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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 25th March, 2021
% *Decided on: 26th March, 2021*

\+ LPA 405/2020 & CM APPLs.35064/2020 *(stay)*, 1571/2021 *(Impleadment)*, 1581/2021 *(directions)* & 11683/2021 *(Interim Directions)*

RESERVE BANK OF INDIA ..... Appellant
Through: Mr. Jayant Bhushan, Sr. Adv. with Mr. Abhinav Sharma, Mr. Ketan Paul, Mr. Tushar Bhushan & Mr. Amartya Bhushan, Advs.

versus

JINDAL STEEL AND POWER LIMITED
..... Respondent
Through: Mr. Parag Tripathi, Sr. Adv., Mr. Gopal Jain, Sr. Adv. along with Mr. Saket Sikri, Mr. Mahesh Aggarwal, Mr. Naman Joshi, Mr. Apoorv Tripathi, Ms.Priya Kalra & Ms. Meera Menon, Advs. for respondent.
Mr. Zoheb Hossain, Special Counsel for ED and Mr. Amit Mahajan, CGSC for Impleading Applicant/ED.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT

: JASMEET SINGH, J

1. The present appeal has been filed by the Reserve Bank of

India (being the respondent in W.P.(C) No. 3601/2020 titled Jindal Steel & Power Limited V/s Reserve Bank of India) being aggrieved by the order and judgment dated 04.12.2020.

2. The respondent (original petitioner in W.P.(C) 3601/2020,) herein namely, Jindal Steel & Power Limited filed a writ petition in this Hon'ble Court seeking the following reliefs:-

> *"A. Issue a writ, order or direction including a writ in the nature of Mandamus, directing Respondent to permit Petitioner to make additional commitments and payments of USD 300 Million to its wholly owned subsidiary namely Jindal Steel and Power (Mauritius) Limited by way of equity subscription or loan or corporate guarantee or bank guarantee or through other permitted mode from Indian Bank for meeting its debt obligations;*
>
> *B. Pass any other Order(s) as this Hon'ble Court may deem fit in the given facts and circumstances of the present case."*

3. The Respondent is said to be a company with business interest in steel manufacturing, power generation, mining of iron ore, lime stone and coal. To optimise the cost of raw material required for manufacturing and also to have a linkage to raw material like coking coal, the respondent set up various overseas subsidiaries including (i) Jindal Steel & Power (Mauritius) Ltd. (herein after called JSPML), a company incorporated under the

laws of Mauritius; (ii) Skyhigh Overseas Ltd. (also called SOL), a company incorporated under the laws of Mauritius; and (iii) Jindal Steel Bolivia (also called JSBSA).

4. The respondent has been making overseas direct investment and has also undertaken other financial commitments in respect of aforesaid subsidiaries after getting approval from RBI, through SBI. The respondent's wholly owned subsidiary JSPML has loans of USD 370 million and has issued corporate guarantees of USD 864.5 million. JSPML has made various obligations towards its lenders. The respondent, JSPML and the lenders have restructured the payment of the aforesaid due amount of lenders by restructuring agreements dated 07.02.2018 and 15.06.2018. This was further revised on 29.05.2020. The respondent has received a letter dated 13.06.2020 from JSPML stating that they do not have the funds available and the lenders may enforce the corporate guarantee of the respondent for the entire amount of USD 864.5 million. In addition, there is also a debt of the wholly owned subsidiary of JSPML namely Jindal Steel Power (Australia) Limited, JSPAL.

5. It is further stated that JSPML does not have funds available to meet its cash flow requirements and also cannot make payment to its wholly owned subsidiary JSPAL. Hence, the respondent sought to make additional financial commitments and payments of USD 300 million to its wholly owned subsidiary

JSPML for meeting its debt obligations.

6. The appellant filed its counter affidavit before the learned Single Judge and took various objections as under:-

(i) Delhi Court lacks territorial jurisdiction;

(ii) ED is a proper and necessary party; and

(iii) The petition suffers from delay and laches.

(iv) The respondent concealed material information about inquiries and investigations it is facing at the hands of the ED.

(v) Under Regulation 6 and 9 of **Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 ("FEMA ODI Regulations")** and more particularly under Regulation 9, the approval of RBI is "subjective" and "based upon RBI's satisfaction."

(vi) The RBI under the FEMA is a regulator of Foreign Exchange and has to see the adverse effects on the economy if permission for remission is granted.

7. The learned Single Judge considered the objections of the appellant and held as under:-

a) The appellant rejected the application of the respondent on account of objections raised by ED.

b) A conjoint reading of Regulation 6 and 9 would show that where an Indian Party is under any

investigation by any investigation/enforcement agency or regulatory body, the Indian party can apply under Regulation 9 for making any direct investment in a joint venture or wholly owned subsidiary outside India.

c) The learned Single Judge further held that it is clear from the reading of Regulations 6 and 9 that mere existence of an investigation by an investigation/enforcement agency or regulatory body *ipso facto* does not debar an Indian Party from direct investment in Joint Venture or wholly owned subsidiary outside India.

8. The learned Single Judge also held that the impugned order dated 30.12.19 is bad as:-

i) No reasons have been given for rejection.

ii) The reasons given in the order communicated vide Email dated 30.12.2019 at 3:29 PM is also passed contrary to Regulation 9.

9. The learned Single Judge has relied upon ***Mahender Singh Gill Vs. Chief Election Commissioner, (1978) 1 SCC 405*** that

"8. when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the

time it comes to court on account of a challenge, get validated by additional grounds later brought out ...."

10. The learned Single Judge further held that reasons given subsequently in the e-mail dated 30.12.2019, or in the counter affidavit do not satisfy the requirements of Regulation 9(3) so as to warrant denial of approval.

11. The learned Single Judge further held that the appellant while dealing with an application filed under Regulation 9 cannot reject the same at the behest of any other Statutory Agency like CBI, Enforcement Directorate, etc.

12. To come to this conclusion, the learned Single Judge relied upon ***Chintpurni Medical College & Hospital & Anr. Vs. State of Punjab & Ors. AIR 2018 SC 3119*** and various other judgments of the Apex court.[1]

13. Lastly, the learned Single Judge held that the commitment and transactions of the respondent were done with prior consent and permission of the appellant. Now the appellant sought to take a U-turn and refused the permission to complete transactions which have already been cleared by the appellant.

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[1] ***Dipak Babaria & Anr. vs. State of Gujarat & Ors. (2014) 3 SCC 502; Ajantha Transports (P) Ltd., Coimbatore vs. T V.K. Transports, Pulampatti, Coimbatore District, AIR 1975 SC 123.***

14. Hence, the learned Single Judge quashed the impugned order dated 30.12.2019 wherein request for undertaking additional financial commitments was rejected by the appellant.

15. Aggrieved by the said order dated 04.12.2020, the appellant, RBI has filed the present appeal. Mr. Jayant Bhushan, learned Sr. Counsel appearing for the appellant has argued the following:-

A. That the observations of the learned Single Judge that stated that the order dated 30.12.2019 gives no reason is incorrect and bad in law.

1. The arguments of the learned Sr. Counsel for the appellant is that the reason for rejection communicated to the respondent on 30.12.2019 was an administrative action and unless and until a Statute/Regulation requires decision to be given, administrative decisions do not require "reasons to be given in writing".
2. Learned Sr. Counsel has further contended that even though the order dated 30.12.2019 require no reasons to be given even then the appellant in order to ensure principles of natural justice, equity and fair-play communicated the reasons vide email dated 30.12.2019 sent at 3:29 PM giving the reasons as under:-

"From: Semwal, Mayank <mayanksemwal@rbi,org.!n>

Date: Man, Dec 30,2019 at 3:29 PM

Subject: RE: RBI Letter

To:deepak.sogani@iindalsteel.com<deepak.sogani@jindillsteel.com>

Dear Shri Sogani,

With respect to the attached letter to your trailing e-mail, addressed to our CGM, Shri R.K Moolchandani, you may recall that during a meeting held in November, 2019 in CGM's cabin, your Company's representatives were advised that with a view to expedite decision on your request, we had already written to DoE for their views in the matter. As Shri Hemant Kumar has already discussed with the CGM through telecon today, in view of the reservations expressed by DoE/ongoing investigations, it shall not be possible for us to give approval

Thanks and Regards,
MayankSemwal
Manager
Foreign Exchange Dept.
Reserve Bank of India
Mumbai

In support of the above contentions the learned Sr. Counsel for the appellant has relied on ***M/s. Mahabir Jute Mills LTD., Gorakhpore Vs. Shri Shibban Lal Saxena and Ors,[2] Union Of India and Ors. Vs. E.G. Nambudiri [3], and Hanuman Prasad***

[2] (1975) 2 SCC 818
[3] (1991) 3 SCC 38

and Ors. Vs. Union Of India And Anr.[4]

The learned Sr. Counsel has further argued that E.G Nambudiri case as well as Hanuman Prasad case both have considered Mahender Singh Gill and the only harmonious construction which can be culled out from conjoint readings of the judgments is that when an administrative or a quasi-judicial order is passed the authorities passing those orders cannot be permitted to substitute their reasons or contents of orders by reference to subsequent affidavits or other actions which did not find place in the order.

B. That the case of the appellant cannot fall under Regulation 6 but can only fall under Regulation 9(3) of FEMA ODI Regulations. Regulation 9 reads as under :-

> *"1) An Indian Party, which does not satisfy the eligibility norms under Regulations 6 or 7 or 8, may apply to the Reserve Bank for approval.*
>
> *(2) Application for direct investment in Joint Venture/Wholly Owned Subsidiary outside India, or by way of exchange for shares of a foreign company, shall be made in Form ODI, or in Form ODB, as applicable.*
>
> *(2A) An application made under sub-regulation (2) in Form ODI*
>
> *(a) for the purpose of investment by way*

[4] (1996) 10 SCC 742

of remittance from India, in an existing company outside India, shall be accompanied, by the valuation of shares of the company outside India, made-

(i) where the investment is more than USD 5 (five) million, by a Category I Merchant Banker registered with SEBI or an Investment Banker/Merchant Banker registered with the appropriate regulatory authority in the host country; and

(ii) in all other cases, by a Chartered Accountant or a Certified Public Accountant.

(b) for the purposes of investment by acquisition of shares of an existing company outside India where the consideration is to be paid fully or partly by issue of the Indian party's shares, shall be accompanied by the valuation carried out by a Category I Merchant Banker registered with the SEBI or an Investment Banker/Merchant Banker registered with the appropriate regulatory authority in the host country.

(3) The Reserve Bank may, inter alia, take into account following factors while considering the application made under sub-regulation (2):-

a. Prima facie viability of the Joint Venture/Wholly Owned Subsidiary outside India;

b. Contribution to external trade and other benefits which will accrue to India

through such investment;

c. Financial position and business track record of the Indian Party and the foreign entity;

d. Expertise and experience of the Indian Party in the same or related line of activity of the Joint Venture or Wholly Owned Subsidiary outside India."

Mr. Bhushan placed reliance on the words "*inter alia"* appearing in Regulation 9(3) to urge that the grounds mentioned in Regulation 9(3) are indicative and not exhaustive.

He further argued that the appellant has to be satisfied and only then it is to grant approval. The satisfaction is "subjective satisfaction" of the appellant.

The appellant before granting approval sought inputs from the DOE and based upon their inputs, the approval was not be granted. The learned Sr. Counsel for the appellant argued that DOE being an expert body its opinion was sought and after seeking their opinion which was contained in the letter of 03.12.2019, the appellant conveyed its rejection on 30.12.2019. The letter dated 03.12.2019 reads as under:

"F. No. T-16/07-Coord/2019 Date: 03/12/2019
To,

Shri Mayank Semwal,
Manager,
Reserve Bank of India,
Foreign Exchange Department,

Central Office, Overseas Investment Division,
Amar Building, 5th Floor,
Fort, Mumbai - 400 001.

Subject: Indian party ("IP"), Jindal Steel and Power Ltd -WOS, Jindal Steel and Power (Mauritius) Ltd, (UIN:NDWAZ20070442): Approval for undertaking additional financial commitments - reg

Sir,
Please refer to your letter No. FE.CO.OID.l2295/19.10.136/2019-20 dated 05.11 .2019 on the above subject.

2. In this regard, I have been directed to inform you that the Directorate is conducting investigations against M/s Jindal Steel & Power Ltd (India) under Foreign Exchange Management Act, 1999 (FEMA) in 04 cases. Further, the Directorate is also conducting investigations under Prevention of Money Laundering Act, 2002 (PMLA)in 03 cases against M/s Jindal Steel & Power Ltd (India) and its related entities I persons.

3. Brief details of pending FEMA and PMLA cases are enclosed as Annexure-'A' and Annexure-'B' respectively.

4. In view of the above, at this stage this Directorate has objections to the subject proposal of M/s Jindal Steel & Power Ltd (India) for approval of additional financial commitment by way of granting loan/ equity/ guarantee/corporate guarantee to M/s Jindal Steel & Power Ltd (Mauritius) as the same may result in non-availability of properties of attachment and jeopardise the on-going investigations by this Directorate.

5. This issues with the approval of Director of Enforcement.

Encl: As above

Yours faithfully,

(Ashima Batra)

Deputy Director"

C. The learned Sr. Counsel has further argued that the impugned order dated 04.12.2020 is liable to be set aside only on the ground that it did not deal with any of the preliminary objections raised by the appellant. The appellant in his counter affidavit has raised the following preliminary objections

(i) lack of territorial jurisdiction;

(ii) non joinder of necessary & proper party, ie. Enforcement Directorate;

(iii) Delays and laches; and

(iv) Concealment of material facts and information.

D. As a further limb to this argument the learned Sr. Counsel for the appellant has argued that even though the learned Single Judge has held that more than a year has passed and no action has been taken by the ED, the said finding could not have been arrived at by the learned Single Judge in the absence of ED.

E. The learned Sr. Counsel has argued that the findings that the RBI has rejected the application of the respondent filed under Regulation 9 at the behest of ED is flawed.

The learned Sr. Counsel has argued that this is not a case where the appellant has delegated or shared its power with someone else or allowed someone else to dictate to it, but is a case where the appellant has sought ED's view and based on ED's view taken a considered decision.

The learned Sr. Counsel has relied on ***State of Bihar v. Asis Kumar Mukherjee (Dr)***[5]to contend that " to consult another is not to surrender but merely to seek"

> *13. ...To consult another is not to surrender to that other, but merely to seek assistance in the careful exercise of public power. All that we mean to emphasize is that the plain words we have already referred to, about the meaning of which the two sides have battled, should be read having due regard to their normal import, statutory setting, professional object and insistence on standards.*

F. The learned Sr. Counsel for the appellant has also challenged the finding of the learned Single Judge regarding the appellant taking a u-turn by refusing the permission to the respondent to complete transactions which already have been cleared by the appellant.

Mr. Bhushan further contended that even though the respondent has remitted foreign exchange in the past, the same was pursuant to the interim orders passed by this Hon'ble Court. This Hon'ble Court passed

Order Dates	**Permission by the**	**Remittance (in**

[5] **(1975) 3 SCC 602**

	Appellant pursuant to the Order	**USD)**
19.06.2020	22.06.2020	USD 90 million
24.07.2020	29.07.2020	USD 54.99 million
29.09.2020	30.09.2020	USD 96.15 million

The learned Sr. Counsel for the appellant argued that even though the appellant gave permission at three earlier instances, the same were pursuant to interim orders by the Learned Single Judge and the very fact that the appellant chose not to challenge the order and in fact comply with the same can neither be held against them nor will have bearing on the merits of on the present appeal.

He relied on the Judgment ***M/s. Mahabir Jute Mills LTD., Gorakhpore Vs. Shri Shibban Lal Saxena and Or.,***[6]

G. The learned Sr. Counsel has argued before us that it was only on 14.08.2019 that the DOE started investigation into alleged violation of FEMA against JSPML and it is only after on 14.08.2019 that the appellant became more circumspect of the respondent and hence sought approval of ED. Hence any permissions granted by the appellant prior to 14.08.19 are meaningless.

[6] (1975) 2 SCC 818

H. The learned Sr. Counsel has stated that no amount of giving unencumbered assets can be ordered as a condition of granting permission as the violations are "Foreign Exchange Violation." The principle in Foreign Exchange Violations is to conserve the foreign exchange so that valuable foreign exchange does not leave the country. Unencumbered assets in INR cannot be a substitute for Foreign Exchange Violations.

I. The learned Sr. Counsel has argued before us that the impugned judgment does not direct any permission to be given to the respondent. It is the submission of the learned Sr. Counsel for the appellant that the appellant cannot be worse off in filing the appeal than had he not filed the appeal.

J. The learned Sr. Counsel has further drawn our attention to the letter of 03.09.2020, wherein the Directorate of Enforcement, duly informed the details of pending FEMA and PMLA cases to the appellant. It was only thereafter, that the permission for corporate guarantees were granted by the appellant.

Submissions of the learned Sr. Counsel for the respondent

16. On the other hand, Mr. Tripathi learned Sr. Counsel appearing on behalf of the respondent has stated that the aggregate financial commitment of the respondent in its three

overseas subsidiary companies was as under:-

Name of Overseas Direct Subsidiaries	**UIN No.**	**Direct Investment Equity shares***	**Loans***	**Corporate Guarantees issued***	**Total (in USD)***
JSPML	NDWAZ20070042	102.84	370	864.5	1337.34
SOL	NDWAZ20130244	22.35	NIL	NIL	22.35
JSB SA	NDWAZ20070365	148.59	NIL	0.32	148.91
	TOTAL	273.78	370.0	864.82	1508.60

*All Figures in USD and are in millions

17. The respondent, its wholly owned subsidiary JSPML and its lenders have restructured payment, according to which the following payments are to be made by JSPML to its lenders on:

Amount*	Last date by which payment is to be made
USD 153 Million	March 31, 2020
USD 229.5 Million	March 31, 2021
USD 382.5 Million	March 31, 2022

18. Since the first instalment payable on 31.03.2020, had got delayed, the same had to be renegotiated with the lenders and the revised payment schedule is as under:-

Payment Due Dates	**Amount**
24.6.2020	USD 51 Million
31.7.2020	USD 40.80 Million
30.9.2020	USD 61.20 Million
31.3.2021	USD 229.50 Million
31.3.2022	USD 382.50 Million

19. In addition, the respondent has to also pay instalments of JSPAL along with additional interest and other charges which inflated the remittance to USD 90 million on 22.06.2020, USD 54.99 million on 29.07.2020 and USD 96.15 million on 30.09.2020.

20. In order to meet the contentions of the learned Sr. Counsel for the appellant, the learned Sr, Counsel for the respondent has stated that even the judgment relied upon by the appellant namely the ***E.G. Nambudiri*** case states that "competent authority has no license to act arbitrarily, he must act in a fair and just manner".

21. The learned Sr. Counsel for the respondent has argued that even assuming without admitting that the reasons can be looked into, the bare perusal of the reasons clearly shows that the same

are arbitrary and whimsical. In support, the learned Sr. Counsel for Respondent has drawn our attention to argue that the reasons communicated in the e-mail of 30.12.2019 as well as in the letter of 03.12.2019 only shows that the Directorate of Enforcement has indicated

(a) pending of FEMA and PMLA cases.

(b) in view of the above DOE has objections.

22. The learned Sr. Counsel for Respondent submitted that even after the letter of 03.12.2019 the appellant has granted permission to respondent on 09.09.2020. As per the letter of 09.09.2020, letter dated 09.09.20 reads as the appellant had "no objection from the FEMA angle."

23. In para 22 of counter affidavit filed by the appellant in the writ petition filed by the respondent, the appellant has clearly stated:

> *"22. It is submitted that the Respondent could have rejected the approval on the basis of the reservations expressed by ED but in on view of the pendency of the previous Writ Petition and in deference to the interim orders passed by this Hon'ble Court therein granted approval on conditions set out in therein. It is submitted that the conditions imposed in the letter of 09.09.2020 are not only in line with the FEMA ODI Regulations but also in line with the order passed by this Hon'ble Court and are necessary to protect the interests of the ED pending the adjudication of the previous Writ Petition. It is submitted that in view of the aforesaid, granting unconditional permission to the*

transactions as proposed by the Petitioner would amount to Respondent's failure in discharge of its statutory duties."

24. The learned Sr. Counsel has further stated that it is evident from the entire correspondence, pleadings & documents on records that at best the ED has only expressed "a reservation" and expressing a reservation cannot be construed reason for rejection of permission to remit foreign exchange.

25. The learned Sr. Counsel has further stated that some investigations & inquiries have been pending against the respondent. It is in this view of the matter that each and every permission that has been granted to the respondent has been without prejudice to any action that may be taken by RBI or any investigative agency on account of any contravention observed at the future date.

26. The learned Sr. Counsel has further submitted that JSPML, the wholly owned subsidiary of the respondent has already taken the credit of foreign exchange from various lenders and the foreign exchange has already come to the country. It is only this foreign currency which is now being repaid by the respondent.

27. Without prejudice to the above, the learned Sr. Counsel for the respondent has further argued that the factum of Foreign Exchange Violation has not been raised before the learned Single

Judge either in the counter affidavit nor argued, and not even raised as a ground in the present appeal. It cannot be permitted to be argued for the first time during oral arguments.

28. The learned Sr. Counsel has further submitted that under PMLA as per Section 2(U) the only violation is proceeds of crime which is define as under:-

> *"(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;"*

29. The present case is not a PMLA violation as it is not the case of the RBI nor is the case of the appellant that the amounts of 90 million USD, 54.99 million USD and 96.15 million USD which were remitted in the past were not used for the purpose for which they were remitted. The learned senior counsel further argued that the letter dated 14th August, 2019 shows that there is not even an investigation against the respondent but only an enquiry.

30. The learned Sr. Counsel has further drawn our attention to the letter of the 03.09.2020 of DOE to state that the DOE was perfectly satisfied with the order of 24.07.2020 passed by the learned Single Judge which is reproduced herein under:-

> *"15. In these circumstances, in my opinion, the petitioner has made out a prima facie case. The interim directions*

as stated in the order of this court dated 19.06.2020 are reiterated.

16. In the facts I pass the following directions:-
The respondent shall permit the petitioner to transmit the sum of 54.99 million USD forthwith before 31.07.2020 as has been prayed for. This permission is however subject to the following:
(i)The petitioner shall furnish an undertaking from the Board of Directors that if for some reason this court passes a direction to the petitioner to deposit the said remitted amount amounting to 55 million USD, the petitioner shall forthwith deposit the same in court.
(ii)The petitioner shall give an undertaking that it has unencumbered assets worth 60 million USD or above and that the petitioner shall not sell, alienate or transfer or encumber these assets without prior permission of this Court."

31. The learned Sr. Counsel submits that even today they are ready to give an undertaking from the Board of Directors that if for some reason this court passes a direction to the respondent to deposit the said remitted amount amounting to 241.5 million USD, the Respondent shall forthwith deposit the same in court. As well as an undertaking that it has unencumbered assets worth 241.5 million USD or above and that the respondent shall not sell, alienate or transfer or encumber these assets without prior permission of this Court.

32. Learned Sr. Counsel for the respondent has further argued that the appellant in the past has given permissions four times for

Corporate guarantee namely

Sl No.	RBI Approval No	Date of FC	Amount of FC in Cash sweep	Amount of FC in CG	Date of reporting of FC	Remarks
1	Ref No FE.CO.OID /19.10.136/ 2014-15 Dated 24.03.2015	21-Sep-15		1,00,00,000	04-Dec-17	Axis Bank Guarantee issed
2		21-Dec-15	2,80,00,000		12-Jul-18	
3		12-Jan-16	2,50,00,000		12-Jul-18	
4			**5,30,00,000**			
	Total in USD					
		26-Apr-18	60,00,000		09-May-18	
5	Ref No FE.CO.OID 8633 /19.10.136/ 2017-18 Dated 20.04.2018	22-May-18	50,00,000		29-May-18	
6		04-Jun-18	35,00,000		07-Jun-18	
7		14-Jun-18	50,00,000		20-Jun-18	
8		22-Jun-18	50,00,000		07-Jul-18	
9		25-Jun-18	15,00,000		07-Jul-18	
10		26-Jun-18	60,00,000		18-Jul-18	
11		06-Jul-18	50,00,000		18-Jul-18	
12			**3,70,00,000**			
	Total in USD					
1		26-Sep-18		44,00,00,000		Corporate Guarantee rollover of USD 440
		26-Sep-18		16,50,00,000		Corporate Guarantee rollover of USD 165
		26-Sep-18		1,70,00,000		Corporate Guarantee fresh of USD 17
		26-Sep-18		60,00,000		Corporate Guarantee fresh of USD 6
				62,80,00,000		
3		26-Sep-18	75,00,000		29-Sep-18	
4		28-Sep-18	1,40,00,000		29-Sep-18	
5		26-Dec-18	1,00,00,000		31-Dec-18	
6		27-Dec-18	10,00,000		31-Dec-18	
7		28-Dec-18	10,00,000		31-Dec-18	
8		11-Jan-19	50,00,000		22-Jan-19	
9		22-Jan-19	1,00,00,000		22-Jan-19	
10		29-Jan-19	15,00,000		02-Feb-19	
11		29-Jan-19	45,00,000		02-Feb-19	
12		21-Mar-19	1,00,00,000		26-Mar-19	
13		26-Mar-19	50,00,000		03-Apr-19	
14		26-Mar-19	30,00,000		03-Apr-19	
15		26-Mar-19	50,00,000		03-Apr-19	
16		26-Mar-19	20,00,000		03-Apr-19	
17		26-Mar-19	20,00,000		03-Apr-19	
18		26-Mar-19	20,00,000		03-Apr-19	
19		26-Mar-19	20,00,000		03-Apr-19	
20		26-Mar-19	30,00,000		03-Apr-19	
21		26-Mar-19	50,00,000		03-Apr-19	
22		26-Mar-19	30,00,000		03-Apr-19	
23		27-Mar-19	20,00,000		03-Apr-19	
24		11-Apr-19	20,00,000		27-May-19	
25		17-Apr-19	20,00,000		27-May-19	
26		13.05.2019	50,00,000		27-May-19	
27		20.05.2019	50,00,000		27-May-19	
28		21.06.2019	20,00,000		03-Aug-19	
29		21.06.2019	10,00,000		03-Aug-19	
30		24.06.2019	20,00,000		03-Aug-19	
31	Ref No FE.CO.OID 1546 /19.10.136/ 2018-19 Dated 14.09.2018	25.06.2019	10,00,000		03-Aug-19	
32		25.06.2019	20,00,000		03-Aug-19	
33		25.06.2019	20,00,000		03-Aug-19	
34		25.06.2019	20,00,000		03-Aug-19	
35		25.06.2019	10,00,000		03-Aug-19	
36		25.06.2019	20,00,000		03-Aug-19	
37		26.06.2019	20,00,000		03-Aug-19	
38		27.06.2019	20,00,000		03-Aug-19	
39		26.06.2019	10,00,000		03-Aug-19	
40		27.06.2019	20,00,000		03-Aug-19	

41		27.06.2019	20,00,000		03-Aug-19	
42		27.06.2019	20,00,000		03-Aug-19	
43		27.06.2019	10,00,000		03-Aug-19	
44		27.06.2019	10,00,000		03-Aug-19	
45		27.06.2019	20,00,000		03-Aug-19	
46		31.07.2019	20,00,000		02-Aug-19	
47		31.07.2019	20,00,000		02-Aug-19	
48		31.07.2019	10,00,000		02-Aug-19	
49		02-Aug-19	20,00,000		02-Aug-19	
50		02-Aug-19	20,00,000		02-Aug-19	
51		02-Aug-19	10,00,000		02-Aug-19	
52		02-Aug-19	20,00,000		02-Aug-19	
53		27-Aug-19	20,00,000		29-Aug-19	
54		27-Aug-19	20,00,000		29-Aug-19	
55		27-Aug-19	10,00,000		29-Aug-19	
56		19-Sep-19	10,00,000		21-Sep-19	
57		19-Sep-19	20,00,000		21-Sep-19	
58		23.09.2019	20,00,000		30-Sep-19	
59		23.09.2019	10,00,000		30-Sep-19	
60		25.09.2019	9,80,000		30-Sep-19	
61		25.09.2019	20,000		30-Sep-19	
62		25.09.2019	20,00,000		30-Sep-19	
63		25.09.2019	20,00,000		30-Sep-19	
64		25.09.2019	20,00,000		30-Sep-19	
65		25.09.2019	50,00,000		30-Sep-19	
66		27.09.2019	20,00,000		03-Oct-19	
67		18.10.2019	20,00,000			
68		06.11.2019	10,00,000			
69		19.11.2019	10,00,000			
70		20.11.2019	10,00,000			
71		25.11.2019	10,00,000			
72		27.11.2019	10,00,000			
73		10.12.2019	10,00,000			
74		16.12.2019	10,00,000			
75		19.12.2019	10,00,000			
	Total in USD		**18,95,00,000**			
			27,95,00,000			

		16.01.2019		15,40,00,000		mio
		16.01.2019		45,00,000		Corporate Guarantee fresh CG of USD 4.5 mio
		16.01.2019		2,20,00,000		Corporate Guarantee fresh of USD 22 mio
		16.01.2019		10,00,000		Corporate Guarantee fresh of USD 1 mio
	Ref No FE.CO.OID 3425/19.10.136/ 2018-19 Dated 10.12.2018	16.01.2019		4,50,00,000		Corporate Guarantee rollover of USD 45 mio
		16.01.2019		1,00,00,000		Corporate Guarantee rollover of USD 10 mio
			-	23,65,00,000		
			Total CG	**86,45,00,000**		

33. After having given permission four times in the past there was no reason for the appellant to deny permission on 30.12.2019.

34. We have also heard the applicant in C.M. No. 1571/2021 namely Directorate of Enforcement and have passed the order separately.

35. Learned Sr. Counsel for appellant has also argued in the rejoinder reiterating the submissions made earlier.

36. The learned Sr. Counsel for the appellant has relied upon the Report of the 2019-2020 of the respondent to show that the net foreign exchange expenditure is more than the income generated by the respondent and hence the appeal deserves to be allowed.

Analysis and Conclusion

37. After considering the entire documents on record and the submissions of the learned Sr. Counsels, we are unable to agree with the contentions of the learned Sr. Counsel for the appellant for the following reasons:-

A. **No reasons given in the order dated 30.12.2019**

We are of the view that the order dated 30.12.2019 gives no reason for rejecting the application of the respondent. Assuming for the sake of arguments that the reasons are contained in the e-mail of 30.12.2019 as well as in the letter of 03.12.2019, we are also required to see that the reasons so mentioned are not arbitrary, whimsical and in accordance with the scheme of the FEMA. The reasons for rejection must be considered and also must relate to the dominant purpose of the FEMA Regulations which is conservation of Foreign Exchange. The reason contained in the e-mail of 30.12.2019 namely " reservation expressed

by DOE/on-going investigations" and in the letter of 03.12.2019 namely " conducting investigations against M/s Jindal Steel Power under FEMA in four cases" and "conducting investigations under PMLA in three cases," cannot be a ground for denial of permission. The appellant cannot deny approval merely on the premise of pending investigation. It is not the case of the RBI, in the appeal, counter affidavit in the writ petition or argued before us that the remittances made in the past by the respondent have been misused. Till date pursuant to the permission of the RBI the respondent has remitted a total amount of 241.14 million USD (USD 90 million+ USD 54.99 million+ USD 96.15 million). Since, we have considered the reasons given for rejection in the order dated 30.12.2019 the reliance on Mahender Singh Gill, E.G Nambudiri and Hanuman Prasad case becomes irrelevant. Hence, we hold that even if we look at the reasons for rejection contained in the order dated 30.12.2019, the reasons are arbitrary, whimsical and do not further the scheme of Foreign Exchange Management Act.

B. **The reliance on word " *inter alia*" under Regulation 9(3)**

We have considered the arguments of the learned Sr. Counsel for the appellant as well as learned Sr. Counsel for the respondent. We are of the view that Regulation 9(3) the word *" inter alia"* of FEMA ODI Regulations must

take its colour from the scheme, drift and tenor of the Act as well as Regulations. The FEMA ODI Regulations do not contemplate any role of the third party or the agency for approval or for prior approval, least of all investigating agency. The only mention of pending investigation is under Regulation 6(2) (iii) ie. If the Indian Party is under RBI caution list/lists of defaulters or under investigation by an investigation/enforcement agency or by a regulatory body. The very fact that Regulation 9(3) makes a conscious omission of pending investigations, by an investigation/ enforcement agency, further strengthens our opinion that merely an on-going enquiry /pending investigations cannot be a ground for rejection of permission to remit Foreign Exchange. It will be relevant to point out that all permissions given by the appellant have categorically stated ***" each permission is without prejudice to any action that may be taken by any investigative agency on account of contravention"***

We also note with approval that even after " so-called reservation" indicated by the DOE, the appellant has granted permission to the respondent on 09.09.2020 indicating " no objection from the FEMA 1999 angle."

The counter affidavit of the appellant has reiterated that the conditions imposed in the letter of 09.09.2020 are in line with FEMA ODI Regulations. Hence, we hold that the denial of permission dated 30.12.2019 based upon

Regulation 9(3) of FEMA ODI Regulations is wrong.

C. **Not dealt with preliminary objections raised in the counter affidavit.**

We are of the view, that the preliminary objections raised in the counter affidavit are not relevant/ germane to issue in controversy and hence have not been referred to by the learned Single Judge.

i. Lack of territorial jurisdiction

We are of the view that the authorised dealer bank i.e. the entity through which overseas direct investment is sought to be made, is State Bank of India, overseas branch New Delhi.

The appellant himself in communication dated 01.01.2008***(page 414)***, has directed the respondent to approach New Delhi Regional Office. Hence, no fault is found in the order of the learned Single Judge in entertaining the writ petition.

ii. ED is a proper &necessary party

The writ petition in the present case is impugning the order dated 30.12.2019 rejecting the respondent's request to remit funds abroad. The same has to be

tested in the context of the FEMA ODI Regulations.

iii. Delays and laches

The challenge in the writ petition is to the impugned order of the RBI dated 30.12.2019 and the writ petition has been filed on 17.06.2020. It is pertinent to mention that on account of COVID-19, there had been a complete lock-down in the country from the last week of March, 2020. Hence, to our mind there is no delay which merits dismissal of the writ petition on this account.

iv. Concealment of material facts

To our minds, after going through the documents and hearing the parties, there has been no concealment of any material, fact or information which was relevant to the issue in controversy and which has not been brought to the notice of the learned Single Judge intentionally or malafidely, by the respondent.

Hence, the learned Single Judge has not adverted to the preliminary objections raised in the counter affidavit.

D. **No finding against ED could have been given without ED being a party.**

We are unable to agree with this contention of the appellant as there is no finding given against the ED by the learned Single Judge. The learned Single Judge in Para 38 of the impugned order and judgment dated 04.12.2020 has observed merely that there is nothing on record of the writ court which shows that any demand appears to have been raised by the ED on the respondent. The learned Single Judge has further held that DOE has enough power under various statutory regimes to attach properties and assets of the defaulter individual.

E. **The appellant has rejected the application of the respondent at the behest of ED.**

The learned Sr. Counsel has relied on ***State of Bihar v. Asis Kumar Mukherjee (Dr)***[7] to contend that he has sought ED's view to consult and take a considered decision

We have already, while adverting to the arguments of the learned Sr. Counsel for the appellant in ground (A) held that the reasons for rejection have been merely the apprehension expressed by the ED. The said apprehension of the ED is neither in spirit of the scheme of FEMA nor Regulation 9(3). The reliance of RBI on the apprehensions expressed by ED in its e-mail of 30.12.2019 and the letter of 03.09.2020 itself has been held by us to be incorrect and hence, the rejection by the appellant dated 30.12.2019 is

[7] **(1975) 3 SCC 602**

incorrect. In view of the above, the reliance placed on the judgment ***State of Bihar v. Asis Kumar Mukherjee (Dr)*** is misplaced.

F. **The appellant taking u-turn by taking permission**

We have already held and we rely on the observation of E.G Nambudiri that " competent authority has no licence to act arbitrary, he must act in a fair and just manner." The appellant in the present case has granted four permissions as elaborated by us in paragraph 32&33. The appellant even as late as 09.09.2020 has granted permission to the respondent ie. much after the alleged Panama/Mauritius Leaks on 14.08.2019 subject to

> *"3. The said approval is subject to the following terms and conditions:*
>
> *i. IP shall furnish an undertaking from the Board of Directors, that if on the basis of its investigations DOE, for some reason, requires the IP to deposit equivalent amount of the said financial commitment amounting to USD 407 million, AUD 6.35 million and AUD 40.15 million respectively, the IP shall forthwith deposit the same with their designated AD bank.*
>
> *ii. The IP shall give an undertaking that it has unencumbered assets worth USD 450 million, AUD 7.00 million and AUD 45.00 million or above and that the IP shall not sell, alienate or transfer or encumber these assets without prior permission of DOE."*

This clearly shows that the only requirement of the RBI was

i. an undertaking from the Board of Director to deposit equivalent amount and

ii. give an undertaking that the respondent has unencumbered assets worth the remittance amount.

During the course of arguments the learned Sr. Counsel for the respondent has categorically made the statement that they would give a Board Resolution to deposit equivalent amount of the said financial commitment amounting to USD 241.5 million and an undertaking that it had unencumbered assets worth USD 241.5 million but the same was not acceptable to the respondent. Be that as it may, it is clear that the letter of 09.09.2020 was issued by the respondent after the so-called Panama/Mauritius Leaks and there is no justification or satisfactory explanation as to why the permission was granted even as late as 09.09.2020.

Moreover, the learned Sr. Counsel for the appellant had relied on the Judgment ***M/s. Mahabir Jute Mills LTD., Gorakhpore Vs. Shri Shibban Lal Saxena and Ors*** to urge that the very fact that the appellant chose not to challenge the order and in fact comply with the same cannot be held against them. The said judgment need not detain us as we are of the opinion that the order dated 30.12.2019 is itself flawed.

Hence, denial of permission of 30.12.2019 by the respondent is flawed.

G. **No amount of unencumbered asset can be ordered as a**

condition for granting permission

The said ground has been raised by the learned Sr. Counsel for the appellant that no amount of unencumbered assets can be ordered as a condition for granting permission as violation for foreign exchange and further that the principle of Foreign Exchange Violation is to conserve valuable foreign exchange.

We have gone though the counter affidavit filed by the appellant as well as the grounds of appeal and in none of the two, the said grounds has been urged or argued. It seems that the said grounds have been argued before us for the first time without there been any pleadings on record. In view of the laws laid down by the Hon'ble Supreme Court, ***Attar Singh Gurumukh Singh and Ors. Vs. Income Tax Officer, Ludhiana And Ors***[8]**.** we are unable to look into the said grounds in the absence of pleadings. Without prejudice, assuming the said grounds could have been raised the same is devoid of merit as on 09.09.2020, the RBI itself permits remittance of foreign exchange subject to two conditions namely:

i. an undertaking from the Board of Director to deposit **equivalent amount and**

ii. give an undertaking that the respondent has unencumbered assets worth the remittance amount

38. For the reasons given in this judgment , and in this view of the matter, we find no infirmity in the order and judgment dated

[8] (1991) 4 SCC 385

04.12.2020 of the learned Single Judge passed in W.P. (C) No. 3601/2020. Consequently, the present appeal is devoid of any merits and is dismissed along with accompanying applications.

CM APPL. 1571/2020*(Impleadment)*

39. The present application has been filed under Order I Rule 10 read with Section 151 of CPC by the Directorate of Enforcement seeking impleadment as a respondent in the present appeal.

40. The case set up by the DOE is that the DOE informed the appellant that an inquiry under FEMA is being initiated against the respondent and others in respect of purchase and sale of four vessels registered in the name of respondent's subsidiaries in Marshal Island during the year 2012-017. The applicant has further stated that the present proceedings will have an impact on the investigation being carried out by the DOE and hence sought impleadment in the present application as respondent.

41. The law with regard to impleadment has been settled by the Hon'ble Supreme Court in *Mumbai International Airport (P) LTD. Vs. Regency Convention Centre and Hotels Private LTD. And Ors.*[9] as well as *Vidur Impex And Traders Private Limited And Ors. V.s Tosh Apartments Private Ltd. And Ors*. [10]

[9] (2010) 7 SCC 417
[10] (2012) 8 SCC 384

42. The Hon'ble Supreme Court has stated that a necessary party is the person who ought to be joined as the party in the proceedings and in whose absence an effective decree cannot be passed by the court.

43. A proper party is a person whose presence would enable the court who completely, effectively and properly adjudicate upon all matters and issues, though he may not be the person in favour of or against whom a decree is to be made for the reasons we have elaborated in our judgment dated 26.03.2021.

44. We feel that DOE is neither a proper nor a necessary party to the present proceedings as no relief is claimed against DOE
ii. The disputes in question can be effectively, completely and properly be adjudicated in the absence of applicant.

45. In addition we are also persuaded by the fact that there is no averment in the application as to why DOE chose not to file a similar application for impleadment in the original writ proceedings and has only come up for the first time in the present appeal. The application is totally silent on the said ground. In this view of the matter we find no merit in the application and the same is dismissed.

JASMEET SINGH, J

CHIEF JUSTICE

MARCH 26, 2021
LPA 405/2020