2025:DHC:7433

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment pronounced on: 28.08.2025***

\+ **W.P.(C) 261/2025, CM APPLs. 1249/2025 & 5825/2025**

NITA PURI .....Petitioner

Through: Dr. Abhishek Manu Singhvi (Senior Advocate) along with Mr. Vaibhav Mishra, Mr. Ekansh Mishra, Mr. Avishkar Singhvi, Mr. Rajeev Goyal, Mr. Vijay Aggarwal, Mr. Rachit Bansal and Mr. Shubham Tiwari, Advocates.

versus

UNION OF INDIA .....Respondent

Through: Ms. Rupali Bandhopadhyay (CGSC) along with Mr. Abhijeet Kumar, Advocate for UOI.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition has been filed by the petitioner, an ex/suspended director of Moser Baer India Ltd. (hereinafter *"MBIL"*), assailing the order dated 05.09.2024 issued by the Ministry of Corporate Affairs, Government of India, under Section 212(1)(c) of the Companies Act, 2013 (hereinafter *"Act, 2013"*), directing the Serious Fraud Investigation Office (hereinafter *"SFIO"*) to conduct an investigation into the affairs of MBIL, and its "subsidiaries including joint venture and associate companies as on date".

2. MBIL, stated to have been incorporated in 1983 by the petitioner's late husband, was engaged in the manufacture of CDs, DVDs, and other

optical media. In 2012, MBIL sought relief under the Corporate Debt Restructuring ("CDR") Scheme of the Reserve Bank of India. Pursuant thereto, the Corporate Debt Restructuring Empowered Group ("CDR-EG"), comprising a consortium of lender banks, commissioned a Stock Audit and a Techno-Economic Viability ("TEV") study. Based on the findings of the Stock Audit report dated 16.06.2012 prepared by M/s RRCA & Associates and the TEV Report dated 09.06.2012 prepared by M/s Ernst & Young, MBIL was classified as a "Class B" borrower and formally admitted into the CDR framework. Notably, MBIL was not categorized as "Class C" or "Class D," which are typically assigned to entities suspected of fraud, misfeasance, or other financial irregularities.

3. In 2017, MBIL was admitted into insolvency proceedings before the National Company Law Tribunal, New Delhi. Subsequently, the Interim Resolution Professional ("IRP"), acting at the instance of the Committee of Creditors ("CoC"), commissioned a Forensic/Special Purpose Audit of MBIL, covering the financial years 2015–2016, 2016–2017 and 2017–2018 (up to the insolvency commencement date, i.e., 14.11.2017). The said Forensic/Special Purpose Audit, conducted by Kashyap Sikdar & Co. (hereinafter "Sikdar Report), aimed to ascertain instances of financial irregularities, including diversion of funds, siphoning of assets, or fraudulent transactions. The Sikdar Report revealed no adverse findings.

4. During the CoC meeting held on 05.05.2018, pursuant to the presentation of findings of the Sikdar Report by the auditor, the CoC accepted the said audit report, affirming that no evidence of Preferential, Undervalued, Fraudulent and Extortionate (PUFE) transactions on the part of MBIL was found. In the same meeting, the CoC approved the

engagement of M/s GSA & Associates to conduct a Forensic Audit of the MBIL for the period between 01.04.2012 and 31.03.2015. The audit report prepared by M/s GSA & Associates (hereinafter *"GSA Report"*) was submitted to the Liquidator on 03.06.2019.

5. Meanwhile, Bank of Baroda, one of the financial creditors of MBIL, issued a Show Cause Notice dated 13.03.2020 to the erstwhile directors of MBIL, calling upon them to explain why they should not be declared wilful defaulters. It is pointed out that the said Show Cause Notice was primarily based on the findings contained in the GSA Report.

6. Thereafter, on 19.08.2022, the Identification Committee of Bank of Baroda declared Mrs. Nita Puri and Mr. Ratul Puri, (the ex-directors of MBIL), 'Wilful Defaulters'. The said declaration was affirmed by the Review Committee of the Bank vide order dated 23.03.2023.

7. The said declaration was challenged before this Court in W.P.(C) No. 4181/2023 titled ***'Ratul Puri vs. Bank of Baroda*** (hereinafter *"BOB judgement"*). *Vide* judgment dated 29.02.2024, a coordinate Bench of this Court set aside the order passed by the Identification Committee and the Review Committee, holding inter alia that prior to admitting MBIL into CDR, it was incumbent upon the banks to investigate as to whether instances of fraud, malfeasance, diversion or siphoning existed. It was noted that the MBIL was admitted for CDR without imposition of any onerous conditions, indicating no such irregularities existed at the relevant time.

8. An appeal (LPA No. 396/2024), filed against the BOB judgment was dismissed by the Division Bench vide order dated 08.08.2024.

9. Separately, in 2016, the State Bank of India ("SBI") had issued a Show Cause Notice under the 'Wilful Defaulter Master Circular'. The

declaration was challenged in W.P. (C) No. 2336/2023 titled ***Ratul Puri vs. State Bank of India & Anr.*** (hereinafter *"SBI judgement"*). As recorded in the SBI judgment dated 20.03.2023, SBI undertook not to act upon the Review Committee's findings, and the wilful defaulter proceedings stood dropped. No appeal was filed against the said judgment, which has attained finality.

10. The grievance of the petitioner is that despite the aforementioned judicial findings, including the binding decision in BOB judgement, the impugned order dated 05.09.2024 has been issued by the respondent, relying upon the same forensic audit reports. The petitioner, being an ex/suspended director, emphasizes that the impugned investigation may prejudice her rights and interests.

SUBMISSIONS ON BEHALF OF THE PETITIONER

11. In the above conspectus, learned senior counsel for the petitioner has contended as under:

(i) Relying upon the judgment of the Division Bench of Bombay High Court in ***Parmeshwar Das Agarwal & Ors. vs. The Additional Director (Investigation) Serious Fraud Investigation Office & Ors.*** 2016 SCC OnLine BOM 9276, it is contended that the impugned order is *ultra vires* Section 212 of the Act, 2013, as it fails to comply with the statutory prerequisites for invocation of the said provision.

It is submitted that in terms of the aforesaid judgment, an order passed under Section 212(1)(c) of the Act, 2013 must mandatorily reflect the necessity of investigation in public interest, and the reasons justifying the involvement of SFIO. It is submitted that this necessarily flows from the

statutory delineation carved out in Section 212 *viz-a-viz*. Section 210 of the Act, 2013.

(ii) It is contended that the impugned order is predicated on a fundamentally flawed assumption that the forensic audit reports of M/s GSA & Associates and M/s Kashyap Sikdar & Co. revealed "preferential, undervalued, extortionate and fraudulent transactions" (PUFE). Copious reliance is placed on the said audit reports to contend that the said factual premise is non-existent and is not borne out from the said reports.

(iii) As such, it is submitted that the formation of "opinion" for the purpose of Section 212(1)(c) of the Act, 2013 is vitiated, having been arrived at despite 'non-existence' of any relevant circumstance/s. It is submitted that the existence of the circumstance/s (forming the basis of "formation of opinion") is subject to judicial review, and when the non-existence of relevant circumstances (on which any opinion could be founded) is apparent, the order under Section 212(1)(c) cannot sustain. Reliance in this regard is placed on the aforesaid judgment of the Division Bench of the Bombay High Court and also on the judgments of the Supreme Court in ***Barium Chemicals Limited and Anr. vs. Company Law Board and Ors.***, AIR 1967 SC 295, ***Rohtas Industries vs. SD Aggarwal and Ors.***, 1969 1 SCC 325 and ***Rampur Distillery vs. Company Law Board and Anr***, 1969 2 SCC 774.

(iv) It is submitted that the impugned order suffers from material infirmity owing to the non-consideration of the BOB judgment dated 29.02.2024, which was in the backdrop of an identical factual conspectus, involving the same company and, therefore, has a direct and determinative bearing on the present proceedings. Specific reliance is placed on para 107, 144 and 150 of

the said judgment.

(v) It is submitted that the SBI judgment dated 20.03.2023, similarly bears directly on the validity and rationale of the impugned order. It is submitted that in light of the reasons and circumstances detailed in the BOB and SBI judgments, any direction by the Central Government to initiate an investigation under Section 212(1)(c) of the Companies Act, 2013 is untenable.

12. Lastly, it is submitted that confronted with the infirmities in the impugned order, the counter-affidavit filed on behalf of the respondent seeks to furnish certain additional reasons in justification thereof. It is submitted that these additional reasons, are liable to be disregarded in view of the legal position laid down by the Supreme Court in ***Mohinder Singh Gill & Another vs. The Chief Election Commissioner, New Delhi & Ors.***, 1978 1 SCC 405, ***Opto Circuit India Ltd. vs. Axis Bank & Ors.*** 2021 6 SCC 707 and ***Ritesh Tiwari & Anr. vs. State of Uttar Pradesh & Ors.***, 2010 10 SCC 677. Without prejudice, learned senior counsel for the petitioner submits that even the purported additional grounds sought to be relied upon are squarely covered and precluded by the findings in the BOB Judgment.

13. For the above reasons, it is submitted that the present petition merits acceptance, and the impugned order is required to be set aside.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

14. Learned counsel for the respondent has controverted the above submissions of the learned senior counsel for the petitioner and has sought to justify the impugned order. It has been specifically contended that the issues presented before this Court while rendering the BOB judgment were

entirely different. The limited question before the Court in the said proceedings was whether the order declaring the petitioner therein, [Ratul Puri (former Director of MBIL)], as a wilful defaulter, was valid. This Court, in Para 52 of the said judgment, delineated the definition of 'wilful default' keeping in mind the applicable RBI Master Circular. It was held that the person who has used the loan amount for other purposes than the one set out in the loan agreement is a wilful defaulter.

15. It is emphasized that in the BOB judgment, this Court identified certain material irregularities in the procedure followed for declaring the petitioner therein a wilful defaulter, and that the said irregularities formed the primary reason for the conclusions drawn in the said judgment. It is contended that procedural lapses, if any, on the part of the Bank of Baroda in pursuing its legal remedies cannot prejudice or constrain the SFIO in the exercise of its statutory functions.

16. It is further emphasized that the judgment rendered in BOB case does not quash the concerned forensic audit report i.e. the GSA Report. It is submitted that setting aside/quashing of the action declaring the ex-directors as wilful defaulters cannot preclude the SFIO investigation *qua* other aspects pertaining to conduct of affairs of the company. Likewise, it is submitted that the Sikdar Report pertains to the affairs of the MBIL only for a limited timeframe, i.e. for the financial year 2015-16, 2016-17 (audited) and 2017-18 (provisional) and accordingly, the findings contained therein cannot limit or foreclose the scope of the proposed SFIO investigation.

17. In response to a query of the Court as regards the basis of the findings/reasons recorded in Para 2(a) to 2(g) of the impugned order dated 05.09.2024, it has been categorically contended that the said findings are

based on the Sikdar Report and GSA Report. The written submissions filed on behalf of the respondent clearly affirm this position in the following words :

> *"A query was raised by this Court regarding the basis of the finding mentioned in Point 2(a) to (g) of the impugned order (Page 27-28 of the petition). The said findings are based on the Sikdar Report (page 30 onwards in the petition) and GSA Report (page 195 of the petition). The relevant page number with respect to the said findings are as follows:*

Finding at	*Relevant page no. in the petition and para*
Para 2 (a)	*42 (internal page no.13) at Para VI A.*
Para 2 (b)	*44 (internal page no. 15) at Para d*
Para 2 (c)	*45 (internal page no. 16) at Para C*
Para 2 (d)	*46 (internal page no. 17) at Para D*
Para 2 (e)	*47 (internal page no. 19) at Para G*
Para 2 (f)	*48 (internal page no. 20) at Para H*
Para 2 (g)	*49 (internal page no. 20) at Para J*

18. Finally, it is contended that no prejudice will be caused to the petitioner if a comprehensive investigation is undertaken into the affairs of MBIL.

REASONING AND FINDINGS:

19. Having considered the rival contentions of the parties, this Court finds that there is merit in the petitioner's contention that the impugned order cannot withstand the scrutiny of law. The reasons are enumerated as under:

A. The impugned order is in contravention of the dicta laid down in the judgment of the Bombay High Court in *Parmeshwar Das Aggarwal & Ors. vs. Additional Director (Investigation) Serious Fraud Investigation*

***Office & Ors.* 2016 SCC OnLine Bom 9276**

20. In the aforesaid case, the Bombay High Court had occasion to examine the statutory scheme of Chapter XIV of the Companies Act, 2013. After taking note of the corresponding provisions in Section 234 and 237 of the Companies Act, 1956 (hereinafter *"Act, 1956"*) and considering the judgment of the Supreme Court in ***Barium Chemicals Ltd. & Anr. vs. Company Law Board & Ors.*** (supra) and ***Rohtas Industries vs. S.D. Aggarwal & Ors.*** (supra) it was held as under:

> *"40. 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.*
>
> *41. 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."

42. Therefore, a perusal of this section would indicate that the Central Government must form an opinion, that opinion must be that it is necessary to investigate into the affairs of a company. The Central Government can act on the receipt of a report of the Registrar or Inspector under section 208 or on intimation of a special resolution passed by a company that its affairs are to be investigated or in public interest. Thus, there is a discretion to order an investigation into the affairs of the company.

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45. The Registrar of Companies had already made a detailed report and forwarded it to the Ministry and the contents of which he has reproduced. He has also reported on the issue raised in the letter of the Ministry of Corporate Affairs dated 30th October, 2015. He points out in details as to how matters are subjudice and with regard to subjudice matters, it will not be possible for him to undertake any investigation. He has pointed out clearly as to how the issues relating to non filing of annual accounts/annual returns, no action is required till the pendency of litigation and upto the final outcome. As far as serious issues regarding the above matters, namely, allotment of coal mines, extension of facilities he has opined that it is not for his office to take any action. It is on the basis of such a report that the impugned order has been passed. The impugned order reads as under:

"WHEREAS, the Central Government has the power under section 210 and section 212(1)(c) of the Companies Act, 2013 to order investigation into the affairs of a company in Public interest.
2. AND WHEREAS ROC, West Bengal has submitted his report dated 13.01.2016 to the Central Government in the matter of Singhal Enterprises Pvt. Ltd. and has recommended that investigation be made by multi-disciplinary authorities/specialised agency to find out misutilisation of bank finance and other violations under provision of law.
3. NOW therefore, in exercise of powers conferred under section 212(1)(c) of the Companies Act, 2013, the Central Government hereby orders investigation into the affairs of Singhal Enterprises Pvt. Ltd. by the Serious Fraud Investigation Office (SFIO) of the Ministry of Corporate Affairs.
4. The Director, SFIO, in exercise of powers u/s 212(1), may decide such

number of inspectors, as he may consider necessary and the Inspectors so appointed, shall exercise all the relevant powers under the Companies Act, 2013 for the purpose of the investigation.
5. SFIO shall complete the investigation and submit report to the Central Government within a period of four months from the date of issue of this order.
6. This order is issued for and on behalf of the Central Government.

Sd/-
(UK Sahoo) Joint Director"

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47. 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.***

48. 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.

49. This is the only basis, namely, the report of the Registrar of Companies, West Bengal, or its contents which has enabled the Central Government to exercise its powers under section 212(1)(c). It is, therefore, apparent that it has not necessarily acted in terms of its power conferred by section 212 to direct investigation into the affairs of the company in public interest. The foundation for reaching the opinion or satisfaction is the report of the Registrar. We have referred to the details in that report and we are of the firm opinion that based on that the Central Government could not have recorded a satisfaction or an opinion that investigation into the affairs of the company are necessary. There is no element of public interest which is projected, save and except some vague and general references to certain allegations in matters of bank finance and allotment of coal mines and alleged diversion of raw materials. There has been absolutely no details

furnished nor referred in the report. Rather, the report proceeds on the basis that as far as these issues are concerned nothing can be done by the Ministry of Corporate Affairs or the Registrar of Companies. We fail to understand, therefore, how in the present facts and circumstances and based on allegations and counter allegations between two groups of shareholders can it be even held that it is necessary in public interest to direct an investigation into the affairs of the company. Once we reach the conclusion that there is lack of requisite material to arrive at the requisite opinion or record the necessary satisfaction, then, in exercise of our powers of judicial review, we can safely quash and set aside the impugned order. We find that the opinion recorded or the satisfaction reached is vitiated by total non application of mind. None of the factors which are germane and relevant for forming the opinion have been referred. The opinion or satisfaction is based only on the complaint of the Member of Parliament to the CVC and with regard to which report was called for from the Registrar. Even the contents of that report have been, as held above, misread and totally misinterpreted. Based on that no opinion could have been recorded that it is necessary to investigate the affairs of the company in public interest."

21. Thus, it has been unequivocally laid down in the aforesaid judgment that:

(i) the existence of circumstances relevant for formation of opinion for the purpose of Section 212(1)(c) of the Act, 2013, "must be demonstrable";

(ii) the exercise of power under Section 212 must be in consonance with the scheme of Chapter XIV of the Act, 2013. In terms thereof, in the first instance, power is conferred under Section 206 to conduct inspection/inquiry (Section 206(4) of the Companies Act, 2013). Section 208 specifically contemplates that the registrar or inspector shall, after inspection of books of accounts or inquiry under Section 206, submit a report in writing to the Central Government, along with such documents, if any, and the report may also include or recommend further investigation into the affairs of the company, if necessary.

(iii) Section 210 contemplates investigation into the affairs of a company:

(a) on the receipt of a report of 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.

(iv) Where a report under Section 208 does not find any occasion to conduct a further investigation, the same has a bearing on the exercise of power under Section 212(1)(c) of the Act, 2013 (as in the facts of the case before the Bombay High Court).

(v) Where recourse is sought to be taken to Section 212(1)(c) of the Act, 2013, the same ought 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"

(vi) It is necessary for the Central Government not only to form an opinion regarding necessity to investigate into the affairs of the company, but also to justify the assignment of such investigation/s to the SFIO.

(vii) An order under Section 212 must disclose the relevant circumstance/s which warrant (i) conduct of investigation and (ii) conduct of investigation by the SFIO.

22. In the present case, the impugned order (apart from other infirmities referred to herein below), fails to articulate the "necessity of investigation by

SFIO", thereby contravening the mandatory requirement articulated in Para 47 of the aforesaid judgment of the Bombay High Court.

23. Importantly, in the SLP filed against the aforesaid judgment of the Bombay High Court, the following order was passed by the Supreme Court:

> *"The Special Leave Petition is dismissed both on the ground of delay as well as on merits."*

Thus, the Supreme Court has approved the aforesaid judgement of the Bombay High Court "on merits", thereby lending a binding force to its interpretation of Section 212(1)(c).

24. The impugned order, inasmuch as it does not satisfy the ingredients enunciated by the Bombay High Court for the purpose of an order under Section 212(1)(c) of the Act, 2013, suffers from an apparent and incurable legal lacuna.

25. Apart from the above, there are other independent reasons as well, which render the impugned order unsustainable.

Non Conduct of Inquiry Under Section 206(4) of the Companies Act, 2013

26. Crucially, the counter-affidavit filed on behalf of the respondent, avers that the Central Government had, pursuant to a complaint dated 20.07.2018 by Shri Balraj Singh, President of the Bhartiya Mazdoor Sangh, ordered an inquiry under Section 206(4) of the Companies Act, 2013 on 08.08.2018. The resulting inquiry report recommended that an inspection of the books of accounts and papers of the concerned companies be undertaken under Section 206(5) of the Companies Act, 2013.

27. There is absolute silence in the impugned order, and also in counter-

affidavit filed on behalf of the respondent, as to whether such inspection was ever conducted, and if so, the outcome thereof. The abandonment of the statutory course recommended under Section 206(4), without any explanation therefor, exacerbates the legal lacuna, as noticed hereinabove.

28. It is noticed that in ***Rohtas Industries*** (supra), it was observed by the Supreme Court that the concerned Department of the Central Government which deals with Companies is "presumed to be an expert body in Company Law Matters[1]". The same position has been reiterated by the Bombay High Court in ***Parmeshwar Das Agarwal*** (supra).

29. It is incomprehensible as to why the Central Government was remiss in conducting an independent inspection despite the same having been ordered pursuant to an inquiry under Section 206(4) of the Companies Act, 2013, as far back as in 2018.

30. It is notable that that in ***Parmeshwar Das Agarwal*** (supra), the Bombay High Court found that where a report under Section 208 does not find any occasion to conduct a further investigation, the same has a bearing on the exercise of power under Section 212(1)(c) of the Act, 2013. In the present case, the situation is much worse. Despite a recommendation that an inspection of the books of accounts and papers of the concerned company be undertaken under Section 206(5) of the Companies Act, 2013, the same was

[1] The power under Sections 235 to 237 has been conferred on the Central Government on the faith that it will be exercised in a reasonable manner. The department of the Central Government which deals with companies is presumed to be an expert body in company law matters. Therefore the standard that is prescribed under Section 237(6) is not the standard required of an ordinary citizen but that of an expert. The learned Attorney did not dispute the position that if we come to the conclusion that no reasonable authority would have passed the impugned order on the material before it, then the same is liable to be struck down. This position is also clear from the decision of this Court in Barium Chemicals v. Company Law Board.

apparently not done.

Apparent false / mis-statement on the face of the impugned order; non-existence of any "demonstrable circumstances" on the basis of which any "opinion" could be formed for the purpose of Section 212(1)(c) of the Act, 2013.

31. A perusal of the impugned order reveals that it relies on alleged Preferential, Undervalued, Fraudulent, and Extortionate (PUFE) transactions purportedly identified in the forensic audit conducted by M/s GSA & Associates, and the 'Specific Purpose Audit' by Kashayap Sikdar & Co.

32. However, upon examination of the actual forensic audit reports (GSA Report and Sikdar Report) it becomes evident that the said assertion made in the impugned order (regarding identification of PUFE transaction/s) is factually inaccurate and inconsistent with the very audit reports, on which the impugned order is founded.

33. The Sikdar Report clearly sets out that the scope thereof was to "*report on transactions as mentioned u/s 43, 45, 49, 50 and 66 of IBC, 2016 from books of accounts of Moser Baer India Ltd. (MBIL) for last two years i.e. 2015-16 and 2016-17 (audited) and 2017-18 (Provisional) till the insolvency commencement date i.e. 14.11.2017.*"

34. Pursuant thereto, the report specifically takes note of above enumerated provisions of the IBC 2016 which deal with Preferential, Undervalued, Fraudulent and Extortionate (PUFE) transaction and the render findings with regard thereto. The relevant findings of the Sikdar Report are reproduced hereunder:

> *"5. OUR OBSERVATIONS AND KEY FINDINGS*
>
> *I. REPORT U/S 43 OF IBC, 2016*

Section 43 of Insolvency and Bankruptcy code states as under:

> *(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in subsection (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.*
>
> *(2) A corporate debtor shall be deemed to have given a preference, if-*
> *a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and*
>
> *b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.*
>
> *(3) For the purposes of sub-section (2), a preference shall not include the following transfers-*
>
> *a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;*
>
> *b) any transfer creating a. security interest in property acquired by the corporate debtor to the extent that-*
>
> > *(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property: and*
> >
> > *(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:*
> >
> > *Provided that any transfer made in pursuance of the order of a court shall not preclude such transfer to be deemed as giving of preference by the corporate debtor.*
> >
> > *Explanation.- For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods,*

services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time. if -

a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

We understand that for any Transaction to be termed as Preferential as per section 43(2), there should be transfer of property or an interest thereof of the corporate debtor, not in the ordinary course of business for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor: and such transfer shall has the effect of putting such creditor or a surety or a guarantor as the case may be, in a beneficial position in order of preference than it would have been in the event of distribution of assets being made in accordance with section 53 . ***In compliance of the above, we have verified the transactions during the period under consideration and have not come across any such transaction of the nature as stated above.***

II. REPORT U/S 45 OF IBC,2016

Section 45 of IBC, 2016 states that:

(1) If the liquidator or the resolution professional, as the case may be on an examination of the transactions of the corporate debtor referred to in sub-section (2) of section 43 determines that certain transactions were made during the relevant period under section 46 which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor-

a) makes a gift to a person; or

b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Our understanding of the Section 45(2) of the Insolvency and Bankruptcy Code,2016 means that an undervalued transaction is one where corporate debtor makes a gift or transfers one or more assets for insignificant consideration, provided that such transaction has not taken place in the ordinary course of business of the corporate debtor. For transaction made with a related party the relevant period is two years preceding the insolvency commencement dale and for transactions made with any other person this period is one year preceding the insolvency commencement date. In compliance with the above section. we have verified the transaction of Sales and Purchases including the transactions to related party and we have not come across any transaction to be covered u/s 45 of IBC,2016 as per our observation given below:

a. ***Verification of Financial and Inventory records***

Moser Baer India Ltd (MBIL) has been selling finished goods to Moser Baer Entertainment Ltd (MBEL) and also purchasing the goods from the MBEL which is a related party. The detail of sale and purchase during the year 2016-17 and 2015-16 is as under:

Sr No	Particulars	Amount 2016-17	Amount 2015-16
1	Sale to Moser Baer Entertainment Ltd	9073.31 Lac	9814.38 Lac
2	Purchase from Moser Baer Entertainment Ltd	4837.39 Lac	2416.24 Lac

We have made product wise comparison of goods sold to MBEL with price charged to other parties and report that no major discrepancies were noticed*. A detail of product wise sample picked for comparison is enclosed as Annexure A.*

Similarly, in case of purchases made by MBIL from MBEL, we have made product wise comparison of item purchased with price from other parties and report that no major discrepancies were observed *Detail of product wise sample picked for comparison ss enclosed as Annexure B.*

III. REPORT U/S 49 OF INSOLVENCY AND BANKRUPTCY CODE,2016

Section 49 of IBC, 2016 states as under:

Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor-

> *a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim, against the corporate debtor; or*
>
> *b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order-*

(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and

(ii) protecting the interests of persons who are victims or such transactions:

Provided that an order under this Section-

> *a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and*
>
> *b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.*

As stated in our report on Section 45 of Insolvency and Bankruptcy Code, 2016 we have not come across any undervalued transactions during the period under review, Section 49 of the Insolvency and Bankruptcy Code 2016 is not applicable.

IV. REPORT U/S 50 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

Section 50 of the IBC, 2016 stipulates as under-

(1) Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority

if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

(2) The Board may specify the circumstances in which a transactions which shall be covered under sub-section (1).

Explanation.-For the purpose of this section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

We understand that the Extortionate credit transactions are the credit transactions which involve the receipt of financial or operational debt to the corporate debtor. They are termed as extortionate because the terms are either unconscionable, or require the corporate debtor to make exorbitant payments in respect of the credit provided. However, a debt which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

We have not come across any such transaction where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date.

V. REPORT U/S 66 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if

a) before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

b) such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor.

Explanation.- For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

We understand that, as per Section 66 of the IBC, 2016, the business should be carried out with the intention to defraud the creditors or for any fraudulent purpose. During the course of our special audit, we have not come across any such transaction."

35. Thus, the existence of any PUFE transactions was expressly negated by the Sikdar Report.

36. Likewise, in the GSA Report, it has been concluded as under:

"i. The period of our review did not present an opportunity for any diversion of funds. Imbalance in the capital structure indicates diversion of short term funds for long term uses arising out of investments/ advances credit afforded to associate companies prior to the period of our assignment.

XXX XXX XXX

xiv. Most of the transaction related to assets and leases were entered into the company in the period before our review and therefore shall not be able comment on the fraudulent and extortionate transactions."

37. As such, even the GSA Report does not arrive at the conclusion that is sought to be attributed to it in the impugned order.

38. In the circumstances, it is apparent that the impugned order, in paragraph 2 thereof, wrongly records that "*in Moser Bear India Limited (MBIL) following Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE) transactions were noticed in the Forensic Audit Report… "*. As noticed, the said assertion is belied by a bare perusal of the concerned Audit report/s. It is incomprehensible as to why the impugned

order contains such an apparent mis-statement.

39. The above strikes at the very root of the validity of the impugned order. While it is true that an order issued by the Central Government under Section 212(1)(c) of the Act, 2013 is predicated on the "opinion" of the Central Government, the same clearly has no legs to stand on, where the formation of opinion is based on non-existent ground/s.

40. It is again noticed that in making a wrong / false attribution to the GSA Report and / or Sikdar Report, the impugned order in the present case bears an uncanny similarity to the factual conspectus of the case that fell for consideration before the Bombay High Court in the aforesaid case of ***Parmeshwar Das Agarwal*** (supra). Paragraph 2 of the order under Section 212(1)(c) of the Act, 2013 in that case, referred to an ROC report dated 13.01.2016, which allegedly recommended that investigation be made by "Multi Disciplinary Authority / Specialized Agency to find out mal-utilization of the bank finance and other violations under provisions of law". The Bombay High Court, however, found that in fact, the ROC report did not make any such recommendation[2].

41. In the present case, the impugned order asserts that the concerned audit report/s rendered findings regarding transactions which fall in the "PUFE Category". However, neither of the two forensic audit reports on the basis of which such attribution is made, finds any PUFE transaction.

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[2] A bare perusal of this order would indicate that the Central Government has referred to the report dated 13th January, 2016, but completely misread and misinterpreted it. It has not recommended any investigations to be made under the Companies Act, 1956 or 2013. If at all the investigations are to be made in terms of this recommendatory report, or suggestion therein, that is for the multiple disciplinary authorities to find out misutilisation of bank finances and other violations of law. The respondents ought to be aware that there is a difference in the language of the two relevant sections, namely, section 210 and section 212.

42. The law is well-settled that although the formation of opinion by the Central Government is subjective, but the existence of circumstance/s forming the basis of such opinion must be 'demonstrable'. The legal position in this regard has been expounded by the Supreme Court in the landmark cases of ***Barium Chemicals Limited vs. Company Law Board*** (supra), ***Rohtas Industries vs. SD Aggarwal*** (supra) and ***Rampur Distillery vs. Company Law Board***, (supra). The same has also been reiterated by the Division Bench of Bombay High Court in ***Parmeshwar Das Agarwal*** (supra). As held therein, the legal position expounded by the Supreme Court [in ***Barium Chemicals, Rohtas Industries*** and ***Rampur Distillery*** (supra)] for the purpose of judicial review of the "opinion" under Section 237 and 326 of the 1956 Act, is also applicable, and relevant for the purpose of testing the "formation of opinion" under Section 212 of the Act, 2013.

43. In ***Barium Chemicals Limited vs. Company Law Board*** (supra) M. Hidayatullah, J and J.M. Shelat, J, while considering the provisions of Section 237(b) of the Companies Act, 1956 (which also contemplates the formation of "opinion") came to the conclusion that though the power under Section 237(b) is a discretionary power (as in the case of Section 212(1)(c) of the Act, 2013), the existence of relevant circumstance/s on the basis of which such an opinion if founded must be "objectively established" and must be "demonstrable".

44. The judgment of J.M. Shelat, J in ***Barium Chemicals Limited vs. Company Law Board*** (supra) holds as under:

> *"31. The object of Section 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any*

difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted Section 637(i)(a) it knew that government would entrust to the Board its power under Section 237(b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. ***But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded****. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. This analysis finds support in Gower's Modern Company Law (2nd Edn.), p. 547 where the learned author, while dealing with Section 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality". There must therefore exist circumstances which in the opinion of the Authority*

suggest what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute."

45. Again, in the case of ***Rohtas Industries vs. SD Aggarwal***, (supra), it was held in the judgment rendered by K.S. Hegde, J. as under:

"5. Before taking action under Sections 237(b)(i) and (ii), the Central Government has to form an opinion that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any member or that the company was formed for any fraudulent or unlawful purpose or that the persons concerned in the formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members.

From the facts placed before us, it is clear that the Government had not bestowed sufficient attention to the material before it before passing the impugned order. It seems to have been oppressed by the opinion that it had formed about Shri S.P. Jain. From the arguments advanced by Mr Attorney, it is clear that but for the association of Mr S.P. Jain with the appellant-company, the investigation in question, in all probabilities would not have been ordered. Hence, it is clear that in making the impugned order irrelevant considerations have played an important part.

The power under Sections 235 to 237 has been conferred on the Central Government on the faith that it will be exercised in a reasonable manner. The department of the Central Government which deals with companies is presumed to be an expert body in company law matters. Therefore the standard that is prescribed under Section 237(b) is not the standard required of an ordinary citizen but that of an expert. The learned Attorney did not dispute the position that if we come to the conclusion that no reasonable authority would have passed the impugned order on the material before it, then the same is liable to be struck down. This position is also clear from the decision of this Court in Barium Chemicals v. Company Law Board.

It was urged by Mr Setalvad, learned counsel for the appellant, that clause

(b) of Section 237 prescribes two requirements i.e. (1) the requisite opinion of the Central Government and (2) the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause (1) or that the persons mentioned in sub-clause (2) were guilty of fraud, misfeasance or misconduct towards the company or any of its members. According to him though the opinion to be formed by the Central Government is subjective, the existence of circumstances set out in clause (b) is a condition precedent to the formation of such an opinion and therefore the fact that the impugned order contains recitals of the existence of those circumstances, does not preclude the court from going behind those recitals and determining whether they did in fact exist and further whether the Central Government in making that order had taken into consideration any extraneous consideration. But according to the learned Attorney the power conferred on the Central Government under clause (b) of Section 237 is a discretionary power and the opinion formed, if in fact an opinion as required by that section has been formed, as well as the basis on which that opinion has been formed are not open to judicial review. In other words according to the learned Attorney no part of Section 237(b) is open to judicial review: the matter is exclusively within the discretion of the Central Government and the statement that the Central Government had formed the required opinion is conclusive of the matter.

Courts both in this country as well as in other Commonwealth countries had occasion to consider the scope of provisions similar to Section 237(b). Judicial dicta found in some of those decisions are difficult of reconciliation.

6. The decision of this Court in Barium Chemicals case which considered the scope of Section 237(b) illustrates that difficulty. In that case Hidayatullah, J., (our present Chief Justice) and Shelat, J., came to the conclusion that though the power under Section 237(b) is a discretionary power the first requirement for its exercise is the honest formation of an opinion that the investigation is necessary and the further requirement is that "there are circumstances suggesting" the inference set out in the section; an action not based on circumstances suggesting an inference of the enumerated kind will not be valid; ***the formation of the opinion is subjective but the existence of the circumstances relevant to the inference as the sine qua non for action must be demonstrable; if their existence is questioned, it has to be proved at least prime facie; it is not sufficient to assert that those circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to conclusions of certain definiteness; the conclusions must relate to an intent to defraud, a fradulent or unlawful purpose, fraud or misconduct.*** *In other words they held that although the formation of opinion by the Central Government is a purely subjective process and such an opinion cannot be challenged in a*

court on the ground of propriety, reasonableness or sufficiency, the authority concerned is nevertheless required to arrive at such an opinion from circumstances suggesting the conclusion set out in sub-clauses (i), (ii) and (iii) of Section 237(b) and the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. Shelat, J., further observed that it is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded; it is also not reasonable to say that the clause permitted the authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose."

46. It was further held as under:

"11. Coming back to Section 237(b), in finding out its true scope we have to bear in mind that that section is a part of the scheme referred to earlier and therefore the said provision takes its colour from Sections 235 and 236. In finding out the legislative intent we cannot ignore the requirement of those sections. In interpreting Section 237(b) we cannot ignore the adverse effect of the investigation on the company.

Finally we must also remember that the section in question is an inroad on the powers of the company to carry on its trade or business and thereby an infraction of the fundamental right guaranteed to its shareholders under Article 19(1)(g) and its validity cannot be upheld unless it is considered that the power in question is a reasonable restriction in the interest of the general public. In fact the vires of that provision was upheld by majority of the Judges constituting the Bench in Barium Chemicals case principally on the ground that the power conferred on the Central Government is not an arbitrary power and the same has to be exercised in accordance with the restraints imposed by law. ***For the reasons stated earlier we agree with the conclusion reached by Hidayatullah and Shelat, JJ. in 'Barium Chemicals' case that the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause (1) or the persons mentioned in sub-clause (2) were guilty of fraud or misfeasance or other misconduct towards the company or towards any of its members is a condition precedent for the Government to form the required opinion and if the existence of those conditions is challenged, the courts are entitled to examine whether those circumstances were existing when the order was made****. In other words, the existence of the circumstances in question are open to judicial review though the opinion formed by the Government is not amenable to review by the courts. As held earlier the required circumstances did not exist in this case."*

47. In ***Rampur Distillery vs. Company Law Board*** (supra), in the context of formation of opinion under Section 326(2) of the Act, 1956 , it was observed as under:

> *"13. The Courts, however, are not concerned with the sufficiency of the grounds on which the satisfaction is reached. What is relevant is the satisfaction of the Central Government about the existence of the conditions in clauses (a), (b) and (c) of sub-section (2) of Section 326. The enquiry before the Court, therefore, is whether the Central Government was satisfied as to the existence of the conditions. The existence of the satisfaction cannot be challenged except probably on the ground that the authority acted mala fide. But if in reaching its satisfaction the Central Government misapprehended the nature of the conditions, or proceeded upon irrelevant materials, or ignores relevant materials, the jurisdiction of the Courts to examine the satisfaction is not excluded.*
>
> *XXX XXX XXX*
>
> *17. We are, therefore, unable to agree that because the exercise of the power depends upon satisfaction, its exercise cannot be subjected to judicial review the Government being the final arbiter of the conditions in which the power may be exercised.*
>
> *18. But in dealing with a petition against an order made by the Board under Section 326 of the Companies Act, 1956, the High Court is not constituted a Court of Appeal over the judgment of the Board. The Court has merely to consider whether in arriving at its decision the Board has restricted itself to the enquiry contemplated to be made and has taken into consideration all the relevant circumstances and that its decision is not vitiated by irrelevant or extraneous matters."*

48. The Division Bench of the Bombay High Court in ***Parmeshwar Das Agarwal*** (supra) placed reliance on the aforesaid judgment, as well as on the following paragraphs of ***Hariganga Cement Ltd. vs. Company Law Board*** 1986 SCC OnLine Bom 337:

> *"11. Some of the principles governing the orders passed by the Company Law Board under section 237(b) of the Companies Act may be borne in mind. The earlier view of the Supreme Court reported in (1952) 2 SCC 606 AIR 1953 SC 53 was not approved subsequently. In the said decision in*

1953, the Supreme Court had held that "whenever a provision of law confers certain power on an authority on its forming a certain opinion on the basis of certain facts, the courts are precluded from examining whether the relevant facts on the basis of which the opinion is said to have been formed were in fact existed." This decision in 1953 has been overruled by the subsequent decision of the Supreme Court in the matter of Rohtas Industries Ltd. v. S.D. Agarwal reported in AIR 1969 SC 707, in which the Supreme Court has observed that the 1953 decision cannot be considered as authority for this proposition. It was further held by the Supreme Court, approving the decision in Barium Chemicals case (AIR 1967 SC 295) that "the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause (1) or the person-mentioned in sub-clause (ii) were guilty of fraud or misfeasance or other misconduct towards the company or towards any of its members is a condition precedent for the Government to form the required opinion and, if the existence of those conditions is challenged, the courts are entitled to examine whether those circumstances were existing when the order was made. In other words, the existence of the circumstances in question is open to judicial review though the opinion formed by the Government is not amenable to review by the courts....". Thus, even though the subjective opinion formed by the Company Law Board is not amenable to challenge, the judicial courts can certainly look at the circumstances as to whether they were existing, or if they were existing, whether they had any nexus to the opinion formed by the Company Law Board.

12. It is well settled that the discretionary powers under Section 237(b) of the Companies Act must be exercised honestly and not for corrupt or ulterior purposes. The authority must form the requisite opinion honestly and after applying its mind to the relevant material before it. In exercising the discretion, the authority must have regard only to circumstances suggesting one or more of the matters specified in sub clauses (i), (ii) and (iii) of Section 237(b) of the Companies Act. It must act reasonably and not capriciously or arbitrarily. It will be an absurd exercise of discretion, if, for example, the authority forms the requisite opinion on the ground the the director in charge of the company is a member of a particular community. Within these narrow limits, the opinion is not conclusive and can be challenged in a court of law. (refer paragraph-45 of Rohtas Industries Ltd.'s case AIR 1969 SC 707). The Supreme Court has also observed in the above case at paragraph-46 that "If it is established that there were no materials upon which the authority could form the requisite opinion, the court may infer that the authority did not apply its mind to the relevant facts. The requisite opinion is then lacking and the condition precedent to the exercise of the power under Section 237(b) is not fulfilled.

15. The discretionary powers vested in the Company Law Board under Section 237(b) of the Companies Act are of a very wide nature and the said powers have to be exercised with great conception and retrospection and in a judicious manner. The powers under Section 237 have been conferred on the Central Government in the faith that it will be exercised in a reasonable manner. The Department of the Central Government which deals with companies is presumed to be an expert body in company law matters. Therefore, the standard that is prescribed under Section 237(b) is not the standard required of an ordinary citizen by that of an expert. Hence, if the court comes to the conclusion that no reasonable authority would have passed the impugned order on the material before it, then the same is liable to be struck down.

16. The formation of the opinion under Section 237 of the Companies Act by the Central Government is subjective, but the existence of circumstances relevant to the inference as the sine que non for action must be demonstrable. It is not reasonable to say that the clause permits the Government to say that it has formed the opinion on circumstances which, it thinks, exist. Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned in court, has to be proved at least prima facie. It is not sufficient to say that circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to a conclusion of certain definiteness. When it is challenged that the opinion has been formed mala fide or upon extraneous or irrelevant matters, the respondents must disclose before the court, the circumstance which will indicate that his action was within the four corners of his own powers."

49. Considering the above exposition of law, the Division Bench of the Bombay High Court in ***Parmeshwar Das Agarwal*** (supra), concluded as under :

> *"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."*

50. It necessarily follows that all the relevant circumstance/s must be taken into account, and the existence of the same must be "demonstrable", for the purpose of forming an opinion under Section 212(1)(c) of the Act,

2013. The impugned order in the present case, falls short of these requirements on account of the false attribution/mis-statement in paragraph 2 thereof. The same demonstrates that in material respect/s, the impugned order/formation of opinion for the purpose of Section 212(1)(c), is based on "non-existent" circumstances.

51. In addition to the above, there are other difficulties as well, which seriously afflict the impugned order and render the same unsustainable. The same are enumerated below.

52. A perusal of the impugned order reveals that the paragraphs 2(a), 2(b), 2(c), 2(d), 2(e), 2(f) and 2(g), have been bodily lifted (cut and pasted) from certain selected portions of the Sikdar Report. The following table is illustrative of the same.

Impugned order dated 05.09.2024	***Sikdar Report***
(a) *MBIL has sold finished goods to its subsidiary Moser Bear Entertainment Limited (MBEL) regularly although there was substantial non-recovery of its dues from MBEL. Whereas, MBEL has made recovery of its sundry debtor on regular basis but payment to it holdings company MBIL has not been made regularly. As on 31.03.2017, MBIL has made provision of Rs 57.48 Crores for MBEL debtor. Similarly, sales made to other related parties have also not been realized and provision for the same has also been made in books of accounts. Total provision against sales to related parties has been made for Rs 167.47 Cr as on 31.03.2017:*	***VI A.*** *Moser Baer India Limited (MBIL) has sold Finished Goods to its Subsidiary, Moser Baer Entertainment Limited (MBEL) regularly inspite of the fact that substantial non-recovery of its dues from MBEL. Our scrutiny of Financial Statements of MBEL also revealed that MBEL has made recovery of its Sundry Debtor on regular basis but payment to its creditor MBIL has not been made regularly, although the outstanding balance been decreasing in last few years.* *Similarly sales made to other related parties have also not being realized and provision for the same has also been made in books of accounts.* *Total provision against sales to related party has been made for Rs. 167.47 crores till 31 .03.2017.*
(b) *MBIL had to recover a sum of Rs 333.36 crores from Moser Baer Solar*	***VI B(d)*** *MBIL has to recover a sum of Rs. 333.36crores from MBSL and Rs. 50.41 Cr*

Limited ("MBSL") and Rs 50.41 crores from Helios Photo Voltaic Limited ("HPVL") on account of lease/sublease as on 14.11.2017. A sum of Rs 226.74 Cr has also been provided out of above in the books of accounts of MBIL as on 31.03.2017. As the lease rent was not received in full from the very first year and subsequently a substantial amount has become recoverable, the reason for not terminating the agreement and restricting the loss to MBIL by giving lease to other parties is not clarified to the auditor conducting the special purpose audit.	*from HPVL on account of lease/ sublease entered with MBSL and HPVL as on 14.11.2017.* *A sum of Rs. 226.74 crores, as per detail below has also been provided out of above in the books of accounts of MBIL till 31.03.2017, resulting loss to MBIL to this extent.*
(c) *MBIL had invested in Equity/Preference shares as well as debentures of related parties and provision for Rs.653.09 crores have been made against the same for diminution in value of investments.*	***VI C.*** *Moser Baer India Limited had invested in Equity/ Preference shares as well as Debentures of related parties and Rs. 653.09 crores has been provided against the same for diminution in value of investments in last four years. However the provisions made in last two years are as under;*
(d) *MBIL has made Provisions against doubtful loans and advances given to related parties and their interest for Rs 23.53 crores has been made.*	***VI D.*** *Provisions against doubtful Loans and advances given to related parties and there interest for 23.53 crores has been made in last two years.*
(e) *MBIL has leased total land from GNIDA admeasuring 381418 sq. mt. Documents provided to the auditor does not give any information about the portion of land admeasuring 44131 sq. mt.*	***VI G.*** *Moser Baer India Limited, by way of three lease deeds dates 26.06.2001, 22.03.2002 and 5.09.2002 owns land from Greater Noida Industrial Development Authority at Plot No.66, Udyog Vihar Phase- 11 , GNIDA, Gautam Budha Nagar, UP admeasuring 381418.230 sq. ml.* *xxx xxx xxx* *The documents provided to us does not give any information about balance portion of land i.e. 44131.07 sq, mt.*
(f) *MBIL has made provision for slow moving inventory of stores & spares and consumables for Rs 24.62 crores was made*	***VI H.*** *Provision for slow moving inventory of stores & spares and consumables for Rs 24.62 crores has been made during the*

during FY 2016-17.	*year 2016-17 based on internal assessment of the company. Further, its realization value has been considered @ 10% without any basis.*
(g) *MBIL has made provision for impairment of assets has been made for Rs 61 crores in the books of accounts as on 31.03.2017.*	***VI J.*** *Provision for impairment of assets has been made for Rs 61 .00 crores in the books of accounts as on 31.03.2017 based on the report of SPA Capital Advisers Ltd which has been calculated on the basis of distressed sale value of assets as on August, 2015, considering fixed valuation report or assets by M/s Dun & Bradstreet Information Services Pvt. Ltd.*

53. The above is disconcerting for a variety of reasons. Firstly, the Sikdar Report contains an express disclaimer stating that report has been prepared on "test check basis"[3]. It further states that the report is neither an audit nor an expression of opinion on the financial statements of the company, and that it was prepared solely for the benefit of the concerned professional within the confines of a limited mandate entrusted to it. As already noticed, there is no reason why the Central Government ought not to have conducted

[3] 4. LIMITATIONS OF OUR AUDIT
The procedures performed are not an audit. or a compilation of the Company's financial statements or any part thereof, nor an examination of management's assertions concerning the effectiveness of the Company's internal control systems and detection of fraud, nor an examination of compliance with laws. regulations, or other matters. Accordingly, our performance of the procedures will not result in the expression of an opinion or any other form of assurance on the Company's financial statements or any part thereof. nor an opinion or any other form of assurance on the Company's internal control systems or its compliance with laws , regulations, or other matters. The report is meant for Insolvency Professional of the company who has assigned us the job to carry out the Special Purpose Audit in respect of scope of audit mentioned in the report. The Report is furnished solely for the information of the RP and should not be used. circulated, quoted or otherwise referred to for any other purpose nor included or referred to in whole or in part in any document. We have carried out our assignment on test check basis on the documents submitted by management of the company. Our observations on Statutory Regulations do not purport to be an opinion, expert or otherwise. It merely repre

an inspection of its own, especially since an inquiry under Section 206(4), as far back as in 2018, culminated in a recommendation that "an inspection of the books of accounts and papers of the concerned companies be undertaken under Section 206(5) of the Act, 2013. As noticed, this has been specifically adverted to in paragraph 5 of the counter-affidavit filed by the respondent[4]. No explanation has been offered for the (presumable) omission to conduct such an inspection.

54. Secondly, the treatment accorded to the concerned Audit Reports in successive judicial pronouncements [the BOB judgment] has evidently not been considered at all while passing the impugned order. The same amounts to a failure to take into account 'relevant circumstance/s' for the purpose of forming an opinion under Section 212(1)(c) of the Companies Act, 2013.

Findings qua the Forensic Reports (Sikdar Report and GSA Report) in the Judgment dated 29.02.2024 in W.P.(c) 4181/2023

55. In the judgment rendered by a Coordinate Bench of this Court in W.P.(C) 4181/2023, it was categorically held that the reliance placed by the respondent on the GSA Forensic Audit Report, was misconceived inasmuch as report itself repels the contention of diversion or siphoning of funds from the concerned company.

56. It is the strenuous contention on behalf of the petitioner that the said judgement elaborately deals with the alleged objectionable dealings between MBIL and its subsidiary/ies, which are also cited in the impugned order. The

[4] That the Central Government had earlier ordered an Inquiry u/s 206(4) of the Companies Act, 2013 on 08.08.2018, based on the complaint of Shri Balraj Singh, President, Bhartiya Mazdoor Sangh dated 20.07.2018 and the Inquirt report has recommended the conducting of inspection of books of accounts and papers of the companies under section 206(5) of the Companies Act, 2013.

said judgement also copiously deals with the concerned Forensic Audit Report/s, and the observations made therein.

57. It is submitted that the findings rendered in the aforesaid judgment preclude the requirement of any investigation or order under Section 212(1)(c) of the Act, 2013.

58. In the present proceedings, while this Court is not required to go to the extent of adjudicating whether the petitioner's inference as regards the judgment dated 29.02.2024 in W.P.(C) 4181/2023, is justified, it is apparent that the said judgment, which deals with allegations regarding siphoning of funds / alleged 'PUFE' transactions, was in the nature of 'relevant material' that ought to have been considered prior to issuance of the impugned order. It is theoretically possible, that the Central Government may have arrived at the same "opinion" even after consideration of the said judgment. However, the wholesale disregard/ non-consideration of a binding judicial pronouncement which makes copious observations as regards the very same Audit Report/s on which the impugned order is founded, cannot be countenanced. Judicial treatment accorded to the very same Forensic Audit Report/s on which the present impugned order is founded [even in the context of an action to declare the ex-directors as 'wilful defaulters'] is a relevant circumstance that ought to have been taken into consideration. It has been admitted in paragraph 16[5] of the Counter Affidavit of the

[5] "16. That it is prayed that the petition may be dismissed as there is sufficient material on record for the Central Government to form an opinion and assign this case to SFIO. The fact that the judgment dated 29.02.2024 in WP(C) 4181/2023 and 20.03.2023 in WP(C) 2336/2023 were not taken into account before passing the order of investigation dated 05.09.2024 into the affairs of Moser Baer India Limited (MBIL) has no bearing to the order of investigation as there was sufficient material before the Central Government which is required for formation of an opinion."

Respondent, that neither the BOB Judgment nor the SBI Judgment, which also consider the effects of the concerned forensic audit report, were placed or considered by the respondent while reaching its subjective satisfaction/opinion for the purpose of issuing the impugned order.

59. The relevant paragraphs in the said judgment dated 29.02.2024 which makes comments / render findings as regards the very same Audit Report/s are as under:-

> *"107. In the Annexure to the said Minutes, in reference to the allegations against the petitioner, the only evidence noted is the Forensic Audit Report. Apart from reference to the Forensic Audit Report, there is no other document or reasoning recorded in the Minutes to conclude that an event of wilful default has occurred.*
>
> *144. This brings this Court to consider the effect of the Forensic Audit Report dated 3.6.2019. As recorded above, this Court, vide order dated 28.11.2023 had directed the parties to place on record the document which showed the satisfaction arrived at by the respondent-Bank to issue show cause notice to the petitioner. The petitioner, on 16.12.2023, placed on record a compilation annexing Minutes of Meeting dated 24.2.2020, wherein, the decision to issue show cause notice to the petitioner was taken. In the said Minutes, it is recorded that the decision to issue show cause notice is taken on the basis of the Forensic Audit Report. In the column "Document/ Evidence", which proved the event of wilful default, it is mentioned "Forensic Audit Report of M/s GSA and Associates". Thus, the whole basis for issuance of show cause notice to the petitioner is the Forensic Audit Report dated 3.6.2019.*
>
> *148. As discussed above, Clauses 2.1.3(b) and (c) read with Clauses 2.2.1 and 2.2.2 of the Master Circular, "diversion" and siphoning" can be triggered by a bank only in respect of the borrowed funds. The respondent-Bank has tried to justify its show cause notice and orders passed by the Identification Committee and Review Committee on the basis of the Forensic Audit Report.*
>
> *149. However, a perusal of the Forensic Audit Report, specially Clause D(iv), reveals that the said Report has clarified that the source of funds of investments made in subsidiaries was not verified in the Forensic Audit Report as the same were made prior to the period of review. The relevant portion of Forensic Audit Report is reproduced as under:-*

> *"iv. Please further note that source of funds of the investments made by the company in its subsidiaries, associates and joint ventures were not verified by us as these investments were made before our period of review".*

> *150. Thus, the Forensic Audit Report did not verify the source of funds which were invested in the subsidiaries. The respondent-Bank, could not have issued show cause notice to the petitioner for wilful default, without verifying the source of funds that were invested. Unless the funds that were invested were found to be borrowed funds, the respondent-Bank did not have jurisdiction to invoke the Master Circular. The very genesis of "diversion" or "siphoning of" funds is dependent on the funds being borrowed funds. The reliance placed by the respondent-Bank on the Forensic Audit Report is clearly misconceived. The Forensic Audit Report does not record any conclusion regarding diversion or siphoning of funds qua the petitioner. The reliance placed by the respondent-Bank on the Forensic Audit Report to issue show cause notice of wilful default to the petitioner is clearly misplaced."*

60. The judgment rendered by the Division Bench in LPA No. 294/2024 serves to corroborate the point that the findings rendered *qua* the forensic audit reports in the judgment dated 29.02.2024 in W.P.(C) 4181/2023 were relevant factors that ought to have been taken into account before forming the opinion. The Division Bench has made scathing observations as regards the tenability of drawing any adverse inference, either on the basis of the Sikdar Report or the GSA Report. In fact, the very credibility of the concerned Forensic Audit Report/s has been doubted by the Division Bench. The Division Bench has gone to the extent of saying that the said reports cannot be relied upon in any "cognate proceedings".

61. It has been observed by the Division Bench of this Court as under:

> *"43.....When one examines the track record of MBIL, it has to be noted that, in the period of twelve years starting FY 2006-2007, MBIL had been subjected to three separate and independent forensic audits, by Kashyap Sikdhar & Co. and Rajvanshi & Associates and GSA & Associates, none of which detected any fraud or diversion, much less siphoning off of funds. Even at the time of approving the CDR, the CDR-EG gave MBIL a clean*

chit. Post CDR, as already noted, all inflow and outflow of accounts took place through the TRA, which was managed by the lender Banks and maintained by the Central Bank. Not a single proceeding was ever initiated against MBIL, at any point of time. In the same context, it is worthwhile to note that MBIL had accumulated cash accruals of 4304 crores as recorded in its balance sheets, the veracity of which has not been disputed by BOB.

44. We, like the learned Single Judge, are, therefore, not satisfied that MBIL, or the respondent, can be characterised as a "wilful defaulter", within the meaning of the Master Circular. Indeed, that seems to have been the view of all concerned, including the lenders, the Banks and the CDR-EG, till the FAR of GSA Associates. This is why, quite obviously, the Minutes of Meeting dated 24 February 2020 of the BOB cited the FAR, and the FAR alone, as the basis for the decision to issue show cause notice to the respondent. The FAR itself, as we have already observed, does not commend itself to credibility.

62. Further, it has been observed as under:

111.....We are constrained, moreover, to enter this comment as we find, in these appeals, that the financial auditor, in the FAR, has acknowledged that all details, or facts, were not available with it. Unless the financial auditor is in possession of all facts and details, it cannot return even a tentative opinion on whether there has been diversion or siphoning of funds. An FAR which is issued without being possessed of all the necessary factual material and statistical details is really worthy of little credibility, and cannot constitute the basis for proceeding against the borrower for declaring him a wilful defaulter either under the Master Circular, or, we may venture to add, in any cognate proceedings either."

63. In view of the above observations, this Court is unable to countenance a situation where SFIO investigation under Section 212(1)(c) of the Companies Act, 2013 is initiated without even taking note of / factoring in the judicial pronouncement/s referred to hereinabove.

64. It also transpires that the counter affidavit filed on behalf of the respondent/claimant at para 3(i) to (iii) and 4(i) to (ix), 7 (a) to (i) and 15 has referred to additional reasons/grounds to justify the impugned order.

65. The petitioner is right in contending that the validity of this impugned

order has to be assessed on the basis of what is stated therein and not on the basis of the additional reasons/circumstances sought to be supplied in the counter-affidavit filed on behalf of the respondent. The same is mandated in terms of the judgment of the Supreme Court in ***Mohinder Singh Gill & Another v. The Chief Election Commissioner, New Delhi & Ors.*** (supra)[6], ***Opto Circuit India Ltd. v. Axis Bank & Ors.*** (supra)[7] and ***Ritesh Tiwari v. State of Uttar Pradesh*** (supra) [8] . If anything, the additional

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[6] 8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, 1951 SCC 1088 : AIR 1952 SC 16]:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
Orders are not like old wine becoming better as they grow older.

[7] 12. The action sought to be sustained should be with reference to the contents of the impugned order/communication and the same cannot be justified by improving the same through the contention raised in the objection statement or affidavit filed before the Court. This has been succinctly laid down by this Court in Mohinder Singh Gill v. Chief Election Commr. [Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405] as follows : (SCC p. 417, para 8)

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, gets validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police v. Gordhandas Bhanji, 1951 SCC 1088] : (SCC p. 1095, para 9)
>
> '9. … public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.'

Orders are not like old wine becoming better as they grow older."

In fact, in the instant case such contention of having exercised power under Section 102 CrPC has not been put forth even in the counter-affidavit, either in this appeal or before the High Court and has only been the attempted ingenuity of the learned Additional Solicitor General. Such contention, therefore, cannot be accepted. In fact, in the objection statement filed before the High Court much emphasis has been laid on the power available under the PMLA and the same being exercised though without specifically referring to the power available under Section 17 of the PMLA.

[8] 32. It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A

reasons/justifications in the impugned order, serves to corroborate the point that the respondent was remiss in taking note of all 'relevant circumstances' prior to 'formation of opinion' for the purpose of Section 212(1)(c).

66. The petitioner vehemently contends that even the additional grounds referred to in the counter-affidavit, are precluded by the BOB Judgment. In this regard, reliance is placed on the following chart, which has been handed over during the course of the arguments:

S. No.	Additional Point in Counter Affidavit	Relevant findings in BoB Judgment
ALLEGATIONS RELATING TO INVESTMENTS/ RECEIVABLES WITH RESPECT TO TRANSACTIONS WITH SUBSIDIARIES INCLUDING SALES OR SERVICE, RECEIVABLES, LOANS, ADVANCES, INVESTMENTS, WRITE OFF/ PROVISIONING ETC.		
1.	*Para 4(i) "...company **invested** heavily in **subsidiaries**..."*	*"94... **in its counter affidavit to the Writ Petition at paragraph no.11, the respondent-Bank has admitted that it was "aware of the nature of investment and transactions."** (@pg.311 of WP)*
2.	*4(ii) "... company has taken **loans** from Banks... These loans have been **diverted to subsidiary**..."*	*"The investments in the subsidiaries were made by MBIL from 2006 onwards till 2010. The audited financial statements duly reflected the investments in the subsidiaries. **It is, therefore, difficult to accept that the respondent-Bank became aware of the investments in subsidiaries, which now according to them, is an act of diversion of funds, only in 2019 after it obtained a copy of the Forensic Audit Report.** It is equally difficult to accept that the respondent-Bank did not review the financial statements of MBIL"..."...**the Flash Report of 2012 clearly recorded the factum of investments of MBIL in its subsidiaries**"...*
3.	*4(iii) "... fund raised by the company by way of loans and bonds have been **diverted as investment** in group companies..."*	
4.	*4(iv) "... position of **investment** in some of the **subsidiaries**.... with amount of **provisions for diminution in value**..."*	*"97...**a meeting of all the lender banks had taken place on 20.7.2012**. The **Minutes ...records that MBIL had made investments in its subsidiaries and that there were constraints in realizing the investments due to financial stress**..." "**In-line***
5.	*4(vi) "...Company has... **lease rent receivables**..."*	

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subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits. (Vide Upen Chandra Gogoi v. State of Assam [(1998) 3 SCC 381 : 1998 SCC (L&S) 872] ; Satchidananda Misra v. State of Orissa [(2004) 8 SCC 599 : 2004 SCC (L&S) 1181] and SBI v. Rakesh Kumar Tewari [(2006) 1 SCC 530 : 2006 SCC (L&S) 143] .)

6.	*4(vii) "... **Provision** for large amount of **debts written off**..."*	***with its vision, it began making strategic investments year after year. These investments had been funded from the substantial Cash Surpluses generated by the company in earlier years – from FY-06 onwards and partially from FCCB issuance in FY-08."...**"Court has already held that the respondent-Bank was aware about the investments in the subsidiaries at all relevant times**."...***
7.	*4(viii) "...Company has **sold goods**... **to its subsidiaries**...also **made provision** for doubtful debts..."*	
8.	*4(ix) "...company has also **written off doubtful debts**..."*	***"The lender banks, including the respondent-Bank, subsequently issued the FRS, which is their own internal document**. Clauses 1.3.2, 1.6.1 and 5.1 of the said FRS also clearly record that MBIL had made investments in its subsidiaries"..... "An entire section in Clause 5.1.2 in the FRS is dedicated to the **"Constrained Ability to Unlock Value from Investments in Subsidiaries under Present Circumstances‖ and a —summary of the difficulties by (each of) its subsidiaries**."... "It is evident that the respondent-Bank was aware of such investments all throughout.." ... "...the FRS noted the inability of MBIL to realise the investments in the subsidiaries as a reason for the financial hardships..."*
9.	*7(a) "MBIL has **sold** finished **goods to** its **subsidiary**... there was substantial **non-recovery** of its dues... and **provision** for the same."*	
10	*7(b) "MBIL had to recover a sum ... from Moser Baer Solar Limited ("MBSL") and .... Helios Photo Voltaic Limited ("HPVL") on account of **lease/sublease**..."*	*"..**No one expected the unprecedented disruptions**..."..."..investments when made were "strategic with growth potential and expected profits" ...**FRS admits the knowledge of investments from the inception, as also the source of such investments being the cash surpluses of MBIL from previous years. The issuance of show cause notice in respect of allegation no.1, which does not pertain to borrowed funds, in itself is without jurisdiction**..." **in the FRS, despite noting investments by MBIL in the subsidiaries, the lender banks consciously did not categorise them as "adverse flow of funds."***
11	*7(c) "MBIL had **invested** in Equity/Preference shares....**diminution in value of investments**..."*	
12	*7(d) "MBIL has made **Provisions** against doubtful **loans** and **advances** given to **related parties**..."*	"128...***CDR-EG in its meeting held on 24.2.2012 had categorised MBIL in Class-B as per the CDR Master Circular. The Class-B is for – "Corporate/promoters affected by external factors and also having weak resources, inadequate vision, and not having support of professional management."***
13	*7(e) "MBIL has **leased** total land..."*	
14	*7(f) "MBIL has made **provision**..."*	
15	*7(g) "MBIL has made **provision**..."*	

16	*7(h) "...no records....company regulates its **purchases and sales with its related entities**..."*	***Class-C applies to – "Over-ambitious promoters; and borrower-corporate which diverted funds to related/unrelated fields with/without lenders' permission."***
17	*7(i) "...company had also extended **corporate guarantees** amounting.... **in respect of subsidiary companies**..."*	***If the lender banks, while doing the CDR, had found the investments in subsidiaries as "diversion of funds", then it ought to have placed MBIL in Class-C and not in Class-B...**"The lender banks, therefore, never treated the investments in subsidiaries as an act of diversion or siphoning either during finalization of the CDR scheme or after its failure**"*
18	*Para 3(ii), "...**Company**... **has an** investment...**trade receivables...in a wholly owned subsidiary** as at March 31, 2017..."*	130...***despite noting investment in subsidiaries, never categorized them as diversion of funds***... 132...***lender banks appreciated the nature of these investments and found them to be potentially financially sound***... 135... ***in Clause 8.1(3), the lender banks had expressly restricted MBIL from selling "any of its fixed assets / investments" "without prior recommendation of the Monitoring Committee and approval of CDR EG". Thus, according to lender banks, the investments at the time when made, were strategic; had growth potential and expected profits. However, when the investments did not yield profits due to various factors, they were subsequently categorized as "diversion/siphoning". Such an approach cannot be countenanced***... 137...***The other part of the allegation no. 1 was that "During the period from 01.04.13 to 31.03.15, provision and write off made amounting to Rs. 287.03 Crores"***... 139... ***Since it is an admitted position that the investments were made from cash surpluses of MBIL, the writing off of the investments, cannot, by itself, be regarded as an act of wilful default***. 140...***at the time of making these investments, the lender banks found them to be financially very sound. If that were so, the same,***

		subsequently cannot be categorized as acts of wilful default which were intentional, deliberate and calculated. 156…***In the present case, the lender banks were aware of the investments made by MBIL in its subsidiaries…The investments were treated as strategic with growth potential and expected profits. The investments were found to have been made from the cash surpluses of MBIL. The lender banks did not find these investments as diversion or siphoning of borrowed funds. The lender banks placed MBIL in Class-B of CDR Master Circular which cannot be assigned if there is diversion of funds. They found no occasion to order a forensic audit of MBIL either before finalization of CDR scheme or after its failure. The lender banks, therefore, never treated the investments in subsidiaries as an act of diversion or siphoning either during finalization of the CDR scheme or after its failure.***" **[Para 95-100, 121, 128, 130, 132, 135, 137, 139, 140, 156] (pg. 254@ 311-315/328/333-339/344 - 345 of WP)**
ALLEGATION OF IMPAIRMENT AND ACCUMULATION OF LOSSES IN MBIL		
19	***Para 3(i)*** "…***Company…recorded an impairment loss…***"	*"….MBIL flourished as the business of CDs and DVDs was a lucrative business… emergence of newer platforms of storage, CDs and DVDs started becoming obsolete and could not sustain the growth trajectory… MBIL entered into other forays and formed two subsidiaries…to manufacture solar cell modules …solar business … was valued at more than USD 1 billion …several investors invested …USD 193.50 million …like IDFC, Nomura, Morgan Stanley, GIC, CDC etc… global financial crisis in…2007 and the dumping of solar panels by Chinese companies severely impacted the business of MBIL and its subsidiaries…* ***Directorate of Anti Dumping in India made a recommendation to the Government to impose anti-dumping duties against Chinese companies …of 70%. However, Government of India chose …to provide electricity at cheaper rates in India in consumers" favour. This led to Indian manufacturers of solar panels like MBIL"s***
20	***Para 3(iii)*** "…***Company has incurred a net loss…***"	
21	***Para 15 "… Investigation order has been passed*** *under Section 212(1)(c) of the Companies Act, 2013* ***is view of*** *the fact that* ***Company's accumulated losses…***"	

		subsidiaries MBPV and MBSL to suffer financially**……*****"As the profits of MBIL started to decline and there was a looming threat of loan repayment default, lenders of MBIL found MBIL"s case fit for admission for restructuring"*** **[Para 5, 6, 8, 10] (pg. 254@256 – 258 of WP)** 97. ***During…CDR…meeting of all the lender banks*** *had taken place on 20.7.2012…Minutes…* ***records that MBIL had made investments in its subsidiaries and that there were constraints in realizing the investments due to financial stress.*** **(@pg. 312 of WP)** 122. *Thus,* ***the lender banks including the respondent-Bank, in their own internal document acknowledged that they were fully aware of the investments made by MBIL in its subsidiaries. The investments had substantial potential of high growth and profit. No one expected the unprecedented disruptions…*****(@pg.330 of WP)** 135…***according to lender banks, the investments …were strategic; had growth potential and expected profits. However, when the investments did not yield profits due to various factors, they were subsequently categorized as "diversion/siphoning". Such an approach cannot be countenanced…*****"(@pg.336 of WP)**

67. It is contended that paragraphs 3, 4, 7 and 15 of the counter affidavit contain allegations of diversion, siphoning, investments/receivables with respect to the transactions with subsidiaries, including sales or service, receivables, loans, advances, investments, write off/provisioning etc. They are all broadly covered by allegation 1 of the show cause notice, which was subject matter of the BOB judgment, which also corresponds to para 2(a) to (g) of the impugned order. Notably, allegation 1 and the findings in that regard by the Review Committee have been set aside on merits by this Court

in the BOB Judgment.

68. It is not necessary in these proceedings to conclusively pronounce upon the aforesaid contention of the petitioner. Suffice it to say, that prior to issuance of the impugned order, the scope, import and consequences flowing from the judgment dated 29.02.2024 in W.P.(C) 4181/2023 ought to have been taken into consideration.

69. For all the above reasons, the impugned order fails to withstand legal scrutiny.

70. An order under Section 212(1)(c) of the Act, 2013 directing investigation by the SFIO is not a routine administrative measure. It is in the nature of an extremely serious statutory action having grave consequences and repercussions for the subject entities and individuals. It is therefore, imperative that such an order must be issued only after due application of mind, after examining all relevant circumstances.

71. The existence of "relevant circumstances" is *sine qua non* as for the purpose of formation of opinion under Section 212(1)(c) of the Act, 2013. As held by the Supreme Court in ***Barium Chemicals Limited vs. Company Law Board*** (supra), ***Rohtas Industries vs. SD Aggarwal*** (supra) and ***Rampur Distillery vs. Company Law Board***, (supra), and reiterated by the Bombay High Court in ***Parmeshwar Das Agarwal*** (supra), the existence of the relevant circumstances has to be "demonstrable". Exercise of power under Section 212(1)(c) in a casual or perfunctory manner, seriously undermines the statutory provision itself and the safeguards implicit thereunder. The use of boilerplate language and/or extrapolations from third party documents, without consideration of all the "relevant circumstances", reflects a disregard for procedural propriety. It can hardly be emphasized

enough that the power under Section 212(1)(c) must be exercised with circumspection and deliberation. In the present case, the impugned order under Section 212(1)(c) appears to have been issued in a rather casual manner, unmindful of the statutory pre-requisites therefor.

72. In the circumstances, the impugned order dated 05.09.2024 (and all consequential proceedings pursuant thereto), is hereby quashed.

73. The petition is allowed in the above terms. All pending applications also stand disposed of.

SACHIN DATTA, J

AUGUST 28, 2025/*at, ss, r*