(2019) 01 DEL CK 0012

In the Delhi High Court

Case No : Criminal Writ Petition No. 3960 Of 2018

Vivek Harivyasi APPELLANT

Vs

Union Of India & Ors RESPONDENT

Date of Decision : 04-01-2019

Acts Referred:

Companies Act, 2013 — Section 212(3), 212(8), 447
Code Of Criminal Procedure, 1973 — Section 167

Citation : (2019) 3 AD(Delhi) 97 : (2019) 1 JCC 557

Hon'ble Judges : Jyoti Singh, J;Anup Jairam Bhambhani, J

Bench : Division Bench

Advocate : Kapil Sibbal, K.C. Mittal, A.K. Bhardwaj, Yaashna Thakran, Aditya Vikram Singh, Kumar Manish, Jagriti, Ruchika Mittal, Yugansh Mittal, Maninder Acharya, Amit Mahajan, Akshay Makhija, Tejaswita Sachdeva, Anuraj Ahluwalia

Judgement

Jyoti Singh, J

CRL.M.A. 50740/2018 (Exemption)

Exemption granted subject to all just exceptions.

The application is disposed of.

W.P. (CRL) 3960/2018 & CRL.M.B. 50739/2018

1. By way of the instant petition, the petitioner seeks to challenge the power of respondent nos.2, 3 and 4 to carry out investigation in terms of Section 212(3) of Companies Act, after expiry of the time period as provided in Section 212(3) Companies Act, as also the alleged illegal arrest of petitioner on 10.12.2018 and all other proceedings emanating therefrom.

2. The brief and relevant facts necessary to adjudicate the present petition are that vide order dated 20.06.2018, respondent no. 1 ordered investigation into the affairs of Adarsh Group of Companies and LLPs by the Serious Fraud Investigation Office (hereinafter referred to as 'SFIO') in public interest and

Director SFIO appointed a team of officers to carry out investigation.

3. The petitioner was called upon to join investigation along with Rahul Modi and Mukesh Modi and certain others. The order of the Central Government had given a period of three months to the SFIO to complete the investigation and submit their report. But the same could not be completed by SFIO within the said period of time.

4. The petitioner claims that he was called upon to appear for investigation on 10.12.2018 and when he appeared before respondent no.2, he was illegally arrested by respondent no.3 at the office of respondent no. 2.

5. On 11.12.2018, the petitioner was produced before the Judicial Magistrate, Gurugram under Section 167 Cr.P.C. and remand of the petitioner was sought by an application dated 11.12.2018. The learned Judicial Magistrate, granted three days custody of the petitioner to SFIO. Thereafter, the petitioner was produced before the learned Sessions Judge on 14.12.2018 and further custody was sought. The petitioner claims that on this day, during the course of arguments, an issue was raised before the learned Sessions Judge that the investigation was illegal as the time period mentioned in the order dated 20.06.2018 had expired in terms of Section 212(3) of the Companies Act in September, 2018 itself. However, the SFIO had produced a letter dated 13.12.2018 whereby they had sought permission from the Central Government for extension of time to complete the investigation. After hearing arguments, the learned Sessions Judge granted further four days custody of the petitioner to the SFIO.

6. The above writ petition was listed before this Court on 21.12.2018 and this Court had granted time to the counsel for the respondents to produce the relevant original file for perusal of the Court and the matter was listed before Vacation Bench on 24.12.2018. On 24.12.2018, during the arguments it was noticed that the writ petition had not disclosed as to what had transpired before the learned Sessions Judge after the four days remand granted on 14.12.2018. This Court had, therefore, adjourned the matter to 26.12.2018 to enable the learned counsel to revert on this aspect.

7. On 26.12.2018, the learned senior counsel for the petitioner handed over an order dated 21.12.2018 passed by the Sessions Judge, Gurugram whereby the learned Sessions Judge had remanded the petitioner to judicial custody till 04.01.2019; while, in compliance of an order of the Division Bench of this Court, as referred to below, the other two accused persons Mukesh Modi and Rahul Modi were released on bail on furnishing bail bonds in the sum of Rs. 5 lakh each, with two sureties in the like amount.

8. Learned senior counsel for the petitioner vehemently contended that the investigation against the petitioner had been ordered by the Central Government by an order dated 20.06.2018 prescribing a period of three months to submit its report to the Central Government. He has drawn the attention of the Court to Section 212(3) of the Companies Act to contend that the said provision clearly

mandates the SFIO to conduct investigation within a specified time period and any investigation beyond the prescribed time period is bad in law and without jurisdiction. The three months period having ended on 19.09.2018, any investigation thereafter was without jurisdiction, and the petitioner's arrest on 10.12.2018 pursuant thereto was illegal and the petitioner deserves to be released forthwith. On the issue of territorial jurisdiction of this Court to hear a matter relating to the petitioner's judicial custody in Gurugram, learned senior counsel submitted that his challenge is to the arrest order dated 10.12.2018 which arrest has been made at Delhi and to the investigation which is being carried out by the SFIO in Delhi. The learned senior counsel contended that the case of the petitioner is squarely covered by the judgment of a coordinate Bench of this Court dated 20.12.2018 in W.P.(Crl.) No. 3842/2018 titled Rahul Modi v. Union of India & Ors. and W.P.(Crl.) No. 3843/2018 titled Mukesh Modi v. Union of India & Ors, as the petitioner is identically placed. The learned senior counsel further argued that the issue of territorial jurisdiction of the Delhi High Court to deal with an habeas corpus petition with the remand orders passed by a court at Gurugram was also decided in the said judgment.

9. Per contra, the learned Additional Solicitor General appearing on behalf of the respondents contended that in the short counter-affidavit filed on behalf of respondent Nos. 2 to 4, the respondents have clearly brought out that the essence of the SFIO's investigation was to unearth huge sums of money diverted/ siphoned-off from the entities under investigation. She submitted that the investigation had so far revealed that the amount allegedly siphoned off belongs to 22 lakh poor depositors of Adarsh Credit Cooperative Society Limited, Ahmedabad and outstanding balance due to the depositors is upward of Rs.10,000 crores. The deposits have been taken from the public at an interest rate of 6% to 16% p.a. by making them members; and lending the same at the rate of 24% to 36% p.a. On verification, it was found that most of the loans in value terms are given to entities/companies controlled by Mukesh Modi and his family/associates. According to the learned Additional Solicitor General, the petitioner was also deeply involved and was the promoter / director / signatory of most of the 22 entities under investigation, which have been doing business of real estate.

10. On the question of time period for investigation prescribed in order dated 20.06.2018, the learned Additional Solicitor General has submitted that on 13.12.2018, the office of the SFIO had written to the Central Government to extend the time for completing the investigation and submitting the report by another period of six months, as the number of cases assigned to SFIO are very large and the nature of investigation was such as it involved large number of group entities and their associates to be investigated; and in between there were a number of urgent cases in which orders were passed by the courts to carry-out investigation in a time bound manner. The learned Additional Solicitor General has also vehemently contended that the period prescribed under Section 212(3) of the Companies Act cannot be so sacrosanct that an investigation should be

declared unlawful, particularly when it relates to a serious case of fraud and siphoning-off of large sums of money, as the present. Reading Section 212(3) of Companies Act, it was argued that the legislature has consciously used the word 'may' and not 'shall' in the said provision. The attention of the Court was also drawn to Section 212(8) of the Companies Act wherein powers have been given to the SFIO to arrest a person when found guilty of an offence under Section 447 of the Companies Act. The argument advanced was that sub-section (8) and sub-section (3) of Section 212 operate in two different fields and the power of arrest is independent of the time-line prescribed for investigation under Section 212(3) which time-line is for submission of a report by the SFIO to the Central Government, coupled with the fact that sub-section (11) permits the SFIO to even submit an interim report. Learned ASG submitted that the argument of the petitioner that the time lines are sacrosanct, cannot be stretched to such a level that an arrest in a serious case like this should be declared illegal on that ground alone. Responding to the argument of the learned senior counsel for the petitioner that the judgment of the coordinate Bench squarely covers the case of the petitioner, the learned ASG stated, on instructions, that the Department is proposing to file an appeal against the said judgment. The learned ASG has further contended that this Court would have no territorial jurisdiction to entertain the present petition as the petitioner is in judicial custody in Gurugram and not in the SFIO custody. She has further pointed out that being in judicial custody, there are other legal remedies available to the petitioner and a petition of habeas corpus is even otherwise not maintainable as the arrest has been made under the provisions of the Companies Act, 2013 and cannot be termed as an illegal detention.

11. We have heard learned counsel for the parties and have gone through the judgments relied upon by both the sides.

12. Having gone through the judgment of the coordinate Bench relied upon by the petitioner, we are of the view that reliance by the petitioner on the said judgment may not be dispositive of the present case as there are certain issues which arise additionally in the present case, both factual and legal, which were not raised in that case and were accordingly not considered inter alia that the provisions of Sections 212(3) and 212(8) of the Companies Act operate in two different fields and the power of investigation and power of arrest are independent of each other; that the stipulation as to time-frame for investigation may not necessarily apply to the time period for which a person may be placed under arrest; that it is the prerogative of the SFIO to submit even an interim report at any stage of the investigation; that the petitioner in the present case is in Judicial Custody and not SFIO custody; that the Companies (Amendment) Act, 2015 making the offence of fraud under Section 447 of the Companies Act a cognizable offence may have retrospective application.

13. In this view of the matter, we deem it appropriate to issue formal notice in the matter, calling upon the respondents to file a detailed counter-affidavit

answering the various issues arising in the present petition. The same may be filed within a period of three days with advance copy to the learned counsel for the petitioner, who may file a rejoinder thereto, if any, before the next date of hearing.

13. List the matter for hearing on 9th January, 2019 before the Roster Bench.

Dasti under the signature of Court Master.

