(1969) 03 CAL CK 0001

Calcutta High Court

Case No: Appeal from Original Order No. 236 of 1966

New Central Jute Mills Co. Ltd.		APPELLANT
	Vs	
Deputy Secretary, Ministry of Finance, Department of Revenue and Company Law, Government of India and Others		RESPONDENT

Date of Decision: March 7, 1969

Acts Referred:

- Companies Act, 1956 - Section 209, 209(4), 235, 235, 236
- Constitution of India, 1950 - Article 14, 19(1)(g), 226
- Penal Code, 1860 (IPC) - Section 120B, 409, 456, 467, 477

Citation: 73 CWN 557

Hon'ble Judges: D.N. Sinha, C.J; B.C. Mitra, J

Bench: Division Bench

Advocate: R.C. Deb, Subrata Roy Chowdhury and P.L. Khaitan, for the Appellant; Niren De, B. Das and B. Basak, for the Respondent

Final Decision: Allowed

Judgement

D.N. Sinha, C.J.

The appellant in this case is Messrs. New Central Jute Mills Co. Ltd. which is a public limited company incorporated under the Indian Companies Act, 1913 (hereinafter referred to as the "appellant") and is an existing company under the Companies Act, 1956 (hereinafter referred to as the "said Act") having its registered office at 11, Clive Row, Calcutta. It carries on business inter alia as manufacturers of jute goods, chemicals and fertilizers. It owns two jute mills called Albion Jute Mills and Lothian Jute Mills situate at Budge Budge, West Bengal. It owns a factory at Varanasi known as Sahu Chemicals & Fertilizers in which soda ash and ammonium chloride are produced. Messrs. Sahu Jain Ltd., of 11, Clive Row, Calcutta was at all material times and still is the managing agents of the appellant. The authorized capital of the

appellant is rupees five crores divided into 30,00,000 ordinary shares of Rs. 10/- each and 20,00,000 preference shares of Rs. 100/- each. The paid-up capital of the appellant is Rs. 2,89,00,000/- divided into 33,000 preference shares of Rs. 100/- each fully called-up and 25,60,000 ordinary shares of Rs. 10/- each fully called-up. The capital of the appellant was increased by Rs. 42,75,000/- in 1958 and further by Rs. 42.75,000/- in 1959 and again by Rs. 85,00,000/- in 1961. These figures are mentioned to show that the appellant is a substantial company. In the petition it is stated that at all material times the business of the appellant was run on sound principles resulting in substantial profits, declaration of good dividends and provision for sufficient reserve, For example it is stated that the appellant made a net profit of Rs. 1,32,55,724/- for the year ended 31st March 1963 after meeting all expenses and interest charges and after providing Rs. 53,55,584/- for depreciation. The appellant declared as dividend a sum of Rs. 28,60,000/- in addition to payment of interim dividend of Rs. 12,80,000/-for the year ended 31st March 1963. In other words, during the said year the appellant declared 15 per cent dividend on ordinary shares and 9.1 per cent on preference shares. On or about 11th April 1963, the Central Government purported to pass an order under sub clauses (i) and (ii) of clause (b) of section 237 of the said Act. The relevant part of section 237 of the said Act runs as follows:

237. Without prejudice to its powers u/s 235, the Central Government-

(a) shall appoint one or more competent persons as Inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if-

(i) the company, by special resolution, or

(ii) the Court, by order, declares that the affairs of the company ought to be investigated by an Inspector appointed by the Central Government; and

(b) may do so if, in the opinion of the Central Government, there are circumstances suggesting-

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any, of its members, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) that the persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

2. It would be interesting to relate here shortly how provisions as to inspection and investigation of the affairs of companies came to be incorporated in the said Act. The Indian Companies Act, 1913 was extensively amended in 1936 and thereafter further amended from time to time. After the World War II, there was a demand for

its drastic revision. In the report of the Company Law Committee, 1952 it was stated:

No law, however well-conceived or well drafted can be altogether fool and knave proof and it is impossible for any law to protect the fool from the consequences of his acts and omissions. Nevertheless, we consider that it is the function of law to prevent dishonest and unscrupulous people from creating conditions and circumstances, which will enable them to make fools of others. The powers of inspection and investigation into the affairs of a company, which the Companies Acts of most countries confer on Government or a quasi-independent authority are intended primarily as a check on the activities of such people. We recognize that, in some cases, the use of the powers of inspection and investigation may initially tend to shake the credit of a company and thereby adversely affect its competitive position, although the allegations against the company may in the end be found to have been largely unfounded. It is therefore necessary that the investigation provisions of the Act should be so conceived as to reduce this threat to the credit of companies to a minimum. This risk should not, however, defer us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company where such investigation is prima facie called for. On the contrary we consider it to be in the long term interest of the trade and industry of this country that such powers should be vested in a competent authority and exercised energetically albeit with due caution and fairness in all cases which require investigation. (Report of the Company Law Committee, 1952 p. 133).

3. The demand for drastic action was sought to be made by enacting the Companies Act, 1956 which came into operation from April 1, 1956. The said Act has been amended several times. Section 209(4) of the said Act contains provisions for inspection and sections 235 to 251 contain provisions for investigation. I have already mentioned that on or about the 11th April 1963 an order was passed under sub-clauses (i) and (ii) of clause (b) of section 237 of the said Act upon the appellant. The relevant part of the said order runs as follows:

Whereas the Central Government is of the opinion that there are circumstances suggesting that the business of the New Central Jute Mills Limited a company having its Registered Office at 11, Clive Row, Calcutta (hereinafter referred to as the said Company) is being conducted with intent to defraud its creditors, members or other persons and the persons concerned in the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the said company or its members;

And whereas the Central Government consider it desirable that an Inspector should be appointed to investigate the affairs of the said company and to report thereon;

Now therefore in exercise of the several powers conferred by sub-clauses (i) and (ii) of clause (b) of section 237 of the Companies Act, 1956 (Act I of 1956). The Central Government hereby appointed Shri S. Prakash Chopra of M/s. S. P. Chopra and

Company, Chartered Accountants, 31F Co naught Place, New Delhi as Inspector to investigate the affairs of the said Company for the period from 1-4-58 to date and should the Inspectors so consider it necessary also for the period prior to 1.4.58 and to report thereon to the Central Government pointing out inter alia irregularities and contraventions in respect of the provisions of the Companies Act, 1956, or of the Indain Companies Act, 1913, or any other law for the time being in force and person or persons who are responsible for such irregularities and contraventions.

The Inspector shall complete the investigation and submit six copies of his final report to the Central Government not later than four months from the date of issue of this order unless time in that behalf is extended by the Central Government.

A separate order will issue with regard to the remuneration and other incidental expenses of the Inspector.

4. On receipt of the said order the appellant wrote to the respondent No. 1 objecting to the investigation, inter alia on the ground that the order was un-warned, without jurisdiction and made on consideration of extraneous circumstances, and requested the said respondent to furnish to the appellant the materials on the basis of which the order had been made. The said respondent by his letter dated 17 June, 1963, repudiated the allegation and refused to disclose any material as asked for. The said Mr. S. P. Chopra who was appointed Inspector was however, allowed to commence the investigation but could not complete it within the period originally fixed and by an order dated 9th August 1963, the period originally fixed was extended to 31st October 1963. On or about the 6th September 1963, an order was made for inspection by Mr. I. N. Puri under subsection (4) of section 209 of the Act. The appellant company objected to this order also, but the objection was overruled. By an order dated 31st October 1963 a further extension was given to Mr. S. P. Chopra to complete his investigation and report up to 31st January, 1964. By an order dated 29th January 1964, a third extension was given up to 30th June 1964. By an order dated 12th June 1964, an Additional Inspector Mr. U. N. Puri was appointed and the two Inspectors were directed to complete the investigation and report by 30th June 1964, or such date as may be extended from time to time, if and when necessary. By an order dated 30th June 1964, Mr. S. P. Chopra was relieved of his duties at his own request. In that order, it was stated that it had been represented to the Central Government that the investigation and report could not be completed within the extended time due to the refusal of the company and its officers to produce all books and papers or to appear before the Inspector for the purpose of examination, and due to other non-co-operative dilatory tactics. In his place, Mr. S. C. Bafna was appointed co-Inspector with Mr. I. N. Puri and they were directed to complete investigation and report by the 31st December 1964. On or about the 21st July 1964, the appellant made an application to this Court under article 226 of the Constitution, praying for a writ of Certiorari for quashing of the order dated 11th April 1963, and also the orders dated 6th September 1963, 12th June 1964 and 30th June 1964, and

for a writ of Mandamus directing the respondent to recall or rescind the said orders and for a writ of prohibition restraining the respondents from taking further steps in the impugned proceedings. A rule was issued on 21st July 1964. I might mention here that a similar rule was issued in C. R. No. 203 1965 (Deputy Secretary, Ministry of Finance etc. v. Sahu Jain Limited.) In both these applications the grounds are similar. The rule in Sahu Jain''s case was heard by Banerjee, J. and by his order dated 6th August 1965 the rule was made absolute and the impugned orders in that case were quashed and appropriate writs were issued, making it clear however, that nothing contained in the said order would stand in the way of the Central Government making a fresh investigation according to law. In both these rules, a common point of law was raised, namely as to whether, the Central Government, in making an order was bound to satisfy the court on the point as to whether, prima facie grounds existed for taking action against the companies concerned, in terms of sub-clauses (i) and (ii) of clause (b) of section 237. In Sahu Jain''s case (supra), the stand taken by the respondent was that the "opinion" of the Central Government, based on circumstances mentioned in sub-clauses (i) and (ii) of clause (b) were subjective and it was not bound to disclose either to the party concerned or the court, even the prima facie grounds upon which the opinion was based. In Sahu Jain''s case (supra) a complete blanket was drawn and although affidavits were filed, no grounds were disclosed to the Court. By his judgment and order dated 6th August 1965 the rule in the case was made absolute and the impugned orders were quashed, mainly on the ground that the respondents were bound to satisfy the court that there existed prima facie grounds for making an order under sub-clauses (i) and (ii) of clause (b) of section 237, and as this was not done the orders were defective and without jurisdiction. In the instant case, the very same attitude has been taken, namely that the "opinion" of the Central Government was subjective and needed no disclosure either to the party or to the court. By an elaborate judgment the learned Judge negative this contention, but held that in the affidavit in-opposition filed by Mr. D. S. Dang, Deputy Secretary to the Government of India affirmed on 29th August 1964, materials were disclosed, making out a prima facie case that circumstances existed in this case satisfying the provisions of sub-clauses (i) and (ii) of clause (b) of section 237. This information is stated to be contained in paragraph 4 of the said affidavit-in opposition of Mr. Dang, which runs as follows:

Further for the greater part of the period under investigation, Messrs. N. C. Jain and Company, a firm of Chartered Accountants were the statutory auditors of the petitioners. In the same period, members of such firm were also acting as employees in some of the other concerns belonging to or controlled by Shanti Prasad Jain and/or members of his family who also control and manage the petitioner. In the premises, it is contended that the statutory auditors of the petitioner were not at material times independent and at no material time there has been a just audit of the petitioner''s affairs.

5. Banerjee, J. was of the opinion that this statement was sufficient to make the impugned orders valid. The learned Judge said as follows:

It appears from the Annual Report of the petitioner company for the years 1955 to 1962-63 all annexed to the petition that Sahu Jain Limited, is and has been the Managing Agent of the petitioner company. It is not disputed that Shanti Prasad Jain is the Chairman of he Board of Directors of Sahu Jain Limited. The Central Government appears to entertain the opinion that there are circumstances suggesting that members of the firm of N. C. Jain and Company, Statutory Auditors to the petitioner company, are employed in other concerns belonging to or controlled by Shanti Prasad Jain. Now, the value of the audit report depends upon the independence and integrity of the auditors. If it appears that auditors are under some sort of obligation to the company, the accounts of which they audit, there may arise a doubt that the auditors might have discharged their functions much too indulgently. If such a doubt arises, it cannot be ignored as a doubt which no reasonable man should entertain. In the affidavit in-reply the petitioner no doubt denies that any member or members of the firm of auditors were employed as alleged. I am not in a position to decide which version is correct. Be that as it may, paragraph 4 of the affidavit in-opposition makes one definite allegation against the petitioner company and the nature of the allegation is not such as does not make a reasonable man inquisitive. The petitioner company controls very large capital contributed by the public. Its liabilities by way of loan and otherwise are also considerable. If it does not do its business honestly and properly, the repercussions on the economics of the country may be pretty severe. If in the opinion of the Central Government there are circumstances suggesting that the petitioner company has been employing an obliging firm of auditor''s which may cover up its malpractices, it cannot be said that the Government did not act reasonably in taking action u/s 237(b) or must have proceeded on a fundamental misconception of the law and the matter in regard to which the opinion was to be formed.

6. There were other grounds argued in support of the rule, but mainly on the ground stated above, the application failed and the rule was discharged on 4th August 1965 although no order as to costs was made It is against this order that this appeal is directed. In both the cases, a number of authorities were cited, but the learned Judge did not have the opportunity of considering two Supreme Court decisions which have since come into existence and which are decisive on the points involved in the two cases, namely (1) The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, and an unreported decision, (2) Rohtas Industries Limited v. S. D. Agarwall and another, (Civil Appeals Nos. 2274 to 2276 of 1966, judgment dated 16th December 1968). In fact, in Sahu Jain''s case, (supra), an appeal was preferred against the order of Banerjee, J. dated 6th August 1965 and following the decision in Barium Chemicals Limited and the other authorities mentioned in the judgment of Mitra, J. dated 18th February 1969 the decision of Banerjee, J. was upheld and the appeal has been dismissed with costs. In this appeal, we have

received further assistance from the recent judgment of the Supreme Court in (2) Rohtas Industries Limited, (supra). I will now proceed to summaries the findings in these two cases and apply them to the facts of the instant case, to see whether the order of Banerjee, J. in the instant case dated 4th August 1965 can be supported or should be set aside. In the case of (1) The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, the facts were briefly as follows: In 1959/60 the appellant No. 2, Balasubramaniam obtained from the Central Government two licenses for the manufacture of 2,500 and 1,900 tones of barium chemicals per year in the name of Trans world Traders of which he was the proprietor. He then started negotiations with Kali Chemie of Hanover, West Germany to collaborate with him in setting up a plant. While he was so negotiating, M/s. T. T. Krishnamachari and Company who were the sole selling agents of the said German company for some of their products, approached the second appellant for the sole selling agency of barium products of the plant proposed to be put up by the second appellant. The second appellant did not agree. On December 5, 1960 M/s. T. T. K. and Co. applied to the Central Government for a license for manufacture of barium chemicals. The second appellant objected to it but in spite of his objections the license was granted. In the year 1961, the Barium Chemicals Limited, the appellant No. 1, was incorporated with an authorized capital of Rupees one crore and an issued capital of rupees fifty lakhs. Its primary object was to carry on the business of manufacturing all types of barium compounds. Balasubramaniam, the appellant No. 2 was appointed the managing director of the company from December 5, 1961. The erection of the plant was undertaken by M/s. L. A. Mitchell Limited, Manchester, in pursuance of a collaboration agreement approved by the Central Government. In November 1961 the Central Government granted a license to the said company for import of machinery. On or about this time Mr. T. T. Krishnamachari, the respondent no. 2 was appointed a minister and rejoined the cabinet later on becoming the Minister of Finance and Economic Co-ordination and thereafter the Finance Minister of India. On August 30, 1962 the license granted to M/s. T. T. K. Limited was revoked. It is stated that the appellant No. 2 was instrumental in having this done, by speaking to Prime Minister Nehru. On the other hand, it was stated that M/s. T. T. K. Limited had them selves decided to surrender it. Meanwhile, the appellant No. 1 was not faring well. It was not able to start work in full capacity and it was found on a survey report made by M/s. Humphreys and Glasgow (Overseas) Limited, Bombay that the planning and design of the plant erected by the collaborators was defective. The appellant No. 1, gave notice to M/s. Mitchell Limited on April 2, 1965 that if the plant was not completely installed by June 1, 1965 the company would terminate the arrangements and seek damages. As a result of it, the chairman of L. A. Mitchell Limited Lord Poole visited India and it was agreed that the necessary repairs would be carried out by the collaborators at an expenditure of ₹2,50,000/- in addition to the amount already invested by it, and that production would commence from June 1965. In the meantime M/s. Kali Chemie of Hanover started negotiations for a collaboration agreement and the proposal was that the appellant No. 1, should be

reorganized and its share capital distributed between Kali Chemie and M/s. T. T. K. Chemicals Limited. It was also proposed that Kali Chemie should take over the responsibility of production; the appellant No. 1, would be responsible for he management and M/s. T. T. K. Chemicals Limited should take over the sales promotion. These negotiations however came to nothing owing to the agreement with the original collaborators. On May 19, 1965 the Secretary of the Company Law Board under the direction of the Chairman thereof issued an order on behalf of the Company Law Board u/s 237(b) of the said Act. The relevant part of the order ran as follows:

In the opinion of the Company Law Board there are circumstances suggesting that the business of M/s. Barium Chemicals Limited * * * * is being conducted with the intent to defraud its creditors, members and other persons; and further that the affairs of the company have in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members.

Therefore, in exercise of the powers vested by clause (b) of section 237 of the Companies Act, 1956 (Act I of 1956) read with the Government of India, Department of Revenue, Notification No. GSR 178, dated the 1st February, 1964, the Company Law Board hereby appoint. ****** as inspectors to investigate the affairs of the company since its incorporation in 1961.

7. Pursuant to the notice, search warrants were obtained and searches were carried out and documents were seized. The second appellant submitted a representation to the Board that the company was a first of its kind of India, that it could not go into production because of defective planning by the collaborators and that the impugned order had been made on account of trade rivalry between the company and M/s. T. T. K. and Company in which the minister Mr. T. T. Krishnamachari was interested. It was stated that the order was male fide and it was made on grounds extraneous to the provisions of section 237(b) of the said Act and at the instance of the second respondent, Mr. Krishnamachari. As the Board was determined to proceed with the implementation of the order, an application was made before the Punjab High Court under article 226 for having the impugned order quashed and for certain other relief''s. This application failed and thereupon the appellants appealed to the Supreme Court. On behalf of the appellants four contentions were raised:

1. That the impugned order dated May 19, 1965 was mala fide and was the result of the personal hostility of the minister.

2. The circumstances said to have been found were extraneous to section 237(b) and could not constitute a basis for the impugned order and the order was, therefore, ultra vires the section.

3. That the impugned order was in any case bad as it was passed by the Chairman alone.

4. That the impugned order was bad because section 237 itself was bad as offending against Articles 14 and 19(1) (g).

8. In the case, there was a majority judgment delivered by Shelat, J. allowing the appeal and setting aside the impugned order, which was agreed with by Hidayatullah, J. (as he then was) and Bachawat, J. According to the minority judgment delivered by Mudholkar, J. for himself and Sarkar, C.J. it was held that the exercise of the power did not violate any fundamental rights, that the opinion to be formed u/s 237(b) was subjective, but that if the grounds were disclosed by the Board, the court could examine them for considering whether they were relevant. That in the facts of the case they appeared to be relevant. It was not shown that it was made mala fide and the appeal should be dismissed. All the three learned Judges constituting the majority gave their reasons and I shall now refer to the same. All the learned Judges agreed that the impugned provisions were not ultra vires Articles 14 and 19(1) (g) of the Constitution and also upon the fact that the charge of mala fides had not been established. In the present case we need not deal with these points.

9. In the present case we are concerned only with the question as to whether the provisions of section 237 (b) (i) and (ii) are entirely subjective and cannot be gone into by the court or if the order was objected to on the ground of mala fides or relevance, the court has jurisdiction to go into the question and to what extent. If it has jurisdiction to go into the matter, can it be said in the instant case that the respondents have given a satisfactory answer as to the objections raised, so as to make out a prima facie case. The observation of Shelat, J. so far as they are relevant on these points may be summarized as follows:

(1) The object of section 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object.

(2) There is no doubt that the formation of the opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the Government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency.

(3) But the authority is required to arrive at such an opinion from circumstances suggesting the existence of circumstances set out in sub-clauses (i), (ii) or (iii). The expression "circumstances suggesting" means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or an illegal purpose. The proof of such intent or purpose is still to be deduced through an investigation. But it does not that even the existence of circumstances is a matter of subjective opinion. The law requires that there must exist circumstances from which

the authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. The legislature could not have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded.

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

(5) The words "reason to believe" or "in the opinion of," do not always lead to the construction that these processes do not lend themselves even to a limited scrutiny by the court.

(6) Of course, if there is any question of mala fides, dishonesty or corrupt purpose, it can be challenged in court and set aside, but even if it is based on good faith, the authority has to act in accordance with and within the limits of the legislative powers and its order can be challenged if it is beyond those limits or if it is based on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these circumstances, it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind.

10. In the judgment of Shelat, J. it was pointed out that the chairman of the Board had filed an affidavit-in-opposition in which it was stated that the circumstances upon which the Board arrived at the opinion resulting in the impugned order were as follows:

(i) there had been delay, bungling and faulty planning of the project, resulting in double expenditure for which the collaborators had put the responsibility upon the Managing Director, petitioner No. 2;

(ii) since its floatation the company had been continuously showing losses and nearly 1/3rd of its share capital had been wiped off;

(iii) that the shares of the company which to start with were at premium were being quoted on the stock exchange at half their face value; and

(iv) some eminent persons who had initially accepted seats on the Board of Directors of the company had subsequently severed their connections with it due to differences with petitioner No. 2 on account of the manner in which the affairs of the company were being conducted.

11. It was held that the grounds disclosed in the affidavit of the chairman did not establish any intent to defraud or unlawful purpose either in the formation or conduct of the company or misfeasance or misconduct towards the company or its members. Delay, bungling or faulty planning could not constitute fraud, misfeasance or misconduct.

The relevant findings of Hidayatullah, J. (as he then was) may be summarized as follows:

(1) The power contained in section 237(b) of the said Act is discretionary and its exercise depends upon the honest formation of an opinion that an investigation is necessary. The words "in the opinion of the Central Government" indicate that the opinion must be formed by the Central Government and it is implicit that the opinion must be an honest opinion.

(2) The next requirement is that "there are circumstances suggesting etc. These words indicate that before the Central Government forms its opinion it must have before it circumstances suggesting certain inferences. These inferences are as follows:

(a) that the business is being conducted with intent to defraud-

(i) creditors of the company, or

(ii) any other person;

(b) that the business is being conducted-

(i) for a fraudulent purpose, or

(ii) for an unlawful purpose;

(c) that persons who formed the company or manage its affairs have been guilty of-

(i) fraud, or

(ii) misfeasance or other misconduct- towards the company or towards any of the members.

(d) that information has been withheld from the members about its affairs which might reasonably be expected including information relating to the calculation of commission payable to-

(i) managing or other director

(ii) managing agent

(iii) secretaries and treasurers

(iv) the managers.

(3) The above-mentioned grounds limit the jurisdiction of the Central Government, outside which the power cannot be exercised. An action not based on circumstances suggesting inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on fishing expeditions to find evidence.

(4) The formation of the opinion is subjective, but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. It is not reasonable to say that the clause permits the Government to say that it has formed the opinion on circumstances which it thinks exist.

(5) Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, ii questioned in court, has to be proved at least prima facie. It is not sufficient to say that the circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to conclusion of certain definiteness.

(6) When it is challenged that the opinion has been formed mala fide or upon extraneous or irrelevant matters, the respondent must disclose before the court, the circumstances which will indicate that his action was within the four corners of his own powers.

12. On the facts, the majority view was that this onus has not been discharged and that the order was made on extraneous circumstances and the charge of mala fides was not substantiated. The affidavit of the Chairman showed that he relied on circumstances which showed - "delay, bungling and faulty planning" resulting in "double expenditure", for which the collaborators had put the responsibility on the second appellant. There was admitted loss in the running of the undertaking, for which the blame was put on faulty planning and design by the collaborators. None of these circumstances showed intent to defraud. That some directors had resigned did not also establish fraud or misconduct. There might be other reasons for their resignation. The affidavit of Mr. Dang merely repeated the allegations made by the Chairman and stated that a "deeper probe" was necessary. It did not prove the existence of circumstances under which the power could be exercised.

On the relevant ponit, Bachawat, J. agreed with the views stated above. He expressed different views on the question of delegation, but we are not concerned with it in this case.

13. The next case to be considered is the unreported decision of (2) Rohtas Industries Limited v. S. D. Agarwal and another, (supra). The facts in that case were briefly as follows: The appellant in the appeals was a company incorporated under the Indian Companies Act, 1913 some time in 1933 having its registered office at Dalmianagar in Bihar. The authorized capital was 15 crores and paid-up capital about 6 crores. On or about the 11th April 1963 a notice was issued at the instance

of the Board upon the said company under sub-clauses (i) & (ii) of clause (b) of section 237 of the said Act. Inspectors were appointed and like the previous case, time was repeatedly extended. The company applied before the Patna High Court, challenging the said order and a rule was issued under Article 226. In that case also the Chairman, Company Law Board, filed an affidavit-in-opposition. The circumstances disclosed therein in issuing the said order were as follows:

(a) Shri S. P. Jain together with his friends, relations and associates is principally in charge of the management of the petitioner company. Over a long period, several complaints had been received by the Deptt. as to the misconduct of the said Shri S. P. Jain towards companies under his control and management. Some of these were referred to and enquired into by a commission of Inquiry headed by Mr. Justice Vivian Bose of the Supreme Court of India, which in its report dated 15th June 1962 made adverse findings and observations against Shri S. P. Jain. Shri Jain is being prosecuted in the Court of District Magistrate, Delhi under sections 120B read with section 409, 456, 467 and 477 of he Indian Penal Code in regard to his misconduct in the management of what are known as the Dalmia Jain group of companies, and most of the material upon the basis of which this prosecution was launched was available to the Central Government on 11th April 1963. Shri Jain is also being prosecuted in Calcutta for misconduct in the Management of Messrs. New Central Jute Mills Co. Ltd., a company under the same management as the petitioner on the basis of an F. I. R. lodged by the Department with the Special Judge, Police Establishment just before the 11th April 1963. Shri Jain is also being proceeded against before the Companies Tribunal under sections 388B and 398 for misconduct in managing the affairs of M/s. Bennett Coleman & Co. Ltd. and details as to Shri Jain''s misconduct were with the Central Government as on 11th April 1963.
(b) Complaints had also been received by the Department before 11th April 1963 specifically as to the misconduct on the part of the management of the petitioner company in the conduct of its affairs.

14. The High Court dismissed the writ petition, holding that the opinion formed by the Central Government was not open to judicial review. From that order there was an appeal to the Supreme Court. In the Supreme Court, a further affidavit was filed and the only additional material that was placed before the Court were three complaints received by Government which were marked as annexure, A, B and C. At the hearing it was conceded that the allegations made in annexure "A" were too vague and could not been the basis for making the impugned order. One concrete allegation made therein related to an event prior to the date from which an enquiry had been ordered. In fact, it had occurred in 1939 whereas the enquiry was ordered for a period subsequent to 1-4-50. The allegations in annexure "B" were also found to be vague and not relied on. The following complaint in annexure "C" was relied on:

The investment of the Company in Albion Plywoods Ltd. and their variations by the Company''s Managing Agents appear to have been done to benefit the Managing Agents, their friends and brokers, at the expense of the shareholders. It appears that the preference shares in this company were sold at the market rate of Rs. 100/- each when these could be converted into ordinary shares of Rs. 10/- each which were then quoting at Rs. 15/- in the stock market. This and various other acts of deliberate commissions and omissions require a thorough investigation so that share solders in general may have a feeling of security in the company.

With regard to the above mentioned allegations, it appeared that there was no material before the Board when it issued the order as to who were the partners of Bagla and Co. to whom the 3000 preference shares were sold, and consequently whether the transaction could be said to have been made with a view to profit the directors of the appellant company or their relations. Hedge, J., held as follows:

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

15. The learned Judge then proceeded to uphold the vires of the section agreeing with the decision in Barium Chemical''s case (supra) and then proceeded to state as follows:

Next question is whether any reasonable authority much less expert body like the Central Government could have reasonably made the impugned order on the basis of the material before it. Admittedly the only relevant material on the basis of which the impugned order can be said to have been made is the transaction of sale of preference shares of Albion Plywoods Limited. At the time when the Government made the impugned order, it did not know the market quotation for the ordinary shares of that company as on the sale of those shares or immediately before that date. They did not care to find out that they were sold for inadequate consideration. If as is now proved that the market price of those shares on or about May 6, 1960 was only Rs. 11/- per share then the transaction in question could not have afforded any basis for forming the opinion required by section 237(b). If the market price of an ordinary share of that company on or about May 6, 1960 was only Rs. 11/- it was quite reason-bale for the Directors to conclude that the price of the ordinary shares is likely to go down in view of the company''s proposal to put on the market another 50,000 shares as a result of the conversion of the preference shares into ordinary shares. We do not think that any reasonable person much less any expert body like the Government, on the material before it, could have jumped to the conclusion that

there was any fraud involved in the sale of the shares in question. If the Government had any suspicion about the transaction it should have probed into the matter further before directing any investigation. We are convinced that the precipitate action taken by the Government was not called for nor could be justified on the basis of the material before it. The opinion formed by the Government was a wholly irrational opinion. The fact that one of the leading Directors of the appellant company was a suspect in the eye of the Government because of his antecedents, assuming without deciding, that the allegations against him are true, was not a relevant circumstance. That circumstance should not have been allowed to cloud the opinion of the Government. The Government is charged with the responsibility to form a bonafide opinion on the basis of relevant material. The opinion formed in this case cannot be held to have been formed in accordance with law.

16. In the result the appeals were allowed and the orders were set aside. Bachawat, J. described it as a "border line case". He held that the court had no power to review the facts as an appellate body, nor could it substitute its opinion for that of the Government. He however, came to the conclusion that there were no materials before the Government on which it could form the opinion that there were circumstances suggesting fraud etc. as mentioned in the impugned order dated May 11, 1963. It can therefore be said that it had formed the opinion without applying its mind to the materials before it and therefore, the opinion formed was in excess of its powers. The learned Judge agreed with the proposed order of Hegde, J.

17. It is clear therefore form the principles which have now been firmly established in the two Supreme Court decisions mentioned above, that upon being challenged the respondents must show to court that prima facie reasons existed and were considered before the order was made in conformity with the provisions of sub-clauses (i) and (ii) of clause (b) of section 237 of the said Act. It is obvious that these reasons must exist when the order was made. It has been definitely laid down that an order could not be made to commence a fishing expedition in order to find the reasons for making an order. Reasons, if found afterwards cannot justify the order in retrospect, if they were not available to the authority exercising its powers, in arriving at an opinion in conformity with the provisions stated above.

18. I have already stated above that there were two cases which were decided by Banerjee, J. In Sahu Jain''s case (supra), the respondent authorities refused to disclose any reason to this Court for forming the opinion, although it was charged that the reasons were mala fide, extraneous and irrelevant. That order was manifestly against the principles laid down in the two cases mentioned above and has now been set side. The only distinction in this case is that the learned Judge in the court below had found that in paragraph 4 of the affidavit-in-opposition, certain statements were made which have been set out above. According to the learned Judge, these were sufficient reasons to uphold the legality of the order made. We have some doubts as to whether the allegations made, amount to fraud,

misfeasance or misconduct as is required under sub-clauses (i) and (ii) of clause (b) of section 237. Be that as it may, an objection has been taken by Advocate General, which appears to be fatal to the respondents. He argues with great force that if the law is that the respondent authorities must show to the court that prima facie reasons existed for arriving at the opinion upon which the impugned order is based, it must be averred and shown that these circumstances existed at the time when the order was made and that the authority making the order was aware of them and based its opinion on these circumstances. Briefly put, the allegation in paragraph 4 is that there has not been adequate and proper audit of accounts of the appellant, as the auditor''s reports were based on information furnished to them which were defective and the audit was not made by an independent auditor. It is nowhere stated that this fact came to be known to the authorities at or before the time when the impugned order was made, and that the impugned order was made upon the basis of these facts which came to be known prior to the making of the order. This of course would be fatal because the respondent authorities could not possibly justify the making of the impugned orders until such an averment was made and substantiated. The learned Judge in relying on the statements made in paragraph 4 of the affidavit of Mr. D. S. Dang affirmed on 29th August 1964 completely overlooked this aspect of the matter. The learned counsel on behalf of the respondents asked for an opportunity to file further affidavits and inspite of opposition by the counsel for the appellants, we for the ends of justice permitted additional affidavits to be filed up on this point and adjourned the hearing of the case. In fact, the matter was adjourned several times in order to enable such affidavit to be filed. Now however, learned counsel for the respondent is constrained to admit before the court that his clients are not in a position to file any such affidavit in court. In our opinion, there can be now no doubt that the respondent authorities have failed to discharge the onus of proving even a prima facie case to support the impugned order. The learned Judge in the court below has relied on only one paragraph of the affidavit-in-opposition and this does not contain the necessary averments, and is useless for the purpose of the respondents.

19. The result is that applying the tests set out in the two Supreme Court decisions mentioned above, this appeal should succeed and the judgment and order of the court below is set aside and the rule is made absolute and the impugned orders are set aside and/or quashed by appropriate writs and the respondents are restrained by a writ in the nature of Mandamus from giving effect to the same. This will not however prevent them from issuing any further orders in accordance with law. The appellants are entitled to the costs of the appeal. Certified for two counsel.

The operation of this order will remain stayed for six weeks from this date.

B.C. Mitra, J.

I agree.