

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
CP 4506/2018**

Under Section 130 of the Companies Act, 2013

In the matter of

Union of India, MCA

... Petitioner

Vs

Infrastructure Leasing & Financial Services Ltd ... R1

IL&FS Financial Services Limited ... R2

IL&FS Transportation Networks Ltd ... R3

Coram: Hon'ble Shri V P Singh, Member (J)

Hon'ble Shri Ravikumar Duraisamy, Member (T)

For the Petitioner: Mr. Sanjay Shorey, Director (Legal and Prosecution), MCA, Mr. Manmohan Juneja, Regional Director (Western Region), MCA, Mr. Vinod Sharma, ROC Mumbai, MCA, Mr. Meghav Gupta, Company Prosecutor, MCA, Mr. Neelambuj, Company Prosecutor, ROC Mumbai, MCA,

For SEBI : Mr. Nishant Upadhyay a/w Mr. Nirav Parmar, i/b K. Ashar & Co for SEBI

For the Respondents: Mr. Karl Tamboly a/w Devesh Juvekar, Rishabh Jaisani, Pooja Vasandani i/b Mr. Arun Sane, Ms. Ekta Tyagi, Mr. Naclsher Kohli, i/b DSK Legal, Mr. Malhar Satakia a/w Kamal Shankar, Atul Menon i/b BSR Associates LLP, Mr. Krishnava Dutt, i/b Argus Partners for Keki Mistry (Non Executive Director), Mr. Swapnil Gupte, i/b Argus Partners for Harish Engineer (Non Executive Director), Mr. Mustafa Doctor a/w Anugrah Robin Frey & Akriti Shika, i/b L & L Partners for Deloitte Haskins & Sells, Mr. Mangesh Sawant, Mr. Venkatesh Dhond a/w Prateek Mishra i/b L & L Partners for SRBC & Co LLP, Mr. Krishnava Dutt, i/b Argus Partners, Ms. Pooja Pandey, Mr. Gamonjit Singh Sethi, Mr. V. R. Dhond, Sr. Advocate and Mr. Prateek Mishra, Advocate, i/b L & L Partners for SRBC & CO LLP, Mr. Mohit Arora, i/b AZB & Partners appearing for Independent Directors, Mr. Malhar Zatakia a/w Kamal Shankar and Atul Memon i/b AZB & Partners for BSR & Associates LLP

Per V. P. Singh, Member (Judicial)

ORDER

Oral Order dictated in the open court on 1.1.2019

This Petition has been filed by Union of India, MCA through Regional Director, Western Region, against Infrastructure Leasing and Financial

Services Limited, IL&FS Financial Services Limited and IL&FS Transportation Networks Ltd under Section 130(1) of the Companies Act, 2013 seeking permission for:

1. *Re-opening of the Books of account and re-casting thereof including financial statements of Infrastructure Leasing and Financial Services Limited (R-1), IL&FS Financial Services Limited (R-2) and IL&FS Transportation Networks Ltd (R-3) for the past five Financial Years viz. from Financial Year 2012-2013 to Financial Year 2017-2018.*
2. *Appointing such person/firm of Chartered Accountants to recast the accounts/financial statement of Infrastructure Leasing and Financial Services Limited (R-1), IL&FS Financial Services Limited (R-2) and IL&FS Transportation Networks Ltd (R-3) for the past five Financial Years viz. from Financial Year 2012-2013 to Financial Year 2017-2018*

Director (Prosecution and Legal) requested passing the order under Section 130 relating to the re-opening of the accounts of the Respondent Companies on the basis of report of ICAI and the report of SFIO.

Section 130 of the Companies Act reads as below:

- (1) *A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the Central Government, the Income Tax Authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that-*
 - (i) *the relevant earlier accounts were prepared in a fraudulent manner; or*
 - (ii) *the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements:*

Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income Tax Authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned and shall take

into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned before passing any order under this Section.

- (2) *Without prejudice to the provisions contained in this Act, the accounts so revised or re-cast under sub-section (1) shall be final.*

First proviso to Section 130(1) provides that court or the Tribunal as the case may be **shall give notice** to the Central Government, the Income Tax Authorities, the Securities and Exchange Board (SEBI) or any other statutory regulatory body or authority concerned and any other person concerned and shall take into consideration the representations if any made by the Government or the Income Tax Authorities, SEBI or the body or the authority concerned **before passing any order under this Section.**

Director (Legal & Prosecution) appearing on behalf of Central Government has filed Affidavit of Service in compliance of our earlier order dated 21.12.2018 which shows that notices have been served on the Income Tax Authority, SEBI, other statutory/ regulatory bodies, along with the Respondents.

After serving the notices, Counsel representing the SEBI stated that SEBI doesn't have any objection, if the accounts and financial statements of R1 and R3, which are the listed companies, are re-opened and re-casted.

R3 in the main Company Petition has filed written objection wherein it is stated that an order permitting re-opening of the books of account and re-casting thereof including financial statements of R1 to R3 for the past five years can be passed in a condition when Tribunal comes to the conclusion that the accounts of relevant years were earlier prepared fraudulently; or that the affairs of R1 to R3 were mismanaged during the relevant period, casting a doubt on the reliability of the financial statements.

It is further contended on behalf of R3 that the main Company petition is still pending and if any order is passed in this company petition, it may have bearing upon the main company petition.

Ld. Counsel appearing on behalf of the Auditors, Deloitte Haskins & Sells LLC, SRBC & Co. LLP and BSR & Associates LLP requested that time

be given for filing reply. It is further contended by them that at this stage when ICAI enquiry is pending, no such opinion can be formed that accounts were being prepared in a fraudulent manner. Ld. Counsel representing the auditors has emphasized on para 3(A) of the application, wherein it is mentioned that **“accounts for the past five years have been prepared in a fraudulent and negligent manner by the erstwhile statutory auditors, viz. Deloitte Haskins & Sells LLC, SRBC & Co. LLP and BSR & Associates LLP.** The prima facie finding of the Disciplinary Committee of the ICAI in its opinion dated 3.12.2018 demonstrates that the erstwhile statutory auditors have been negligent and have not verified crucial information/documents. Rosy financial statements of the said companies have been presented, and the severe mismatch between the cash flows and payment obligations, total lack of liquidity and glaring adverse financial ratio's of the said companies have been camouflaged.

The Ld Sr. Counsels appearing on behalf of statutory auditors contends that it is not the work of the auditors to prepare the accounts. Role of the Auditor is only to audit the accounts prepared by the company. Director (Prosecution and Legal) has conceded this fact that auditors was not having any role in preparing the accounts. Normally accounts of the companies are prepared by the company and audit is done by the auditors.

Ld. Counsel appearing on behalf of the erstwhile directors has also opposed the application on the ground that no such order under Section 130 of the Companies Act, 2013 can be passed at this stage without forming an opinion that accounts were being prepared in a fraudulent manner, and at this stage, enquiry/investigation is still pending. Therefore order under Section 130 cannot be passed.

We have heard the argument of the Director (P&L) and arguments advanced by the Ld. Sr. Counsels appearing on behalf of the auditors and other Counsels appearing on behalf of erstwhile Directors and perused the records. On bare reading of Section 130 of the Companies Act, 2013, it is clear that order under Section 130 can be passed for recasting the financial statements of the company, after issuing notices to the Central Government, Income Tax Authorities, SEBI or other statutory Regulatory Body or authority concerned.

In this case, notices have been served on Regulatory Bodies, but no objection has been filed by them. Union of India has filed this Petition

only for re-opening and recasting of the accounts, and the role of the auditor is only to audit the accounts, but not to prepare the accounts. Therefore, the contention of the Petitioner in para 3(A) of the Petition that the accounts for the past five years have been prepared in a fraudulent and negligent manner by the erstwhile statutory auditors of the company is incorrect. Only after getting the report or after recasting the accounts if anything comes in light that the accounts have been prepared in fraudulent manner, or there is any role of statutory auditors in the alleged fraudulent activities, then only any remark can be passed against the Statutory auditors or the concerned person.

Union of India has filed this petition on the basis of preliminary report of SFIO and prima facie report of ICAI, wherein it is stated that ***“from the maturity pattern of certain items of assets and liabilities as at 31.3.2017 that during the period from over two months till five years there is a serious mismatch between assets and liabilities position, so liquidity concerns existed on the balance sheet date. However, no such concerns were reported in the Audit report.”***

In the SFIO Report , para 225.12, it is stated that ***“in nutshell, the above findings highlight the fraudulent and irresponsible conduct of key managerial & executive personnel of IL&FS Limited in using EWT as a vehicle for their personal enrichment, after the fifth supplemental indenture.”***

Further, it is reported in SFIO report that ***“it is clear that all the distributions made by the EWT were fraudulent to enrich few employees/managerial personnel.”***

It is further reported that ***“EWT trust which was primarily meant for welfare of needy employees was thus used as a conduct to give shape to fraudulent motives of the key managerial persons of IL&FS Limited. Copies of the financial statements for last 11 years are collectively placed as Annexure V. Less than 1% of total expenditure was made towards welfare of employees and the remaining was diverted towards enriching few selective employees.”***

On perusal of Section 130 of the Companies Act, 2013, it is clear that before passing any order under this Section, it is not necessary to held that accounts were prepared in a fraudulent manner.

Section 130(1) (i) &(ii) lays down the **following pre condition for passing an order for recasting and re-opening the accounts of a company:**

- (i) The relevant earlier accounts were prepared in a fraudulent manner; or
- (ii) The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.”

At this stage, we cannot hold that alleged accounts of the companies were prepared in a fraudulent manner, because investigation is still pending. *In our earlier order dated 1.10.2018 on the basis of prima facie report that the affairs of the company were mismanaged during the relevant period and that the affairs of the company and subsidiary companies were being mismanaged during the relevant period as contemplated under Section (1) and (2).* Therefore, we need not examine or express any opinion on the allegations made against the auditors in this Petition, at this stage. **The Union of India, without prejudice, is not pressing any allegation at this stage.**

In the circumstances, we allow this petition filed under Section 130 of the Companies Act, 2013 for re-opening the books of accounts and recasting the financial statements of Infrastructure Leasing & Financial Services Limited (R1), IL&FS Financial Services Limited (R2) and IL&FS Transportation Networks Limited (R3) for the past five financial years , viz. from Financial Year 2012-13 to Financial Year 2017-2018.

We further issue directions to Central Government to appoint such person/firm as the Chartered Accountants to recast the accounts/financial statements of all the three companies, i.e. Infrastructure Leasing & Financial Services Limited (R1), IL&FS Financial Services Limited (R2) and IL&FS Transportation Networks Limited (R3) for the past five financial years, viz. from Financial Year 2012-13 to Financial Year 2017-2018.

Regional Director may submit the name of the Auditor for our approval for the said purpose so that recasting of accounts can be done.

We further clarify that this order is without prejudice to the rights of auditors and all the parties present and will not affect the proceedings before ICAI in any manner, which will be decided independently on its own merits.

By passing an order for recasting the accounts will have no bearing on the main Company petition which is pending under Section 241-242 of the Companies Act, 2013.

Petition is disposed of accordingly.

Sd/-

RAVIKUMAR DURAISAMY

Member (Technical)

Sd/-

V. P. SINGH

Member (Judicial)