HON'BLE SRI JUSTICE S.V. BHATT

W.P.No.38841 OF 2016

ORDER:

Heard Mr.Vedula Venkata Ramana, learned senior counsel for petitioner, Mr.K.Lakshman, the Assistant Solicitor General for respondents 1 to 5, Ms.K.Mamatha for respondent No.6 and Mr.Ashwani Kumar for respondent No.7.

The petitioner prays for Mandamus declaring order No.07/131/2011-CL II (SR) dated 10.06.2016 of 1st respondent and the consequential communication Ref: SFIO/CHN/CSITA/Corr. dated 02.08.2016 and the notice dated 21.09.2016 of 4th respondent, as illegal and unconstitutional.

The petitioner challenges the impugned order etc., as not conforming to Section 212 of the Companies Act, 2013 (for short, 'the Act').

The submissions of counsel substantially centered around Section 212 of the Act. Therefore, the circumstances relevant for dealing with these submissions alone are adverted to.

The Medak Diocese of Church of South India Trust Association, Church House, Old Lancer Line, Secunderabad, Telangana, represented by its Director and also the Power of Attorney Holder i.e., Vimal Sukumar is the petitioner. The petitioner is one of the units of Church of South India Trust Association (CSITA), which is registered under the provisions of the Act and it is averred that CSITA is recognized as a charitable company under Section

8 of the Act. On 21.09.2016, the 4th respondent issued notice to Dr.Vimal Sukumar, deponent of the writ affidavit, to produce the registers, documents etc., before 4th respondent on or before 03.10.2016. It is further averred that the 1st respondent has taken up report of the Registrar of Companies under Section 212 (1)(a) and through impugned order dated 10.06.2016, the 1st respondent ordered investigation into the affairs of CSITA by the Serious Fraud Investigation Office (SFIO). The 4th respondent in continuation of the order under Section 212 issued notice dated 21.09.2016. The petitioner challenges impugned proceedings as not conforming to the requirement of Section 212 i.e., "is of the opinion" and reflect mechanical entrustment of investigation to SFIO. Hence, the writ petition.

Mr.Vedula Venkata Ramana contends that Section 212 empowers the Central Government to order investigation into the affairs of a company by SFIO, however, by forming an opinion in this behalf. According to him, the recording of opinion, though is subjective, the order of Central Government for investigation into the affairs of a company by SFIO must reflect expression of at least the subjective opinion or forming of opinion for ordering investigation by SFIO. In the case on hand, the impugned order does not contain opinion and, on the other hand, refers to report sent by the Registrar of Companies under Section 2(8). Therefore, through impugned order investigation by SFIO is in breach of the requirement of Section 212 of the Act and is liable to be set aside. He relies on PARMESHWAR DAS AGARWAL AND ORS. v. THE

ADDITIONAL DIRECTOR (INVESTIGATION), SERIOUS FRAUD INVESTIGATION OFFICE, MINISTRY OF CORPORATE AFFAIRS AND ORS[1] and contends that the ratio laid down by the Division Bench squarely covers the contention raised by the petitioner and prays for setting aside the order etc., impugned in the writ petition.

Respondents 1, 2 and 4 filed counter affidavit. The counter affidavit raises preliminary objections on the maintainability of writ petition. The counter affidavit refers to circumstances preceding the orders impugned in the writ petition and the necessity of investigation by SFIO. The counter affidavit on the contention of writ petitioner viz., the order dated 10.06.2016 is in contravention of Section 212 reads as follows:

> "That the contents of para 7 are wrong and baseless, hence denied. It is submitted that as per the Companies Act, 2013, the Central Government is empowered to order for investigation into affairs of the company either under Section 210 or 212 of Companies Act, 2013 based on the report of the Registrar of Companies (RoC) under Section 208 of the Companies Act, 2013. It is further submitted that as per Section 210 of Companies Act, 2013, the investigation shall be carried out by any inspectors appointed by the Central Government. However, the Central Government without prejudice to the Section 210 of Companies Act, 2103, can order for investigation, which shall be carried out by the SFIO only under Section 212 of Companies Act 2013. It is submitted that in the present matter as per the recommendation of the Registrar of Companies (RoC) under Section 208 of the Companies Act, 2013 and considering the material on record such as the complaints of serious nature, the central government ordered for investigation by the SFIO under Section 212 of Companies Act 2013. On the sake of repetition, it is submitted that the petitioner was incorporated on

[1] (2016) 199 Company Cases 353 BOMB (DB)

26.09.1947 under the Company Identification Number (CIN) U93090TNPL000346 under the Indian Companies Act 1913 as provided under Section 26 Company limited by Guarantee and when the Companies Act, 1956 was introduced by repealing the Indian Companies Act 1913, then automatically the provisions of Section 25 of the Companies Act, 1956 would be applicable to the petitioner company. (now section 8 of the Companies Act 2013). However, the petitioner company vide its ordinary resolution i.e., dated 05.03.2002 & 17.06.2005, changed the MOA and AOA and without obtaining the approval of the Central Government as well as without passing the special resolution as per section 17, 21 & 31 of the Companies Act, 1956

Mr.Lakshman, appearing for respondents 1, 2 and 4, firstly contends that the order impugned in the writ petition is passed after forming the opinion as required by Section 212 and no exception to impugned order, on this ground can be taken. According to him, sufficient material is with Central Government for ordering investigation by SFIO and further, in the case on hand, the investigation is ordered on a report forwarded by the Registrar of Companies under Section 208. The impugned order refers to the report of Registrar of Companies and it is a case of agreement with the report of Registrar by 1st respondent. Therefore, the 1st respondent is deemed to have complied with the requirement of Section 212. According to him, the order impugned is read with the report of Registrar of Companies. He further contends that on the contrary, the expression of any decision of opinion while ordering investigation could be complained as Central Government expressing final view while ordering investigation by SFIO. He produced the record from 1st respondent and by drawing the attention of the Court, to the reports received from Registrar, he contends that no exception to the order impugned dated 10.06.2016 could be taken.

He further contends that ordering investigation, in the case on hand, is not for the sake of asking and the 1st respondent considered the material and thereafter formed the opinion. It is alternatively submitted that even assuming without admitting that the formation of opinion is correctly reflected in the order dated 10.06.2016, the opinion will not go into the merits of the exercise undertaken by the 1st respondent, for there is so much material for re-examining the case and ordering investigation by SFIO. At best, the matter is required to be re-considered by 1st respondent, for the omission relied on by the petitioner does not go to the root or merits of the issue warranting investigation.

Ms.Mamatha and Ashwani Kumar though have raised the objection as to the maintainability of writ petition i.e., at the instance of petitioner and in this Court, but have confined their submissions to the requirement to Section 212 of the Act. The counsel appearing for respondents 6 and 7 have contended that there is sufficient material in the case on hand for ordering investigation by SFIO under Section 212 of the Act and the objection raised by petitioner is purely technical. The counsel for respondents 6 and 7 have adopted the submissions of Mr.Lakshman in this behalf. For brevity, the contentions are not referred once again.

I have perused the record and noted the submissions made on behalf of counsel appearing for the parties.

Now, the points for consideration are –

(i) whether impugned order No.07/131/2011-CL II (SR) dated 10.06.2016 of 1st respondent conforms to the requirement of Section 212 of the Act or not; and

(ii) to what relief?

To appreciate the rival submissions, this Court considers it appropriate to excerpt order dated 10.06.2016 and also Section 212(1) a to d:

Order dated 10.06.2016:

Government of India
Ministry of Corporate Affairs
No.07/131/2011-CL II (SR)

5th Floor "A" Wing, Shastri Bhawan,
Dr.R.P.Road, New Delhi – 110001

Dated: 10th June, 2016

ORDER

Whereas the Central Government is empowered under section 212 of the Companies Act, 2013 to order investigation into the affairs of any company and to appoint one or more competent persons as Inspectors to investigate the affairs of the company.

2. And whereas RoC (Chennai)/RD, Southern Region, vide their report dated 2nd June, 2016 submitted to the Central Government Under section 208 of the Companies Act, 2013 has also recommended investigation into the affairs of the company i.e., M/s Church of South India Trust Association.

3. Now, therefore, in exercise of powers conferred under section 212 (1)(a) of the Companies Act, 2013 the Central Government hereby orders investigation into the affairs of M/s Church of South India Trust Association, to be carried out by the Serious Fraud Investigation office.

4. The Inspectors appointed by Director, SFIO to investigate into the affairs of the above mentioned company, shall exercise all the powers available to them under the Companies Act, 2013. The Inspectors shall complete their investigation and submit the report to the Central Government within a period of six (6) months from the date of issue of this order.

5. Further, if any information is required during the course of investigation, you are requested to depute some officer to coordinate with the Ministry for obtaining the desired documents/information.

6. This order is issued for and on behalf of the Central Government.

Sd/-
(Himanshu Shekhar)
Deputy Director

Section 212(1) a to d

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".

The Division Bench of Bombay High in PARMESHWAR DAS AGARWAL's case interpreted the words viz., "is of the opinion" used in Sections 210 and 212 of the Act. The operative portion of the judgment reads thus:

> "Thus, the principle is that there has to be an opinion formed. That opinion may be subjective, but the existence of circumstances relevant to the inference as to the sine qua non for action must be demonstrable. It is not reasonable to hold that the clause permits the Government to say that it has formed an opinion on circumstances which it thinks exist. Since existence of circumstances is a condition fundamental to the making of the opinion, when questioned the existence of these circumstances have to be proved at least prima facie.
>
> In that light if one peruses the powers conferred under the 2013 Act, they are also identical. By section 206, there is a power to conduct inspection and enquiry by section 207. Both these powers are to be exercised by the Registrar. Then, the report has to be made by the Registrar and the Registrar or the Inspector after inspection of the Books of account or inquiry under section 206 and other books and papers of the company under section 207, shall submit a report in writing to the Central Government along with such documents, if any, and such report may, if necessary, include a recommendation that further investigation into the affairs of the company is necessary. For that, reasons in support have to be set out. We are not concerned with the power of search and seizure vesting in the Registrar in terms of section 209. Then comes the crucial provision in the 2013 Act, namely, section 210. That reads as under :
>
> "210. Investigation into affairs of company.-
>
> (1) Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company -
> (a) on the receipt of a report or the Registrar or inspector under section 208;
> (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or

> (c) in public interest it may order an investigation into the affairs of the company.
> (2) Where an order is passed by a court or the Tribunal in any proceedings before it then the affairs of a company ought to be investigated, the Central Government shall order the investigation into the affairs of that company.
> (3) For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct."

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Section 210 falling in the same Chapter XIV titled Inspection, Inquiry and Investigation contains these two sections. Section 210 confers a discretion in the Central Government to order an investigation into the affairs of the company and that power has to be exercised if there is an order passed by a Court or a Tribunal in any proceedings before it to the effect that the affairs of a company ought to be investigated. Thus sub-section (1) of section 210 confers a discretion while sub-section (2) is mandatory in terms. By sub-section (3) and when the Central Government orders an investigation into the affairs of the company, it may appoint one or more persons as Inspectors so as to carry out this task and to report thereon in such manner as the Central Government may direct. By section 212 the seventeen sub-sections thereof enable investigation into the affairs of a company by Serious Fraud Investigation Office. This power is without prejudice to the provisions of section 210. This power is to be exercised if the Central Government is of the opinion that it is necessary to investigate into the affairs of a company by the SFIO. Therefore, the power to investigate into the affairs of company is common to both provisions. In the former there are three clauses (a) to (c) in sub-section (1) of section 210 and the investigation is to be carried out by the Central Government by appointing Inspectors and there is a discretion in that behalf. This power is stated to be akin to section 235 of the 1956 Act. The latter enables investigations into the affairs of a company by the SFIO and there is one more clause (d) in sub-section (1) of section 212 where the Central Government can act on a request from any department of the Central Government or a State Government. Therefore, in a given case there could be an action initiated on the request of the Central Vigilance Commission or based on its recommendations. However, by its very title, the investigation under section 212 by the SFIO ought to be on the basis of the opinion of the Central Government that it is necessary to investigate into the affairs of the company by SFIO. That opinion has to be based on the report of the Registrar or Inspector under section 208; on intimation of a special resolution passed by a company that its affairs are required to be investigated; in the public interest or on the request from any department of the Central Government or the State Government. By section 211, the SFIO is established to investigate frauds relating to a company. It is a very special office and headed by a Director and consists of such number of experts from the fields enumerated in subsection (2) of section 211 to be appointed by the Central Government from amongst persons of ability, integrity and experience. The wide powers that this office enjoys, as is set out in various sub-sections of section 212, would denote as to how its involvement comes after the investigations are assigned to it by the Central Government. By their very nature the investigations into frauds relating to a company have to be assigned. They have to be of such magnitude and seriousness demanding involvement of experts in the fields enumerated in sub-section (2) of section 211. Therefore, while exercising the powers under sub-section (1) of section 212, the Central Government ought to be not only forming an opinion about the necessity to investigate into the affairs of the company, but further that such investigations have to be assigned to the SFIO.

We do not think that there were materials in the present case and which can be termed as enough to warrant the exercise of power by the Central Government by resorting to section 212(1) of the Act of 2013. The Central Government, in the order under challenge, did not spell out any circumstances, except outlining its power under the above sections to order investigation into the affairs of a company in public interest. None disputes that power or its existence. In para 2 of the impugned order,

> however, a reference is made to the report of the Registrar of Companies, West Bengal, dated 13th January, 2016. We have already held that the findings in this report are not enough for the Central Government to exercise the drastic power. Something more was required and to be established as circumstances or material enough for exercise of the power. That is clearly lacking in this case".

Section 210 deals with investigation into the affairs of company by a person appointed as Inspector to investigate into the affairs of the company. Section 212 deals with investigation into affairs of company by SFIO. Section 212 begins with the words - without prejudice to provisions of Section 210 where the Central Government is of the opinion, that it is necessary to investigate into the affairs of the Company by SFIO, on receipt of a report of the Registrar or Inspector under Section 208, the Central Government may by order, assign the investigation into the affairs of said company to SFIO. The words "without prejudice to provisions of Section 210" in this context mean that the Central Government in a given case by forming opinion on the necessity of investigation by SFIO orders accordingly. Section 212 deals with a different situation than the situations covered by Section 210. In cases warranting investigation by SFIO, the Central Government forms opinion that it is necessary to order investigation by SFIO. The opinion is formed from the sources referred in clauses (a) to (d). Section 212(1) further refers to formation of opinion that it is necessary to investigate into affairs of company by SFIO.

The contention of Mr.K.Lakshman is that it is one thing, if investigation by SFIO is ordered without material or report, but it is altogether different if basing on material/report which is adverted to in the order. In other words, according to him, the reference to what is available on record is sufficient satisfaction of requirements of formation of opinion on the necessity of investigation by SFIO. This Court is in agreement with the reasoning in PARMESHWAR DAS AGARWAL's case and the impugned order could be set aside. But as a distinction is attempted between the order impugned in the writ petition and the order considered in PARMESHWAR DAS AGARWAL's case, this Court considers the impugned order and requirement of Section 212 independently.

The petitioner is not challenging the jurisdiction or authority of 1st respondent to order investigation by SFIO. Therefore, the procedure followed by the 1st respondent alone is examined in this writ petition. According to Merriam Webster's Dictionary of Law, the word "opinion" means–

> a belief stronger than impression and less strong than positive knowledge

Therefore, the 1st respondent is required to form an opinion i.e., something more than mere re-telling of gossip or hearsay and reflects judgment or belief resulting from what one thinks on a particular question. Such belief or conviction is manifested by 1st respondent in ordering investigation by SFIO. The words "is of the opinion" "that it is necessary to investigate" impose a jurisdictional duty on Central Government to form opinion on the necessity of investigation by SFIO. The material before Central Government is considered from the view point of necessity of such investigation by SFIO. Without again juxtaposing the operative portion of the order impugned in the writ petition, it can be held that the order impugned in the writ petition by itself does not show the existence of opinion, much less necessity for ordering investigation by SFIO. This Court hastens to add that no particular expression is suggested and it is accepted that the opinion depends upon case to case basis. But the subjective opinion, if is available in the order passed for investigation by SFIO, then the Central Government is satisfying the requirement for ordering investigation by SFIO. If the contention of Mr.Lakshman i.e., the report under Section 208 is available, there is reference to report in the order impugned and that conforms to the requirement of Section 212, is untenable, for if such is the intention of Parliament, then the syntax or structure of Section 212 would have been otherwise. The section is interpreted as the section stands by following the settled principles of interpretation. In the case on hand, this Court is of the view that the order dated 10.06.2016 of 1st respondent does not reflect forming opinion on the necessity for investigation by SFIO.

As already noted, the record of CSITA is produced before the Court.

For the above reasons, it is held that the order impugned in the writ petition does not satisfy the requirements i.e., "is of the opinion", "that it is necessary to investigate" in Section 212 (1) of the Act. The order dated 10.06.2016 is set aside and the consequential proceedings dated 02.08.2016 and notice dated 21.09.2016 are also set aside. The matter is remitted to 1st respondent for exercise of its jurisdiction under Section 212 of the Act, basing on the report of the Registrar of Companies, within three weeks from the date of receipt of a copy of this order.

It is clarified that this Court has not examined the merits of the matter, and after perusing the record produced, the issue is remitted back to 1st respondent for re-consideration afresh in accordance with Section 212 of the Act.

The writ petition is ordered as indicated above. There shall be no order as to costs.

Pending miscellaneous petitions, if any, stand closed.

S.V.BHATT, J

16th November, 2017

<u>Note</u>:

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