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

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Reserved on: September 12, 2024**Decided on: October 29, 2024**+ **W.P.(C) 8148/2010****PUTZMEISTER INDIA PRIVATE
LIMITED & OTHER****.....Petitioners**

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Rishi Agrawala, Ms. Niyati Kohli, Mr. Abhay Agnihotri, Mr. Aditya Bapat and Mr. Sanjeev Seshadri, Advocates

V**UNION OF INDIA & OTHERS****.....Respondents**

**Through: Mr. Mukul Singh, CGSC with Ms. Ira Singh and Mr. Utsav Pokhriyal, Advocates for R-1 & 2
Mr. H.S. Parihar, Mr. Kuldeep S. Parihar and Ms. Ikshita Parihar, Advocates for R-3/RBI
Mr. Trideep Pais, Senior Advocate with Mr. Sagar Chawla, Ms. Shweta Yadav and Ms. Sanya, Advocates for R - 5 & 6**

CORAM**HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN****J U D G M E N T**



1. The petitioners filed the present petition with the following prayers: -

(a) Issue a Writ of Certiorari or a writ, order or direction in the nature of Certiorari calling for the papers and proceedings in the matter and after examining the legality and property thereof to quash and set aside the impugned order viz., FC Approval No. 97(2010)210(2009) dated 29th September 2010 issued by respondent no.2 and the Impugned Amendment viz., Amendment bearing No. FC.II 97(2010)210(2010) dated 10th November 2010 issued by respondent no.2 to respondent no.5

(b) Issue a Writ of Mandamus or a writ, order or direction in the nature of Mandamus ordering and directing respondent no.2 to forthwith withdraw, cancel and revoke the impugned order viz., FC Approval No. 97(2010)210(2009) dated 29th September 2010 issued by respondent no.2 and the Impugned Amendment viz., Amendment bearing No. FC. II 97(2010)210(2010) dated 10th November 2010 issued by respondent no.2 to respondent no.5

(c) issue an appropriate order or direction for enquiring into the conduct of respondents no. 1 to 4 and to take such action against them as is warranted in law.

(d) issue a writ of mandamus or a writ, order or direction in the nature of mandamus ordering and directing the respondents to act in accordance with law and confiscate the illegal investment made by respondents no.5 and 6 in breach of foreign Exchange Management Act. 1999 read with Press Note Nos. 1 and 3 (2005 Series)

(e) for such further and other orders, directions and reliefs as the nature and circumstances of the case may require.



2. Briefly stated relevant facts are that the respondents no. 1 to 4 are the authorities of the Government of India and are under a duty to control and ensure the compliance of Foreign Direct Investment. The petitioner no. 2 is the Managing Director and the petitioner no. 3 is the director of the petitioner no. 1. The respondent no. 5 required the contract and network of the petitioners no. 2 and 3 and Indian partners to enter into the Indian market and manufacture its products. The petitioners no. 2 and 3 along with respondent no. 5 entered into a joint venture agreement on 19.12.1997. A Licensed Production Agreement dated 19.12.1997 was also executed between the petitioners no. 2 & 3 and the respondent no 5. The petitioner no.1 was the joint venture entity incorporated pursuant to the joint venture agreement on 20.01.1998. The petitioners no. 2 and 3 are holding 76% of the issued, subscribed and paid-up capital of the petitioner no.1 and the respondent no. 5 is holding balance 24% of the issued, subscribed and paid-up share capital of the petitioner no.1. The Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India issued Press Note. 18(1998 Series) dated 14.12.1998 pertaining to approval of foreign/



technical collaboration under the automatic route with previous ventures/tie-up in India. The Press Note No.18 (1998 Series) stipulated that automatic route for FDI/or technology collaboration would not be available to those who have or had any previous joint venture or technology transfer/trade mark agreement in the same or allied filed in India and in such cases the foreign investor/technology supplier would have to necessarily seek FIPB/PAB approval route for joint venture or the detailed technology transfer agreements. Press Note No.18 (1998 Series) further stipulated that the onus was on the investors/technology supplier to provide the requisite justification as also to the satisfaction of FIPB/PAB that the new proposal would not in any way jeopardize the interests of the existing joint venture or technology/trade mark partner or other stake holders.

2.1. A new joint venture agreement was entered into on 04.11.2004 between the petitioners no. 2 and 3 and the respondent no. 5 whereby the participation of the respondent no. 5 was increased to 65% and the participation of the petitioners no. 2 and 3 was reduced to 35% in the shareholding of the petitioner no. 1. The respondent no. 1 reviewed guidelines notified vide Press Note. 18 (1998 Series) dated



14.12.1998 and issued Press Note No. 1 (2005 Series) dated 12.01.2005 setting out the guidelines for approval of foreign/technical collaborations under the automatic route with previous ventures/tie up in India. Press Note No. 1 (2005 Series) stipulated that prior approval in cases where the foreign investor has an existing joint venture or technology transfer/trade mark agreement in the same field and the onus to provide requisite justification as well as proof to the satisfaction of the Government that the new proposal would or would not in any way jeopardize the interests of the existing joint venture or technology/trade mark partner or other stakeholders would be equally on the foreign investor/technology supplier and the Indian Partner. The respondent no. 1 issued Press Note. 3 (2005 Series) dated 15.03.2005 giving clarification regarding guidelines for approval of foreign/technical collaboration under the automatic route with previous ventures/tie-up in India. It is clear that the joint venture was existing on 12.01.2005 and it was necessary for the respondent no. 5 to seek prior approval of the Government of India/ Foreign Investment Promotion Board before making any investment in the same field.



2.2. The respondent no. 5 attempted to withdraw from the Joint Venture. The dispute has been arisen between the parties. The respondent no. 5 on 23.06.2005 attempted to withdraw from the joint venture by way of letters and terminated the License Production Agreement. The respondent no. 5 wanted to set up its own competing entity in India i.e. the respondent no. 6 and contemplated to do the business as done by the petitioner no. 1. The respondent no. 5 in flagrant breach and in total disregard to the second Joint Venture Agreement and Licensed Production Agreement and the guidelines laid down in Press Note. 1 and Press Note No 3 set up a new company i.e. the respondent no 6 on or about 14.06.2005 and made investment therein by subscribing to its entire share capital on 22.07.2005. The respondent no. 5 on 08.08.2005 filed a false declaration in the form FC-GPR that it does not have any other joint venture entities or technical collaboration or trade mark agreement in same or allied field in India and, therefore, can invest through automatic route without Foreign Investment Protection Board (FIPB) approval. The respondent no. 5 in FC-GPR stated about activity of the respondent no. 6 as manufacture and sale of construction



machinery. The respondent no. 5 in violation of second Joint Venture Agreement sought to transfer its shareholding in the petitioner no. 1 to one Sanjeev Bhakat. The Company Law Board vide judgment dated 19.06.2007 set aside the transfer of shares by the respondent no. 5 to Sanjeev Bhakat.

2.3 The respondent no. 5 was not permitted to make an investment being a foreign company through the automatic route in terms of the Press Note no.1 (2005 Series) read with Press Note no. 3 (Series 2005) due to the reason that the respondent no. 5 had existing joint venture in India. The petitioners no. 2 and 3 made numerous representations to the relevant statutory authorities i.e. the respondents no. 1 to 3 to bring in their notice infraction of foreign direct investment policy by the respondent no. 5. The petitioners no. 1 to 3 filed a writ petition bearing no 5633-35 of 2006. The Department of Industrial Policy and Promotion/DIPP on 02.04.2007 after agreeing with the petitioners held that *prima facie*, a case of violation of FDI policy had occurred in the investment of the respondent no. 5 while setting up a wholly owned subsidiary in India i.e. the respondent no 6 under the automatic route while having an



existing joint venture in India in the same field. The respondents no. 5 and 6 challenged the order dated 02.04.2007 by filing a writ petition bearing W.P.(C)No. 3443/2007 before this court which was dismissed by the learned Single Judge vide order dated 1.07.2008. The respondents no. 5 and 6 filed LPA bearing no. 387/2008 titled as **Putzmeister AG, Germany & others V UOI & others** and vide order dated 04.08. 2008, the authorities were restrained from taking any coercive action in pursuance of order dated 02.04.2007. The Division Bench of this court without expressing any opinion on the right of the respondent no. 5 to approach The Foreign Investment Promotion Board allowed LPA to be dismissed as withdrawn vide order dated 11.08.2019 on the basis that the respondents no. 5 and 6 would be approaching the Foreign Investment Protection Board for *ex post facto* approval and directed that the application for approval would be decided in accordance with law. Accordingly, order dated 02.04.2007 passed by the respondent no. 1 became final and as such the respondent no. 5 accepted, admitted and acknowledged the violation of the public policy and guidelines laid down in Press Note 1 and 3 by assessing the automatic route.



2.4 The respondent no. 5 filed an application/proposal bearing Ref. No. 210/2009-FC 1 dated 6.10.2009 before the respondent no. 2 for grant of *ex post facto* approval under the Press Note 1 (2005 Series) for the investment made by it in the respondent no. 6. The respondent no. 2 by letter dated 16.10.2009 forwarded said letter to the petitioner no 1 for comments on said application/proposal which was replied by the petitioner no. 1 vide replies dated 23.10.2009. The respondent no. 2 vide letter dated 01.01.2010 requested the petitioner no. 1 to make a representation on the issues subject matter of the proposal before Director, FIPB on 05.01.2010 and accordingly the petitioner no. 1 made presentation. The respondent no. 2 vide letter dated 16.02.2010 addressed to the petitioner no. 1 and the respondent no. 5 informed about examination of the contentions of the petitioner no. 1 and the respondent no. 5 by a Committee under Chairmanship of AS (DEA). The Committee constituted as per decision of the Foreign Investment Promotion Board in its meeting held on 18.01.2010 was comprising Ms. L.M. Vas, Additional Secretary, Department of Economic Affairs-Chairman; Mr. Govind Mohan, Joint Secretary (I and I); Mr. Prabodh Saxena. Director (FIPB), Mr. P. K. Bagga, Officer on



Special Duty (CM&I), Mr. Deepak Narain, Director, Department of Industrial Policy and Promotion and Mr. Sushil Lakra. Industrial Adviser, Department of Heavy Industry which accorded hearing to the petitioner no. 1 and the respondent no. 5 and written submissions were also furnished by the petitioner no. 1 and the respondent no. 5. The respondent no. 2 vide letter dated 30.09.2010 forwarded copy of FC Approval no. 97(2010)210(2009) dated 29.10.2010 issued to the respondent no. 5 granting *post facto* approval to the proposal of the respondent no. 5 (hereinafter referred to as “**the impugned order**”). The respondent no. 5 vide letter dated 01.10.2010 addressed to the respondent no. 2 requested for amendment of the impugned order and the respondent no. 2 vide its Amendment bearing No. FC. II 97(2010)/210(2010) dated 10.11.2010 amended Clauses 1 and 8 of the impugned order. The petitioners made various applications to various authorities, officers and ministries and also received replies. The respondent no. 2 by Office Memorandum dated 05.04.2010 sought opinion of The Department of Legal Affairs, Ministry of Law and Justice, Government of India regarding grant of *ex post facto* approval under Press Note No. 1 to investment of the respondent no 5



in the respondent no 6 and it was opined that *ex post facto* approval can be given.

2.5 The Foreign Investment Promotion Board in meeting held on 18.01.2010 has directed for constitution of the Committee under Chairmanship of Ms. L. M. Vas, Additional Secretary, Department of Economic Affairs with representation from the Department of Economic Affairs, Department of Industrial Policy and Promotion and Department of Heavy Industry as its members. The petitioners and the respondents no 5 were given personal hearing on 17.03.2010 by the Committee comprising Ms. L.M. Vas, Additional Secretary, Department of Economic Affairs-Chairman; Mr. Govind Mohan, Joint Secretary (I and I); Mr. Prabodh Saxena. Director (FIPB), Mr. P. K. Bagga, Officer on Special Duty (CM&I), Mr. Deepak Narain, Director, Department of Industrial Policy and Promotion and Mr. Sushil Lakra. Industrial Adviser, Department of Heavy Industry. The said Committee was reconstituted by Office Memorandum dated 29.07.2010 and Shri. Bimal Julka, Director General (DG), Director of Currency (DoC) has taken charge of I &I Division in the rank of Additional Secretary and he shall be chairing the meetings of the



Committee. The Committee which has given the recommendation on 04.08.2010 was comprising different members from the Committee which accorded personal hearing to the petitioners and the respondent no. 5. Accordingly, recommendation given 04.08.2010 was bad, inconsequential and without any effect. The petitioners prayed that impugned order and subsequent amendment are erroneous and bad in law and deserve to be quashed. The petitioners being aggrieved filed the present petition and challenged the impugned order and subsequent amendment on various grounds as stated and mentioned in the petition.

3. The respondent no. 5 filed reply wherein stated that the present petition is not maintainable. The respondent no.5 had filed its proposal for grant of *ex post facto* approval for the investment made in the respondent no 6 in exercise of its right as observed by the Division Bench of this court in LPA. The respondent no. 2 has considered and evaluated comments, objections and allegations of the petitioners in great details and thereafter the respondent no. 2 accorded *ex post facto* approval and issued FC Approval dated 29.09.2010 in accordance with law. As per current Foreign Direct



Investment Policy of India (FDI Policy), 100% foreign direct investment is permitted under automatic route of the Reserve Bank of India without approval of the respondent no. 2 in the area of activity and business of the respondent no. 6. The prior approval of the Government as per Press Note no.1 was required where the foreign investor has an existing joint venture in the same field. The Government has examined and evaluated the relevant facts and evidence furnished by the respondent no. 5 and the petitioners and also deliberated upon the proposal at length and thereafter came to categorical finding and satisfaction that the investment proposal of the respondent no. 5 shall not jeopardize the interests of the petitioners. The respondent no. 5 sought FC Approval only in compliance with the provisions of the Press Note No. 1 (2005 Series). The FC approval has been granted for the foreign investment by the respondent no. 5 in the respondent no. 6 in conformity with FDI policy of India. The Press Note No 1 has been repealed and scraped with effect from 01.04.2011 and as such no approval is required by the respondent no. 5 for investment in the respondent no. 6. The respondent no. 2 is an expert and high-powered executive agency and



empowered to examine foreign investment proposals and to take appropriate decisions in the matter connected with foreign direct investment. FIPB is consisting of senior government officials and functionaries. FIPB has considered the foreign investment proposal of the respondent no. 5 carefully and judiciously. FIPB Committee arrived at conclusion that the respondent no. 5 and the petitioners no. 2 & 3 parted their ways in July, 2005 in acrimonious fashion and based on various findings opined that no jeopardy caused to the petitioners. The Report of FIPB Committee was placed before 158th meeting of FIPB held on 10.09.2010 and FIPB considered background of the proposal in detail. The proposal of the respondent no. 5 and the objections and comments of the petitioners were considered and examined by FIPB in comprehensive manner. The decision of FIPB was based on objective, reasonable and transparent considerations. The decision of the respondent no. 2 was based on advice, deliberations and recommendation of multiple specialized agencies which had examined the proposal of the respondent no. 5. The decision of FIPB and specially constituted FIPB Committee to accord *ex post facto* approval to the proposal of the respondent no. 5



was well reasoned. FIPB has power to grant *ex post facto* approval. The Department of Legal Affairs of the Ministry of Law and Justice also opined that FIPB has power to grant ex post facto approval to the investment proposal of the respondent no 5. The respondent no. 2 has considered the proposal with sufficient details and accorded proper hearing to the petitioners before granting the approval. The FC approval granted to the respondent no. 5 is in interest of the Indian Economy and the public interest. The grant of FC Approval is valid and completely justified. The respondent no. 5 had withdrawn from joint venture legally and is no longer associated with the petitioners in any manner. The petitioners also misappropriated funds and legitimate dues of the respondent no 5.

3.1 The respondent no. 5 in preliminary submissions stated that the respondent no. 5 entered into a Joint Venture Agreement dated 19.12.1997 with the petitioners no. 2 and 3 and a License Production Agreement was also executed on 19.12.1997. The petitioner no. 1 was incorporated on 23.01.1998 in pursuance of Joint Venture Agreement and the petitioners were holding 76% of total issued and paid-up share capital of the petitioner no. 1 whereas the respondent



no. 5 was holding 24% of share capital. A new Joint Venture Agreement was also signed on 04.11.2004 which could not be executed or implemented due to differences between the petitioners no. 2 and 3 and the respondent no. 5. The respondent no. 5 has decided to invest in the respondent no. 6. The respondent no. 5 withdraw from second Joint Venture Agreement and License Production Agreement on 12.06.2002 and transferred its shareholding to the petitioner no. 1. The petitioner no. 1 as a joint venture has become defunct and sick. The arbitration proceedings were invoked and initiated.

3.2 The respondent no. 5 filed a Writ Petition (Civil) bearing no 3443 of 2003 to impugn and challenge the letter dated 02.04.2007 as illegal, unreasonable and arbitrary and to restrain the respondents no. 1 to 4 from taking any action in pursuance of letter dated 02.04.2007 issued by the respondent no 1. The writ petition was dismissed vide order dated 01.07.2008. The respondent no. 5 and 6 filed LPA bearing no 387/2008 to challenge order dated 01.07.2008 wherein the respondent authorities were restrained from taking any coercive action in pursuance of letter dated 02.04.2007. The respondent no 5



decided to withdraw LPA and to approach FIPB in the matter. The Division Bench allowed the respondent no. 5 to withdraw the writ petition and LPA vide order dated 11.08.2009. The respondent no. 5 decided to file its investment proposal for consideration and approval by FIPB and on 06.10.2009 made an application with complete disclosure of details to FIPB for grant of *ex post facto* approval under erstwhile Press Note No. 1 of 2005 for investment made in the respondent no 6. The Department of Economic Affairs (FIPB Unit) forwarded application of the respondent no. 5 to the petitioners for comments. The respondent no. 5 also furnished additional information. The petitioners no. 2 and 3 submitted their comments on 20.11.2009 to the respondent no 2 which were also forwarded to the respondent no. 5 on 12.12.2009. The respondent no. 5 also filed detail reply on 01.01.2010. The representative of the respondent no. 5 also had a meeting with Director, FIPB on 05.01.2010 to explain the proposal and on that day the petitioners were also given a hearing by the Director, FIPB. FIPB in its meeting held on 18.01.2010 to consider and evaluate proposal of the respondent no. 5 in greater detail directed that a Committee under the Chairmanship of the



Additional Secretary, Department of Economic Affairs be constituted to examine rival contention of the respondent no. 5 and the petitioners. Accordingly, Committee was constituted as detailed herein above comprising representatives from DIPP i.e. the respondent no 1, Department of Economic Affairs (DEA or the respondent no 2) and the administrative ministries. The petitioners and the respondent no. 5 made their respective submissions before FIPB Committee. The various communications were also exchanged. The proposal was also referred to Department of Legal Affairs vide Office Communication dated 05.04.2010 and opined that the respondent no. 2 is competent to grant *ex post facto* approval. FIPB in its 158th meeting held on 10.09.2010 after deliberations and considerations of material placed before it observed that *ex post facto* approval can be given to the proposal of the respondent no. 5 subject to conditions and compounding by the Reserve Bank of India. The respondent no. 2 vide letter dated 29.09.2010 notified the respondent no. 5 regarding *ex post facto* approval of proposal of the respondent no 5. The respondent no. 5 on 01.10.2010 issued a letter to the respondent no. 2 seeking certain corrections and amendments in FC



Approval dated 29.09.2010. The respondent no. 2 accordingly issued letter dated 10.11.2010. The respondent no. 2 exercised its administrative discretion in appropriate and legal manner. The respondent no. 5 on reply on merits denied allegations levelled against the respondent no. 5 by the petitioner.

4. The respondent no. 1 and 2 also filed their counter affidavit. It is stated that as per dispute the respondent no. 5 had equity investment in existing Joint Venture Company i.e. the petitioner no. 1 but without obtaining NOC from the Joint Venture partner as Press Notes 1 and 3 invested in another Indian Company i.e. the respondent no. 6 which was in violation of FDI Policy. The respondent no. 1 which is the nodal Department for FDI policy vide letter dated 02.4.2007 has opined that the violation of FDI Policy has occurred by the respondent no. 5 by setting up of a wholly owned subsidiary in India in same field. The respondent no 5. filed writ petition bearing no 3443 of 2007 which was dismissed by the learned Single Judge of this court vide judgment dated 01.07.2008. The respondent no. 5 preferred LPA which was allowed to be dismissed as withdrawn along with writ petition vide order dated 01.07.2008 and without



expressing any opinion on merit of the case allowed the respondent no. 5 to approach the respondent no. 2 for relief. The respondent no. 2 received a proposal from the respondent no. 5 and comments were called from the respondent no. 5 and the petitioner no. 1. The respondent no. 2 in its 149th meeting held on 18.01.2010 directed for constitution of a committee under Chairmanship of Additional Secretary, Department of Economic Affairs to examine the rival contentions of the respondent no. 5 and the petitioners and to make recommendations. The Committee also included representatives from Department of Industrial Policy & Promotion, Department of Economic Affairs and Administrative ministries. Accordingly, Committee was constituted. Notices were issued to both the parties to represent their case. Ms. L.M. Vas, AS (DS) was the Chairperson of the Committee while Sh. Govind Mohan, Joint Secretary, DEA; Sh. Prabodh Saxena, Director, DEA; Sh. P. K. Bagga, OSD (CM&I), DEA, Sh. Deepak Narain, Director, DIPP and Sushil Lakra, Industrial Advisor, DHI were other members of the Committee. The second meeting of the Committee was held on 11.06.2010 in presence of above-mentioned Chairperson and members.



4.1. Sh. Bimal Julka, Director General, Directorate of Currency took over charge of Investment & Infrastructure Division in place of Ms. L. M. Vas. The Committee was reconstituted under the chairmanship of Sh. Bimal Julka and third meeting of the Committee was held on 04.08.2010 under Chairmanship of Sh. Bimal Julka and other representatives as mentioned herein above. The respondent no 2/FIPB on basis of opinion of the Committee observed that *ex post facto* approval can be granted and accordingly *ex post facto* approval was issued to the respondent no. 5 vide letter dated 29.09.2010 which was subsequently amended vide letter dated 10.11.2010. The respondents no. 1 and 2 also denied other allegations of the petitioners.

5. Sh. Dayan Krishnan, the learned Senior Counsels for the petitioners in backdrop of above stated facts argued that the petitioners were heard on 17.03.2010 by a committee headed by Ms. L. M. Vas, Additional Secretary Department of Economic Affairs which considered case of the petitioners while the third meeting of the Committee which was held on 04.08.2010 and made final recommendation to the FIPB was reconstituted Committee headed by



Sh. Bimal Julka, Director General, Directorate of Currency. Sh. Krishnan further argued that due to change in the Committee, two members who heard the petitioners were not part of the Committee on 04.08.2010. Accordingly, it is gross violation of principles of natural justice and defeats very purpose of fair hearing. He further argued that FIPB Committee was not having power to grant *ex post facto* approval. The approval and subsequent amendment perpetuated illegality as it was subjected to compounding by RBI. The approval/amendment granted by the respondent no. 2 on recommendation of FIPB did not record any reason and was contrary to the Principles of Natural Justice.

6. Sh. Trideep Pais, the learned Senior Counsel for the respondents no 5 and 6 argued that first meeting of the Committee was held on 17.03.2010 wherein a personal hearing was granted to the petitioners and the respondent no. 5. The parties also filed their written submissions before the Committee and the Committee in third meeting held on 04.08.2010 after dealing with the issues raised by the petitioners and the respondent no. 5 in detail decided to recommend to FIPB to accord *ex post facto* approval to the respondent no. 5 with



certain conditions and also referred names of the members present in the meeting held on 04.08.2010. He argued that there was a change in the composition of the Committee but four members of the Committee remained the same and as such there was no violation of Principles of Natural Justice and placed reliance on **Madhya Pradesh Industries Ltd. V Union of India & others**, 1965 SCC OnLine SC78 and **Union of India & another V Jesus Sales Corporation**, (1996) 4SCC 69. He further stated that the Committee considered the arguments advanced by the petitioners in its meeting held on 04.08.2020. He further argued that the petitioners have failed to demonstrate whether any prejudice was caused to the petitioners. The petitioners were well aware about change in the constitution of the Committee and never raised any objection before 158th meeting held on 10.09.2010. Sh. Pais also countered argument advanced by Sh. Krishnan that the Committee was not having power to grant *ex post facto* approval and the respondent no. 5 was entitled to make investment as there was no existing joint venture on 22.07.2005. Sh. Pais also rebutted other arguments advanced by Sh. Krishnan who also advanced arguments in rebuttal.



7. The principles of natural justice involve a procedural requirement of fairness and have become an essential part of any system of administrative justice. Natural Justice is considered to be part of rule of law. The Supreme Court in **Sangram Singh V Election Tribunal Kotah**, AIR 1955 SC 425 observed that one should not be condemned unheard and decision should not be reached behind the back. The Supreme Court in **Maneka Gandhi V Union of India**, AIR 1978 SC 597 emphasized that natural justice is an essential element of procedure established by law and state action must be right, just and fair and not arbitrary, fanciful and oppressive. It was held that Article 14 of the Constitution strikes at arbitrariness of state action and ensures fairness and equality of treatment. The Supreme Court in **Mohinder Singh V Chief Election Commissioner**, AIR 1978 SC 851 observed that the principles of natural justice are bones of healthy government.

7.1. The Supreme Court in **Indian Oil Corporation Limited and others V Shashi Prabha Shukla and another**, (2018) 12 SCC 85 observed as under:-

33. (a) public authority in its dealings has to be fair, objective, non arbitrary, transparent and non



discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non negotiable prescriptions and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts, etc. Such outrages would clearly be unconstitutional and extinctive of the rule of law which forms the bedrock of the constitutional order.

7.2. The Supreme Court in Southern Power Distribution Company Limited of Andhra Pradesh (APSPDCL) & another V M/s Hinduja National Power Corporation Limited & another, 2022 Livelaw (SC) 117 and observed as under:-

Every action of a State is required to be guided by the touchstone of non arbitrariness, reasonableness and rationality. Every action of a State is equally required to be guided by public interest. Every holder of a public office is a trustee, whose highest duty is to the people of the country. The Public Authority is therefore required to exercise the powers only for the public good.

7.3. The principles of natural justice are equally applied in purely administrative functions. The Supreme Court in A.K. Kraipak V Union of India, AIR 1970 SC 150 observed that the principles of



natural justice are applicable to administrative inquiries and established that observance of principles of natural justice in decision making process of the administrative body having civil consequences. The Supreme Court again in **Neelam Mishra V Harinder Kumar Paintal**, AIR 1990 SC 1137 observed that administrative order involving civil consequences must be passed in accordance with notions of fairness.

7.4. The purpose of the principles of natural justice is to prevent miscarriage of justice. The expression *audi alteram partem* implies that a person must be given an opportunity to defend himself and ensures that no one should be condemned unheard. *Audi alteram partem* makes it obligatory for an authority that a party should not suffer in person or in purse without an opportunity of being heard and implies that before an order is passed against any person real, reasonable and effective opportunity of being heard must be given to him. The rule of fair hearing is consisting of two components which are notice and hearing. It is basic principle of natural justice that the authority should give to the affected party a notice of the case against him so that he may defend himself adequately. The administrative



authority is also required to afford reasonable opportunity to the party to present his case. A real, rationale and effective hearing includes disclosure of all relevant material or information which the authority wishes to use against the individual in arriving of its decision. The administrative authority cannot take a decision on the basis of any material unless the person against whom it is sought to be utilised is given an opportunity to rebut or explain the same.

8. The factual position is more or less admitted by the contesting parties. The petitioner no. 1 was outcome of Joint Venture Agreement between the petitioners no. 1 and 2 and the respondent no. 5 and the respondent no. 5 were having equity investment in the petitioner no. 1. The respondent no. 5 without any approval or NOC from the petitioner no. 1 in terms of Press Notes 1 and 3 made investment in the respondent no. 6 which was found to be in violation of FDI Policy by the respondent no. 1 vide letter dated 02.4.2007 and opined that the respondent no. 5 had violated FDI Policy by setting up of a wholly owned subsidiary in India in same field. The respondent no. 5 filed writ petition bearing no. 3443 of 2007 but without any success as per judgment dated 01.07.2008. LPA filed by



the respondent no. 5 was allowed to be dismissed as withdrawn along with writ petition vide order dated 01.07.2008 and the respondent no. 5 for appropriate relief was allowed to approach the respondent no. 2. The respondent no. 5 made a proposal to the respondent no. 2 and thereafter comments were invited from the respondent no. 5 and the petitioner no. 1. A Committee was constituted as per decision taken by the respondent no. 2 in its 149th meeting held on 18.01.2010 under Chairmanship of Additional Secretary, Department of Economic Affairs to issues between the respondent no. 5 and the petitioners and to make recommendations. Ms. L.M. Vas, AS (DS); Sh. Govind Mohan, Joint Secretary, DEA; Sh. Prabodh Saxena, Director, DEA; Sh. P. K. Bagga, OSD (CM&I), DEA, Sh. Deepak Narain, Director, DIPP and Sushil Lakra, Industrial Advisor, DHI were the Chairperson/ members of the Committee and the second meeting of the Committee was held on 11.06.2010. Sh. Bimal Julka, Director General, Directorate of Currency replaced Ms. L. M. Vas as Chairperson of the Committee. The third meeting of the Committee was held on 04.08.2010 under Chairmanship of Sh. Bimal Julka and the respondent no. 2/FIPB on basis of opinion of the Committee



accorded *ex post facto* approval to the respondent no. 5 vide letter dated 29.09.2010 which was subsequently amended vide letter dated 10.11.2010.

9. The petitioners did not allege that proper, appropriate and meaningful opportunity of being heard was not afforded to them or that they were denied to make representation/written submissions and from submitting documents. It is apparent from respective pleadings of the parties that they were called for personal hearing on 17.03.2010 and submitted written submissions on 19.03.2010. The main grievance of the petitioners is that the Committee under the Chairmanship of Sh. Bimal Julka which recommended to FIPB regarding grant of *ex post facto* to the respondent no. 5 for investment in the respondent no 6. on 04.08. 2010 was not the same Committee which heard the petitioners no. 2 and 3 and the respondent no. 5 on 17.03.2010 regarding grant of *ex post facto* approval to the respondent no. 5 and said Committee was headed by Ms. L. M. Vas. It means that Committee under Chairmanship of Ms. L. M. Vas which heard the petitioners no. 2 and 3 and the respondent no. 5 on 17.03.2010 on issue of grant of *ex post facto* to the respondent no. 5



on its proposal did not recommend grant of *ex post facto* to the respondent no. 5 rather it was recommended by the Committee headed by Sh. Bimal Julka. The composition of both the Committees i.e. one which heard the petitioners no. 2 and 3 and the respondent no. 5 on 17.03.2010 and the Committee which recommended grant of approval to the respondent no. 5 on 04.08.2010 was different and said factual position is not under dispute or disputed by either of the parties and the respondents no. 1 and 2 in counter affidavit have admitted this factual position. The learned Senior Counsel for the petitioners under these circumstances alleged gross violation of the Principles of Natural Justice and the learned Senior Counsel for the respondents no. 5 and 6 stated that no prejudice was caused to the petitioners as the petitioners were having knowledge about the change in the constitution of the Committee and were given proper opportunity of being heard by the Committee. Sh Pais also argued that Sh. Prabodh Saxena and Ms. L. M. Vas were not part of the Committee on 04.08.2010 and one member Sh. Bimal Julka did not personally hear the petitioners but four members of the Committee remained same.



10. The Supreme Court in **Gullapalli Nageswara Rao & others V Andhra Pradesh State Road & another** and also relied on by the learned Senior Counsel for the petitioners considered Motor Vehicles Act, 1939 and the Rules framed thereunder which imposes a duty on the State Government to give a personal hearing and the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. It was observed that the divided responsibility is destructive of the concept of judicial hearing and such a procedure defeats the object of personal hearing. The personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up its doubts during the course of arguments and the party appearing to persuade the authority by reasoned arguments to accept this point of view. It was further held that if one person hears and another decides, then personal hearing becomes an empty formality. The Coordinate Bench of this court in **Hyundai Rotem Company V Delhi Metro Rail Corporation** which is also cited by the learned Senior Counsel for the petitioners also observed that if one authority is hearing and another authority is passing the order then it defeats the very purpose of personal hearing.



11. In the present case, the respondents no. 1 and 2 in counter affidavit alleged that it is not the general practice to ask the parties to participate in FIPB meetings but in cases where personal hearing of the parties is considered to be necessary then the parties are called to present their case either before the Board or before a committee especially constituted to consider a particular issue. In the present case a committee was constituted vide letter dated 16.02.2010 issued by DEA then the petitioners and the respondent no. 5 were called to present their respective case before committee. It is further stated that once the committee gave its report then no need was felt to call the parties again before FIPB. It is also reflecting from the counter affidavit filed on behalf of the respondents no. 1 and 2 that the first meeting of Committee was to be held on 03.03.2010 and subsequently held on 17.03.2010. The notices were also issued to the concerned parties. The first meeting was chaired by Ms. L. M. Vas, AS (DEA) and Sh. Govind Mohan, Joint Secretary, DEA; Sh. Prabodh Saxena, Director, DEA; Sh. P. K. Bagga, OSD (CM & I), DEA, Sh. Deepak Narain, Director, DIPP and Sh. Sushil Lakra, Industrial Director, DHI were present as representatives of the



Administrative Ministries. It is further stated that second meeting of the Committee was held on 11.06.2010 which was chaired by Ms. L. M. Vas and attended by Sh. V. Bhaskar, Joint Secretary, DIPP, Sh. Govind Mohan, Joint Secretary, DEA; Sh. Prabodh Saxena, Director, DEA; Sh. P. K. Bagga, OSD (CM & I), DEA, Sh. Deepak Narain, Director, DIPP and Sh. Sushil Lakra, Industrial Director, DHI. It was further stated that Sh. Bimal Julka, Director General, Directorate of Currency (DEA) took over the charge of Investment & Infrastructure Division under FIPB and thereafter Committee was reconstituted under Chairmanship of Sh. Bimal Julka vide OM dated 29.07.2010. The third meeting of the Committee was held on 04.08.2010 which was attended by Sh. Bimal Julka, Director General, Directorate of Currency (DEA), Sh. Govind Mohan, Joint Secretary, DEA; Sh. P. K. Bagga, OSD (CM & I), DEA, Sh. Deepak Narain, Director, DIPP and Sh. Sushil Lakra, Industrial Director, DHI. The said Committee accorded *ex post facto* approval to the respondent no 5.

12. It is not stand of the respondents no. 1 and 2 that the petitioners no. 2 and 3 and the respondent no. 5 were called for personal hearing or accorded personal hearing on 04.08.2010 which reflects that



reconstituted Committee accorded approval to the respondent no. 5 on its proposal for investment made in the respondent no. 6 only on basis of submissions oral and documentary and documents already submitted to Committee prior to reconstitution till 17.03.2010. The reconstituted Committee under chairmanship of Sh. Bimal Julka should have afforded or given a fresh personal hearing to the petitioners no. 2 and 3 and the respondent no. 5 before according *ex post facto* approval to the respondent no 5. Although four members were common in Committees on 17.03.2010 and 04.08.2010 but on both occasions, Chairpersons of the Committee were different and reconstituted Committee without affording fresh opportunity to the parties and despite fact that personal hearing was given by the earlier Committee has accorded the approval to the respondent no. 5 which was in gross violation of the right to personal hearing and in turn Principles of Natural Justice. The approval to the respondent no. 5 either should have been granted by the Committee which was chaired by Ms. L. M. Vas or a fresh personal hearing must have given by the reconstituted Committee under chairmanship of Sh. Bimal Julka and failure to do so was gross violation of Principles of Natural Justice.



Although it is stand of the respondents no. 1 and 2 that the parties were not required to be given personal hearing but once it was afforded to the petitioners no. 1 and 2 and the respondent no. 5 then it must have been meaningful and in accordance with observation of Principles of Natural Justices. The act of the respondent no. 1 and 2/FIPB in according approval to the respondent no. 5 by reconstituted Committee without affording a fresh opportunity of being heard to the parties was in gross violation of the Principles of Natural Justice. There is force in arguments advanced by the learned Senior Counsel for the petitioners that recommendation of grant of approval to the respondent no. 5 on 04.08.2010 was in violation of Principles of Natural Justice. The contrary arguments advanced by the learned Senior Counsel for the respondent no. 5 & 6 are misplaced even no prejudice might have caused to the petitioners.

13. Sh. Dayan Krishnan, the learned Senior Counsels for the petitioners also argued that the respondent no. 2 while granting approval/amendment to the respondent no. 5 on recommendation of FIPB did not record reasons and is contrary to the Principles of Natural Justice. He further argued that amendment dated 10.10.2010



wherein it was recorded that no jeopardy has been caused to the petitioners no. 1 and 2 was made without affording any opportunity of being heard to the petitioners no. 2 & 3. Sh. Trideep Pais, the learned Senior Counsel for the respondents no. 5 and 6 argued that amendment in FC Approval does not materially alter impugned order dated 29.09.2010. The respondent no. 2 on 29.09.2019 accorded *ex post facto* approval to the respondent no. 5 on its proposal. FIPB in its 158th meeting held on 10.09.2010 considered objections raised by the petitioners in detail and thereafter had decided to accord *ex post facto* approval to the respondent no. 5 for investment in the respondent no. 6. He argued that there was no denial of the Principles of Natural Justice to the petitioners. Both learned Senior Counsels cited case law in support of their arguments.

14. The Supreme Court in **Engineer and Manufacturing Co. V Union of India**, AIR 1976 SC 1785 reiterated the principle with an emphasis that the rule requiring reasons to be given in support of an order is a basic principle of natural justice which must inform the quasi-judicial process. It should be observed in its proper spirit and "mere pretence of compliance with it would not satisfy the



requirement of law". It was observed in **Maneka Gandhi V Union of India**, AIR 1990 SC 1984 that giving of reasons is a healthy check against abuse or misuse of power. The requirement of duty to give reasons was further crystallized in **S.N. Mukherjee V Union of India**, AIR 1990 SC 1984 and reasons due to which a reasoned decision must be passed were discussed. It was observed that reasoned decision: (i) guarantee consideration by the authority; (ii) introduce clarity in decisions; and (iii) minimize chances of arbitrariness in decision-making thereby ensuring fairness in the process. It was observed as under:

In our opinion, therefore, the requirement that reason must be recorded must be recorded should govern the decisions of govern the an administrative authority exercising quasi judicial functions irrespective of fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clean and explicit so as to indicate that the authority has given due consideration to the points in controversy.

14.1 The Supreme Court in **Rani Lakshmi Bai Kshetriya Gramin Bank V Jagdish Sharan Varshney & others**, (2009) 4SCC496 held that the purpose of disclosure of reasons is that people should have



confidence in judicial and quasi-judicial authorities and minimize chances of arbitrariness. It was held as under:-

The purpose of disclosure of reasons, as held by a Constitution Bench of this Court in the case of S.N. Mukherjee vs. Union of India reported in (1990) 4 SCC 594, is that people must have confidence in the judicial or quasi-judicial authorities. Unless reasons are disclosed, how can a person know whether the authority has applied its mind or not? Also, giving of reasons minimizes chances of arbitrariness. Hence, it is an essential requirement of the rule of law that some reasons, at least in brief, must be disclosed in a judicial or quasi-judicial order, even if it is an order of affirmation.

14.2 The Supreme Court in the case of **Namit Sharma V Union of India**, (2013) (1) SCC 745 regarding duty to give reasons held as under: -

It is not only appropriate but is a solemn duty of every adjudicatory body, including the tribunals, to state the reasons in support of its decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice jurisprudence rests. It is informative to the claimant of the basis for rejection of his claim, as well as provides the grounds for challenging the order before the higher authority/constitutional court. The reasons, therefore, enable the authorities, before whom an order is challenged, to test the veracity and correctness of the impugned order. In the present times, since the fine line of distinction between the functioning of the administrative and quasi-judicial bodies is gradually becoming faint, even the administrative bodies are required to pass reasoned orders. In this regard, reference can be made to the judgments of this Court in the cases of Siemens



Engineering & Manufacturing Co. of India Ltd. v. Union of India & Anr. [(1976) 2 SCC 981]; and Assistant Commissioner, Commercial Tax Department Works Contract and Leasing, Kota v. Shukla & Brothers [(2010) 4 SCC 785].

14.3 Any authority when conferred with a discretionary power must exercise that power after applying its mind to the facts and circumstances of the case. The authority should not act mechanically in exercise of discretion. The Supreme Court in **East Coast Railway V Mahadev Appa Rao**, (2010) 7 SCC 2794 observed that every order passed by a public authority must disclose due and proper application of mind by the person making the order.

15. Even at risk of repetition, it is stated that the petitioner no. 1 was incorporated due to execution of Joint Venture Agreement between the petitioners no. 2 and 3 and the respondent no. 5. The respondent no. 5 set up the respondent no. 6 on or about 14.06.2005 and made foreign investment therein. The petitioners made complaints to the respondents no. 1 to 3 for violation of Press Notes No. 1 & 3. The respondent no. 1 passed an order dated 02.04.2007 holding that the respondent no. 5 had violated FDI Policy in setting the respondent no. 6. The respondent no. 5 vide order dated 11.08.2009 passed in



LPA bearing no 387 of 2008. LPA was permitted to approach FIPB for appropriate relief. Thereafter the respondent no. 5 filed an application/proposal on 6.10.2009 for grant of *ex post facto* approval under Press Note No. 1 (2005 Series) for investment made in the respondent no. 6. FIPB in its meeting held on 18.01.2010 directed for constitution of a committee to examine rival contentions of the petitioners and the respondent no. 5 and said Committee was set up under Chairmanship of Ms. L. M. Vas. The Committee gave a hearing to the petitioners no. 2 and 3 and the respondent no. 5 on 17.03.2010 and written submissions were also submitted by them. The Committee was reconstituted under chairmanship of Sh. Bimal Julka and said reconstituted committee made recommendation on 04.08.2010 for grant of *ex post facto* approval and said recommendation was considered by FIPB in its meeting held on 10.09.2010 and thereafter the respondent no. 2 granted *ex post facto* approval to the respondent no. 5.

16. The perusal of Approval dated 29.09.2010 reflects that the Department of Economic Affairs, FIPB (FC SECTION), Ministry of Finance conveyed to the respondent no. 5 about grant of *ex post facto*



approval by the Government of India subject to certain terms and conditions. The clause 10 of said Approval detailed about circumstances which were necessary for grant of approval to the respondent no. 5. The *ex post facto* approval dated 29.09.2010 was result of deliberations made in FIPB on the basis of recommendation made by Committee constituted by FIPB to examine rival contentions of the petitioners no. 2 and 3 and the respondent no. 5 about foreign investment made by the respondent no. 5 in the respondent no. 6. The petitioners no. 2 and 3 were given personal hearing by the Committee and written submissions were also submitted by the petitioners no. 2 and 3. It cannot be said that *ex post facto* Approval dated 29.09.2010 was granted without any reason although those reasons may not be specifically mentioned in Approval dated 29.09.2010. The argument advanced by the learned Senior Counsel for the petitioners that Approval dated 29.09.2010 was without any reason or passed without reasons does not have legal force. The contrary arguments advanced by the learned Senior Counsel for the respondents no. 5 and 6 carry legal force.



17. However, in view of the fact that reconstituted Committee which recommended grant of approval to the respondent no. 5 on 04.08.2010 was not the Committee comprising same Chairperson/members which heard the petitioners no. 2 and 3 and the respondent no. 5 on 17.03.2010. Accordingly grant of approval on 29.09.2010 by the respondent no. 2 to the respondent no. 5 needs fresh reconsideration again by the Committee which shall be hearing the petitioners no. 2 and 3 and the respondent no. 5 on the proposal of the respondent no. 5 and shall be taking decision on the proposal made by the respondent no. 5. Accordingly, the respondent no.2/Ministry of Finance/FIPB is directed to constitute fresh/new Committee to hear afresh on proposal of the respondent no. 5 stated to have been made on 06.10.2009 vide application bearing Ref. No 210/2009-FC.1 within six weeks from date of this judgment and said Committee shall hear the petitioners no. 2 and 3 and the respondent no. 5 on proposal of the respondent no. 5 and thereafter same committee shall take appropriate decision on the proposal of the respondent no. 5. It is made clear that there shall not be any change in composition of the Committee or reconstitution of the Committee in



any circumstance. The new Committee shall afford opportunity of being heard to the petitioners and the respondent no. 5 which shall also include filing of written submissions if any by the petitioners no. 2 and 3 and the respondent no. 5. The freshly constituted Committee shall take appropriate decision on recommendation about proposal of the respondent no. 5 within a period of eight weeks from date of constitution and shall be at liberty to take independent decision without being influenced by previous recommendation made on 04.08.2010. It is made clear that there is no stay or injunction on operation of *ex post facto* approval dated 29.09.2010 till newly constituted committee takes appropriate decision on proposal of the respondent no. 5. The parties to the petition shall also be at liberty to initiate appropriate legal proceedings in case they feel aggrieved by any decision/recommendation made by the Committee or by the respondent no. 2/FIPB thereafter or in any altered circumstance.

18. The present petition along with pending applications, if any, stand disposed of.

DR. SUDHIR KUMAR JAIN
(JUDGE)

OCTOBER 29, 2024 *sk/tk*