Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.538-539 OF 2019
(Arising out of Special Leave Petition (Criminal) Nos.94-95 of 2019)

Serious Fraud Investigation Office …Appellant

VERSUS

Rahul Modi and Another Etc. …Respondents

WITH

TRANSFER PETITION (CRL.) NO.35 OF 2019
(Serious Fraud Investigation Office & Anr. vs. Vivek Harivyasi & Ors.)

J U D G M E N T

Uday Umesh Lalit, J.

1. Leave granted.

2. These Appeals challenge the correctness of the common interim order dated 20.12.2018 passed by the High Court of Delhi at New Delhi in Writ Petition (Crl.) Nos.3842 and 3843 of 2018.

3. In exercise of powers conferred by Section 212(1)(c) of the Companies Act, 2013 ("2013 Act", for short) and under Section 43(2) and (3)(c)(i) of the Limited Liability Partnership Act, 2008 ("2008 Act", for short), the Central Government vide order No.07/115/2018/CL-II (NWR), directed investigation into the affairs of Adarsh Group of Companies and LLPs ('The Group', for short) by Officers of Serious Fraud Investigation (SFIO) as nominated by Director, SFIO. The relevant part of the Order dated 20.06.2018 was as under:-

> "Whereas the Central Government is empowered under Section 212(1)(c) of the Companies Act, 2013 (the Act) to order investigation into the affairs of a company in public interest by the Serious Fraud Investigation Office (SFIO).
>
> 2. And whereas the Central Government is also empowered to order investigation into the affairs Limited Liability Partnerships (LLPs) under Section 43 (2) & (3) (c) (i) of the Limited Liability Partnership Act, 2008.
>
> 3. AND whereas on the basis of opinion formed by the Central Government, it has been decided to investigate the affairs of following *companies:*-

S NO	CIN	COMPANY / LLP NAME	NEW ADDRESS	REGION	PAN_ NUMBER	STATUS
1.	U45201HR2000PLC045738	ADARSH BUILDESTATE LIMITED	1ST FLOOR, BLOCK-B, VATIKA ATRIUM GOLF COURSE ROAD, SECTOR-53 GURGAO	Haryana	AAJCA1907A	ACTV

			N			
2 to 124	..	…	…	…	…	…
125	U45201RJ2013PTC042465	WATER-FALL REAL ESTATES PRIVATE LIMITED	J 7, MOTI DOONGRI ROAD, JAIPUR	Rajasthan	AABCW3826E	ACTV

4. Now, therefore, in exercise of powers conferred under Section 212 (1) (c) of the Companies Act, 2013 and under Section 43 (2) & (3) (c) (i) of the LLP Act, 2008 the Central Government hereby orders investigation into the affairs of the above named companies and LLPs to be carried out by officers of the Serios Fraud Investigation Office (SFIO) as nominated by Director, SFIO.

5. The SFIO shall investigate into following areas (above mentioned companies and LLPs) in addition to any other issues that it may come across during the investigation.

(i) To ascertain and unearth rotation of funds or identification of quantum of diversion of funds of siphoning including beneficiaries thereof:

(ii) To identify instances of mismanagement, negligence or fraud;

(iii) To ascertain the role of auditors, KMPs or independent directors or any other person in the alleged fraud:

(iv) To examine role of any other entity used as conduit in the alleged fraud;

(v) To identify non-compliance of the statutory provisions of the Act and its impact on Corporate Governance.

6. That the Inspector(s) so appointed shall exercise all powers available to them under Section 217 of the Companies Act, 2013 and Chapter IX of LLP Act, 2008. The inspector(s) shall complete their investigation and submit their report to the Central Government within a period of 03 (Three) months from the date of issue of this order.

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

Sd/-
(Santosh Kumar)
Joint Director"

4. On the same date, i.e. on 20.06.2018 an Order was passed by the Director, SFIO. The relevant portion of said order was as under:-

"3. Now, therefore, in exercise of powers conferred under Section 212(1) of the Companies Act 2013, the following Officers are designated as Inspectors to carry out the investigation into the affairs of the above-mentioned entities and shall exercise all the powers available to them under the Companies Act, 2013:

1. Shri P.C. Maurya, Addl. Director
2. Shri Prashant Baliyan, Deputy Director
3. Shri G. L. Meena, Sr. Asst. Director
4. Shri Kumar Gautam, Asst. Director

4. And further, in exercise of powers conferred under Section 212(4) of the Companies Act, 2013, Sh. Prashant Baliyan, Dy. Director is appointed as Investigating Officer to carry out the above noted investigation. The Investigating Officer shall have the powers of Inspector as enumerated under Section 217 of the Companies Act, 2013. As per the investigation order, following issues are specifically to be examined along with other issues which may come across during the investigation:

(i) To ascertain and unearth rotation of funds or identification of quantum of diversion of funds or siphoning including beneficiaries thereof;
(ii) To identify instances of mismanagement, negligence or fraud;
(iii) To ascertain the role of auditors, KMPs or independent directors or any other person in the alleged fraud;
(iv) To examine role of any other entity used as conduit in the alleged fraud; and

> (v) To identify non-compliance of the statutory provisions of the Act and its impact on Corporate Governance.
>
> 5. The Inspectors and the Investigating Officer shall complete the investigation and submit the report within three months hereof."

5. The period mentioned in Clause 6 of the Order dated 20.06.2018 came to an end on 19.09.2018. Based on the material gathered during investigation, an approval was sought under Rule (2) of the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 ("2017 Rules", for short) from the Director, SFIO to arrest three accused persons namely Rahul Modi, Mukesh Modi and Vivek Harivyasi. The approval was granted by the Director, SFIO on 10.12.2018. The arrest order issued under Rules 4 and 5 of 2017 Rules made reference to the proceedings, "07/115/2018 CL-II (NWR) Dt. 20.06.2018"

The accused were accordingly arrested on 10.12.2018. The compliance in terms of 2017 Rules was effected and they were produced before the Duty Magistrate, District Courts, Gurugram, Haryana on 11.12.2018.

6. After hearing Counsel for the appellant as well as for the accused, the Judicial Magistrate First Class, Gurugram by order dated 11.12.2018 granted remand till 14.12.2018 and directed they be produced before the Special Court (Companies Act), Gurugram on 14.12.2018. The application seeking remand had sought to make out a case for custody of the accused. The matter was dealt with by the Judicial Magistrate as under:-

> "5. Counsel for accused Nos.1 and 2 argued that these persons have already been co-operated with the investigation since 20th June and their office have been sealed. Despite this, now remand has been sought without any reason, therefore, kindly it be declined.
>
> 6. Perusal of documents on record shows that there are serious allegations and as per order dated 20.06.2018, investigation was ordered to be initiated and now accused has been produced before this court under Section 167 Cr.P.C. seeking SFIO remand. This court is to exercise the power of Magistrate in terms of Section 436(1)(B). At this stage, remand has been sought. The offence alleged is definitely serious in nature and the arrest orders are placed on record. Consequential to these documents, accused were arrested and produced. Undoubtedly, they have been appearing on notices issued by the SFIO but still the investigation has not been completed because some part of investigation needs personal involvement. This case prima facie attracts Section 447 of Companies Act, which certainly makes this offence cognizable and no bailable. The main grounds for which the investigation is to be conducted in custody is ascertainment of further trail qua withdrawn money and to locate the beneficiaries. In addition to this, identification of properties and explanation about loans and advances mentioned in the books of accounts can only be given by accused but they have not come up with any such explanations till now. Even the persons who are in custody are not going to facilitate the investigation in proper

> manner so that the real facts can be established. These grounds definitely require detained and comprehensive investigation so it would be proper to grant the custody of these accused to SFIO for three days. Accused be produced before the Special Court under Companies Act on 14.12.2018. Copy of this order be handed over to the IO and accused as they have requested. Custody of all three accused namely Mukesh Modi, Rahul Modi and Vivek Harivyasi is given to SFIO for three days. File be sent to the Special Court under the Companies Act."

7. On 13.12.2018 a proposal was made by SFIO seeking approval of the Central Government for extension of time for completing investigation and submission of investigation report in respect of 57 cases which were at various stages of completion and the period granted for completion of investigation had either expired or was near the expiry. One of the cases referred to was that of the Group at Sl. No.24 of the list. On 14.12.2018 the accused were produced before the Special Court with a fresh application for remand. The prayer for extension of custody was opposed by the accused *inter alia* on the grounds that the period of completion of investigation as stipulated in the order dated 20.06.2018 had expired and as such all further proceedings were illegal. During the course of proceedings, the proposal seeking extension in respect of said 57 cases, where investigation had not been completed, was placed before the Special Court. After going into the record, the Special Court found that the application seeking further remand was justified. It, therefore,

extended the police custody of the accused till 18.12.2018. Para 6 of the Order dated 14.12.2018 passed by the Special Court was:-

> "6. Admittedly as per the provisions of Section 212(3) of the Companies Act, the investigations ordered are required to be completed within the specified time. But the issue is even if it not so done, what should be consequences and whether further proceedings or investigations shall be unlawful. The answer to the mind of this court is simply no because the time frame mentioned is to complete the investigations in a time bound manner but the said time can be extended from time to time by the same authority. And in this case all, after investigations when the team submitted report to competent authority, which is the Director of SFIO, he permitted the team to arrest the accused and go for further investigations, which in the given facts and circumstances amount to extension. Then the purpose of section 212(3) is just to grant sanction to investigate as per the procedure provided under Chapter XIV of the Companies Act, 2013 and as per sub-Section 6, the offence alleged is cognizable and non-bailable and thus power has been granted to the SFIO to arrest the persons involved and see their remand and then to file a final report to the Central Government. And thus the issue of filing a report before the court after arrest is mandatory but doing so before the arrest of the accused is not a time bound exercise that too violation of which can be legal impediment for further investigation."

The proposal was accepted vide order dated 14.12.2018 passed by the Central Government in respect of the Group and extension was granted upto 30.06.2019.

8. On 17.12.2018 Writ Petition (Criminal) Nos.3842 & 3843 of 2018 were filed under Articles 226 & 227 of the Constitution of India read with Section 482 of Cr.P.C. by Rahul Modi and Mukesh Modi respectively in

the High Court of Delhi. It was submitted that with the expiry of period within which the investigation had to be completed in terms of order dated 20.06.2018, all further proceedings including the arrest of the respondents were illegal and without any authority of law. The Writ Petitions therefore prayed for declaration that the investigation carried out after 19.09.2018 was illegal and without jurisdiction and also prayed for Writ of Habeas Corpus directing release from illegal arrest made on 10.12.2018. The prayers in both the petitions were almost identical and were as under:

> A. "Issue a writ of mandamus or any other appropriate writ/direction/order in the nature of a writ declaring that the power of Respondents No.2 to 4 to carry out investigation under Section 2012(2) Companies Act, 2013 after the expiry of the time period is illegal and unconstitutional.
>
> B. Issue a writ of mandamus or any other appropriate writ/direction/order in the nature of a writ declaring that the investigation carried out after 19.09.2018 in File No.SFIO/INV/AOI/2018-19-AGC & L/842-966 vide order No.07/115/2018-CL-II dated 20.06.2018 as illegal and without jurisdiction.
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> C. Issue a writ/direction/order declaring the arrest of the Petition dated 10.12.2018 at New Delhi in the office of Respondent No.2 by Respondent No.3, and proceeding emanating therefrom being without jurisdiction and illegal and the Petitioner Rahul Modi be released forthwith.
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> D. Issue a writ of Habeas Corpus directing immediate release of the Petitioner herein Sh. Rahul Modi from the illegal arrest

> dated 10.12.2018 at New Delhi and consequent illegal custody from Respondent No.2 to 4 at;

9. These Writ Petitions came up before the High Court on 18.12.2018 and following order was passed:

> "At request of Ms. Maninder Acharya, learned ASG appearing on behalf of the Union of India, in order to enable her to obtain instructions qua the extension of time for the submission of report by the SFIO, the hearing of the petitions is adjourned."

On the same day the accused were produced before the Special Court and after being satisfied that further custody was required in order to complete investigation, the accused were remanded to police custody till 21.12.2018. The relevant part of the Order of the Special Court was:-

> "2. The SFIO has placed before the undersigned complete noting proceedings showing the investigations carried out by it from the last date till today. As submitted by the counsel for the complainant and after going through the case diary in the form of noting sheets from the day the accused were handed to the custody of the complainant till today, it comes out that admittedly some more disclosures about the entire scam has been disclosed by the accused persons relating to some new issues leading to disclosure about undisclosed wealth and thus the request for further custody of accused persons is required to trail and confront them with the subsequent evidence and events and to investigate the matter further as per the disclosures made by the accused to unearth real facts of siphoning of the huge money, in view of this investigations in the order dated 14.12.2018. As such, finding the request to be genuine and the plea of custodial interrogation to be necessary for the logical end of the entire

> investigations, the application in hand is allowed and all the three accused persons are remanded to further custody of the SFIO till 21.12.2018 upto 2.00 p.m."

10. The Writ Petitions came up before the High Court on 20.12.2018. The High Court issued notice making it returnable on 31.01.2019. The High Court thereafter proceeded to consider whether immediate release of the respondents by way of ad interim relief was called for. Both the sides were heard and the issues which arose for consideration in the Writ Petitions were framed as under:

> "a) Whether the ex post facto extension granted on behalf of the Competent Authority is valid in law; and
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> b) Whether the vested rights created in favour of the applicants, in the interregnum, when there was purportedly no legal sanction to carry out the investigation against the applicants, renders the said action, and in particular their arrest illegal, without jurisdiction and contrary to law."

11. While considering the matter from the perspective of grant of *ad interim* relief, as prayed for in applications, Crl.M.A. No.50033 of 2018 in Writ Petition (Criminal) No.3842 of 2018 and Criminal M.A. No.50035 of 2018 in Writ Petition (Criminal) No.3843 of 2018 the following points were framed:

> "15. In view of the submissions made on behalf of the parties, the issues that arise for consideration in the present applications are:-

> "a) Whether this Court can in a proceeding for habeas corpus under Article 226 of the Constitution of India, test the correctness, legality and validity of an order of remand, passed by a Competent Magistrate/ and
>
> b) Whether this Court has the territorial jurisdiction to adjudicate the present habeas corpus proceedings, in view of the circumstance that the remand orders were rendered by a Competent Magistrate at Gurugram, which have not been specifically assailed in these proceedings?"

12. The High Court by its order dated 20.12.2018 directed release of said Rahul Modi and Mukesh Modi on interim bail, during the pendency of the writ petitions, on their furnishing personal bond in the sum of Rs.5 lakhs each with 2 local sureties in the like amount subject to conditions stipulated in the order. During the course of its order following observations were made by the High Court in paragraphs 22 to 30:-

> "22. On a conspectus of the above decisions and in the light of the arguments advanced on behalf of the parties, what we are called upon to determine at this stage is whether the arrest of the applicants was illegal and without the authority of law; and whether the subsequent remand orders, which are cited to sanctify the arrest, are beyond the pale of examination by this Court in the present applications.
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> 23. There is no denying the fact that, the Competent Authority vide its order dated 20.06.2018 directed the SFIO to conduct an investigation into the affairs of the subject entities, in public interest. There is also no quarrel with the circumstance that, the period specified by the Competent Authority in the said order dated 20.06.2018 lapsed on 19.09.2018. There is also no dispute with regard to the fact that, the SFIO sought an extension of time, from the Competent Authority, to carry out

further investigation under the mandate of the provisions of Section 212 of the said Act, only on 13.12.2018, admittedly two and half months after the period granted to them by the Competent Authority for the said purpose, had come to an end by efflux of time.

24. There is also no quarrel with the circumstance that, the *ex post facto* extension granted by the Competent Authority, retrospectively, was granted only on 14.12.2018. It is, therefore, *prima facie* axiomatic that, when the applicants were arrested by the SFIO on 10.12.2018, the period specified in the said order dated 20.06.2018 for the submission of the report, post investigation, had already elapsed. It is further relevant to state that, at that juncture the SFIO had neither applied nor obtained the *ex post facto* extension of the period specified in the said order dated 20.06.2018.

25. It is, in these circumstances, read in conjunction with the norms set out by the SFIO itself, warranting investigation to be completed within the timeframe, stipulated by the Central Government, that we are of the considered view that the order of arrest suffers from the vice of lack of jurisdiction, unlawful and illegal.

26. A statutory body must be strictly held to the standards by which it professes its conduct to be judged.

27. Illegal detention of the applicants, in our considered view, cannot be sanctified by the subsequent remand orders, passed by the concerned Magistrate. The right of the applicants to insist upon the strict and scrupulous discharge of their duty by the SFIO and observe the forms and rules of law, is absolute. The arrest of the applicants on 10.12.2018 in the light of the circumstances antecedent and attendant was an absolute illegality and patently suffers from the vice of lack of legal sanction and jurisdiction.

28. This Court in a petition for habeas corpus cannot justify the continued illegal detention of the applicants; merely on account of the circumstance that the concerned Magistrate has rendered remand orders. The further custody of the applicants would, in our considered view, violate the principles of personal liberty, enshrined in Article 21 of the Constitution of India. The

> continued detention of the applicants does not admit of lawful sanction.
>
> 29. Even otherwise, the remand order dated 14.12.2018, insofar as, it observes as follows:-
>
> > "6. ……..And in this case all, after investigations when the team submitted report to competent authority, which is the Director of SFIO, he permitted the team to arrest the accused and go for further investigations, which in the given facts and circumstances amount to extension."
> >
> > is wrong, incorrect and patently contrary to law and the official record.
>
> 30. This is quite apart from the circumstance that, the applicants were arrested at the SFIO office at New Delhi on 10.12.2018, thereby rendering the remand orders passed by the concerned Magistrate in Gurugram, wholly without jurisdiction."

13. The original writ petitioners Rahul Modi and Mukesh Modi were, therefore, released on bail. The aforesaid order dated 20.12.2018 passed by the High Court is presently under challenge. Mr. Tushar Mehta, learned Solicitor General appeared for the appellant – SFIO in both criminal appeals while the original writ petitioners were represented by Mr. Kapil Sibal, Mr. Mukul Rohatgi and Mr. Sidhharth Luthra, Senior Advocates. Both sides also filed their written submissions.

14. The learned Solicitor General submitted *inter alia*:

(a) In terms of the provisions of 2013 Act, the investigation commenced when the present matter was assigned to SFIO under Section 212(1) of 2013 Act and the investigation would end on filing of a report by SFIO after completion of investigation, as per Section 212(12) of the Act. It would be incorrect to assume that the mandate to investigate or power to arrest would come to an end on completion of three months from 20.06.2018.

(b) The stipulation in Section 212(3) of 2013 Act regarding submission of the report to the Central Government "within such period as may be specified in the order" is purely directory.

(c) Power of arrest under Section 212(8) of 2013 Act conferred upon the Director, Additional Director and Assistant Director is not circumscribed by any time limit and so long as the conditions stipulated in said sub-section are satisfied, such power of arrest can be validly exercised.

(d) The Habeas Corpus Petition was not maintainable in the High Court of Delhi as after their arrest the original Writ Petitioners were produced before the Judicial Magistrate, Gurugram on 11.12.2018 and were remanded to custody under a judicial order. Thereafter they were produced before the Special Court, Gurugram on 14.12.2018 and were

again remanded to custody under judicial order passed by Special Court, Gurugram.

(e) Since the registered office of the Principal Company was in Gurugram, they were rightly produced before the Magistrate and Special Court in Gurugram. Thus, if at all the Habeas Corpus Petition ought to have been filed before the High Court of Punjab and Haryana and not in High Court of Delhi.

(f) The focal point of examination in a Habeas Corpus Petition is the date of return and not the initiation of proceedings. In the present case, on 18.12.2018 when the petitions were taken up for consideration, not only was there an order of extension dated 14.12.2018 passed by the Central Government but there were valid orders of remand passed by the Judicial Magistrate, Gurugram on 11.12.2018 and by the Special Court, Gurugram on 14.12.2018 and 18.12.2018.

15. Mr. Sibal, Mr. Rohatgi and Mr. Luthra, learned Senior Advocates appearing for the original writ petitioners submitted, *inter alia*:-

(a) A special jurisdiction has been created by Section 212 of 2013 Act under which corporate affairs in relation to any company can be investigated into by SFIO, which may have far reaching consequences. It is precisely for this reason that certain time limit is contemplated within

which investigation must be completed and the investigation cannot be allowed to be an endless matter. The period prescribed under the 1st Order, therefore, had to be scrupulously observed and the mandate came to an end on the expiry of said period.

(b) SFIO being a special entity which otherwise has no jurisdiction to investigate into the matter, must therefore act within the parameters of the mandate and no arrest after the expiry of the period could have been effected.

(c) Any arrest made beyond the period would be without jurisdiction and the High Court was, therefore, justified in granting the relief in the present matter.

(d) The Writ Petitions principally challenged the orders of arrest being without jurisdiction and it was only the 4th prayer in the Writ Petitions which pertained to issuance of a writ of Habeas Corpus.

e) The order entrusting investigation to SFIO was passed in New Delhi, SFIO is located in New Delhi, the order of arrest was passed in New Delhi, the writ petitioners were arrested in New Delhi and were kept in custody in SFIO office in New Delhi and as such the High Court of Delhi had jurisdiction to consider the Writ Petitions and grant relief as prayed for.

f) In the absence of any extension for further investigation, the power of arrest could not have been exercised on 10.12.2018. Any further extension cannot validate the act of initial arrest. Such arrest being unsupported by any valid mandate, was an act of illegality which violated Article 21 calling for interference by the High Court.

16. The basic facts in the present matter can be summed up:-

a) The investigation was assigned to SFIO vide Order dated 20.6.2018. This Order did stipulate in para 6 that the Inspectors should complete their investigation and submit their report to the Central Government within three months.

b) The period of three months expired on 19.09.2018.

c) The proposal to arrest three accused persons was placed before the Director, SFIO and after being satisfied in terms of requirements of Section 212(8) of 2013 Act approval was granted by Director, SFIO on 10.12.2018.

d) After they were arrested on 10.12.2018, the accused were produced before the Judicial Magistrate, who by

his order dated 11.12.2018 remanded them to custody till 14.12.2018 and also directed that they be produced before the Special Court on 14.12.2018.

e) On 13.12.2018 a proposal seeking extension of time for completing investigation in respect of 57 cases including the present case was preferred by SFIO.

f) On 14.12.2018 the Special Court, Gurugram remanded the accused to custody till 18.12.2018.

g) On the same date i.e. on 14.12.2018 the proposal for extension was accepted by the Central Government in respect of the Group and extension was granted upto 30.06.2019.

h) On 17.12.2018 the present Writ Petitions were preferred which came up for the first time before the High Court on 18.12.2018.

i) On 18.12.2018 itself the accused were further remanded to police custody till 21.12.2018.

j) On 20.12.2018 Writ Petitions were entertained and the order which is presently under appeal was passed.

k) Pursuant to said order, the original Writ Petitioners were released on bail.

In the backdrop of these facts, the High Court found that a case for interim relief was made out. The principal issues which arise in the matter are whether the High Court was right and justified in entertaining the petition and in passing the Order under appeal?

17. For considering whether the writ petitioners were entitled to any interim relief, two questions were framed by the High Court in paragraph 15 of its Order. Before considering the matter from the perspective of said two questions, an issue which was stressed by the learned Solicitor General may be addressed first. It was submitted by him that the date with reference to which the legality of detention can be challenged in a Habeas Corpus proceeding is the date on which the return is filed in such proceedings and not with reference to the initiation of the proceedings. He relied upon the

decision of the Federal Court in ***Basanta Chandra Ghose vs. King Emperor***[1], which had concluded:

> "… …If at any time before the Court directs the release of the detenue, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention…. …"

Similar questions arose for consideration in ***Naranjan Singh Nathawan vs. State of Punjab***[2], ***Ram Narayan Singh vs. State of Delhi***[3], ***A.K. Gopalan vs. Govt. of India***[4], ***Pranab Chatterjee vs. State of Bihar and Another.***[5], ***Talib Hussain vs. State of Jammu and Kashmir***[6], ***Col. Dr. B. Ramachandra Rao vs. State of Orissa and Others.***[7]. These decisions were considered in ***Kanu Sanyal vs. District Magistrate, Darjeeling and Others***[8], as under:

Re: Grounds A and B.

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1 (1945) 7 FCR 81

2 (1952) SCR 395

3 (1953) SCR 652,

4 (1966) 2 SCR 427

5 (1970) 3 SCC 926

6 (1971) 3 SCC 118

7 (1972) 3 SCC 256

8 (1974) 4 SCC 141

4. These two grounds relate exclusively to the legality of the initial detention of the petitioner in the District Jail, Darjeeling. We think it unnecessary to decide them. It is now well settled that the earliest date with reference to which the legality of detention challenged in a habeas corpus proceeding may be examined is the date on which the application for habeas corpus is made to the Court. This Court speaking through Wanchoo, J., (as he then was) said in *A.K. Gopalan* v. *Government of India*[5]:

"It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of the hearing."

In two early decisions of this Court, however, namely, *Naranjan Singh* v. *State of Punjab*[2] and *Ram Narayan Singh* v. *State of Delhi*[3] a slightly different view was expressed and that view was reiterated by this Court in *B.R. Rao* v. *State of Orissa*[7] where it was said (at p. 259, para 7):

"in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings".

and yet in another decision of this Court in *Talib Hussain* v. *State of Jammu & Kashmir*[6] Mr Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that (at p. 121, para 6):

"in habeas corpus proceedings the Court has to consider the legality of the detention on the date of the hearing."

Of these three views taken by the Court at different times, the second appears to be more in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus. But, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, the earliest date with

> reference to which the legality of detention may be examined is the date of filing of the application for habeas corpus and the Court is not, to quote the words of Mr Justice Dua in *B.R. Rao* v. *State of Orissa*[7], "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus". Now the writ petition in the present case was filed on January 6, 1973 and on that date the petitioner was in detention in the Central Jail, Vizakhapatnam. The initial detention of the petitioner in the District Jail, Darjeeling had come to an end long before the date of the filing of the writ petition. It is, therefore, unnecessary to examine the legality or otherwise of the detention of the petitioner in the District Jail, Darjeeling. The only question that calls for consideration is whether the detention of the petitioner in the Central Jail, Vizakhapatnam is legal or not. Even if we assume that grounds A and B are well founded and there was infirmity in the detention of the petitioner in the District Jail, Darjeeling, that cannot invalidate the subsequent detention of the petitioner in the Central Jail, Vizakhapatnam. See para 7 of the judgment of this Court in *B.R. Rao* v. *State of Orissa*. The legality of the detention of the petitioner in the Central Jail, Vizakhapatnam would have to be judged on its own merits. We, therefore, consider it unnecessary to embark on a discussion of grounds A and B and decline to decide them."

The law is thus clear that "in Habeas Corpus proceedings a Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings". In ***Kanu Sanyal***[8] the validity of the detention of the petitioner in District Jail, Darjeeling was therefore not considered by this Court and it was observed that the infirmity in the detention of the petitioner therein in the

District Jail, Darjeeling could not invalidate subsequent detention of the petitioner in the Central Jail, Vishakhapatnam.

18. At this stage we may also deal with three recent cases decided by this Court:-

A) In ***Manubhai Ratilal Patel through Ushaben vs. State of Gujarat and others***[9] a Division bench of this Court extensively considered earlier decisions in the point including cases referred to above. It also dealt with an issue whether Habeas Corpus petition could be entertained against an order of remand passed by a Judicial Magistrate. The observations of this Court in paragraphs 20 to 24 and para 31 were as under:

> **20.** After so stating, the Bench in ***Kanu Sanyal case***[8] opined that for adjudication in the said case, it was immaterial which of the three views was accepted as correct but eventually referred to para 7 in ***B. Ramachandra Rao***[7] wherein the Court had expressed the view in the following manner: (SCC p. 259)
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> "*7.* … in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings."
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> Eventually, the Bench ruled thus: (*Kanu Sanyal case*[8], SCC p. 148, para 5)

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9 (2013) 1 SCC 314

"*5.* … The production of the petitioner before the Special Judge, Visakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Visakhapatnam, pursuant to the orders made by the Special Judge, Visakhapatnam, pending trial must be held to be valid. This Court pointed out in ***Col. B. Ramachandra Rao*** **v.** ***State of Orissa***[7] (SCC p. 258, para 5) that a writ of habeas corpus cannot be granted
'where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal'."

21. The principle laid down in ***Kanu Sanyal***[8], thus, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.

22. At this juncture, we may profitably refer to the Constitution Bench decision in ***Sanjay Dutt*** **v.** ***State through CBI, Bombay (II)***[10] wherein it has been opined thus: (SCC p. 442, para 48)

"*48.* … It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order."

23. Keeping in view the aforesaid concepts with regard to the writ of habeas corpus, especially pertaining to an order passed by the learned Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code relating to remand. There are two provisions in the Code which provide for remand i.e. Sections 167 and 309. The Magistrate has the authority under Section 167(2) of the Code to direct for detention of

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10 (1994) 5 SCC 410 : 1994 SCC (Cri) 1433

the accused in such custody i.e. police or judicial, if he thinks that further detention is necessary.

24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.

… **…** **…**

31. Coming to the case at hand, it is evincible that the arrest had taken place a day prior to the passing of the order of stay. It is also manifest that the order of remand was passed by the learned Magistrate after considering the allegations in the FIR but not in a routine or mechanical manner. It has to be borne in mind that the effect of the order of the High Court regarding stay of investigation could only have a bearing on the action of the investigating agency. The order of remand which is a judicial act, as we perceive, does not suffer from any infirmity. The only ground that was highlighted before the High Court as well as before this Court is that once there is stay of investigation, the order of remand is sensitively susceptible and, therefore, as a logical corollary, the detention is unsustainable. It is worthy to note that the investigation had already commenced and as a resultant consequence, the accused was arrested. Thus, we are disposed to think that the order of remand cannot be regarded as untenable in law. It is well-accepted principle

> that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao*[3] and *Kanu Sanyal*[9], the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law."

B) In Saurabh Kumar vs. Jailor, Koneila Jail and another[11] the issue was dealt with in para 13 of the leading Judgment as under:-

> **13.** It is clear from the said narration of facts that the petitioner is in judicial custody by virtue of an order passed by the Judicial Magistrate. The same is further ensured from the original record which this Court has, by order dated 9-4-2014, called for from the Court of the Additional Chief Judicial Magistrate, Dalsingsarai, District Samastipur, Bihar. Hence, the contention of the learned counsel for the petitioner that there was illegal detention without any case is incorrect. Therefore, the relief sought for by the petitioner cannot be granted. Even though there are several other issues raised in the writ petition, in view

11 (2014) 13 SCC 436

> of the facts narrated above, there is no need for us to go into those issues. However, the petitioner is at liberty to make an application for his release in Criminal Case No. 129 of 2013 pending before the Court of the learned Additional Chief Judicial Magistrate, Dalsingsarai."

Thakur, J. (as the learned Chief Justice then was) who agreed with the leading Judgment authored by Ramana, J., also dealt with the matter in paragraph 22 of his concurring opinion as under:

> **"22.** The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer could be allowed by the court below, having regard to the nature of the offences allegedly committed by the petitioner and the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody."

C) A Bench of three learned Judges of this Court in ***State of Maharashtra and Others vs. Tasneem Rizwan Siddiquee***[12] concluded as under:-

> **"10.** The question as to whether a writ of habeas corpus could be maintained in respect of a person who is in police

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12 (2018) 9 SCC 745

custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in *Saurabh Kumar* v. *Jailor, Koneila Jail*[11] and *Manubhai Ratilal Patel*[9] v. *State of Gujarat*. It is no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18-3-2018/19-3-2018 and decided by the High Court on 21-3-2018 her husband Rizwan Alam Siddiquee was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No. I-31 vide order dated 17-3-2018 and which police remand was to enure till 23-3-2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.

11. Reverting to the prayer for expunging the scathing observations made in the impugned judgment, in particular paras 4-6, reproduced earlier, it is submitted that the said observations were wholly unwarranted as the Deputy Commissioner of Police concerned who was present in Court, could not have given concession to release Rizwan Alam Siddiquee in the teeth of a judicial order passed by the Magistrate directing police remand until 23-3-2018. Moreover, it is evident that the High Court proceeded to make observations without giving any opportunity, whatsoever, to the police officials concerned to explain the factual position on affidavit. The writ petition was filed on 18-3-2018/19-3-2018 and was moved on 20-3-2018[2] when the Court called upon the advocate for the appellants to produce the record on the next day i.e. 21-3-2018. The impugned order came to be passed on 21-3-2018[1], notwithstanding the judicial order of remand operating till 23-3-2018. The High Court, in our opinion, should not have taken umbrage to the submission made on behalf of the Deputy Commissioner of Police that the respondent's

> husband could be released if so directed by the Court. As aforesaid, the DCP has had no other option but to make such a submission. For, he could not have voluntarily released the accused who was in police custody pursuant to a judicial order in force. The High Court ought not to have made scathing observations even against the investigating officer without giving him an opportunity to offer his explanation on affidavit.
>
> ***12.*** Suffice it to observe that since no writ of habeas corpus could be issued in the fact situation of the present case, the High Court should have been loath to enter upon the merits of the arrest in the absence of any challenge to the judicial order passed by the Magistrate granting police custody till 23-3-2018 and more particularly for reasons mentioned in that order of the Magistrate. In a somewhat similar situation, this Court in ***State represented by Inspector of Police and others v. N.M.T. Joy Immaculate***[13] deprecated passing of disparaging and strong remarks by the High Court against the investigating officer and about the investigation done by them. Accordingly, we have no hesitation in expunging the observations made in paras 4 to 6 of the impugned judgment against the police officials concerned in the facts of the present case."

19. The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the Order was passed by it, not only were there orders of remand passed by the Judicial Magistrate

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13 (2004) 5 SCC 729

as well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14.12.2018. The legality, validity and correctness of the order or remand could have been challenged by the original Writ Petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent Appellate or Revisional Forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial Order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent Order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in said order dated 20.06.2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14.12.2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the

petition, there was as order of extension passed by the Central Government on 14.12.2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of Habeas Corpus petition, the High Court was not justified in entertaining the petition and passing the Order.

20. We must, however, deal with the submission advanced on behalf of the original Writ Petitioners that the relief as regards Habeas Corpus was a secondary prayer while the principal submissions were with regard to the first three prayers in the petition. It was submitted that with the expiry of period, the entire mandate came to an end and as such, there could be no arrest and that illegality in that behalf would continue regardless whether there was a subsequent order of extension. In the submission of the learned counsel for the Writ Petitioner such an extension could not cure the inherent defect and as such, the High Court was justified in entertaining the petition. We may deal with this issue after considering the second question posed by the High Court in said paragraph 15.

21. The first Order dated 20.06.2018 itself indicated that the Registered Office of the Principal Company was in Gurugram, Haryana. Section 435 of 2013 Act contemplates establishment of Special Courts for the purpose of providing speedy trial of offences under said Act. Section 436 then provides that *"offences specified under sub-section (1) of Section 435 shall be triable only by Special Court established or designated for the area in which the Registered Office of the Company, in relation to which the offence is committed ……".* Soon after the arrest, the accused were produced before the Judicial Magistrate, Gurugram on 11.12.2018, who remanded them to custody till 14.12.2018 and directed that they be produced before the Special Court, Gurugram on 14.12.2018. Accordingly the accused were produced before the Special Court, Gurugram, who thereafter remanded them to custody first till 18.12.2018 and later till 21.12.2018. The Special Court, Gurugram would be competent to deal with the matter in terms of Section 436. Learned counsel for the writ petitioners, however, contend that since the accused were arrested in Delhi, were kept in custody in Delhi, and the SFIO office being in Delhi, the High Court of Delhi was competent to entertain and consider the writ petitions so preferred by the writ petitioners.

Reliance was placed by them on the decision of this Court in ***Navinchandra N. Majithia*** v. ***State of Maharashtra and others***[14]

22. In ***Navinchandra Majithia***[14], all the transactions between the parties had occurred within the jurisdiction of the High Court of Bombay. However, a complaint was filed against the petitioner at Shillong pursuant to which investigation was taken up by Shillong Police. It was submitted that such investigation was wholly incorrect and unjustified and a writ petition was preferred in the High Court of Bombay seeking quashing of the complaint so filed at Shillong or in the alternative to transfer the investigation to an appropriate Investigating Agency of Mumbai Police. Paragraph 29 of the decision shows that in the peculiar fact situation of the case, this Court directed that further investigation in relation to the complaints filed at Shillong be conducted by Mumbai Police. Thomas, J. who agreed with the leading Judgment authored by D.P. Mohapatra, J. observed in his concurrent opinion as under:

> **"44.** In the present case, a large number of events have taken place at Bombay in respect of the allegations contained in the FIR registered at Shillong. If the averments in the writ petition are correct then the major portion of the facts which led to the registering of the FIR

14 (2000) 7 SCC 640

> have taken place at Bombay. It is unnecessary to repeat those events over again as Mohapatra, J. has adverted to them with precision and the needed details.
>
> **45.** In the aforesaid situation it is almost impossible to hold that not even a part of the cause of action has arisen at Bombay so as to deprive the High Court of Bombay of total jurisdiction to entertain the writ petition filed by the petitioner. Even the very fact that a major portion of the investigation of the case under the FIR has to be conducted at Bombay itself, shows that the cause of action cannot escape from the territorial limits of the Bombay High Court."

23. In ***Dashrath Rupsingh Radhod vs. State of Maharashtra and another***[15]**,** a Bench of three learned Judges of this Court was called upon to consider the questions regarding territorial jurisdiction of Courts with regard to criminal complaints under the Negotiable Instruments Act, 1881 and para 13 of the decision noted the earlier decision in ***Navinchandra N. Majithia***[14] and observed as under:

> **"13.** We are alive to the possible incongruities that are fraught in extrapolating decisions relating to civil law onto criminal law, which includes importing the civil law concept of "cause of action" to criminal law which essentially envisages the place where a crime has been committed empowers the court at that place with jurisdiction. In *Navinchandra N. Majithia* v. *State of Maharashtra*[14] this Court had to consider the powers of High Courts under Article 226(2) of the Constitution of India. Noting the presence of the phrase "cause of action"

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15 (2014) 9 SCC 129

> therein it was clarified that since some events central to the investigation of the alleged crime asseverated in the complaint had taken place in Mumbai and especially because the fundamental grievance was the falsity of the complaint filed in Shillong, the writ jurisdiction of the Bombay High Court was unquestionably available. The infusion of the concept of "cause of action" into the criminal dispensation has led to subsequent confusion countenanced in High Courts. It seems to us that *K. Bhaskaran* v. *Sankaran Vaidhyan Balan and another*[16], , allows multiple venues to the complainant which runs counter to this Court's preference for simplifying the law. Courts are enjoined to interpret the law so as to eradicate ambiguity or nebulousness, and to ensure that legal proceedings are not used as a device for harassment, even of an apparent transgressor of the law. Law's endeavour is to bring the culprit to book and to provide succour for the aggrieved party but not to harass the former through vexatious proceedings. Therefore, precision and exactitude are necessary especially where the location of a litigation is concerned."

24. It is true that the decision in ***Dashrath Rupsingh Radhod*** [15] was in the context of a criminal complaint under Section 138 of the Negotiable Instruments Act and not while dealing with an issue of maintainability of a writ petition under Article 226 of the Constitution. It cannot, therefore, be said that in the present case, the High Court completely lacked jurisdiction to entertain the petition. However, since the challenge was with respect to the detention pursuant to valid remand orders passed by the Judicial Magistrate and the Special Court, Gurugram, in our considered view, the

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16 (1999) 7 SCC 510 : 1999 SCC (Cri) 1284

High Court should not have entertained the challenge. If the act of directing remand is fundamentally a judicial function, correctness or validity of such orders could, if at all, be tested in a properly instituted proceedings before the appellate or revisional forum. In the circumstances even if the arrests were effected within the jurisdiction of the High Court, since the accused were produced before a competent court in pursuance of Sections 435, 436 of 2013 Act, the High Court ought not to have entertained the writ petition. However, since the High Court considered the matter from the standpoint whether the initial Order of arrest itself was valid or not and then found that such illegality could not be sanctified by subsequent Order of remand, we may deal with that question now.

25. At the outset, we may extract relevant statutory provisions.

A) Sections 211 and 212 of 2013 Act are as under:-

> **"211. Establishment of Serious Fraud Investigation Office.** – (1) The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company:
>
> Provided that until the Serious Fraud Investigation Office is established under sub-section (1), the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No.45011/16/2003-Adm-I, dated the 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

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

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

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

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

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

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

(a) on receipt of a report of the Registrar or inspector under section 208;
(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
(c) in the public interest; or
(d) on request from any Department of the Central Government or a State Government,

The Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspector, as he may consider necessary for the purpose of such investigation.

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

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

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

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

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), [17][offence covered

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[17] Subs. by Act 21 of 2015, sec. 17, for "the offences covered under sub-sections (5) and (6) of section 7, section 34, section 36, sub-section (1) of section 38, sub-sections (5) of section 46, sub-section (7) of section 56, sub-section (10) of section 66, sub-section (5) of section 140, sub-section (4) of section 206, section

under section 447] of this Act shall be recognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless-

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

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

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

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

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

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

(7) The limitation on granting of bail specified in sub-section (5) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

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

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213, section 229, sub-section (1) of section 251, sub-section (3) of section 339 and section 448 which attract the punishment for fraud provided in section 447".

person and shall, as soon as may be, inform him of the grounds for such arrest.

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

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

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

(11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government.

(12) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

(13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

(14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

(15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be

deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974).

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

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

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

B) Section 43 of 2008 Act is as under:-

"43. Investigation of the affairs of limited liability partnership – (1) The Central Government shall appoint one or more competent persons as inspectors to investigate the affairs of a limited liability partnership and to report thereon in such manner as it may direct if–

(a) the Tribunal, either suo moto, or on an application received from not less than one-fifth of the total number of partners of limited liability partnership, by orders, declares that the affairs of the limited liability partnership ought to be investigated; or

(b) any Court, by order, declares that the affairs of a limited liability partnership ought to be investigated.

(2) The Central Government may appoint one ore more competent persons as inspectors to investigate the affairs of a limited partnership and to report on them in such manner as it may direct.

(3) The appointment of inspectors pursuant to sub-section (2) may be made, -

(a) if not less one-fifth of the total number of partners of the limited liability partnership make an application along with supporting evidence and security amount as may be prescribed; or
(b) if the limited liability partnership makes an application that the affairs of the limited liability partnership ought to be investigated; or
(c) if, in the opinion of the Central Government, there are circumstances suggesting –

(i) that the business of the limited partnership is being or has been conducted with an intent to defraud its creditor, partners or any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive or unfairly prejudicial to some or any of its partners, or that the limited liability partnership was formed for any fraudulent or unlawful purpose; or

(ii) that the affairs of the limited liability partnership are not being conducted in accordance with the provisions of this Act, or

(iii) That, on receipt of a report of the Registrar or any other investigating or regulatory agency, there are sufficient reasons that the affairs of the limited liability partnership ought to be investigated."

26. Reading of the provisions of 2013 Act shows that certain Sections in Chapter XXIX prescribe punishment for offences such as fraud, false statement, false evidence and withholding of property under Sections 447, 448, 449 and 452 respectively. The punishment for fraud involving an amount of at least Rs.10 lakhs or 1 per cent of the turnover of the Company, is imprisonment for a term which may extend to 10 years. The offence of fraud in relation to the affairs of a Company is considered to be a grave offence and the writ petitioners were allegedly guilty of such offence. Chapter XIV of 2013 Act deals with Inspection, Inquiry and Investigation. Under Section 210, investigation into the affairs of a Company can be undertaken. Section 211 contemplates establishment of Serious Fraud Investigation Offence (SFIO) which is to be headed by a Director and is to consist of Experts with ability, integrity and experience in fields like Banking, Corporate Affairs, Taxation, Forensic Audit, Capital Market, Information Technology, Law or such other fields. SFIO headed by a Director is thus a compact and competent unit consisting of experts in various domains. Section 212 empowers the Central Government to assign the investigation into the affairs of a Company to SFIO. Upon such assignment the Director SFIO may designate such number of inspectors under sub-Section (1) and shall cause the affairs of the Company to be investigated by an Investigating Officer under

sub-Section (4). The expression used in sub-Section (1) is "*assign the investigation*". Sub-Section (2) incorporates an important principle that upon such assignment by the Central Government to SFIO, no other investigating agency of the Central Government or any State Government can proceed with investigation in respect of any offence punishable under 2013 Act and is bound to transfer the documents and records in respect of such offence under 2013 Act to SFIO.

27. Under sub-Section (3) where the investigation is so assigned by the Central Government to SFIO, the investigation must be conducted in the manner and in accordance with the procedure provided in the Chapter and a report has to be submitted to the Central Government within such period as may be specified. This provision contemplates submission of a report within the period as may be specified. The subsequent provisions then contemplate various stages of investigation including arrest under sub-Section (8) and that SFIO is to submit an interim report to the Central Government, if it is so directed under sub Section (11). Further, according to sub-Section (12), on completion of the investigation, SFIO is to submit the "investigation report" to the Central Government. This report under sub-Section (12) may lead to further follow up actions. Under sub-Section (13) a copy of the "investigation

report" could be obtained by any concerned person by making an application in that behalf to the Court while under sub-Section (14) on receipt of said "investigation report" the Central Government may direct SFIO to initiate prosecution against the Company.

The "investigation report" under sub-Section (12) is to be submitted on completion of the investigation whereas report under sub-Section (11) is in the nature of an interim report and is to be submitted if the Central Government so directs. In the backdrop of these provisions we must now consider whether the period within which a report is contemplated to be submitted to the Central Government under sub-Section (3) is mandatory and what is the scope and extent of such stipulation. It must also be stated here that the provisions of Section 43(2) of 2008 Act do not postulate any such period and the assignment in the present case to SFIO was under the concerned provisions of 2013 Act as well as under 2008 Act.

28. Section 212(3) of 2013 Act by itself does not lay down any fixed period within which the report has to be submitted. Even under sub-Section (12) which is regarding "investigation report", again there is no stipulation of any period. In fact such a report under sub-Section (12) is to be submitted "on completion of the investigation". There is no stipulation of any fixed

period for completion of investigation which is consistent with normal principles under the general law. For instance, there is no fixed period within which the investigation under Criminal Procedure Code must be completed. If the investigation proceeds for a longer period, under Section 167 of the Code certain rights may flow in favour of the Accused. But it is certainly not the idea that in case the investigation is not over within any fixed period, the authority to investigate would come to an end.

Again, sub-Section (2) of Section 213 of 2013 Act does not speak of any period for which the other Investigating Agencies are to hold their hands, nor does the provision speak of any re-transfer of the relevant documents and records from SFIO back to said Investigating Agencies after any period or occurring of an event. For example, under Section 6 of the National Investigation Agency Act, 2008 ("NIA Act" for short) the Agency (NIA) can be directed by the Central Government to investigate the Scheduled Offence under the NIA Act and where such direction is given, the State Government is not to proceed with any pending investigation and must forthwith transmit the relevant documents and records to the Agency (NIA). But under Section 7 of NIA Act, the Agency may, with previous approval, transfer the case to the State Government for investigation and trial of the offence.

29. The very expression "*assign"* in Section 212(3) of 2013 Act contemplates transfer of investigation for all purposes whereafter the original Investigating Agencies of the Central Government or any State Government are completely denuded of any power to conduct and complete the investigation in respect of the offences contemplated therein. The idea under sub-Section (2) is complete transfer of investigation. The transfer under sub-Section (2) of Section 213 would not stand revoked or recalled in any contingency. If a time limit is construed and contemplated within which the investigation must be completed then logically, the provisions would have dealt with as to what must happen if the time limit is not adhered to. The Statute must also have contemplated a situation that a valid investigation undertaken by any Investigating Agency of Central Government or State Government which was transferred to SFIO, must then be re-transferred to said Investigating Agencies. But the Statute does not contemplate that. The transfer is irrevocable and cannot be recalled in any manner. Once assigned, SFIO continues to have the power to conduct and complete investigation[18]. If that be so, can such power stand curtailed or diminished if the investigation is

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18 The decision of this Court in Kazi Lhendup Dorji vs. State of Sikkim & Ors reported in (1994) Supp. 2 SCC 116 (para 16), though in a different situation, laid down that consent once given by State Government under which investigation was handed over to CBI, could not be recalled or rescinded by the State Government and it is the CBI which would be competent to complete investigation.

not completed within a particular period. The Statute has not prescribed any period for completion of investigation. The prescription in the instant case came in the order of 20.06.2018. Whether such prescription in the Order could be taken as curtailing the powers of SFIO is the issue.

30. It is well settled that while laying down a particular procedure if no negative or adverse consequences are contemplated for non-adherence to such procedure, the relevant provision is normally not taken to be mandatory and is considered to be purely directory. Furthermore, the provision has to be seen in the context in which it occurs in the Statute. There are three basic features which are present in this matter:-

1. Absolute transfer of investigation in terms of Section 212(2) of 2013 Act in favour of SFIO and upon such transfer all documents and records are required to be transferred to SFIO by every other Investigating Agency.

2. For completion of investigation, sub-Section (12) of Section 212 does not contemplate any period.

3. Under sub-Section (11) of Section 212 there could be interim reports as and when directed.

In the face of these three salient features it cannot be said that the prescription of period within which a report is to be submitted by SFIO under sub-Section (3) of Section 212 is for completion of period of investigation and on the expiry of that period the mandate in favour of SFIO must come to an end. If it was to come to an end, the legislation would have contemplated certain results including re-transfer of investigation back to the original Investigating Agencies which were directed to transfer the entire record under sub-Section (2) of Section 212. In the absence of any clear stipulation, in our view, an interpretation that with the expiry of the period, the mandate in favour of SFIO must come to an end, will cause great violence to the scheme of legislation. If such interpretation is accepted, with the transfer of investigation in terms of sub Section (2) of Section 212 the original Investigating Agencies would be denuded of power to investigate and with the expiry of mandate SFIO would also be powerless which would lead to an incongruous situation that serious frauds would remain beyond investigation. That could never have been the idea. The only construction which is, possible therefore, is that the prescription of period within which a report has to be submitted to the Central Government under sub-Section (3) of Section 212 is purely directory. Even after the expiry of such stipulated period, the mandate in

favour of the SFIO and the assignment of investigation under sub-Section (1) would not come to an end. The only logical end as contemplated is after completion of investigation when a final report or "investigation report" is submitted in terms of sub-Section (12) of Section 212. It cannot therefore be said that in the instant case the mandate came to an end on 19.09.2018 and the arrest effected on 10.12.2018 under the orders passed by Director, SFIO was in any way illegal or unauthorised by law. In any case, extension was granted in the present case by the Central Government on 14.12.2018. But that is completely besides the point since the original arrest itself was not in any way illegal. In our considered view, the High Court completely erred in proceeding on that premise and in passing the order under appeal.

31. These appeals therefore deserve to be allowed and the Order under appeal must be set aside. Since the writ petitioners were directed to be released on bail, by way of interim relief, we direct as under:-

(a) The Order dated 20.12.2018 passed by the High Court in W.P. (Crl.) No.3842 of 2018 and in W.P. (Crl.) No.3843 of 2018 is set aside.

(b) The writ petitioners namely Rahul Modi and Mukesh Modi are directed to surrender and remain present on 01.04.2019 at 11.00 a.m. before the

Special Court, Gurugram. The Special Court may then consider the matter on merits and whether the accused are required to be remanded to custody.

(c) In case, said writ petitioners do not appear on the day and at the time stipulated above, the personal bonds executed by them and the surety bonds shall stand forfeited and the appellant shall be at liberty to arrest said writ petitioners.

(d) The writ petitioners shall file affidavits of compliance in this Court by 08.04.2019.

32. Transfer Petition (Crl.) No.35 of 2019 was filed by Serious Fraud Investigation Office (SFIO) and Deputy Director, SFIO (Original Respondents seeking transfer of Writ Petition (Crl.) No.3960 of 2018. Said writ petition preferred on 21.12.2018 by Vivek Harivyasi claimed similar relief as was granted by the High Court in Writ Petition (Crl) Nos.3842 and 3843 of 2018 on 21.12.2018. However, before the writ petition could be taken up, the decision of the High Court dated 20.12.2018 was put in challenge before this Court and Transfer Petition (Crl.) No.35 of 2019 seeking transfer of Writ Petition (Crl.) No.3960 of 2018 was also preferred.

33. On 08.03.2019 learned counsel appearing for Vivek Harivyasi submitted that his client would prefer an application for bail before the concerned court and following direction was passed by this Court:

> "The respondent No.1 in T.P. (Crl.) No.35/20-19 may prefer application for bail and if such an application is preferred, the concerned court in question may consider the matter on merits without being influenced by any observations in the order of the High Court, impugned herein.

34. In view of our above decision in Criminal Appeals arising from Special Leave Petition (Crl.) Nos.94-95 of 2019, no separate orders are called for in the transfer petition. The transfer petition is, therefore, disposed of.

35. In the end, we must state that we have not and shall not be taken to have expressed any opinion on merits of the matter which shall be gone into independently by the concerned courts.

……..…..……..……J.
(Abhay Manohar Sapre)

..…….……J.
(Uday Umesh Lalit)

New Delhi,
March 27, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL Nos.538-539 OF 2019 (Arising out of S.L.P.(Crl.) Nos.94-95 of 2019)

Serious Fraud Investigation Office ….Appellant(s)

VERSUS

Rahul Modi and Anr. Etc. ….Respondent(s)

WITH

TRANSFER PETITION (CRL.) NO.35 OF 2019
(Serious Fraud Investigation Office & Anr. vs. Vivek Harivyasi & Ors.)

J U D G M E N T

Abhay Manohar Sapre, J.

1. I have had the advantage of going through an elaborate, well considered and scholarly draft judgment proposed by my esteemed brother Justice Uday Umesh Lalit.

2. I entirely agree with the reasoning and the conclusion, which my erudite brother has drawn, which are based on remarkably articulate process of reasoning. However, having regard to the nature of the controversy, I wish to add a few words of mine.

3. One of the questions which fell for consideration in these appeals and was ably argued at length by the learned senior counsel for both the parties was in relation to the scope, extent and the purpose of Section 212 of the Companies Act, 2013 (hereinafter referred to as the "Act") and, in particular, whether the compliance of sub-section (3) of Section 212 of the Act is mandatory or directory and, if so, why.

4. As rightly reasoned out by my learned brother Lalit, J., having regard to the scheme of the Act underlined in Chapter XIV (Sections 206 to 229 of the Act) dealing with the matters relating to

inspection, inquiry and investigation of the companies in juxtaposition with Chapter XXIX which prescribes the punishment/penalties for commission of various offences specified under the Act, the compliance of sub-section (3) of Section 212 of the Act is essentially directory.

5. If the submission of the learned counsel for the respondents (writ petitioners) that the compliance of sub-section (3) of Section 212 of the Act in relation to the submission of the report be held mandatory is accepted (which I am afraid, I cannot accept) in our view, the very purpose of enacting Section 212 of the Act would get defeated and will become nugatory.

6. Indeed, when I apply the well-known principle of purposive interpretation while interpreting the relevant provisions in juxtaposition and hold that sub-section (3) of Section 212 of the Act is directory

in nature, it serves the legislative intent for which Chapter XXIX is enacted.

7. I, therefore, agree with the reasoning and the conclusion arrived at by brother Justice Lalit on the interpretation of sub-section (3) of Section 212 of the Act.

8. In the light of what is held above, the other arguments of learned counsel for the respondents do not survive for consideration.

9. So far as the other issues are concerned, brother Lalit, J. has dealt with them succinctly. I entirely agree with him.

.....J.
[ABHAY MANOHAR SAPRE]

New Delhi;
March 27, 2019.