IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

FEMA APPEAL (L) NO. 1 OF 2015
AND
NOTICE OF MOTION (L) NO. 168 OF 2015

ND Investments	}	Applicant
versus		
Union of India	}	Respondent

WITH
FEMA APPEAL (L) NO. 2 OF 2015
AND
NOTICE OF MOTION (L) NO. 170 OF 2015

Fraser Castellino	}	Applicant
versus		
Union of India	}	Respondent

WITH
FEMA APPEAL (L) NO. 3 OF 2015
AND
NOTICE OF MOTION (L) NO. 171 OF 2015

Bishwarnath Bachun	}	Applicant
versus		
Union of India	}	Respondent

WITH
FEMA APPEAL (L) NO. 6 OF 2015
AND
NOTICE OF MOTION (L) NO. 172 OF 2015

Samlla Sivaramen	}	Applicant
versus		
Union of India	}	Respondent

WITH
FEMA APPEAL (L) NO. 7 OF 2015
AND
NOTICE OF MOTION (L) NO. 173 OF 2015

Ranjit Barthakur	}	Applicant
versus		
Union of India	}	Respondent

WITH
FEMA APPEAL (L) NO. 5 OF 2015
AND
NOTICE OF MOTION (L) NO. 174 OF 2015

Manoj Badale	**}**	**Applicant**
versus		
Union of India	**}**	**Respondent**

WITH
FEMA APPEAL (L) NO. 4 OF 2015
AND
NOTICE OF MOTION (L) NO. 175 OF 2015

Raghuram Lyer	**}**	**Applicant**
versus		
Union of India	**}**	**Respondent**

WITH
FEMA APPEAL (L) NO. 8 OF 2015
AND
NOTICE OF MOTION (L) NO. 176 OF 2015

Suresh Chellaram	**}**	**Applicant**
versus		
Union of India	**}**	**Respondent**

WITH
FEMA APPEAL (L) NO. 9 OF 2015
AND
NOTICE OF MOTION (L) NO. 177 OF 2015

Barbara Jacqueline Haldi	**}**	**Applicant**
versus		
Union of India	**}**	**Respondent**

WITH
FEMA APPEAL (L) NO. 10 OF 2015
AND
NOTICE OF MOTION (L) NO. 178 OF 2015

M/s. EM Sporting Holdings Ltd.	**}**	**Applicant**
versus		
Union of India	**}**	**Respondent**

WITH
FEMA APPEAL (L) NO. 11 OF 2015
AND
NOTICE OF MOTION (L) NO. 181 OF 2015

M/s. Jaipur IPL Cricket Pvt. Ltd. } Applicant
versus
Union of India } Respondent

Mr. Darius Khambatta-Senior Advocate with Mr. Rohan Shah, Mr. Amit Vyas and Mr. Deep Roy i/b. M/s. Economic Law Practice for the Appellants in All Appeals.

Mr. A. J. Rana-Senior Advocate with Mr. Salil Shah and Mr. Dhiren Shah for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.
DATED :- JANUARY 21, 2015

P.C. :-

These Appeals and the Notice of Motions are directed against the order passed by the Chairman of the Appellate Tribunal under the Foreign Exchange Management Act, 1999.

2) The order is in the nature of a condition imposed on the Appellants to enable them to proceed and prosecute their Appeals on merits. In other words, the order has been passed on applications seeking waiver of the condition of pre-deposit of a penalty amount and stay of the orders impugned in the Appeals on the file of the Tribunal.

3) The few facts which are required to appreciate the rival contentions and the substantial questions of law are that the Appellants are companies as also individuals. The Board of Control for Cricket in India (BCCI) had established a separate Sub-committee/unit known as Indian Premiere League (IPL). That was to hold and oversee operation of a domestic 20 overs cricket competition in India and if permitted, elsewhere in the world. The IPL is a part of the BCCI and managed by a separate governing Council reporting to BCCI. In terms of a global tender inviting bids for franchisees and floated in December, 2007, bidders were invited to participate by selecting a team and for playing in this tournament. There were conditions, which have been imposed on the bidders. In the light of the tender being global and the participants would be companies registered and functional abroad, there are certain stipulations and which have been noted by the Tribunal as well. The performance deposit amount was to be made on behalf of the promoters. The Appellants rely upon the corporate structure under which there was a holding company and there was a subsidiary incorporated in Mauritius. There was also a newly incorporated Indian operating company, which is a 100% subsidiary. However, before the formalities of incorporation and registration of the Indian company were completed and since the bid was successful, certain amounts were remitted. They were remitted and reached BCCI

through concerns abroad rather than the Indian subsidiary. The compliances had to be made with the Regulations under the Foreign Exchange Management Act, 1999 (FEMA). Those having not been made, the Enforcement Directorate proceeded on the footing that the parties have violated the terms and conditions under these regulations and consequently of the Act itself. The notices to show cause were issued and in terms thereof, certain orders have been passed. The proceedings culminated in imposition of penalty for unlawful remittance allegedly made and which is computed in terms of the provisions of FEMA.

4) We do not wish to express any opinion insofar as the merits of the matter including the computation of penalty. What we have noted is that aggrieved by the order passed, Appeals were preferred and the Appellate Tribunal was therefore approached with applications seeking waiver of the condition of pre-deposit. The matter was placed before the Appellate Tribunal Foreign Exchange (Appeal Nos. 9-19/2013). The applications were heard extensively. The parties argued as to how the adjudication order dated 30th January, 2013 passed by the Special Director, Enforcement Directorate, Mumbai, holding them liable for contravention of section 3(b) and 6(2) of FEMA read with Regulation 5 of Foreign Exchange Management (Permissible Capital

Account Transactions) Regulations, 2000 read with para 8 of Schedule I to Regulation 5(1) of Foreign Exchange Management (Transfer of Issue of Security by a person resident outside India) Regulations, 2000 is illegal and incorrect. The penalty imposed of Rs.98.35 crores, according to the Appellants, was wholly unsustainable.

5) A Bench of the Tribunal heard the applications seeking waiver of the pre-deposit and stay of the order of the adjudicating authority. However, the members constituting the Bench were divided in their opinion. The matter was then referred to the Chairman. He noted that the two members heard these applications on 28th April, 2014. Till 1st August, 2014, no orders were passed, but a order was drafted and signed by one of the members of the Bench. The other member did not agree with some of the findings recorded in paras 35 to 37 of the order prepared and drafted by the other member Dr. Singh. The disagreeing member delivered an independent order. That was pronounced on 4th August, 2014. That is how the matter was placed before the Chairman.

6) The Chairman noted the rival contentions and particularly that the penalty could not have been imposed at all. Further, he noted the argument that imposition and at 3 times as stipulated in the order is also erroneous. These arguments were noted, but the Hon'ble

Chairman found that the members of the special Bench were divided on the aspect that there cannot be a complete or total waiver of the condition of pre-deposit. Meaning thereby, there cannot be an unconditional waiver and stay. Some conditions will have to be imposed including of deposit of money. However, what should be the quantum is the disagreement.

7) He noted the differences in the two orders and then arrived at a conclusion that this is a fit case where each of the Appellants should be directed to deposit 40% and furnish a Bank Guarantee for the remaining 60% amount under the adjudication order. This is the order which is impugned in these batch of Appeals.

8) From the order passed on 24th December, 2014 and impugned before us, we find that substantial questions of law arise for determination and consideration of this Court in these Appeals. They are admitted on the following substantial questions of law:-

> "(a) Whether, in the facts and circumstances of the present case, the ATFE, despite finding that the deposit of 40% of the penalty being excessive, can still order the deposit of the same?
>
> (b) Whether, in the given facts and circumstances of the present case, where all the three members have found grounds for waiver of pre-deposit, the Appellants can still be directed to make a deposit of 40% of the penalty?

(c) Whether, section 31 of the Act limits the power of the Hon'ble third member to merely adopting one of opinions of the members on the point of difference, despite not agreeing completely with either of the said opinion?"

9) With the consent of Mr. Khambatta, the learned Senior Counsel appearing for the Appellants and Mr. Rana, the learned Senior Counsel appearing for the Respondent, we dispose of the Appeals finally.

10) We have perused the Memo of Appeals and the Annexures thereto including the impugned orders. We find that the Chairman was required to apply his mind to the differences that were noted by him. It was open for him to find out as to whether the Appellants having made out a *prima facie* case, could any relief be granted and in terms of the legal provisions. If the legal provisions enable the Tribunal to consider the case of "undue hardship", whether that term is to be given a restricted meaning, namely, financial hardship alone or whether that should take in its import a prima facie case being made out and the point being arguable, a party would suffer unless the condition of pre-deposit is waived totally or partially. In other words, something more than financial hardship or difficulty can also read in this term and the words appearing in the relevant provision. We do not find any such

application of mind by the Chairman. Ordinarily, therefore, we would have been required to sent the matters back to the Tribunal and for hearing afresh on the applications seeking waiver of the condition of pre-deposit and stay of recovery till disposal of the Appeals on merits.

11) However, considering the fact that the Appellants have made out a *prima facie* case that we are of the opinion that this Court can proceed to balance the rights and equities. The case of compliance being made with the Regulations and subsequently would meet and satisfy the same or whether each of the provisions relied upon merit strict compliance is the focal issue. That will have to be addressed by the Tribunal and in the Appeals. Once the Appellants claim that there is no revenue or financial loss and that the remittance to India has come through proper channels, namely through the banks, then, whether obtaining of permissions and approvals subsequently and whether incorporation of an Indian subsidiary later on would enable the Appellants to claim any benefit or seek any relief are other core questions involved in the Appeals. The Appellants would have to satisfy the Tribunal that monies may have been remitted by certain companies or concerns abroad to BCCI, but reached it not through a Indian subsidiary is something which should not invite penal consequences. Once the monies have reached the beneficiary through appropriate

banking channels, then, there is no violation or breach of law is the case put up by the Appellants in these Appeals. The Tribunal must consider as to whether the provisions of law and particularly the Regulations have indeed been complied and as claimed substantially though not strictly. That is a matter which must be gone into by the Tribunal and on merits. However, in the given facts and circumstances, the Appellate Tribunal should have imposed reasonable conditions and exercised its discretion judiciously and not gone by any formula. It should have, even at the *prima facie* stage, satisfied itself as to whether there is any breach or violation of law. If that breach and violation is serious enough and requiring imposition of penalty, whether there is any discretion in the matter of imposition of penalty. Further, the settled principles enabling imposition of penalty have to be read into the subject legal provisions or they are not permitted to be so read. When these are vital and crucial questions raised, then, the Tribunal should have imposed conditions which would enable the parties to prosecute their Appeals on merits. Imposition of a condition and of cash deposit of 40% of the amount awarded and imposed as penalty and giving a Bank Guarantee of 60% for the balance, in the given facts and circumstances and peculiar to these cases, does not meet the ends of justice. Some of the Appellants are individuals and they have raised a plea that at the time of finalisation of the transactions, they were not associated with the company. Rather they were earlier or later associated, not necessarily with the company incorporated and established in India, but abroad. Such and other issues therefore should have enabled the Tribunal to consider the cases of individuals and on their own merits, even for granting partial or total waiver. Since a blanket condition and general order has been passed applicable to all the Appellants that we are of the view that the impugned order deserves to be interfered with.

12) Having found that the order need not be set aside in its entirety, but substituting it with some reasonable conditions will meet the ends of justice that we pass the following order:-

(i) On the Appellant in FEMAL/11/2015 depositing, with the Deputy Director of Enforcement Directorate, Mumbai, a sum of Rs.15 crores, within a period of 8 weeks from the date of receipt of a copy of this order and compliance being reported, the Tribunal shall proceed to hear the Appeal of this Appellant as well as the Appeals of other Appellants, on merits and in accordance with law.

(ii) The Tribunal shall dispose of the Appeals without being influenced by any *prima facie* conclusions or tentative observations either in the orders passed by the members constituting the special Bench or by the Chairman.

(iii) The Appeals should be disposed of after hearing both sides and equally uninfluenced by any tentative and *prima facie* observations in the present order passed by this Court.

(iv) We clarify that our observations and findings are tentative and *prima facie* and shall not influence the final outcome of the Appeals.

(v) We further clarify that all contentions of both sides on the merits of controversy and interpretation of the legal provisions are kept open.

(vi) In the event any default is committed in complying with our order, then, all consequences in law shall follow. Liberty to apply for early hearing before the Tribunal after the deposit is made by the Appellant.

13) The Appeals are disposed of accordingly.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**