



2024:DHC:6461-DB



\$~156

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

+ LPA No.808/2024, CM APPL. 48008/2024, CM APPL. 48009/2024, CM APPL. 48010/2024, CM APPL. 48011/2024

PC FINANCIAL SERVICES PRIVATE LIMITED ...APPELLANT

Through: Ms. Vanita Bhargava, 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.

%

Date of Decision: 22nd August, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

1. Present appeal has been filed challenging the impugned order dated 13th December, 2023 passed by learned Single Judge in W.P.(C) 8514/2022 captioned *PC Financial Services Private Ltd. Vs. Directorate of Enforcement & Anr.* whereby the aforesaid writ petition was dismissed.

2. The facts germane to the present appeal are as under:

- a. It is the case of the appellant that the appellant, incorporated in the year 1995 under the provisions of the Companies Act, 1956,

Signature Not Verified

Digitally Signed
By: MADHU KARDANA
Signing Date: 28.08.2024
16:41:50

LPA No.808/2024

Page 1 of 18



2024:DHC:6461-DB



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 appellant 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 appellant had 58 employees on the payroll and around 427 employees working on a third-party payroll basis. The CashBean application of the appellant 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 appellant has a high recovery rate of the loans disbursed and profitable operations.

- b. It is stated that the appellant had engaged a Hong Kong based Company, namely Hong Kong Fintango Limited for procurement of an IP licence and had entered into a Software Licence Agreement dated 1st October, 2019, with it for providing IP and Digital Lending Software Licence, that is, the CashBean App to the appellant for the Indian digital micro-lending market.
- c. The appellant further states that another Company, that is, Mobimagic Co. Ltd., provided technical services to the appellant till March, 2020 and, thereafter, the services of HK Fintango were engaged from August, 2020.



2024:DHC:6461-DB



- d. The appellant states that for the Technical fees, the appellant'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, which resulted in independent benchmarking reports.
- e. It is stated that Mobimagic was the original developer of the CashBean software, which was subsequently transferred by it to HK Fintango on 26th September, 2019. Post such transfer, HK Fintango has been awarded with the new Software Copyright Certificate for the same. The appellant states that for the business of the appellant, 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.
- f. The appellant claims that for the above transactions, the appellant 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 appellant claims to have



2024:DHC:6461-DB



also deducted the Tax at Source for payments made to these Companies and as having greatly contributed to the tax base of the country.

- g. The appellant claims that on a misunderstanding of the business operations of the appellant, the respondent no.1 issued Seizure Order No. 01/2021 dated 26th August, 2021; Seizure Order No. 02/2021 dated 30th September, 2021; and Seizure Order No. 03/2021 dated 15th December, 2021, seizing a consolidated amount of Rs.270,18,76,436/- of the appellant. The respondent no.1 alleged that the appellant 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 appellant. It is alleged that the appellant has, therefore, contravened Section 4 of the Foreign Exchange Management Act, 1999, (hereinafter referred to as “*the FEMA*”) and an equivalent value of the property was liable to be seized from the appellant in India. The above seizure orders have been confirmed by the respondent no.2 *vide* the Order dated 4th February, 2022.
- h. The appellant had challenged the order dated 4th February 2022 of the Competent Authority by way of the underlying writ petition. The said writ petition was dismissed by the impugned judgement dated 13th December, 2023. Hence the present appeal.



2024:DHC:6461-DB



3. Ms. Vanita Bhargava, learned counsel for the appellant, pointed at the outset that despite the order dated 04th May, 2023 passed by the Supreme Court directing the learned Single Judge to hear the matter on merits, according to her, learned Single Judge had disposed of the said writ petition on the ground that the disputed questions of facts as arising in the petition could not be considered by a writ Court under Article 226 of the Constitution of India.

4. She submits that the Supreme Court had, in the order dated 04th May, 2023, taken note of the fact that the appellant had withdrawn its statutory appeal from the Appellate Tribunal on the ground that all pleadings and documents were already filed and completed before the learned Single Judge and that the High Court could very well decide the entire dispute. She states that the withdrawal of the appeal was predicated on the statement given by the learned Additional Solicitor General of India (for short “ASG”) and recorded in the order dated 24th August, 2022 passed in *LPA No.487/2022* captioned ***Directorate of Enforcement vs. PC Financial Services Pvt. Ltd. & Anr.*** This fact, she submits, was brought to the notice of the Supreme Court while the order dated 04th May, 2023 was passed. She says that this mandate was violated by the learned Single Judge while passing the impugned judgment.

5. Learned counsel for appellant also submits that relegating the appellant to the proceedings before the Adjudicating Authority on the ground that since the Adjudicating Authority was *in seisin* of the matter, the appellant would have an opportunity to get its defence tested, too was



2024:DHC:6461-DB



contrary to the directions passed by the Supreme Court in the order dated 04th May, 2023.

6. She submits that the learned Single Judge did not consider the merits of the matter as also the fact that there was no tangible material or evidence before the Seizing Authority to form “*reason to believe*” for effecting seizures under the orders which were challenged before the learned Single Judge. Equally, she submits that the Competent Authority under the FEMA Act also did not consider the sufficient evidence and cogent material produced by the appellant clearly demonstrating the lack of tangible material to form “*reason to believe*”, before effecting seizure. According to her, the non-consideration of such evidence and tangible material placed on record by the appellant, would by itself, vitiate not only the seizure orders but also the order dated 04th February, 2022, passed by the Competent Authority. Learned counsel for appellant submits that the learned Single Judge did not appreciate any material at all placed on record by the appellant to demonstrate the lack of evidence/tangible material available with the Seizing Officer to have “*reason to believe*” before effecting seizures. She states that this omission, violates the mandate of the order passed by the Supreme Court on 04th May, 2023. In order to support her contentions, she has taken this Court through the order dated 04th May, 2023 of the Supreme Court as also various paragraphs of the impugned judgment.

7. She submits that grave prejudice has been caused to the appellant by virtue of the impugned judgment of the learned Single Judge inasmuch as,



2024:DHC:6461-DB



on the one hand, the appellant has withdrawn its statutory appeal challenging the seizure orders as also the order dated 04th February, 2022 passed by the Competent Authority filed before the Appellate Tribunal on the ground that the underlying writ petition was pending before the learned Single Judge of this Court, and on the other hand, the learned Single Judge has, without appreciating the tangible material placed alongwith the underlying writ petition, literally relegated the appellant to take its remedies before the Adjudicating Authority. On this basis, she submits that the petitioner has not only been deprived of a proper hearing on merits but also lost out an opportunity of a statutory appeal.

8. She submits that learned Single Judge in para 42 of the impugned order has observed that since substantial hearings have already taken place before the Adjudicating Authority on the complaint filed by the respondent, there arose no need or reason to exercise the discretionary powers under Article 226 of the Constitution of India. She states that the learned Single Judge overlooked the fact that the appellant had a right to challenge the confirmation order of the Competent Authority by way of a statutory appeal and had instead chosen to substantially challenge the same by way of the underlying writ petition, which ought to have been decided on merits instead of being relegated. She states that having regard to the entire conspectus which was placed before the Supreme Court which then had passed the directions *vide* the order dated 04th May, 2023, the disposal of the writ petition in a summary manner is contrary to the mandate of the order of the Supreme Court. She prays that this Court while exercising its



2024:DHC:6461-DB



appellate jurisdiction, consider the material placed on record on its merits and pass appropriate orders.

9. *Per contra*, Mr. Anurag Ahluwalia, learned CGSC for respondent No.1 vehemently refutes the submissions of the appellant. He states that contrary to the submissions made on behalf of the appellant, the learned Single Judge has not only dealt in detail with the merits of the matter but also rightly observed that since the statutory complaint has been filed, the matter needs a detailed examination on the evidence filed by both sides and that the Adjudicating Authority would be the jurisdictional authority to examine the disputed questions of facts and render its judgment thereon.

10. He states that the learned Single Judge had examined the material placed before the Seizing Authority which had objective material before it to form "*reason to believe*". He states that after having satisfied its judicial conscience on the relevant material, the learned single Judge concluded that there were tangible materials to form the "*reason to believe*" before the said seizure orders were passed. According to him, after having examined the matter on its merits, the learned Single Judge had recorded the observations contained in paras 41 and 42 to conclude that since the dispute is pending adjudication before the Adjudicating Authority, it did not require interference under Article 226 of the Constitution of India.

11. Learned counsel for respondent No.1 has also briefly made some submissions on the factual background of the matter.

12. He vehemently opposes the submissions made by the appellant in respect of withdrawal of the appeal allegedly predicated on the statement of



2024:DHC:6461-DB



learned ASG. as noted in the order dated 24th August, 2022 in LPA No.487/2022. He submits that it was the counsel for the appellant himself who had chosen to withdraw the statutory appeal and made the relevant submissions in the underlying writ petition pending before the learned Single Judge. In order to support the said submissions, he invited the attention of this Court to the order dated 13th September, 2022. He states that it was categorically noted in the said order that the learned Senior Counsel appearing for the appellant/petitioner chose not to pursue their appeal pending before the Tribunal subject to the rights being reserved to agitate all questions in the pending writ petition. On this basis, he states that the learned Single Judge had considered all the arguments of the parties and passed the impugned judgment. He states that the scope of proceedings under Article 226 of the Constitution of India are restrictive and cannot be akin to an appellate proceeding. He prays that the present appeal be dismissed.

13. We have heard the learned counsel for the parties, perused the impugned judgment as also the records of the case.

14. At the outset, from the arguments addressed, it appears that there is a controversy in respect of the directions passed by the Supreme Court *vide* the order dated 04th May, 2023 in *Civil Appeal No.3406/2023, PC Financial Services Private Ltd. Vs. Directorate of Enforcement & Anr.* Though, the learned counsel for the appellant has forcefully submitted that the learned Single Judge has not followed the mandate of the directions of the Supreme Court in the aforesaid order, however, we find that the learned



2024:DHC:6461-DB



Single Judge has considered the issues in detail and exercised his jurisdiction purely in accordance with the contours of judicial review as available under Article 226 of the Constitution of India.

15. From the record and also the submissions of the learned counsel for the parties, it is apparent that consequent upon the order dated 04th February, 2022 passed by the Competent Authority, the appellant had filed a statutory appeal before the Appellate Tribunal. However, at the relevant time, since the Appellate Tribunal was not constituted, the appellant had approached this Court *vide* the underlying writ petition. During the pendency of the said writ petition, the Tribunal appears to have been duly reconstituted. Post re-constitution, when the underlying writ petition was taken up on 13th September 2022, the following order was passed upon the statement of the learned senior counsel for the appellant:

“%

O R D E R
13.09.2022

The Court notes that the instant writ petition had been entertained notwithstanding the petitioner having instituted an appeal before the Appellate Tribunal against the order impugned here. However, one of the considerations which had weighed then was that the Appellate Tribunal was not functional in the absence of members having been appointed. Subsequently however, the Tribunal has become functional and the Court is informed that Members as well as the Chairperson have come to be appointed. In view of the aforesaid, the first issue which arises is whether the writ petition should be continued.

Mr. Ganesh, learned Senior Counsel appearing for the petitioner, submits that it chooses not to pursue the appeal which is pending before the Tribunal subject to rights being reserved to agitate all questions in the pending writ petition. This, in the backdrop, as Mr. Ganesh would contend, of the fact that pleadings have been duly exchanged on the instant writ petition and the Division Bench in the LPA No. 487/2022 has framed directions for the disposal of the writ petition itself.

In view of the aforesaid, let the petitioner, if so chosen and advised,



2024:DHC:6461-DB



withdraw the appeal which is pending before the Appellate Tribunal subject to rights being reserved to pursue and agitate all questions in the instant writ petition.

List again on 18.10.2022 in the category of "End of Board".

16. It is also clear from the record that the appellant had filed an application before the Appellate Tribunal seeking withdrawal of the appeal on the ground that the underlying writ petition is pending adjudication. It is observed from the order dated 12th October, 2022 passed by the Appellate Tribunal that the appeal was permitted to be withdrawn with a Caveat that the same is to the risk of the appellant. It is also clear from the said order that the Tribunal was clear in its opinion that the jurisdiction to adjudicate upon such dispute was squarely with the Tribunal. Yet, on the insistence of the appellant, the appeal before the Tribunal was permitted to be withdrawn. For the purpose of clarity, the order dated 12th October, 2022 is reproduced hereunder:

*"ORDER
12.10.2022*

MP-FE-115/HYD/2022 (Misc.) In FPA-FE-13/HYD/2022

An application has been filed to seek withdrawal of appeal, though now, the Tribunal has been properly constituted and accordingly, jurisdiction lies with the Tribunal to deal with the appeal arising out of the order passed by the Competent Authority.

It is yet submits that a Writ Petition having been filed, the appellant would press the said Writ Petition despite the availability of the remedy before this Tribunal. Liberty is however sought to seek recall of the today's order, if the Writ Petition is not decided on merits by the High Court in the light of the constitution of the Tribunal.

The learned counsel for the appellant was given time to seek proper instructions for the withdrawal of appeal after Tribunal



2024:DHC:6461-DB



becoming functional a(NOT READABLE)..... to those directions, he prays for withdrawal of the appeal. It was made clear that he would be carrying risk because Tribunal may not like to burden itself for subsequent application for recall of the order, if the Writ Petition is dismissed by the High Court in the light of the constitution of the Tribunal.

On instructions, the appellant is willing to take risk and accordingly the application is allowed and appeal is dismissed as withdrawn.

*Sd/-
(Chairman)
Sd/-
(Member)
Sd/-
(Member)*

*New Delhi
12th October, 2022*

17. It is sufficiently clear from the aforesaid orders that the appellant had exercised its choice under the doctrine of election and has wilfully and knowingly forgone the appellate remedy under the provisions of the FEMA. The appellant appears to have elected the remedy under a legal advice and is thus deemed to have known the consequences. Particularly, when the procedure and appropriate statutory appellate remedy, provided under the Act, is voluntarily given up. Thus, the contention that the appellant was constrained to approach this Court by the underlying writ petition, is not entirely correct. Once a party elects its remedy, it cannot be permitted to submit that it was forced to choose that path and as a result thereof, has to face the consequences.

18. So far as the submission of the appellant that the learned Single Judge did not deal with the material facts of the matter is concerned, we



2024:DHC:6461-DB



find that the contention is contrary to the observations made by the learned Single Judge in the impugned judgment. A perusal of the impugned judgment clearly indicates that the learned Single Judge had meticulously examined the facts, considered the submissions of the parties and applied its mind to the facts and rendered his findings thereon. We also find that the learned Single Judge has considered various provisions of the Act and after having examined the facts as submitted and the law as laid down by the Supreme Court in ***Radha Krishan Industries vs. State of Himachal Pradesh and Ors., 2021 6 SCC 771***, concluded that there was enough tangible material before the Seizing Officer as also the Competent Authority to confirm such seizure. Learned Single Judge also took into account that the respondents are basing their allegations on the ground that the huge amounts of foreign currency have been clandestinely transferred by the appellant, in the garb of licence fees and other charges, to the foreign entities which, in fact, were being held by the appellant itself in the bank accounts of such foreign companies and are related to the Opera Group. It is further observed that it was on this basis that the respondents allege violation of Section 4 read with Section 10 (6) of the Act, consequently satisfying the conditions set out in Section 37A of the Act.

19. We also find that in the impugned order, learned Single Judge has observed that though “*reason to believe*” must be based on some tangible material, a Court 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. Though, the learned Single Judge has concluded as



2024:DHC:6461-DB



above, yet in para 37 of the impugned order, has extracted the relevant portions of the Confirmation Order of the Competent Authority to satisfy its conscience of the tangible material before the Competent Authority as also the Seizing Officer before forming an opinion of the existence of “*reason to believe*”.

20. We are in agreement with the learned Single Judge insofar as the opinion regarding the formation of “*reason to believe*” is concerned. This is for the reason that the Supreme Court in ***Income Tax Officer vs. Lakhmani Mewal Das***, 1976 3 SCC 757, has categorically laid down the ratio that the Authority must have tangible material before it in order to form “*reason to believe*”. The Apex Court also observed that the “*reason to believe*” does not merely mean a purely subjective satisfaction on the part of the Authority, but must arise on examination of objective material and must be held in good faith. It was also observed that it is open to the Court to examine whether the reasons for the formation of belief have a rational connection and are not extraneous or irrelevant. To this limited extent, the Courts could examine such actions of the authorities. We find from the impugned judgment that the learned Single Judge has taken note of the tangible material before the Seizing Officer as well as the Competent Authority before the order dated 04th February, 2022 confirming the seizure was passed by the Competent Authority. Thus, the submission that the learned Single Judge has not considered the issue on facts, is belied by the observations contained in the impugned judgment. To make this issue clear, we consider it appropriate to extract the relevant paragraphs of the



impugned order hereunder:

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

“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 overinvoiced. 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 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.”

21. We have also perused the Seizure Orders and find that the Officer has examined the relevant material before him in great detail and has, apparently after analysing the same, coupled with the statement of the CEO of the appellant, formed his “*reasons to believe*” before effecting seizures. We have also examined the order dated 4th February, 2022 of the Competent Authority under the FEMA and find that the same is based on tangible material which was analysed and consequently the seizure orders were confirmed. At that stage a Constitutional Court is not to interdict the investigations or probe the evidentiary value of such material gathered. It is trite that Courts exercising powers of judicial review would consider as to whether there was objective and tangible material available with the authorities before any action of effecting seizure was contemplated. A Court exercising writ jurisdiction is not sitting as an appellate court or authority. Thus, we are satisfied that the learned single Judge has exercised the jurisdiction vested, correctly.

22. We have also perused the grounds raised by the appellant in the



2024:DHC:6461-DB



present appeal and find that the appellant has urged many facts which cannot be evaluated or considered by a writ Court since the same would require evidence and the evaluation thereof. Moreover, the issue as to what constitutes “*capital account transaction*” and “*current account transaction*” and as to how the appellant has transacted its business and by what mode etc. and whether the appellant is connected to the Opera Group and other entities like Mobimagic and HK Fintango, with whom and through whom, it is alleged that financial transactions were made which are alleged to be in violation of the provisions of FEMA, in our considered opinion, are highly disputed questions of fact. Having regard to the fact that the records indicate that there exists an absolutely diametrically opposite and contrary set of disputed facts, it is apparent that the Court exercising powers of judicial review under Article 226 of the Constitution of India, does not have the necessary wherewithal to render its opinion thereon.

23. So far as the contentions regarding the impugned order relegating the appellant to the proceedings before the Adjudicating Authority without deciding the matter on merits itself is concerned, the same is noted only to be rejected. We find that the learned Single Judge has noted in para 42 of the impugned judgment that the respondents have already filed a statutory complaint before the Adjudicating Authority and substantial hearings have already taken place before it. It appears that the learned Single Judge was given to understand that the said complaint is likely to be disposed of in the near future. It was in these circumstances that the learned Single Judge found the said fact as yet another reason not to exercise the discretionary



2024:DHC:6461-DB



powers under Article 226 of the Constitution of India in the underlying writ petition. We have found that the learned Single Judge has already examined the issue on merits and passed the impugned judgment. Having regard to the fact that the Adjudicating Authority while deciding the complaint shall obviously also decide the sanctity of the seizure as also the validity of the Confirmation Order dated 04th February, 2022 passed by the Competent Authority, we too find no reasons to interfere with the observations rendered by the learned Single Judge in the impugned judgment.

24. For the aforesaid reasons, the appeal being bereft of merits is dismissed with all the pending applications, however, without any order as to costs.

25. Nothing stated above shall tantamount to any observation on the merits of the matter pending adjudication before the Adjudicating Authority.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J

AUGUST 22, 2024/rl/kct