

**IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR.JUSTICE V.G.ARUN**

**Monday, the 10th day of October 2022 / 18th Aswina, 1944
WP(C) NO. 26228 OF 2022(C)**

PETITIONERS:

1. KERALA INFRASTRUCTURE INVESTMENT FUND BOARD (KIIFB), REPRESENTED BY DR. KANDATHIL MATHEW ABRAHAM, CHIEF EXECUTIVE OFFICER/FUND MANAGER, THE KERALA INFRASTRUCTURE INVESTMENT FUND BOARD, 2ND FLOOR, FELICITY SQUARE, MG SQUARE, STATUE, THIRUVANANTHAPURAM- 695001
2. DR. KANDATHIL MATHEW ABRAHAM, CHIEF EXECUTIVE OFFICER/ FUND MANAGER, THE KERALA INFRASTRUCTURE INVESTMENT FUND BOARD, S/O MATHEW MAPPILA, AGED ABOUT 65 YEARS, R/O B 4 LOWER, MILLENIUM, APARTMENTS, JAGATHY, THYCAUD P.O, THIRUVANANTHAPURAM-695 014.
3. ANIE JULA THOMAS, JOINT FUND MANAGER, THE KERALA INFRASTRUCTURE INVESTMENT FUND BOARD, D/O THOMAS KALLUMKAL KOSHY, AGED ABOUT 49 YEARS, R/O VILLA NO.2, THANOTHRA, EMBASSY HOMES, MUDAVANMUGAL, THIRUVANANTHAPURAM-695 012.

RESPONDENTS:

1. DIRECTOR, DIRECTORATE OF ENFORCEMENT, KOCHI ZONAL OFFICE, KANOOS CASTLE, A.K. SESHADRI ROAD, KOCHI - 682 011.
2. THE STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM - 695 001.
3. ADDL R3, THE RESERVE BANK OF INDIA, REPRESENTED BY ITS CHIEF GENERAL MANAGER, FOREIGN EXCHANGE DEPARTMENT, CENTRAL OFFICE, EXTERNAL COMMERCIAL BORROWINGS DIVISION, MUMBAI. ADDL R3 IS SUO MOTU IMPEADED AS PER ORDER DATED 10-10-2022 IN WP(C)26228/2022

Writ petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to restrain the 1st Respondent from taking any further steps pursuant to Exhibit P4, Exhibit P6, Exhibit P8, Exhibit P10, Exhibit P11 and Exhibit P13 summonses.

This petition coming on for orders upon perusing the petition and the affidavit filed in support of WP(C) and upon hearing the arguments of SRI.K.GOPALAKRISHNA KURUP (SENIOR ADVOCATE) along with M/S. B.G.HARINDRANATH, AMITH KRISHNAN H. & M.GOPIKRISHNAN, Advocates for the petitioners, DEPUTY SOLICITOR GENERAL for R1, the court passed the following:

V.G.ARUN, J.

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W.P. (C) No.26228 & 25774 of 2022

Dated this the 10th day of October, 2022

ORDER

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The first petitioner is the Kerala Infrastructure Investment Fund Board (KIIFB) constituted under Section 4 of the Kerala Infrastructure Investment Fund Act 1999 (the Act). The second petitioner is the Chief Executive Officer of the KIIFB and the third petitioner is its Fund Manager. The petitioners are aggrieved by the repeated issuance of summons by the Directorate of Enforcement/first respondent under Section 37(1) and (3) of the Foreign Exchange Management Act, 1999 (the FEMA) read with Section 131(1) of the Income Tax Act, 1961 and Section 30 of the Code of Civil Procedure, 1908.

2. The essential facts are as under;

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The Kerala Infrastructure Investment Fund Act provides for the constitution of a fund for investment in the infrastructure projects in the State. The Kerala Infrastructure Investment Fund Scheme was notified accordingly. Among other sources, the corpus of the fund consists of the amounts borrowed by the KIIFB under Section 8 of the Act. In accordance with the said provision, the in 31st General Body Meeting of the KIIFB held on 30.11.2017, decision was taken to raise funds for various infrastructure projects within the State by issuing Rupee Denominated Bonds (Masala Bonds). The Board appointed Axis Bank as its Advisor to the Masala Bonds issue. On 22.05.2018, the Axis Bank (AD-I) issued Ext.P1 letter to the Reserve Bank of India, seeking permission for issuance of Masala Bonds of Rupees 2672.80 Crores by the KIIFB. By Ext.P2 letter dated 01.06.2018, the RBI intimated its 'No Objection' under the extant Rupee Denominated Bond framework. Thereafter the RBI issued Ext.P3

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communication, allotting loan a registration number for the Rupee Denominated Bonds. Based on the permission granted, the Masala Bonds issue was opened for subscription on 26.03.2019 and closed on 27.03.2019. The Bonds were subsequently listed on the London and Singapore Stock Exchanges.

3. On 03.02.2021, the second petitioner was served with Ext.P4 summons issued under Section 37(1) and (3) of the Foreign Exchange Management Act, 1999 (the FEMA) read with Section 131(1) of the Income Tax Act, 1961 and Section 30 of the Code of Civil Procedure, 1908. Thereafter, Exts.P6 and P8 summons were issued. In response to the summons, the second petitioner made available the documents mentioned therein and addressed Ext.P9 letter to the Deputy Director of the first respondent, stating that the summons were *ultra virus* the provisions of the FEMA as well as the principles laid down by the Supreme Court. Thereafter, the second petitioner was

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issued with Ext.P10 summons and he appeared before the Assistant Director of the first respondent in person on 15.12.2021 and made oral submissions.

4. While so, the third petitioner was issued with Ext.P11 summons dated 07.07.2022. The third petitioner appeared before the first respondent in response to the summons on 19.07.2022 and made her oral submissions. The third petitioner was asked to appear again on 22.07.2022. By Ext.P12 letter dated 20.07.2022, she sought an adjournment of the personal hearing by two weeks. Thereafter, the third petitioner was issued with Ext.P13 to which she gave Ext.P14 reply, stating that she had already appeared and answered all the questions put to her, most of which were not in relation to Section 13 of the FEMA. The third petitioner also submitted that her privacy was intruded for no obvious reason, by requiring her to submit her IT returns and bank accounts, without even indicating the reason for compelling

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her to produce those documents. The writ petition was filed at that stage, seeking to quash the summons and the first respondent from initiating any investigation into the Masala Bonds issued by the KIIFB.

5. Senior Advocate K.Gopalakrishna Kurup appearing for the petitioners made the following submissions;

6. The so called inquiry by the Directorate of Enforcement is *ex facie* illegal since the Masala Bonds were issued with prior approval from the RBI, as provided in Section 6(3)(d) of FEMA and the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018. The KIIFB is constituted under a State enactment, with the Chief Minister as its Chairperson, Minister for Finance as Vice-Chairperson, the Vice Chairman of the State Planning Board, the Chief Secretary, Secretary (Law), Secretary (Finance), Secretary (Finance- Resources) and 7 others as members. The Chief Executive Officer, who is the Member

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Secretary, is a Senior IAS officer. The Act contains inbuilt checks and measures for streamlining the functioning of the KIIFB. Borrowing and lending activities are undertaken with previous sanction from the Government. Further, as per Section 9 of the Act, the Government provides guarantee re-payment of the principal and interest of any fund raised by the Board. The books of accounts and the balance sheet are audited and certified. A copy of the annual report of the Board is submitted to the Government before the end of July every year. Further, all actual Extra Commercial Borrowings are reported to the RBI on a monthly basis. The RBI having not raised any objection or even suspicion regarding the issuance of Masala Bonds and utilisation of the funds raised, the Enforcement Directorate is not empowered to any inquiry. Relying on the decision in LIC v. Escorts Ltd [(1986) 1 SCC 264], it is contended

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that while the task of enforcement is left to the Directorate of Enforcement, only the Reserve Bank of India is empowered to decide whether permission for raising funds from outside the country is to be granted or not. The repeated summons, without even revealing the reason for summoning the petitioners and requiring them to produce the personal and private details, reeks of *mala fides*. The indifferent manner in which the summons were issued indicates lack of application of mind. In **Barium Chemicals Ltd v. A. J Rana [1972 1 SCC 240]**, the Apex Court while dealing with the question relating to the circumstances in which a notice under Section 19(2) of the Foreign Exchange Regulations Act, 1947 can be issued, has categorically held application of mind to be *sine qua non* for issuance of summons. Continuance of the roving inquiry is causing prejudice to the State as a whole, since the hype regarding pendency of an

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inquiry has resulted in the funding agencies hesitating to offer financial support.

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7. The petitioner is the former Finance Minister of the State and in that capacity, was the Vice-Chairperson of the KIIFB during the period 2016-2021. The petitioner is also being summoned by the officials in the Enforcement Directorate. The petitioner is also challenging the issuance of repeated summons as illegal.

8. Senior Advocate Sidharth Dave appearing for the petitioner took exception to the issuance of summons, without specifying the reason, and the compulsion to produce statement of accounts and documents relating to the immovable property of not only the petitioner, but his immediate relatives as well. It is submitted that the intention can only be vilified the petitioner, who has always maintained high standards and integrity as a politician. Referring to Section 37 of the FEMA, it is contended that the

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Enforcement Directorate can conduct inquiry/investigation only on Section 13 being contravened. As per Section 13, the contravention of any rule, regulation, notification, direction etc issued in exercise of the powers under the Act, or of any condition subject to which an authorisation is issued by the Reserve Bank, can result in adjudication and imposition of penalty. As per Section 13(1-B), the adjudicating authority can recommend initiation of prosecution by filing a criminal complaint, if any person is found to have acquired foreign exchange, foreign security or immovable property situated outside India. It is contended that the manner in which the summons is issued clearly reveals that the Enforcement Directorate is bent upon prosecuting the petitioner.

7. It is argued that the Enforcement Directorate is engaged in a roving inquiry, for reasons best known to all. In this regard, attention is drawn to the Annexure to Ext.P5

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summons, wherein details of all the bank accounts maintained/operated by the petitioner and his family members in India and abroad, details of the petitioner's foreign visit for the last ten years along with purpose and income therefrom, details of foreign inward remittance sent by the petitioner or companies/firms in which the petitioner is the Director/Partner during the last ten years along with irrelevant documents, bank accounts etc. are sought.

8. Senior Advocate S.V.Raju, learned Additional Solicitor General appearing for the Enforcement Directorate, refuted the allegations of *mala fides* and put forth the following contentions;

9. Other than making unsubstantiated allegations, the petitioners have not pointed out any contravention of the provisions of FEMA in issuing the summons. Section 37 of the FEMA clothes the ED with sufficient power to issue summons when violation of the provisions is

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suspected or brought to its notice. It is the settled position of law that there cannot be a writ of prohibition restraining inquiry, adjudication and prosecution by a competent agency. It has been so held, though with reference to the provision of FERA, in **Standard Chartered Bank and others v. Directorate of Enforcement and others [(2006) 4 SCC 278]**. The High Court of Madras in **T.T.V.Dinakaran v. Enforcement Officer, Enforcement Directorate [1995 SCC OnLine Mad 893]** and **K.A.Manshoor v. Assistant Director, Enforcement Directorate, Government of India [2009 SCC OnLine Mad 1839]** has repelled the challenge against summons, based on the contention that the summons does not reflect application of mind by the authority. The Foreign Exchange Management Act contained Section 6(3) until it was omitted with effect from 15.10.2019 vide Act 20 of 2011. Section 6(3) provided the RBI with the power to prohibit,

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restrict or regulate the issuance of Foreign Currency Convertible Bonds. In exercise of that power and in accordance with the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018, the RBI had issued Ext.P18 Master Direction detailing the External Commercial Borrowing framework. The framework also contains an end-usage negative list. The External Commercial Borrowing proceeds cannot be invested for the items included in the negative list. One item in the negative list is real estate activity. The subject inquiry is being conducted to find out whether proceeds from the Masala Bonds have been invested in real estate or other prohibited activities included in the negative list. The ED has every authority to conduct such inquiry since Clause 12 of Ext.P18 imposes the borrower with the primary responsibility of ensuring that the borrowing is in compliance with the applicable guidelines and makes any contravention of the applicable provisions actionable under FEMA.

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10. The inquiry was also necessitated since the Comptroller and Auditor General (CAG) had reported that raising of funds through issue of Masala Bonds is a classic case of off budget borrowings, which bypasses the limits set on Government borrowings under Article 293 of the Constitution of India and violates the provision of Entry 37 of List 1. The procedure under the FEMA require the Enforcement Directorate to file a complaint based on the inquiry. Thereupon an adjudication has to be conducted before proceeding further. The attempt of the petitioners, through the premature and unmerited writ petition, is to scuttle the inquiry.

11. In reply, learned Senior Counsel for the petitioner submitted that the CAG report cannot be the basis for an inquiry and prosecution by the Enforcement Directorate, since the defects reported by the CAG were considered by the Legislative Assembly on 22.01.2021 and rejected as per Ext.P16 resolution. It is for the

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Parliament or the State legislature, as the case may be, to decide whether to accept or reject the report. In **Arun Kumar Agrawal v. Union of India, [(2013) 7 SCC 1]**, the Apex Court has held the CAG's report to be subject to parliamentary debates, as also the authority of the Public Accounts Committee to accept the Ministries objection and reject the CAG report.

12. In the instant case, the State Assembly has rejected that part of CAG report dealing with issuance of Masala Bonds. Hence, an inquiry based on the rejected report will amount to transgression into the State's domain, which goes against the principle of cooperative federalism. It is submitted that absolutely nothing is stated in the counter affidavit as regards the contention based on Section 6(3) of FEMA. In spite of this Court having required the competent officer of the Directorate to file affidavit stating whether issuance of Masala Bonds by any

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other entity is being enquired into, that aspect is also not mentioned in the counter affidavit.

13. As pointed out by the learned Additional Solicitor General, there is very limited scope for issuing a writ of prohibition, restraining the Directorate of Enforcement from proceeding with the inquiry. The scope for interference with the issuance of summons at the stage of inquiry/investigation is also limited. At the same time, even going by the precedents, there is no absolute embargo in the writ court considering the sanctity and legality of the inquiry. The instant case is different from the others insofar as the inquiry is being conducted against a statutorily constituted Board, the activities of which is being subjected to scrutiny by the State. Further, raising of funds by issuing Masala Bonds, was permitted by the Reserve Bank of India. In the above circumstances, whether an inquiry is warranted, is the question arising for consideration.

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14. In the counter affidavits filed in the writ petitions, the repeated assertion of the deponent is as under;

"4. It is submitted that the edifice of the investigation initiated by the 1st Respondent is cemented by two facets. Firstly, complaints were received on the contravention of regulations of Foreign Exchange Management Act, 1999 by Kerala Infrastructure Investment Fund Board (KIIFB) a body corporate with respect to Rupee denominated bonds overseas (Masala Bonds). Secondly, there were observations on non-adherence to Constitutional provisions with respect to the Masala Bonds and KIIFB borrowings in the State Finance Audit Report of Comptroller and Auditor General of India for the year ended March 2019. In view of the said complaints and CAG Report, the Office of the 1st Respondent has initiated investigation into the allegations of the contravention of regulations of Foreign Exchange Management Act, 1999."

With regard to the above aspect, I find *prima facie* merit in the contention that the objection in the CAG report cannot be the basis for an

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inquiry in the instant case, since the objection was considered and rejected by the State Assembly. In **Arun Kumar Agrawal v. Union of India [(2013) 7 SCC 1]**, the Apex Court has made the following observations with respect to the the sanctity of CAG report and the power of the Parliament;

“66. We have referred to the report of the CAG, the role of the PAC and the procedure followed in the House, only to indicate that the CAG Report is always subject to scrutiny by Parliament and the Government can always offer its views on the report of the CAG.

67. The question that is germane for consideration in this case is whether this Court can grant reliefs by merely placing reliance on the CAG's Report. The CAG's Report is always subject to parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG Report or reject the report of the CAG. The CAG, indisputably is an independent constitutional functionary, however, it is for Parliament to decide whether after receiving the report i.e. PAC to make its comments on the CAG's Report.

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68. We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective Ministries have to offer on the CAG's Report. The Ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various issues. For instance, we cannot as such accept the CAG report in the instance case."

Therefore, it is doubtful whether the objections in the CAG report, which stands rejected by the State Assembly, can lead to an inquiry by the Enforcement Directorate.

15. In the course of arguments, the learned Additional Solicitor General had submitted that the inquiry was also necessitated since complaints were received regarding violation of the permission granted under Section 6(3) of FEMA, the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and the Master Directive issued by the Reserve Bank of India. As

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regards this contention, the submission of the petitioners that monthly reports in Form ECB 2 is being submitted to the Reserve Bank and no objection or suspicion has been raised by the RBI, assumes relevance. In view of the said contention, I find the Reserve Bank of India also to be a necessary party for deciding the issues involved.

16. Yet another pertinent aspect is that, in spite of the direction issued by this Court on 2.9.2022 requiring the competent officer of the Enforcement Directorate to state whether the issuance of Masala Bonds by other entities is being inquired into, absolutely nothing in that regard is stated in the counter affidavit filed on 23.09.2022. The competent officer was called upon to deal with the above aspect since the petitioners had asserted that other Government entities like National Highways Authority of India, National Thermal Power Corporation Ltd, Indian Renewable Energy Development Agency Ltd

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have also issued Masala Bonds and no investigation/inquiry is being conducted with respect to the issuance of Bonds by those entities. To say the least, I am perturbed by the manner in which the direction of this Court has been sidelined and neglected. The following paragraphs of the Apex Court's decision in **Manoharlal Sharma v. Union of India [2021 SCC OnLine SC 985]**, being contextually relevant is extracted hereunder;

"52. Of course, the Respondent-Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute. However, it is incumbent on the State to not only specifically plead such constitutional concern statutory immunity but they must also prove and justify the same in Court on affidavit. The Respondent-Union of India must necessarily plead and prove the facts which indicate that the information sought must be kept secret as their divulgence would affect

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national security concerns. They must justify the stand that they take before a Court. The mere invocation of national security by the State does not render the Court a mute spectator."

17. The above discussion leads me to the conclusion that although the inquiry/ investigation by the Enforcement Directorate is not liable to be interdicted, there is no justification in the petitioners being repeatedly summoned by the officers of the Enforcement Directorate.

For the aforementioned reasons, issuance of further summons to petitioners 2 and 3 in W.P. (C) No.26228 of 2022 and the petitioner in W.P. (C) No.25774 of 2022 shall be kept on hold for two months.

The Reserve Bank of India, represented by its Chief General Manager, Foreign Exchange Department, Central Office, External Commercial Borrowings Division, Mumbai is *suo motu* impleaded as an additional respondent in both writ

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petitions. Registry is directed to take necessary steps for issuing notice to the impleaded respondent through speed post.

Post on 15.11.2022 for further consideration.

Sd/-

V . G . ARUN
JUDGE

Scl/



APPENDIX OF WP(C) 26228/2022

- Exhibit P1** TRUE COPY OF THE LETTER DATED 22.05.2018 ADDRESSED BY AD-I BANK OF KIIFB TO RBI.
- Exhibit P2** TRUE COPY OF THE LETTER ADDRESSED BY RBI TO KIIFB DATED 01.06.2018.
- Exhibit P3** TRUE COPY OF THE LETTER OF RBI GRANTING A LOAN REGISTRATION NUMBER DATED 22.03.2019.
- Exhibit P4** TRUE COPY OF THE SUMMONS ISSUED BY THE 1ST RESPONDENT TO THE 2ND PETITIONER DATED 03.02.2021.
- Exhibit P5** TRUE COPY OF THE NEWSPAPER REPORTS ON THE CASE REGISTERED BY 1ST RESPONDENT AGAINST KIIFB DATED MARCH 2021.
- Exhibit P6** TRUE COPY OF THE SUMMONS ISSUED BY THE 1ST RESPONDENT TO THE 2ND PETITIONER DATED 01.03.2021.
- Exhibit P7** TRUE COPY OF THE LETTER DATED 03.03.2021 SENT BY THE 2ND PETITIONER TO THE 1ST RESPONDENT.
- Exhibit P8** TRUE COPY OF THE SUMMONS ISSUED BY THE 1ST RESPONDENT TO THE 2ND PETITIONER DATED 08.03.2021.
- Exhibit P9** TRUE COPY OF THE LETTER SENT BY THE 2ND PETITIONER TO THE 1ST RESPONDENT DATED 16.03.2021.
- Exhibit P10** TRUE COPY OF THE SUMMONS ISSUED BY THE 1ST RESPONDENT TO THE 2ND PETITIONER DATED 08.12.2021.
- Exhibit P11** TRUE COPY OF THE SUMMONS ISSUED BY THE 1ST RESPONDENT TO THE 3RD PETITIONER DATED 07.07.2022.
- Exhibit P12** TRUE COPY OF THE LETTER SENT BY THE 3RD PETITIONER TO THE 1ST RESPONDENT DATED 20.07.2022.
- Exhibit P13** TRUE COPY OF THE SUMMONS ISSUED BY THE 1ST RESPONDENT TO THE 3RD PETITIONER DATED 01.08.2022.
- Exhibit P14** TRUE COPY OF THE LETTER ADDRESSED BY THE 3RD PETITIONER TO THE 1ST RESPONDENT DATED 08.08.2022.