IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.320 OF 2024

Chowgule and Company Private Limited
having its registered office at
Chowgule House, Mormugao Harbour,
Goa 403803
Represented through its Constituted Attorney
Mr Vishwanath Kamat Malayekar,
appointed through
Power of Attorney 21.12.2023. … Petitioner

Versus

1 Assistant Director General of Foreign Trade,
Nishtha Bhavan (New CGO Bldg),
New Marine Lines,
Churchgate, Mumbai 400 020

2 Deputy Director General of Foreign Trade,
Nishtha Bhavan (New CGO Bldg),
New Marine Lines,
Churchgate, Mumbai 400 020

3 Joint Director General of Foreign Trade,
Nishtha Bhavan (New CGO Bldg),
New Marine Lines,
Churchgate, Mumbai 400 020

4 Additional Director General of Foreign Trade,
Udyog Bhavan,
Maulana Azad Road, New Delhi 110001

5 Director General of Foreign Trade,
Udyog Bhavan, Maulana Azad Road,
New Delhi 110001

6 Union of India
(through the Secretary to the Government of
India, Ministry of Commerce, New Delhi) …Respondents

Mr S. D. Lotlikar, Senior Advocate with Mr Terence Sequeira, Advocate for the Petitioner.
Mr Pravin Faldessai, Deputy Solicitor General of India for the Respondents.

CORAM: M. S. KARNIK &
VALMIKI MENEZES, JJ

Reserved on : 6th AUGUST 2024
Pronounced on: 12th AUGUST 2024

JUDGMENT (Per M. S. Karnik, J)

1. By this petition under Article 226 of the Constitution of India the petitioner prays for quashing and setting aside the impugned order dated 09.02.2024 and further commanding the respondents to refrain from taking any further action or proceeding against the petitioner with regard to interest on the strength of the impugned order. It is further prayed that the respondents be directed to return the original bank guarantee for an amount of Rs.1,21,69,200/- drawn on State Bank of India, Commercial Branch, Vasco da Gama Goa, to the petitioner along with all previous original bank guarantees.

2. The facts of the case in brief are thus: -

The petitioner is a Private Limited Company registered under the Companies Act, 1956. The petitioner is engaged in the business of mining, shipbuilding and allied activities. Relying upon the original Exim Policy, 1988-91 and acting upon the said policy, the petitioner entered into a contract with one NKK Corporation, Japan on 07.02.1990 for the export of processed iron ore, which was not an ineligible item in Appendix 12 under the Exim Policy, 1988-91. However, the petitioner actually exported the processed iron ore and realised NFE earnings of Rs.52,00,51,848/- between the period April, 1990 to March, 1991 during the new Exim Policy. The petitioner applied for a grant of additional licence on 23.07.1992. The same came to be rejected by the Assistant Chief Controller of Imports and Exports on the ground that there was no provision for grant of an additional licence. In an appeal preferred by the petitioner, the Joint Chief Controller of Imports and Exports remanded the matter to the Assistant Chief Controller of Imports and Exports for a fresh adjudication.

3. The Assistant Chief Controller of Imports and Exports again rejected the said application by observing that the item "*iron ore processed*" exported by the Appellant during April 1990 to March 1991 is included in Appendix 12 of the Exim Policy, Book 1990-91. The Ministry of Commerce vide REP Circular No.11/93 dated 05.05.1993 introduced a scheme stating that in lieu of

introducing full convertibility, cash amount of 20% premium would be paid against the additional licence. The petitioner referring to the above Circular lodged a claim for 20% premium for Rs.1,21,69,200/- (being 20% of Rs.6,08,46,000/-) on 14.07.2023. In the meantime, the petitioner preferred an appeal challenging the order dated 30.04.1993 before the JDGFT which was rejected. Thereafter, the petitioner preferred a second appeal before the Additional Director General of Foreign Trade against the decision of the JDGFT dated 02.09.1993.

4. Since the scheme for payment of premium was going to expire on 31.12.1993 and the aforesaid appeal was not disposed of, the petitioner preferred a Writ Petition No.629 of 1993 before this Court praying for quashing of the orders of the Assistant Director and JDGFT dated 30.04.1993 and 02.09.1993 respectively and for mandamus to them to pay to the petitioner the said premium of Rs.1,21,69,200/- forthwith. By an interim order passed on 15.12.1993, this Court directed the respondents to deposit an amount of Rs.1,21,69,200/-. The Union of India preferred a Special Leave Petition bearing SLP (C) No.344 of 1994 before the Supreme Court against the interim order dated 15.12.1993. By order dated 14.01.1994, the Supreme Court set aside the order dated 15.12.1993 of this Court after recording the assurance of the Additional Solicitor General that if the petitioner would succeed in

any proceeding then "*the amount claimed by the petitioner under the scheme would not be denied by reason alone that the scheme had expired on 31.12.1993*".

5. During the pendency of the Writ Petition No.629 of 1993, the petitioner received the communication/order dated 05.10.1994 from the DGFT, New Delhi informing that the Additional Director General of Foreign Trade by the order has rejected the second appeal. By judgment dated 13.09.1995, this Court partly allowed Writ Petition No.629 of 1993, and quashed the order of the Additional Director of Foreign Trade dated 05.10.1994, and remitted the matter to the ADGFT to consider the question of the petitioner's eligibility for an additional licence or in lieu thereof the petitioner is entitled to 20% premium. After remand, the second appellate authority again dismissed the appeal on the ground that the application filed by the Appellant for grant of additional licence was barred by limitation.

6. Aggrieved by the decision of the Second Appellate Authority, the petitioner filed Writ Petition No.286/1996. By judgment and order dated 30.01.2001, the writ petition was allowed and the order of the ADGFT dated 12.01.1996 was quashed and set aside.

7. The respondents challenged the judgment dated 30.01.2001 of this Court before the Supreme Court by filing SLP. When the said matter came up for hearing on 27.08.2001, the Supreme Court granted leave in the matter and directed the petitioner to furnish a bank guarantee to the respondents for the amount due i.e. Rs.1,21,69,200/- along with interest and on furnishing of the said bank guarantee. By order dated 09.09.2002, the Supreme Court directed the petitioner to give an undertaking that if the bank guarantee is not renewed by the petitioner two months prior to its expiry, the Union of India would be entitled to invoke the bank guarantee. The Supreme Court further directed the Union of India to release the amount within four weeks. The respondents paid the amount of Rs.1,21,69,200/- only without any interest. The petitioner continued to renew the said bank guarantee from time to time.

8. The Supreme Court by order dated 04.04.2007 remanded the matter back to this Court to consider afresh the effect of Appendix 12 to the Policy of April 1990-March 1993. However, with regard to the payment of Rs.1,21,69,200/- made to the petitioner, the Supreme Court stated that "*By an interim order, this Court on 09.09.2002 directed the Union of India to pay to the assessee the amount of Rs.1,21,69,200/- subject to furnishing of bank guarantee. The said order shall remain in operation till*

disposal of the writ petition by the High Court and the respondent shall keep on renewing the bank guarantee till a final decision is taken by the High Court".

9. By judgment and order dated 26.06.2008, this Court dismissed the Writ Petition No.286 of 1996 holding that the petitioner was exporting a product (processed iron ore) which was inadmissible as per Appendix 12 to the Exim Policy. The petitioner assailed the judgment dated 26.06.2008 passed by this Court before the Supreme Court by filing an SLP. The Supreme Court extended the stay granted by this Court from time to time. Last such bank guarantee was extended on 24.06.2022 for an amount of Rs.1,21,69,200/-.

10. The Supreme Court by judgment dated 04.11.2022 upheld the judgment of this Court by dismissing the Civil Appeal thereby ultimately holding that the petitioner is not entitled for benefit of the additional licence under the Exim Policy.

11. After the decision of the Supreme Court, the petitioner addressed a letter dated 09.12.2022 to the ADGFT requesting them to provide bank details for payment of Rs.1,21,69,200/-. After three months, the office of the ADGFT responded to the petitioner's letter by providing the bank details to facilitate

payment to the RBI. In the said letter dated 24.03.2023, the respondents requested to deposit the claim incentive along with 15% rate of interest. The petitioner requested 30 days period to respond to the letter dated 24.03.2023 vide communication dated 05.04.2023 as the petitioner was in the process of closing the Financial Year end activities of April-March 2023. However, the office of ADGFT through its letter dated 24.04.2023 did not accede to the request of the petitioner for an extension of time and immediately directed the petitioner to pay the amount due failing which necessary action will be taken under the Foreign Trade (Development and Regulation) Act (FT Act for short).

12. On 08.05.2023, the petitioner informed the respondent that the petitioner has made payment of the amount of Rs.1,21,69,200/- via RTGS dated 04.05.2023. By the same letter, the petitioner requested for an appointment with DGFT for clarification on the interest part of the subject matter. The office of the ADGFT vide letter dated 29.05.2023 informed the petitioner that they can avail personal hearing with the Deputy Director General on 16.06.2023. By letter dated 29.05.2023, the petitioner requested the office of the ADGFT that the petitioner has been in a bonafide manner complying with all the conditions which were imposed on them by the office of DGFT from time to time. In view of the same, a request was made for waiving off the interest as

stated in the letter dated 24.03.2023 and return back the original bank guarantee. However, there was no response from the office of the DGFT.

13. As there was apprehension that the respondents may encash the bank guarantee, the petitioner filed a Miscellaneous Civil Application No.239 of 2024 (F) in Writ Petition No.286 of 1996 on 25.01.2024 praying for the return of the original bank guarantee, in view of the payment of Rs.1,21,69,200/- made by the petitioner. By communication dated 05.02.2024, the JDGFT called upon the petitioner to immediately pay an amount of Rs.3,65,38,023/-. By the said communication, the petitioner was also informed that the personal hearing has been fixed on 09.02.2024 at 11.30 a.m. The petitioner thereafter by letter dated 08.02.2024 requested the JDGFT to defer the personal hearing by 15 days. Respondent No.3-JDGFT by an order dated 09.02.2024 forfeited the bank guarantee of Rs.1,21,69,200/- and directed the petitioner to pay the remaining amount of Rs.2,43,68,823/- within 10 days. It was also directed that the IEC of the petitioner be put on DEL i.e. Denied Entities List as per the provision of 2.14 of FTP 2023. Pursuant to the filing of this petition, this Court by an interim order stayed the impugned order on the condition that the petitioner would deposit the bank guarantee amount of

Rs.1,21,69,200/- within two weeks. The petitioner has deposited the said amount of Rs.1,21,69,200/-.

14. Mr Faldessai, learned Deputy Solicitor General of India for the respondents raised a preliminary objection that the present petition should not be entertained as the petitioner has an alternate equally efficacious remedy of filing an appeal under Section 15 of the FT Act. In support of his submissions, reliance is placed on the decision of the Supreme Court in ***PHR Invent Educational Society Vs Uco Bank and others***[1]**.**

15. Let us first deal with the preliminary objection raised by learned Deputy Solicitor General of India. Chapter V of the FT Act provides for appeal and review. Section 15 is a provision for appeal. Section 15(1) stipulates that any person aggrieved by any decision or order made by the adjudicating authority under this Act may prefer an appeal within a period of forty-five days from the date on which the decision or order is served on such person to the Appellate authority specified therein. Section 13 provides for the "*Adjudicating Authority*"**.** Section 2(a) defines "*adjudicating authority*" means the authority specified in, or under, Section 13. Section 13 says that any penalty may be imposed or any

[1] Arising out of SLP(C) No.8867 of 2022

confiscation may be adjudged under this Act by the Director-General or subject to such limits as may be specified, by such other officer as the Central Government may, by notification in the Official Gazette, authorise in this behalf. Thus, an appeal shall lie under Section 15 of the FT Act, if any penalty is imposed or any confiscation is adjudged under the Act, by the adjudicating authority.

16. The question is whether the demand for interest can be subject matter for adjudication by the adjudicating authority. The provisions of Chapter IV of the FT Act deal with search, seizure, penalty and confiscation. Section 11 provides for contravention of provisions of the FT Act, rules, orders and foreign trade policy. The provisions of sub-section (1) to sub-section (9) of Section 11 pertain to the imposition of penalty and confiscation. Sub Section (7) of Section 11 needs to be mentioned as it says that without prejudice to the provisions contained in this Section, the importer-exporter Code number of any person who fails to pay any penalty imposed under this Act, may be suspended by the Adjudicating Authority till the penalty is paid or recovered, as the case may be. Section 11 which is important having a bearing on the present controversy needs to be reproduced which reads thus:

*"[11. **Contravention of provisions of this Act, rules, orders and foreign trade policy.** — (1) No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the foreign trade policy for the time being in force.*

(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy, he shall be liable to a penalty of not less than ten thousand rupees and not more than five times the value of the goods or services or technology in respect of which any contravention is made or attempted to be made, whichever is more.

(3) Where any person signs or uses, or causes to be made, signed or used, any declaration, statement or document submitted to the Director General or any officer authorised by him under this Act, knowing or having reason to believe that such declaration, statement or document is forged or tampered with or false in any material particular, he shall be liable to a penalty of not less than ten thousand rupees or more than five times the

value of the goods or services or technology in respect of which such declaration, statement or document had been submitted, whichever is more.

(4) Where any person, on a notice to him by the Adjudicating Authority, admits any contravention, the Adjudicating Authority may, in such class or classes or cases and in such manner as may be prescribed, determine, by way of settlement, an amount to be paid by that person.

(5) A penalty imposed under this Act may, if it is not paid by any person, be recovered by any one or more of the following modes, namely: —

(a) the Director General may deduct or require any officer subordinate to him to deduct the amount payable under this Act from any money owing to such person which may be under the control of such officer; or

(b) the Director General may require any officer of customs to deduct the amount payable under this Act from any money owing to such person which may be under the control of such officer of customs, as if the said

amount is payable under the Customs Act, 1962 (52 of 1962); or

(c) the Director General may require the Assistant Commissioner of Customs or Deputy Commissioner of Customs or any other officer of Customs to recover the amount so payable by detaining or selling any goods (including the goods connected with services or technology) belonging to such person which are under the control of the Assistant Commissioner of Customs or Deputy Commissioner or Customs or any other officer of Customs, as if the said amount is payable under the Customs Act, 1962 (52 of 1962); or

(d) if the amount cannot be recovered from such person in the manner provided in clauses (a), (b) and (c),—

(i) the Director General or any officer authorised by him may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the District in which such person owns any property or resides or carries on business and the said Collector on receipt of such certificate shall proceed to

recover from such person the amount specified thereunder as if it were an arrear of land revenue; or

(ii) the Director General or any officer authorised by him (including an officer of Customs who shall then exercise his powers under the Customs Act, 1962 (52 of 1962)) and in accordance with the rules made in this behalf, detain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid, as if the said amount is payable under the Customs Act, 1962 (52 of 1962); and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and costs including cost of sale remaining unpaid and shall render the surplus, if any to such person.

(6) Where the terms of any bond or other instrument executed under this Act or any rules made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (5), the amount may, without prejudice to any other mode of

recovery, be recovered in accordance with the provisions of that sub-section.

(7) Without prejudice to the provisions contained in this section, the Importer-Exporter Code Number of any person who fails to pay any penalty imposed under this Act, may be suspended by the Adjudicating Authority till the penalty is paid or recovered, as the case may be.

(8) Where any contravention of any provision of this Act or any rules or orders made thereunder or the foreign trade policy has been, is being, or is attempted to be, made, the goods (including the goods connected with services or technology) together with any package, covering or receptacle and any conveyances shall, subject to such conditions and requirement as may be prescribed, be liable to confiscation by the Adjudicating Authority.

(9) The goods (including the goods connected with services or technology) or the conveyance confiscated under sub-section (8) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent

to the market value of the goods or conveyance, as the case may be.]

[11-A. Crediting sums realised by way of penalties in Consolidated Fund of India.—All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

11-B. Empowering Settlement Commission for regularisation of export obligation default. — Settlement of customs duty and interest thereon as ordered by the Settlement Commission as constituted under section 32 of the Central Excise Act, 1944 (1 of 1944), shall be deemed to be a settlement under this Act.]"

17. On a reading of the aforesaid provisions, in our opinion, the demand for payment of interest on the amount which has been paid over to the petitioner by the respondents as per the order of the Supreme Court cannot be included in the term penalty which can be adjudicated in terms of the provisions of the FT Act or rules made thereunder.

18. The law with regard to the entertaining the petition under Article 226 of the Constitution of India in case of availability of alternate remedy is well settled. The decision relied upon by learned

Deputy Solicitor General of India in *PHR Invent Educational Society* (supra) is significant. Paras 14 to 22 crystalizes the legal position which read thus: -

> "*14. The law with regard to entertaining a petition under Article 226 of the Constitution in case of availability of alternative remedy is well settled. In the case of Satyawati Tondon (supra), this Court observed thus:*
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> > *"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery*

of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court

is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance."

15. It could thus be seen that, this Court has clearly held that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. It has been held that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. The Court clearly observed that, while

dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. It has been held that, though the powers of the High Court under Article 226 of the Constitution are of widest amplitude, still the Courts cannot be oblivious of the rules of self-imposed restraint evolved by this Court. The Court further held that though the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, still it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution.

16. The view taken by this Court has been followed in the case of ***Agarwal Tracom Private Limited v. Punjab National Bank and others*** *[(2018) 1 SCC 626].*

17. In the case of ***Authorized Officer, State Bank of Travancore and Another v. Mathew K.C.*** *[(2018) 3 SCC 85], this Court was considering an appeal against an interim order passed by the High Court in a writ petition under Article 226 of the Constitution staying further proceedings at the stage of Section 13(4) of the SARFAESI Act. After considering various judgments rendered by this Court, the Court observed thus:*

> *"16. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference."*

18. The same position was again reiterated by this Court in the case of ***Phoenix ARC Private Limited v. Vishwa Bharati Vidya Mandir and others*** *[(2022) 5 SCC 345.*

19. Again, in the case of ***Varimadugu OBI Reddy v. B. Sreenivasulu and others*** *[(2023) 2 SCC 168], after referring to earlier judgments, this Court observed thus:*

> *"34. The order of the Tribunal dated 1-8-2019 was an appealable order under Section 18 of the SARFAESI Act, 2002 and in the ordinary course of business, the borrowers/person aggrieved was supposed to avail the statutory remedy of appeal which the law provides under Section 18 of the SARFAESI Act, 2002. In the absence of efficacious alternative remedy being availed, there was no reasonable justification tendered by the respondent borrowers in approaching the High Court and filing writ application assailing order of the Tribunal dated 1-8-2019 under its jurisdiction under Article 226 of the Constitution without*

exhausting the statutory right of appeal available at its command."

20. It could thus be seen that this Court has strongly deprecated the practice of entertaining writ petitions in such matters.

21. Recently, in the case of ***Celir LLP*** *(supra), after surveying various judgments of this Court, the Court observed thus:*

"101. More than a decade back, this Court had expressed serious concern despite its repeated pronouncements in regard to the High Courts ignoring the availability of statutory remedies under the RDBFI Act and the SARFAESI Act and exercise of jurisdiction under Article 226 of the Constitution. Even after, the decision of this Court in Satyawati Tondon [United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260], it appears that the High Courts have continued to exercise its writ jurisdiction under Article 226 ignoring the

statutory remedies under the RDBFI Act and the SARFAESI Act."

22. It can thus be seen that it is more than a settled legal position of law that in such matters, the High Court should not entertain a petition under Article 226 of the Constitution particularly when an alternative statutory remedy is available."

19. As the demand for payment of interest cannot be a penalty in terms of the provisions of the FT Act, there can be no appeal against such order under Section 15 of the FT Act. We do not find any provision prescribing an alternate efficacious remedy to the petitioner under the FT Act for redressal of the grievance. There is thus no merit in the preliminary objection of the learned Deputy Solicitor General of India about the existence of an effective alternative remedy. We proceed to entertain the petition in its challenge to the impugned order.

20. So far as the impugned order by which the demand for interest at the rate of 15% on the amount of Rs.1,21,69,200/- is concerned, it will be necessary to briefly refer to the facts already narrated hereinbefore. It is pertinent to note that by an interim order, the Supreme Court on 09.09.2002 directed the respondent

–Union of India to pay to the assessee an amount of Rs.1,21,69,200/- subject to furnishing a bank guarantee. The said amount of Rs.1,21,69,200/- was accordingly paid by the respondent to the Petitioner. The petitioner furnished a bank guarantee of Rs.1,21,69,200/-. The High Court dismissed the Writ Petition No.286 of 1996 vide judgment and order dated 26.06.2008 holding that the petitioner was exporting a product (processed iron ore) which was inadmissible as per Appendix 12 to the Exim Policy. The SLP filed before the Supreme Court against the decision of the High Court was dismissed on 04.11.2022. As a result of such dismissal, the petitioner was required to pay an amount of Rs.1,21,69,200/- which was paid over to them by the Respondent-Union of India. The said amount was paid by the petitioner to the respondent on 08.05.2023. The JDGFT by communication dated 05.02.2024 directed the petitioner to pay an amount of Rs.3,65,38,023/- (this amount includes Rs.1,21,69,200/- + interest). On 09.02.2024, the bank guarantee of Rs.1,21,69,200/- was forfeited and the petitioner was directed to pay the remaining amount of Rs.2,43,68,823/-.

21. Learned Senior Advocate Mr Lotlikar submitted that the demand of interest on the amount of Rs.1,21,69,200/- and the consequent forfeiture of the bank guarantee as well as the action on the part of the respondent in putting the IEC number of the

petitioner on Denied Entities List is without jurisdiction and illegal. Learned Senior Advocate submitted that the only liability of the petitioner after the final judgment of the Supreme Court was to either pay the amount of Rs.1,21,69,200/- or the respondents were entitled to encash the bank guarantee. It is further submitted that the impugned order is dehors the provisions of the FT Act.

22. Learned Deputy Solicitor General Mr Faldessai on the other hand submitted that this is a clear case where the petitioner has utilized the amount of Rs.1,21,69,200/- and having failed before the Hon'ble Supreme Court, the petitioner is liable to pay interest on such amount. It is further submitted that the JDGFT was competent to raise demand for payment of interest at the rate of 15% per annum as the petitioner was utilizing the amount belonging to the Revenue. It is further submitted that the JDGFT has ample power under the FT Act and the rules framed thereunder to raise such demand and enforce the same.

23. Heard learned counsel. We now proceed to deal with the contention as to whether the respondent is competent to/has jurisdiction to adjudicate upon the quantum of interest and enforce the same under the provisions of the FT Act. The Supreme Court upheld the judgment of the High Court holding that the petitioner was exporting a product (processed iron ore) which was

inadmissible as per Appendix 12 to the Exim Policy. During the pendency of the petition, the Supreme Court by an interim order had directed the Union of India to pay an amount of Rs.1,21,69,200/- to the petitioner subject to furnishing bank guarantee. After the dismissal of the petition, the amount of Rs.1,21,69,200/- was paid by the petitioner to the respondent. The question is whether the respondent could adjudicate on the quantum of interest and enforce the same under the provisions of the FT Act by revoking the bank guarantee and putting the IEC number of the petitioner on the DEL.

24. It is pertinent to note that under the orders of the Supreme Court, the amount of Rs.1,21,69,200/- was paid by the respondent to the petitioner subject to furnishing bank guarantee. The order of the High Court as well as the Hon'ble Supreme Court does not reveal that this amount of Rs.1,21,69,200/- was paid to the petitioner by the respondent with interest. The petitioner paid the amount covered by the bank guarantee after the order was passed by the Supreme Court in favour of the respondents. The Adjudicating Authority i.e. JDGFT purporting to exercise powers under Section 13 of the FT Act called upon the petitioner to pay interest on this amount which the respondent had paid to the petitioner as per the order of the Supreme Court. We have already referred to the definition of 'Adjudicating Authority' and

also dealt with Section 13 in the earlier part of this order. As per Section 13 what can be imposed is any penalty or any confiscation may be adjudged under the FT Act. Section 11 of the FT Act deals with contravention of provisions of FT Act, rules, orders and foreign trade policy.

25. In the present case, the Supreme Court held that the petitioner was exporting a product which was inadmissible as per Appendix 12 of Exim Policy. Consequently, the petitioner was not entitled to the benefits of the claim of cash amount of 20% premium that would be paid against the additional licence. The contravention of the provisions of the FT Act, rules, orders and foreign trade policy lead to the consequences provided under the FT Act.

26. The demand by the respondent is for payment of interest on the amount of Rs.1,21,69,200/- which according to the respondent was utilized by the petitioner to which they were not legally entitled to. The respondent may have a claim against the petitioner for payment of interest but in our opinion the same cannot be adjudicated under the provisions of the FT Act, 1992. Under the provisions of the FT Act, any penalty may be imposed or any confiscation may be adjudged. We do not find any provision

in the FT Act providing for adjudication of a claim of interest on the amount as is the subject matter in the present petition.

27. Learned Deputy Solicitor General of India was at pains to submit that under Section 17 of the FT Act, the adjudicating authority making any adjudication or hearing any appeal or exercising any powers of review under the FT Act, shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 while trying a suit. Relying on sub-section (2) of Section 17, learned Deputy Solicitor General of India submitted that every authority making any adjudication or hearing any appeal or exercising any powers of review under this Act shall be deemed to be a Civil Court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973. It is therefore, submitted that the JDGFT is a Court within the meaning of the Interest Act, 1978. The argument is that as Section 3 of the Interest Act, 1978 empowers the Court to allow interest, the order passed by the adjudicating authority is within his jurisdiction.

28. We are afraid that the submissions of the learned Deputy Solicitor General are completely misconceived. Having come to the conclusion that in the facts of the present case, the JDGFT has no jurisdiction to adjudicate upon a claim for payment of interest, the question of exercising powers of Civil Court in respect of the

matters stipulated in Section 17 of the FT Act will not arise. The contention that the adjudicating authority is a Court within the meaning of the Interest Act, 1978 is untenable.

29. We do not find any provision in the FT Act for levy of interest on such delayed payment moreso when the amounts were paid under the orders of the Supreme Court subject to furnishing of a bank guarantee. The interest cannot be construed to be a penalty to confer jurisdiction on the adjudicating authority to adjudicate the claim for payment of interest. The Supreme Court in ***Indian Carbon Limited and others Vs State of Assam***[2] has held that the interest can be levied and charged on delayed payment of tax only if the statute that levies and charges tax makes a substantive provision in this behalf.

30. We do appreciate the submission of learned Deputy Solicitor General of India as regards the doctrine of unjust enrichment. The petitioner was paid money in terms of the order of the Hon'ble Supreme Court upon furnishing bank guarantee. Having lost the claim, the petitioner was required to pay back this amount. Let us consider the doctrine of restitution as propounded by the Supreme Court in ***South Eastern Coalfields Ltd. vs State Of M.P. and***

[2] (1997) 6 SCC 479

Ors, reported in ***(2003) 8 SCC 648***. In Para 28, the Supreme Court has made some important observations. Para 28 reads thus:-

> *"28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There*

is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to

> *interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."*

Undoubtedly, we find that in no uncertain terms, the Hon'ble Supreme Court has observed that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of money had remained in operation.

31. Relying on the aforesaid observations, learned Deputy Solicitor General of India submits that adjudicating authority under Section 17 of the FT Act is competent to demand interest from the petitioner, which power, according to him is also available under Sections 11, 13 and Rule 11 of the Rules framed under the

FT Act. Learned Deputy Solicitor General submits that assuming without admitting that the adjudicating authority is not competent to award interest, even then there is no reason to interfere with an order passed by adjudicating authority as the same ultimately is in aid of substantial justice and moreso when the same is in consonance with the principles laid down by the Supreme Court in *South Eastern Coalfields Ltd.* (supra).

32. We are of the considered opinion that howsoever appealing the argument of learned Deputy Solicitor General may sound, this Court cannot overlook the competency of the authority in adjudicating the claim for grant of interest. The claim for interest has to be enforced before a forum competent to award interest. We make it clear that we are only holding that in the facts of the present case, the adjudicating authority under the FT Act has no authority/jurisdiction to adjudicate the claim for payment of interest. It is open for the respondents to enforce the claim for payment of interest as against the petitioner in accordance with law.

Corrections carried out as per order dated 02.09.2024 in MCA No.2185 of 2024(F).

33. Consequently, the petition is allowed in terms of prayer (a) and clauses /(b). The respondents are further restrained from putting the Importer-Exporter Code number (IEC) of the petitioner on the Denied Entity List (DEL) and in case already done, the

respondents are directed to remove the petitioner from the said list.

Corrections carried out as per order dated 02.09.2024 in MCA No.2185 of 2024(F).

The registry is directed to return to the petitioner an amount of Rs.1,21,69,200/- deposited by the petitioner pursuant to the order dated 13.02.2024 passed by this Court. No order as to costs.

VALMIKI MENEZES, J **M. S. KARNIK, J**