

Prosecution Architecture Under The Companies Act 2013

FOREWORD

MECHANISM FOR CRIMINAL PROCEEDINGS UNDER THE PRESENT COMPANIES ACT 1956

Generally at the time of scrutinizing the Balance Sheet and Other Financial Statements of the Company, if Registrar of Companies come across any lapses on part of the Company in recording the transactions and financial irregularities etc. and observed provisions of Companies Act 1956 has been violated by the Company and Officers in preparation of Financial Statements, the Registrar of Companies issues show cause notice to the company / officers in default. On such Show cause notice being served upon to the company, it is the responsibility of the Company to make sure all details sought by the Registrar of Companies is properly provided to the satisfaction of the Registrar of Companies. If Registrar of Companies is convinced with the explanation given by the company and upon getting proper documents and back papers, he may drop the proceedings.

In case, the company is not in a position to prove its genuineness in providing the details sought for by the Registrar of Companies, then the Registrar of Companies will serve show cause notice to the directors as officers in default and company stating that why action shall not be taken by the Registrar of Companies against the company for the lapse in compliance as observed by Registrar of



Mr. S. DHANAPAL

Companies. In which case the company have a option of either satisfying the Registrar of Companies by providing required documents and details sought for or if it is not in a position to prove that the company genuinely recorded the financial transactions and maintain books of accounts in compliance with the provisions of the Act, approach Company Law Board to compound the offences committed by the company accepting that there are lapses on part of the Company as well as directors in complying the provisions of the Act.

In case, the company has failed to compound the offences with Company Law Board, then the Registrar of Companies will proceed further to file a complaint against the company and its directors with Magistrate Court who has jurisdiction to try the said offences after obtaining permission from the Ministry.

On such complaint being filed with Magistrate, the procedure prescribed under Code of Criminal Procedure will be followed by the Magistrate Court to dispose the matter.

PROSECUTION UNDER COMPANIES ACT 2013

SERIOUS FRAUD INVESTIGATION OFFICE (SFIO)

Companies Act 2013 provides for establishment of a Serious Fraud Investigation Office to investigate into the affairs of the Company on an order by the Central Government and where any case has been assigned to the SFIO, no other investigating agency shall proceed with investigation in such case. The Investigating Officer of SFIO shall have all the powers of a civil court while trying a suit.

If the Director, Additional Director or Assistant Director of Serious Frauds Investigation Office authorised in this behalf by the Central Government 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 earlier in this write up as "cascading effect of Section 447, he may arrest such person and present him before the Judicial Magistrate or a Metropolitan Magistrate within 24 hours.

For this purpose the Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a Company.

Therefore under the provisions of Companies Act 2013, SFIO has got statutory status as proposed therein. Investigation report of SFIO filed with the Court for framing of charges shall be treated as a report filed by a Police Officer. SFIO shall have power to arrest in respect of certain offences of the Act which attract the punishment for fraud. Those offences shall be cognizable and the person accused of any such offence shall be released on bail subject to certain conditions

provided in the relevant section of the Act. Stringent penalty is provided for fraud related offences.

However it is also provided that until the Serious Fraud Investigation Office is established under subsection (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.

It is provided that when the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office-

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

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

It is also provided that 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.

It has also been prescribed in the Companies act that 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 Chapter XIV and submit its report to the Central Government within such period as may be specified in the order. In such case 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.

It is also mandated not only on part of the company but also its officers and employees, who are or have been in employment of the company to take responsibility to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

SPECIAL COURTS

The provisions of the Companies Act 2013 provide for establishment of Special Courts. Offences under the Companies Act 2013 shall be tried only at Special Courts. Complaints can be filed by Shareholder, ROC or any officer

authorized by Central Government; however the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorized by the Securities and Exchange Board of India.

LAST WORDS:

One of the most important and serious provision that is going to be made applicable on Companies act 2013 becoming effective is that irrespective of anything contained in the Code of Criminal Procedure, 1973, the offences covered under sub-sections (5) and (6) of section 7, section 34, section 36, subsection (1) of section 38, sub-sections (5) of section 46, sub-section (7) of section 56, subsection (10) of section 66, sub-section (5) of section 140, sub-section (4) of section 206, section 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 of companies Act 2013 shall be cognizable 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:

However if any 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.

It is also provided that the Special Court shall not take cognizance of any offence referred to in 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.

The limitation on granting of bail specified above is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. Therefore seriousness and intention of introducing in-depth criminal provisions into the provisions of Companies Act 2013 goes to prove that law makers have decided to bring a thought process into the mind of corporates and other stake holders

that Companies Act shall no longer be looked into as civil and regulatory kind of law and It looks that they wanted corporate and other stake holders to treat and understand it as more of a criminal nature of law , when they fail to follow and comply with the provisions of the Companies Act 2013 in its real and true spirits.

The stringent penalties prescribed for non-compliance under each section, providing statutory status to Serious Fraud Investigation Office and placing the report of SFIO on par with police report, giving it power to arrest, introduction of section 447 providing severe Punishment for Fraud etc. all drive at the point that the Companies Act 2013 is extremely serious on compliance and it has also provided for an effective and time bound enforcement machinery to inflict it.

*(The author is a Chennai based Company Secretary.
He can be reached at csdhanapal@gmail.com)*
