**IN THE HIGH COURT AT CALCUTTA**
**CIVIL APPELLATE JURISDICTION**
**ORIGINAL SIDE**

**Present:-**
**The Hon'ble Justice Madhuresh Prasad**
**And**
**The Hon'ble Justice Supratim Bhattacharya**

***APO 114 of 2016***
***With***
***WPO 1157 of 2004***

**SAJAL DUTTA**
**-Vs-**
**RESERVE BANK OF INDIA AND ORS.**

**OCOT 3 of 2016**
**IA No. GA/1/2025**

**SAJAL DUTTA**
**-Vs-**
**RESERVE BANK OF INDIA AND ORS.**

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| For the Appellant | : | Mr. S. N. Mookherjee, Sr. Adv.<br>Mr. Shounak Mitra, Adv.<br>Mr. Samriddha Sen, Adv.<br>Mr. Vishwarup Acharyya, Adv. |
| For the Respondent No. 6 | : | Mr. S. N. Mitra, Sr. Adv.<br>Mr. Prantik Garai, Adv.<br>Mr. Subhojit Roy, Adv.<br>Mr. Ramanuj Roy Chowdhuri, Adv.<br>Mr. Atish Majumdar, Adv. |
| For the RBI | : | Mr. Debdatta Sen, Sr. Adv.<br>Ms. Suchismita Ghosh Chatterjee, Adv.<br>Mr. Prasun Ghosh, Adv. |
| Judgment on | : | December 24, 2025. |

**Madhuresh Prasad, J.:**

1. The Ruby General Hospital Company Limited (hereinafter referred to as the Company) was incorporated in the year 1991 by two non-resident Indians Dr. Kamal Dutta and Binod Prasad Sinha along with Sajal Dutta, the younger brother of Dr. Kamal Dutta, and an Indian entrepreneur. The company took up a project to establish a hospital cum diagnostic centre at Calcutta. The project cost was about Rs. 11 crores. 88% of the project, i.e. Rs. 8 crores were to be by way of NRI participation. The balance 11.12% of the shares was to be contributed by resident Indians. The NRI investment was approved by the Department of industrial development, government of India, Secretariat of Industrial Approval (SIA for short).

2. Dr. Kamal Dutta was one of the 1st directors of the said company. He along with Dr Binod Prasad Sinha held 52.74% of the equity shares in the company. Dr. Kamal Dutta contributed Rs. 4.26 crores out of which about Rs. 3.5 crores were by way of second-hand equipment brought from the USA. Sajal contributed Rs. 1.23 crores.

3. The Reserve Bank of India granted permission on 29.03.1997 for allotment of shares to Dr. Kamal Dutta for the equipment brought by him from the United States of America (USA for short). The permission however was withdrawn on 20.05.1998 at the instance of the company, which challenged the approval granted by the Reserve Bank of India

before the Calcutta High Court, by filing a writ petition No. 525 of 1999 The High Court directed for giving a personal hearing to the parties.

4. The Reserve Bank of India once again granted approval for allotment of the shares. The approval was challenged by the company again, by filing another writ petition No. 1977 of 1999.

5. In compliance of the directions passed by the High Court the Reserve Bank of India again passed an order dated 07.05.2004 granting permission to allot shares to Dr. Kamal Dutta against supply of second-hand medical equipment imported from USA, treating the same as his capital contribution.

6. Certain directions passed in this writ petition were allegedly not followed properly, and another writ petition was filed by the company, being writ petition No. 1157 of 2004, wherein the permission dated 07.05.2004 granted by GM, RBI was again challenged by filing the present writ petition. The judgement dated 16.03.2016 passed therein is under challenge in the present intra court appeal.

7. The Company was the 1st petitioner in the writ petition. Sajal Dutta, the Managing Director was petitioner No.2. The writ petition was filed seeking quashing of the Speaking order dated 07.05.2004 passed by the General Manager of the Reserve Bank of India, Kolkata, (GM, RBI for short) in terms of section 19 (1) (d) of the Foreign Exchange Regulation Act, 1973 (FERA for short), granting permission to the company to issue 30,55,329 shares of Rs. 10 each on non-repatriation

basis in favour of Dr. Kamal Dutta (Dr. Kamal for short). The permission was granted for issuance of shares against importation of second-hand medical equipment, for which Dr. Kamal had made the payments abroad. The GM RBI had also granted permission under section 29 (1) (b) of the FERA to Dr. Kamal, an NRI, to hold such shares.

8. The writ petitioners alleged that during the hearing before the GM, RBI the writ petitioners requested for certain documents. The request was rejected by an earlier order dated 23.04.2004 passed by the GM RBI in the same proceeding, which resulted in violation of the principles of natural justice. This order dated 23.04.2004 was also challenged in the writ petition.

9. A significant development after filing of the writ petition is that the directors of the company at a meeting dated 16.09.2006 resolved not to proceed with the pending writ petition (W.P. No. 1157 of 2004). As a result, the company (petitioner No. 1) withdrew from the writ proceeding on 30.11.2006.

10. The 2nd petitioner, namely Sajal Dutta, thus, remained the sole writ petitioner. He continued to pursue the writ proceeding.

11. In such circumstance, the company filed a General Application bearing G.A. No. 360 of 2007 seeking dismissal of the writ petition on the ground of its non-maintainability in law, since the company had withdrawn from the proceeding. The company also raised an issue regarding the 2nd writ petitioner, an individual shareholder, having no

*locus standi* to pursue the writ proceeding since the nature of grievance and relief did not involve any infringement of the writ petitioner's individual/fundamental rights.

12. The writ petition was dismissed by the Learned Single judge by a judgment dated 16.03.2016. The same was put to challenge by Sajal by filing an appeal (APO 114 of 2016).

13. G.A. No. 360 of 2007 was disposed of by the learned single judge by the self-same judgement dated 16.03.2016, which was assailed by Dr. Kamal, by filing a cross objection (OCOT No. 3 of 2016).

14. Thus, the appeal filed by Sajal Dutta (APO 114 of 2016) was taken up for consideration by this court along with the cross objection (OCOT 3 of 2016) filed by Dr. Kamal.

15. There is a relevant development in the meantime. Dr. Kamal, along with Dr. Binod Prasad Sinha moved the Company Law Board (CLB for short) on or about 12.11.1997, by filing an application under Sections 397 and 398 of the Companies Act, 1956, alleging various acts of oppression and mismanagement in the affairs of the company. Certain relief was granted by the CLB by its order dated 29.10.1999 passed in Company Petition No. 86 of 1997, subject to result of the present writ proceeding.

16. Order of the CLB was challenged by Sajal by filing an appeal before the Ld. single judge of the Calcutta High Court. Cross appeal was also filed by Dr. Kamal.

17. APO No. 746 of 1999 filed by Sajal and APO No. 759 of 1999 filed by Dr. Kamal was disposed of by the Ld. Single Judge by an order dated 31.03.2005. The Ld. Single Judge found that the applicants before the CLB failed to make out a case for winding up of the company. The Learned single judge recorded that Sajal acted with prejudice to the interest of the company but the conditions precedent for winding up of a company were not made out. Setting aside the order passed by the CLB, the learned single judge left it to the applicants to avail appropriate remedy by way of a Company Suit.

18. The order dated 31.03.2005 was put to challenge by Dr. Kamal and Dr. Binod Prasad Sinha by way of an appeal before the Hon'ble Supreme Court of India, which was numbered as Civil Appeal No. 3471 of 2006, and was decided by the apex court on 11.08.2006 confirming the order and direction of the CLB. This judgement of the apex court in ***Kamal Kumar Dutta and Another vs. Ruby General Hospital Ltd. And Others*** is reported in ***(2006) 7 SCC 613***.

19. Sri. S.N. Mookherjee, the learned senior advocate, appeared and made submissions on behalf of the appellant, Sajal Dutta. Submissions were advanced on behalf of Dr Kamal by Sri S.N. Mitra learned Senior Advocate. The Reserve Bank of India was represented by Sri Debdatta Sen.

20. At the very outset Mr. Mitra, learned Senior Advocate raised a preliminary objection regarding maintainability of the writ petition. He

submits that initially the writ petition was filed by the Company on the ground that the Board of Directors had not resolved to send any application to the RBI seeking permission for allotment of equity shares against second-hand medical equipment sent by Dr. Kamal. The application for allotment, was founded on an alleged resolution taken in a meeting dated 03.03.1997, which is not reflected in the Company records. The Company had sent communication in this regard to the RBI by its letters dated 16.04.1997 and 26.05.1997. The writ petition was thus filed by the Company challenging the permission granted by the RBI.

21. There is a significant development after filing of the writ petition. The Company resolved not to proceed with the writ petition. Pursuant to such decision, the Company has withdrawn its name from the writ petition, meaning thereby that the Company was not making an issue in respect of the permission for issuing shares in favour of Dr. Kamal, granted by the RBI on 07.05.2004. Therefore, Sajal could not have continued to pursue the writ petition. The resolution of the Board dated 16.09.2006, not to proceed with the writ petition was taken after Sajal seized to be Managing Director of the Company. He also seized to be a director. He, thereafter, was merely a shareholder of the Company. Therefore, there was no question of continuance of Sajal as petitioner No. 2, who was a petitioner as the Managing Director of the Company.

22. On the issue of maintainability Mr. Mitra further submitted that the CLB findings regarding acts of oppression committed by Sajal

against Dr. Kamal were affirmed by the Apex Court in the case of ***Kamal Kumar Dutta*** (Supra). Dr. Kamal was thus appointed as the Managing Director of the Company and under his leadership the Board took a decision not to proceed further with the writ petition. Therefore, allowing Sajal to continue to pursue the writ petition amounts to overreaching the effect of the apex court judgement. Therefore, the judgement of the learned single judge insofar as it acknowledges maintainability of the writ petition by Sajal is unsustainable.

23. He further submitted that the writ petition does not raise any issue of violation of any right/fundamental right of Sajal. Therefore, there was no scope for Sajal to continue to pursue the writ petition.

24. In support of his submissions regarding non-maintainability of the writ petition at instance of the petitioner No. 2, Mr. Mitra relied upon decision in the case of ***Life Insurance Corporation of India vs. Escorts Ltd. And Others*** reported in ***(1986) 1 SCC 264.*** He has referred to paragraph 84 of the judgment to submit that RBI was the competent authority, vested with discretion to consider issuance of shares to Dr Kamal, and allowing him to hold such shares. There is no provision under FERA enabling an individual to challenge such decision. Neither Company nor the individual (Sajal) could take it upon themselves to question the merits of the GM, RBI decision. He also submitted that *bona fides* of the Reserve Bank of India vested with statutory power and discretion in this regard cannot be doubted. He also relied upon judgment of the Apex Court in the case of ***Peerless***

***General Finance and Investment Co. Limited and Another vs. Reserve Bank of India*** reported in ***(1992) 2 SCC 343***.

25. Mr. Mookherjee on the other hand submitted that the petitioner no.2 in the writ petition (Sajal) being a shareholder had a vital interest in the affairs of the Company. Dr. Kamal had obtained the permission from the GM, RBI for allotment of shares in his favour against import of second-hand low-quality equipment purchased by him abroad. The same was in conflict with the SIA approval dated 06.08.1993 which contemplated import of equipment of Rs.420 lacs to be financed out of non-resident Indian (NRI) Investment in petitioner no.1 (Company). The issue and allotment of shares therefore could only be made against funds (foreign exchange) remitted/ invested in the Company from abroad by Dr. Kamal; and only if such funds were utilized for covering the cost of import of new capital goods. The SIA Approval was under the statement of industrial policy dated 24.07.1991, which contemplated such investment. The GM, RBI however, granted permission for allotment of shares on non-repatriable basis against import of second-hand low-quality equipment which was purchased abroad by Dr. Kamal contrary to the terms of SIA approval.

26. Grant of such permission by the RBI was therefore legally unsustainable and issuance of shares in favour of Dr. Kamal against import of such second-hand inferior equipment, would result in wrongly enhancing Dr. Kamal's shareholding and reducing the writ petitioner shareholding in the Company. It is under such

circumstances that specific averments have been made in the writ petition regarding the RBI's order dated 07.05.2004 imposing unreasonable restriction on the petitioner's right to carry on trade, and that the RBI permission is to the benefit of Dr. Kamal, and at the expense of petitioner No. 1 as well as petitioner No. 2 (Sajal).

27. Insofar as petitioner No. 2 is concerned, the effect of import of such second-hand low quality equipment based on permission of RBI dated 07.05.2004, adversely effected and diminished his percentage shareholding in the Company, at the cost of undue enhancement in shareholding of Dr. Kamal, as a result Dr Kamal would enjoy control over the decisions and affairs of the Company. This was an individual injury upon the petitioner because of illegal decision of GM, RBI dated 07.05.2004. The petitioner No. 2 (Sajal Dutta) therefore, had a personal/ individual interest to pursue in the writ proceeding. Thus, despite petitioner No. 1 withdrawing from the writ petition, such right was recognised by the judgment of the Hon'ble Single Judge in the writ proceeding.

28. Mr. Mukherjee, has also drawn attention of the Court towards statement of the Apex Court in the same paragraph of the judgment in the case of ***Life Insurance Corporation of India*** (Supra) wherein the Apex Court held that there are limited class of cases where grant of permission by the RBI may be questioned by an interested party in a proceeding under Article 226 of the Constitution of India. According to him, challenge to an RBI permission, as per the judgment is permissible

on the ground of *mala fide,* non-application of mind or being in contravention of the provisions of the Act, Rules, Orders and directions issued under the Act.

29. In support of his submissions regarding maintainability of the writ petition Mr. Mookherjee placed several judgments before the learned Single Judge including judgments in the case of ***Calcutta Gas Company (Proprietary) Ltd. Vs. State of West Bengal and Others*** reported in ***AIR 1962 SC 1044***, ***Rustom Cavasjee Cooper vs. Union of India*** reported in ***AIR 1970 SC 564***, ***Union of India and Another vs. Arulmozhi Iniarasu and Others*** reported in ***(2011) 7 SCC 397***, ***Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra and Others*** reported in ***(2013) 4 SCC 465***, ***Rajasthan State Industrial Development & Investment Corporation. vs. Subhash Sindhi Cooperative Housing Society, Jaipur and Others*** reported in ***(2013) 5 SCC 427*** as also decision of the Apex Court in the case of ***Bennett Coleman & Co. Ltd. and Others vs. Union of India and Others*** reported in ***AIR 1973 SC 106***.

30. Considering decision in the case of the ***Rustom Cavasjee Cooper*** (Supra) the Hon'ble Single Judge took note of extract from paragraph 14 of the decision wherein the Apex Court considered that an action may impair the rights of a company, as also rights of a shareholder. Considering such a circumstance the Apex Court took into consideration that if the State action impairs the right of the shareholders as well as the company, the writ Court may not deny its

jurisdiction to grant relief. The learned Single Judge considered that this principle was reiterated by the Apex Court in the case of the ***Neptune Assurance Co. Ltd. And Others vs. Union of India and Another*** reported in ***AIR 1973 SC 602*** as also in the case of ***Bennett Coleman & Co.*** (Supra). The learned Single Judge further took note of the law stated by the Apex Court in the case of ***Press Trust of India and Another vs. Union of India and Others*** reported in ***AIR 1974 SC 1044***. Paragraph 8 of the judgment has been taken note of. Upon a careful consideration of the above citations dealing with the invocation of writ jurisdiction by a shareholder the learned Single Judge found with reference to the facts of the present case that at the time of incorporation of the company Dr. Kamal had 52% shares and Sajal had 48% shares. The learned Single Judge took note of the fact that an alteration in the shareholding of Dr. Kamal, would have the effect of enhancing his existing shareholding. Since there were principally only two shareholders further allotment of shares in favour of Dr. Kamal would have the direct consequence of shifting control of the company in his favour. Allotment of shares in favour of Dr. Kamal therefore, was found by the learned Single Judge to directly affect Sajal's individual rights as a shareholder in the Company.

31. We find that even in the two decisions relied upon by Mr. Mitra in the case of ***Life Insurance Corporation of India*** (supra) and ***Peerless General Finance and Investment Co. Limited*** (Supra) the Apex Court acknowledged the Court's function to see that lawful

authority is not abused by a statutory authority. The Apex Court also recognized that there may be limited class of cases where grant of permission by RBI may be questioned by an interested party in a proceeding under Article 226 of the Constitution of India on the ground that it was *mala fide* or that there was no application of mind, or in contravention with the statute or Rules, orders and directions issued under the statute.

32. Insofar as submission of Mr. Mitra that since RBI is the competent authority to examine whether there was compliance with FERA for grant of permission for issuance of shares in favour of Dr. Kamal Dutta and Dr. Binod Dutta, and that the RBI decision was not open to challenge under Article 226 of the Constitution of India, we find that such submission cannot be accepted as a rule. The exercise of writ jurisdiction by now is well recognized, to be discretionary, yet circumscribed by well settled principles for exercise of writ jurisdiction. We are therefore, not inclined to accept submission of the learned Advocate in this regard that decision of the RBI is not open to challenge under Article 226 of the Constitution of India. In the instant case itself, prior to the present writ petition, at least two writ petitions were entertained an order passed thereupon by the High Court in respect of the RBI permission for issuance of shares in favour of Dr. Kamal and Dr Binod Prasad Sinha.

33. There can be no dispute that RBI is the authority/competent to consider the issue regarding compliance with FERA for the purpose of

permission to issue shares in favour of Dr. Kamal. However, we cannot conceive of such a situation where any decision of the RBI taken in this regard would be beyond the scope of scrutiny under Article 226 of the Constitution of India. In an appropriate case where decision of a statutory authority is perverse without any basis, without taking into consideration relevant material and without jurisdiction, then it cannot be said that a Constitutional court exercising judicial review under Article 226 of the Constitution of India would be powerless to interfere with such decision. In such circumstances, including an order passed in violation of principles of natural justice, having civil consequences, in an appropriate case, decision of the RBI would be amenable to the writ jurisdiction under Article 226.

34. The learned Single Judge, therefore, in our opinion rightly found that the Company, and its principal shareholders i.e. Dr. Kamal as well as the writ petitioner (Sajal) had a vital interest in the grant of such license, or its revocation. The learned Single Judge, after a detailed consideration of the facts and law, rightly concluded that the company, Dr. Kamal, as well as Sajal had right to approach the writ Court assailing decision of the GM, RBI.

35. Upon consideration of the judgments cited in this regard, noted above we further add that it is well settled that in every case a shareholder cannot be barred from seeking legal remedy. Being a shareholder in a company, in our opinion cannot be made a basis to contend that even individual rights and injury cannot be raised in

appropriate judicial proceeding before a forum/ Court of competent jurisdiction. Merely because the injury/right sought to be remedied /enforced is in some way also effecting the company, the individual shareholder, in our opinion, cannot be deprived of legal remedies. It is needless to say that whether the shareholder is able to make out a case for any relief before a Court is required to be considered on a case to case basis, in the facts and circumstances of a particular case. In view of consideration above we find no infirmity in decision of the learned Single Judge, having regard to the nature of right, claimed by the petitioner (Sajal Dutta) in this case, in holding that he was entitled to approach the writ Court in his individual capacity.

36. Another submission advanced on behalf of Sajal is that the GM, RBI permission was sought by an application made under para 39B of the statement of industrial policy. The approval dated 06.08.1993 contemplated allotment of shares to NRI (Dr. Kamal) on repatriable basis. Import of new capital goods was to be financed out of such NRI investment. The approval was binding on RBI. The RBI had in principle conveyed its approval to issue of equity shares in the Company to the NRI with repatriation benefit.

37. Paragraph 39B of the statement of Industrial Policy dated 24.04.1991, dealt with Foreign Investment. 39B (iii) is the relevant provision under which the application for grant of shares was made. It, therefore, was required to be considered under the said provision. Paragraph 39B also contained a note 4 which reads:

> *"Foreign investment must cover the cause of imported capital goods which must be new and not second-hand."*

38. This statement of industrial policy was binding on the RBI, and was ignored and overlooked while granting the permission impugned in the writ proceedings. In the instant case admittedly, second-hand equipment was brought into the Company by Dr. Kamal, therefore, the importation of second-hand equipment, which was also of very inferior quality could not be acknowledged by the RBI so as to allow issuance of shares in lieu thereof. Under the provisions of the FERA, GM, RBI was bound to consider and follow the mandate laid down in the SIA approval. The RBI approval dated 07.05.2004, therefore, was unsustainable.

39. Dr. Kamal's reliance placed on the Ministry of Finance letter dated 03.01.1994 to sustain the approval dated 07.05.2004 is misplaced and unsustainable. It is submitted that the RBI could not ignore the provisions of the statement of Industrial Policy, which did not permit import of second-hand capital equipment. The decision of the RBI to grant permission for allotment of shares on repatriable basis in lieu of second-hand medical equipment is in deviation from and contrary to the SIA approval. The permission granted by the GM, RBI *de horse* the terms of SIA approval and the prevailing industrial policy and import policy is, therefore, unsustainable. The GM, RBI could not ignore these provisions while considering an application. In support of such contention, Mr. Mukherjee has relied upon ***Union of India vs. ABN Amro Bank and Others*** reported in ***(2013) 16 SCC 490*** and

***Elizabeth Jacob vs. District Collector, Idukki and others*** reported in ***(2008) 15 SCC 166***.

40. The RBI approval without taking into consideration and contrary to the terms of the SIA approval is, therefore, unsustainable and is fit to be set aside. The RBI has further failed to take into consideration the fact that the second-hand machinery brought in by Dr. Kamal, was over invoiced and of inferior quality.

41. This issue has been contested by Mr. Mitra learned Senior Advocate appearing for Dr. Kamal. It is submitted that the EXIM Policy relied upon by the writ petitioner applied only where there was an actual inflow of foreign capital. In such case, purchase of new capital equipment was required to be purchased by utilizing foreign currency. In the present case, in lieu of his capital contribution Kamal had purchased the second-hand equipment with his own funds, abroad. He had supplied the machinery which was purchased abroad. Such import of second-hand machinery was permissible observing all formalities. It is nobody's case that the requisite formalities for import was not complied.

42. In support of his submission he has drawn attention of the Court towards the export and import policy for the period 01.04.1992 and 31.03.1997 issued by the Ministry of Commerce, Government of India. The same is published by the Central Government under Section 5 of the Foreign Trade (Development and Regulation) Act 1992. The statutory policy records the following clause in paragraph 25:

> *"25. All Second-hand capital goods, having a minimum residual life of 5 years, may be imported by the Actual Users, without a licence, subject to Actual User condition. The Actual User shall furnish to the Customs at the time of clearance of goods, a self declaration to the effect that the second-hand capital goods being imported have a minimum residual life of 5 years, in the prescribed form as given in Appendix XI of the Handbook of Procedures. If the CIF value of second-hand capital goods being imported is Rs. One crore and above, the importer shall also furnish to the Customs at the time of clearance of goods, a Certificate from an internationally reputed Inspection and Certification Agency to the effect that the purchase price is reasonable."*

43. We find no force in such submission regarding any lapse committed by the GM, RBI, by not considering the terms of approval for foreign investment under the SIA policy dated 06.08.1993. The reliance placed on decisions in the case of ***ABN Amro Bank*** (Supra) and ***Elizabeth Jacob*** (Supra) is misplaced. A lack of consideration would arise only if an authority overlooks, or ignores a provision or policy relevant to the decision. Under such circumstance, in an appropriate case there may be scope to interfere with such decision taken by a statutory authority, ignoring other mandatory applicable provisions. In the present case, we have noticed that the modus of investment, approved by SIA policy dated 06.08.1993 was not pursued. There was a conscious decision to resort to different modus of investment, which did not involve bringing in any foreign capital or outflow of any foreign currency for purchase of equipment. Thus, there was no occasion whatsoever for the RBI to take into consideration the approval under the SIA policy dated 06.08.1993.

44. The learned Advocate also made submissions with reference to the judgment of the Company Law Board dated 29.10.1999 in C.P. No. 86 of 1997, paragraph 28 of which reads:

> *"28. …In this case, as is evident from the facts of the case, that it was decided to invest by way of supply of equipments as is apparent from the annual report for 1994-95 wherein, not only in the directors report but also in the balance sheet, it is recorded that the petitioner had supplied imported equipments. In this connection reference may also be made to a fax dated 31st January, 1995 (page 81 of Vol. III) from the 3rd respondent to the petitioner wherein the petitioner was informed that two consignments of imported equipments had already been sent to the hospital and that on the basis of valuation made by the customs, further disbursement of about Rs. 80 lakh was expected from the IDBI.*
>
> *….Thus, both the company and the respondent were aware that the petitioner had supplied imported equipments and as a matter of fact the company had treated the cost of the same as 'share application money'. We feel that the objection that the import of equipments was not envisaged in the SIA/RBI approvals cannot be raised nearly three years after the import and acceptance of the equipments and having treated the cost of the same as "share application money".*

45. The order of the CLB having been affirmed by the Apex Court in the case of ***Kamal Kumar Dutta*** (supra). It is submitted that now there is no occasion to raise any issue in this regard.

46. We further find that there is a letter dated 03.01.1994 issued by the Government of India, which allows the RBI to take action with respect to certain issues as follows:

> *" a) Government of India have no objection to the capitalisation of payments made by NRIs directly for import of capital goods.*
>
> *b) In those cases where such direct payment is for import of new capital goods, the equity participation may be permitted on repatriable basis.*

*c) In all such cases where the amounts are paid directly by NRIs against import of secondhand-capital-goods, the investment is permissible only on non-repatriable basis."*

47. The learned Advocate for the RBI has also taken a stand that the grant of permission by the GM, RBI vide order dated 07.05.2004 was with reference to paragraph 25 (Supra) of chapter 5 of the EXIM Policy which provided for import of second-hand capital goods without license. The GM, RBI while allowing the permission also relied upon the Government of India letter dated 03.01.1994 wherein the Central Government issued policy directive that in such case, as arose for consideration herein, where the amount is directly paid by the NRI for importing second-hand capital goods, the investment was permissible only on non-repatriable basis. Therefore, the RBI, by the order dated 07.05.2004 granted permission to issue shares to Dr. Kamal on non-repatriable basis against importation of second-hand capital equipment for the Company. The RBI was the authority vested with statutory power to grant permission in this regard.

48. The learned Advocate for the RBI further submitted that Clause 39B of the Industrial Policy and the extract from handbook for NRI investment in India relied upon, governed direct foreign monetary investment into a company on repatriable basis in view of the foreign exchange requirement for import of capital goods. In the present case there is no outflow of foreign exchange for import of new capital goods. The second-hand capital goods were purchased by Dr. Kamal from his own funds, outside the country, before bringing the second-hand machinery into the country for use of the Company. It was under such

a circumstance that permission was sought from the RBI under the provisions of Section 19(1)(d) and 29(1)(b) of FERA for issuance of shares against such direct importation of second-hand capital goods. For such importation neither the policy relied upon by Sajal Dutta, nor the handbook are relevant.

49. The learned Advocate further pointed out that the Company originally intended foreign collaboration for NRI investment to establish the hospital. It, therefore, applied before the SIA. At that time the project envisaged foreign equity participation of 88.88% of the paid-up capital (eight hundred lakhs). At that time the project contemplated that capital goods worth Rs. 420 lakhs were to be purchased out of the foreign investment. Under such circumstances, the approval was granted by SIA vide letter dated 06.08.1993. The said modus of equity participation or purchase of capital goods by the Company with foreign currency was not pursued. Company did not pursue the modus of acquisition approved by SIA under letter dated 06.08.1993. Therefore, any reliance placed by Sajal on the SIA approval dated 06.08.193 to allege any infirmity in the GM, RBI permission dated 07.05.2004, is unsustainable.

50. Upon consideration of the submissions advanced on behalf of the parties with reference to the EXIM Policy, SIA approval and the Government's DO dated 03.01.1994 we find that the reliance placed by the learned senior advocate, Mr. Mukherjee on the SIA approval dated 06.08.1993 and EXIM Policy are misplaced. The RBI is the statutory

authority under the law. Even at the time the equipment was imported by the Company, the RBI was the statutory authority competent to grant permission for issuance of shares to an NRI under Section 19(1)(d) and 29(1)(b) of the Foreign Exchange Regulation Act. This competent authority has clarified the entire position with reference to the facts, being the change in modus of the Company, in deciding not to utilise the foreign exchange invested in the Company for procurement of machinery; and instead relying upon importation of second-hand machinery purchased abroad by Dr. Kamal (NRI). Because of change in modus of acquisition of machinery the SIA approval dated 06.08.93 was not applicable to the transaction. Thus in our opinion there is no scope to find fault in the decision of the RBI based on the DO letter issued from the Ministry of Finance, Government of India on 03.01.1994. The decision is based on relevant material and government policy and after hearing both the parties. The RBI has acted in terms of the DO letter dated 03.01.1994. The same is evident from a plain reading of the impugned order dated 07.05.2004, passed by the GM, RBI, relevant extract of which reads:

> *"…I am of the opinion that the Reserve Bank has a rather a limited role under the Provisions of FERA, 1973 in the dispute between the parties and there are 3 issues to be addressed. I will be addressing them serially as follows:*
>
> *First Issue*
>
> *"Whether approval shall at all be granted or not"*
>
> *In terms of section 19(1)(d) any person (which includes a company) has to obtain RBI's permission before, Issuing shares to a person resident outside India. Section 19(1)(d) of FERA, 1973 reads as follows:*

> *"Notwithstanding anything contained in Section 81 of the Company's Act, 1958, no person shall, except with the general or special permission of the Reserve Bank issue, whether in India or elsewhere, any security which is registered or to be registered in India, to a person resident outside India."*

*From the above, it is clear that any person (which includes a company) can issue shares to NRIs only with the prior permission of RBI for issuance of such shares.*

*The issuance of shares can be on repatriation or on non-repatriation basis. RBI permitted issuance of shares on repatriation basis when foreign remittance was received through normal banking channel or when there was capitalization of new equipment supplied by the NRIs. If the equipment supplied were second hand, then the capitalisation of the same was allowed on non-repatriation basis.*

*Admittedly, In this case, the equipments supplied by Dr. K.K. Dutta were second-hand and there is no dispute on this point. SIA approval was obtained on 6th August 1993 in which non-resident equity participation allowed is 88.88 per cent. SIA letter also states that Project envisages import of capital goods worth Rs. 420 lakhs to be financed out of NRI Investment. The Import of the equipment was governed by the then EXIM policy in terms of which there was no restriction on Import of second-hand capital goods. Thereafter on 4th November 1993 In-principle approval was granted by RBI for Issuance of shares on repatriation basis. During the financial year 1994-95 and 1995-96, Dr. K. K. Dutta supplied/imported second-hand medical equipments and applied for shares against the second-hand equipment. The Import of such medical equipments against which shares were to be issued, pending RBI permission for the same, was reflected in the Annual Report and Balance Sheet of the Company for the years ending 31st March 1995 and 31st March 1996. This fact was also known to Shri Sajal Dutta as he had signed the above Balance Sheets as Director of the Company. The above Balance Sheet also showed Income over Rs. 100 lakhs from out of the operation of the hospital obviously with the use of equipment supplied by Dr. Dutta and commissioned by the Hospital.*

*The permission granted by RBI vide its letter dated 22nd March 1997 was on the basis of the RGHL application dated 17th March 1997 signed by Dr. K. K. Dutta as the Chairman of the company enclosing thereto all the requisite documents. The same was scrutinized by ECD, RBI, Kolkata as, at that point of time, the Regional Offices of RBI were delegated with the powers of*

*approval for permission for Issuance of shares on non-repatriation basis. Permission was granted by ECD, RBI, Kolkata, after scrutinizing all the required documents submitted by RGHL and after finding the same to be in order. At that point of time RBI, Kolkata did not have the information that Dr. Kamal Kumar Dutta had ceased to be the Chairman of the company and there was a Board Resolution of the company not to apply for shares against second-hand equipment. Hence the act of RBI, Kolkata was based on the documents/papers signed/submitted by Dr. Dutta representing himself as the Chairman of the Company. Therefore, the aforesaid permission was granted In good faith and without negligence. Dr. Dutta took delivery of the permission letter addressed to RGHL. In original, personally which was given to him as he represented himself as the Chairman of the Company and as such, the letter was not posted to the company at its registered office address.*

*This permission was objected to by the Ruby General Hospital represented by Shri Sajal Dutta, the Managing Director of the company vide its letter 26th May 1997 mainly on the two. grounds mentioned earlier. RBI, Kolkata withdrew its approval letter dated 22.3.1997 on the basis of this complaint. However, RBI, Kolkata in good faith believing in the representation of Shri Sajal Dutta withdrew the approval letter issued to RGHL and handed over to Dr. Dutta on 22nd March 1997 by issuing another letter dated 2.6.1997 a copy of which was endorsed to Dr. Dutta.*

*Dr. Dutta represented against the same. The representation was examined by the Bank and a decision was taken to maintain status quo and in view of the fact that Dr. K. K. Dutta, NRI Investor has already made payment to the suppliers of second hand machineries abroad. The aforesaid decision of the Bank was communicated vide letter dated March 6, 1999 to RGHL and copy endorsed to Dr. Dutta.*

*Incidentally, the CLB vide its order dated 20.10.1999 has held that Dr. K. K. Dutta has not vacated his office as Chairman and as such restored Dr. K. K. Dutta as Director-Chairman of the Company and has nullified the Board meeting in which the decision was taken for not applying to RBI for Issuance of shares against secondhand equipment. This order of CLB has not been stayed or super ceded or nullified by any court of law which has been confirmed by Shri Sujal Dutta. Therefore, on the date of application, I.e.,17.3.1997, Dr. Dutta was the Chairman of the company who had duly applied for permission for Issuance of shares on non-repatriation basis for which the permission was granted.*

*In view of the above, I am of the opinion that the RBI's permission for issue of shares shall be granted in terms of section 19 (1) (d) of FERA, 1973 to RGHL. The permission granted to RGHL to Issue shares to the person resident outside India (i.e. to Dr. K. K. Dutta) shall also to be treated as permission to such person (i.e. to Dr. K. K. Dutta), resident outside India to acquire or hold such shares under section: 29 (1) (b) of the Act, Ibid.*

*Second Issue*

*"Whether the approval shall be on non-repatriation basis alone"*

*As discussed above, the equipment's supplied by Dr. K. K. Dutta were secondhand. The company had received and utilized the same for which Dr. Dutta had made payment abroad. Since as per the then existing policy of RBI, capitalization of secondhand equipment could be permitted on non-repatriation basis only, I am of the view that permission shall be granted for issue of shares on non-repatriation basis alone. Though there was conflicting claims and counter claims regarding functionality or dysfunctionality of the medical equipment's or its valuation etc. by both the parties producing various documents and papers in support of their own stand, I am of the view that it is beyond the scope and purview of my Investigation to delve into each and every claim and counter claim.*

*Third Issue*

*"Whether there shall be any monitory limit or limit to the number of shares"*

*The permission shall be granted for the issue of 30,55,329 equity shares of Rs. 10/- each against import of secondhand medical equipment's to D. K. K. Dutta, NRI Investor on non-repatriation basis for which he had made the payments abroad and in support of which he had submitted documentary evidence at the time of making application which was scrutinized and found to be in order.*

*I hereby direct that a copy of this Order be sent to both the parties to the proceedings before me…."*

51. We are conscious of the limited scope of judicial review in such circumstance where there is no lack of jurisdiction in a statutory authority, and the decision dated 07.05.2004 is in exercise of statutory

discretion, taking into consideration relevant material being the DO letter dated 03.01.1994. We, therefore, considering the settled law circumscribing the scope of judicial review in such matters refrain from sitting in appeal over the decision of a statutory body such as RBI. We find no infirmity in the permission dated 07.05.2004 granted by the General Manager, RBI for issuance of shares in favour of Dr. Kamal.

52. Since in the present case there was no issue of importation of goods involving outflow of any foreign exchange, RBI has rightly relied upon the DO letter dated 03.01.1994 which governed the transaction carried on by the Company since amount was paid directly by the NRI (Dr. Kamal) against import of second-hand capital goods. Such investment is permissible as manifests from extract of the DO letter dated 03.01.1994, taken note of above, but on non-repatriable basis. In the present case such investment had been permitted and issuance of shares allowed on non-repatriable basis and, therefore, we find no infirmity whatsoever in the permission dated 07.05.2004 granted by the RBI.

53. The learned Single Judge has considered two other issues raised by the parties. Regarding issue, estoppel or res judicata. Mr. Mitra submitted that in ***Kamal Kumar Dutta*** (supra) the Apex Court found that there was a case of oppression of Dr. Kamal under Section 397(1)(b) of the Companies Act. In view of such findings having been recorded by the Apex Court in the judgment, challenge to the RBI permission dated 07.05.2004 by the declared oppressor was barred by res judicata or

issue, estoppel. The learned Single Judge has considered this aspect but has taken note of the fact that in the judgment in the case of ***Kamal Kumar Dutta*** (supra) the Apex Court did not make any comment with regard to issuance of 30,55,329 equity shares to Dr. Kamal. The finding of the learned Single Judge in this regard in our opinion does not require any interference. In paragraph 48 the Apex Court has taken notice of the fact of pendency of the present writ petition regarding grant of shares against importation of medical equipment by Dr. Kamal. Taking note of the pendency of the present writ petition the Apex Court in paragraph 48 observed:

> *"…48. Since the issue of granting of equity shares against the medical equipments supplied by Appellant 1 to the tune of Rs 3.5 crores is pending before the Calcutta High Court in a writ petition, therefore, CLB has not passed any final order but passed a limited order as mentioned above. However, we have examined the matter in detail and we are satisfied that there is fool proof case of oppression. But at the same time we do not feel inclined to pass an order for winding up of the Company because it will not be in the interest of the Company nor in the interest of the parties. Therefore, we allow the appeals and set aside the impugned order dated 31-3-2005 passed by the learned Single Judge of the High Court and pass limited direction that all the resolutions which have been passed by the Board of Directors, or in the annual general meeting or extraordinary general meeting with regard to the raising of funds of Rs 40 lakhs in the meeting of 19-4-1995 and the meeting dated 16-2-1996 whereby Appellant 1 was stripped off his powers as Managing Director, the resolution by which Dr. Binod Prasad Sinha was removed from the office of Director and other resolutions by which the shares were allotted to the subsidiary company of Sajal Dutta or other persons are bad and we restore the position ante 19-4-1995 and direct that a fresh meeting be convened and proper decision be taken in the matter in the interest of the Company. We confirm the order and direction of CLB…"*

54. The Apex Court has taken notice of pendency of the present writ petition. The judgment of the Apex Court extracted above takes note of the fact. In this connection, we find that the issue of allotment of shares in favour of Dr. Kamal was not decided by the Apex Court. We agree with the finding of the Hon'ble Single Judge that the Apex Court did not comment with regard to issuance of 3055329 equity shares issued in favour of Dr. Kamal. Therefore, we find no force in submission of Mr. Mitra as regards *res judicata* or issue estoppel.

55. Insofar as the issue regarding violation of the Foreign Exchange Regulation Act, alleged by Mr. Mukherjee on behalf of Sajal we find no force in such submission. The permission was granted by RBI on 07.05.2004. Much prior thereto the Foreign Exchange Regulation Act was repealed and, in its place, the Foreign Exchange Management Act, 1999 came into effect on 01.06.2000. There is no dispute that under FEMA no permission was required from RBI to allot shares on importation of capital goods to non-resident Indians.

56. The rights and liabilities of the erstwhile FERA were governed by a sunset clause wherein Mr. Mukherjee claimed his client's rights were preserved under Section 6 of the General Clauses Act. In view of our finding recorded above regarding the approval dated 07.05.2004 being issued by the RBI in accordance with law and under the applicable statutory provisions and directive issued by the Government of India, we find such issue not arising in the facts and circumstances of the present case.

57. No allegation regarding statutory incompetence of the RBI to grant the permission dated 07.05.2004 has been raised. There is also no allegation of mala fide being raised against the GM, RBI, the authority who granted the permission on 17.05.2004. As far as the DO letter dated 03.01.1994 is concerned, the writ petitioner never challenged the same. The RBI decision is founded on such directive.

58. We have given our anxious consideration to the issue. In view of our findings above, we find no infirmity in decision of the learned Single Judge requiring interference by this Court in the present intra Court Appeal.

59. The appeal deserves to be and is hereby dismissed.

60. OCOT is disposed of accordingly.

61. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

**(Madhuresh Prasad, J.)**

I agree.

**(Supratim Bhattacharya, J.)**