

ITEM NO.3

COURT NO.6

SECTION XII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s).6856/2023

[Arising out of impugned final judgment and order dated 05-01-2023 in ARB. O.P.(COM. DIV) No. 88/2022 passed by the High Court of Judicature at Madras]

GPE (INDIA) LTD & ORS.

Petitioner(s)

VERSUS

TWARIT CONSULTANCY SERVICES PRIVATE LIMITED & ANR. Respondent(s)

IA No. 69062/2023 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT

IA No. 171210/2024 - EXEMPTION FROM PERSONAL APPEARANCE

IA No. 146939/2024 - MODIFICATION OF COURT ORDER

IA No. 194480/2024 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES

IA No. 182414/2023 - PERMISSION TO PLACE ON RECORD SUBSEQUENT FACTS WITH

Diary No(s). 45297/2023 (XII)

IA No. 246048/2023 - CONDONATION OF DELAY IN FILING

IA No. 246049/2023 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT

IA No. 48838/2024 - MODIFICATION

IA No. 246050/2023 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES

CONMT.PET.(C) No. 206/2024 in Diary No(s). 45297/2023

Date : 26-08-2025 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE J.B. PARDIWALA

HON'BLE MR. JUSTICE K.V. VISWANATHAN

For Petitioner(s) Mr. Balbir Singh, Sr. Adv.

Mr. Jatin Pore, Adv.

Mr. Sreeram Vg, Adv.

Mr. Chandra Prakash, Adv.

Mr. Naman Tandan, Adv.

For M/S. D.S.K. Legal, AOR

Mr. Rajiv Shakdher, Sr. Adv.

Mr. Siddharth Khattar, Adv.

Mr. Kush Chaturvedi, AOR

Syed Faraz Alam, Adv.

Mr. Atharva Gaur, Adv.

Mr. Aayushman Aggarwal, Adv.

Ms. Ayesha Choudhary, Adv.
 Mr. Karan Khetani, Adv.
 Mr. J.Ivan Rajan, Adv.
 Mr. Divij Mohan, Adv.
 Mr. Samrath Rekhi, Adv.

For Respondent(s) Mr. Purvish Malkan, Sr. Adv.
 Mr. Karan Jain, Adv.
 For M/S. D.S.K. Legal, AOR

Mr. Atul Sharma, Adv.
 Mr. Abhinav Sharma, Adv.
 Mr. Alok Tripathi, AOR

UPON hearing the counsel the Court made the following
 O R D E R

SLP(C) No.6856/2023

1. This petition arises from the judgment and order passed by the High Court of Judicature at Madras, dated 05.01.2023 in Arbitration O.P.(COM. DIV) No. 88/2022 and O.A. No.76/2022 and A.No. 67/2022 respectively, by which the petition filed by the petitioners herein under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 respectively (for short, 'the Act 1996') to declare the foreign arbitral award being enforceable in India with other ancillary prayers came to be disposed of holding that the Foreign Award, in favour of the petitioners, is enforceable in India subject to obtaining RBI approval, if required under the law.
2. We should first take notice of the order dated 17.04.2023 passed by a coordinate Bench. The same reads thus:

"Issue notice to the respondents, returnable in the month of July 2023.

Notice will also be issued to the Reserve Bank of India to ascertain, if at all any approval/permission from them is required, and if yes, at what stage will it be required. Copy of the paperbook with this order will be served on the nominated counsel for the Reserved Bank of India, who

would obtain instruction and file response.

We clarify that the execution proceedings may continue. It will be open to the petitioners to file an application as an allegation has been made that the respondents are parting with the assets with a view to frustrate the award/decreed. We clarify that we merely recorded the submission, and have not made any comments on the correctness or merits of the allegation."

3. We should also take notice of the second order dated 12.12.2023, which reads thus:

"It is stated by the learned counsel appearing for the Reserve Bank of India (RBI) that the payment under an award is treated as a current account payment and does not require any specific approval or permission. This statement is made without prejudice to the rights and contentions of the RBI or relating to the purchase of shares.

Let an affidavit to the above effect be filed on behalf of the RBI within seven days from today.

Re-list in January 2024."

4. The High Court while disposing of the petition filed by the petitioners herein for the purpose of enforcement of the Foreign Award recorded a categorical finding that the respondents herein - judgment debtors failed to establish any ground on which the recognition of the Foreign Award should be declined. Para 45 of the impugned order reads thus:

"45. For reasons set out above, I conclude that the respondents failed to establish any ground on which the recognition of the Foreign Award should be refused. Consequently, subject to the requirement of obtaining RBI approval before initiating further proceedings for enforcement, the Foreign Award is recognized and held to be enforceable as a decree of this Court. As a corollary, subject to and in accordance with terms and conditions, if any, imposed by the RBI in its approval, the respondents are required to pay the amounts claimed by the petitioners in paragraph 36(b) of the petition. If the Foreign Award is not complied with, after

obtaining RBI approval, it is open to the petitioners to institute appropriate proceedings in accordance with the applicable provisions of the Code of Civil Procedure, 1908. Consequently, connected original application and application are closed."

5. We heard Mr. Balbir Singh, the learned Senior Counsel appearing for the petitioners, Mr. Rajiv Shakhder, the learned Senior Counsel appearing for the judgment-debtors and Mr. Atul Sharma, the learned counsel appearing for the Reserve Bank of India (for short, 'RBI').

6. Mr. Shakhder, the learned Senior Counsel, tried his best to persuade us to take the view that the agreement between the parties itself could be termed as illegal as the parties were *in pari delicto*. In such circumstances, according to Mr. Shakhder, once this Court holds that the agreement itself is illegal, the Foreign Award cannot be enforced under the provisions of the Act 1996.

7. On the other hand, Mr. Balbir Singh, the learned Senior Counsel, fervently urged the Court to look into the Affidavit-in-Reply, filed by the RBI, particularly the stance of the RBI. According to Mr. Balbir Singh, the RBI has made itself very clear that the payment of compensatory damages, as awarded by the Arbitral Tribunal, being in the nature of current account transaction, the same is enabled under Section 5 of the Foreign Exchange Management Act, 1999 (for short, 'FEMA') read with Foreign Exchange Management (Current Account Transaction) Rules, 2000 by residents (respondents) to non-resident (petitioner Nos.1-2 respectively), and *per se*, would not require any approval or

permission from the RBI under the FEMA. The RBI, in its Affidavit-in-Reply, has stated thus:

"5. It is stated that, in exercise of the powers conferred by clause (b) of sub-section (3) of Section 6 and Section 47 of FEMA, the Reserve Bank makes the regulations to prohibit, restrict or regulate, transfer or issue security by a person resident outside India. Accordingly, foreign investments by a person resident outside India in the equity instruments in India was governed by Notification No. FEMA.20/2000-RB dated 03.05.2000 ("FEMA 2000 Notification") at the time when the investment in the instant case was made by the Petitioners. FEMA 2000 Notification has since been replaced by Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 issued vide Notification No. FEMA 20R/2017-RB dated 07.11.2017 and further again superseded by Foreign Exchange Management (Non-debt instruments) Rules, 2019 dated 17.10.2019 ("FEMA NDI Rules").

(Note: sub-section (3) of Section 6 was omitted Amended vide the Finance Act, 2015 dated 14-05-2015).

A copy of FEMA 2000 Notification has been attached as Annexure R-3/1.

6. It is stated that the present Petition has been filed to seek special leave to appeal against the Order dated 05.01.2023 of the Hon'ble High Court of Madras relating to enforcement of the foreign arbitral award granted in favour of the Petitioners under the Arbitration and Conciliation Act, 1996 ("Impugned Order"). Under the Impugned Order, the Hon'ble High Court of Madras has observed, *inter alia*, that,

"41. Given that FEMA is a statute aimed at regulating foreign exchange, in my view, the receipt of damages equivalent to the entire unpaid sale consideration of INR 195 crore pursuant to the Foreign Award for breach of contracts to buy shares at an aggregate sum of INR 200 crore, when the market value of the shares at the time of breach was zero, requires the prior approval of RBI. While undertaking this exercise, the RBI will do well to bear in mind that an Indian company received investments by representing and warranting that the agreements are valid and enforceable under Indian law and thereafter reneged on contractual obligations. This resulted in the award of damages

by the Arbitral Tribunal. Some relevant considerations would be: if the amount received as damages is not repatriated and is instead deployed in India, there may not be an impact from a foreign exchange outflow perspective, whereas, if the money is to be repatriated out of India, the implications from a foreign exchange perspective change significantly. These and other material aspects may be taken into consideration by the RBI upon receipt of an appropriate application. To that extent, in this context, I disagree with the conclusion in NTT Docomo." (emphasis added)

7. Accordingly, under the Impugned Order, the Hon'ble High Court of Madras has held, *inter alia*, that:

"Consequently, subject to the requirement of obtaining RBI approval before initiating further proceedings for enforcement, the Foreign Award is recognized and held to be enforceable as a decree of this Court. As a corollary, subject to and in accordance with terms and conditions, if any imposed by the RBI in its approval, the respondents are required to pay the amounts claimed by the petitioners in paragraph 36(b) of the petition...." (emphasis added)

8. It is observed from the writ petition that the aforementioned foreign arbitral award dated 07.01.2021 has been granted in the international commercial arbitration held in Singapore International Arbitration Centre in accordance with the Singapore International Arbitration Centre Rules, 2016. The aforementioned arbitration had arisen on account of a dispute under three share purchase agreements (hereinafter referred as "SPAs") and a letter agreement dated 28.09.2015 wherein the Respondents 1 and 2 were to purchase the securities held by the Petitioners in Haldia Coke and Chemicals Private Limited. However, it is observed that a dispute arose when Respondents 1 and 2 failed to furnish the purchase consideration in accordance with the SPAs. In accordance with the arbitral award, the Petitioners were awarded aggregate damages for INR 195,00,00,000/- with interest for breach of SPAs by Respondents 1 and 2. A copy of the SPAs is attached as Annexure P-1 to the Petition. A copy of the letter agreement dated 28.09.2015 is attached as Annexure P-2 to the petition.

9. It is stated that two share subscription and shareholders agreements dated 31.05.2010 executed by the Petitioners for purchase of securities of Haldia

Coke and Chemicals Private Limited ("SSHAs") stated that:

"the Investor [i.e., the Petitioners who have invested in Haldia Coke and Chemicals Private Limited] shall be entitled to receive an IRR of at least 24% (twenty four percent) on its Total Investment Amount by exercising any of the rights under Clauses 15.2.4, 15.2.3, or 15.2.5 ("Put Buy Back Return")

10. It is stated that the aforementioned provisions of the SSHAs provided the Petitioners with an exit option wherein the exit price for each security was guaranteed.

11. It is submitted that Section 6 of the FEMA regulates capital account transactions (investments) involving foreign exchange in capital instruments made by a person resident outside India and FEMA 2000 Notification regulates foreign investments at the point in time during which the investments were made by the petitioners. It may be noted that in terms of Regulation 5 (1) of FEMA 2000 Notification read with Para 5 (b) of Schedule 1 further read with Regulation 10B of FEMA 2000 Notification, the non-resident petitioners cannot invest in an instrument which provides an assured exit price as the investment in an Indian Company and transfer of shares to another resident has to be at fair value arrived at as per the instructions issued by Reserve bank from time to time. Relevant portion of the Para 5 (b) of Schedule 1 and Regulation 10B of FEMA 2000 Notification is reproduced herein below:

"5. Issue Price:

Price of shares issued to persons resident outside India under this Schedule, shall not be less than -
(b) the fair valuation of shares done by a SEBI registered Category-I Merchant Banker or a Chartered Accountant as per the discounted free cash flow method, where the shares of the company is not listed on any recognised stock exchange in India ..."

"10. B Transfer by way of sale not covered by Regulation 9 by a person resident outside India

(1) A person resident outside India, may transfer share or convertible debenture of an Indian company, without the prior permission of the Reserve Bank, by way of sale, to a person resident in India subject to the adherence to pricing guidelines, documentation and reporting requirements for such transfers as may

be specified by Reserve Bank from time to time.]

12. It is submitted that, an Indian entity can issue equity instruments to a person resident outside India only at a price more than or equal to the fair value of shares as determined in accordance with the pricing guidelines of Reserve Bank.

13. It is therefore submitted that, based on the perusal of the documents produced along with the Special Leave Petition, it is *prima facie* observed that the initial investment made through the SSHAs involves contravention of applicable provisions of FEMA.

14. It is further submitted that the share transfer contemplated under the SSHAs as referred to in the present petition is also prohibited under Regulation 10B of FEMA 2000 Notification as a guaranteed exit price to the person resident outside India for the investment made may not be adhering to the pricing guidelines. Relevant portion of the Regulation 10B of FEMA 2000 Notification is already reproduced for reference above.

15. The detailed guidelines on the pricing for transfer of shares from person resident outside India to person resident in India is to be read with relevant instructions consolidated in Master Circular on Foreign Direct Investment issued by RBI from time to time. In this regard, Para 2 of Annex-3 of Master Circular on Foreign Direct Investment dated 01.07.2010 ("Master Circular") states that:

"2.3 Transfer by Non-resident (i.e. by incorporated non-resident entity, erstwhile OCB, foreign national, NRI, FII) to resident

Sale of shares by a non-resident to resident shall be in accordance with Regulation 10 B (2) of Notification No. FEMA 20/2000-RB dated May 3, 2000 which shall not be more than the minimum price at which the transfer of shares can be made from a resident to a non-resident as given at para 2.2 above."

A copy of the Master Circular is attached as Annexure R-3/2.

16. However, in the instant case, it is understood from para 35 and 45 of the Impugned Order that, pursuant to the failure of Respondents 1 and 2 to furnish the purchase consideration in accordance with the SPAs, the Arbitral Tribunal has awarded aggregate damages of INR 195,00,00,000/- plus interest for

breach of contract to purchase shares that were subscribed to by the Petitioners. Thus, the Arbitral Award does not provide for any transfer of shares from Petitioners to Respondents. The Ld. Tribunal has, instead, awarded INR 195,00,00,000/- as compensatory damages that shall be paid to the Petitioners by the Respondents, which are not in the nature of the consideration for transfer of equity shareholding from the Petitioners to the Respondents as contemplated under the SSHAs.

17. In view of the above, it is submitted that the payment of compensatory damages as awarded by the Ld. Tribunal, being in the nature of current account transaction is enabled under Section 5 of FEMA read with Foreign Exchange Management (Current Account Transaction) Rules, 2000 by resident Respondents to non-resident Petitioners Nos. 1 and 2, and per se would not require any approval or permission from the Answering Respondent under FEMA. Further, it may be noted that payment of such compensatory damages without any transfer of equity instrument does not fall under the purview of RBI. The submissions made hereinabove are without prejudice to the position that to the extent issuance and transfer of shares referred to in the writ petition involve contravention of FEMA, the contravening parties are liable, unless such contraventions are compounded in accordance with the provisions of FEMA. A copy of Foreign Exchange Management (Current Account Transaction) Rules, 2000 is attached as Annexure R-3/3.

18. It is further submitted that as far as payment of amount awarded under the Arbitral Award as damages by resident Respondents to resident Petitioner No. 3, being a transaction between a person resident in India with another person resident in India, does not fall under the purview of FEMA. "

8. Learned counsel appearing for the RBI submitted that he has nothing further to add in view of the clear stance of the RBI as reflected in the Affidavit-in-Reply.

9. In view of the aforesaid, we are of the view that there is no impediment in law insofar as enforcement of the Foreign Award is concerned. Nothing further is required to be adjudicated in

this petition and the same is accordingly disposed of.

10. The execution proceedings shall now proceed further expeditiously.

11. As a result, the pending interlocutory applications also stand disposed of.

D.No.45297/2023

1. Delay condoned.

2. In light of the disposal of SLP(C) No.6856/2023, the instant petition is dismissed.

3. As a result, the pending interlocutory applications also stand disposed of.

CONMT.PET.(C) No. 206/2024 in Diary No(s). 45297/2023

1. Learned counsel for the petitioner does not want to press the petition.

2. The Contempt Petition is, accordingly, disposed of as not pressed.

(SATISH KUMAR YADAV)
ADDITIONAL REGISTRAR

(POOJA SHARMA)
COURT MASTER (NSH)