$~J-

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

Judgment Reserved on: 21.09.2020

% Judgment Pronounced on: 04.12.2020

\+ W.P.(C) 3601/2020, CM Nos.12807-08, 1227,12954 & 14774/2020

JINDAL STEEL & POWER LIMITED ..... Petitioner

Through Mr. Parag P. Tripathi, Sr. Adv. and Mr.Gopal Jain, Sr. Adv. with Mr. Saket Sikri, Mr.Vijay Aggarwal, Mr. Mahesh Agarwal, Mr.Naman Joshi, Mr. Manish Kharbanda, Ms. Priya Singh, Mr.Shailesh Pandey, Mr. Mudit Jain, Mr. Tarun Singla and Ms. Meera Menon, Advs

versus

RESERVE BANK OF INDIA ..... Respondent

Through Mr. Atul Sharma and Mr. Abhinav Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This writ petition is filed by the petitioner seeking the following relief:-

> "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;"

2. The petitioner is said to be a company with business interest in steel manufacturing, power generation, mining of iron ore, lime stone and coal. It is claimed that the petitioner has a business strategy of both forward and backward integration so as to be the most competitive company in the market. To optimise the cost of raw material required for manufacturing as also to have a linkage to raw material like coking coal, the petitioner set up various overseas subsidiaries including (i) Jindal Steel & Power (Mauritius) Ltd. (also 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).

3. It is stated that the petitioner has been making overseas direct investment and has also undertaken other financial commitments in respect of the aforesaid subsidiaries after getting them approved from RBI through SBI. It is stated that as on 31.03.2020, the aggregate financial commitment of the petitioner in the aforesaid three subsidiary companies is as follows:-

"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	370.00	864.82	1508.60

* All figures are in USD and are in Millions"

4. The petitioner's wholly owned subsidiary JSPML, namely, Jindal Steel and Power (Mauritius) Ltd. had made various obligations towards its lenders. The petitioner, 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 has been later on revised again in terms of a waiver letter that was signed on 29.05.2020. The petitioner also claims to have received a letter dated 13.06.2020 from JSPML stating that they do not have funds available and the lenders may therefore enforce the corporate guarantee of the petitioner for the entire amount of USD 864.50 million. There is also a debt of the wholly owned subsidiary of JSPML, namely, Jindal Steel Power Australia Ltd. (JSPAL). 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 petitioner seeks to make additional financial commitments and payments of USD 300 million to its wholly owned subsidiary Jindal Steel and Power (Mauritius) Ltd.(JSPML) for meeting its debt obligations. It is stated that the norms for making investments by an Indian party in an overseas wholly owned subsidiary are stipulated in the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004.

5. As per Regulation 6 of the said Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004(hereinafter referred to as 'Regulations 2004'), every Indian party is entitled to make direct investment upto 400% of its net worth in a joint venture or wholly owned subsidiary outside India for an amount upto 1 billion US Dollars in a financial year without any approval of RBI or any other agency. The Regulation also requires that in case

the amount of direct investment in a joint venture or wholly owned subsidiary outside India in a financial year is above 1 billion USD or if an Indian party is in Reserve Bank's Exporters caution list or list of defaulters to the banking system circulated by RBI or under investigation by any investigation/enforcement agency or regulatory body, prior approval of RBI for making direct investment in a joint venture or wholly owned subsidiary outside India is required under Clause 9 of the said 2004 Regulations.

6. The writ petition lists out trials and investigations that the petitioner is facing. The details of which are as follows:-

> "23.1 A case bearing CC No. *248/2019 (erstwhile CC No. 44/2016 in RC No. 219 2013 E 0006)* is pending before the Ld. Special Judge – CBI, Rouse Avenue Courts, New Delhi against the Petitioner and M/s Gagan Infra Energy Limited, M/s Jindal Reality Private Limited and their then and present directors, public servants and other accused persons in relation to alleged illegalities/ irregularity in the allocation of Amarkonda Muragadangal Coal block. The Ld. Special CBI Court vide its Order dated 16 August 2018 had framed charges for the offences u/s 420 Indian Penal Code 1860 [hereinafter **"IPC**"], and S. 13(1)(d) of the Prevention of Corruption Act, 1988 [hereinafter "**PC Act**"] against all accused persons. The matter is now put up for further prosecution evidence from 17.6.2020 to 23.6.2020. Petitioner and its directors have pleaded 'not guilty' and are contesting the charges.
>
> 23.2 The Enforcement Directorate has filed a complaint being CR Case No. 1/2019 (erstwhile CRC No. 8/2018), which is pending before the Ld. Special Judge-CBI, Rouse Avenue Courts, New Delhi against various persons including the Petitioner and 14 other accused of alleged offences under illegalities/ irregularities in the allocation of Amarkonda Murgadangal coal block to the Petitioner.

The matter is listed on 3.7.2020 for filing the report for further investigation.

23.3 Case bearing number CC No. 314/2019 (*erstwhile CC No.13/2017 in RC No. 2019 2015 E – 0004*) is pending before the Ld. Special Judge – CBI, Patiala House Courts, New Delhi against the Petitioner and five others, then and present directors/ officials of the Petitioner, in relation to alleged illegalities/irregularities in the allocation of Urtan North Coal Mine to the Petitioner. The Court *vide* order dated 25.7.2019 has framed the charges under Sections 420 of the IPC and Section 120 B of the IPC against all accused persons, and the matter is listed on 24.6.2020 for filling of the further investigation report. Petitioner and its Directors have pleaded 'not guilty' and are contesting the charges.

23.4 A notice bearing number F. No. ECIR /15 /DLZO/2015/ AD/ VM has been received from the Enforcement Directorate with regard to an investigation being made under the provisions of the PMLA in respect to Urtan North Coal Block. In this regard, relevant documents have been submitted to the office of Enforcement Directorate, and the matter is pending investigation.

23.5 Further, another FIR has been registered by the CBI/ EOIII on 18.10.2014, bearing RC No. 221/2014/E0018, against the Petitioner and other unknown public servants under sections 120 – B read with 409 & 420 of IPC and section 13 (1) (C), read with section 13 (1) (d) of the PC Act, in connection with the Gare Palma IV/1 coal block in Chhattisgarh. The matter is pending investigation since 2014.

23.6 Notice bearing number F. No. ECIR/24/DLZO/2014/AD/ VM has been received by the Petitioner from the Enforcement Directorate with regard to an investigation being made under the provisions of the PMLA in respect to Gare Palma IV/I Coal block. The relevant documents have been submitted to the office of Enforcement Directorate, and the matter is pending investigation.

> 23.7 Notice bearing No. 1044/PE 219/2012/E/0004/CBI/EOIII New Delhi dated 25.3.2020 has been received from CBI for preliminary enquiry being conducted with regard to Petitioner seeking allocation of Utkal-D coal block in December 1999. It is pertinent to mention that the Utkal-D coal block was formally not allocated to Petitioner. The relevant documents have been submitted to the office of CBI."

7. The petitioner wishes to remit USD 300 Million to JSPML by way of equity subscription/loan/corporate guarantee/bank guarantee or through other permitted mode. This is within the permitted limit of 400% of the net worth of the petitioner. It is stated that had there been no trials/investigations pending, the petitioner was entitled to automatically make payment to the extent of 400% of its net worth without approval of RBI. However, as the aforesaid trials/investigations are pending, the petitioner submitted an application on 03.09.2019 for respondent's approval to make an additional financial commitment in JSPML by way of equity subscription/loan/corporate guarantee/bank guarantee, etc. However, on 30.12.2019 the respondent refused to grant permission to the petitioner to make additional commitment/payment as above. Hence, the present writ petition.

8. The respondent has filed its counter-affidavit. In the counter-affidavit the respondent has taken the following objections:-

(i) This Court lacks territorial jurisdiction as the head office of the respondent is in Mumbai. The petitioner was dealing with the Foreign Exchange Department, Central Office, Overseas Investment Division in Mumbai.

(ii) There is non-joinder of necessary and proper parties as Enforcement

Directorate ('ED') is a necessary and proper party for the adjudication of the dispute. It is pleaded that respondent has declined the petitioner's application seeking permission to carry out outward remittances to its Overseas Wholly Owned Subsidiary Jindal Steel and Power (Mauritius) Limited due to the objections of the Enforcement Directorate on the petitioner's proposal on the ground that certain investigations and enquiries are pending against the petitioner, including investigations relating to petitioner's offshore investment in JSPML. Reliance is sought to be placed on communications from the ED dated 03.12.2019 and 28.02.2020 which states that petitioner's proposal may result in non-availability of properties for attachment and may jeopardise the on-going investigations by the ED. It is stated that the respondent had refused permission to the petitioner in view of the aforesaid letters issued by the ED and hence, ED is a necessary and a proper party.

(iii) It is pleaded that the petition suffers from delay and laches as the rejection of the application of the petitioner was issued by the respondent on 30.12.2019. Petitioner has chosen to sleep over the matter and has now at the last minute filed the present Writ Petition.

(iv) It is further pleaded that the petitioner has concealed material information about investigations and enquiries it is facing at the hands of ED and is, therefore, disentitled from claiming any equitable reliefs. It is claimed that the following investigations/enquiries which are mentioned by ED in its letter dated 14.08.2019 and 03.12.2019 have been concealed by the petitioner.

- Investigations are underway against the Petitioner for its offshore investment and disinvestment in its WOS JSPML.
- Investigation against the Petitioner regarding unrealized export

proceeds. Investigation in this case was initiated on the basis of communication received from SIT which in turn was received from RBI. Unrealised export proceeds for an amount of Rs.751,48,99,454/- of the Petitioner for period prior to March 2014 and March 2014 to March 2015 were reported in the said communication. In this regard clarification was sought from the concerned AD Bank, which has reported Nil pendency regarding aforesaid amount. However, one transaction of USD 9.03 Million of the Petitioner with M/s Ircon International Ltd, Bangladesh is still under investigation for suspected contraventions of FEMA.

- Enquiry under the provisions of FEMA in respect of purchase and sale of 4 vessels registered in the names of their subsidiaries in Marshall Island during the year 2012 to 2017. For the aforesaid procurement of vessels deal, these entities have entered into various Joint Ventures by acquiring/transferring shares from time to time during the period. The details of these entities associated in the process amongst others include JSPML.
- Investigation in two cases under FEMA regarding purchase of aircraft by the shareholding company of the Petitioner and JSPML and Buyer's Credit loan taken by the Petitioner and its repayment in 2013.

(v) The respondent admits that in the past permission had been granted by the respondent to remit certain funds and to furnish a corporate guarantee in relation to a loan taken by JSPML. However, it is pleaded that on 14.09.2018 certain investigations/enquiries have been initiated regarding the transactions between the petitioner and JSPML, the very entity to which the petitioner No.1 is to remit a sum of USD 300 Million. It is claimed that the pendency of this enquiry was concealed by the petitioner in its application to the respondent dated 03.09.2019. It is admitted that the petitioner made the application in view of Regulation 6(2)(iii) read with Regulation 9(1) of Regulations 2004 which require an entity/party which is under investigation/enforcement of an agency or

regulatory body to obtain prior approval of RBI for any transaction falling under aforesaid regulations. The approval of the respondent is required since petitioner is admittedly under investigation and facing prosecution of various offences under Indian Penal Code, 1860, Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002 and FEMA Act, 1999. It is further pleaded that Enforcement Directorate had pointed out its objection to the petitioner's application on 3.12.2019 and hence respondent did not grant permission and informed the petitioner accordingly on 30.12.2019.

(vi) The counter-affidavit states that an Indian party which falls under Regulation 9, if it approaches the respondent for permission, the respondent deals with such application with necessary caution and diligence and any decision on such application is made considering the objectives enshrined in the Foreign Exchange management Act, the role of the respondent as a regulator of the foreign exchange and adverse effect on our economy, if any, in case such permission is granted.

9. The counter-affidavit admits that the petitioner has wholly owned subsidiaries which have been noted above. The petitioner had undertaken certain financial commitments for the aforesaid subsidiaries after getting approval from the respondent through SBI which is an authorized dealer under the Foreign Exchange Management Act. The counter-affidavit also states that the petitioner has given a corporate guarantee of 864.82 million dollars. It is further stated that the petitioner and its wholly owned subsidiary JSPML have restructured the payment of the aforesaid due amount to lenders by restructuring agreement dated 07.02.2018. It is admitted that the petitioner had been granted permission by the

respondent to remit certain sums and to furnish a corporate guarantee in relation to a loan taken by JSPML. It is further claimed that post grant of such approval, on 14.09.2018 certain enquiries/investigations have been initiated with regard to the transactions between the Petitioner and JSPML. It is in the course of such enquiry that the Enforcement Directorate (ED) vide its letter dated 14.08.2019 wrote to the respondent seeking certain information/documents in relation to an enquiry being initiated against the petitioner and some other entities including JSPML in respect of purchase and sale of 4 vessels registered in the name of their subsidiaries in the Marshall Islands during 2012 to 2017. It is claimed that the pendency of this enquiry was concealed by the petitioner in its application to the respondent dated 03.09.2019 and even before this court.

10. It is further stated that pursuant to the application filed by the petitioner on 03.09.2019 to the respondent for grant of permission for making additional financial commitment of USD 300 million to JSPML, the respondent wrote to the ED to enquire about the pendency of the investigations. The ED vide its letter dated 03.12.2019 issued to the respondent stated that it has objections to the proposal of the petitioner for approval of additional financial commitment to JSPML as there are investigations pending and the same may result in non-availability of properties for attachment and jeopardize the on-going investigations. In view of the objection raised by ED, the respondent states that it did not grant permission to the petitioner for making additional financial commitment of USD 300 million to JSPML and the same was informed to the petitioner on 30.12.2019. Even after 30.12.2019, as the respondent approached the ED, the ED vide its letters dated 28.02.2020 and 08.04.2020 has reiterated its

earlier stand that the grant of approval for additional financial commitment to the petitioner would result in jeopardizing the ongoing investigations and may result in non-availability of properties for attachment.

11. I have heard learned senior counsel for the petitioner and learned counsel for the respondent.

12. Learned senior counsel for the petitioner has reiterated that the petitioner had given the corporate guarantee after taking prior permission from RBI. The respondent cannot now on the instructions of the Enforcement Directorate take a u-turn and obstruct the petitioner to honour its guarantees given with the prior permission of RBI. Reliance is also placed on Regulation 9 of the concerned Regulations, 2004 to stress that RBI has to exercise its own discretion and give approval. Just because certain investigations, etc. are pending by FEMA authorities or the Enforcement Directorate cannot be a ground to reject the application of the petitioner. It is stressed that mere pendency of proceedings before the stated Authorities *per se* cannot be a ground to reject the application of the petitioner

13. Learned counsel for the respondent has vehemently reiterated that the petitioner are guilty of suppressing pendency of various proceedings initiated against them by the Enforcement Directorate. It has been vehemently urged that the respondent was justified in rejecting the application of the petitioner in view of the stand taken by the Enforcement Directorate.

14. I may now look at the impugned order dated 30.12.2019 by which order the application of the petitioner was rejected. The same reads as follows:-

> "IP, Jindal Steel and Power Ltd -WOS, Jindal Steel and Power (Mauritius) Ltd, (UIN:NDWAZ20070442): Request for undertaking owtward Remittance**.**
>
> Please refer to your letter dated October 23, 2019 on the captioned subject.
>
> 2. In this connection, we advise that your application concerning IP's request for undertaking additional financial commitment(s) to its captioned WOS was considered carefully, but we regret to inform that the said request cannot be acceded to."

15. Hence, by a cryptic non-speaking order, the respondent RBI has rejected the application of the petitioner without giving any reasons whatsoever.

16. The reasons for having passed the impugned order and rejecting the application of the petitioner are stated in the counter-affidavit in paras 18 and 19 of the preliminary objections which read as follows:-

> "18. The Respondent, in view of the objections raised by the ED did not grant permission to the Petitioner for making additional financial commitment of USD 300 Million to JSPML and informed the Petitioner of the same vide its letter and email dated 30.12.2019.
>
> 19. Even after the Respondent's refusal to grant permission on account of the information provided by the ED, the Respondent upon the Petitioner's persistent follow up and representations approached the ED which vide its letters of 28.02.2020 and 08.04.2020 reiterated its earlier stand that the grant of approval for additional financial commitment to the Petitioner would result in jeopardising the ongoing investigations and may result in non-availability of properties for attachment. Copies of the ED's letters dated 28.02.2020 and 08.04.2020 are annexed herewith and marked as Annexure R-3 and Annexure R-4 respectively."

17. RBI also relies upon a communication dated 03.12.2019 that was sent by the Enforcement Directorate's office which reads as follows:-

> "Please refer to your letter No. FE.CO.OID./2295/19.10.136/2019-20 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 / 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."

Hence, essentially the respondent have rejected the application of the petitioner and have not granted permission for making the additional financial commitment/payment of USD 300 million on account of the objection raised by the Enforcement Directorate.

18. I may now look at the applicable regulations, namely, the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations 2004. Regulation 6 and Regulation 9 of the said Regulations read as follows:-

> "**6. Permission for Direct Investment in certain cases**
>
> (1) Subject to the conditions specified in sub-regulation (2), (and Regulation 7 in case investment in financial services sector) an Indian party may make direct investment in a Joint Venture or Wholly Owned Subsidiary outside India.
>
> (2) (i) The total financial commitment of the Indian party in Joint Ventures/Wholly Owned Subsidiaries shall not exceed 100% of the net worth of the Indian Party as on the date of the last audited balance sheet;
> **Explanation**: - For the purpose of the limit of 100% of the net worth the following shall be reckoned, namely:
> (a) cash remittance by market purchase and /or equivalent rupee investments in case of Nepal and Bhutan
> (b) capitalisation of export proceeds and other dues and entitlements as mentioned in Regulation 11;
> (c) fifty per cent of the value of guarantees issued by the Indian party to or on behalf of the joint venture company or wholly owned subsidiary.
> (d) investment in agricultural operations through overseas offices or directly
> (e) External Commercial Borrowing in conformity with other parameters of the ECB guidelines. Notwithstanding anything contained in these Regulations investment in Pakistan shall not be permitted.
> Notwithstanding anything contained in these Regulations, investment in Pakistan shall not be permitted.

(ii) The direct investment is made in an overseas JV or WOS engaged in a bonafide business activity.
(iii) The Indian Party is not on the Reserve Bank's Exporters caution list /list of defaulters to the banking system circulated by the Reserve Bank or under investigation by any investigation/enforcement agency or regulatory body.
(iv) The Indian party has submitted up to date returns in form APR in respect of all its overseas investments;
(v) The Indian Party routes all transactions relating to the investment in a Joint Venture/Wholly Owned Subsidiary through only one branch of an authorised dealer to be designated by it.
Explanation: -
The Indian Party may designate different branches of authorised dealers for different Joint Ventures/Wholly Owned Subsidiaries outside India.
(vi) The Indian Party submits form ODA, duly completed, to the designated branch of an authorised dealer.

xxx"

"9. Approval of the Reserve Bank in certain cases
(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 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."

19. Hence, as per Regulation 6 of the said Regulations, an Indian party may make direct investment in a joint venture or wholly owned subsidiary outside India subject to the conditions specified. One of the disqualifications for attraction of Regulation 6 is that the Indian party should not be on the Reserve Bank's Exporters' caution list or list of defaulters to the banking system or under investigation by any investigation/enforcement agency or the regulatory body.

20. Regulation 9 provides that where a party does not satisfy the eligibility norms under Regulation 6, it may apply to RBI for approval. A conjoint reading

of Regulation 6 and Regulation 9 would show that where an Indian party is under investigation by any investigation/enforcement agency or regulatory body then it can apply under Regulation 9 for making any direct investment in a joint venture or wholly owned subsidiary outside India. Manifest from a reading of Regulations 6 and 9 is 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 a joint venture or wholly owned subsidiary outside India, etc.

21. I may now see whether the said order dated 30.12.2019 has been validly passed. It is obvious that the impugned order rejects the application of the petitioner without giving any reason whatsoever. Such an order would clearly not be tenable. That apart, in my opinion, the aforesaid order dated 30.12.2019 is also passed contrary to Regulation 9 for various reasons. I will now elaborate my said conclusion.

22. Firstly, as stated the said order fails to give any reasons as to why the application of the petitioner is being rejected. The order has serious consequences for the petitioner inasmuch as the commitments undertaken abroad with the prior consent of the respondent would go into default causing huge losses to the petitioner. The reasons given latter in the counter-affidavit would normally not be accepted. It is settled position of law that the respondent cannot improve its case in this manner. Reference in this context may be had to the judgment of the Supreme Court in the case of ***Mahender Singh Gill Vs. Chief Election Commissioner, (1978) 1 SCC 405*** where the Supreme Court held as follows:-

> "8. The second equally relevant matter is that 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....."

23. In the present case, admittedly there are no reasons given. This on the face of it shows that the said impugned order is vitiated and liable to be set aside.

24. Secondly, I may for completely dealing with the case of the respondent in any case look at the reasons given by the respondent in the counter-affidavit to justify rejection of the application of the petitioner. As noted above, the counter-affidavit shows that the application of the petitioner was rejected in view of the objection raised by the Enforcement Directorate in its letter dated 03.12.2019, as noted above.

25. Regulation 9 (3) of the 2004 Regulations spells out the criteria to be adopted by RBI while considering an application made by a party under Regulation 9. The relevant parameters that are spelt out are as follows:-

> "....."
> (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."

26. In the counter-affidavit, in the reasons that have been given for rejecting the application of the petitioner, there is absolutely no reference to any of the aforesaid factors stipulated in Regulation 9(3) of the 2004 Regulations as a ground for rejecting the application of the petitioner. The criteria stated in Regulation 9(3) may not be exhaustive and other issues may be taken into account if facts so warrant. However, no such facts are stated by the respondent. It is manifest that the said order dated 30.12.2019 is wholly contrary to Regulation 9 in question.

27. Thirdly, the issue that arises is Can RBI, the respondent while dealing with an application filed under Regulation 9 reject the same at the behest of any other statutory agency like CBI, Enforcement Directorate, etc. As pointed out above, the only basis for passing the impugned order is the objections raised by the ED.

28. It is settled position of law that an authority cannot share its power with someone else or allow someone else to dictate to it by declining an act or by submitting to their wishes or instructions. In this context reference may be had to the judgment of the Supreme Court in the case of ***Chintpurni Medical College & Hospital & Anr. Vs. State of Punjab & Ors., AIR 2018 SC 3119*** where the Supreme Court noted that the State Government appears to have withdrawn the

essentiality certificate acting on the dictates of the Medical Council of India. The Court observed that this itself would vitiate the withdrawal of the essentiality certificate by the State. The passage from Wade and Forsyth in Administrative Law, 10th Edn., at page 269 was approved which states as follows:-

> "Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them."

29. Hence, where the authority which is given to a functionary is exercised, at least in part, by the wrong authority, the resulting decision is ultra virus and void.

30. Reference may also be had to another judgment of the Supreme Court in the case of ***Dipak Babaria & Anr. vs. State of Gujarat & Ors. (2014) 3 SCC 502*** where the Court held has follows:-

> "69**.** Besides, the present case is clearly a case of dictation by the State Government to the Collector. As observed by Wade and Forsyth in the 10th Edn. of *Administrative Law*:
>
> > "If the Minister's intervention is in fact the effective cause, and if the power to act belongs to a body which ought to act independently, the action taken is invalid on the ground of external dictation as well as on the obvious grounds of bad

faith or abuse of power."

The observations by the learned authors to the same effect in the 7th Edn. were relied upon by a Bench of three Judges of this Court in *Anirudhsinhji Karansinhji Jadeja* v. *State of Gujarat* [(1995) 5 SCC 302] . In that matter the appellant was produced before the Executive Magistrate, Gondal, on the allegation that certain weapons were recovered from him. The provisions of TADA had been invoked. The appellant's application for bail was rejected. A specific point was taken that the DSP had not given prior approval and the invocation of TADA was non est. The DSP, instead of granting prior approval, made a report to the Additional Chief Secretary, and asked for permission to proceed under TADA. The Court in paras 13, 14, 15 has held this to be a clear case of "*dictation*", and has referred to Wade and Forsyth on *Surrender, Abdication and Dictation*."

31. Reference may also be had to the judgment of the Supreme Court in the case of ***Ajantha Transports (P) Ltd., Coimbatore vs. T.V.K. Transports, Pulampatti, Coimbatore District, AIR 1975 SC 123.***

"23. Thus, decisions of this Court have made it clear that an exercise of the permit issuing power, under Section 47 of the Act, must rest on facts and circumstances relevant for decision on the question of public interest, which has to be always placed in the forefront in considering applications for grant of permits. Consideration of matters which are not relevant to or are foreign to the scope of powers conferred by Section 47 will vitiate the grant of a permit under Section 47. A fact which, in certain circumstances, is relevant for a decision on what the public interest demands may become irrelevant where it is not connected with such public interest. Indeed, every class of consideration specified in Section 47(1) of the Act seems correlated to the interests of the public generally. It appears that Section 47(1)(*a*) gives the dominant purpose and Section 47(1)(*b*) to (*f*) are only its

> sub-categories or illustrations. If any matter taken into consideration is not shown to be correlated to the dominant purpose or, the relationship or the effect of a particular fact, which has operated in favour of a grant is such as to show that it is opposed, on the face of it, to public interest, the grant will be bad. The power to grant permits under Section 47 of the Act is limited to the purposes for which it is meant to be exercised. Considerations which are relevant for applying Articles 14 and 19(1)(*g*) of the Constitution could not be foreign to the scope of Section 47(1)(*a*) which is fairly wide."

32. The facts and the counter-affidavit of the respondent reveal that the respondent has acted at the behest and saying of the Enforcement Directorate and has rejected the application of the petitioner by passing the impugned order dated 30.12.2019. The same amounts to the respondent acting at the behest of another Agency. The impugned order is clearly vitiated.

33. There is another aspect which persuades me to hold that the impugned order is illegal. Admittedly the commitments and transactions carried out earlier by the petitioner with its wholly owned subsidiary were done with the prior consent and permission of RBI. By the impugned order, RBI seeks to take a u-turn and seeks to refuse permission to the petitioner to complete transactions which have already been cleared earlier by the respondent. No plausible explanation is sought to be given as to why this *volte face* has taken place except relying upon the communication received from the ED. I have dealt with this aspect in the interim order that was passed on 24.07.2020, relevant portion of which reads as follows:-

> "9. Reference in this context may be had to the original permission granted by respondent/RBI to the petitioner on

24.03.2015 where permission was granted to the petitioner for carrying out the following transactions:-

> "a) Issuance of SBLC by IndusInd Bank for an amount of USD 59.575 million.;
> b) Issuance of Corporate Guarantee of USD 45 million in favour of Axis Bank, DIFC Branch, Dubai to enable the WOS to avail a term loan of USD 45 million;
> c) ODI of USD 100 million by way of equity/loan/corporate guarantee to/on behalf of the WOS."

10. Similarly, on 20.04.2018 the RBI/respondent again gave its approval for utilising balance amount of USD 37 Million out of the approved limit of USD 100 Million which was sanctioned on 24.03.2015. Thereafter on 14.09.2018 RBI gave its no objection to roll over the corporate guarantee of USD 440 Million and USD 165 Million and to issue fresh guarantee worth Rs.17 Million and USD 6 Million on behalf of its overseas WOS. A permission was also given to undertake additional financial commitment by way of equity subscription, granting loan etc not exceeding USD 200 Million for supporting operations of its overseas subsidiaries. Another approval is given on 10.12.2018. It is hence not denied that the entire transactions/commitments and corporate guarantee have been done by the petitioner with prior approval of the respondent bank. It is manifest that the impugned order would lead to default of its commitment by the petitioner to the Foreign lenders which commitment was given with prior permission of the respondent.

11. It is also an admitted fact that investigations and criminal cases were there against the petitioner at the time when the aforenoted approvals have been granted earlier. There is no clarity on record as to what has transpired after the last permission was granted on 10.12.2018 for the respondent to take a stand to deny the permission other than communications received from Enforcement Directorate on 14.08.2019 and 03.12.2019……."

34. Clearly, there is no explanation why RBI seeks to set at naught the earlier permission given in this manner.

35. Clearly, while exercising powers under Regulation 9 of the 2004 Regulations, RBI has completely ignored the relevant factors and has merely at the behest of the Enforcement Directorate passed the impugned order dated 30.12.2019. Past permissions given have been ignored. I may note that there is not even a whisper anywhere that there is any attempt on the part of the petitioner to carry out an illegal transaction or that the proposed transactions are an attempt to siphon away funds out of India beyond the reach of law enforcing agencies. Clearly the rejection of the application of the petitioner on 30.12.2019 is illegal. It is also contrary to Regulation 9 of the 2004 Regulations. I accordingly quash the communication dated 30.12.2019. The matter is remanded back to RBI to reconsider the application made by the petitioner afresh as per law and in accordance with the principles noted above. Needful be done by RBI expeditiously.

36. I may note that this court had passed interim orders in favour of the petitioner on 19.06.2020 and 24.07.2020. On 19.06.2020, the following directions were passed:-

> "13. In these facts and circumstances, I pass the following directions:-
>
> The respondent shall permit the petitioner to transmit the sum of 75 million USD forthwith, the respondent will also permit the petitioner to transmit another sum of 15 million USD by 30.06.2020 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 90 million USD, the petitioner shall forthwith deposit the same in court.

(ii)The petitioner shall give an undertaking that it has unencumbered assets worth 100 million USD or above and that the petitioner shall not sell, alienate or transfer or encumber these assets till the next date of hearing."

37. Similarly, on 24.07.2020, the following directions were passed:-

"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."

38. The transactions carried out pursuant to the interim orders of this court shall be treated as valid and in order. On both the occasions, the petitioner had given an undertaking that they have unencumbered assets worth the amount to

be remitted and they shall not sell, alienate or transfer or encumber the said assets without prior permission of this court. These undertakings were taken from the petitioner keeping into account the apprehension of the Enforcement Directorate as the said Directorate on 03.12.2019 had informed RBI that granting approval to the petitioner may result in non-availability of properties for attachment and would jeopardize the on-going investigation of the Directorate. A year has now passed since the said communication dated 03.12.2020 was issued by the Enforcement Directorate. No demand appears to have been raised on the petitioner by the ED in the past one year. Even otherwise, in my opinion, the Directorate of Enforcement has enough powers under various statutory regimes to attach properties and assets of a defaulting individual or take other steps. As the impugned order has been set aside, the bond in question shall come to an end and the embargo on the assets shall cease.

39. With the above directions, the preset petition stands disposed of. Pending applications also stand disposed of.

JAYANT NATH, J.

DECEMBER 04, 2020
rb/st