

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**FEMA APPEAL NO. 1 OF 2020
WITH
INTERIM APPLICATION NO. 1706 OF 2020
IN
FEMA APPEAL NO. 1 OF 2020**

The Special Director,

Directorate of Enforcement, (WR) Directorate of
Enforcement,

Janmabhoomi Chambers,

1st Floor, Walchand Hirachand Marg,

Fort, Ballard Estate, Mumbai.

At Present Address:

Ministry of Finance,

Department of Revenue,

Government of India through

The Assistant Director, 4th Floor,

Kaiser I Hind Building, Currimbhoy Lane,

Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Jaipur IPL Cricket Pvt. Ltd.,

6th Floor, MET Building,

General A. K. Vaidya Marg,

Bandra Reclamation, Bandra (W),

Mumbai-400 050.

...Respondent

**WITH
FEMA APPEAL NO. 2 OF 2020
WITH
INTERIM APPLICATION NO. 2065 OF 2020
IN
FEMA APPEAL NO. 2 OF 2020**

The Special Director,

Directorate of Enforcement, (WR) Directorate of
Enforcement,

Janmabhoomi Chambers,

1st Floor, Walchand Hirachand Marg,

Fort, Ballard Estate, Mumbai.

At Present Address:

Ministry of Finance,

Department of Revenue,

Government of India through

The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Manoj Badale,
M/s. ND Investments LLP, 2nd Floor, 26-28,
Hammersmith Grove, London W6 7AW, UK.

...Respondent

**WITH
FEMA APPEAL NO. 1 OF 2021
WITH
INTERIM APPLICATION NO. 2058 OF 2020
IN
FEMA APPEAL NO. 1 OF 2021**

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.
At Present Address:
Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Ranjit Barthakur,
Jaipur IPL Cricket Pvt. Ltd.,
6th Floor, MET Building,
General A. K. Vaidya Marg,
Bandra Reclamation, Bandra (W),
Mumbai-400 050.

...Respondent

**WITH
FEMA APPEAL NO. 2 OF 2021
WITH
INTERIM APPLICATION NO. 2054 OF 2020
IN
FEMA APPEAL NO. 2 OF 2021**

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,

Fort, Ballard Estate, Mumbai.

At Present Address:

Ministry of Finance,

Department of Revenue,

Government of India through

The Assistant Director, 4th Floor,

Kaiser I Hind Building, Currimbhoy Lane,

Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

M/s. ND Investments LLP,

2nd Floor, 26-28, Hammersmith Grove, London

W6 7AW, UK.

...Respondent

WITH

FEMA APPEAL NO. 3 OF 2021

WITH

INTERIM APPLICATION NO. 2062 OF 2020

IN

FEMA APPEAL NO. 3 OF 2021

The Special Director,

Directorate of Enforcement, (WR) Directorate of
Enforcement,

Janmabhoomi Chambers,

1st Floor, Walchand Hirachand Marg,

Fort, Ballard Estate, Mumbai.

At Present Address:

Ministry of Finance,

Department of Revenue,

Government of India through

The Assistant Director, 4th Floor,

Kaiser I Hind Building, Currimbhoy Lane,

Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Bishwarnath Bachun,

M/s. EM Sporting Holdings Ltd., 5th Floor,

C & R Court, 49, Labourdonnais Street,

Port Louis, Mauritius.

...Respondent

WITH

FEMA APPEAL NO. 4 OF 2021

WITH

INTERIM APPLICATION NO. 2068 OF 2020

IN

FEMA APPEAL NO. 4 OF 2021

The Special Director,

Directorate of Enforcement, (WR) Directorate of

Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.

At Present Address:

Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Suresh Chellaram,
Managing Director & Chief Executive,
M/s. Chellaram PLC, 26, Cameron Road, Ikoyi,
Lagos, Nigeria.

...Respondent

WITH
FEMA APPEAL NO. 5 OF 2021
WITH
INTERIM APPLICATION NO. 2069 OF 2020
IN
FEMA APPEAL NO. 5 OF 2021

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.
At Present Address:
Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Mrs. Barbara Jacqueline Haldi,
M/s. EM Sporting Holdings Ltd., 5th Floor,
C & R Court, 49, Labourdonnais Street,
Port Louis, Mauritius.

...Respondent

WITH
FEMA APPEAL NO. 6 OF 2021
WITH
INTERIM APPLICATION NO. 2056 OF 2020

**IN
FEMA APPEAL NO. 6 OF 2021**

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.
At Present Address:
Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Raghuram Iyer,
Jaipur IPL Cricket Pvt. Ltd., 6th Floor,
MET Building, General A. K. Vaidya Marg,
Bandra Reclamation, Bandra (W),
Mumbai-400 050.

...Respondent

**WITH
FEMA APPEAL NO. 7 OF 2021
WITH
INTERIM APPLICATION NO. 2059 OF 2020
IN**

FEMA APPEAL NO. 7 OF 2021

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.
At Present Address:
Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

M/s. EM Sporting Holdings Ltd.,
5th Floor, C & R Court, 49,
Labourdonnais Street, Port Louis, Mauritius.

...Respondent

**WITH
FEMA APPEAL NO. 8 OF 2021
WITH
INTERIM APPLICATION NO. 2060 OF 2020
IN
FEMA APPEAL NO. 8 OF 2021**

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.
At Present Address:
Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Fraiser Castellino,
Flat No. 2, Marakkesh Apartments,
St. Mark Road, Bangalore-560 001.

...Respondent

**WITH
FEMA APPEAL NO. 9 OF 2021
WITH
INTERIM APPLICATION NO. 2061 OF 2020
IN
FEMA APPEAL NO. 9 OF 2021**

The Special Director,
Directorate of Enforcement, (WR) Directorate of
Enforcement,
Janmabhoomi Chambers,
1st Floor, Walchand Hirachand Marg,
Fort, Ballard Estate, Mumbai.
At Present Address:
Ministry of Finance,
Department of Revenue,
Government of India through
The Assistant Director, 4th Floor,
Kaiser I Hind Building, Currimbhoy Lane,
Ballard Estate, Fort, Mumbai-400 001.

...Appellant

Versus

Ms. Samila Sivaramen,

M/s. EM Sporting Holdings Ltd.,
5th Floor, C & R Court, 49,
Labourdonnais Street, Port Louis, Mauritius.

...Respondent

Mr. Ashish Chavan, with Mr. Zishan Quazi, for Appellants.
Mr. Rohan P. Shah, with Mr. Roy Deep, Mr. Srisabari Rajan, Mr.
Manish Rastogi & Prajwal Tiwari, i/b Deep Roy, for Respondents.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 6th December 2023
PRONOUNCED ON : 13th December 2023

JUDGMENT: (*Per Dr. Neela Gokhale, J.*)

1. These Appeals under Section 35 of the Foreign Exchange Management Act, 1999 (“**FEMA**”) are directed against order dated 11th July 2019 passed by the Appellate Tribunal for SAFEMA, FEMA, NDPS, PMLA & PBPT Act (“**the Tribunal**”), modifying the order passed by the Special Director of Enforcement to the extent of reducing the quantum of total penalty imposed upon the Appellants which totaled to Rs.98.35 Crores to Rs.15 Crores only. The Tribunal has thus held that the amount of Rs.15 Crores already deposited by Appellants pursuant to the directions of this Court dated 21st January 2015 is reasonable and the same be treated as penalty for the contravention of the Act as held by the Tribunal.

2. The facts emerging from the Appeals are:

(a) On receipt of information, inquiries were initiated by the

Mumbai Zonal Office of the Directorate of Enforcement in the functioning of the Twenty-Twenty cricket tournament popularly known as 'the Indian Premier League' ("IPL") organized by the Board of Control for Cricket in India ("BCCI"). BCCI was called upon to furnish certain information on the basis on which, it was felt that there were large scale irregularities in the conduct and functioning of the IPL and its franchisees. A comprehensive investigation revealed certain irregularities in the context of Respondents.

(b) The process of allotting ownership of teams for IPL commenced by floating an Invitation to Tender ("ITT") to any person to submit a bid to own and operate a team for participation in the IPL. The bidders were required to choose from eight locations to operate their teams, viz., Mumbai, Delhi, Kolkata, Chennai, Bangalore, Hyderabad, Mohali and Jaipur. The person being awarded ownership of a team is known as a 'franchisee.' Each successful bidder would be allotted only one team. Several criteria with respect to eligibility and fitness were stipulated and laid down in the ITT. One such criteria was the performance deposit of US\$5 million equivalent to Rs. 20 Crores.

3. The present Appeals relate to the deposits from various sources made during the bidding process by Jaipur IPL Cricket Pvt. Ltd. and its Directors and Promoters, the Respondents herein which were held to be in contravention of the various provisions of FEMA and the regulations made thereunder.

4. One Emerging Media IPL Ltd., UK submitted a bid of US\$ 67 millions (Rs.268 Crs.) for a team at Jaipur. This amount was to be paid in ten equal installments over a period of ten years. The franchise for Jaipur was known as 'Rajasthan Royals'. The franchise agreement was signed by Jaipur IPL Cricket Pvt. Ltd. ("**JIPL**") and the BCCI. Fraiser Castellino, the then CEO of JIPL (Respondent in FEMA Appeal No.8 of 2021) executed the agreement on behalf of JIPL and one Lalit Modi, Vice President of BCCI and Chairman of IPL executed the same on behalf of BCCI.

5. The performance deposit of Rs.20,19,87,410.23 for JIPL was transferred from UK to the account of BCCI-IPL with HDFC Bank, Chennai. The said amount was transferred by one Manoj Badale (Respondent in FEMA Appeal No.2 of 2020) from UK on behalf of Emerging Media IPL Ltd. Subsequently, the franchise agreement was signed on 14th April 2008 and the balance deposit money, i.e., US\$773,480.99 after the auction was paid by one EM Sporting Holdings Ltd., Mauritius ("**EMSH**") (Respondent in FEMA Appeal No.7 of 2021) to BCCI. Thus, Manoj Badale and EMSH together paid a total amount of Rs.23,49,27.410/-. The documents furnished by JIPL clearly showed that JIPL was a wholly owned subsidiary of EMSH. The date of incorporation of EMSH was 5th May 2008 and that of JIPL was 8th March 2008. The paid-up capital of the company at incorporation was Rs.1 Crore having 10000 shares. Ranjit

Barthakur (Respondent in FEMA Appeal No.1 of 2021) and Fraiser Castellino, both Directors of JIPL owned 5000 shares each. Ranjit Barthakur sold 4990 shares to EMSH, Mauritius and Fraiser sold 5000 shares to EM Sporting Holdings, Mauritius. From the details of the foreign investments of JIPL, it was revealed that JIPL also received foreign investments through Axis Bank, Fort, Mumbai. The investments totaling Rs.9,73,18,034/- were shown as Foreign Direct Investment (“**FDI**”) in India in equity. JIPL had filed an application seeking approval from the Reserve Bank of India (“**RBI**”) for issuing shares to EMSH, Mauritius which was paid by Manoj Badale and EMSH, Mauritius to BCCI towards performance deposit and franchise fees. RBI refused permission and conveyed clearly that an Indian company receiving share subscription from a person resident outside India by mode of payment other than that indicated in paragraph 8 of Schedule I to a notification dated 3rd May 2000 and capitalization of pre-incorporation of expenses required prior approval of Foreign Investment Promotion Board (“**FIPB**”) for issue of shares to a foreign investor. JIPL also received additional foreign investments from Manoj Badale and one ND Investments LLP, UK Ltd. (Respondent in FEMA Appeal No.2 of 2021). These investments of Manoj Badale and ND Investments LLP were also shown as FDI in India in equity. Thus, it was alleged by the Enforcement Directorate that JIPL and its promoters (as named above) contravened the provisions of FEMA

and accordingly, four separate show cause notices dated 13th April 2011 were issued by the Special Director of Enforcement to JIPL and its promoters, i.e., Respondents herein. Show cause notices were issued to JIPL for the following contraventions:

(i) SCN 1: Issued to Jaipur IPL Cricket Pvt. Ltd. for the following contraventions:

- i. Section 6(3)(b) of FEMA read with Regulation 5(1) of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and para 8 of Schedule 1 thereto and also read with Regulation 5 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 issued under Section 6(2) of FEMA to the extent of Rs.23,49,27,410.23.
- ii. Section 6(3)(b) of FEMA read with Regulation 5(1) of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and para 8 of Schedule 1 thereto and also read with Regulation 5 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 issued under Section 6(2) of FEMA to the extent of Rs.9,73,18,034/-.
- iii. Section 6(3)(b) of FEMA read with Regulation 5(1) of Foreign Exchange Management (Transfer or Issue of Security by a Person

Resident Outside India) Regulations, 2000 and also read with para 9(1)(A) of Schedule 1 thereto, to the extent of Rs.23,49,27,410.23 and Rs.9,73,18,034/-.

iv. Shri Ranjit Bharthakur, Shri Raghuram Iyer, and Shri Fraiser Castelino have been charged for above contraventions in terms of Section 42(1) of FEMA, 1999.

(ii) SCN II: Issued to EM Sporting Holdings Ltd., for contravention of:

i. Section 6(2) of FEMA read with Regulation 5 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 and also read with para 8 of Schedule 1 to Regulation 5(1) of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 issued under section 6(3)(b) of FEMA, 1999, to the extent of Rs.23,49,27,410/- and Rs.9,73,18,034/- totalling Rs.33,22,45,444/-.

ii. Shri Bishwarnath Bachun, Mrs. Samila Sivaramen, Mrs. Barbara Jacqueline Haldi, and Shri Manoj Badale, Director of M/s EM Sporting Holdings Ltd., and Shri Suresh Chellaram, Managing Director & Chief Executive of M/s Chellarams PLC, Nigeria have been charged for above contraventions in terms of Section 42(1) of FEMA, 1999.

(iii) SCN III: Issued to Shri Manoj Badale for contravention of Section (3)(b) of FEMA to the extent of Rs.20,19,87,410/- and another amount of Rs.5,07,25,000/-.

(iv) SCN IV: Issued to M/s N.D. Investments Ltd.:

- i. for contravention of Section (3)(b) of FEMA, to the extent of Rs.4,65,93,034/-.
- ii. Shri Manoj Badale, Director has been charged for above contraventions in terms of Section 42(1) of FEMA, 1999.

6. All parties replied to the Show Cause Notices and all the parties were individually and personally heard by the Special Director of Enforcement. Statements of all Respondents were recorded and all parties were afforded opportunity to adduce evidence. The Special Director in his order dated 30th January 2013 recorded his satisfaction pertaining to all Respondents being guilty of contravening Section 6(3)(b) of FEMA read with Regulation 5(1) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and paragraph 8 of Schedule I further read with Regulation 5 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. Hence, in exercise of powers conferred on him under Section 13(1) of FEMA, the Special Director imposed penalty on each Respondent in the Appeals before us in respect of separate show cause notices as follows:

	Name of Respondent	Penalty Imposed (Rs. In Crores)
(i)	JIPL	32.30
(ii)	Ranjit Bartakur	6.40
(iii)	Raghuram Iyer	5.10
(iv)	Fraiser Castellino	6.40
(v)	EMSH, Mauritius	18.90
(vi)	Bishwarnath Bachun	2.45
(vii)	Samila Sivaramen	2.45
(viii)	Barbara Jacqueline Haldi	2.45
(ix)	Suresh Chellaram	3.70
(x)	ND Investments LLP	2.00
(xi)	Manoj Badale	16.20
	Total	98.35

Thus, the Special Director held all Respondents guilty of having contravened the provisions of FEMA and the Regulations made thereunder and imposed penalty on individuals against the respective show cause notices. Total penalty of Rs. 98.35 Crores was directed to be paid in the office of the Directorate of Enforcement within 45 days from the date of receipt of the order.

7. Respondents assailed this order dated 30th January 2013 before the Tribunal. FEMA provides for a condition of pre-deposit of the penalty amount for preferring an Appeal. Respondents, therefore, made an application before the Tribunal seeking waiver of the

condition of pre-deposit of the penalty amount and stay of the order dated 30th January 2013. On account of a difference of opinion amongst the members of the Tribunal, the matter was placed before the Chairman for decision and upon consideration of respective opinion of individual members of the Tribunal, the Chairman directed Respondents to deposit 40% of the penalty as a pre-deposit in addition to furnishing a bank guarantee for the remaining 60% amount of the Adjudication Order. The pre-deposit direction was assailed by Respondents in this Court by way of an Appeal.

By its order dated 24th December 2014, this Court admitted the Appeals on three substantial questions of law, and after hearing the parties, this Court was pleased to conclude that the imposition of condition of cash deposit and bank guarantee failed to meet the ends of justice. Thus, by another order dated 21st January 2015, this Court was pleased to substitute the pre-deposit order of the Tribunal and directed Respondents to deposit total amount of Rs.15 Crores within eight weeks from the date of receipt of the order. This Court also directed the Tribunal to dispose the Appeals uninfluenced by its *prima facie* observations.

8. The Appeals were then heard by the Tribunal and the impugned order dated 11th July 2019 came to be passed. In its finding, the Tribunal has recorded that the various propositions of law raised by the parties are well settled by the Foreign Exchange

Tribunal and various High Courts and the Supreme Court and the adjudicating officer is bound to follow the said decisions. The Tribunal has found the order of the Special Director to be perverse inasmuch as it failed to deal with many of the precedents of the High Courts and the Supreme Court which are binding on the Adjudicating officers. The Tribunal relied on many decisions especially the decision of the Apex Court in the matter of (a) *Wimco Ltd. Vs Director of Enforcement*,¹ and (b) *Union of India vs Kamalakshi Finance Corporation Ltd.*² The Tribunal has re-appreciated the evidence minutely and concluded absence of any intention or *mens rea* on the part of Respondents in contravening the provisions of FEMA. Many Respondents, who are individuals were not in charge of the day-to-day management of the entities and were not even aware of the remittances in the manner alleged as illegal. The Tribunal has thus held that the parameters laid down by the Supreme Court and the High Courts for imposition of penalty in quasi criminal proceedings such as the present case are not wholly satisfied and hence, imposition of an exorbitant penalty totalling to Rs.98.35 Crores be reduced to Rs.15 Crores. It is this reduction in the amount of penalty which is assailed by Appellant in the present Appeals. The penalties as imposed by Special Director and as modified by the Tribunal read as under:

1 1997(94) Taxman 542.

2 1992 Supp (1) SCC 547.
Gaikwad RD

Appeal No.	Name of Respondent	Penalty Imposed by the Special Director (Rs. In Crores)	Penalty reduced by the Tribunal as in the Impugned Order (Rs. In Crores)
1/2020	JIPL	32.30	7.00
1/2021	Ranjit Bartakur	6.40	1.00
6/2021	Raghuram Iyer	5.10	Nil
8/2021	Fraiser Castellino	6.40	1.00
7/2021	EMSH, Mauritius	18.90	2.00
3/2021	Bishwarnath Bachun	2.45	Nil
9/2021	Samila Sivaramen	2.45	Nil
5/2021	Barbara Jacqueline Haldi	2.45	Nil
4/2021	Suresh Chellaram	3.70	Nil
2/2021	ND Investments LLP	2.00	2.00
2/2020	Manoj Badale	16.20	2.00
	TOTAL	98.35	15.00

9. Mr. Ashish Chavan, learned Counsel for Appellants has criticized the findings of the Tribunal by saying that the Tribunal ought not to have taken a lenient view and has erred in holding the contraventions of the provisions of FEMA by Respondents as merely technical. Mr. Chavan submitted that the Tribunal ought to have appreciated that the arrangement of the flow of funds by Respondents was made to route the investments through Mauritius as the funds flowing into India from UK was not permissible especially

in the light of admitted fact that they did not have the approval of the RBI and the FIBP. Further, the Tribunal has not recorded any justification in reducing the quantum of penalty especially in view of the gross contraventions of the provisions of the FEMA by Respondents which caused a significant loss to Government exchequer. So saying, he proposed as many as sixteen questions of law terming them to be 'Substantial Questions of Law' that needed to be determined by this Court.

10. On the other hand, Mr. Rohan Shah, Counsel appearing for Respondents defended the impugned order by drawing our attention to various decisions of the Constitutional Courts pertaining to the scope of judicial review under Section 35 of the FEMA, laying down the parameters on which an Appeal of such a kind be entertained and the justification of interference with a finding of fact as a question of law. He also canvassed the doctrine of proportionality *vis-a-vis* justification of interference by an Appellate Court. He took us through the order passed by the Special Director of Enforcement and pointed out the absence of any reasoning or justification for imposing maximum penalty as provided in the Act. The charges in the show-cause notices being answered in the affirmative yet there is no discussion on the quantum of penalty imposed on Respondents. On the contrary, the Tribunal has specifically dealt with each charge against Respondents individually and collectively and reasoned as to

how the exorbitant penalty imposed on Respondents individually is inversely proportionate to the act attributed to each Respondent and thereby wholly unjustified. In fact, there is a categorical finding of perversity in the order passed by the Special Director. He has relied upon the following cases:

Scope of judicial review under Section 35 of FEMA.

- (1) ***Mohtesham Mohd. Ismail v. Enforcement Directorate,***³
- (2) ***Union of India v. Amarjeet Singh,***⁴
- (3) ***SEBI v. Mega Corp. Ltd.,***⁵
- (4) ***Sir Shadi Lal Sugar and Geeneral Mills Ltd. v. CIT ,***⁶

Doctrine of proportionality – Interference of Court when justified.

- (5) ***Excel Crop Care Ltd. v. CCI,***⁷
- (6) ***Hindustan Steel Ltd. v. State of Orissa,***⁸
- (7) ***Coimbatore District Central Coop. Bank v. Employees Assn.,***⁹

Section 42(1)- “a person in-charge and responsible for the conduct of the affairs of a company”

- (8) ***Girdhari Lal Gupta v. D. H Mehta,***¹⁰
- (9) ***Katta Sujatha (Smt.) v. Fertilizers and Chemicals Travancore Ltd. & Anr.***¹¹

11. We have perused the order passed by the Special Director as well as the impugned order. We have also gone through the proposed

3 (2007) 8 SCC 254.
 4 2009 SCC OnLine Del. 995.
 5 2022 SCC OnLine SC 361.
 6 (1987) 4 SCC 722.
 7 (2017) 8 SCC 47.
 8 (1969) 2 SCC 627.
 9 (2007) 4 SCC 669.
 10 (1971) 3 SCC 189.
 11 (2002) 7 SCC 655.
 Gaikwad RD

questions of law as suggested by Appellant in the Appeal memos.

12. At the outset, the sixteen questions placed before us as 'Substantial Questions of law' appear to be mere repetitions of each other *albeit* having only an interchangeability of words. We thus, do not find any reason to dwell on the questions individually as placed for consideration by Appellant. The only issue that arises for our consideration is whether interference by the Tribunal in the order of the Special Director is justified on the touchstone of the doctrine of proportionality.

13. The order of the Special Director clearly indicates that although satisfaction in respect of contravention of the provisions of the FEMA has been recorded, there is no explanation or any discussion in respect of the basis on which maximum penalty has been imposed. Mr. Chavan, in fairness, agreed. It appears that the Special Director has taken the sum involved in the contravention as alleged by the Investigating Officer of the Enforcement Directorate and multiplied it by three to arrive at the quantum of penalty as contemplated by Section 13(1A) of the FEMA. The Tribunal, on the other hand, after going through each charge, has recorded a clear finding that an exorbitant penalty has been imposed upon the individuals arrayed without recording any findings on the specific roles of said individuals. Judicial precedents clearly established that the onus of proving the role of an individual and specifically proving

that the said person was in day-to-day management of the affairs of the company is that of the Department. The Tribunal after going through the facts of the matter has also found the Department to have completely failed in the discharge of this burden of proof. The Special Director has simply re-produced the provisions of the FEMA to justify the imposition of penalty without any discussion on the corresponding act attributed to each individual to deserve such a penalty. The imposition of maximum penalty is justified only if it is shown that the person was in-charge and responsible for the functioning of the company, having some motive to benefit from the transaction in question. The Tribunal has particularly noted the absence of *mala fides* and *mens rea* on the part of Respondents. The Tribunal has further held that the Special Director has not discussed any specific role of any individual Respondent to justify the invocation of the provisions of the FEMA and further calling for imposing of maximum penalty.

14. On the merits of the case, the Tribunal has observed that there was no other way for Respondents to participate in the bidding process for the IPL franchise organised by the BCCI except by making remittance directly to the BCCI, which essentially accounts for a major portion of the total remittances in question.

(a) The Tribunal has found Ranjit Barthakur (Respondent in FEMA Appeal No.1 of 2021), the Chairman and Director of JIPL to

never have been responsible for regulatory compliance on day-to-day basis and neither was he a party to nor did he control or take any decision with regard to subject remittances.

(b) Fraiser Castellino (Respondent in FEMA Appeal No.8 of 2021) ceased to be a Director on 1st October 2008 and subsequently, he was not involved with the business or activities of JIPL. Thus, the Tribunal has vindicated him from any violation as alleged by the Enforcement Directorate.

(c) Raghuram Iyer (Respondent in FEMA Appeal No.6 of 2021) has also been absolved on the ground that his main role in the organisation was generation of revenue through the sale of commercial rights in connection with the cricket team and its players and his responsibility was for sales and marketing activity of the franchise. Moreover, he resigned from the directorship of JIPL in 2016. All the respective remittances took place when Raghuram Iyer was not a Director and hence, imposition of maximum penalty on him was held to be completely unjustified.

(d) Bishwarnath Bachun (Respondent in FEMA Appeal No.3 of 2021) did not have any role in the daily operations of EMSH and was not in overall control of its business. The remittances attributed to Bishwarnath Bachun were made at a time when he was not even involved with the affairs of the group.

(e) Samila Sivaramen (Respondent in FEMA Appeal No.9 of 2021) was also a representative of Tresco International Limited, one of the shareholders of the EMSH and also had no role in the daily operations of the EMSH. She was not even aware of the remittances attributed to her as EMSH was neither in existence nor had operational bank account at that point of time. There is no justification of imposing any penalty on Samila Sivaramen.

(f) In reference to Barbara Haldi (Respondent in FEMA Appeal No.5 of 2021), the Tribunal has found her to be mere nominee Director of EMSH and had no role in the daily operations of EMSH. She was also not aware of any remittances and in the absence of *mens rea*, imposition of penalty is totally unjustified.

(g) Suresh Chellaram (Respondent in FEMA Appeal No.4 of 2021) was found to be under *bona fide* belief that the remittances made by the EMSH were legal and were made for business emergencies. The intention of routing money through offshore entities for meeting financial needs of JIPL were clearly set out and thus, when there was requirement of payment to be made in relation to franchise, it was only inevitable that the money would be arranged by promoter and in such a scenario, the remittance made was purely business decision and not a deliberate act by Suresh Chellaram to flout any law or regulation in force at the relevant time.

(h) In so far as Manoj Badale (Respondent in FEMA Appeal No.2 of 2020) is concerned, the Tribunal has found that although there was no *mens rea* on the part of Badale, it is an admitted position that Badale arranged for payments and although the acts of Badale are held to be under *bona fide* belief that the remittances made by him were legal, Badale and ND Investments LLP are responsible for the transactions in which the contraventions have happened. However, the Tribunal did not find any justification for imposing maximum penalty and has reduced the same.

15. Overall, the Tribunal has found that *firstly*, no loss has been caused to exchequer; *secondly*, the remittances have come into India and remained in India. This is not a case where any foreign exchange has gone out of India; *thirdly*, the remittances were utilised for the purposes for which they were intended and there is not even an allegation of utilization of the money for extraneous purposes; *fourthly* the entities have not gained any benefit whatsoever and in fact suffered considerable financial detriment as shares having beneficial transferable interest have not been issued against remittances to the said entities for the past 11 years; and *fifthly*, 'Rajasthan Royals' franchise has participated in the IPL since 2008 with no other allegation of contravening any FEMA provisions or regulations made thereunder.

Thus, the Tribunal found no justification in the order passed by

the Special Director for imposing maximum penalty on Respondents and contraventions are categorized at best as technical and venial.

16. In the decision of the Hon'ble Supreme Court of India in the case of *Sir Shadilal Sugar and General Mills (supra)*, while dealing with the issue as to whether there was justification for an interference by the High Court in a finding of fact by transforming the same into the question of law, the Apex Court has held as follows:

"14.....This Court reiterated that findings on questions of pure fact arrived at by the Tribunal were not to be disturbed by the High Court on reference unless it appeared that there was no evidence before the Tribunal upon which they, as reasonable men, could come to the conclusion to which they have come; and this was so, even though the High Court would on the evidence have come to a conclusion entirely different from that of the Tribunal. In other words, such a finding could be reviewed only on the ground that there was no evidence to support it or that it was perverse.

15.Where an ultimate finding on an issue was an inference to be drawn from the facts found, on the application of any principles of law, there would be a mixed question of law and fact, and the inference from the facts found was in such a case, a question of law. But where the final determination of the issue equally with the finding or ascertainment of the basic fact did not involve the application of any principle of law, an inference from the facts could not be regarded as one of law....."

17. In the instant case, there is a finding of fact by the Tribunal and all the relevant facts have been considered in a proper light. The Tribunal has arrived at its conclusion on the basis of evidence to support and after analysing the said evidence. The findings are far from being perverse. Thus, no question of law arises in the case. The

question raised by Appellant relating to justification of the reduction of penalty imposed by the Special Director is purely based on facts and no question of law even remotely, arises from the same.

18. We find that in fact no justification has been recorded by the Special Director to impose maximum penalty as opposed to the Tribunal having considered relevant material has interfered and reduced the penalty. We do not find it proper to transgress the limits of this Court's jurisdiction, preferring the view of the Tribunal or that of the Special Director, one way or the other, in regard to factual appreciation of the finding of facts in the matter.

19. The parameters for imposition of penalty have also been considered by the Hon'ble Supreme Court of India in *Excel Crop Care Ltd. (supra)* and it has been held as follows:

"42.Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping relevant factors in mind.....Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the Assessee. The approach of the Assessing Officer in this behalf must be fair and objective."

20. In *Hindustan Steel Ltd. (supra)*, the Apex Court has held as follows:

"8.An order imposing penalty for failure to carry out statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will also not be imposed because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a

matter of discretion of the authority to be exercised judicially or on a consideration of all relevant circumstances....."

21. In *Coimbatore District Central Co-operative Bank (supra)*, the Supreme Court has explained the concept of proportionality in the following manner:

"18. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision maker has ordered is priorities, reached a conclusion or arrived at a decision. The very essence of decision making consists in the attribution of relative importance to the factors and considerations in the case....."

19.....the principle of proportionality needs to be imbibed in to any penalty imposed under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors which is not the intention of Act....."

22. We find that the Special Director has completely failed to apply the doctrine of proportionality as interpreted and elucidated by the Apex Court in its various decisions, while choosing to impose maximum penalty on Respondents. Having gone through the impugned order, this Court does not find anything perverse in the findings, reasoning and conclusion of the Tribunal. We are in agreement with the finding of the Tribunal that in the absence of any discussion or justification pertaining to the basis for imposing the maximum penalty and juxtaposing this with the alleged acts attributed to each individual, the order of the Special Director is unsustainable.

In any case, we find that the matter is of pure appreciation of evidence and does not raise any question of law. As held in

Mohd. Ismail (Supra) by the apex Court, in an Appeal under Section 54 of FERA, the High Court should exercise its appellate power only "When there existed a question of law and not a question of fact". Even under Section 35 of the FEMA, an Appeal will lie only in regard to a question of law arising out of such order as appealed against. In the present case, Appellant is unable to point out any such question of law that arises for determination from the impugned order of the Tribunal. What has been pointed out are essentially questions of fact, involving appreciation of evidence.

23. In this view of the matter, this Court does not find any error in the impugned judgment of the Tribunal. Consequently, these Appeals are without merits and are dismissed as such. There will be no order as to costs.

24. In view of dismissal of Appeals, Interim Applications pending therein, also stand disposed of.

(DR. NEELA GOKHALE, J.)

(K. R. SHRIRAM, J.)

RAJU
DATTATRAYA
GAIKWAD
Digitally
signed by RAJU
DATTATRAYA
GAIKWAD
Date:
2023.12.13
15:03:51
+0530