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W.P. Nos. 8296, 8349, 8350 & 8351 /2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
26.06.2023	27.07.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

**W.P. NOS.8296, 8349, 8350 & 8351 OF 2020
AND
W.M.P. NOS.9944, 9945, 10697, 10019 & 10022 OF 2020**

D.V.Ravi .. Petitioner in WP 8296/2020

G.V.Raman .. Petitioner in WP 8349/2020

R.Sridhar .. Petitioner in WP 8350/2020

M/s.Shriram Transport Finance Co. Ltd.
(the Successor in interest of M/s.Shriram
Holdings (Madras) Pvt. Ltd.), rep. by its
Director & Authorised Signatory, D.V.Ravi
Mookambika Complex, 3rd Floor
No.4, Lady Desika Road
Mylapore, Chennai, Tamil Nadu 600 004. .. Petitioner in WP 8351/2020

- Vs -

1. The Directorate of Enforcement
Southern Regional Office
Government of India, Ministry of Finance
'Shastri Bhavan, III Block III Floor



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WEB COPY 26, Haddows Road, Chennai 600 006.

2. Reserve Bank of India
Chennai Regional Office
Foreign Exchange Department
Fort Glacis, Rajaji Salai
Chennai 600 001.

3. Department of Economic Affairs
Ministry of Finance, Government of India
North Block, New Delhi.

.. Respondents in all petitions

Writ Petitions filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari calling for the records of the 1st respondent in relation to the impugned order No.SDE/SRO/CEZO-I/02/2020 (SK) dated 04.03.2020 and quash the same as being arbitrary and illegal.

For Petitioners : Mr.K.G.Raghavan, SC, for
M/s. Preeti Mohan

For Respondents : Mr. R.Shankara Narayanan, ASG
Assisted by Mr. N.Ramesh, CGSC for R-1
Mr. C.Mohan for
M/s.King& Partridge for R-2
Mr. P.R.Pragadish for R-3

COMMON ORDER

Assailing the impugned order in and by which the 1st respondent had imposed a penalty on the Directors of the Company and also on the company,



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the present writ petitions have been filed questioning the said order on the main plea that it is beyond the jurisdiction of the 1st respondent.

2. The narrative of the case of the petitioners, shorn of unnecessary details, is culled out hereunder :-

Shriram Holdings (Madras) Pvt. Ltd. (for short 'SHMPL') was incorporated and functioned primarily as a holding company, which held shares and investments in various entities under the umbrella of the Shriram Group. This included *inter alia* shares held by SHMPL in other entities of the Shriram Investments Ltd. (for short 'SIL') and Shriram Overseas Finance Ltd. (for short 'SOFL'), which entities were Non-Banking Finance Companies. The merger of SIL and SOFL with STFCL was carried out through Scheme of Amalgamation on 25.11.2005 and 1.12.2006 with effect from 1.4.2005.

3. It is the further case of the petitioners that in the year 2005, SHMPL entered into an arrangement with an investment entity, viz., Newbridge India Investments II Ltd., and M/s.Newbridge India Investments III Ltd. (for short



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'Newbridge'), based in Mauritius. In view of the collaboration between Newbridge and SHMPL, investments to a total extent of Rs.600 Crores were to be made in SHMPL, SIL and SOFL. Newbridge, being an entity based outside India, to carry on business transactions with Newbridge, SHMPL ought to get the approval of the Government through Foreign Investment Promotion Board (for short 'FIPB') in terms of Section 2 (w) of Foreign Exchange Management Act, 1999 (for short 'FEMA, 1999') and Section 6 of FEMA, 1999 r/w the provisions of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000.

4. It is the further case of the petitioners that in compliance of the aforesaid provisions, Newbridge, vide application dated 28.9.2005, submitted with FIPB, sought approval for investments proposed to be made in India. The application was with a proposal that Newbridge would make investments in SHMPL and for SHMPL to in turn make downstream investments in SIL and SOFL, for the purpose of business of commercial vehicle loan financing. The approval sought was four proposed investment by Newbridge through



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subscription and/or subsequent acquisition of upto 74% of the equity shares of SHMPL.

5. It is the further averment of the petitioners that the application seeking approval for investment by Newbridge made with the 3rd respondent, viz., FIPB was granted on 27.12.2005. Vide the approval, permission was granted for investments to be made by Newbridge, which permitted foreign equity participation in foreign exchange upto 74% by way of investment through subscription and/or subsequent acquisition of upto 74% of the equity shares of SHMPL; consequential downstream investment by SHMPL in shares and warrants of each of SIL, STFCL and SOFL. Consequent upon the dilution, the holding of SHMPL in SIL, STFCL and SOFL reduced to 40%. The other terms and conditions on the basis of which approval was granted was also laid out by FIPB.

6. It is the further case of the petitioner that subsequent to the approval granted by FIPB, since SIL was merged with STFCL on the basis of the Scheme of Amalgamation approved by the High Court vide order dated



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25.11.2005 with effect from 1.4.2005, which fact was brought to the notice of FIPB, approval was sought for, for making downstream investments only in STFCL and SOFL and amendment to the original approval was sought for, which was approved vide amendment dated 31.01.2006 granting approval in respect of downstream investment by SHMPL in STFCL and SOFL. Pursuant to the grant of approval, inward remittances were received from Newbridge on various dates starting from 2.2.2006.

7. It is the further case of the petitioners that a total amount of Rs.546,68,36,249/- was received by way of inward remittances as evident from the compounding application submitted by SHMPL to the 2nd respondent dated 10.05.2013 and it reveals that the amount was well within the limit of Rs.600 Crores approved by FIPB.

8. It is the further averment of the petitioners that SHMPL was under the bona fide assumption that the issuance of warrants would be within the ambit of approval granted by FIPB, as permission was granted for investment through subscription and/or subsequent acquisition of upto 74% of the equity



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9. It is the further averment of the petitioners that upon receipt of foreign remittances, equity shares were issued, both directly and upon conversion of warrants. It is further averred by the petitioners that there was some unintentional omission on the part of SHMPL in complying with its reporting obligations as required under the Foreign Exchange Management Regulations with regard to filing of Form FC-GPR, but which was also duly complied with.

10. It is the further averment of the petitioners that the 2nd respondent, vide its communication dated 12.3.2013 informed STFCL, then SHMPL, with reference to the FC-GPR filed that though approval was obtained from FIPB dated 27.12.2005 as amended on 31.01.2006 for 74% equity participation by Newbridge in SHMPL and downstream investment by SHMPL in STFCL and SOFL, however, it was pointed out by the 2nd respondent that there was no approval for the issue of partly paid and unpaid optionally convertible warrants to Newbridge and accordingly advised SHMPL to obtain post facto approval from FIPB, Ministry of Commerce and Industry for the issue of partly paid and unpaid optionally convertible warrants.



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11. Pursuant to the aforesaid communication of the 2nd respondent, STFCL addressed a letter dated 14.3.2013 to the Under Secretary, FIPB, Department of Economic Affairs pointing out that approval was granted by FIPB for the purpose of investments to be made upto 74% and that Newbridge had made investments in 6 tranches from February, 2006 to June, 2009 upto 49% of equity capital of SHMPL and further pointing out the circumstances under which the amendment to the approval was sought for in view of the intervening merger of SIL with STFCL. It was also further brought to the notice of FIPB that warrants had been issued to Newbridge, which were subsequently converted into equity shares on 20.10.2006, 27.03.2007 and 31.07.2007 and informed that the entire warrants had been converted into equity shares in SHMPL within a period of 18 months from the date of allotment.

12. It is the further case of the petitioners that the investments made were consistent with FIPB approval as only 49% of the equity capital came to be held by Newbridge as against approved limit of 74% and the remittances were also within the limits prescribed. It is the further averment of the



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petitioners that the warrants issued were also only for the purpose of subsequently issuing equity shares, which issuance is below 74%. It is the further case of the petitioners that as the 2nd respondent had advised the STFCL to obtain post facto approval of FIPB, the letter is being addressed and it was further highlighted that there was no prohibition whatsoever on the issue of warrants under the FDI guidelines prevailing at the time of allotment in the year 2006. It is the further case of the petitioners that during October, 2010, a revised policy was framed allowing the issue of warrants with the approval of FIPB. Therefore, necessary approval was sought for by the petitioners from FIPB relating to the issue of partly paid and unpaid warrants to enable them to approach the 2nd respondent for obtaining an acknowledgment of FC-GPRs filed for allotment of shares.

13. It is the further case of the petitioners that FIPB, in response to the communication of the petitioners, had addressed its response dated 20.03.2013 to STFCL, wherein it has clearly spelt out the stand of FIPB that policy with regard to issue of warrants at the material time was not explicit and, the warrants in question having already been issued and converted into



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equity shares before the formulation of the policy, approval of FIPB is not required at this point of time.

14. It is the specific case of the petitioners that FIPB had taken a pertinent stand that there was no policy at the material point of time governing issue of warrants and further the warrants having already been issued and converted into equity shares, no approval of FIPB is required, which clearly shows that there was no irregularity or contravention on the part of STFCL or SHMPL.

15. Further to the above communication of FIPB, STFCL addressed the 2nd respondent to issue acknowledgement for the FC-GPRs on the basis of the communication of FIPB.

16. In response to the aforesaid communication, the 2nd respondent had issued a memorandum dated 26.4.2013 by pointing out that the FC-GPRs forms cannot be taken on record for certain contraventions of FEMA, 1999, and the contraventions pointed out by the 2nd respondent related to the delay



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in reporting the inward remittances; though remittances equivalent to Rs.546,68,36,249/- towards allotment of shares, the shares were allotted only to the tune of Rs.546,67,91,700/-, thereby the excess amount in retention of the company to the tune of Rs.44,549/- for which no shares have been allotted within 180 days from the date of receipt of inward remittances; and that FC-GPR form after the issue of shares was submitted with a delay. It is therefore the specific case of the petitioners that there has been no contravention of FEMA, 1999, insofar as relating to foreign exchange is concerned.

17. It is the further case of the petitioners identifying the aforesaid issues, the 2nd respondent held that they were contraventions of Paras 9 (1)(A), 8 and 9 (1)(b) of Schedule I to notification FEMA 20/2000-RB dated 3.5.2000 and that in terms of Section 15 of FEMA, any contravention u/s 13 may, on an application, be compounded and that the 2nd respondent had also issued detailed guidelines for compounding of contraventions under FEMA and, accordingly, the petitioners were informed to submit necessary applications for compounding the within a period of 45 days in line with the



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circulars. It is the specific case of the petitioners that it is not the case of the 2nd respondent at any point of time that issue of warrants were contrary to FEMA and the issues identified as contraventions were compoundable, which had been informed by the 2nd respondent to the petitioner. It is therefore the case of the petitioners that the above clearly shows that the 2nd respondent, basis the FIPB letter dated 20.03.2013, had come to the conclusion that there was no contravention of the provisions of FEMA and regulations made thereunder.

18. It is the further case of the petitioners that compounding application was filed on which the 2nd respondent passed an order dated 13.08.2013 in and by which the contraventions were compounded on payment of Rs.18,70,100/-, which was duly complied with by STFCL.

19. It is the case of the petitioners that when it was presumed that everything stood rested, out of the blue, after a period of six year from the compounding, a show cause notice dated 30.03.2019 was issued by the 1st respondent alleging that the company and the individuals, viz., the then



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Directors of the company, had allegedly contravened the provisions of Section 6 (3)(b) of FEMA, 1999 r/w Regulation 4 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, wherein it was alleged that the company could not have allotted share warrants when FIPB approvals related only to equity shares. It is the further case of the petitioner that the show cause notice had emanated on the basis of a complaint made by the Assistant Director of the 1st respondent. Incidentally, it is the case of the petitioner that way back in the year 2012, the 1st respondent had sought for information, the petitioners, vide their reply dated 7.8.2012 had responded to the 1st respondent providing all the details. Such being the case, keeping silent for more than six years, the present show cause notice has been issued based on a complaint by the Assistant Director of the 1st respondent.

20. It is the further case of the petitioners that though explanation was offered by the petitioners, however, the 1st respondent had rendered a finding, inspite of the materials and also the personal representation of the petitioners that the company and its Directors had contravened the provisions



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of FEMA, 1999 and the Regulations. It is therefore the averment of the petitioners that even at the time of issuance of show cause notice, pre-determination of the issue has been made by the 1st respondent with regard to the allegation of the contravention of the provisions of FEMA, 1999 by the petitioners, which is writ large in the order of the 1st respondent as all the materials placed before it had not been taken into consideration while adjudicating the issue.

21. It is the further case of the petitioners that though detailed reply showing the sequence of events that had taken place had been placed before the 1st respondent in the explanation submitted by the petitioners, however, without properly taking cognizance of the same, the impugned order has come to be passed. It is the further averment of the petitioners that the impugned order had been premised on the conclusion that the correspondences exchanged between the petitioners and respondents 2 and 3 would go to show that the permission granted was only with regard to issue of equity shares and not for the issue of warrants.



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22. It is the further averment of the petitioners that the findings of the 1st respondent in the impugned order that warrant as an instrument of FDI was recognized under FEMA, 1999 only by way of notification dated 30.06.2014 with effect from 8.7.2014 and, therefore, warrants issued on and after that date alone could be considered as capital instruments for the purpose of FEMA Regulations. It is the further finding of the 1st respondent that warrant was not a permitted FDI instrument till 7.7.2014 and that the Indian entities could only issue equity shares, preference shares and convertible debentures upto 7.7.2014 and further it has been held that only by its Press Note 9 dated 15.9.2015, FIPB had modified the FDI Policy of 2015 by allowing partly paid shares and warrants as eligible capital instruments and, therefore, any act done in the issuance of warrant prior to 7.7.2014, is a clear contravention of the provisions of FEMA and the Regulations.

23. It is the further contention of the petitioners that the finding with regard to FIPB being aware of warrants and did not ask the petitioners to compound as compounding under FEMA, 1999 is a voluntary process and, therefore, conclusion has been arrived at that the petitioners have



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contravened the provisions of Section 6 (3) (b) of FEMA, 1999 and Regulation 4 of the Regulations and, therefore, a penalty of Rs.5 Crores has been imposed on the Company and Rs.50 Lakhs has been imposed as penalty on each of the then Directors of the company. Aggrieved by the said order passed by the 1st respondent, the present petitions have been filed.

24. When the matter was taken up for hearing, learned counsel appearing for the 1st respondent questioned the maintainability of the present petition by submitting that as against the orders passed by the 1st respondent, remedy of appeal is available before the appellate authority, viz., Appellate Tribunal against the order passed by the Special Director (Appeals) and without exhausting the said remedy, the petitioners have rushed to this Court, which is *per se* impermissible.

25. In view of the above stand taken by the learned counsel for the 1st respondent, this Court, called upon the learned senior counsel for the petitioners to address this Court as to the maintainability of the writ petitions in the first instance and, thereafter, proceed with the other contentions, so



that this Court to decide the issue comprehensively, including on the question of maintainability.

26. In such circumstances, the learned senior counsel appearing for the petitioners addressed this Court on the question of maintainability of the writ petitions in addition to the other contentions.

27. Learned senior counsel appearing for the petitioners submitted that the mere availability of alternative remedy is not an absolute bar to the filing of a writ petition. It is the submission of the learned senior counsel that the rule relating to alternative remedy is only on account of efficacy and convenience rather than on law. It is the further submission of the learned senior counsel that the contention of the respondents, is more on the question of entertainability of the writ petition rather than on the question of maintainability of the writ petition.

28. Pointing to the aforesaid distinction between *entertainability* and *maintainability*, learned senior counsel, adverting to the decision of the Apex



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Court in ***Godrej Sara Lee Ltd. – Vs – Excise & Taxation Officer – cum – Assessing Authority &Ors. (2023 SCC OnLine SC 95)***, submitted that the power of the High Court under Article 226 to issue writs under the Constitution is plenary in nature and merely because an alternative remedy is available would not be a bar for the Court to reject the writ as not maintainable in a routine manner. It is the submission of the learned senior counsel that objection as to the maintainability goes to the root of the matter, which, if found to be of substance, would render the court incapable of adjudicating the *lis*, however, entertainability is entirely within the realm of discretion of the courts.

29. It is the further submission of the learned senior counsel submits that when the authority, who has passed the impugned order, has no jurisdiction to pass such order, the mere fact that an alternative remedy of appeal is available would not act as a bar in knocking the doors of this Court by invoking the writ jurisdiction. It is the submission of the learned senior counsel that when FIPB had already observed that no post facto approval was required to be granted as it would have no relevance in respect of the



warrants issued as the said warrants were already converted into equity shares, the 1st respondent, who is merely an enforcement authority had assumed to itself the power to determine with regard to approval required for the issue of warrants. When the policy making body, viz., FIPB, had clearly concluded there was no necessity for issuing post facto approval and the implementing body, viz., the RBI having considered the same and treated the matter as closed, the usurpation of the said powers by the 1st respondent is not only erroneous but is a clear case of exceeding the jurisdiction and, therefore, for want of jurisdiction, the impugned order suffers the vice of illegality and the same requires to be interfered with by this Court by invoking its extraordinary jurisdiction under Article 226 of the Constitution by entertaining the present writ petition, as the writ petition is thoroughly maintainable.

30. It is the further submission of the learned senior counsel that the alleged contravention is of the year 2005 for which show cause notice has been issued by the 1st respondent during March, 2019. The delay in taking action by issuing the show cause notice affects the substratum of the



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prosecution case and the present show cause notice cannot be allowed to survive.

31. It is the further submission of the learned senior counsel that the policy making body is the Government through the statutory functionaries like DIPP, FIPB, which decisions are implemented by the 2nd respondent, viz., Reserve Bank of India (for short 'RBI') by notifying and implementing the amendments to the Regulations. In the case on hand, FIPB has given clearance to the petitioners for the issuance of equity shares and insofar as the warrants issued, which were later converted into equity shares, IFPB has clearly opined that post facto approval was not required as the warrants were already converted into equity shares and that being the case, the 1st respondent cannot sit over the decision of IFPB to decide whether approval has been granted or not or whether IFPB had permitted the particular transaction.

32. It is the further submission of the learned senior counsel that the 1st respondent is only an enforcing authority under the FEMA, 1999 and RBI alone



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has the power to determine whether or not a particular transaction is to be permitted or not. Once RBI has taken a view, the 1st respondent has no authority to go behind the same. According to the learned senior counsel, this is a clear act of excess of jurisdiction, usurped by the 1st respondent, appropriating power on itself to determine whether approval ought to have been obtained by the petitioner. The order passed by the 1st respondent is nothing but a clear overreach into the domain of IFPB and RBI and when the said authorities have closed the issue, it does not lie within the jurisdiction of the 1st respondent to pass any order contrary to the order passed by the said statutory authorities.

33. It is the further submission of the learned senior counsel that the empowerment of RBI u/s 6 (3) of FEMA, clearly provides the RBI *to prohibit, restrict or regulate the matters*, which are set out in the said provision. RBI having not chosen to either prohibit, restrict or regulate the issue of warrants issued by the petitioners during the period 2006-2007, which later stood issued as equity shares, it clearly establish that neither the FDI Policy nor the FEMA Regulations either restricted or prohibited the issuance of warrants in



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any manner, which would also be evident from the position adopted by IFPB in its communication. Merely because at the material time, the issuance of warrants was not explicit in the said provision, the 1st respondent cannot traverse into the jurisdiction of the 3rd respondent and hold that approval ought to have been obtained by the petitioners.

33 (a). It is the further submission of the learned senior counsel that the subsequent adoption of policy to permit issuance of warrants clearly show that even during 2006-2007, there was no prohibition for issuance of warrants and only as an additive measure, the insertion was made with regard to issuance of warrants at a later point of time in the year 2014 by adopting a new policy and, therefore, the act of the 1st respondent in treating the issuance of warrants as a contravention of the provisions of FEMA, which neither prohibits or restricts issuance of warrants, and the consequential act of penalisation of the said act is wholly illegal, perverse, arbitrary and beyond the jurisdiction of the 1st respondent.



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33 (b). It is the further submission of the learned senior counsel that the request of the petitioners to FIPB for post facto approval, on the advice of RBI, was not negative by FIPB; rather FIPB had merely indicated that there was no necessity for grant of post facto approval, as the warrants, which stood issued had already been converted into equity shares. It is therefore the submission of the learned senior counsel that had the intention of IFPB that issuance of warrants was *per se* illegal, necessary action would have been taken by IFPB. But IFPB did not take any action, but merely held that the grant of approval did not arise because of the fact that the warrants stood already converted to equity shares. It is the further submission of the learned counsel that had the issuance of warrants been illegal, IFPB would not have held that approval was not necessary, as by no means, IFPB would have been a party to the alleged illegality. Therefore, the clear indication of IFPB that no approval was necessary as the warrants have been converted into equity shares clearly show that the act of the petitioners in issuing warrants is not illegal and even otherwise, IFPB would have granted post facto approval had the warrants not been converted into equity shares by then. Therefore, the act of the respondents in holding that no approval was granted by IFPB is clearly against



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the proceedings of IFPB and, therefore, the consequential order of the 1st respondent inflicting penalty on the petitioners for alleged contravention of the FEMA, 1999 is not only illegal, perverse and arbitrary, but it is also not supported by the provisions of FEMA, 1999 and, therefore, liable for interference.

34. It is the further submission of the learned senior counsel that pursuant to the orders of IFPB, which was placed before RBI by the petitioners for the purpose of satisfying the requirement of submission of the requisite forms relating to the issuance of equity shares, for the delayed submission, RBI had compounded the contravention relating to delay in submission of the requisite forms and also with regard to certain portion of the money, which was held by the petitioners, which was for the purpose of bank charges. Had RBI, being the custodian general of foreign exchange, was of the view that IFPB had not granted approval and that there was contravention of FEMA, necessarily RBI would have taken action and the fact that RBI had not taken any action on the petitioners is a clear indication that not only was RBI agreeable with the view of IFPB that the issuance of warrants were not in



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contravention of FEMA, 1999, but the petitioners having converted the warrants into equity shares by the time the matter was placed before IFPB for post facto approval, the necessity for post facto approval did not arise, as IFPB was also of the view that the issuance of warrants were not in contravention of FEMA, as there was no distinct prohibition under FEMA with regard to issuance of warrants. Therefore, the impugned orders passed by the 1st respondent is nothing but a clear overreach of the jurisdiction vested with it and, therefore, liable to be interfered with.

35. To substantiate the aforesaid contentions, learned senior counsel placed reliance on the following decisions :-

- i) *State of U.P. & Ors. – Vs – Indian Human Pipe Co. Ltd. (1977 (2) SCC 724);*
- ii) *Whirlpool Corporation – Vs – Registrar of Trademarks, Mumbai & Ors. (1998 (8) SCC 1);*
- iii) *Radha Krishnan Industries – Vs – State of HP & Ors. (2021 (6) SCC 771);*
- iv) *Godrej Sara Lee Ltd. – VS – Excise & Taxation Officer-cum-Assessing Authority & Ors. (2023 SCC OnLine SC 95);*
- v) *Anisminic Ltd. – Vs – Foreign Compensation Commission & Anr.*



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- vi) *Embassy Property Development Pvt. Ltd. – Vs – State of Karnataka & Ors.*
- vii) *LIC of India - Vs – Escorts Ltd. & Ors. (1986 (1) SCC 264);*
- viii) *Commissioner of Customs – Vs – Aditya Birla Nuvo Ltd. (2021 (378) ELT 42 (Kar.)*
- ix) *Titan Industries Ltd. – Vs – The Addl. Commissioner of Customs, Air Cargo Complex & Ors. (2003 (111) ECR 819);*
- x) *Titan Medical Systems (P) Ltd. – Vs – Collector of Customs, New Delhi (2003 (9) SCC 133);*
- xi) *Autolite (India) Ltd. – Vs – Union of India (UOI) & Ors. (2003 (5) BomCR 92);*
- xii) *Cannon India Pvt. Ltd. – Vs – Commissioner of Customs (2021 SCC OnLine SC 200);*
- xiii) *Indibly Creative Pvt. Ltd. & Ors. – Vs – Government of West Bengal & Ors. (2020 (12) SCC 436);*
- xiv) *SEBI – Vs – Sunil Krishna Khaitan & Ors. (2023 (2) SCC 643); and*
- xv) *R.M.Mehrotra – Vs – Enforcement Directorate & Ors. (MANU/DE/0706/2008)*

36. Learned Addl. Solicitor General appearing for the 1st respondent, while fairly conceded that there is no revenue loss to the Government on account of the issuance of share warrants by the petitioners, which have



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subsequently been converted into equity shares, however, submitted that the act of the petitioners being in contravention of the provisions of FEMA, 1999, the 1st respondent has jurisdiction to take action and, therefore, the issuance of show cause notice cannot be said to be without jurisdiction.

37. It is the further submission of the learned Addl. Solicitor General that the approval granted by FIPB was only in relation to the issuance of equity shares and it does not cover issuance of share warrants. In fact, the approval letter of FIPB clearly specifies that the petitioners have to obtain requisite clearances, if the investments are in any way in violation of the provisions of FEMA, 1999.

38. It is the further submission of the learned Addl. Solicitor General that the failure of the petitioners to comply with reporting obligations under FEMA, as it is the duty cast upon the petitioners to file requisite forms setting out the compliance with all the applicable laws along with requisite certificates. Drawing the attention of this Court to the communication of RBI dated 12.3.2013, learned Addl. Solicitor General submits that the



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communication of RBI clearly reveals that the approval granted by FIPB was only in relation to equity shares and there was no approval granted in respect of partly paid and partly unpaid optionally convertible warrants and, therefore, SHMPL was directed to approach FIPB to obtain post facto approval. It is therefore the submission of the learned Addl. Solicitor General that there was no permission for the petitioners to issue warrants and such an act is in gross violation of the laws under FEMA.

39. It is the further submission of the learned Addl. Solicitor General that even the communication of FIPB dated 20.03.2013 reveals that the approval granted in 2005 did not cover the issue of warrants and since the warrants issued had come to be converted to equity shares, any approval to be granted would be only redundant.

40. It is the further submissions of the learned Addl. Solicitor General that the contraventions pointed out by RBI resulting in compounding by way of application filed by the petitioners, would only relate to reporting obligations with regard to the issue of shares to a person resident outside



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India and would no way be termed to be a matter attaining finality by absolving the petitioners of the contravention.

41. It is the further submission of the learned Addl. Solicitor General that only in the year 2014, RBI, by way of notification dated 30.06.2014 made amendments to Foreign Exchange Management (Transfer of Issue of Security by a Person Resident Outside India) Regulations, 2000, which amendment, brought within its inclusion of the term 'Warrant', share warrants as well, which could be treated as security within the meaning of Section 2 (za) of FEMA, 1999.

42. It is the further submission of the learned Addl. Solicitor General that in response to the show cause notice issued by the 1st respondent, explanation was submitted by the petitioners in which it has been stated that FDI policy of 2010 mandated that prior approval was required for issuance of warrants by Indian Company to residents outside India and prior to that, there was no prohibition. Further, it was stated by the petitioners that FIPB had in its response to the post facto approval clarified that no permission of FIPB was



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required and, therefore, the act of the 1st respondent is in derogation to the stand taken by FIPB and the 1st respondent has no jurisdiction to issue the show cause notice.

43. It is the further submission of the learned Addl. Solicitor General that in consideration of the explanation of the petitioners, the impugned order had come to be passed, for the findings rendered therein and penalty was imposed on the petitioners. It is the further submission of the learned Addl. Solicitor General that inspite of the fact that a remedy of appeal is available against the said order, without resorting to the said remedy, the petitioners have rushed to this Court and, therefore, the present petition is not maintainable.

44. Referring to Section 2 (27) of the Companies Act, 1956, it is the submission of the learned Addl. Solicitor General that a 'member' in relation to a company does not include a bearer of a share-warrant of the company issued in pursuance of Section 114. It is therefore the submission of the learned Addl. Solicitor General that individuals, who hold share-warrants



would not be construed as members of the company until such time the warrants are converted to share. Permission given by FIPB was only for issuance of fully paid-up shares and without approval of the Central Government, share warrants to bearers outside India could not be issued and in the absence of any permission from RBI, and also the fact that the concept of warrants not being available under FEMA prior to 2014, the mere subsequent conversion of share warrants into equity shares would squarely be a contravention of the provisions of FEMA, 1999.

45. It is the further submission on behalf of the 1st respondent that the stand of the petitioners that there was no restriction in the issuance of share warrants prior to 2010, as there was no express prohibition is wholly misconceived, as Section 4 of the FEMA, 1999, creates a bar on any entity residing in India to acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. Therefore, unless specific permission is granted under the provisions of FEMA or by authority competent to give such permission, acquisition or possession of foreign exchange or security is prohibited. Therefore, any act by the



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petitioners prior to the inclusion of warrants in the year 2014, holding of foreign funds or securities would not escape the rigours of Section 4 of FEMA. It is the further submission of the learned Addl. Solicitor General that exception having been carved out only in the year 2014, any act perpetrated in the year 2005 in contravention of the provisions of FEMA, it is clear **whatever not permitted is prohibited**. In the absence of any permission granted to the petitioners, the natural corollary would be that there stood a prohibition for the petitioners to issue share warrants and, therefore, there is a clear contravention of the provisions of FEMA.

46. It is the further submission of the learned Addl. Solicitor General that the contention of the petitioners that Section 6 (3)(b) having stood repealed with effect from 15.10.2019 and, therefore, no action can be taken as against the petitioners for any alleged violation is wholly erroneous as the show cause notice was issued on 30.3.2019 when the relevant provision was available under the FEMA and the subsequent repeal of the said provision would not bar the continuance of the legal proceedings, which had been



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initiated prior to the repealment of the said provision. In this regard, the decision in ***State of Punjab – Vs – Mohar Singh (1955 (1) SCR 893)***.

47. It is the further submission of the learned Addl. Solicitor General that express omission would also covered u/s 6 of the General Clauses Act in respect of the word “*Omission*” contained in FEMA and in support of the aforesaid submission, reliance is placed on the decision of the Apex Court in ***Fibre Boards Pvt. Ltd., - Vs – Commissioner of Income Tax, Bangalore (2015 (10) SCC 333)***.

48. However, it is the submission of the learned Addl. Solicitor General that the prosecution taken up by the 1st respondent being relatable to a contravention, which was very much available in FEMA, 1999, the date on which the offence was committed is relevant and if the said act constitutes an offence, the subsequent amendment or repealment would not render the said act as not an offence. Therefore, the prosecution initiated by the 1st respondent against the petitioners for contraventions of FEMA, 1999 is wholly maintainable and cannot be said to be without jurisdiction.



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49. It is the further submission of the learned Addl. Solicitor General that Section 37 of the FEMA, 1999, empowers the 1st respondent to initiate search and seizure in respect of the contraventions contained u/s 13 of FEMA, 1999. Therefore, the 1st respondent is infested with power and authority to initiate action for any contraventions of the provisions of FEMA, 1999 and it has not acted in excess of its jurisdiction. It is the further submission of the learned Addl. Solicitor General that a writ under Article 226 is not maintainable, as the issue relating to issuance of warrants and its permissibility at the relevant point of time are disputed questions, which cannot be decided by this Court. Therefore, the present petitions are not maintainable and the petitioners are to be relegated to approach the appropriate forum for redressing their grievances. Accordingly he prays for dismissal of the present petitions.

50. Learned Addl. Solicitor General placed reliance on the following decisions :-

i) State of Pubjab – Vs – Mohar Singh (1955 (1) SCR 893; and



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*ii) Fibre Boards Pvt. Ltd., Bangalore – Vs – Commissioner of
Income Tax, Bangalore (2015 (10) SCC 333)*

51. This Court gave its anxious consideration to the erudite exposition of the issue advanced by the learned senior counsel appearing on either side with particular reference to the decisions of the Apex Court and also the relevant provisions of law.

52. The first and foremost issue that requires the deliberation of this Court is with reference to the maintainability of a writ petition, more particularly when there is an appeal remedy available under FEMA, 1999.

53 The power of the High Court to entertain petitions under Article 226 of the Constitution does not stand curbed inspite of availability of alternative remedy. It has been the consistent view of the Courts that the power of the High Court under Article 226 is wide and any attempt to give a narrow construction would militate the spirit of the Constitution.



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54. In **Whirlpool Corporation – Vs – Registrar of Trademarks, Mumbai**

& Ors. (1998 (8) SCC 1), the Apex Court has detailed the circumstances under which, inspite of the availability of an alternative remedy, a writ is maintainable. The relevant portion of the said decision is quoted hereunder :-

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution

16. Rashid Ahmad vs. Municipal Board, kairana, AIR 1960 SC 163, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting Writs. This was followed by another Rashid case, namely, K.S.Rashid & Son Vs. The Income Tax Investigation Commissioner AIR 1954 SC 207 which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that Writ Petition



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under Article 226 could still be entertained in exceptional circumstances.

17. A Specific and clear rule was laid down in State of U.P. vs. Mohd. Nooh 1958 SCR 595 = AIR 1958 SC 86, as under :

"But this rule requiring the exhaustion of statutory remedies before the Writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V.Venkateswaran, Collector of Customs. [Bombay vs Ramchand Sobhraj Wadhwani & Anr.](#) AIR 1961 SC 1506 and was affirmed and followed in the following words "The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper



exercise of the discretion of the Court, and that in a matter which is thus per-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court".

19. Another Constitution Bench decision in *Calcutta Discount co.Ltd. vs Income Tax Officer Companies Distt.* 1 AIR 1961 SC 372 laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment. the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction under 8.34 I.T.Act".

20. *Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a*



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case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.”

55. Reiterating the aforesaid proposition, a Division Bench of the Delhi High Court in ***R.M.Mehrotra – Vs – Enforcement Directorate & Ors.*** (***MANU/DE/0706/2008***), held as under :-

“12. The power of the High Courts under Article 226 is indeed wide and any attempt to place a narrow construction upon its jurisdiction would militate the spirit of the Constitution itself. As was observed in Dwarkanath v. ITO Article 226 "ex facie confers a wide power on the High Courts to reach injustice wherever it is found". It is true that while exercising its power of review under Article 226 the Courts have a wide discretion, and would ordinarily, where alternative remedies exist, desist from exercising using them. But that cannot amount to a mechanical rejection of the power itself in the face of an alternative remedy. In State of Tripura v. Manoranjan Chakraborty the Supreme Court, speaking about the plenary nature of the jurisdiction under Article 226, stated as follows:

As we see it, the point in issue is no longer res integra . This Court in Gujarat Agro Industries Co. Ltd.



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v. Municipal Corporation of the City of Ahmedabad dealing with an analogous provision, where discretion to waive pre-deposit was limited only to the extent of 25 per cent of the tax, was upheld by this Court. To the same effect is the decision of this Court in Shyam Kishore v. Municipal Corporation of Delhi.

4. For the reasons contained in the said decisions, we hold that the impugned provisions are valid. It is, of course, clear that if gross injustice is done and it can be shown that for good reason the court should interfere, then notwithstanding the alternative remedy which may be available by way of an appeal under Section 20 or revision under Section 21, a writ court can in an appropriate case exercise its jurisdiction to do substantive justice. Normally of course the provisions of the Act would have to be complied with, but the availability of the writ jurisdiction should dispel any doubt which a citizen has....

Therefore, the contention of the Respondents that the Court must not exercise its jurisdiction under Article 226 because of the existence of an alternative remedy cannot be accepted. The impugned notice was issued way back in 1994, and after a lapse of fourteen years it would unjust for this Court to direct the Petitioners to take recourse to the appellate procedures under the relevant enactments."



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56. Recently, the Apex Court had occasion to reiterate the aforesaid position in the decision in *Godrej Sara Lee case (supra)*, wherein it has been held as under :-

“4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as “not maintainable” merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has



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not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition "not maintainable". In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication.



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On the other hand, the question of “entertainability” is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (State of Uttar Pradesh vs. Mohd. Nooh) had the occasion to observe as follows:

“10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury’s Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in



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exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

***"

6. At the end of the last century, this Court in paragraph 15 of its decision reported in (1998) 8 SCC 1 ([Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others](#)) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:

- (i) where the writ petition seeks enforcement of any of the fundamental rights;
- (ii) where there is violation of principles of natural justice;
- (iii) where the order or the proceedings are wholly without jurisdiction; or
- (iv) where the vires of an Act is challenged.



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(Emphasis Supplied)

57. From the above, it unambiguously transpires that the availability of alternative remedy does not operate as an absolute bar to the maintainability of a writ petition and it is only a rule of policy, convenience and discretion rather than a rule of law. The Apex Court has culled out the circumstances in which a writ court would be justified in entertaining a writ petition inspite of the availability of alternative remedy. Therefore, in view of the ratio laid down on the issue relating to maintainability of a writ petition *de hors* the availability of alternative remedy, this Court holds that there would be no embargo on the petitioners filing the present petitions before this Court.

58. Once this Court has held that the writ petitions could be filed before this Court even when alternative remedy of appeal is available, the next issue that requires the determination of this Court is the entertainability of the writ petitions by this Court. As held by the Apex Court in *Godrej Sara Lee case (supra)*, the mere maintainability of a writ would not always lead to entertainability of the writ as entertaining a writ is within the realm of



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discretion of the High Courts as writ remedy being discretionary. In this scenario, it is necessary for this Court to consider whether the writ could be entertained, as the main ground of attack is the jurisdiction of the 1st respondent to pass the impugned order.

59. The main ground canvassed by the petitioner with regard to ouster of jurisdiction of the 1st respondent, in respect of the issue on hand is the fact that the 1st respondent is merely an enforcer and not the custodian and in respect of any regulation with regard to conservation of foreign exchange, it is only the RBI, which has the authority to grant permission or otherwise. However, to the contrary, it is the stand of the 1st respondent that it has jurisdiction to deal with the issue, as, as an enforcer, the 1st respondent is to see whether the petitioners have obtained the requisite permission with regard to involving in the transaction of foreign exchange with an off-shore entity.

60. There could be no contra opinion that RBI is the authority vested with the powers relating to the regulation and conservation of foreign



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exchange and, in fact, in the words of the Apex Court in *LIC's case (supra)*, RBI is the custodian-general of foreign exchange. Necessarily any permission with regard to inflow or outflow of money, viz., foreign exchange should be upon necessary grant of approval by the RBI. However, only insofar as grant of permission for receiving foreign exchange, approval of RBI is necessary. Insofar as enforcement with regard to the manner in which the foreign exchange is being handled, viz., whether it is within the four corners of the permission granted by the RBI or the appropriate authority of the Central Government, the 1st respondent has the powers to investigate into the issue. In the aforesaid backdrop, in view of the aforesaid issue, definitely these writ petitions are entertainable so as to find out whether the act of the 1st respondent in passing the impugned order is within the provisions of FEMA, 1999.

61. It is evidenced from the materials available on record that information was called for from the petitioners with regard to the receipt of foreign exchange way back in the year 2012 and, thereafter, things were at rest until a complaint was lodged by the Assistant Director, resulting in the



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issuance of show cause notice dated 30.03.2019 u/s 6 (3) (b) of FEMA, 1999 by the 1st respondent. The 1st respondent had, even in the year 2012, called upon certain information from the petitioners, which was duly given by the petitioners on 7.8.2012. However, no action was taken by the 1st respondent on the said response and out of the blue, the show cause notice had come to be issued after about seven years and the delay in the issuance of show cause notice vitiates the prosecution, is an ancillary contention advanced on behalf of the petitioners. On the above facts, this Court is called upon to adjudicate the correctness of the show cause notice and the jurisdiction of the 1st respondent to issue the same resulting in the consequential impugned order.

62. In the light of the aforestated facts and the materials as it transpires with regard to the approval for receipt of foreign exchange, action had been taken by the 1st respondent u/s 6 (3) (b) of FEMA, 1999. For better appreciation of the issue, Section 6 (3) (b) is quoted hereunder :-

"6. Capital Account Transactions.- (1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

* * * * *



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(3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations prohibit, restrict or regulate the following :-

(a) transfer or issue of any foreign security by a person resident in India;

(b) transfer or issue of any security by a person resident outside India;

* * * * *

63. When the show cause notice was issued on 30.03.2019, Section 6 (3) (b) was available in the statute. However, subsequently, the said provision has been repealed with effect from 15.10.2019 and no longer subsists. However, the present impugned order had come to be passed on 04.03.2020 after repeal of the provision and, therefore, according to the petitioners, the order passed by the 1st respondent is without jurisdiction.

64. However, in this regard, learned Addl. Solicitor General placed reliance on the decision of the Apex Court in ***State of Punjab – Vs – Mohar Singh (1955 (1) SCR 893 :: AIR 1955 SC 84)***, wherein the effect of repealment and order passed subsequent thereto has been dealt with. The relevant portion of the said decision is quoted hereunder :-



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“The High Court, in support of the view that it took, placed great reliance upon certain observations of Sulaiman C.J. in Danmal Parshotamdas v. Baburam. The question raised in that case was whether a suit by an unregistered firm against a third party, after coming into force of section 69 of the Partnership Act, would be barred by that section in spite of the saving clause contained in section 74(b) of the Act. The Chief Justice felt some doubts on the point and was inclined to hold that section 74(b) would operate to save the suit although the right sought to be enforced by it had accrued prior to the commencement of the Act; but eventually he agreed with his colleague and held that section 69 would bar the suit. While discussing the provision of section 74(2) of the Partnership Act, in course of his judgment, the learned Chief Justice referred by way of analogy to section 6(e) of the General Clauses Act and observed as follows:

“It seems that section 6(e) would apply to those cases only where a previous law has been simply repealed and there is no fresh legislation to take its place. Where an old law has been merely repealed, then the repeal would not affect any previous right acquired nor would it even affect a suit instituted subsequently in respect of a right, previously so acquired. But where there is a new law which not only repeals the old law, but is substituted in place of the old law, section 6(e) of the General Clauses Act is not



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applicable, and we would have to fall back on the provisions of the new Act itself.”

These observations could not undoubtedly rank higher than mere obiter dictum for they were not at all necessary for purposes of the case, though undoubtedly they are entitled to great respect. In agreement with this dictum of Sulaiman C.J. the High Court of Punjab, in its judgment in the present case, has observed that where there is a simple repeal and the Legislature has either not given its thought to the matter of prosecuting old offenders, or a provision dealing with that question has been inadvertently omitted, section 6 of the General Clauses Act will undoubtedly be attracted. But no such inadvertence can be presumed where there has been a fresh legislation on the subject and if the new Act does not deal with the matter, it may be presumed that the Legislature did not deem it fit to keep alive the liability incurred under the old Act. In our opinion the approach of the High Court to the question is not quite correct. Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The



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line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

65. The observations in respect of Section 6 (e) of the General Clauses Act in the aforesaid decision would squarely stand attracted to the case on hand. In the case on hand, the repealment of Section 6 (3) was not followed up with a fresh legislation. In the absence of the old law being substituted with a new law, the provisions of the General Clauses Act would not apply.



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66. However, it is to be pointed out that when Section 6 (3) (b) was available in the statute, the show cause notice has come to be issued, which is very well within the power and jurisdiction of the 1st respondent and, therefore, necessarily, the repealment of Section 6 (3) (b) would not stop the 1st respondent from proceeding with the due process of law subsequent to the issuance of the show cause notice, so long as there is no repugnancy with the other provisions of FEMA, 1999. Therefore, the act of the 1st respondent in following up on the show cause notice even after repealment of Section 6 (3) cannot bar the 1st respondent from proceeding further on the show cause notice.

67. However, it is to be pointed out that the task of enforcement alone is left to the 1st respondent and it is only the 2nd who is empowered to decide on the permission that may be granted. In the case on hand, the 3rd respondent is entrusted with the task of granting approval for receipt of foreign exchange. Now the question that looms large is whether the 1st respondent can decide whether approval has been granted to the petitioners or not for a particular act, in the facts and circumstances of the case. To



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address the aforesaid issue, it becomes necessary for this Court to turn back to certain communications between the petitioners and respondents 2 and 3, which would give a broad picture with regard to the issue of approval claimed to have been granted by the 3rd respondent.

68. Though the facts with regard to the present issue have been spelt out in extenso in the earlier portion of this order, however, in order to holistically consider the issue in the light of the various approvals which have been pressed into service by the petitioners permitting the receipt of foreign exchange, the compounding permitted by the RBI and the allegation of the 1st respondent that the money received in foreign exchange has not been utilised as per the approval granted by FIPB, the crux of the whole issue requires to be looked into.

69. Necessary permission was solicited from FIPB for the purpose of receiving foreign exchange to the extent of about Rs.600 Crores by SHMPL from the off-shore entity from Mauritius, viz., Newbridge. Pursuant to the above, approval sought for was granted by FIPB for subscription of upto 74%



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of equity share capital so as to enable SHMPL to make further downstream investments into STFCL, vide its communication dated 27.12.2005.

70. Pursuant to the above, foreign investments were received by the petitioners and the details of the amounts received have been given by the petitioner in its affidavit and for better appreciation, the same is quoted hereunder :-

Sl.No.	Date of Allotment	Details of Instrument as contained in FC-GRP	No. of instruments	Date of remittance	Amount Received as per FIRC. In INR
1	02.02.2006	Equity shares	6868696	02.02.2006	324,80,00,000/-
2	02.02.2006	Warrants	4166171	05.10.2007	6,24,93,000/-
3	20.10.2006	Warrants	4166171	22.03.2007	91,72,79,978/-
4	27.03.2007	Warrants	3057595	26.07.2007	26,88,53,271/-
5	31.07.2007	Warrants	896177	11.12.2007	11,76,10,000/-
6	12.12.2007	Equity shares	392000	10.06.2009	85,26,00,000/-
7	12.06.2009	Equity shares	2842000		
Total amount					546,68,36,249/-

71. There is no quarrel with regard to the foreign exchange received by the petitioners. In fact, the foreign exchange received by the petitioners is lower than the amount for which approval has been granted by FIPB. Thereafter, STFCL has issued equity shares to Newbridge to the extent of



about Rs.300 Crores, which is also not in dispute. However, to the extent of about Rs.243 Crores, STFCL had, initially, issued share warrants.

72. In the meantime, since there was some typographical errors in the number of equity shares that were to be issued to Newbridge, necessary amendment application was filed with FIPB and amendment was also ordered as per order dated 31.01.2006. In respect of the receipt of foreign investments and the manner of its utilisation, the petitioners were to file necessary report in form FC-GPR (Foreign Collaboration – General Permission Route) before the RBI on which there was some delay for which compounding was resorted to and the petitioners have also paid the penalty towards compounding.

73. However, at the time of compounding, basing the information provided in the forms submitted by the petitioners, the 2nd respondent, viz., RBI, had referred to two sets of warrants issued by SHMPL to Newbridge observed that the approval of FIPB dated 27.12.2005 as amended on 31.01.2006 was only for 74% equity participation by Newbridge in SHMPL and



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downstream investment by SHMPL in STFCL and SOFL and there was no implicit approval for the issue of partly paid and unpaid optionally convertible warrants to Newbridge and, therefore, the petitioners were advised to obtain *post facto* approval from FIPB in respect of the partly paid and unpaid optionally convertible warrants.

74. Pursuant thereto, the petitioners addressed their communication dated 14.3.2013 to FIPB seeking *post facto* approval by pointing out that approval granted by FIPB to investments to be made upto 74% of which investments have been made only to the tune of 49% of the equity capital, which is within the approved limit and, therefore, sought for *post facto* approval with regard to the share warrants issued by further pointing out that the said share warrants, which were issued, were already converted to equity shares within a period of 18 months from the date of allotment.

75. In response to the aforesaid communication, FIPB, vide its response dated 20.03.2013 had replied that "*the policy regarding issue of warrants at the material time was not explicit. Since the warrants in question have*



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already been converted even before the current policy was formulated, as such approval of FIPB s not required at this point of time.”

76. Pursuant to the above communication of FIPB, the 2nd respondent, vide their memorandum dated 26.4.2013, with regard to the contraventions relating to the submission of forms FC-GPR, pointed out the contraventions of Paras 9 (1)(A), 8 and 9 (1)(b) of Schedule I to Notification FEMA 20/2000-RB dated 3.5.2000 and on the application of the petitioners u/s 13, had compounded the contraventions on payment of penalty. It is to be pointed out that the contraventions related to the belated submission of form FC-GPR and holding of amount to the tune of Rs.44,459/- by the petitioners. Nowhere, the 2nd respondent had come to the conclusion that the issue of warrants were without the approval of FIPB nor it was held that the issue of warrants were prohibited and, therefore, the act of the petitioners were in contravention of FEMA, 1999.

77. In the above backdrop of facts, this Court has to ascertain whether the issuance of share warrants was prohibited at the relevant point of time



and without approval of FIPB issuance of share warrants would be a contravention of Section 6 (3) (b) of FEMA, 1999, warranting the 1st respondent to proceed with the issuance of show cause notice and resultant impugned order.

78. To answer this issue, it would be apposite for this Court to refer to the decision of the Apex Court in *LIC's case (supra)*, wherein the Apex Court, on the powers of RBI vis-a-vis the Enforcement Directorate has observed thus:-

"84. On an overall view of the several statutory provisions and judicial precedents to which we have referred we find that a shareholder has an undoubted interest in a Company, an interest which is represented by his share-holding. Share is movable property, with all the attributes of such property. The rights of a shareholders are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the Company in the shape of dividends; (iv) to apply to the Court for relief in the case of oppression; (v) to apply to the Court for relief in the case of mismanagement; (vi) to apply to the Court for winding up of the Company; (vii) to share in the surplus on winding up. A share is transferable but



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while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between the transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. The relationship of trustee and 'cestui que trust' is established and the transferor is bound to comply with all the reasonable directions that the transferee may give. He also becomes a trustee of the dividends as also of the right to vote. The right of the transferee 'to get on the register' must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest 'to get on the register'. Where the transfer is regulated by a statute, as in the case of a transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any,



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prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the right to "get on the register" unless and until the requisite permission is obtained. A transferee who has the right to get on the register, where no permission is required or where permission has been obtained, may ask the company to register the transfer and the company who is so asked to register the transfer of shares may not refuse to register the transfer except for a bona fide reason, neither arbitrarily nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of the shareholder. On the other hand, where, for instance, the requisite permission under the FERA is not obtained, it is open to the company and, indeed, it is bound to refuse to register the transfer of shares of an Indian company in favour of a non-resident. But once permission is obtained, whether before or after the purchase of the shares, the company cannot, thereafter, refuse to register the transfer of shares. Nor is it open to the company or any other authority or individual to take upon itself or himself, thereafter, the task of deciding whether the permission was rightly granted by the Reserve Bank of India. The provisions of the Foreign Exchange Regulation Act are so structured and woven as to make it clear that it is for the Reserve Bank of India alone to consider whether the requirements of the provisions of the Foreign Exchange Regulation Act and the various rules, directions and



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orders from time to time have been fulfilled and whether permission should be granted or not. The consequences of non-compliance with the provisions of the Act and the rules, orders and directions issued under the Act are mentioned in sees. 48, 50, 56 and 63 of the Act. There is no provision of the Act which enables an individual or authority functioning outside the Act to determine for his own or its own purpose whether the Reserve Bank was right or wrong in granting permission under Section 29(1) of the Act. As we said earlier, under the scheme of the Act, it is the Reserve Bank of India that is constituted and entrusted with the task of regulating and conserving foreign exchange. If one may use such an expression, it is the 'custodian-general' of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the Reserve Bank of India and the Reserve Bank of India alone that has to decide whether permission may or may not be granted under Section 29(1) of the Act. The Act makes it its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally. We do not, however, rule out the limited class of cases where the grant of permission by the Reserve Bank of India may be questioned, by an interested party in a proceeding under



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Article 226 of the Constitution, on the ground that it was mala fide or that there was no application of the mind or that it was opposed to the national interest as contemplated by the Act, being in contravention of the provisions of the Act and the rules, orders and directions issued under the Act. Once permission is granted by the Reserve Bank of India, ordinarily it is not open to anyone to go behind the permission and seek to question it. It is certainly not open to a company whose shares have been purchased by a non-resident company to refuse to register the shares even after permission is obtained from the Reserve Bank of India on the ground that permission ought not to have been granted under the FERA. It is necessary to remind ourselves that the permission contemplated by Section 29(1) of the Foreign Exchange Regulation Act is neither intended to nor does it impinge in any manner or any legal right of the company or any of its shareholders. Conversely neither the company nor any of its shareholders is clothed with any special right to question any such permission.”

79. From the above, it clearly transpires without any semblance of doubt that the custodian general of foreign exchange is the Reserve Bank of



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India and any permission with regard to inflow of foreign exchange would definitely have to have the permission of the Reserve Bank of India.

80. In the case on hand, the permission is for receiving foreign exchange in lieu of issuance of equity shares and for the said purpose, the appropriate authority to grant permission is FIPB. Newbridge, the foreign investor, intended to invest in equity shares in the petitioner-company, with further downstream investment in the sister concern of the petitioner company for which necessary approval was granted by FIPB. In fact, the 1st respondent is also not disputing the approval granted to the petitioners for issuance of equity shares. However, the show cause notice was issued only on account of the petitioner company issuing share warrants, which was later converted into equity shares.

81. The sequence of events for obtaining approval have already been extracted above. In this regard, the initial approval was granted by FIPB on 27.12.2005. Thereafter, as there was certain errors in the number of equity shares, further approval was solicited, which was also granted by FIPB on



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31.01.2006. There is no quarrel that equity shares were issued by the petitioner company in favour of Newbridge. However, for an amount of about Rs.243 Crores, share warrants were issued, which was subsequently converted into equity shares.

82. The interregnum infraction in issuance of share warrants and subsequent conversion into equity shares invited the investigation of the 1st respondent, resulting in the show cause notice and the subsequent impugned order.

83. It has been the ratio of the Supreme Court even in *LIC case (supra)* that RBI is the custodian general of foreign exchange. In the present case, the foreign investment was approved by FIPB. However, with respect to the issuance of warrants, even the 2nd respondent had called upon the petitioners to obtain *post facto* approval of FIPB. As aforesaid, the 2nd respondent being the custodian general of foreign exchange, had it felt that Section 6 (3) (b) was infringed by the petitioners as permission was explicitly required for issuance of warrants, definitely the 2nd respondent would not have relegated the



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petitioners to go before FIPB and obtain *post facto* approval. This clearly shows that the 2nd respondent was of the view that there was no prohibition u/s 6 (3) (b) on issuance of warrants. However, as the 2nd respondent felt that approval was initially granted by FIPB, an explicit *post facto* approval was directed to be obtained from FIPB.

84. Consequent upon the direction of the 2nd respondent, the petitioners have approached the 3rd respondent, viz., FIPB seeking *post facto* approval with regard to the warrants issued, which were converted to equity shares, by the time *post facto* approval was sought. On the aforesaid communication, FIPB had deliberated the matter and the following order was passed :-

“the policy regarding issue of warrants at the material time was not explicit. Since the warrants in question have already been converted even before the current policy was formulated, as such approval of FIPB is not required at this point of time.”

85. A careful perusal of the aforesaid communication reveals that FIPB had nowhere said that the issuance of warrants at the point of time when it



was issued by the petitioner company required permission. In fact, the order clearly spells out that there was no explicit policy at the material point of time with regard to issuance of warrants. The above stand of FIPB unequivocally speaks to the effect that there was no explicit policy with regard to warrants, which effectively could only mean that there was no prohibition on issuance of warrants. The further stand of FIPB that no *post facto* approval is required as the warrants have since been converted into equity shares should not be read in isolation and it should be read in conjunction with the earlier part of the order, where FIPB has intimated that there was no explicit policy with regard to issuance of warrants at the relevant point of time.

86. Omission to spell out warrants to be included in the term 'security' as defined u/s 2 (za) of FEMA cannot be taken mean that issuance of warrants is prohibited. Prohibition should be clearly spelt out either explicitly or even impliedly. There is neither an implicit nor an explicit prohibition. The mere omission of warrants, therefore, cannot be construed that it is a prohibited instrument and, therefore, it is a contravention of Section 6 (3) (b) of FEMA, 1999.



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87. Had FIPB was of the view that there was a clear prohibition, even impliedly, the tenor of the order of FIPB would have been in a different form. However, FIPB had spoken out that there was no explicit material denoting prohibition and, therefore, the conversion into equity shares already having taken place, there was no requirement for *post facto* approval. Even if FIPB had felt that a permission was required, though there was no prohibition for issuance of warrants, FIPB would have accorded *post facto* approval. However, the fact that FIPB has made it clear that no *post facto* approval was required clearly shows that there was no prohibition in the issuance of warrants at the material point of time.

88. Further, one other aspect, which also gives more impetus to the case of the petitioners is sub-section (3) of Section 6, which is as under :-

“(3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations prohibit, restrict or regulate the following.”



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89. As on the relevant date when the share warrants were issued, there was no regulations bny the 2nd respondent prohibiting the issue of share warrants, which was the only reason the 2nd respondent had directed the petitioners to approach FIPB to obtain *post facto* approval. If really there were any regulations, or even implied prohibition in the issuance of share warrants, RBI being the custodian general of foreign exchange, would definitely have called upon the explanation of the petitioners. However, without calling for any explanation from the petitioners, as there was no prohibition from their end, the 2nd respondent merely relegated the petitioners to FIPB to obtain *post facto* approval for the simple reason that FIPB was also standing on the same footing as that of RBI. FIPB, in essence, had adopted the very same stance as that of the 2nd respondent and had informed the petitioners that at the material point of time, there was no explicit policy regarding issuance of warrants and, therefore, *post facto* approval was not required as by then the warrants were converted into equity shares.



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90. When any act, which is not explicitly prohibited, it cannot always be taken to mean that there is no permission. However, in case of acts, where there is clear prohibition, the question of permission does not arise. Only on that premise, the 3rd respondent had addressed that *post facto* approval is not required as there was no prohibition.

91. Further, one other aspect which also strengthens the case of the petitioners is that after the order of FIPB, when the forms FC-GPR were submitted with the 2nd respondent, though belatedly, along with the communication of the 3rd respondent, the question of no approval or prohibition was not raised by the RBI. Instead, the 2nd respondent put the petitioners on notice that there is contravention of Paras 9 (1)(A), 8 and 9 (1) (b) of Schedule I to Notification FEMA 20/2000-RB dated 3.5.2000 and that in terms of Section 15 of FEMA any contravention u/s 13 may, on an application, be compounded. Guidelines for compounding were also issued by the 2nd respondent. Accordingly, on the quantification of the compounding fees, the contraventions were compounded by the 2nd respondent. The 2nd respondent had nowhere stated that there is contravention of Section 6 (3) (b) of FEMA,



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1999; rather the contravention related only to the delay in filing the forms FC-GPR and certain other discrepancies.

92. In the aforesaid backdrop of the facts as could be seen from the materials available on record, when the 2nd respondent itself has accepted that there was no contravention of Section 6 (3) (b) of FEMA, 1999, the show cause notice issued by the 1st respondent to the petitioners alleging that there is no permission for issuance of share warrants is not only uncalled for, but is also an act usurping the powers of the 2nd respondent.

93. As laid down by the Apex Court in *LIC case (supra)*, except for the RBI and in this case FIPB, no other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted and the question cannot be raised by any authority either directly or indirectly, even by the 1st respondent.

94. Further, the investment by Newbridge in the petitioner company though approved to the extent of 74% of equity shares, only 49% has been

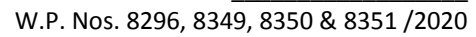


invested in the petitioner company. The finding recorded by the 1st respondent is that the approval of FIPB is permission of investment through subscription and/or subsequent acquisition of upto 74% of the equity shares of M/s.SHMPL and not warrants. However, it is not clear from where the 1st respondent has culled out that warrants were not permitted. In fact, the terminology used in the approval is that it is *investment through subscription and/or subsequent acquisition of upto 74%*. A harmonious reading of the above approval would only go to mean that subsequent to the subscription, subsequent acquisition can be made upto 74% of the equity shares and it does not spell out any where that the subsequent acquisition of equity shares cannot be based on the warrants for which investment have already been made by Newbridge. Further, the approval is for investment upto 74% of the equity shares and the amount invested by Newbridge in the petitioner company by way of foreign investment, which was issued as warrants and subsequently converted into equity shares. Further, it is fairly conceded by the learned Addl. Solicitor General appearing for the 1st respondent that due to the aforesaid act of the petitioners, no loss has been caused to the exchequer.



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95. Further, it is even the finding rendered by the 1st respondent that prior to 2014, the definition of capital to include 'warrant' has not been included and inclusion was made only by the circular of 2015. Holding so, a finding has been rendered that issuance of warrants is nothing but a contravention of the provisions of FEMA in the absence of approval. The 1st respondent had gone on to hold that no approval has been granted by FIPB. However, the fact remains that in the *post facto* approval sought for, FIPB has clearly mentioned that there was no explicit policy at the material point of time and, therefore, no *post facto* approval is required. The 1st respondent has interpreted the order of FIPB that *no approval was needed for issue of warrants at this point of time simply means that it has no relevance since the warrants issued by Noticee 1 were already converted into equity shares* to mean that though approval was necessary, it has no relevance at the material point of time. When FIPB, the authority, who is vested with power to grant approval has held that no *post facto* approval is required, interpreting the order in any other fashion, that too by an authority, who is not empowered to decide on the manner in which the said order has been passed, it does not lie



96. That being by the act of the petitioners without contravening the provisions of FEMA, 1999, the show cause notice and the subsequent order of the 1st respondent imposing penalty on the ground of want of permission is nothing but usurping the jurisdiction of the 2nd respondent, which is wholly impermissible.

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98. For the reasons aforesaid, this Court is of the considered view that the writ petitions deserve to be allowed by setting aside the orders impugned herein. Accordingly, the impugned order passed by the 1st respondent is set aside and all the writ petitions are allowed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

27.07.2023

Index : Yes / No

GLN



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To

1. The Directorate of Enforcement
Southern Regional Office
Government of India, Ministry of Finance
'Shastri Bhavan, III Block III Floor
26, Haddows Road, Chennai 600 006.

2. Reserve Bank of India
Chennai Regional Office
Foreign Exchange Department
Fort Glacis, Rajaji Salai
Chennai 600 001.

3. Department of Economic Affairs
Ministry of Finance, Government of India
North Block, New Delhi.



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W.P. Nos. 8296, 8349, 8350 & 8351 /2020

M.DHANDAPANI, J.

GLN

**PRE-DELIVERY ORDER IN
W.P. NOS.8296, 8349
8350 & 8351 OF 2020**

**Pronounced on
27.07.2023**



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W.P. Nos. 8296, 8349, 8350 & 8351 /2020