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

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Date of decision: 24.07.2020

+ W.P.(C) 3601/2020

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. Deepanshu
Choithani, Mr. Gurpreet Parwanda, Mr. Mudit
Jain, Mr. Tarun Singla and Ms. Meera Menon,
Advs.

versus

RESERVE BANK OF INDIA

..... Respondent

Through Mr. Atul Sharma, Mr. Abhinav
Sharma and Ms. Abhilasha Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

This hearing is conducted through video conferencing.

CM No.14774/2020

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

“A. Pass necessary orders and directions to the Respondent, in line with the order of this Hon’ble Court dated 19.6.2020, to permit the Petitioner to remit USD 54.99 Million on or before 31st July 2020 towards the payment due for the 2nd or July tranche, the details of which are set out in Paragraph 9 of the present Application.”

2. As is evident from the above prayer in the aforementioned application the petitioner seeks permission for remission of USD 54.99 Million on or before 31st July, 2020 on the same facts and grounds on the basis of which this Court had passed an interim order on 19.06.2020. The said order also gives the factual background of this case. The same reads as follows:-

W.P.(C) 3601/2020 & CM No.12827/2020

1. This writ petition is filed 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 case of the petitioner is that it has wholly owned subsidiaries (WOS) including Jindal Steel & Power (Mauritius) Ltd. (JSPML), Sky High Overseas Limited and Jindal Steel Bolivia S.A. The petitioner states to have made overseas direct investment and has also undertaken financial commitments for the afore-noted subsidiaries after getting approval from RBI through SBI which is an authorized dealer under the Foreign Exchange Management Act. The petitioner states that a total direct investment in equity shares of 172.64 million dollars has been made. Similarly, there are loans of 307.61 million US dollars. The petitioner has also given a corporate guarantee of 864.82 million dollars.
3. It is further stated that the petitioner and its wholly owned subsidiary JSPML and its lenders have restructured payment of aforesaid due amount to lenders by restructuring agreement dated 07.02.2018. Under the said agreement a sum of USD 153 million was to be paid on or before 31.03.2020. Accordingly, the petitioner made an application on 03.09.2019 to respondent through its authorized agent for remittance of USD 300 million to JSPML to fulfil its debt obligations. However, the application of

the petitioner was rejected by the respondent by e-mail dated 30.12.2019 on the ground that “reservations expressed by the Enforcement Directorate”.

4. As there was delay on the part of the respondent, the remittance payable on 31.03.2020 was re-negotiated with the lenders, the said amount payable was renegotiated and an agreement was signed on 29.05.2020. It is pleaded that a sum of Rs.75 million US dollars has to be remitted by 24.06.2020 and another 15 million dollars has to be remitted by 30.06.2020.

5. I have heard learned counsel for the parties. Learned senior counsel for the petitioner has strongly urged that the entire transaction, namely, the loans of 279.5 million dollars and the corporate guarantee of USD 865 million have been given by the petitioner after taking due permission from RBI. It is also urged that since 2015 there has been no fresh inquiry under FEMA or PMLA initiated by the law enforcement agencies. The old inquiries which are of insignificant amounts continue to be languishing. Despite pendency of those inquiries it is pleaded that several permissions have been given by RBI earlier.

6. Now, for no reason merely on the saying of the concerned Enforcement Directorate, permission is being refused to the petitioner. It is also pleaded that under Regulation 6 which is the automatic route for making payment without permission from RBI, the petitioner could have done so only in case no investigation is going on by the Law Enforcement Agencies. He further submits that as investigation by agencies are going on the petitioner has chosen to approach the RBI under Regulation 9. Under Regulation 9 it is pleaded that no such permission is required. He further states that unless urgent permission is granted by this court to pay the agreed instalment of loans noted above, namely, total of 90 million US dollars by 30.06.2020, the petitioner would be in default of the guarantees given and also the credit rating of the petitioner would drastically fall making it very difficult for the petitioner to carry on business.

7. Learned counsel appearing for the RBI has pointed out that the permission has been declined on the saying of the Enforcement Directorate. He has in Court shown the communications dated 14.08.2019 and 03.12.2019 from the Directorate of Enforcement.

He relies upon the communication dated 14.08.2019 which mentions a fresh inquiry.

8. I may first look at the relevant regulations issued by RBI being notification no. FEMA 120/RB-2004 dated 17.07.2004 which reads 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.

(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;

.....

Similarly, Regulation 9 reads as follows:

“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.....”

9. What follows from the reading of the above regulations is that in case an Indian party does not satisfy the eligibility norms of Regulation 6 then it may apply for RBI for approval. It is Regulation 6 which states that permission cannot be given in case the investigations are pending by the Law Enforcement agencies. Regulation 9 does not provide any such stipulation. Hence, prima facie the petitioner was correct in having approached RBI under Regulation 9.

10. I also cannot help noticing that the petitioner has filed a chart showing that permissions have been given by RBI on 24.03.2015, 20.04.2018, 14.09.2018 and 10.12.2018. The corporate guarantee, hence, for 865 million USD has been given after prior permission of RBI. These permissions have been given

as late as in 2018. Learned senior counsel for the petitioner has vehemently argued that no FEMA or any other investigation has been initiated by the law enforcement agencies after 2015.

11. Learned counsel for RBI has pointed out to some inquiry initiated recently as mentioned in communication dated 14.08.2019 by Enforcement Directorate. The petitioner refutes this. I cannot help noticing that the corporate guarantee and the loans have prima facie been taken with the prior permission of RBI. It would hardly be appropriate for the RBI to now let the petitioner go in default and dishonour its corporate guarantee because some investigation proceedings are pending by law enforcement agencies which appears to have been pending since 2015. In fact, as noted above while these proceedings were pending as late as in 2018, RBI has given permission to the petitioner. The petitioner has made a prima facie case.

12. In case the necessary permission for transmission of 90 million USD is not granted, as sought for, it is manifest that irreparable loss and injury would be caused to the petitioners as their credit rating would get downgraded.

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.

14. Issue notice. Learned counsel for the respondent/RBI Mr. Atul Sharma accepts notice. Counter affidavit be filed within three weeks, as sought for. Rejoinder, thereto, if any, be filed within one

week.

15. List on 20.07.2020.”

3. Learned counsel for the petitioner has reiterated the submissions which were made when order dated 19.06.2020 was passed. It is pleaded that factually the present application raises the same issues and contentions that were raised when order dated 19.06.2020 was passed.

4. However, when the aforementioned order dated 19.06.2020 was passed the counter-affidavit of respondent/RBI was not on record. Respondent/RBI has now filed its counter-affidavit. I may note some of the salient objections taken by the respondent in its counter-affidavit. Same are as follows:-

- (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 (hereinafter referred to as ‘JSPML’) 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 FEMA ODI Regulations 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.

5. I have heard learned counsel for the parties. Learned senior counsel for the petitioner has reiterated his arguments which were made on 19.06.2020. It has been reiterated by learned senior counsel for the petitioner that the petitioner has given a corporate guarantee of 864.82 Million Dollars after taking prior permission from RBI. The aforesaid loan has been restructured on 7.2.2018. After various negotiations, an agreement was also signed with the lenders on 29.05.2020 wherein a sum of Rs.75 million USD was to be remitted by 24.06.2020, 15 Million US Dollars on 30.6.2020. Now, it is pleaded that by 31.7.2020 an amount of USD 54.99 Million has to be paid for the second tranche. Learned counsel for the respondent has reiterated that it is on account of pendency of the aforesaid proceedings/investigation/enquiries under FEMA and under PMLA that the objection has been withheld.

6. I may look at the relevant Regulations issued by RBI by Notification No. FEMA 120/RB-2004 dated 17.07.2004 which has been reproduced above in the order dated 19.06.2020. It is clear from a reading of Clause 6 [explanation] (iii) that an Indian party under investigation by an investigating agency/enforcement agency or Regulatory Body, cannot make direct investment in joint venture or wholly owned subsidiary outside India. Clause 9 of the Regulation stipulates that where an Indian party does not satisfy the eligibility norms under Regulation 6 they may apply to RBI for approval. It would follow that where investigations are going on against the party as stated the party has to for the purpose of making direct investment in a joint venture or a wholly owned subsidiary approach RBI for permission.

7. In this context now reference may be had to the impugned order

issued by respondent/RBI declining permission to the petitioner on 30.12.2019 which reads as follows:-

“IP, Jindal Steel and Power Ltd-WOS, Jindal Steel and Power (Mauritius) Ltd. (UIN: NDWAZ20070442): Request for undertaking outward 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 commitment(s) to its captioned WOS was considered carefully, but we regret to inform that the said request cannot be acceded to.”

8. It is manifest from a reading of the above communication dated 30.12.2019 that it is a cryptic communication giving no reasons whatsoever why the permission sought for has been rejected. This aspect is more apparent, given the background in which the permission was being sought.

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 aforementioned 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. I may have a look at these communications. A perusal of the communicated dated 14.08.2019 shows that it is a mere request for certain information/document. Reference may also be had to the communication dated 3.12.2019. Relevant portion of which reads as follows:-

“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

Laundrying 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.”

12. A perusal of Annexure A of the above communication shows that it refers to investigations being carried out. The date of commencing of these investigations are not stated. It has been pointed out by learned senior counsel for the petitioner that these are mere investigations being carried out and not even a Show Cause Notice or even a notice under Rule 4(1) of The Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 have been initiated.

13. Annexure B of the aforementioned communication refers to three cases against the petitioner. Again the date of commencement of these investigations are not mentioned. Learned senior counsel for the petitioner has stressed that there are no new investigations or matters pending and all details of pending matters have been duly stated in paragraph 23 of the Writ Petition none of which are new cases and have been pending even prior to the approvals given on 20.04.2018, 14.09.2018 and 10.12.2018.

14. What prima facie appears is that based on a communication written by Directorate of Enforcement containing cryptic information the RBI/respondent has chosen to withhold permission to the petitioner. The discretion under clause 9 of the abovenoted Regulations has to be exercised

by RBI the respondent based on cogent facts and materials and not at the mere directions of Directorate of Enforcement. It was for the respondent/RBI to exercise its discretion in the facts and circumstances of the case keeping in view its own permissions given and subsequent facts and events that may have taken place after the permission was given. The discretion has to be exercised by RBI. The same cannot be delegated to the Enforcement Directorate. The impugned orders is also a non speaking order.

15. In these circumstances, in my opinion, the petitioner has made out a prima facie case. The interim directions as stated in the order of this court dated 19.06.2020 are reiterated.

16. In the facts I pass the following directions:-

The respondent shall permit the petitioner to transmit the sum of 54.99 million USD forthwith before 31.07.2020 as has been prayed for. This permission is however subject to the following:

(i)The petitioner shall furnish an undertaking from the Board of Directors that if for some reason this court passes a direction to the petitioner to deposit the said remitted amount amounting to 55 million USD, the petitioner shall forthwith deposit the same in court.

(ii)The petitioner shall give an undertaking that it has unencumbered assets worth 60 million USD or above and that the petitioner shall not sell, alienate or transfer or encumber these assets without prior permission of this Court.

17. Application stands disposed of.

W.P.(C) 3601/2020

Arguments have been heard in part on the last date of hearing.
For further arguments list on 28.08.2020.

JAYANT NATH, J

JULY 24, 2020/n

