasad Vs. State of Bihar and anr.** (paragraph 9). **(2014) 3 SCC 92 : Hardeep Singh Vs. State of Punjab** (paragraph 28) is also relied upon to show that the judgment in case of **Laxmi Bramhan** is found per in curium there. **(1986) 2 SCC 709 : A.S. Gaurava and anr. Vs. S.N. Thakur and anr** (paragraph 10) is relied upon to submit that unless and until there is express provision in Cr.P.C. or other procedural law, the Criminal Court cannot take procedural steps. He relied upon the provisions of section 209 of Cr.P.C. to demonstrate that as there is no cognizance taken, power to remand could not have been exercised. That power becomes available only after committal for trial and not before that. Section 309(2) is also pressed into service for this purpose. To urge that there is no inherent power to remand, he draws support from **(1975) 2**

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HIGH COURT OF JUDICATURE AT BOMBAY

SCC 220 : Natabar Parida Vs. State of Orissa (paragraph 5 and 8) as also **(1995) 4 SCC 190 : Union of India Vs. Thamisharasi** (paragraph 16). **(1972) 3 SCC 141 : CBI Vs. Anupam Kulkarni** (paragraph 9) is also relied upon.

154--- He also tendered written submissions in rejoinder on behalf of Petitioner Harishankaran in Writ Petition No.5263 of 2019.

155--- Advocate Khambata in Criminal Writ Petition No. 4145 of 2019 also submitted brief written note to distinguish the judgment reported at **(2007) 8 SCC 559-- Carona Ltd. vs. Parvthy Swaminathan & Sons** relied upon by the MCA and to urge that events like resignation subsequent to filing of S. 140(5) proceedings must be taken note of.

156--- Senior Advocate Mr. Seerwai also gave brief note in Criminal Writ Petition No. 4144 of 2019 in rejoinder.

157--- Because some judgments were cited while advancing

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HIGH COURT OF JUDICATURE AT BOMBAY

arguments in rejoinder, Advocate Chinoy has also submitted written submissions in rejoinder. He has explained the same in brief and contended that the steps taken need to be understood in the context in which the same became necessary. He also explained the purpose and object of the proceedings. He submitted that the alleged admissions of Government cannot be seen as final and determinative. On incomplete investigation, he has reiterated his contentions and submitted that the final report submitted by the SFIO here may be followed by further final report. For that purpose he has drawn support from **PMC Mercantile Pvt. Ltd, vs. State- (2014) 3 MWN (Criminal) 454** (paragraph 11 and 18).

158--- He has substantiated the order of the central government dated 29/5/2019 directing prosecution under section 212(14) and also attempted to distinguish the judgment reported at **(1973) 3 SCC 581 : Union of India and Ors. Vs. Messrs. Rai Singh Dev Singh Bist and Ors.** relied upon by the petitioners and **(1997) 7 SCC 622 : Mansukhlal Vithaldas Chauhan Vs. State of Gujarat**. He

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HIGH COURT OF JUDICATURE AT BOMBAY

submits that the approach of NCLT in the order is just and proper. Since right of the parties in proceedings under section 140(5) of 2013 Act crystallizes on the date of filing of the report. He submits that **Uco Bank & another vs. Rajinder Lal Capoor--(2007) 6 SCC 694** is the judgment which considers the punishment of Criminal and Service Jurisprudence.

159--- He has also commented upon **(1975) 1 SCC 770** – ***Pasupuleti Venkateswarlu vs. The Motor and General Traders*** relied upon by the petitioners to urge that the said judgment proceeds on the premise that the right to relief must be in existence as on the date the suiter initiates legal proceedings. He further points out that there also Hon'ble Apex Court has held that the legislative intent cannot be frustrated.

160--- As regards the order of NCLT made under the first proviso to section 140(5), he submits that as the NCLT was satisified that the such auditors need to be prohibited from

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HIGH COURT OF JUDICATURE AT BOMBAY

continuing the audit work, it has right to make that order as the said satisfaction has been reached when the auditor was in office. The consequential disqualification follows from the second proviso to section 140(5). Hence, after initiation of the proceedings, the auditor cannot resign.

161--- He has submitted that the case law cited by the petitioners to show that their challenge to orders of NCLT must be entertained in the present petition is not applicable in the present facts. He has submitted that the petitioners have moved NCLT for dismissal of the proceedings and as such they have to follow the statutory channel and accept it.

162--- He submits that the action contemplated against the Directors and officers by section 241(3(a), 242(4A) and 243(1A) need to be appreciated in the mode & manner as approved by the Statute. The directors and officers of a company stand on the different footing and therefore, the Chartered Accountant opting to work as company auditor cannot compare or equate himself with them. He has also again pointed out how second

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HIGH COURT OF JUDICATURE AT BOMBAY

proviso to section 140(5) cannot be eclipsed by substantive part of section 140(5). He adds that the NCLT Rules 2016 contain sufficient procedure for conducting the matter against the auditor/company under section 140(5).

163--- Lastly he has relied upon some judgments in effort to show how Article 20(2) of the Constitution of India is not relevant in the present matter. At the end of his written note, he has again reiterated the defences in brief.

164---- Before proceeding with the discussion, we find it suitable to enumerate the questions which arise for determination. Those questions are--

A-- Whether S. 140(5) of 2013 Act is unconstitutional?

-- Whether it is bad as it singles out only the Company Auditors and excludes the directors or the office bearers of the companies from its scope?

– Whether it is arbitrary since it does not carry

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HIGH COURT OF JUDICATURE AT BOMBAY

adequate procedural safeguards as contained in Indian Chartered Accountants Act or in S. 132 of the 2013 Act?

B –- Whether it violates the principle of double jeopardy?

C-- Whether other prayers in these writ petitions can be entertained if the answer to any of the above questions is in negative? i.e. whether the petitions are maintainable as the alternate remedy of appeal to NCLAT is available?

D-- Whether NCLT can exercise the jurisdiction under S. 140(5) of the 2013 Act after the CA to be removed has resigned or ceased to be the statutory auditor of the concerned Company?

E-- Whether the Central Government could have moved the application in stayed proceedings?

F--Whether the direction to prosecute is after due application of mind?

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HIGH COURT OF JUDICATURE AT BOMBAY

G-- Whether report of SFIO in present matter is an Interim report or not a final report under scheme of S. 212 (11) / (13/14) of 2013 Act?.

165--- After lucubration, we find that the answer to all the above questions depend on interpretation of these Sections and deciphering legislative scheme behind it. Purpose of the said provisions and how it needs to be construed are the moot issues. We are not required to examine the contentions on diligence or culpability of the Company Auditors (CAs) subjected to its jurisdiction by NCLT.

166------ The arguments on constitutionality first require understanding of the legislative object behind adding a measure like S. 140(5) to the statute book. Answers to questions like -(a) violation of Art. 14 (b) whether 2nd proviso is explainatory or restrictive or an independent provision? (c)- whether debarment thereunder is against the Art. 20(2)? etc.

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HIGH COURT OF JUDICATURE AT BOMBAY

depend on it. The relevant Sections of 2013 Act read as under--

132. Constitution of National Financial Reporting Authority.— (1) The Central Government may, by notification, constitute a National Financial Reporting Authority to provide for matters relating to accounting and auditing standards under this Act.

(2) Notwithstanding anything contained in any other law for the time being in force, the National Financial Reporting Authority shall—

(a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;

(b) monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed;

(c) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and

(d) perform such other functions relating to clauses (*a*), (*b*) and (*c*) as may be prescribed.

(3) The National Financial Reporting Authority shall consist of a chairperson, who shall be a person of eminence and having expertise in accountancy, auditing, finance or law to be appointed by the Central Government and such other members not exceeding fifteen consisting of part-time and full-time members as may be prescribed:

Provided that the terms and conditions and the manner of appointment of the chairperson and members shall be such as may be prescribed:

Provided further that the chairperson and members shall make a declaration to the Central Government in the prescribed form regarding no conflict of interest or lack of independence in respect of his or their appointment:

Provided also that the chairperson and members, who are in full-time employment with National Financial Reporting Authority shall not be associated with any audit firm (including related consultancy firms) during the course of their appointment and two years after ceasing to hold such appointment.

(4) Notwithstanding anything contained in any other law for the time being in force, the National Financial Reporting Authority shall—

(a) have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under

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HIGH COURT OF JUDICATURE AT BOMBAY

the Chartered Accountants Act, 1949 (38 of 1949):

Provided that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the National Financial Reporting Authority has initiated an investigation under this section;

(b) have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely—

(i) discovery and production of books of account and other documents, at such place and at such time as may be specified by the National Financial Reporting Authority;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) inspection of any books, registers and other documents of any person referred to in clause (*b*) at any place;

(iv) issuing commissions for examination of witnesses or documents;

(c) where professional or other misconduct is proved, have the power to make order for—

(A) imposing penalty of—

(i) not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and

(ii) not less than [1][five lakh rupees], but which may extend to ten times of the fees received, in case of firms;

(B) debarring the member or the firm from engaging himself or itself from practice as member of the Institute of Chartered Accountant of India refund to in clause (*e*) of sub-section (1) of Section 2 of the Chartered Accountants Act, 1949 (38 of 1949) for a minimum period of six months or for such higher period not exceeding ten years as may be decided by the National Financial Reporting Authority.

Explanation.—For the purposes of his (*sic* this) sub-section, the expression "professional or other misconduct" shall have the same meaning assigned to it under Section 22 of the Chartered Accountants Act, 1949 (38 of 1949).

(5) Any person aggrieved by any order of the National Financial Reporting Authority issued under clause (*c*) of sub-section (4), may prefer an appeal before [2][the Appellate Tribunal in such manner and on payment of such fee as may be prescribed].

(6) [3][* * *]

(7) [3][* * *]

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HIGH COURT OF JUDICATURE AT BOMBAY

(8) [3][* * *]

(9) [3][* * *]

(10) The National Financial Reporting Authority shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings in such manner as may be prescribed.

(11) The Central Government may appoint a secretary and such other employees as it may consider necessary for the efficient performance of functions by the National Financial Reporting Authority under this Act and the terms and conditions of service of the secretary and employees shall be such as may be prescribed.

(12) The head office of the National Financial Reporting Authority shall be at New Delhi and the National Financial Reporting Authority may, meet at such other places in India as it deems fit.

(13) The National Financial Reporting Authority shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as the Central Government may, in consultation with the Comptroller and Auditor-General of India prescribe.

(14) The accounts of the National Financial Reporting Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and such accounts as certified by the Comptroller and Auditor-General of India together with the audit report thereon shall be forwarded annually to the Central Government by the National Financial Reporting Authority.

(15) The National Financial Reporting Authority shall prepare in such form and at such time for each financial year as may be prescribed its annual report giving a full account of its activities during the financial year and forward a copy thereof to the Central Government and the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor-General of India to be laid before each House of Parliament.

140. Removal, resignation of auditor and giving of special notice.— (1) The auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf in the prescribed manner:

Provided that before taking any action under this sub-section, the auditor concerned shall be given a reasonable opportunity of being heard.

(2) The auditor who has resigned from the company shall file within a period of thirty days from the date of resignation, a statement in the prescribed form with the company and the Registrar, and in case of

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HIGH COURT OF JUDICATURE AT BOMBAY

companies referred to in sub-section (5) of Section 139, the auditor shall also file such statement with the Comptroller and Auditor-General of India, indicating the reasons and other facts as may be relevant with regard to his resignation.

(3) If the auditor does not comply with sub-section (2), he or it shall be punishable with fine which shall not be less than [1][fifty thousand rupees or the remuneration of the auditor, whichever is less,] but which may extend to five lakh rupees.

(4)(*i*) Special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re- appointed, except where the retiring auditor has completed a consecutive tenure of five years or, as the case may be, ten years, as provided under sub-section (2) of Section 139.

(ii) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(iii) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so,—

(a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

(b) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company,

and if a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting:

Provided that if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar:

Provided further that if the Tribunal is satisfied on an application either of the company or of any other aggrieved person that the rights conferred by this sub-section are being abused by the auditor, then, the copy of the representation may not be sent and the representation need not be read out at the meeting.

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

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HIGH COURT OF JUDICATURE AT BOMBAY

it may, by order, direct the company to change its auditors:

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

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

Explanation I.—It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its director or officers.

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

141. Eligibility, qualifications and disqualifications of auditors.--

(1)---

(2)---

(3) The following persons shall not be eligible for appointment as an auditor of a company, namely—

(*h*) a person who has been convicted by a court of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction;

(4) Where a person appointed as an auditor of a company incurs any of the disqualifications mentioned in sub-section (3) after his appointment, he shall vacate his office as such auditor and such vacation shall be deemed to be a casual vacancy in the office of the auditor.

167---- Respondent MCA has raised a preliminary objection about tenability of the instant challenge in the writ-petitions. They submit that if the S. 140(5) is held constitutional, the other prayers must be allowed to be looked into by the NCLAT where one of the petitioners has already approached. In ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Ors.*** (supra) Hon. Apex Court in para 15 has observed that when vires of an enactment are challenged, the writ petition is maintainable. Similarly ***Isha Beevi on behalf***

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HIGH COURT OF JUDICATURE AT BOMBAY

of the minor Umaiben Beevi and Others vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Ors.:(paragraph 5) ***and Bengal Immunity Company Limited vs. State of Bihar and Ors.:*** , (paragraph 8) disclose that all orders passed in the matter by NCLT can be assailed before this Court since constitutional validity has been questioned.

168----- In ***Competition Commission of India vs. Bharti Airtel Limited and Ors (2019) 2 SCC 521*****,** in para 119, the Apex Court relies on *Carona Ltd.* Apex Court holds (SCC pp. 569 & 571, paras 26-28 & 36) that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It reiterates well settled law that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a

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HIGH COURT OF JUDICATURE AT BOMBAY

subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess. Observations in paragraphs 71 to 76 in **(2007) 1 SCC 732-- Arun Kumar & Others vs. Union of India & Others** also show the same position. Whether on the date on which NCLT passes an order u/S. 140(5), the CA nust be in the office or not, is the jurisdictional fact and on its answer, depends the jurisdiction of NCLT. These precedents also show that the availability of alternate remedy can not operate as bar and remedy of appeal before NCLAT does not bar exercise of writ jurisdiction by this Court. It is not correct and no law requires that after having taken the cognizance, this Court has to discontinue the scrutiny if it finds the provisions constitutional, and the Petitioners need to be relegated to the appellate forum.

169--- Having found that the alternate remedy of NCLAT does not bar consideration of the controversy, We can revert back to challenge on merits.

Hon. Apex Court in **Swiss Ribbons P ltd. vs. UOI**

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HIGH COURT OF JUDICATURE AT BOMBAY

(supra) in para 38 holds that the legislation can be struck down on the ground that it is manifestly arbitrary. ***Modern Dental College and Research Centre and Ors. vs. State of Madhya Pradesh and Ors.:*** (supra) is relied upon to point out the need of balancing fundamental right of CA to practice & limitations on it. We have noted that the change of auditor as directed by NCLT is after its satisfaction about it. The debarment or disqualification is not only due to that satisfaction. Effort of the Parliament appears to elevate the noble profession of company auditor still higher. We find that the measure of debarment can not be seen as disproportionate in the scheme of S. 140(5) of 2013 Act.

170--- Adv. Seervai relied upon ***State of Rajasthan v. Mukan Chand, (1964) 6 SCR 903 : AIR 1964 SC 1633***

where in paragraph 8, the Constitution Bench points out that in order to pass the test of permissible classification, two conditions must be fulfilled, namely, (*1*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are put together from

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HIGH COURT OF JUDICATURE AT BOMBAY

others left out of the group, and (*2*) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question. Hon. Apex court holds that condition 2 above was clearly not satisfied in case before it. The object sought to be achieved by the Rajasthan Jagirdars' Debt Reduction Act,1957, was to reduce the debts secured on *jagir* lands which had been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act. The Jagirdar's capacity to pay debts had been reduced by the resumption of his lands and the object of the Act was to ameliorate his condition. The fact that the debts were owed to a Government or local authority or other bodies mentioned in the impugned part of Section 2(*e*) had no rational relationship with this object sought to be achieved by the Act. Further, no intelligible principle underlies the exempted categories of debts. The Hon. Aoex Court found the reason why a debt advanced on behalf of a person by the court of wards is clubbed with a debt due to a State or a scheduled bank and why a debt due to a non-scheduled bank was not excluded from the purview of the Act, not discernible. This law is followed

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HIGH COURT OF JUDICATURE AT BOMBAY

in **Leelabai Gajanan Pansare vs. Central Insurance Company- (2008) 9 SCC 720**.

171------ However, here said twin test is not relevant at all. We find that the Director of a Company or its Officers (paid servants of company) form the distinct class and are to be seen as part of the establishment of the Company. However the CA stands on entirely different footing and can not be seen as an officer of or subordinate to Company in any manner. Thus, efforts being made by the Petitioner to work out the similarity or equality amongst them can not succeed. We therefore do not find any need to multiply the citations in this respect.

172------ The heading or title of section 140 needs to be given due attention as per the judgment in the case of ***Raichurmatham Prabhakar and Another vs. Rawatmal Dugar,***

supra. Respondents also relied upon it for this proposition and to urge that plain language must be given full effect. To explain what word "change" in S. 140(5) signifies, support is drawn from **(1986) 1 SCC 100 – Forward Construction Company**

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HIGH COURT OF JUDICATURE AT BOMBAY

vs. Prabhat Mandal, paragraph-33. Paragraphs 55 & 63 of **Dharani Sugars & Chemicals Ltd. vs. Union of India – (2019) 5 SCC 480** are relied upon to show that when the law prescribes the mode/manner in which a thing is to be done it must be done that way or then not at all and, when the one section in same Act deals with a general power while the other deals with a specific power, the specific power can not be utilized via such general provision. We find that in present facts, the S. 132, S. 447 and S. 140(5) do not militate with each other at all & hence, recourse to these principles is not necessary. Discussion little later in the body of this judgment will bring on record our reasons in support.

173----- **(2017) 5 SCC 598 –Bhuwalika Steel Industries ltd. Vs, Union of India**, supports the argument that NCLT has erred in resorting to the deeming fiction as it is the prerogative of the Legislature only. **(2010) 13 SCC 336 – Sant lal Gupta vs. Modern Cooperative Group Hsg. Ltd**. shows that deeming fiction can not be resorted to even by a court of law.

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HIGH COURT OF JUDICATURE AT BOMBAY

174---- We also note that Hon. Apex Court in **Nathi Devi vs. Radha Devi Gupta-- (2005) 2 SCC 271**- para 13 & 14, states that the Legislature inserts every part of statute with a purpose & the legislative intention is that every part thereof should be given effect to. If the words used are capable of only one construction, it is not open to court to adopt any other hypothetical construction on the ground that it finds it more consistent with the alleged object and policy of the Act.

175---- Shri Khambatta has relied upon **(1991) 3 SCC 442 – Tribhovandas Haribhai Tamboli vs. Gujrat Revenue Tribunal & another** which in paragraph 8 points out the effect of a proviso which excluded the lands held on lease from the local authority from application of Bombay Tenancy & Agricultural Lands Act, 1948. **(1975) 2 SCC 791**-- **Carew and Company vs. Union of India**, 4 judges bench of Hon. Apex Court explains how an undertaking for the purposes of Monopolies & Restrictive Trade Practices Act, 1969 needs to be understood is also cited . There the Hon. Court in para 24 to 28

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HIGH COURT OF JUDICATURE AT BOMBAY

states that if two views are possible, one which advances the remedy and suppresses the evil must be adopted.

176-----Shri Seervai relied upon **(1976) 1 SCC 128-- Dwaraka Prasad vs. Dwaraka Das Saraf**-- where the Hon. 4 Judges state that though the proviso may be assigned several functions, the Courts have to be selective having regard to the text & context of the statute. We find that the following exposition in paragraph 18, holds good here. The rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. Hon. Apex Court points out that --

> "The proper course is to apply the broad general Rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be, on the rest.
>
> The true pri"nciple undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail.

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HIGH COURT OF JUDICATURE AT BOMBAY

(*Maxwell on Interpretation of Statutes*, 10th Edn., p. 162)

As explained, here the words in second proviso to S. 140(5) of 2013 Act ordinarily can not be ignored and the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

177---- In view of this ruling, we do not find it necessary to refer to **Union of India vs. Sanjay Kumar Jain-- (2004) 6 SCC 708** -para 11 which states that normally a proviso excepts or qualifies something form an enactment or to the discussion in paragraphs 15 to 17 in **Binani Industries Ltd. vs. Assistant Commissioner of Commercial Taxes – (2007) 15 SCC 435**, relied upon by Adv. Dwarakadas.

178------ Before applying the above dogmas to the present facts, we also consider it convenient to look into the scheme of S.140(5) and whether it allows a punishment to be imposed

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HIGH COURT OF JUDICATURE AT BOMBAY

for any offence. It will also throw light on the issue of double jeopardy.

179----- In **Rajesh Awasthi v. Nand Lal Jaiswal, (2013) 1 SCC 501**

at page 522, it is observed :

"48 In the present context, it has become necessitous to dwell upon the role of the Selection Committee. Section 85(1) of the Act provides for the constitution of the Selection Committee to select Members of the State Commission. The said Committee, as the composition would show, is a High-Powered Committee, which has been authorised to adjudge all aspects. I may hasten to add that I am not at all delving into the sphere of suitability of a candidate or the eligibility, for in the case at hand the issue in singularity pertains to total non-compliance with the statutory command as envisaged under Section 85(5).

49. It is seemly to state that the aforementioned provision employs the term "recommendation". While dealing with the concept of recommendation, a three-Judge Bench of this Court in A. Panduranga Rao v. State of A.P.[28] has stated that the literal meaning of the word "recommend" is quite simple and it means "suggest as fit for employment". In the present case the Selection Committee as per the provision was obliged to satisfy itself when the legislature has used the word "satisfied". It has mandated the Committee to perform an affirmative act. There has to be recording of reasons indicating satisfaction, may be a reasonable one. Absence of recording of satisfaction is contrary to the mandate/command of the law and that makes the decision sensitively susceptible. It has to be borne in mind that in view of the power conferred on the State Commission, responsibility of selection has been conferred on a High-Powered Selection Committee. The Selection Committee is legally obliged to record that it has been satisfied that the candidate does not have any financial or other interest which is likely to affect prejudicially his functions as Chairman or member, as the case may be. The said satisfaction has to be reached before recommending any person for appointment. It would not be an exaggeration to state that the abdication of said power tantamounts to breach of rule of law because it not only gives a go-by to the warrant of law but also creates a dent in the basic index of law. Therefore, the selection is vitiated and it can never come within the realm of curability, for there has been statutory non- compliance from the very inception of selection."

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HIGH COURT OF JUDICATURE AT BOMBAY

180--- **Swadeshi Cotton Mills vs. Union of India – (1981) 1 SCC**

664 , at page 698 observes :

"53. With the aforesaid objects in view, Section 18-AA was inserted by the Amendment Act 72 of 1971. The marginal heading of the section is to the effect: "*Power to take over industrial undertakings without investigation under certain circumstances".* This marginal heading, it will be seen, accords with the Objects and Reasons extracted above. Section 18-AA runs as under:

"(1) Without prejudice to any other provision of this Act, if, from the documentary or other evidence in its possession, the Central Government is satisfied, in relation to an industrial undertaking, that—

(a) the persons incharge of such industrial undertaking have, by reckless investments or creation of encumbrances on the assets of the industrial undertaking, or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking, and that immediate action is necessary to prevent such a situation; or

(b) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the Company owning the industrial undertaking or for any other reason) and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the Company owning the industrial undertaking and the condition of the plant and machinery of such undertaking are such that it is possible to re-start the undertaking and such re-starting is necessary in the interests of the general public,_.

60. Section 18-AA(1)(*a*), in terms, requires that the satisfaction of the Government in regard to the existence of the circumstances or conditions precedent set out above, including the necessity of taking immediate action, must be based *on evidence* in the possession of the Government. If the satisfaction of the Government in regard to the existence of any of the conditions, (*i*) and (*ii*), is based on no evidence, or on irrelevant evidence or on an extraneous consideration, it will vitiate the order of "take-over", and the court will be justified in quashing such an illegal order on judicial review in appropriate proceedings. Even where the statute conferring the discretionary power does not, in terms, regulate or hedge around the formation of the opinion by the statutory authority in regard to the existence of preliminary jurisdictional facts with express checks, the authority has to form that opinion reasonably like a

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HIGH COURT OF JUDICATURE AT BOMBAY

reasonable person.

61. While spelling out by a construction of Section 18-AA(1)(*a*) the proposition that the opinion or satisfaction of the Government in regard to the necessity of taking immediate action could not be the subject of judicial review, the High Court (majority) relied on the analogy of Section 17 of the Land Acquisition Act, under which, according to them, the Government's opinion in regard to the existence of the urgency is not justiciable. This analogy holds good only up to a point. Just as under Section 18-AA of the IDR Act, in case of a genuine "immediacy" or imperative necessity of taking immediate action to prevent fall in production and consequent risk of imminent injury to paramount public interest, an order of "take-over" can be passed without prior, time- consuming investigation under Section 15 of the Act, under Section 17(1) and (4) of the Land Acquisition Act, also, the preliminary inquiry under Section 5-A can be dispensed with in case of an urgency. It is true that the grounds on which the Government's opinion as to the existence of the urgency can be challenged are not unlimited, and the power conferred on the Government under Section 17(4) of that Act has been formulated in subjective terms; nevertheless, in cases, where an issue is raised, that the Government's opinion as to urgency has been formed in a manifestly arbitrary or perverse fashion without regard to patent, actual and undeniable facts, or that such opinion has been arrived at on the basis of irrelevant considerations or no material at all, or on materials so tenuous, flimsy, slender or dubious that no reasonable man could reasonably reach that conclusion, the court is entitled to examine the validity of the formation of that opinion by the Government in the context and to the extent of that issue."

181---- **Maneka Gandhi vs. Union Of India-- (1978) 1 SCC 248 ,** at page 386, shows :

"186. On a consideration of various authorities it is clear that where the decision of the authority entails civil consequences and the petition is prejudicially affected he must be given an opportunity to be heard and present his case. This Court in *Barium Chemicals Ltd.* v. *Company Law Board*[134] and *Rohtas Industries Ltd.* v. *S.D. Agarwal*[135] has held that a limited judicial scrutiny of the impugned decision on the point of rational and reasonable nexus was open to a court of law. An order passed by an authority based on subjective satisfaction is liable to judicial scrutiny to a limited extent has been laid down in *Western U.P. Electric Power & Supply Co.* v. *State of U.P.*[136] wherein construing the provisions of Section 3(2)(*e*) of the Indian Electricity Act 9 of 1910 as

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HIGH COURT OF JUDICATURE AT BOMBAY

amended by the U.P. Act 30 of 1961, where the language used is similar to Section 10(3)(*c*) of the Passports Act, this Court held that when the Government exercises its power on the ground that it "deems such supply necessary in public interest" if challenged, the Government must make out that exercise of the power was necessary in the public interest. The Court is not intended to sit in appeal over the satisfaction of the Government. If there is prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy to consumers the requirements of the statute are fulfilled. "In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review." The decisions cited are clear authority for the proposition that the order passed under Section 10(3)(*c*) is subject to a limited judicial scrutiny. An order under Section 10(3)(*c*) though it is held to be an administrative order passed on the subjective satisfaction of the authority cannot escape judicial scrutiny. The Attorney-General fairly conceded that an order under Section 10(3)(*c*) is subject to a judicial scrutiny and that it can be looked into by the Court to the limited extent of satisfying itself whether the order passed has a rational and reasonable nexus to the interests of the general public."

182---- In **Hamdard (Wakf) Laboratories vs. Deputy Commissioner of Labour-- (2007) 5 SCC 281**, at page 290, Hon. Apex Court observes--

"16. Different statutes, enacted by Parliament from time to time, although beneficial in character to the workmen, seek to achieve different purposes. Different authorities have been prescribed for enforcing the provisions of the respective statutes. The authority under the Payment of Wages Act, 1936 is one of them.

17. In view of the fact that diverse authorities exercise jurisdiction which may be overlapping to some extent, the courts while interpreting the provisions of the statutes must interpret them in such a manner so as to give effect thereto."

183---- The powers under or the provisions contained in S. 132, 140(5) & S. 447 of the 2013 Act also can not be seen as parralel powers as held in **(2007) 3 SCC 184**--**Raja Ram Pal**

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HIGH COURT OF JUDICATURE AT BOMBAY

Vs. Hon. Speaker, Lok Sabha , at page 444 :

"704. I am reminded of what Sarkar, J. stated in *U.P. Assembly case (Special Reference No. 1 of 1964)*: (AIR 1065 SC 745 at p. 810, para 213)

"*213*. I wish to add that I am not one of those who feel that a Legislative Assembly cannot be trusted with an absolute power of committing for contempt. The legislatures have by the Constitution been expressly entrusted with much more important things. During the fourteen years that the Constitution has been in operation, the legislatures have not done anything to justify the view that they do not deserve to be trusted with power. I would point out that though Article 211 is not enforceable, the legislatures have shown an admirable spirit of restraint and have not even once in all these years discussed the conduct of Judges. We must not lose faith in our people, we must not think that the legislatures would misuse the powers given to them by the Constitution or that safety lay only in judicial correction. Such correction may produce friction and cause more harm than good. In a modern State it is often necessary for the good of the country that parallel powers should exist in different authorities. It is not inevitable that such powers will clash. It would be defeatism to take the view that in our country men would not be available to work these powers smoothly and in the best interests of the people and without producing friction. I sincerely hope that what has happened will never happen again and our Constitution will be worked by the different organs of the State amicably, wisely, courageously and in the spirit in which the makers of the Constitution expected them to act."

184 --- Observations of Hon. Apex Court in **Subhash Popatlal Dave vs. Union of India (2014) 1 SCC 280** show that--

"35. This Court consistently held that preventive detention "does not partake in any manner of the nature of punishment" but taken "by way of precaution to prevent mischief to the community"[14]. Therefore, necessarily such an action is always based on some amount of "suspicion or anticipation". Hence, the satisfaction of the State to arrive at a conclusion that a person must be preventively detained is always subjective. Nonetheless, the legality of such subjective satisfaction is held by this Court to be amenable to the judicial scrutiny in exercise of the jurisdiction conferred under Articles 32 and 226 of the Constitution

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HIGH COURT OF JUDICATURE AT BOMBAY

on certain limited grounds.

36. One of the grounds on which an order of preventive detention can be declared invalid is that there is no live nexus between (*1*) the material which formed the basis for the State to record its subjective satisfaction, and (*2*) the opinion of the State that it is necessary to preventively detain a person from acting in any manner prejudicial to the public interest or security of the State, etc. In other words, the material relied upon by the State for preventively detaining a person is so stale that the State could not have rationally come to a conclusion that it is necessary to detain a person without a charge or trial."

185--- One of the major challenges is on the ground of Double Jeopardy and lack of proper procedure. Is action against the company auditor under S.140(5) quasi-criminal?--Discussion in **An Advocate vs. Bar Council of India** (supra) by Hon. 2 judge bench of Apex Court shows that there action was being taken for professional misconduct and punishment was suspension from practice for three years. These proceedings are held quasi criminal in nature and accordingly standards and procedure relevant in criminal jurisprudence are directed to be used. Here we find that S. 140 (5) does not deal with the professional misconduct and hence it is not relevant.

In **Needle Industries (India) Ltd. vs. Needle Industries Newly (India)** -(1981) 3 SCC 333 in paragraph 63 & 65, Hon. Apex Court points out the risk in relying upon solely on

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HIGH COURT OF JUDICATURE AT BOMBAY

documents and importance of process of cross-examination. In **A. Ayyasamy vs. A. Paramsivam and others** -(2016) 10 SCC 386, in paragraph 25, the Hon. Apex Court points out how the allegations of fraud may raise complex questions of law & facts. Thus it holds that to decide such questions, the civil court is the appropriate forum and not the arbitrator. According to petitioners NCLT can not be said to be the apt forum for considering alleged fraud on part of CA. Discussion undertaken by us (below) shows that NCLT is not recording any finding to prejudice any legal right of CA in S. 132 or S. 447 proceedings.

In **AIR 1965 SC 1518-- Ram Dial vs. State of Punjab,** the Constitution bench of Hon. Apex Court examines possibility of pick & choose because of two identical remedies but with different procedures. Those section are S. 14(e), S.16(1) & S. 16(3) of the Punjab Municipalities Act,3 of 1911. In matter before us, the object of S. 140(5) is not the same as in S. 132 of the 2013 Act.

186---- We find the arguments by the petitioners on classification between the Company Auditors on one hand &

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HIGH COURT OF JUDICATURE AT BOMBAY

the Directors or Officers of the company on the other hand misconceived because of unique position of CA qua the Company and status of the Directors or the office bearers of such Company. The directors or the officers of such company must identify themselves with its affairs while the CA has to be aloof & neutral.

187--- In **A.N. Parsuraman and another vs. State of Tamilnadu – (1989) 4 SCC 683**, in para 8, the Hon. Apex Court finds that the executive was given wide discretion in the matter of choice of competent authority in picking and choosing an institution for exemption from the Tamilnadu Private Educational Institutions (Regualation) Act, 1966. It can not be said about S. 140(5) where the power to order the change to CA is conferred upon NCLT – a quasi-judicial Tribunal which has to follow the 2017 Rules. There the norms for refusing or grant of permission were also not prescribed and every thing depended upon the executive's whim & caprice. Here, NCLT has to be “satisfied” and then only it “may” order the company to change its CA. This satisfaction is quasi-judicial

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HIGH COURT OF JUDICATURE AT BOMBAY

and can be assailed as per law.

Reliance upon the Division Bench judgment in case of ***Gagan Harsh Sharma and Anr. vs. State of Maharashtra:*** (supra) to contend that the debarment of CA constitutes Double Jeopardy is erroneous as the debarment prescribed under S. 140(5) is not for fraud.

188---- We have to also look into the Relevance of subsequent events. Judgment reported at ***Pasupuleti Venkateswarlu vs. The Motor and General Traders*** (supra) relied upon by the petitioners to urge that the subsequent events ie those taking place during pendency of the proceedings are also relevant need not be dealt with in depth here because the scheme of S. 140(5) itself envisages a hiatus between initiation of the proceedings for removal of CA on satisfaction being reached by the NCLT and passing of final orders ie issuing a direction to change such CA. In said judgment, the Hon. Three- Judge bench has looked into the need of landlord & event of his obtaining possession of other shop blocks. For same reasons, judgment in ***Ramesh Kumar vs. Kesho Ram:*** (supra)

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HIGH COURT OF JUDICATURE AT BOMBAY

between landlord & tenant, (supra), **Uco Bank & another vs. Rajinder Lal Capoor--(2007) 6 SCC 694** about a provision in service regulation which permitted the inquiry only for withholding the pension after superannuation, or other judgments cited by the respondents to counter it, need not be dealt with. Considering the language & scheme of S. 140(5) which we are mentioning little later in the body of this judgment, it is not necessary to dwell more on these precedents.

189----- While considering the need of importance of a fair procedure, we find it appropriate to begin with precedents cited by the parties. In **Institute of Chartered Accountants Of India vs. L.K. Ratna & Others-- (1986) 4 SCC 537,** in para 18, the Hon. Apex Court points out that another way of looking at the matter is examining the consequences of the initial order as soon as it is passed. Such an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal. It points out that the damage to CA's

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HIGH COURT OF JUDICATURE AT BOMBAY

professional reputation can be immediate and far-reaching. “Not all the King’s horses and all the King’s men” can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate *complete* restitution through an appellate decision. And, therefore, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding.

190--- Opportunity to Cross-Examine and supply of Documents is also a relevant facet. Adv. Khambatta has relied upon **(2012) 7 SCC 56-- P. Sanjeeva Rao vs. State of Andhra Pradesh** and **(2010) 6 SCC 1- Sidartha Vashissht vs. State (NCT of Delhi)** to press imporatnce of supplying the documents & of cross-examination in such matters. As we find debarment or disqualification under S.140(5)- second proviso, getting attached automatically due to the statutory scheme, we find this argument unwarranted at this stage. NCLT has its own

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HIGH COURT OF JUDICATURE AT BOMBAY

Rules & rule 34 also enables it to devise suitable procedure to meet the principles of natural justice.

191--- To understand why doctrine of double jeopardy is not attracted, difference between the disqualification & punishment also need to be briefly stated. Disqualification is generally for a fixed term prescribed by the Legislation and the doctrine of proportionality will not apply. Disqualification is for some conduct which may not constitute an offence but which essentially militates with free & fair discharge of the obligations incurred by the incumbent because of the office which he volunteered to occupy. It rules out possibility of conflict of interests. Holding that a person is disqualified may not always result in his conviction for an offence.

Punishment is for a conduct declared as an offence or misconduct. Commission of an offence would lead to a punishment of imprisonment or to a penalty of fine or both.

Concviction normally leads to automatic disqualification as per the scheme in statute. An accused will be tried by the Court of Law and it will impose the punishment if the charge is proved

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HIGH COURT OF JUDICATURE AT BOMBAY

beyond the reasonable doubt. Strict rules of law of evidence apply to it. Such Court has to choose the quantum of punishment consciously as per settled principles and it can not be too light or too severe. Law gives it discretion for that purpose.

Punishment for a misconduct is after the departmental or disciplinary proceedings which is normally an in-house procedure to maintain discipline in the establishment of the employer or amongst the professional members of the institutions like the Bar Councils at State or National level, Medical Council of India, Institute of the Chartered Accountants etc. Inquiry Officer or Authority has the discretion in the matter of choice of punishments. Strict rules of law of evidence do not apply to it. Punishment after such inquiry does not always result in disqualification of a servant or a workman.

192----- Disqualification under second proviso to S. 140(5) of the 2013 Act springs into life automatically after the order thereunder is passed by the NCLT against the Chartered Accountant. The legislation make provisions for

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HIGH COURT OF JUDICATURE AT BOMBAY

disqualifications for the aspirants of the elective public offices or office bearers of the bodies like the cooperative societies. The disqualification is either fastened at the threshold or during the tenure of the incumbent on such body. Accordingly, it cuts short his tenure or then prohibits him from contesting or continuing in the office. The object obviously is to maintain purity of administration of such artificial bodies either public or private like cooperative societies. Prosecution for the conduct leading to such disqualification may also be additionally provided for in same law or other law.

193---- We find that the Companies Act, 2013 sets out one more disqualification for the Chartered Accountant who has volunteered & become a Company Auditor. When there are already provisions therein for disciplinary action and for offences, this measure for disqualification needs to be strictly construed in the perspective in which it finds place in the scheme of 2013 Act. The Companies Act,2013 itself contains a provision like S. 132 for disciplinary proceedings against such CAs in appropriate cases. Not only this the criminal prosecution

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HIGH COURT OF JUDICATURE AT BOMBAY

is also prescribed vide its S. 447. But considering the important position which such CA ie company auditor occupies, in deserving cases, the Parliament has found it necessary to provide for his immediate removal. It is like an employer suspending the employee whenever the facts warrant it. It may also be compared with a private litigant replacing his lawyer if he doubts anything. Vide S.140(5), an interim arrangement has been made and the Company can be asked to change such company auditor ie CA.

194------ Obviously such a direction can be opposed by the company or the concerned auditor only in proper cases. Satisfaction reached by the independent & impartial tribunal like NCLT needs to be respected by the company auditor and the subject company also is expected not to oppose it. Neither such company nor the concerned CA can claim any vested right in the matter. We find that a highly qualified professional person like chartered accountant who has no personal interest in the matter also should not normally oppose the move. As the said satisfaction is reached in the interest of Company

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HIGH COURT OF JUDICATURE AT BOMBAY

itself, that company is normally not expected to oppose it. In similar situations, several advocates return the brief to client with fees to avoid the unfounded allegations or unsavoury situations of conflict of interest or professional misconduct. A chartered accountant who has opted to be the company auditor obviously can not claim any personal interest, must remain neutral & his commitment to the profession obliges him to accept that satisfaction of NCLT. If the Company or the said CA honour that satisfaction, the NCLT is not required to or expected to pass final order.

195---- Parliament knows that all shareholders and company itself need honest clean accounts and in law, nobody can oppose it. Satisfaction of NCLT about existence of circumstances warranting change of CA does not obviously cast stigma on either Company or concerned CA. If the change as desired takes place & further manipulation (as suspected) of the accounts or further deterioration of the situation is avoided, the NCLT is not required to pass the final order. When final order is not passed, the statutorily mandated

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HIGH COURT OF JUDICATURE AT BOMBAY

disqualification does not come into force at all.

196----- The addition of section like S.140(5) in 2013 Act is only to prohibit the perpetration of apprehended mischief further and it is not to find guilt of or punish the company or its auditor. Therefore only NCLT is empowered to pass a final order against the CA which statutorily results in his disqualification. It has not been given any power to act against the Company which had hired such CA though it may have opposed the proceedings in NCLT. Purpose of S. 140(5) is only to inculcate more responsibility in the CA and law expects him to rise to the occasion by not opposing the proposed change by urging frivolous or roving grounds. He can resign though company hiring him may attempt to oppose NCLT thereby rendering the objections of the company in NCLT nugatory. Because of this salutary object in adding S. 140(5) to the 2013 Act, procedure as elaborate as followed by NFRA is not prescribed there. Though NCLT Rules give same powers as NFRA to NCLT, very rarely there should be or would be an occasion to take recourse to it as any self respecting CA or Company will find themselves

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HIGH COURT OF JUDICATURE AT BOMBAY

not free to raise frivolous or false pleas in defence and the self- esteem would force them to honorably part company with each other.

197-- In the light of the above, we find it appropriate to mention the relevant findings which crystalize out of our deliberations in the matter--

I---- Thus one can not overlook the fact that the Parliament in 2013 Act made provision for NFRA to consider the cases of professional misconduct and for a criminal trial under its S. 447, an agency like NCLT formed under S. 408 has been given a power to issue a direction to change the CA. It is also apparent that NCLT has not been given power to debar or disqualify or impose any punishment on such CA.

II---- Proviso to S. 132(4)(a) of 2013 Act shows that after NFRA initiates investigation into the professional misconduct, the Institute of Chartered Accountants looses that jurisdiction.

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HIGH COURT OF JUDICATURE AT BOMBAY

III -- NCLT does not & can not inquire into a professional misconduct by the CA as it is not conferred with power to choose the nature of punishment or its quantum.

IV-- To reach the required satisfaction, NCLT has power to inquire into such involvement of CA into fraud since it has powers to issue summons, to examine witnesses etc. However, it is for limited purpose of reaching the subjective satisfaction and not to punish ie to debar the CA. Its only role is to examine the need to change that CA.

V-- An officer conducting the departmental or domestic enquiry has power to investigate & adjudicate as also to punish. 2013 Act gives this power to NFRA or the Institute of the Chartered Accountants. S. 140(5) does not in any way militate with that jurisdiction.

VI -- Against the punishment imposed by NFRA, CA can appeal to NCLAT and not to NCLT.

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HIGH COURT OF JUDICATURE AT BOMBAY

VII-- S.140(5) is part of the provision (S.140) which deals with the removal of CA or his resignation. Need of special resolution to remove CA or grant of opportunity to him in that connection are part of this scheme. The concerned CA though removed by special resolution or due to his resignation, is not visited thereby with any action for professional misconduct or prosecution for crime or any disability because of that removal or resignation.

VIII -- The law does not mandate any legal expert on NFRA. The composition of NCLT shows that it is better equipped than NFRA to adjudicate or to apply mind to legal aspects.

IX -- When NCLT comes across cases in which the company does not exercise its power under S. 140(1) or the CA does not resign and there is unholy collusion between them, it can order the company to change him.

X - Functions of NFRA under 2013 Act are more regulatory or supervisory in nature than adjudicatory. Therefore this power to

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HIGH COURT OF JUDICATURE AT BOMBAY

force change is given by parliament to NCLT. Functions entrusted to NCLT are dispute resolution & not governance. NCLT can also exercise contempt jurisdiction.

XI -- After NCLT issues the direction to company to change its CA, procedure under S. 140(1) need not be followed. Exercise of passing of special resolution which is contingent upon the desire of the majority is ruled out. CA against whom the company proposes to pass a special resolution is not prohibited from resigning after following the prescribed procedure. That option is not denied to & also available to CA when NCLT initiates the exercise towards directing the company to change him.

XII --- In legal disputes or controversies, NCLT is better placed or then superior authority in the scheme of 2013 Act when compared with NFRA. Purpose of this power given to it is not to expose the CA to one more disciplinary measure. The power under S.140(5) is more of curative nature.

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HIGH COURT OF JUDICATURE AT BOMBAY

XIII —When the 2013 Act recognizes ICA (Institute of the Chatered Accountants) as the disciplinary body to regulate the profession of CA and its power to punish erring CA, and then gives power to NFRA to proceed against CA in specified cases as also to punish, it is difficult to hold that very same power can be read in S. 140(5) with NCLT. The Parliament can not be presumed to have created multiple agencies with same power. However as NCLT steps in to break the unholy nexus between the company & CA, the Parliament has felt need to give effect to it immediately. Parliament has therefore restricted the debarment only in matters where the CA does not realize this and forces the NCLT to pass the final orders.

XIV -- S. 132 of 2013 Act deals with the professional misconduct and not with criminal offences. It deals with disciplinary control on a class of CA. No such or identical power needed to be vested with NCLT and the Parliament has, only to expedite the change of CA, provided for the debarment when the move based on satisfaction of NCLT is unnecessarily opposed.

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HIGH COURT OF JUDICATURE AT BOMBAY

XV -- Chartered accountant Act takes care of the professional misconducts by CA while 2013 Act vide S. 132,also deals with type of the said misconducts and vide S. 447, takes care of criminal offences. In this backdrop, it is absurd to assume that

S. 140(5) again envisages a punishment for a professional misconduct or for crime of fraud.

XVI --- NFRA deals with professional misconduct of fraud and can choose a commensurate punishment for it. Bare reading of

S. 140(5) shows that NCLT has to stop after passing final order and debarment is not inflicted or controlled by it.

XVII -- Debarment or disqualification under 2nd proviso to S. 140(5) follows automatically due to statutory mandate and NCLT has no option or discretion in that respect.

XVIII -- NFRA has a choice to select the punishment ie it has to exercise its discretion while choosing the quantum of the punishment which shows that S. 132 deals with the

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HIGH COURT OF JUDICATURE AT BOMBAY

departmental action after the professional misconduct. Same can not be said about the 2nd proviso to S. 140(5) as there NCLT has not been given power to punish & the debarment mandated by the Parliament attaches itself to the final order where the NCLT is forced to pass it.

XIX -- As disqualification for reappointment as CA of any company for 5 years is not a punishment for of fraud considered in substantive part of S. 140(5), the NFRA can still exercise the power to punish for professional misconduct of fraud.

XX --- As professional misconduct & offence are not dealt with by the NCLT, disqualification stipulated in second proviso to S. 140(5) can not be construed as a second punishment for same misconduct & it also does not attract the principle of double jeopardy. As legislative mandate of disqualification in second proviso to S. 140(5) is not a punishment either for the misconduct or the offence, obviously it is added as a measure to achieve a laudable goal stated supra.

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HIGH COURT OF JUDICATURE AT BOMBAY

XXI -- Respondents as also the Petitioners do not dispute that considering the consequences emanating from scheme of S. 140(5), it needs to be strictly construed. It contemplates “change of CA” as a final order. The order therefore must be executable (executory) and if the CA has already ceased to be such CA, that final order can not be passed as he can not be or need not be changed.

XXII -- If despite such CA ceasing to be the CA of concerned Company, need for passing of a final order to change him is read into scheme of S. 140(5), it would overlook the absence of need to pass final order and violate its language. NCLT has been given the discretion whether to pass that final order or not, even after reaching the “satisfaction” and legislative wisdom behind it will be lost. It will introduce a discordant note in the scheme of S. 140 itself.

XXIII -- Second proviso speaks of a “final order” and question is whether it needs to be construed in contradistinction with

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HIGH COURT OF JUDICATURE AT BOMBAY

first proviso which contemplates passing of an urgent order within 15 days on application of Central Government prohibiting the “suspect auditor ” to continue with audit work thereby enabling the Central Government to substitute him. This order under first proviso,according to the respondent Union of India is an interim order. According to UOI, the words “final order” in second proviso are to be understood with reference to this “interim” order.

XXIV -- We find that S.140(5) in its substantive part, does not envisage any such interim order. It only speaks of an order and direction to company to change its CA. Thus final order to be issued under substantive part is to a Company only. The CA to be changed who opposes that change, may also be required to be heard under this substantive part as he may point out the want of material to sustain the subjective satisfaction. reached by NCLT.

XXV---NCLT has similar powers as are conferred upon the NFRA but then is not bound by any technical rules and can evolve its

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HIGH COURT OF JUDICATURE AT BOMBAY

own procedure. This freedom is given to NCLT because of better judicial / legal properties and elements inherent in its composition.

XXVI -- NFRA & NCLT as forums provided under the 2013 Act by the Parliament are diferent with distinct purpose & power. They are also inherently distinct in nature. They are bound to have separate Rules to regulate their working & procedure adopted by them can not be questioned only on that ground.

XXVII -- But as object of S. 140(5) is to change the suspect auditor, the final order will always displace an existing auditor. Therefore order asking the Company to change the auditor, alone needs to be treated as final order which will attract the above disqualification or debarment. Element of subjective satisfaction rules out the need of a full fledged inquiry or an exercise to prove it in each & every case.

XXVIII -- CAs who defrauded the Company but have completed their term & left can not be changed & therefore not amenable

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HIGH COURT OF JUDICATURE AT BOMBAY

to S. 140(5). They can be tried for professional misconduct under S. 132 or under the Chartered Accountants Act.

XXIX -- Parliament has not vide S. 140(5) added NCLT as one more agency with same or overlapping powers. Concept like “subjective satisfaction” and despite reaching it, discretion available to NCLT whether to direct change of CA or not to direct it, leaves no manner of doubt that the Parliament has expected NCLT to change the doubtful CA who insists on continuing. This is to cater to the interest of shareholders.

XXX -- S. 140(5) operates in a limited situations, therefore only the power is given to body like NCLT with more legal or judicial expertise, and not to NFRA. While looking into other disputes relating to oppression, mismanagement, amalgamation, merger etc it may come across instances where the company & the CA have colluded together and hence, the company may not remove him under S.140(1) & CA may not resign under S.140(2). Thus NCLT may also force such unwilling partners to part company in appropriate cases.

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HIGH COURT OF JUDICATURE AT BOMBAY

XXXI -- Threat of disqualification is only to expedite the change of CA as the “satisfaction” which triggers said jurisdiction is of a superior authority like NCLT. Intention is not to punish, but to prohibit a CA with prima facie dubious record to continue and to see that concerned Company appoints another CA of its choice as per law.

XXXII -- “Satisfaction” of NCLT which triggers direction to change CA under section 140(5) is not of same standard as required by the words “where professional or other misconduct is proved” in S. 132 which exposes the CA to punishment for professional misconduct.

XXXIII --- Proof under S. 132(4)(c) obliges a finding reached in adherence to well settled principles & after due procedure which can be objectively evaluated. “Satisfaction” under S. 140(5) may not warrant that exercise & that higher dgree of application of mind & proof. Said “satisfaction” has to be the subjective satisfaction of the NCLT.

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HIGH COURT OF JUDICATURE AT BOMBAY

XXXIV --- As such “satisfaction” is reached by the superior authority like NCLT and the CA is in charge of audit work, interest of Company & share holders is given primacy by seeing that he is changed. The further perpetration of apprehended malpractice or mischief is thus put to an end and other CA can continue with audit. The “suspect CA” can then be proceeded against under S. 132(4) of 2013 Act or under Chartered Accountants Act, for the professional misconduct. A self respecting reasonable CA who recuses himself by accepting that satisfaction of NCLT can not be visited with debarment under second proviso to S. 140(5).

XXXV -- Under first proviso to S. 140(5), in specified contingencies, due to urgency, NCLT has to pass order to change a CA within 15 days. There again the same procedure will be followed, but the Central Government can change or substitute the CA itself. There is no provision in 2013 Act & S. 139 also does not authorize the Central Government to appoint

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HIGH COURT OF JUDICATURE AT BOMBAY

the CA for any company. Therefore this power given to Central Government does not take away the power of the concerned Company to appoint CA of its choice. Hence, even after the central government appoints the CA, said Company can exercise its right, Not only this, but said Company or its CA can oppose the move, thereby necessitating the passing of final order. Power given to the Central Government is therefore by way of exception & hence, in emergent situations to avoid further perpetration of apprehended fraud. The NCLT after reaching the subjective satisfaction as warranted by substantive part of S.140(5), may pass an order restraining the suspect CA from further functioning in appropriate cases. Thereafter, the Central Government can be clothed with & gets the power to appoint CA in his place.

XXXVI -- Legislative wisdom behind this scheme or need felt by the Parliament for such a measure is not questioned before us. As the measure is unique and contingent upon the subjective satisfaction of the NCLT, the Parliament expected a

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HIGH COURT OF JUDICATURE AT BOMBAY

higher moral response from the professional like CA and a CA who recuses or resigns, therefore is not subjected to any humiliation ie disqualification. This does not cast any stigma upon him. The scheme in substantive part of S. 140(5) does not imply that once the satisfaction is reached by NCLT, it has to mechanically pass the final order in every case and a direction to change the CA must be issued. This word “may” can not mean “shall”. Only situation in which the final order may not be passed is ceasing of the subject CA as company auditor of that particular company.

XXXVII -- Second proviso to S. 140(5) needs to be construed in this background. It accepts the fact that NCLT may not be required to pass “final order” in all cases. It therefore only operates when NCLT after giving an opportunity to effect change, is required to pass final order against CA ie over-rule his objection & direct the Company before it to change him. If this hearing and order is avoided, said second proviso will never be attracted at all. This debarment is a more stringent measure since it is qua all other companies and not restricted

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HIGH COURT OF JUDICATURE AT BOMBAY

to one company before NCLT. Additionally, such final order also exposes him to possibility of prosecution under S. 447.

XXXVIII-- In suitable cases, even after such change of CA, the earlier CA, Company its directors or the officers can be proceeded against under S. 132, S.447 or Chartered Accountants Act or the other provisions of the Companies Act. Therefore only S. 140(5) begins with words “without prejudice to the other provisions“.

XXXIX--- The second proviso warrants debarment for appointment and also liability for prosecution under S. 447 of the 2013 Act. The issue may crop up in NCLT in relation to one or more companies and it may issue directions to change CA/CAs to such company/ies before it. As NCLT is concerned with purity of the affairs of those companies, it can not issue a general or blanket direction to other companies (not before it) to change their CA also. As NCLT is not invested with power to deal with CA, it can not pass such a general order. However,

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HIGH COURT OF JUDICATURE AT BOMBAY

when the CA forgets his independent & impartial noble status or tries to unnecessarily identify himself with the cause, and thereby raises a frivolous defence, consequences provided for in second proviso are more drastic. Such CA can not be appointed by any other company also in future for 5 years due to debarment.

XL -- By recusing himself after the NCLT reaches the subjective satisfaction, concerned CA does not incur any disadvantage or is not prejudiced. If the action for professional misconduct is initiated or the prosecution under S. 447 is started, he can defend himself effectively and no adverse inference can be drawn against him for exhibiting the higher professional morals or adhering to better benchmark.

XLI -- Such CA can not also make grievance about this scheme of S. 140(5) since nobody compels him to be the Company CA & he opts to be so of his own. He also can not assail the higher moral values expected of him in the said role.

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HIGH COURT OF JUDICATURE AT BOMBAY

XLII-- Second proviso is therefore a notice in advance to such CA who has agreed to conduct himself with high moral values about the possible disqualification for raising the frivolous pleas in defence. NCLT may not be required to take recourse to this power in all cases & the responsible professional like CA is also made to respond with sincerity earnestly. The action when initiated, also need to be completed at the earliest.

XLIII --- S.140(5) is enacted to infuse confidence in the public in corporate sector & to prevent abuse of the position by company to the detriment of its share holders. Direction issued by NCLT thereunder does not result in any injury to Company. Still, it gives opportunity to company or CA to meet the subjective satisfaction but it comes at the risk of disqualification for CA as stipulated in second proviso.

XLIV--- Operation of the second proviso is not controlled by the NCLT whose job is over after it passes final order of changing the CA. Parliament has devised a mechanism to expedite that action and chosen to fasten the disqualification & its period,

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HIGH COURT OF JUDICATURE AT BOMBAY

both statutorily, without leaving any scope for discretion in any body. It therefore is not like a punishment which can be imposed at the end of the disciplinary proceedings for an established professional misconduct or for a proved criminal offence, at he end of trial. There the disciplinary authority or the Court has choice to select the nature or quantum of punishment.

XLV—It is obvious that as CA is not to be dealt with or punished under S. 140(5), he is being replaced only in case of a company where the NCLT is satisfied about the need to replace. While devising a mechanism to accelerate the change, the Parliament could not have forced companies not party before NCLT to change such CA and it could not have ordered CA to give up all existing assignments. Therefore only the debarment or disqualification is for future ie it does not unnecessarily disturb the existing arrangements between such CA and his other client companies. This scheme evolved by the parliament therefore can not be assailed on the ground that it does not disassociate the CA from all his client Companies as that is not

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HIGH COURT OF JUDICATURE AT BOMBAY

the goal with which the power is conferred on NCLT.

XLVI-- It is agreed before this Court by all learned Senior Advocates that language of section 140(5) needs to interpreted strictly. The disqualification under second proviso can not operate if NCLT is not required to pass the order asking the Company to change the CA. It therefore does not operate only on of satisfaction reached by NCLT. It operates because of unsubstantiated defences raised by the CA ie company auditor which the NCLT rejects & passes a fiinal order ie an order to change that CA. This disqualification or debarment is therefore not as a punishment for fraud but it is a caution which the Parliament felt necessary to administer, to avoid the delays in matters which are of vital importance for the shareholders & public. It is therefore a regulatory measure. No petitioner has attempted to urge that the need thereof as felt by the Parliament is bad.

XLVII--- It is obvious that the disqualification prescribed in

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HIGH COURT OF JUDICATURE AT BOMBAY

second proviso to S. 140(5) is not for NCLT"s satisfaction of involvement in fraud or offence of fraud or for professional misconduct. As only fact of final order of NCLT ie a direction to change is the triggering point, it can not attract the principles of double jeopardy at all. Such debarment is avoidable.

XLVIII -- It also follows that the CA in relation to whom the NCLT proposes to issue a direction to change, may therefore prefer to walk out by resigning thereby not taking the risk of a disqualification. He is expected to show a mature & neutral attitude.

XLIX -- Even when Comapny proposes to pass a special resolution for removing its CA under S.140(1), the CA can avoid it by putting in a resignation. The scheme of S. 140 itself interposes "resignation" procedure between the decision of Company to move such special resolution & further processing thereof. The Parliament has placed sub-sections (2) & (3) regarding the resignation between sub-sections (1) & (4) of S.

140 and there is nothing in law to demonstrate that the CA

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HIGH COURT OF JUDICATURE AT BOMBAY

against whom the special resolution of “removal” is initiated, can not resign. Such resignation does not lead to any debarment or disqualification in his practice as CA.

L --Submission of Shri Khambatta that NCLT being creature of statute must act within four corners of law & can not exercise jurisdiction in its excess and also it can not assume the jurisdiction by taking recourse to the deeming fiction about the Company Auditor continuing in office and available for disqualification of debarment despite being rotated out or having resigned, also appears to be well founded. Judgment of Hon. Apex Court in **B. Himmatlal Agrawal vs. Competition Commission of India** – 2018 SCC online SC 574 in para 8 supports this contention.

LI -- The very fact that subjective satisfaction reached by NCLT is not expected by the Parliament to always translate itself into an order of change of CA, points out the necessity to consider the intervening events like the resignation of subject CA. If

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HIGH COURT OF JUDICATURE AT BOMBAY

conduct which led NCLT to reach its satisfaction are only determinative & liability on the CA gets fastened on said date, there was no reason for the Parliament to confer such discretion. Contentions revolving round the date of initiation of that action by NCLT, rights getting crystallized on that date and relevance or otherwise of events like resignation subsequent thereto and all case-law cited by the respective parties, therefor, with respect, does not call for appreciation here.

LII -- Similarly the argument of the Petitioners about procedural discrimination or arbitrary choice with the respondents to pick & choose the CAs for proceeding against them under either S. 132 or S. 140 or S. 447 of 2013 Act, or under the Chartered Accountants Act is unfounded. CA ie company auditor is designed to play a more responsible role than others since he is not part of Company & is statutorily entrusted with duty to keep an eye on its financial affairs in the interest of shareholders & general public. As the precedents explain, though he need not be a bloodhound, he can not ignore the

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HIGH COURT OF JUDICATURE AT BOMBAY

stench emanating from wrong financial practices in Company and claim immunity. On the contrary he must continue to sniff around to avoid any allegation of negligence on himself. If he indulges in any wrong conduct, he can not advance such an argument in defence.

LIII --- Arguments based on the discrimination between the Directors of the Company or its office bearers on one hand & the CAs on the other hand are equally misconceived. Every chartered accountant need not be the company auditor(CA) but once he volunteers to be so, the higher standards and norms apply. His integrity & morals thereafter must be above other chartered accountants & also beyond any doubt. He assumes that role with open eyes & can not be permitted to turn back to challenge the higher moral standards & benchmark of conduct evolved by the Parliament for him. If he has breached it, he can not complain that other violators are not being proceeded against. All violators need to be dealt with as per law & if anybody is shown undue or misplaced sympathy, it can not be

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HIGH COURT OF JUDICATURE AT BOMBAY

used to urge violation of Art. 14.

LIV -- Purpose of disciplinary or departmental action for misconduct against CA under S. 132 of 2013 Act or under the Chartered Accountants Act and object behind S. 140(5) of 2013 Act is clearly distinct. The Parliament has not proposed to punish the CA under S. 140(5), hence precedents like **Mrs. Maneka Gandhi vs. Union of India – (1978) 1 SCC 248** to demonstrate need of an established procedure to deal with the professional misconducts or the criminal offences, can not be used to contend that such provisions prescribing the detailed procedure are mandatory even before NCLT. Power given to NCLT is extraordinary, calls for exercise expeditiously and NCLT has its own Rules to govern the proceedings before it. The CA concerned can always make appropriate prayers & demand such opportunity as felt fit by him. Grievance about the difference in procedure prescribed for misconducts in 2013 Act or the Chartered Accountants Act on one hand and the procedure under S. 140(5) on the other hand, therefore is misconceived. The CA aggrieved by denial of any opportunity,

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HIGH COURT OF JUDICATURE AT BOMBAY

can always point out the prejudice suffered. We therefore do not find it necessary to dwell upon the details of other procedures including the charts comparing it made available by the Petitioners to drive home their contention. Contention that High-Court while functioning as company court had the statutes like CPC, Company Court Rules or the Appellate Side Rules to guide it while NCLT does not have the same, is not at all relevant. **Suraj Mall Mohta and Co. vs. A. V. Visvanatha:**(supra-paragraph Nos.2, 14 and 15) relied upon by Advocate Robin Jaisinghani to highlight importance of uniform procedure is also not attracted here since the cases of tax evaders under different sections of the Income Tax Act are dealt with in that precedent. Art. 14 is held to warrant same procedure and rules of evidence for all tax evaders. Here the object under S. 140(5) is entirely different. **AIR 1952 SC 75 : The State of West Bengal Vs. Anwar Ali Sarkar and another**, paragraph nos. 20(1), 38 and 45 also have no application for the same reasons. With respect, for same reasons, we also need not delve into **A.K. Gopalan Vs. State of Madras** (paragraph 21 and 266) delivered by the Constitution

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HIGH COURT OF JUDICATURE AT BOMBAY

Bench of Hon. Apex Court.

LV --Extending the requirement of standard of proof beyond reasonable doubt in the scheme of S. 140(5) where “satisfaction” of NCLT is envisaged, will result into a paradox. Various judgments noted supra or rival contentions on it, need not detain us in present matter. Law laid down by Hon. Apex Court in **T.T.Antony Vs. State of Kerala and Ors.** (para 27) and **Anju Chaudhary Vs. State of Uttar Pradesh and another** also is not relevant. With respect same can be said about **Union of India Vs. R. Gandhi** or **Madras Bar Association Vs. Union of India and another** cited to submit that even in 2013 Act, NCLT is a judicial tribunal.

LVI -- **State of Goa and another Vs. Colfax Laboratories Ltd. And another** and **H.V. Panchaksharappa vs. K. G. Eshwar**, pressed to explain that allegation of collusion itself mandates the test of “beyond reasonable doubt” also need not be delved into.

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HIGH COURT OF JUDICATURE AT BOMBAY

LVII ---**Supreme Court Bar Association vs. UOI** –(1998) 4 SCC 409, **Pawan Kumar Sharma vs. Gurudial Singh**--(1998) 7 SCC 24, **Pralhad Sarn Gupta vs. Bar Council of India**-- (1997) 3 SCC 585 which deal with the standard of proof or the concept of double jeopardy also do not call for independent appreciation. Few more judgments already referred to in written arguments are also pressed into service by Adv Dessai. However, as the very foundation of his arguments is not accepted by us and we have found recourse to Art. 20 by him unfounded, in order to avoid prolixity & reiteration, we do not consider those judgments. The changes in law in US (**Hudson vs. United States**) also are not relevant.

LVIII --Sr. Adv. Dwarakadas has cited **AIR 1961 SC 794-- Jetahnanda & Sona vs. State of U.P.** to explain what a phrase “final order” in second proviso to S. 140(5) of 2013 Act implies. There in paragraph 7, the Hon. Apex Court states that the order can be final if it affects the rights of the parties to dispute. We find that the “lis” which is required as pre-

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HIGH COURT OF JUDICATURE AT BOMBAY

condition in such case and its adjudication is lacking in the scheme of S. 140(5). Debarment is the mandate of law and NCLT does not have any control on it. NCLT proceeding as if the debarment is the object behind S. 140(5) and using the theory of deemed continuation of the CA though he had been rotated out or resigned, therefore is an error apparent which must be corrected in exercise of its extraordinary jurisdiction by this Court.

198**--** Discussion undertaken by us & our findings supra show the object behind enacting S.140(5) of 2013 Act. It is sufficient to see that effort to work out inconsistency between S. 140(5) of 2013 Act & the Limited Liability Partnership Act, 2008 by one of the petitioners can not be countenanced. The petitioners themselves point out that the Company Law Committee set up by MCA in its report issued on 14.11.2019 explained that debarment of a firm has to be an exception rather than a rule.

199-- The submissions on double jeopardy that the other proceeding need not be before the court of law, judgment of

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HIGH COURT OF JUDICATURE AT BOMBAY

Hon'ble Apex Court reported at **Maqbool Hussain Versus State of Bombay** and **Union of India and another Vs. Purushottam** wherein the Hon'le Apex Court also United States Supreme Court Judgment in **Hudson vs. United States** are not relevant since the debarment in question does not operate on fraud or on any misconduct which can be dealt with in S. 212 or 447 of the 2013 Act. Rival contentions about the correctness of law as expounded & whether larger bench view has been diluted or not, are therefore not the relevant factors here. ***Nirmala J. Jhala vs. State of Gujrat and Another*** (supra) also need not be considered in facts at hand. ***L. D. Jaisinghani vs. Naraindas N. Punjabi:*** also need not be considered in this backdrop. In Nirmala's case, the distinction between the prosecution & the departmental proceedings has been looked into by the Apex Court itself. We therefore need not dwell more on **(2017) 3 Mh.L.J. 929-- Tulsi Das vs. UOI** where only new departmental proceedings for a misconduct for which punishment was already inflicted, have been looked into by the Division Bench of this Court.

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HIGH COURT OF JUDICATURE AT BOMBAY

200-- The contention that the proceedings under S. 140(5) are quasi-criminal also need not detain us here. **Ram Singh and Ors. vs. Col. Ram Singh: 1985 (Supl) SC C 611**, (paragraph Nos. 222, 223) and **Ram Sharan Yadav vs. Thakur Muneshwar Nath Singh and Ors.: (1984) 4 SCC 649**, (paragraph Nos.2 and 3) are relied upon to urge that proceedings under S. 140(5) are quasi criminal. Questions like whether the statutorily mandated disqualification in 2nd proviso to S. 140(5) attracts double jeopardy? Whether the heading of section 140 or case law explaining the role of a "proviso" has any relevance? Whether proceedings u/S. 140(5) are quasi- criminal? stand answered above. Whether the 1996 judgment in **Director of Enforcement vs. M.C.T.M. Corp. (P) Ltd.** (supra) had no occasion to consider constitutional Bench judgment in **Shanti Prasad Jain vs. Director of Enforcement, FERA-- AIR 62 SC 1754** where in para 35, Hon. Constitution Bench observes that the proceedings under the FERA are quasi-criminal in character & it is the duty of the respondents to prove violation of law beyond reasonable doubt, has no bearing in this case. Similarly,questions like Whether S.

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HIGH COURT OF JUDICATURE AT BOMBAY

140(5) is Unconstitutional? Does it violate Art. 14 by signaling out the CAs for a harsher treatment & leaving out the Directors of the Company or its office bearers? Is it bad since it allows pick & choose between the CAs and the Directors of the Company or its office bearers? Is it arbitrary as it does not contain procedural safeguards?, are also answered supra by us. It is seen that debarment under S. 140(5)-2nd proviso can not be seen as quasi-criminal.

201--- Normally as per S. 210 of 2013 Act, the investigation into affairs of the company can be conducted by the Central Government through the Inspectors appointed by it. For the present controversy following sections in the 2013 Act assume imporatnce--

Section-211. Establishment of Serious Fraud Investigation Office.— (1) The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company:

Provided that until the Serious Fraud Investigation Office is established under sub-section (1), the Serious Fraud Investigation Office set up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

(2) The Serious Fraud Investigation Office shall be headed by a Director and consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in,—

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HIGH COURT OF JUDICATURE AT BOMBAY

(i) banking;
(ii) corporate affairs;
(iii) taxation;
(iv) forensic audit;
(v) capital market;
(vi) information technology;
(vii) law; or
(viii) such other fields as may be prescribed.

(3) The Central Government shall, by notification, appoint a Director in the Serious Fraud Investigation Office, who shall be an officer not below the rank of a Joint Secretary to the Government of India having knowledge and experience in dealing with matters relating to corporate affairs.

(4) The Central Government may appoint such experts and other officers and employees in the Serious Fraud Investigation Office as it considers necessary for the efficient discharge of its functions under this Act.

(5) The terms and conditions of service of Director, experts, and other officers and employees of the Serious Fraud Investigation Office shall be such as may be prescribed.

212. Investigation into affairs of Company by Serious Fraud Investigation Office.— (1) Without prejudice to the provisions of Section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—

(a) on receipt of a report of the Registrar or inspector under Section 208;
(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
(c) in the public interest; or
(d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

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

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HIGH COURT OF JUDICATURE AT BOMBAY

agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.

(3) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.

(4) The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under Section 217.

(5) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), [offence covered under Section 447] of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(7) The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

(8) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for

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HIGH COURT OF JUDICATURE AT BOMBAY

such arrest.

(9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

(10) Every person arrested under sub-section (8) shall within twenty- four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court.

(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 (2 of 1974).

(16) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 (1 of 1956) shall continue to be proceeded with under that Act as if this Act had not been passed.

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

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HIGH COURT OF JUDICATURE AT BOMBAY

such information or documents available with it to the Serious Fraud Investigation Office;

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

202-- After due deliberations, we record our conclusions below on the relevant aspects having bearing on status of report under S. 212 submitted by SFIO. Where ever, we have found it necessary to leave the question open, we have mentioned accordingly. Relevant case law has been also looked into thereafter.

I -- S. 212(11) obliges SFIO to submit an interim report when so directed by he Central Government. S. 212(12) obliges him to submit the investigation report after completing the investigation.

II --Thus, the section does not speak of said report as “final report”. Parties have for convenience coined that phrase since

S. 212 (11) uses the word “interim report”.

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HIGH COURT OF JUDICATURE AT BOMBAY

III -- S. 212 itself mandates that after the investigation is “assigned” to SFIO by the Central Government, he has to conduct the investigation in the manner & follow the procedure as given in Chapter XIV of the 2013 Act. It does not speak of S. 173 CR.P.C. or Cr.P.C.

IV -- S.212(13) permits any person to obtain copy of that investigation report.

V -- As per S. 212(14), Central government has to examine investigation report & it may then direct the IO to initiate prosecution.

VI -- Under S.212(15) such investigation report filed in Special Court by SFIO is deemed to be a report filed by the police officer under S. 173 of CrPC.

VII -- In this backdrop, it will not be proper to appreciate the

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HIGH COURT OF JUDICATURE AT BOMBAY

situation in the light of S. 173 CrPC. There is nothing in S. 212 of 2013 Act to demonstrate that interim report under S. 212(11) can not be an investigation report. When the Central Government calls for the interim investigation report, there is nothing in S. 212(14), which prohibits the Central Government from considering it.

VIII -- Though our attention has been drawn to the portions of report which states that investigation into affairs of other companies or into cross-check or cross linkages in their accounts is still not over, that by itself does not mean that said report is incomplete & not conclusive on any facet of the crime. If there are large number of accounts/entries to be verified, a report after investigation into some entries stating that the fraud has been committed, can not be viewed as incomplete or inconclusive. If such few instances of fraud are sufficient to support the charge, such report , though not prepared after completing the investigation into all affairs of the company, can still be looked into by the Central Government under S.212(14).

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HIGH COURT OF JUDICATURE AT BOMBAY

IX -- The Petitioners urge that the report is inconclusive & further investigation is bound to impact or negate the conclusions recorded therein. The contents of the said report show that findings therein may be contingent upon the verification of cross linkages of other group companies.

X -- Provision for default bail in S. 167 CrPC is to put the investigating machinery to notice that it has to complete the investigation within stipulated time. Hence, use of S. 212 (11) power conferred upon it by the Parliament, by the Central Government to call interim report & its processing to prevent use of “default bail” provision can not, without anything more be seen as malafide.

XI --- The provision deeming investigation report filed by SIFO in Court for the purposes of framing of charges to be a report filed by a police officer under Section 173 CrPC itself reveals that such report need not be identified as either interim one or then, in contrast to it, a final one. Distinction between report under S.212(11) & (12) is not relevant under S. 212(15).

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HIGH COURT OF JUDICATURE AT BOMBAY

However said report has to be one on the strength of which the Central Government issues the direction to SFIO to file the prosecution.

XII -- Question whether said report is “final” or “interim” needs to be answered by reading the report & its title or nomenclature can not be decisive. If such report points out the possibility of change of conclusions therein due to subsequent investigation, it can not be seen as report filed for framing the charge as the definite charge can not be framed or founded on it.

XIII --- Direction issued by the central government under S. 212(14) enables the SFIO to lodge the prosecution. Otherwise, after submitting the investigation report, he is helpless. If this direction is not in existence or is void, the prosecution has to fail. It is not the plea of the respondents that the officer who prepared the processing note had already worked on the case and as such, it was possible for him to prepare that note within short time between 28.05.2019 to 29,05,2019.

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HIGH COURT OF JUDICATURE AT BOMBAY

XIV -- This note & the report running into 750 pages was then within 30 hours considered by two officers that too, one after the other, which appears to be highly improbable. The processing note would not absolve the concerned officer of his obligation to apply mind personally & therefore verify the correctness of the appreciation in the processing note itself. Again, the respondents do not plead that the officer(authority) who acted on behalf of the Central Government, was already associated with the investigation and hence, was in position to appreciate the SFIO's interim report fast with the help of other officer who is alleged to have prepared a processing note.

XV-- Superior nature of responsibility cast upon that officer/authority & degree of care to be taken is demonstrated by the provision made by the Parliament for obtaining the legal advise before taking such decision on the report of the SFIO.

XVI —It therefore follows that “report” perused by the Central Government and persuading it to issue the “direction”,

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HIGH COURT OF JUDICATURE AT BOMBAY

therefore only must be filed for framing of charges.

XVII-- Respondent SIFO admits that the Court has not taken cognizance of the report. In these facts, if cognizance is not taken, the Court may not have power to remand & the detention of the Petitioner director may not be legal. However, in present matter, we are not required to answer this question.

XVIII -- CrPC is made applicable to the proceeding before the Court & if in absence of cognizance, there is no such proceeding, S. 167 may not apply to investigation if chapter XIV in 2013 Act contains completes code on the investigation. Arguments on default bail by petitioner director therefore may be misconceived. However, we are leaving this issue open in present matter.

XIX -- As the respondents do not plead on affidavit and bring on record the basic facts to indicate a possibility of due application of mind by the authority granting “direction” to prosecute, no disputed question in relation to such process

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HIGH COURT OF JUDICATURE AT BOMBAY

under S. 212(14) of 2013 Act arises before us. As such, there is no scope for claiming that arguments of the petitioners about non-application of mind raise a disputed question which can be examined during trial.

203-- Adv. Khambata has relied upon **(1974) 1 SCC 242- Nagindas Ramdas vs. Dalpatram Ichharam**, paragraph-27 to urge that admissions in reply by MCA and SFIO that SFIO report under S. 212 is an interim report are judicial admissions which stand on much higher footing and are binding on them. **(2019) 5 SCC 266 : Serious Fraud Investigation Office Vs. Rahul Modi and another**, paragraph 30 is relied upon to submit that prosecution can not be lodged on the strength of such interim report. Learned Single judge of Madras High Court has in **PMC Mercantile Pvt. Ltd, vs. State - (2014) 3 MWN (Criminal) 454** (paragraph 11 and 18) found that report submitted before completion of investigation by SFIO is not a complete report under S. 173(2) CrPC and based on it, cognizance can not be taken by the Magistrate. Such report can not be used to defeat or deny the default bail under S. 167 (2)

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HIGH COURT OF JUDICATURE AT BOMBAY

of CrPC. The Division Bench judgment of Andhra Pradesh High Court in **1966 Cr.L.J. 1377-- Bandi Kotayya vs. The State**, paragraphs 8 & 9 are also pressed into service for this purpose. **2011 SCC online All 641-- Bhartendu Pratap Singh vs. State of U.P.** delivered by learned Single Judge of Allahabad High Court is relied upon to urge that further investigation as per S. 173(8) does not permit continuing the investigation at hand. Various other High Court judgments are also relied upon for this purpose.

204---- The haste with which direction to lodge prosecution was given in less than 30 hours after receipt of a 732 page report of SFIO with about 32,000 pages as annextures, can be examined in the light of observations of Hon. Apex Court in para 18 of **(2018) 6 SCC 676 – K.K. Mishra vs. State of Madhya Pradesh**. Paragraphs 10 to 15 of **(1995) 5 SCC 302 – Aniruddhasinghji Jadeja vs. State of Gujrat** also show an instance of non-application of mind. **(1997) 7 SCC 622- Mansukhlal Vithaldas Chauhan vs. State of Gujrat**, paragraphs 17 to 19 show the effect of non-application of mind

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HIGH COURT OF JUDICATURE AT BOMBAY

and how it vitiates the sanction itself and the prosecution has to fall to ground. **1948 ILR 316 PC-Gokulchand Morarka vs. King Emperor** at pages 326 & 328 are also relied upon to urge that the sanction is a condition precedent for prosecuting the petitioners. If sanction is defective, the trial court does not become a court of competent jurisdiction. Support is also drawn from **AIR 1949 PC 264-- Yusofalli Mulla vs. King Emperor** para 15. **(1979) 4 SCC 172-- Mohd. Iqbal Ahmed vs. State of A.P.** para 3 to urge that case without proper sanction is void ab initio, **(2000) 8 SCC 500- Abdul Wahab Ansari vs. State of Bihar**, para 7 & 8 which is case of no sanction, **(2005) 8 SCC 370-State of Karnataka vs. Nagrajaswamy,** para 15 & 19 reaching same view independently, are also pressed into service. Division Bench judgment of this Court in **2017 SCC online Bom 9434-- Ashok Chavan vs. His excellency Shri Ch. Vidyasagar Rao** relying upon this law and considering the order in review granting sanction particularly paragraphs 63 to 66 & 68 is also relied upon. Paragraphs 38,39, 45, 47 & 48 in **(2007) 1 SCC 1- Praksh Singh Badal vs. State of Punjab & Haryana** is also

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HIGH COURT OF JUDICATURE AT BOMBAY

explained with contention that in matter before us, no distinction can be made between invalid sanction and absence thereof. We may note that here in paragraph 47, the Hon. Apex Court states that question whether there is application of mind or not needs to be answered in facts & circumstances of each case and there can not be any generalized formula for it.

205---- Admitedlly, Email and the processing note has not been given and as such an adverse inference needs to be drawn in present facts, as per **(1973) 3 SCC 581**- **Union of India & Others vs. Messrs Rai Singh Dev Singh Bist**.

206 Status of report under S. 173 and further course of action are explained in para 50 & 51 of ***Kamlapati Trivedi vs. State of West Bengal: (1980) 2 SCC 91*****,** where the Hon. Court observes that sections 169 and 170 do not talk of the submission of any report by the police to the Magistrate, though they do state what the police has to do short of such submission when it finds at the conclusion of the investigation

(1) that there is not sufficient evidence or reasonable ground of

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HIGH COURT OF JUDICATURE AT BOMBAY

suspicion to justify the forwarding of the accused to a Magistrate (Section 169) or (2) that there is sufficient evidence or reasonable ground as aforesaid (Section 170). In either case, the final report of the police is to be submitted to the Magistrate under sub-section (1) of Section 173. Sub-section

(3) of that section further provides that in the case of a report by the police that the accused has been released on his bond (which is the situation envisaged by Section 169), the Magistrate shall make "such order for the discharge of such bond or otherwise as he thinks fit". The courses open to the Magistrate in such a situation can be seen in judgment in case of **Abhinandan Jha vs. Dinesh Mishra**. We have taken note of the deeming fiction made in S. 212(15) supra, which equates a report of SFIO filed by him for the "framing of charge" as report under S. 173 CrPC. Hence, this precedent or other judgments need not be gone into.

207---- We find that effort made to distinguish the cases of "no sanction" and "defective sanction" or reliance upon **(2007) 1 SCC 1-Praksh Singh Badal** by Adv. Venegaonkar is

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HIGH COURT OF JUDICATURE AT BOMBAY

misconceived here. ***State of Punjab and Anr. vs. Gurdial Singh and Ors.: (1980) 2 SCC 471*** paragraph 9, shows that whenever power is abused or the colourable exercise is appearent, that exercise must be seen as non-existent. Order dated 29/5/2019 is therefore void and therefore it is not existing. Action initiated on the basis is therefore void and unsustainable.

208--- Adv. Ponda for the petitioner Director has submitted that the sanction or approval sought by SFIO is not to the final report but to an interim report and this step by SFIO as also respondent no. 1 Union of India through MCA is fraud on S. 212

(12) & (14). The fact that a report has been prepared by SFIO and made over to the MCA is not in dispute. Respondent no. 1 Union of India claims that it has considered it and directed SFIO to lodge the prosecution. This direction dated 29.5 2019 is also on record.

209---- Report made over to UOI by SFIO does not label itself as an interim report and on record, there is copy of one

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HIGH COURT OF JUDICATURE AT BOMBAY

more report also prepared by SFIO which expressly puts a label as “interim report” on said report. S. 212 (11) empowers central government to requisition & obliges SFIO to submit “interim report”. No arguments have been advanced before us on the purpose behind this power and what the central government can do with it. The central government may appreciate the progress made or developments seen in SFIO's report. There appears to be no bar for central government to treat it in terms of S. 212(14) and proceed to issue such directions as deemed fit including one to lodge the prosecution. This conclusion is inevitable due to “deeming fiction” about the status of said report in S. 212(15). A report submitted by the SFIO to the Special Court for the purpose of framing charge needs to be recognized as report under S. 173 CrPC. It follows that in a given situation, the interim report under S. 212(11) may also qualify as report under S. 173 CrPC on the strength of this deeming fiction. Though the term “interim report” is employed in S. 212(11), there is no word “final report” in entire

S. 212 of 2013 Act. We therefore do not find it necessary to embark on exercise of evaluating the case-law cited by the

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HIGH COURT OF JUDICATURE AT BOMBAY

respective learned Advocates.

210--- The subject report runs into more than 730 pages and it has about 32,000/ pages as annextures. Parties have relied upon its portions to urge that it is not complete or it is complete. This report is on IFIN only and its transactions with other group companies or third parties have not been looked into. If this report is not on stand alone basis, the further investigation into affairs with others may have some effect on findings in interim report. Whether all conclusions in the report are therefore provisional or then, there are any or few findings which may not get eclipsed by such investigation into cross linkages or transactions interse, is the moot question. Parties have not invited our attention to any one transaction which has been investigated into fully & reveals some fraud or tampering. Admittedly, the report does not project itself as an interim report under S. 212(11) and the Central Government has not supplied to petitioners the communication with reference to which it was filed by SFIO. It is difficult to presume that office of SFIO would of its own, file any report of incomplete

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HIGH COURT OF JUDICATURE AT BOMBAY

investigation. Alleged processing note prepared by somebody to facilitate its consideration is also not given to the petitioners despite demand. These documents are not produced before us also to help us to understand the situation. Petitioners therefore have rightly argued & asked this Court to draw adverse inference against the respondent no. 1. In proceedings before NCLT, the MCA has described this report as an interim report. Various judgments have been cited to demonstrate that this “admission” of the status of report is conclusive while the respondents argue otherwise. SFIO states that description of his report by MCA does not estopp him from urging that it is not an interim report and from placing the truth before any Court or Tribunal.

211----- Above rather confusing state of affairs shows the unwillingness on part of the respondents to bring on record the best evidence viz. material which will result in clarifying the facts and instead, an attempt to project the same using some adjudicatory principles. It is humanly impossible to read & appreciate such a large report of the SFIO, apply mind & give

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HIGH COURT OF JUDICATURE AT BOMBAY

the appropriate directions within 30 hours. Respondent 1 UOI claims that two officers independently & separately read all these papers running into about 756 + 32,000/ pages and applied mind to it within 30 hours. Assistance of a processing note prepared for that purpose was also taken. In absence of such processing note & the responsible affidavit of the concerned competent person/s, it is difficult to accept this submission.

212----- Even the contention that the reference in pleadings to report of SFIO as an “interim” one is an inadvertent error or a loose description, is not supported by any responsible affidavit.

213---- Respondents do not pick any one transaction as an illustration of full investigation and did not attempt to demonstrate that it is complete in all respects. There is no endeavour to show that the book entries in relation to it are false, fabricated and the investigation by SFIO into affairs of other Companies or into crosslinkages can not have any impact

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HIGH COURT OF JUDICATURE AT BOMBAY

on it. Respondents do not even whisper that “such” transaction is prima-facie sufficient to sustain the charges for which the prosecution is directed.

214---- Word “interim” may not imply always that the conclusions of SFIO are tentative or provisional and likely to change as the investigation progresses. Though the petitioners may not be wholly right in contending that the admissions on status of report are determinative; in these facts the burden was on the Respondents to demonstrate that there was atleast one final determination in said report of SFIO. If such conclusion is supported by investigation as done, the contentions about malafide use of power or colourable use to defeat S. 167 CrPC may not be sustainable. However, when there is no such effort & no material on record before respondent no. 1 or before this Court, the objection about the non-availabilty of the required report under S. 212(14) and also of non-application of mind needs to be upheld.

215 ---- We have already reproduced supra Section 212 of

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HIGH COURT OF JUDICATURE AT BOMBAY

2013 Act. Under S. 212 (6), if the offence complained of to the Special Court is under S. 447 of 2013 Act, it is declared cognizable under S. 439. All other offences are declared to be not cognizable under S. 439. These sections are placed in Chapter XXVIII which deals with Special Courts. Complaint or report under S. 212(15) is to be filed before the Special Court only. S. 438 deals with application of CrPC to the proceedings before such special Court and it reds-

> "438. Application of Code to proceedings before Special Court.— Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be 1[deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be,] and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor."

It is seen that such proceedings before the special court commence here after the directions u/s. 212 (14) to SFIO when SFIO files a report in such special court. This report shall be after completion of investigation by SFIO. Such report shall make out a case for framing of charge. CrPC applies to proceedings before the Court and there is no express provision extending it to the investigation by SFIO in

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HIGH COURT OF JUDICATURE AT BOMBAY

Chapter XIV of 2013 Act.

216-- Chapter XIV in 2013 Act deals with Inspection, Inquiry & Investigation. Powers conferred thereunder to call for information, to inspect books & conduct inquiries, search & seizure, power to investigate under S. 210 and 213 into affairs of Company, Establishment of SFIO and his procedure, procedure & power of Inspectors under S. 217, seizure u/s. 220, provision for freezing of assets and imposition of restrictions upon securities, investigation to continue though steps towards voluntary winding up are initiated and other sections show the complete scheme which may not have been required if CrPC was to fully apply. S. 212(2) gives primacy & exclusive powers to SFIO and restrains all other agencies from proceeding further with any such investigation.

Special procedure for bail prescribed in S. 212(6) and (7) may become most relevant in this backdrop.

217--- Moot question is significance of Chapter XIV & Chapter XXVIII. Whether these two chapters permit or do not

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HIGH COURT OF JUDICATURE AT BOMBAY

permit recourse to default bail is the controversy which perhaps may fall for consideration. Whether the Parliament can, by a law, deny such a bail will also be a question when investigation has to be not only in the offence which has surfaced but a deeper scrutiny of records of concerned company and several other companies/concerns to verify the cross-linkages & impacts becomes essential. Thus the extent of crime, its sweep and area occupied by it may be unfathomable. It may take considerable time. Grant of default bail in such situations or in circumstances like present one may tantamount to giving the accused benefit of his own wrongs. The power under S. 212(11) with Central Government to call for interim report from SFIO, no express bar to direct SFIO to initiate prosecution under S. 212(14) on its strength or over riding deeming fiction created under S. 212(15) all may require proper appreciation. We can not observe more on this aspect in absence of an occasion for proper assistance from the parties. With respect, we may note that **Serious Fraud Investigation Office Vs. Rahul Modi and another** (supra) also does not specifically deal with this issue. In present matter, we

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HIGH COURT OF JUDICATURE AT BOMBAY

are not called upon to decide it. In any case, as will be seen little later since the direction dated 29/05/2019 issued to SFIO is void, we are not required to examine it.

218----- The judgment in **Rakesh Kumar Paul vs. State of Assam --(2017) 15 SCC 67**, in paragraphs 38 & 39 points out the importance of S. 167 CrPC. There the Apex Court has observed ---

" 37. This Court had occasion to review the entire case law on the subject in *Union of India* v. *Nirala Yadav*[11]. In that decision, reference was made to *Uday Mohanlal Acharya* v. *State of Maharashtra*[12] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (*Nirala Yadav case*[11], SCC p. 472, para 24)

"'*13*. (*3*) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.' (*Uday Mohanlal case*[12], SCC p. 473, para 13)"

38. This Court also dealt with the decision rendered in *Sanjay Dutt*[9] and noted that the principle laid down by the Constitution Bench is to the effect that if the charge-sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond."

This judgment or other judgments like **State of Uttar**

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HIGH COURT OF JUDICATURE AT BOMBAY

Pradesh Vs. Lakshmi Brahman and another, : **Raj Kishore Prasad Vs. State of Bihar and anr**., **Hardeep Singh Vs. State of Punjab** ,

A.S. Gaurava and anr. Vs. S.N. Thakur and anr & **Brahman & another vs. State** (supra) need not be dealt with in present matter.

219 -- To evaluate the arguments on non-application of mind by the Central Governmenr while issuing direction to lodge prosecution in less than 30 hours after a 732 page report of SFIO with about 32,000 pages as annextures came to it, observations of Hon. Apex Court **K.K. Mishra vs. State of Madhya Pradesh**. (supra) become relevant. There the cross-examination of Public Prosecutor demonstrated that the wholesome requirement spelt out by Sections 199(2) and 199(4) CrPC, as expounded by Apex Court in *Subramanian Swamy*, has not been complied with. Hon. Court states that a Public Prosecutor filing a complaint under Section 199(2) CrPC without due satisfaction that the materials/allegations in complaint discloses an offence against an authority or against a public functionary which adversely affects the interests of the State would be abhorrent to the principles on the basis of which

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HIGH COURT OF JUDICATURE AT BOMBAY

the special provision under Sections 199(2) and 199(4) CrPC has been structured as held by this Court in *P.C. Josh* and *Subramanian Swamy*. These observations also apply to requirement of application of mind in S. 212(14) of 2013 Act. The Public Prosecutor in terms of the statutory scheme under the Criminal Procedure Code plays an important role. He is supposed to be an independent person and apply his mind to the materials placed before him. In the case before Hon. Apex ourt, the press meet was convened by the appellant on 21-6- 2014. The Government accorded sanction to the Public Prosecutor to file complaint under Section 500 IPC against the appellant on 24-6-2014 which was filed by the Public Prosecutor on the very same day i.e. 24-6-2014. The Apex Court finds that haste with which the complaint was filed prima facie indicated that the Public Prosecutor may not have applied his mind to the material placed before him as held in *Bairam Muralidhar case*. Hon. Court observed that therefore the conviction of the appellant-K.K. Mishra and the sentence imposed would not have any legs to stand. As the very initiation of the prosecution was found to be untenable in law,

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HIGH COURT OF JUDICATURE AT BOMBAY

merely because the trial ended in the conviction of the appellant and the appeal was pending before the High Court, it would not come in the way of Supreme Court interdicting the same. The special and extraordinary jurisdiction under Article

142 of the Constitution of India was used to quash the impugned prosecution/proceedings including the appeal pending before the High Court.

220----- **Aniruddhasinghji Jadeja vs. State of Gujrat** (supra) is the case where the DSP did not exercise the jurisdiction vested in him by the statute and did not grant approval to the recording of information under TADA in exercise of his discretion but it was found to be a clear case of exercise of power on the basis of external dictation.

221----- **Mansukhlal Vithaldas Chauhan vs. State of Gujrat**, paragraphs 17 to 19 show the effect of non-application of mind and how it vitiates the sanction itself and the consequential prosecution has to fall to ground. The sanctioning authority has to consider the entire relevant

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HIGH COURT OF JUDICATURE AT BOMBAY

material which implies application of mind. Its order must disclose that exercise. This exercise can be proved by extrinsic evidence by producing all files before the Court in support of the fact that entire relevant material was then placed before the sanctioning authority. The discretion or freedom with said authority to reach its decision independently can not be encroached upon.

222------ We need not dilate more on this aspect since the rival arguments on status of SFIO's report itself show the absence of application of mind to relevant facets having bearing on it. The direction by the Central Government under S. 212(14) impugned before us itself should have shown whether any one instance of financial bungling has been fully investigated into & it prima-facie shows commission of an offence or not. Such an application of mind would have revealed that examination of cross-linkages with other group companies would not have any impact on it. This assumes significance since the report itself indicates need of further investigation into cross-linkages & cross-check of transactions

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HIGH COURT OF JUDICATURE AT BOMBAY

with other companies. Absence of such a positive prima-facie finding in the impugned direction does not permit or require leading of any evidence to support the decision contained in said direction. The stand of the Respondents that the precedents cited need to be distinguished into two categories – one dealing with “no sanction” and the others dealing with “defective sanction”, therefore, does not hold any water. The direction dated 29/05/2019 is therefore untenable in law.

223-- Answer to question whether the Central Government could have moved application for change of auditor in the NCLT proceedings which are stayed by this Court on the liberty given by the Hon. Apex Court when it dismissed SLP need not detain us as all parties agree that the Companies Act, 2013 does not contain any other provision empowering the Central Government to move such request & no other forum except NCLT. Leave or liberty given by the Hon. Apex Court is not in dispute & the burden was therefore on the petitioners to explain how that liberty could have been used. Even otherwise, the order dated 18.10.2019 can not be seen as adverse to any

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HIGH COURT OF JUDICATURE AT BOMBAY

of the petitioner before us. It does not violate the interim orders of this High Court dated 4/9/2019.

224----- We have considered all the relevant arguments advanced before us by the respective learned counsel with the necessary case law. Parties have argued at length orally & have also, in addition, placed the brief written notes with case-law. We have also narrated their arguments to the extent necessary and attempted to avoid prolixity in the backdrop of our findings. As the prayers in the writ petitions are not identical, we proceed to pass the final orders.

225---- –:**ORDER**:--

In the light of this discussion, we proceed to pass the following orders in these writ petitions:--

WP 4144 & 4145 OF 2019.

A-- S. 140(5) of the Companies Act, 2013 is not

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HIGH COURT OF JUDICATURE AT BOMBAY

unconstitutional and hence,prayer cl. (a) is rejected.

B-- Company petition no. 2062 of 2019 filed by Union of India (MCA) before NCLT on 10th June 2019 is held not tenable qua these petitioners after M/s BSR resigned as statutory auditors of IFIN on 19/06/2019.

C-- Order dated 09/08/2019 passed by the NCLT rejecting the objection of the petitioner dated 14/07/2019 is quahed & set aside to that extent. MA 2505 & 2506 of 2019 filed by these Petitioners in NCLT are accordingly allowed.

D-- Direction under S. 212(14) of the Companies Act, 2013 dated 29/05/2019 issued by respondent no. 1 Union of India to respondent no. 2 SFIO is unsustainable and it is quashed & set aside. The consequential prosecution lodged by the respondent no. 2 SFIO vide Cr. Complaint no. CC 20 of 2019 on the file of Special Court (Companies Act) and Additional Sessions Judge, Greater Mumbai; is therefore not maintainable and it is also quashed & set aside.

E-- Petitions are partly allowed & disposed of. Rule made absolute accordingly with no orders as to costs.

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HIGH COURT OF JUDICATURE AT BOMBAY

WPs 5023, 5035 & 5036 OF 2019.

A- S. 140(5) of the Companies Act, 2013 is not unconstitutional and hence,prayer cl. (a) is rejected.

B- Direction under S. 212(14) of the Companies Act, 2013 dated 29/05/2019 issued by respondent no. 1 Union of India to respondent no. 2 SFIO is unsustainable and it is quashed & set aside. The consequential prosecution lodged by the respondent no. 2 SFIO vide Cr. Complaint no. CC 20 of 2019 on the file of Special Court (Companies Act) and Additional Sessions Judge, Greater Mumbai; is therefore not maintainable and it is also quashed & set aside. Accordingly, prayers (b), (c) & (d) therein are granted.

C-- Each Petition is partly allowed & disposed of. Rule made absolute accordingly with no orders as to costs.

WP 5263 of 2019.

A- Direction under S. 212(14) of the Companies Act, 2013 dated 29/05/2019 issued by respondent no. 1 Union of India to respondent no. 2 SFIO is unsustainable and it is

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HIGH COURT OF JUDICATURE AT BOMBAY

quashed & set aside. The consequential prosecution lodged by the respondent no. 2 SFIO vide Cr. Complaint no. CC 20 of 2019 on the file of Special Court (Companies Act) and Additional Sessions Judge, Greater Mumbai; is therefore not maintainable and it is also quashed & set aside. Accordingly, prayers (a) is granted.

B-- With liberty to the petitioner Hari Sankaran to file appropriate proceedings for his release or for bail and keeping all his contentions open for consideration therein, we reject the other prayer clauses.

C-- Petition is partly allowed & disposed of. Rule made absolute accordingly with no orders as to costs.

NITIN R. BORKAR,J. **CHIEF JUSTICE**

At this stage, learned senior counsel appearing for respondent no 1 seeks stay of the judgment to the extent it holds the direction to file prosecution unsustainable. The request is being opposed by the petitioners. However, we find that during the pendency of the present challenge, the

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HIGH COURT OF JUDICATURE AT BOMBAY

petitioners were protected by interim orders of this court and the prosecution could not proceed furhter. We therefore, continue this interim order for the period of eight weeks from today. Subject to this, the judgment to the extent it quashes the direction to prosecu te issued on 29/5/2019 is stayed for 8 weeks.

NITIN R. BORKAR,J. **CHIEF JUSTICE**

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