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

Reserved on: 07.11.2023
Pronounced on: 13.12.2023

+ **W.P.(C) 8514/2022 & CM APPL. 25799/2022, 25144/2023**

PC FINANCIAL SERVICES PRIVATE LTD Petitioner

Through: Mr.S.Ganesh and Mr.Arvind
Nayar, Senior Advocates with
Mr.Ajay Bhargava, Mr.Atul
Pandey, Mr.Hirak
Mukhopadhyay, Mr.Milind
Jain, Mr.Varun Yadav, Advs.

versus

DIRECTORATE OF ENFORCEMENT & ANR.

..... Respondents

Through: Mr.Anurag Ahluwalia, CGSC,
Mr.Abhigyan Siddhant, Adv.
for R-1.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This petition has been filed by the petitioner praying for the following reliefs: -

“(a) Issue a writ of certiorari, or any other appropriate writ, order or direction quashing the Impugned Order F. NO. S.MISC.16/2021-FEMA dated 04 February 2022 passed by the Ld. Commissioner of Customs (Appeal-I) being the Ld. Competent Authority annexed as (Annexure P-1) and thereby quash the Seizure Order No. 01/2021 bearing No. F. No. T-3/HYZO/75/2021 dated 26 August 2021 annexed as (Annexure P-10) read with letter bearing no. T-3/HYZO/75/2021/4721 dated 12



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October 2021 annexed as (**Annexure P-7**), Seizure Order No. 02/2021 bearing no. T-3/HYZO/75/2021 dated 30 September, 2021 annexed as (**Annexure P-26**); and Seizure Order No. 03/2021 bearing no. T-3/HYZO/75/2021 dated 15 December, 2021 annexed as (**Annexure P-29**) and unfreeze all the bank accounts frozen by way of the above referred Seizure Orders;

(b) Issue a writ on mandamus, or any other appropriate writ, order or direction directing the Respondent No. 1 to close any and all the proceedings undertaken by Respondent No. 1 or by any agency/ department under its instructions, under Foreign Exchange Management Act, 1999 as there is no violation whatsoever by the Petitioner, as alleged by Respondent No. 1.

(c) Issue a writ of mandamus, or any other appropriate writ, order or direction directing the Respondent No. 1 to release the amounts seized under the Seizure Order No. 01/2021 bearing No. F. No. T-3/HYZO/75/2021 dated 26 August 2021 read with letter bearing no. T-3/HYZO/75/2021/4721 dated 12 October 2021, Seizure Order No. 02/2021 bearing no. T-3/HYZO/75/2021 dated 30 September, 2021; and Seizure Order No. 03/2021 bearing no. T-3/HYZO/75/2021 dated 15 December, 2021 and defreeze the bank accounts frozen by Respondent No. 1;

(d) In the alternative, till the Appellate Tribunal becomes functional, the impugned order be kept in abeyance and the Respondent No.1 be directed not to take any coercive steps in furtherance of the Impugned Order and/or the Seizure Order No. 01/2021 bearing No. F. No. T-3/HYZO/75/2021 dated 26 August 2021 read with letter bearing no. T-3/HYZO/75/2021/4721 dated 12 October 2021, Seizure Order No. 02/2021 bearing no. T-3/HYZO/75/2021 dated 30 September, 2021; and Seizure Order No. 03/2021 bearing no. T-3/HYZO/75/2021 dated 15 December, 2021; and”



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2. It is the case of the petitioner that the petitioner, incorporated in the year 1995 under the provisions of the Companies Act, 1956, was earlier registered as a Non-Banking Financial Company - Systemically Important Non-Deposit taking company with the Reserve Bank of India (in short, 'RBI'). The petitioner is engaged in the business of providing unsecured short-term loans to its customers/borrowers in India via its Digital Application based platform called the '*CashBean*'. The petitioner had 58 employees on the payroll and around 427 employees working on a third-party payroll basis. The CashBean application of the petitioner had 60.3 million users, and 39.2 million registered customers, out of which only 3.75 million unique customers were selected after an assessment of creditworthiness for the loan. It is contended that it is because of the success of the CashBean application that the petitioner has a high recovery rate of the loans disbursed and profitable operations.

3. It is contended that the petitioner had engaged a Hong Kong based Company, namely Hong Kong Fintango Limited (hereinafter referred to as the 'HK Fintango') for procurement of an IP licence and had entered into a Software Licence Agreement dated 01.10.2019 with it for providing IP and Digital Lending Software Licence, that is, the CashBean App to the petitioner for the Indian digital micro-lending market.

4. The petitioner further contends that another Company, that is, Mobimagic Co. Ltd. (hereinafter referred to as 'Mobimagic'), provided technical services to the petitioner till March 2020 and,



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thereafter, the services of HK Fintango were engaged from August 2020.

5. The petitioner states that for the Technical fees, the petitioner's Board had taken the necessary and proper decisions by considering the comprehensive requirements of the business risk management, which includes the services scope, Software Licence Agreement commitment and responsibility. The Board had also considered and referred to the industry practice. The Board had also consulted with tier-1 Chartered Accountant Firm/Independent Consultant, Ernest & Young LLP, India ('EY India'), which resulted in independent benchmarking reports.

6. It is contended that Mobimagic was the original developer of the CashBean software, which was subsequently transferred by it to HK Fintango on 26.09.2019. Post such transfer, HK Fintango has been awarded with the new Software Copyright Certificate for the same. The petitioner states that for the business of the petitioner, HK Fintango has granted access to its Software App in a source code format and technical support has been received from Mobimagic; management and other support have been received from another related party entity, namely, TenSpot Pesa Limited.

7. The petitioner claims that for the above transactions, the petitioner has maintained Transfer Pricing Documentation required under Rule 10D of the Income Tax Rules, 1962 read with Section 92D of the Income Tax Act, 1961, and proper forms have been filed with the Income Tax Authorities. The petitioner claims to have also deducted the Tax at Source for payments made to these Companies and as having greatly contributed to the tax base of the country.



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8. The petitioner claims that on a misunderstanding of the business operations of the petitioner, the respondent no.1 issued Seizure Order No. 01/2021 dated 26.08.2021; Seizure Order No. 02/2021 dated 30.09.2021; and Seizure Order No. 03/2021 dated 15.12.2021, seizing a consolidated amount of Rs.270,18,76,436/- of the petitioner. The respondent no.1 alleged that the petitioner had made foreign remittances equivalent to Rs.429,29,65,295.87/- to different foreign companies under the guise of payments against the bogus import of services and that these amounts are held outside India by the related foreign companies of the petitioner. It was alleged that the petitioner has, therefore, contravened Section 4 of the Foreign Exchange Management Act, 1999 (hereinafter referred to as the 'Act'), and an equivalent value of the property was liable to be seized from the petitioner in India. The above seizure orders have been confirmed by the respondent no.2 vide the Order dated 04.02.2022 (hereinafter referred to as the 'Impugned Order').

Submissions of the Learned Senior Counsel for the Petitioner:

9. The learned senior counsel for the petitioner submits that under the Act, the foreign exchange transactions can be classified as 'Capital Account Transaction', as defined in Section 2(e) of the Act, or as 'Current Account Transaction', as defined in Section 2(j) of the Act. He submits that Section 6(3) of the Act provides that all 'capital account transactions' are prohibited unless specifically permitted by the RBI. On the other hand, all 'current account transactions' are permitted unless specifically prohibited. He submits that in the present



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case, the remittances in question pertain to those incurred in the ordinary course of business and are to be categorized as ‘Current Account Transactions’, against which there is no prohibition.

10. He submits that in terms of Foreign Exchange Management (Current Account Transactions) (Amendment) Rules, 2010, the Government of India has expressly removed all caps on remittances for royalty payments for the transfer of technology, and, accordingly, such transactions can be freely undertaken by the entities like the petitioner. He submits that in the absence of any prohibition, the petitioner cannot be said to have violated Section 4 of the Act by making the transfers of the foreign exchange in the transactions in question.

11. He submits that the Impugned Order is premised on the assertion that a Digital Application similar to the CashBean application can be developed in India at a lower cost, and that the petitioner has not done due diligence while entering into the transactions with the related company, that is, HK Fintango. He submits that not only did the petitioner deposit the Tax Deducted at Source (in short, ‘TDS’) on such transactions but also, the assertions made by the respondent no.1 do not constitute a violation of the provisions of the Act or the Rules or the Regulations made thereunder and, therefore, cannot attract Section 4 of the Act. He states that business prudence cannot be tested and mere lack thereof, even presuming such to be the case, cannot be a ground to contend violation of Section 4 of the Act.



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12. The learned senior counsel for the petitioner submits that the Impugned Order is based on vague allegations without there being any material evidence, much less *prima facie* information/documents in support of the assertion that the petitioner holds foreign exchange outside India in contravention with provisions of the Act. The Impugned Order fails to meet the above pre-requisites and essential conditions for invoking Section 37A of the Act. He submits that legitimate payments, that are made in consideration of a licenced Intellectual Property, in the form of royalty, cannot be deemed as foreign exchange held outside India.

13. He submits that the basic reason for the proceedings against the petitioner is a baseless allegation of the petitioner charging higher rates of interest and processing fees from its customers/loan applicants. He submits that such an allegation cannot, however, provide any justification for the invocation of the draconian power of seizure under the Act.

14. The learned senior counsel for the petitioner submits that even otherwise, all the fees/charges that are levied by the petitioner from its customers, are transparently stipulated and presented to the customers, and are duly acknowledged and accepted by them before the loan disbursal. He submits that there is no Circular or Rule issued by the RBI capping the processing fees. He submits that even other major banking institutions impose substantial late fees charges for overdue credit card payments and charge high processing fees, which is not objected to by the Government.



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15. The learned senior counsel for the petitioner reiterates that the respondent has, without any material evidence/document, falsely alleged that payments have been made by the petitioner against bogus invoices. He submits that the allegation of the respondent no.1 that the petitioner was using the CashBean App even prior to the incorporation of HK Fitango, is not sustainable as the respondent failed to appreciate that the said App was developed by Mobimagic, who later transferred the same to HK Fitango, with which the petitioner entered into the Software Licence Agreement. He reiterates that all the payments have been legitimately made by the petitioner with the transfer pricing documentation and the tax related compliances.

16. He submits that the respondent no.1 has incorrectly assumed that all the decisions of the petitioner are made on the recommendation of M/s Opera Limited. He submits that recommendations received from M/s Opera Limited are duly evaluated by the Board of Directors of the petitioner and they are backed by feasibility reports and relying on such reports, the decisions are implemented. He submits that, therefore, the Impugned Order is based only on the conjectures and surmises and cannot be sustained.

17. Placing reliance on the judgment of the Supreme Court in ***Radha Krishan Industries v. State of Himachal Pradesh & Ors.***, (2021) 6 SCC 771, he submits that the power of attachment is a draconian provision and the pre-conditions thereof must be strictly followed. He submits that as the pre-conditions have clearly not been fulfilled in the present case, the Impugned Order has been passed without jurisdiction and is liable to be set aside by this Court in



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exercise of its power under Article 226 of the Constitution of India. He submits that in such exercise, availability of an alternate remedy in the form of an appeal would not be a bar.

Submissions of the Learned Counsel for the Respondents:

18. On the other hand, the learned counsel for the respondents submits that the petitioner has remitted an amount of Rs.429,29,65,295/- for availing various services mainly from Chinese and Hong Kong based companies which were found to be bogus in nature and where, actually, no such services were provided by such companies. He submits that, therefore, there was a violation of Section 4, 10(6), and Section 42(1) of the Act. He places extensive reliance on the statement of Shri Raghuvir Gakhar, Ex-CEO of the petitioner, to submit that all such transactions/agreements were taken by the petitioner under the instructions from its parent company, that is, M/s Opera Limited, and a major portion of the revenue of the petitioner was sent to the overseas companies of M/s Opera Limited in the name of Licence Fee.

19. The learned counsel for the respondents submits that HK Fintango is a subsidiary of M/s Opera Limited, which is also the parent holding company of the petitioner. Mobimagic is again a related company of M/s Opera Limited, and so is M/s TenSpot Pesa Limited, to whom an amount of Rs. 8.5 Crores was provisioned, claiming to have received Technical Managerial Services.

20. He submits that even RBI found various violations to have been committed by the petitioner and has, therefore, cancelled the



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Certificate of Registration of the petitioner vide order dated 23.02.2023.

21. He further submits that the petitioner has also filed a complaint with the Adjudicating Authority in terms of Section 37A(2) of the Act, and the said proceedings are at a final stage.

22. He submits that, therefore, in the present facts and circumstances, this Court should refuse to exercise its discretionary jurisdiction under Article 226 of the Constitution of India and relegate the petitioner to its statutory remedies.

Analysis and Findings:

23. I have considered the submissions made by the learned counsels for the parties.

24. Before opining on the same, it is relevant to draw reference to the previous orders passed in the present petition:-

(a) This Court by its order dated 31.05.2022, while issuing notice on the petition, directed a sum of Rs. 25 crores to be released to the petitioner in the *interim*, subject to the condition that the petitioner shall utilize the said money only for the purpose of meeting its day-to-day essential expenditures as well as towards the payment of the salaries of its employees. The petitioner was also directed to place on record an Affidavit disclosing the details of such utilization of the sum that was being released. The Court accepted the undertaking of the petitioner that no part of the amount, so released, shall be remitted overseas.



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(b) The above order was challenged by the respondents by way of an appeal, being LPA 487/2022, titled as ***Directorate of Enforcement vs. P.C. Financial Services Private Limited & Anr.*** The said Appeal was disposed of by the Division Bench of this Court vide order dated 24.08.2022, recording the submission of the learned senior counsel for the petitioner that the petitioner shall not press for the *interim* order to be implemented while this Court adjudicates the present petition at an earlier date.

(c) It is relevant to note that at the time when this petition was entertained by this Court, the Appellate Tribunal, in terms of Section 18 of the Act, had not been constituted. During the pendency of the petition, however, the Appellate Tribunal was constituted. On 13.09.2022, however, the petitioner stated that it would be withdrawing its appeal pending before the Appellate Tribunal.

(d) The petitioner withdrew its appeal filed before the Appellate Tribunal, as recorded in the order dated 12.10.2022 of the Appellate Tribunal.

(e) In the meantime, the respondents challenged the order dated 13.09.2022 of this Court by way of an appeal, being LPA No. 592/2022, titled as ***Directorate of Enforcement v. P.C. Financial Services Private Limited.*** The same was allowed by the Division Bench of this Court vide its judgement dated 31.10.2022, holding that the petitioner has an equally efficacious alternate remedy available before the learned



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Appellate Tribunal, which is functional, and, therefore, the Appellate Tribunal should decide on the appeal of the petitioner.

(e) Aggrieved of the above order, the petitioner challenged the same by way of a Special Leave Petition, being SLP (C) No. 21385/2022, titled as ***P.C. Financial Services Private Limited v. Directorate of Enforcement & Anr..*** The same was allowed by the Supreme Court vide its order dated 04.05.2023. As this order would have some significance in the decision of this Court on the plea of the respondent that the petitioner has an alternate efficacious remedy, the order is reproduced in full herein below:-

“Leave granted.

On hearing learned counsel for the appellant on 13.12.2022, we had issued notice and stayed the operation of the impugned order relegating the parties once again back to the appellate Court. This was in the scenarios set out in that order as under :

"Learned senior counsel for the petitioner has drawn our attention to the order dated 24.08.2022 at page 384 to contend that it was an agreed order that the matter should be heard by the learned Single Judge where the concession was made by the learned ASG. He submits that as on that date the Tribunal had already been constituted.

On the matter being remitted to the learned Single Judge for consideration, (page 386) on 13.09.2022 the circumstances under which the matter was placed before the learned Single Judge for disposal was recorded and the counsel for the petitioner had made a statement that he



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chooses not to pursue the appeal subject to the rights being reserved to agitate all questions in the pending Writ Petition.

The matter was directed to be listed for disposal at the end of the Board on 18.10.2022.

The impugned order now seeks to remit the petitioner to the remedy of appeal because the Tribunal since stands constituted while the aforesaid facts show that when the earlier orders were passed also the Tribunal had already been constituted."

Learned counsel for the respondents does not dispute the factual position aforesaid, thus submits that the effect of the order would be to take away a right of the appeal whether it be of the appellant or the respondents.

We are not able to persuade ourselves to agree with the submissions of the learned counsel for the respondents with the facts set out aforesaid. In fact the appellant did not press for the interim arrangement made by the learned Single Judge predicated only on the reasoning that the matter would be finally heard by the learned Single Judge. The respondents cannot be permitted to blow hot and cold in this behalf.

The result of the aforesaid is that we set aside the impugned order and direct that the matter be heard in the writ proceedings before the learned Single Judge. In view of the passage of time, it is open to the appellant to pray for any interim orders, as advised, including, the one which has been granted earlier by the learned Single Judge dated 31.05.2022 and it will be for the learned Single Judge to consider the same on the merits.

The appeal stands allowed in the aforesaid terms."



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25. In view of the above order of the Supreme Court, this petition was heard finally by this Court.

26. For consideration of the contentions raised by the learned counsels for the parties, a few provisions of the Act are also required to be reproduced which are as under: -

“2. Definitions.—*In this Act, unless the context otherwise requires,-*

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(e) “capital account transaction” means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;

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(j) “current account transaction” means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,—

(i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,

(ii) payments due as interest on loans and as net income from investments,

(iii) remittances for living expenses of parents, spouse and children residing abroad, and

(iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children;

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3. Dealing in foreign exchange, etc.—*Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall—*



(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;

(b) make any payment to or for the credit of any person resident outside India in any manner;

(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.—For the purpose of this clause, “financial transaction” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

4. Holding of foreign exchange, etc.—Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

5. Current account transactions.—Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction:



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Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

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.*

(2) *The Reserve Bank may, in consultation with the Central Government, specify—*

(a) *any class or classes of capital account transactions, involving debt instruments, which are permissible;*

(b) *the limit up to which foreign exchange shall be admissible for such transactions:*

(c) *any conditions which may be placed on such transactions;*

Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

(2A) *The Central Government may, in consultation with the Reserve Bank, prescribe—*

(a) *any class or classes of capital account transactions, not involving debt instruments, which are permissible;*

(b) *the limit up to which foreign exchange shall be admissible for such transactions; and*

(c) *any conditions which may be placed on such transactions.*

(4) *A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident*



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outside India or inherited from a person who was resident outside India.

(5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

(6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

(7) For the purposes of this section, the term “debt instruments” shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

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10. Authorised person.—*(1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.*

(2) An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein.

(3) An authorisation granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that—

(a) it is in public interest so to do;

or

(b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule,



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regulation, notification, direction or order made thereunder:

Provided that no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.

(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

(5) An authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.

(6) Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose



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for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provisions of the Act for the purpose of this section.

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13. Penalties.—(1) *If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.*

(1-A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37-A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

(1-B) If the Adjudicating Authority, in a proceeding under sub-section (1-A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.



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(1-C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37-A, he shall be, in addition to the penalty imposed under sub-section (1-A), punishable with imprisonment for a term which may extend to five years and with fine.

(1-D) No court shall take cognizance of an offence under sub-section (1-C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1-B).

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

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37A. Special provisions relating to assets held outside India in contravention of section 4.—

(1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property:

Provided that no such seizure shall be made in case where the aggregate value of



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such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

(3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1):

Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate



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order as it deems fit, including setting aside of the seizure made under sub-section (1).

(5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.

(6) Nothing contained in section 15 shall apply to this section.”

27. Section 37A(1) of the Act states that if the Authorised Officer prescribed by the Central Government has reason to believe that any Foreign Exchange, Foreign Security, or any Immovable Property, situated outside India, is suspected to have been held in contravention of Section 4 of the Act, he may, after recording the reasons in writing, by an order, seize value equivalent thereto situated within India.

28. It need not be emphasised that the power of seizure is of far-reaching consequences and, therefore, the pre-conditions stipulated in Section 37A(1) of the Act must be scrupulously complied with. The ‘*reason to believe*’ must be based on tangible material, and as held by the Supreme Court in ***Radha Krishan Industries*** (Supra), should not be based on the ‘*imaginary grounds, wishful thinking, howsoever laudable that may be*’

29. Section 4 of the Act states that, save as otherwise provided by the Act, no person resident in India shall *inter alia* hold, possess, or transfer any Foreign Exchange, Foreign Security, or any Immovable Property situated outside India. Holding, possessing, or transferring any Foreign Exchange outside India except in the manner authorised by the Act is, therefore, a violation of Section 4 of the Act.



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30. The foreign exchange transactions can be bifurcated into '*Current Account Transactions*' and '*Capital Account Transactions*', as defined in Section 2(j) and 2(e) of the Act respectively.

31. The transactions in question, which have been made the basis of the seizure order, can be categorised as '*Current Account Transactions*'.

32. Section 10(5) of the Act prescribes that the 'Authorized Person', before undertaking any transaction in foreign exchange on behalf of any person, shall require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any Rule, Regulation, Notification, Direction or Order made thereunder.

33. Sub-Section 6 of Section 10 states that any person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to the 'Authorised Person' under sub-section (5) of Section 10, does not use it for such purpose or does not surrender it to the 'Authorised Person' within the specified period, or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition or foreign exchange is not permissible under the provisions of the Act or the Rules or Regulations or Direction or Order made thereunder, shall be deemed to have committed an offence/contravention of the provisions of the Act for the purpose of the said section.



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34. Section 13 of the Act states that if any person contravenes any provision of this Act, or contravenes any Rule, Regulation, Notification, Direction, or Order issued in the exercise of the powers under the Act, shall be liable to a penalty.

35. In the present case, it is the allegation of the respondent no.1 that the petitioner has contravened the provisions of Section 4 of the Act, inasmuch as it holds foreign exchange outside India through its group entities and such foreign exchange has been transferred to such accounts by way of bogus transactions with its group companies. In support, the respondent no.1 has *inter alia* contended that the petitioner was not making any independent decisions but was acting merely at the dictate of its holding company, that is, M/s Opera Limited. It has made allegations of overpricing on the CashBean App and stated that the same was being used even prior to the petitioner entering into the Licence Agreement with HK Fintango. There is also an allegation of the payments being made, unsupported by any invoice, and payments being made as licence fees, instead of making it as dividends to the group companies.

36. Though the petitioner claims that the earlier developer of the said App was Mobimagic, which had permitted the petitioner to use the said App; the transactions were entered into at arms-length and are supported by reports from EY India, these would be questions of fact that would need determination by considering the evidence that may be led by the parties on the same.

37. The respondent no.2 in the Impugned Confirmation Order has held and observed as under: -



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“10.....When there is a bonafide reason to doubt the burden lies on the respondent to prove that it is true transaction value in the course of international trade. There is no cogent evidence to show or demonstrate indeed the respondent participated in the transaction and the price is the sole consideration. For instance, the respondent has imported and utilized cash bean app free of cost on trial basis from 1st January 2019 to 1st October 2019 supplied by the group companies. The respondent during the period disbursed the loan amount Rs. 1470.63 crores. The Hongkong Fintango company was established on 04.09.2019 and the app had been developed much before its birth. The respondent company failed to show or place on record any evidence when, at what point of time Hongkong Fintango acquired the licence of the app proof of its purchase, what price and proof of its payment. It is shown that the respondent company purchased the app on 01.10.2019 from Hongkong Fintango. It is unbelievable that such a costly app was provided free of cost for nearly 9 months usage and itself shows that app value is over-invoiced.

The above facts clinchingly proves that the cashbean app is already in possession of beneficial owner/related companies and Hongkong Fintango has not developed the said app and there was no proof of its purchase in the duration of 04.09.2019 to 30.09.2019. The respondent company utterly failed led to show or demonstrate that the seller Hongkong Fintango is either the developer or acquired licence from the developers or from third party. None of the arguments advance by the respondent answer the fundamental questions of the app developer, licence fee etc. In the absence of any material evidence, the bonafide doubt raised by Enforcement directorate w.r.t transfer of foreign outward remittances to the tune of Rs.271 crores to Hongkong Fintango



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merits consideration and qualified the rules of prudence and fair play. The contention of the respondent is that the price for the Cashbean app was decided based on EY transfer pricing report is unmeritorious and unfounded as the report is dated 24.12.2020 which is later to the purchase date 01.10.2019.”

38. Even though I find merit in the contention raised by the learned senior counsel for the petitioner that violation of Section 10(6) of the Act cannot be alleged merely because, according to the respondents, the commercial arrangement entered into by the declarant under Section 10(5) of the Act does not appear to be commercially prudent to the respondents, but at the same time, the respondents in the present case are using the above assertions in support of their conclusion that the amount of foreign currency has been clandestinely transferred by the petitioner in the name of licence fees and other charges to the foreign entities and are, in fact, being held by the petitioner itself in the bank accounts of such foreign companies which are related to the Opera Group. In this manner, the respondents alleged violation of Section 4 read with Section 10(6) of the Act and claim to satisfy the condition set out in Section 37A of the Act, which requires the foreign exchange to be held outside India and which is suspected to have been so held in contravention of Section 4 of the Act.

39. The Impugned Order is to be based merely on ‘*reason to believe*’ that any foreign exchange situated outside India is suspected to have been held in contravention of Section 4 of the Act by the person against whom the order under Section 37A of the Act is being passed. At the stage of passing the order under Section 37A(3) of the



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Act, the Competent Authority is not to arrive at a conclusive finding on the above. Though it may be true that the ‘*reason to believe*’ must also be based on certain tangible material and should be reasonable and not be arbitrary or whimsical, at the same time, the Court in the exercise of its powers under Article 226 of the Constitution of India cannot act as an appellate authority and substitute its own opinion for that of the Competent Authority.

40. The powers under Article 226 of the Constitution of India are rather limited to testing the decision-making process and this Court can interfere with the same where there is a violation of the principles of natural justice or where the proceedings are found to be wholly without jurisdiction or where the decision appears to be completely arbitrary and without any material to support the same. In ***Radha Krishan Industries*** (supra), the principles applicable to the exercise of extra-ordinary discretionary power under Article 226 of the Constitution of India *vis-a-vis* availability of an alternate remedy, have been summarised as under:

“27. The principles of law which emerge are that:

27.1 The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

27.2 The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

27.3 Exceptions to the rule of alternate remedy arise where: (a) the writ petition has been filed for the enforcement of a



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fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

27.4 An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

27.5 When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion;

27.6 In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

41. In the present case, in my opinion, the petitioner has been unable to make out such a case which would warrant an interference of this Court with the Impugned Order. The allegations of the respondents and the defence of the petitioner would need to be tested by the Adjudicatory Authority. On facts, it cannot be said that the action of the respondents is ultra vires the Act or so whimsical as to warrant an interference of this Court at this stage, when the proceedings are pending before the Adjudicatory Authority.



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42. This Court is also cognizant of the fact that pursuant to the Impugned Order, the respondents have also filed a complaint before the Adjudicating Authority. This Court has been informed that substantial hearings have already taken place before the Adjudicating Authority on such complaint, and the same is likely to be disposed of in near future. This adds as a further reason for this Court not to exercise its discretionary powers under Article 226 of the Constitution of India.

CONCLUSION:

43. For the reasons stated hereinabove, I find no merit in the present petition. The same is, accordingly, dismissed along with the pending applications. There shall be no order as to costs.

44. It is clarified that any or all observations made hereinabove shall, in no manner, bind or prejudice the Adjudicating Authority while deciding on the complaint filed by the respondent no.1, and all pleas, contentions, and submissions of the parties shall remain open in such proceedings and shall be considered by the Adjudicating Authority in accordance with law.

NAVIN CHAWLA, J.

DECEMBER 13, 2023/rv/AS/SS