

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.09.2020

+ **CRL.REV.P. 1308/2019 and CRL.M.A. Nos. 43209/2019, 3644/2020, 7626/2020, 7627/2020 & 10502/2020**

DR. RAJESH KUMAR YADUVANSHIPetitioner

Versus

SERIOUS FRAUD INVESTIGATION OFFICE (SFIO) & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Pinaki Mishra, Senior Advocate and Mr Sachin Datta, Senior Advocate with Ms Prity Sharma.

For the Respondents: Mr Chetan Sharma, ASG with Mr Anurag Ahluwalia, CGSC for SFIO (R-1). Mr Dhruv Mehta, Senior Advocate with Mr Rajesh Gautam and Mr Anant Gautam, Advocates for PNB.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition impugning a summoning order dated 16.08.2019 issued by the learned ASJ in *Complaint Case No. 770/2019* captioned "*Serious Fraud Investigation Office (SFIO) v. Bhushan Steel Limited and Ors.*", to the limited

extent that it directs issuance of summons to the petitioner. The learned Court had found that there was sufficient material placed on record against the petitioner for him to face prosecution in respect of offences under Sections 128, 129, 448 read with Section 447 of the Companies Act, 2013 (hereinafter referred as 'Companies Act'). The petitioner is one of the 287 persons/entities that are accused in the said complaint and against whom summons have been directed to be issued in terms of the impugned summoning order. However, the scope of the present petition is confined in the direction to issue summons to the petitioner.

2. The petitioner was Punjab National Bank Limited's nominee on the Board of Directors of Bhushan Steel Limited (hereinafter referred as 'BSL') at the material time. The principal issue that arises for consideration in this case is whether the petitioner can be prosecuted for the alleged fraud committed by BSL and/or promoters solely for the reason that the petitioner was a director of BSL and, whether there is any material on record to indicate that the petitioner was complicit in the commission of the alleged offence.

3. The summoning order was issued pursuant to Criminal Complaint No. 770/2019 (hereinafter referred as 'complaint') filed by the Serious Fraud Investigation Office (hereinafter referred as 'SFIO'). The said complaint was filed pursuant to the investigation carried out by SFIO into the affairs of BSL and other companies. The Government of India had by an order dated 03.05.2016 issued directions to SFIO under Section 212(1) of the Companies Act to

investigate into the affairs of certain companies (fifteen in number) including BSL. Subsequently, approval was also granted to SFIO to investigate the affairs of other companies based on the material that was collected during the investigation.

4. SFIO submitted its investigation report into the affairs of BSL and one hundred and fifty six other companies (hereinafter referred as 'Investigation Report') to the Government of India on 27.06.2019. Thereafter, on 29.06.2019, Ministry of Corporate Affairs, Government of India issued directions to the SFIO to initiate prosecution against the accused persons for the offences mentioned in the complaint. In all, two hundred and eighty seven persons/entities have been arrayed as accused in the said complaint. The petitioner is arrayed as accused no. 175 (A-175). SFIO alleges that during the course of investigation, it found that ex-promoters of BSL [Brij Bhushan Singal (A-158) and Neeraj Singal (A-159)] were directly or indirectly controlling one hundred and fifty seven companies including BSL. SFIO categorised these accused companies into four categories, namely, A, B, C and D. Category A comprises of two companies – BSL and Bhushan Energy Limited (hereinafter referred as 'BEL'). It is alleged that the said category of companies had generated funds, which were diverted to various other companies controlled by Brij Bhushan Singal and Neeraj Singal – (hereinafter collectively referred as 'Promoters'). Category B companies comprises of sixty-two companies and it is alleged that these companies were incorporated by the Promoters and they were either initial subscribers to the Memorandum of Association or

directors in the said companies. SFIO alleges that the funds received in these companies were diverted to purchase properties in the name of the companies or invested as promoter's equity in the form of preference shares in BSL. The third category of companies, namely C category, comprises of eighty-five companies. These companies were in turn divided into sixteen groups where employees of BSL were appointed as directors from time to time. It is alleged that some of these companies were used for providing manpower while the remaining companies were used for diversion of funds from BSL. Category D comprises of eight companies, which were allegedly managed by entry operators primarily engaged in providing accommodation entries. These were used as a conduit for diversion of funds from BSL and other associated companies of the Promoters. It is alleged that these companies were managed by dummy directors for the benefit of the Promoters.

5. The Promoters were required to maintain an appropriate debt equity ratio in BSL and for the said purpose, were required to infuse capital in the said companies. SFIO alleges that the Promoters aided and assisted by their employees and close associates, had through a series of concerted actions using a web of companies, siphoned funds from BSL and BEL – fund generating companies – from the year 2009-10 onwards. Apart from inducing part of the said funds as capital, the Promoters also used part of the said funds to purchase movable and immovable properties.

6. SFIO alleges that the funds were siphoned off using various

methods. One such method was to transfer the funds from BSL and BEL to associate companies (Category B and C companies) by reflecting the same as 'capital advances'. It is alleged that the recipient companies then transferred the funds through one or more layers of associated companies of the Promoters, to BSL, as promoter's equity. It is alleged that these transactions took place in the year 2009-10 and 2010-11. SFIO further alleges that during the financial year 2013-14 and 2014-15, the amounts receivable from eighteen companies in category B and fourteen companies in category C were adjusted from the head 'Capital Advances' to 'Capital Work In Progress'. SFIO alleges that in the year 2011-12, three category B companies and the Promoters routed ₹575 crores, which was borrowed from banks and reflected the same as investments in preference shares of BSL. The interest payments for these loans were made through funds that were siphoned off from BSL through various companies. The said companies and Promoters repaid the loans from the proceeds received from redemption of preference shares of BSL in the year 2015-16 and 2016-17.

7. SFIO alleges that the financial position of BSL became precarious and it was unable to meet its repayment obligations. The loan account of BSL was accordingly classified as SMA-2 and a Joint Lenders Forum (hereinafter referred as 'JLF') was constituted. The JLF, in its meeting held on 23.04.2014, adopted a Corrective Action Plan (hereinafter referred as 'CAP'), which envisaged rectification of the financial position of BSL through Cash Gap Funding. It was

envisaged that there would be a cash flow shortfall to the extent of ₹9100 crores during the financial year 2013-14 till the financial year 2015-16. The said shortfall was to be funded by a loan of ₹6900 crores and infusion of ₹2200 crores in the form of Equity/Sale of Assets/Sale and lease back of Assets. In order to comply with these requirements of the lenders, the Promoters projected that they had infused ₹237 crores as equity and ₹566 crores as preference shares. SFIO alleges that funds were siphoned off from BSL and the same were then infused as investments in the name of the Promoters either in form of subscription to equity shares or preference shares of BSL.

8. SFIO has in some detail set out the manner in which the Promoters had allegedly siphoned off funds from the generating companies through the web of companies. It is not relevant to set out the alleged *modus operandi* in any detail for the purpose of this petition. Suffice it to state that the gravamen of SFIO's allegation is that the Promoters had borrowed funds in companies from various lenders including Punjab National Bank (hereinafter referred as 'PNB') and State Bank of India (hereinafter referred as 'SBI') and had through an elaborate scheme siphoned off the said funds through other companies for their gains. It is alleged that to achieve the said end, they were assisted by various other persons and employees.

9. Insofar as the petitioner is concerned, the petitioner was a Nominee Director of PNB on the Board of BSL.

10. On 12.05.2015, the petitioner was directed by the Competent

Authority of PNB to be inducted on the Board of BSL as PNB's Nominee Director. He was, thereafter on 14.08.2019, appointed as a Director in BSL and continued to hold the said office till 08.10.2017. Admittedly, the petitioner did not share any executive responsibilities of BSL and his role was that of a Non-Executive Director. The petitioner continued to function as a whole-time employee of PNB and at the material time, he was working as an Executive Director of the said bank. The petitioner claims that during the period that he held the office of a nominated director on the Board of BSL, he acted in good faith and there is no material to even *prima facie* conclude that the petitioner is guilty of any offence under Sections 128, 129 and 448 of the Companies Act. The petitioner contends that the impugned summoning order is *ex facie* erroneous and without application of mind.

11. In view of the above, the scope of the present petition is limited to examining whether there is sufficient material on record against the petitioner for him to be proceeded against for the offence under Section 128, 129, 448 read with Section 447 of the Companies Act.

Submissions

12. Mr Pinaki Mishra, learned senior counsel appearing for the petitioner submitted that the complaint filed by the SFIO sets out the specific allegations against the accused persons under various heads but no culpable act is attributable to the petitioner. He drew the attention of this Court to the complaint, which details the *modus*

operandi through which the Promoters had siphoned off the funds from BSL and BEL. He referred to paragraph no. 38 of the complaint, which contains the statement to the aforesaid effect. He thereafter, pointed out that the complaint sets out the specific allegations against the accused persons. The first allegation relates to fraudulent routing of funds, which is described in paragraphs 39 to 56 of the complaint. Paragraph 57 of the complaint sets out the names of individuals, who are liable to be prosecuted for fraudulent routing of funds. There is no allegation that the petitioner was even remotely connected or aware of the same and, therefore, his name does not feature as being involved in the fraudulent routing of funds. The next allegation pertains to commission of fraud through Letters of Credit route. Paragraphs 58 to 70 of the complaint sets out the alleged *modus operandi* of using Letters of Credit to siphon off funds. The role of various individuals in commission of the said offence is also mentioned in the complaint. Paragraph 67 refers to manipulations of ‘stock-in-transit’. The names of the persons who are allegedly responsible for the same are mentioned in paragraph 68 of the complaint. Paragraph 70 of the complaint lists out the names of the individuals liable for prosecution, as being involved in some way or the other, in commission of the fraud through Letters of Credit. The petitioner’s name is not mentioned in paragraph 70 of the complaint and is also not mentioned amongst the individuals who are specifically involved in the said culpable acts. Paragraphs 71 to 73 of the complaint relates to inducing lender banks to grant facilities to BSL. Paragraphs 71 to 73 set out the roles of different individuals who are liable to be prosecuted for

inducing lenders to give credit to BSL. The petitioner's name does not feature as one of the said persons.

13. Paragraphs 75 to 79 of the complaint sets out allegations against different individuals allegedly involved in the falsification of accounts and non-discharge of duties by the audit committee. Mr Mishra pointed out that the petitioner's name is not mentioned in paragraphs 75 to 79 of the complaint that set out and specify the roles of different individuals in falsification of the accounts. However, paragraph 80 of the complaint mentions the name of the persons who are allegedly liable to be prosecuted under Section 128, 129, 448 read with Section 447 of the Companies Act and the petitioner's name is mentioned therein. Apart from the above, the complaint also sets out allegations under the headings: Failure to discharge duties as Statutory Auditors; Manipulation of the Books of Accounts viz. Concealment of true state of affairs; Financial statements not giving true and fair view of the affairs of Category B and C Companies; Concealment of Books of Accounts; and Non-declaration of beneficial interest.

14. Mr Mishra submitted that merely mentioning the petitioner's name as being one of the persons who is allegedly liable to be prosecuted under Sections 128, 129 and 448 of the Companies Act, without ascribing any specific role or pointing out any culpable conduct would not constitute sufficient material to persuade any Court to issue summons. He further emphasized that there was no allegation in the complaint that the petitioner has connived with the Promoters or any other person to falsify the accounts and, therefore, the impugned

order is wholly erroneous.

15. Next, Mr Mishra contended that the petitioner could not be prosecuted under the Companies Act, in view of the specific provisions of Section 16A of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 [hereinafter the Banking Companies (Acquisition and Transfer of Undertakings) Act]. He submitted that the petitioner is sought to be prosecuted solely on the ground that he was a Director on the Board of BSL. However, Section 16A of the Banking Companies (Acquisition and Transfer of Undertakings) Act clearly provides an immunity to a Nominee Director from any such prosecution. He submitted that the petitioner could not be held vicariously liable for any offence committed by the company and unless there is material to show that he had individually committed any culpable act or had not acted in good faith, there was no question of prosecuting the petitioner.

16. Mr Mishra relied on the decision of the Supreme Court in *Birla Corporation Ltd. v. Adventz Investments and Holdings Limited and Ors.*: (2019) 16 SCC 610; *Pepsi Foods Limited v. Special Judicial Magistrate*: (1998) 5 SCC 749; and *Sunil Bharti Mittal v. Central Bureau of Investigation*: (2015) 4 SCC 609, in support of his contention that summons can be issued only after due application of mind and after concluding that there is sufficient ground for proceeding against an accused. He also drew strength from the aforesaid judgments in support of his contention that and the reasons for proceeding against an accused should be briefly indicated in the

said order. He submitted that since there is no specific allegation against the petitioner in the complaint, the Court could not have proceeded on the basis that the petitioner had connived for falsification of the account. He submitted that apart from the fact that no such allegation had been made, there was also no material to support the said view.

17. Mr Mishra referred to a letter dated 19.01.2015 issued by the Department of Financial Services, Ministry of Finance, whereby it confirmed that the provisions of Section 2(60) and 161(3) of the Companies Act are inapplicable to Nominee Directors of Public Sector Banks. It noted that the Statutory Public Sector Banks had specific provisions in the statutes constituting those banks that stipulated that Nominated Directors would not incur any obligation or liability, by reason of being a Director or for anything done or omitted to be done in good faith in discharge of his duties as a Director. The provisions of Section 16A of the Banking Companies (Acquisition and Transfer of Undertakings) Act was also referred to in the said letter. Mr Mishra submitted that in view of the said clarification, there was no question of proceeding against any Nominee Director of a Public Sector Bank in respect of any act done or omitted to be done in discharge of its duties as a Director, unless it was established that he had acted in bad faith and was complicit in commission of any such offence.

18. Mr Sharma, learned ASG appearing for SFIO (respondent no. 1) submitted that an investigation into the affairs of BSL had established

that the Promoters and their family members assisted by employees and close associates had used a complex web of one hundred and fifty-seven companies to siphon off funds from BSL for various purposes. It was also established that they had fraudulently availed of credit from various lender banks and manipulated the books of accounts and financial statements of BSL, thus, causing wrongful loss to banks, financial institutions, and public investors and a wrongful gain to the Promoters and their family members. He submitted that the petitioner was a Nominee Director appointed by PNB on the Board of BSL and was expected to be independent, vigilant and cautious against any fraudulent acts committed by BSL. He was also required to raise red flags and inform PNB of any fraudulent activity. He submitted that the petitioner had specialized knowledge, which ought to have benefited BSL as well as PNB in protecting their interest. However, the purpose for which the petitioner was appointed as a Nominee Director was not served and fraud had been committed on a massive scale over a course of time. He further submitted that the petitioner had access to financial statements and other critical information including various reports of forensic audit, stock audits and concurrent audits instituted by the lenders and therefore, it could not be stated that he did not have any opportunity to analyze the financial statements at the Board Meeting. He submitted that figures relating to stock-in-transit were inflated to avail loan facilities from banks and the true position was concealed only to reflect that the financial condition of BSL was healthy. He stated that under the garb of complying with Indian Accounting Standards (hereinafter referred as 'IndAS'), the financial statements

for the financial year 2016-17 indicted reduced figures of stock-in-transit and receivables. The inflated figures of the previous two years had also been recast and reflected in the financial statements for the year 2016-17. The said statements had been approved by the Board of Directors of BSL and the petitioner was a party to approving the said financial statements. The said financial statements were not only not in compliance with IndAS but also did not reflect the true and fair view of the affairs of BSL. Thus, the petitioner also had a key role in the fraud by BSL.

19. He further submitted that the Circular dated 19.01.2015 issued by the Department of Financial Services, Ministry of Finance, Government of India could not override the provisions of the Companies Act. He also submitted that the said letter would have no relevance while examining the applicability of provisions of Sections 447 and 448 of the Companies Act, which relate to fraud.

20. Lastly, Mr Sharma submitted that although there was no specific allegation in the complaint that the petitioner was complicit and had acted in connivance with BSL, the complaint expressly stated that the roles played by various individuals had been set out in the Investigation Report furnished by SFIO and therefore, the same was required to be read as a part of the complaint. He submitted that if the Investigation Report was perused, the involvement of the petitioner in commission of the offences would be clear. He also stated that the learned Court had not only examined the complaint and the Investigation Report but also all material furnished along therewith

and, therefore, the Court's view was not restricted only to the averments mentioned in the complaint filed by SFIO.

21. Mr Rajesh Gautam, learned counsel appearing for PNB (respondent no.2) referred to Section 16A of the Banking Companies (Acquisition and Transfer of Undertakings) Act and submitted that a Nominee Director could not be prosecuted solely because he or she was on the board of the said Company. He submitted that the immunity afforded to such Nominee Directors was unqualified and unfettered. He also referred to the decision of the Division Bench of the Kerala High Court in *K Subramony v. The Official Liquidator: (2010) 157 Comp Case 61*, wherein the Court had held that a Nominee Director of a financial institution is not engaged in regular management of the company such as maintenance of books of accounts, filing of returns etc. which are conducted by regular employees including whole time or working director. Such directors cannot be assigned any work by the company. They can only be called to attend and participate in the meetings of the Board of Directors and cannot be held responsible for acts and omissions, which the officers of the company including other members of the Board of Directors are required to comply. He also submitted that the provisions of Section 16A of the Banking Companies (Acquisition and Transfer of Undertakings) Act must be interpreted in a purposive manner to give full effect to the intent of enacting the said provision.

22. After the arguments in the present petition were heard and the orders were reserved, the petitioner filed another application seeking

to place on record and rely on an Office Memorandum dated 16.07.2020 issued by the Government of India, Ministry of Finance, Department of Financial Services. The said Office Memorandum accepted that the petitioner and other Nominee Directors of BSL were not responsible for the fraud committed by BSL. In terms of the said Office Memorandum, the Ministry of Corporate Affairs was requested to review the action taken by SFIO against the Directors nominated by PNB, SBI and LIC. The said Office Memorandum also referred to the Office Memorandum dated 27.09.2019 issued by the Central Vigilance Commission (hereinafter referred as 'CVC') accepting the representation made by the petitioner and the Nominee Director of SBI that they did not get sufficient time at the Board Meeting to analyze the financial statements. It was accepted that it was not possible for them to examine the same in view of the limited time that is available for discussion of the agenda items at the Board Meetings. It was also pointed out that BSL is a Public Listed Company and its financials cannot be disclosed prior to the Board Meeting.

23. The relevant extract of the Office Memorandum dated 27.09.2019 issued by the CVC and accepted by the Ministry of Finance, Government of India in the Office Memorandum dated 16.07.2020, is set out below:

“2. Both the officers in their representations have submitted that the SFIO alleged that they did not raise valid concerns during the Board Meetings, which resulted in manipulations of the amount of stocks-in-transit, which figures were adjusted under the garb of

migration to the new Accounting Standards, viz. Ind AS. In this regard, both the officers clarified that M/s BSL is a listed company. Financial Statements and Auditor's Report were price sensitive, hence these were not circulated to the Nominee Directors seven days in advance, but were tabled at Board meeting. In a span of few minutes allotted for discussions on this particular agenda item, it is practically impossible for anyone to analyse the results in detail, compare all the figures with the previous year's figure, much lesser reconcile the figures of stocks-in-transit and that too for a multiproduct and multi-locational company. The figures of stocks-n-transit did not separately figure as an agenda item for discussion for that Board Meeting. As a Board Member, they were not involved in drawing up of Trial Balances of M/s BSL, or of finalizing of their accounts. It is practically impossible for a Nominee Directors on the Board to re-work all the calculations appearing in the Financials, when the Internal Audit, Statutory Audit and the Audit Committee of the Board are supposed to have deliberated on these issues.

3. After considering the representations, the Commission is of the view that the officers did not get sufficient time at the Board Meeting to analyse the financial statement and participate effectively in the decision making process and thus there is merit in the representation of the officers. The Commission, therefore, would advise the CVO, DFS to examine the matter thoroughly and take up the issue with Ministry of Corporate Affairs/SFIO at the earliest.”

Reasons and Conclusion

24. At the outset, it is relevant to note that there is no allegation that the petitioner was involved in the affairs of BSL except in his capacity as a Nominee Director of PNB. In such capacity, he was not assigned

any executive work of BSL but was merely required to attend and participate in the Board Meetings of BSL. The petitioner is, essentially, being prosecuted on account of the financial statements approved during the Board Meetings, in which, the petitioner was present.

25. As noticed above, the allegation is that over a period of time, spanning several years, the Promoters of BSL in connivance with their employees and several other entities had fraudulently siphoned off funds from BSL. Allegedly, they had shown an inflated net worth of the said company and had fraudulently induced lenders and other investors to invest in the said company. The petitioner held the office of a Director of BSL at the material time when the financial accounts for the years ended 31.03.2016 and 31.03.2017 were considered and were approved by the Board of Directors of BSL. The financial statements of BSL for the year ended 31.03.2016 were approved at the meeting of the Board of Directors of BSL held on 06.08.2016. However, the petitioner was not present at the said meeting and was granted leave of absence. Concededly, the petitioner cannot be proceeded in respect of the financial statements and other reports as approved by the Board of Directors of BSL at the meeting held on 06.08.2016. The petitioner is, essentially, being proceeded on account of his participation in the meeting of the Board of Directors of BSL held on 05.07.2017 and for approving the financial statements for the year ended 31.03.2017 as well as the Director's Report for the said year.

26. It is necessary to bear in mind that SFIO's allegation is of a deep seeded fraud involving several entities/individuals, which had been perpetrated over a period of several years. It is alleged that the Promoters of BSL had in connivance with its employees fraudulently reflected their assets including stock-in-transit at inflated figures during the years prior to the financial year 2016-17. With effect from 01.04.2016 (that is, with effect from the financial year 2016-17), it became mandatory for companies to draw up their final accounts in accordance with the IndAS. It is alleged that under the guise of recasting the accounts in accordance with IndAS, the values of assets that were earlier inflated, were reduced and a large amount was written off.

27. The value of stock-in-transit which was reflected at ₹6,524.20 crores at the end of the financial year 2015-16 was recast to ₹298.14 crores as on 31.03.2016, as reflected in the statements for the financial year ending 31.03.2017. The final accounts for the year ended 31.03.2017 were drawn up in accordance with the IndAS and were approved at a meeting of the Board of BSL held on 05.07.2017. It appears that that there is no dispute that the figures of current assets including stock-in-transit, as on 31.03.2017, was correctly reflected in the statements for the year ended 31.03.2017. However, the said accounts also disclosed figures of current assets as on 31.03.2016 and previous years as recast in accordance with IndAS. It is alleged that there was no material difference as far as accounting for inventories or trade receivables under IndAS and the previous accounting standards

(GAAP) followed by BSL, but under the guise of recasting the said accounts, a large amount had been written off in the books of accounts to correct the inflated figures of current assets, which had been inflated earlier to fraudulently avail of higher loans from various lenders. It is contended that under Section 128(1) and 129(1) of the Companies Act, it was essential to ensure that the accounts and financial statements reflect a true and fair view of the state of affairs, thereby, the said provisions are violated. The Director's Report included a note explaining the recasting of the accounts, which is alleged to be false and misleading. As mentioned above, it is alleged that recasting of the accounts was itself a part of the fraud to conceal the fraud perpetrated in previous years.

28. It is apparent that the petitioner is not being prosecuted on account that the financial statements for the year ending 31.03.2017 reflect an incorrect figures against various heads of assets and liabilities; the petitioner is, essentially, being prosecuted because it is alleged that the said financial statements also reflect the recast figures of stock-in-transit and other current assets pertaining to previous years. There does not appear to be any controversy that the figures as recast reflect a true and fair view. However, it is alleged that the figures of current assets reflected in the statements of earlier years was highly inflated and the same are also indicated in the statements pertaining to the financial year ended 31.03.2017 for the limited purpose of reflecting the figures that would have been reflected in financial statements of those years if IndAS was complied with.

29. The financial statements of BSL for the year ended 31.03.2017, which were approved by its Board of Directors on 05.07.2017, conceal the true reason for recasting the figures of the current assets including the stock-in-transit. It is alleged that the reason for recasting the said figures was not on account of any material difference in the accounting policy, but the ostensible reason to migrate to IndAS was used as a subterfuge to recast the figures that had been inflated earlier to avail of higher loans from lenders. It is also alleged that the notes made in the Director's Report and the financial accounts are inaccurate and thus, the said statements do not reflect a true and fair view of the state of affairs of BSL.

30. The learned Trial Court had found that in view of the aforesaid allegations there was sufficient material on record to proceed against the petitioner under Sections 128, 129, 448 read with 447 of the Companies Act.

31. At this stage, it would be relevant to refer to Section 128, 129, 447 and 448 of the Companies Act. Sub-section (1) of Section 128 of the Companies Act mandates that every company shall prepare and keep at its registered office books of accounts and other books and papers and financial statements for every year, which gives a true and fair view of the state of affairs of the company. In the present case, it is alleged that BSL did not maintain books, papers and financial statements that reflect a true and fair view of the state of affairs of the company. Sub-section (6) of Section 128 provides for the punishment that can be imposed for violation of the provisions of Section 128 of

the Companies Act. Sub-Section (6) of Section 128 of the Companies Act is set out below: -

“(6) If the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person of a company charged by the Board with the duty of complying with the provisions of this section, contravenes such provisions, such managing director, whole-time director in charge of finance, Chief Financial officer or such other person of the company shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.”

32. Section 129(1) of the Companies Act mandates that financial statements shall give a true and fair view of the state of affairs of the company and shall comply with the accounting standards notified under Section 133 of the Companies Act and shall be in the form(s) as provided in Schedule III to the Companies Act. Sub-section (7) of Section 129 of the Companies Act provides for the punishment that can be imposed for violation of the provisions of Section 129 of the Companies Act. Sub-section (7) of Section 129 of the Companies Act is set out below: -

“(7) If a company contravenes the provisions of this section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty

thousand rupees but which may extend to five lakh rupees, or with both.”

33. The plain language of Section 128(6) and Section 129(7) of the Companies Act indicates that only the executives of the company or any other person charged by the Board of Directors to comply with the provisions of the said Sections would be liable for punishment, if the same are contravened. The primary duty to carry on the affairs of the company including maintaining the books of accounts rests with the managing director, the whole-time director and other persons charged with the management of the company. It is well settled that a Nominee Director is not obliged to carry out any executive functions and cannot be charged with performance of any executive function of the company.

34. In *K Subramony v. The Official Liquidator* (*supra*), the Kerala High Court has held as under:

“..... As already stated, a Director appointed by a financial institution to the Board of a company has to predominantly protect the interest of the financial institution. Financial institutions advance funds to the company by way of loans or they even participate in the equity of the company. As a director representing the Financial Institution, he is concerned about the application of funds by the company, financial management etc. and he should ensure that the company acts not to the detriment of the interest of the financial institution. Therefore, nominee director of a financial institution is not engaged in regular

management of the company such as maintenance of books of accounts, filing of returns etc. which are routine works of regular employees including whole time or working director. In fact it is for the financial institution to oversee whether their nominee Director acts in such a way to protect it's interest and for his acts and omissions, it is for the financial institution to take action depending on his terms of appointment or to remove him, if he is found unfit. In other words, we are of the view that a Nominee Director is not involved in the routine management of the company and he cannot be assigned any such work by the company except to be called to attend meetings and to participate in the proceedings of the Board of Directors required under the Companies Act and the Memorandum and Articles of Association. So much so, Directors appointed by financial institutions cannot be held responsible for acts and omissions which the officers of the company including other members of the Board of Directors are required to comply with. However, for any act or omission as a director not done in good faith, even a Director nominated by a financial institution under Section 27(1) of the SFC Act can be proceeded against.”

35. The aforesaid decision was rendered in the context of Section 27(3)(b) of the State Financial Corporation Act, 1957, which is similarly worded as clause (b) of Section 16(2) of the Banking Companies (Acquisition and Transfer of Undertakings) Act. Section 16A of the Banking Companies (Acquisition and Transfer of Undertakings) Act is set out below: -

“16A. Arrangement with corresponding new bank on appointment of directors to prevail.—(1)Where any arrangement entered into by a corresponding new bank with a company provides for the appointment by the corresponding new bank of one or more directors of such company, such provision and any appointment of directors made in pursuance thereof shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 (1 of 1956), or in any other law for the time being in force or in the memorandum, articles of association or any other instrument relating to the Company, and any provision regarding share qualification, age limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director appointed by the corresponding new bank in pursuance of the arrangement as aforesaid.

(2) Any director appointed as aforesaid shall—

(a) hold office during the pleasure of the corresponding new bank and may be removed or substituted by any person by order in writing of the corresponding new bank;

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(c) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement.”

36. It is also important to note that it is not the SFIO’s case that the petitioner was charged with performance of any such function. SFIO in its counter affidavit (as well as the Investigation Report) states that *“since the company has not charged any person to comply with*

requirement under Section 129(7) of the Companies Act, 2013, the complete Board of Directors of BSL are liable for prosecution for violating the provisions of Section 129 under Section 448 of the Companies Act, 2013". However, Mr Sharma, learned ASG did not dispute that in terms of Section 16A(2)(b) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, the petitioner being a Nominee Director could not be proceeded against for any violation of provisions of Sections 128 and 129 of the Companies Act unless it was established that he had not acted in good faith.

37. It is clear from the plain language of Section 16A(2)(b) of the Banking Companies (Acquisition and Transfer of Undertakings) Act that a Nominee Director would not incur any obligation or any liability by reason only of his being a director or for anything done or omitted to be done in good faith in discharge of his duties as a director or anything in relation thereto.

38. It is also well settled that a Director cannot be vicariously held responsible for any offence committed by the company unless the relevant statute itself so indicates or there is material to indicate that the particular individual is responsible for perpetrating the said offence.

39. In *Sunil Bharti Mittal v. Central Bureau of Investigation: (2015) 4 SCC 609*, the Supreme Court had observed as under:

“43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can

be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.”

40. The petitioner is also being proceeded against under Section 448 read with Section 447 of the Companies Act. Sections 447 and 448 of the Companies Act are set out below:

“447. Punishment for Fraud.- Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

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

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of

such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

Explanation.—For the purposes of this section—

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

(ii) “wrongful gain” means the gain by unlawful means of property to which the person gaining is not legally entitled;

(iii) “wrongful loss” means the loss by unlawful means of property to which the person losing is legally entitled.

448 – Punishment for false statement

Save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement, -

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material, he shall be liable under Section 447.”

41. A plain reading of the provisions of Section 448 of the Companies Act indicates that a person would be liable under Section 447 of the Act only if he makes a statement knowing it to be false or omits any material fact knowing that the said fact is material. Thus, knowledge that the statement is false or fails to disclose material fact(s) is an essential ingredient of an offence under Section 448 of the Companies Act.

42. Undisputedly, the petitioner cannot be prosecuted solely for the reason that he was a Director on the Board of BSL at the material time when the Board of Directors had approved the financial statements and the Director's Report for the year ended 31.03.2017. The petitioner cannot be proceeded against for any acts of commission or omission done in good faith in discharge of his duties as a Nominee Director.

43. SFIO's contention that all members of the Board of Directors of BSL can be prosecuted for violating Sections 128(1) and 129(1) of the Companies Act, because no other officer had been charged for maintaining the accounts is plainly unmerited. As discussed above, the obligation to maintain true and fair accounts is that of the Company and the Directors of a Company are not vicariously liable for the acts of the Company in the absence of a statutory provision imputing such liability. They can, of course, be proceeded against if it is established that they had individually committed the offence. Further, Section 16A(2)(b) of the Banking Companies (Acquisition and Transfer of

Undertakings) Act expressly grants immunity to a director nominated by a bank for any acts done or omitted to be done in that capacity..

44. Even if it is accepted that the petitioner can be proceeded against for violation of Section 128(1) and/or 129(1) of the Companies Act, on account of the Company not maintaining accounts, books and papers reflecting a true and fair view of the state of affairs of the company, the same can be done only if there is material to allege that the petitioner was aware of the same and had not acted in good faith. Similarly, in terms of Section 448 of the Companies Act, a person is liable for punishment under Section 447 of the Companies Act if the person makes a statement, which he knows to be false or omits any material facts in the statement knowing it to be material.

45. Thus, unless there is material to indicate that the petitioner had knowingly and willfully subscribed to approving the financial accounts of BSL knowing the same to be false and misleading, any prosecution launched against the petitioner would be unsustainable.

46. The learned Trial Court had indicated the reason for proceeding against the petitioner, in paragraph 2.41 of the impugned order. The same is set out below:

“2.41 A-168 to A-178 were also the Independent/ Nominee Directors of A-1 Company who also failed to discharge their duties by conniving and not raising valid concerns which resulted in manipulation in Stock in

Transit leading to adjustment in garb of IndAS.”

47. It is material to note that although the learned Trial Court had reasoned that the petitioner had connived and had not raised valid concerns, which resulted in manipulation of the stock-in-transit leading to adjustment under the guise of IndAS; however, there is no such allegation in the complaint that the petitioner had *connived* or was otherwise *complicit* with the Promoters.

48. Concededly, there is no averment in the complaint that the petitioner was complicit or had connived with the Promoters to approve the financial statements for the year ending 31.03.2017, knowing that the same did not reflect a true and fair view of the state of affairs of the Company and were misleading. There is no allegation in the complaint that the petitioner knew and was aware that the accounts of the previous year had been recast to write off amounts by which the current assets had been inflated in previous years under the guise of migrating to IndAS.

49. Mr Sharma, learned ASG had submitted that although the complaint does not aver that the petitioner has connived with the Promoters, but it mentions that the roles played by various individuals are mentioned in the Investigation Report and, therefore, the said Investigation Report ought to be examined for determining the allegations against the petitioner.

50. In view of the above, the key question to be addressed is whether there is any allegation in the Investigation Report or any material on record which would indicate that the petitioner has connived or has been complicit with the promoters and/or other entities in perpetuating the fraud by approving financial statements, which he knew to be not fairly and truly reflecting the affairs of BSL.

51. The Learned ASG had submitted that the alleged role of the petitioner ought to be viewed on the basis of the Investigation Report submitted by SFIO, which by virtue of paragraph 96 of the complaint was sought to be incorporated as a part of the said complaint. In view of the aforesaid submission, this Court had called upon the learned ASG to refer to the relevant paragraphs of the Investigation Report submitted by SFIO, which would reflect the allegation against the petitioner. He had referred to paragraph 4.94, 5.12.9, 5.12.11 and 5.13.14 of the Investigation Report furnished by the SFIO. The said paragraphs are set out below:

“4.94 In the said meeting, the draft standalone and Consolidated Balance Sheet and statement of Profit & Loss and Cash Flow statement of BSL for the year ended 31st March 2017 and draft auditor’s report were placed before the committee for their consideration and review before submission to the Board for approval. The members of Audit Committee reviewed and financial statement with particular reference to:-

- i Matters required to be included in the director's responsibility statement to be included in the board's report in terms of clause (c) of sub-section (3) of Section 134 of the Companies Act 2013.
- ii Changes, if any, in accounting policies and practices and reasons for the same;
- iii Major accounting entries involving estimates based on the exercise of judgement by management;
- vi Significant adjustments made in the financial statements arising out of audit findings;
- v Compliance with listing and other legal requirements relating to financial statements;
- vi Disclosure of any related party transactions;
- vii Modified opinions(s) in the draft audit report;

The members of audit committee after due deliberations recommended draft Standalone with consolidated balance sheet and statement of Profit & Loss and Cash Flow statement of the company for the year ended 31st March 2017 for approval of the BOD. The above-mentioned report and accounts were adopted by BOD of "BSL" in the AGM held on 16th Sept 2017.

During the course of investigation statement of members of Audit Committee

B.B. Tandon, Ashwani Kumar, CA and M.V. Suryanarayana (S-18) During the course of their deposition they stated that they relied upon the information provided by “BBS” “NJ” along with Statutory auditors. B.B. Tandon, stated that since he was not well versed with the accounting so he relied upon the observation made by the other members of the committee, as one of which was Chartered Accountant.

M.V. Suryanarayana, during the course of his deposition stated that he relied upon the letter given by CEO and CFO with regard to affairs of “BSL”.

All confirmed that they had attended the meeting held on 5th July 2016 where transition from IGAAP to IndAS was made by “BSL”.

In the audit committee meeting both the statutory auditors i.e. R.K. Mehra, CA of Mehra Goel & Co. and M.P. Mehrotra, CA of Mehrotra & Mehrotra were present. During the meeting they also did not raise any objection with regarding to adoption of IndAS, as raised during the course of their deposition before the Investigation. *The information of raw material in transit was material in nature and required deliberation in the committee and AGM which the members approved without raising any objection or issue in this regard.*

The Board of Directors considered and passed the financial statements in the meeting held on 5th July 2016.

The statement of Nominee Director who was present in the meeting held on 5th July 2016 was also recorded. During his deposition he submitted that he relied upon the audited accounts submitted by the auditors of “BSL”.

The statement or information from other directors of Board of “BSL” was examined and it was observed that they simply rely on the observation made by “BBS” and “NJ” with regard to finalization of financials of “BSL”. It also observed one of the independent director Pankaj Sharma was also drawing salary from one of the associated company (Category “C”) of “BBS” and “NS”.

During the course of recording of statement of “BBS” and Pankaj Kumar Agarwal, Head (Accounts), they were specially asked whether BOD has specifically charged any person with regard to compliance of requirement of section 129 of the Companies Act, 2013. They deposed that Board has not charged any person with regard to compliance to the provisions of section 129 of the Companies Act 2013.

The Board had not charged any officer or any other person with the duty of complying with the requirements of section 129 of Companies Act, 2013, or the earlier section 209 of Companies Act, 1956 including for ensuring that the financial statements give a true and fair view of the state of affairs of the company and comply with the Accounting Standards notified under the Companies Act, 1956/2013.

* * *

5.12.9 The Board of Directors of BSL comprised of the ex-promoters, the Whole time Directors, the Independent Directors and the Nominee Directors. The Board of Directors considered and passed the financial statements containing the effect of fraudulent adjustments, as established in Finding 1 – 3. The deteriorating financial position of the company since FY 2013-14 was known to the Board members. At the same time, the “Stock-in-Transit” figures were substantial.

* * *

5.12.11 Nominee Directors on the Board of Directors represented the lender banks, one of the key stakeholders in “BSL”, and had the critical responsibility of safeguarding the interests of “BSL” as well as the lender banks. The Nominee Directors, representing the Banks, had access not only to the financial statements and the accompanying notes/reports but also other critical financial information, including various forensic audit reports, stock audits and concurrent audit reports instituted by the lenders, that had raised a number of red flags about the company. The Nominee Directors abjectly failed in their responsibility to question/object to the fraudulent misstatements in the financial statements and are equally liable for action.

* * *

5.13.14 As stated in Finding No. 12, Nominee Directors on the Board of Directors

represented the lender banks, one of the key stakeholders in “BSL”, and had the critical responsibility of safeguarding the interests of “BSL” as well as the lender banks. The Nominee Directors, representing the Banks, had access not only to the financial statements and the accompanying notes/reports but also other critical financial information, including various forensic audit reports, stock audits and concurrent audit reports instituted by the lenders, that had raised a number of red flags about the company. The Nominee Directors abjectly failed in their responsibility to question/object to the fraudulent misstatements in the financial statements and are equally liable for action.”

(emphasis supplied)

52. A plain reading of paragraph 4.94 of the Investigation Report indicates that the SFIO is largely concerned with the role of the Audit Committee. Insofar as the role of the petitioner is concerned, it merely mentions that he was a Nominee Director of PNB and was present in the meeting of the Board of Directors held on 05.07.2017 (incorrectly mentioned as 05.07.2016 in the Investigation Report) and that he had relied on the audited accounts submitted by the Auditors of BSL. Clearly, paragraph 4.94 of the Investigation Report does not support any allegation that the petitioner was complicit or had connived with the Promoters. On the contrary, it indicates that the petitioner had relied upon the Auditor’s Report in approving the financial statements of BSL. It is mentioned that the petitioner was examined and his

statement was recorded. The said statement also does not indicate that he was complicit with the Promoters of BSL. The petitioner was also asked whether he had tried to verify why and how there was a drastic reduction in the value of stock-in-transit as shown in the balance sheets prepared on 31.03.2016 and 31.03.2017 and he had responded that the Auditors had confirmed that the accounts reflect a true and fair view of BSL. The relevant question and the petitioner's response to the same is material to the controversy and is reproduced below:

“Q. No.20. On 03.06.2019, you were asked to explain the following:-

After the examination of the balance sheet of F.Y 2015-16 it was observed that BSL has shown stock in transit of Rs.6523 crore whereas after the examination of balance sheet of F.Y 2016-17, when the accounts were prepared under IndAS, BSL has shown stock in transit of Rs. 298 crore as on 31.03.2016. Please state whether as a nominee director you tried to verify why and how drastic reduction in stock in transit was shown in the balance sheet, prepared on 31.03.2016 and 31.03.2017.

Ans: I would like to inform that after approval of the financial results by the audit committee the same are placed immediately thereafter to BOD for adoption. During the meeting, statutory auditor of the company confirmed that audit has been conducted by them as per the applicable guidelines and accounts reflect true and fair picture of the company. Hence it was not possible for me to critical analysis the financial results in the meeting as advance agenda regarding result is not given due to price sensitive information. However, the audited results are sent to the lenders and are discussed in consortium/JLF.”

53. It is apparent from the plain reading of paragraph 5.12.9 of the Investigation Report that it also does not contain any specific allegations against the petitioner. It merely states that the Board of Directors of BSL were aware of the deteriorating financial position of the company since the financial year 2013-14 and the figures regarding stock-in-transit were substantial. There is no dispute that the value of stock-in-transit reflected by BSL in its annual accounts for the years prior to the year ending 31.03.2017 were substantial. However, this cannot be construed to mean that the petitioner was aware that the value of stock-in-transit in the years preceding the financial years 2016-17 had been inflated and he knew that the said figures had been recast under the guise of compliance with IndAS, in order to cover up inflating the values in earlier years.

54. The allegations contained in paragraph 5.12.11 and 5.13.14 of the Investigation Report are similar. It is alleged that the Nominee Directors had abjectly failed in their responsibility to question or raise any objections regarding fraudulent misstatements in the financial statements and thus, were liable to be proceeded against. It is also alleged that the Nominee Directors had access not only to financial statements but other reports that had raised a number of red flags about BSL. However, despite the same, they had failed in their responsibility to object to the fraudulent misstatement. According to SFIO, the same made them liable to be proceeded against.

55. It is at once clear that there is no allegation in paragraph 5.12.11 and 5.13.14 of the Investigation report that the Nominee Directors

were aware that figures of certain assets had been falsely inflated in earlier years or that they were aware that the accounts had been recast under the guise of compliance with IndAS to correct the inflated values of current assets. There is also no allegation that the Nominee Directors were aware that the statements approved by them did not reflect true and fair view of the affairs of BSL.

56. There is no allegation that the petitioner had knowingly been a party to make false statements or conceal any material fact. There is a material difference between the allegation that a Nominee Director has been negligent or has failed to discharge his responsibility and an allegation that he has connived or has been complicit in approving statements, which he knows to be false or conceal material information. While the latter may constitute an offence under Section 448 of the Companies Act, the former does not constitute any such offence. In this view, it is clear that the SFIO has not made any allegation in its Investigation Report or in its complaint against the petitioner that falls within the scope of Section 448 of the Companies Act.

57. The learned Trial Court has proceeded on the assumption that there is an allegation that the petitioner has connived with the Promoters and other employees in perpetuating the fraud. Clearly, the Investigation Report submitted by the SFIO also does not make any such allegation against the petitioner.

58. In view of the above, neither the complaint made by the SFIO nor the Investigation Report submitted by the SFIO contains any specific allegations against the petitioner of being complicit or having acted in bad faith. The reasoning of the learned Court that the petitioner had connived with the Promoters and is liable to be proceeded against, is clearly unsustainable and not supported by the allegations made in the complaint or the Investigation Report furnished by the SFIO.

59. Mr Sharma, learned ASG had earnestly contended that the examination by the learned Trial Court at the stage of issuing process was highly restricted and the apposite course for the petitioner would be to seek a discharge from the learned Trial Court under Section 227 of the Cr.PC. He submitted that the learned Trial Court was only required to ascertain whether there was sufficient ground for proceeding against the accused and in this case, there had been a two tier scrutiny as to whether the petitioner should be proceeded against; first by the SFIO and second, by the Central Government while according sanction to SFIO to prosecute the case.

60. Undisputedly, the scope of examination at the stage of issuing process is limited and the concerned Court is not required to evaluate the evidence in any detail. However, it is well settled that even at the stage of taking cognizance, the concerned Court does not act mechanically or as a post office. The Court must apply its mind to the facts of the case and the law applicable thereto. It must satisfy itself that the allegations made in the complaint constitutes an offence. (See:

Birla Corporation Ltd. v. Adventz Investments and Holdings Ltd. and Ors.: (2019) 16 SCC 610).

61. In *Mehmood Ul Rehman v. Khazir Mohammad Tunda and Ors.: (2015) 12 SCC 420*, the Supreme Court has held as under:

“22.The Code of Criminal Procedure requires speaking order to be passed under Section 203 Cr.P.C. when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one’s dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.”

62. In a recent decision of the Supreme Court in *Sunil Bharti Mittal v. Central Bureau of Investigation* (*supra*), the Court had explained the law as under:

“48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

* * *

51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words “sufficient ground for proceeding” appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.

54. However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. No such exercise is done. In this scenario, having regard to the aforesaid aspects coupled with the legal position explained above, it is difficult to sustain the impugned order dated 19-3-2013 in its present form insofar as it relates to implicating the appellants and summoning them as accused persons. The appeals arising out of SLP (CrI.) No. 2961 of 2013 and SLP (CrI.) No. 3161 of 2013 filed by Mr Sunil Bharti Mittal and Ravi Ruia respectively are, accordingly, allowed and order summoning these appellants is set aside. The appeals arising out of SLPs (CrI.) Nos. 3326-27 of 2013 filed by Telecom Watchdog are dismissed.”

63. In the present case, the learned Trial Court has issued summons on the reasoning that it is alleged that the petitioner has connived with the Promoters. However, it is seen that there is no such allegation either in the complaint or in the Investigation Report furnished by the SFIO. Thus, in the given circumstances, this Court does not consider it apposite to relegate the petitioner to approach the Trial Court for seeking a discharge.

64. As noticed above, the petitioner had also made a representation to CVC and had submitted that he barely got few minutes to examine the financial statements and auditor's report and there was hardly any time to carry out any meaningful analysis. He had further represented that as a member of the Board of BSL, he was not involved in drawing up any trial balances of BSL or finalizing of the accounts. It was represented that as a Nominee Director, it is practically impossible to rework the calculations appearing in the financial statements and a Nominee Director cannot be faulted in accepting the financial accounts, once they had been subjected to internal audit, statutory audit as well as detailed examination by the Audit Committee of the Board of Directors.

65. Although the aforesaid explanation appears to be *prima facie* merited and has also been accepted by the CVC, this Court has not considered the said contention as the Trial Court is not required to hear the petitioner prior to issue of summons. This Court has, therefore, confined the examination only to the complaint,

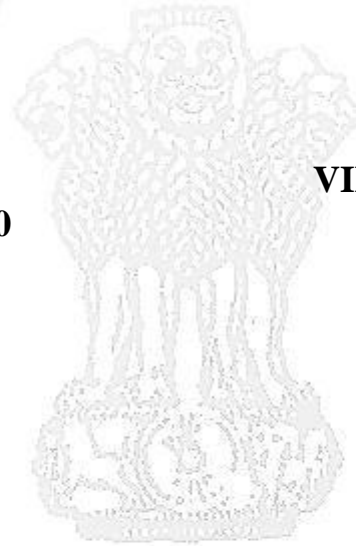
Investigation Report and the material placed by the SFIO before the Trial Court to persuade the Court to issue the summons.

66. In view of the above, the impugned summons issued to the petitioner and the impugned order, to the limited extent that it directs issuance of summons to the petitioner, are set aside.

67. The petition is allowed in the aforesaid terms. All pending applications are also disposed of.

SEPTEMBER 21, 2020
RK

VIBHU BAKHRU, J



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