IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.39 OF 2013
IN
SUMMARY SUIT NO. 520 OF 2013

IDBI Trusteeship Services Ltd. ...Plaintiff

vs.

Hubtown Ltd. ...Defendant

Dr. Veerendra V. Tulzapurkar, Senior Advocate, along with Mr. Sandip Parikh, Mr. Indranil Deshmukh, Mr. Aditya Mehta, Mr. Anish Wadia and Ms. Pooja Vora, instructed by M/s. Amarchand & Mangaldas & Suresh A. Shroff & Co., for the Plaintiff.

Mr. Janak Dwarkadas, Senior Advocate, Mr. D. Madon, Senior Advocate, Mr. Gaurav Joshi, Senior Advocate, along with Mr. Nishit Dhruva, Mr. Ashok Agarwal, Mr. Prakash Shinde, Neeta Jain, Ambru, Jaising Mani and Chirag Bhavsar, instructed by M/s. MDP & Partners, for the Respondent.

CORAM: **S.J. KATHAWALLA, J.**
Judgment reserved on : 30th April, 2015
Judgment pronounced on: 8th May, 2015

JUDGMENT:

1. The Plaintiff – IDBI Trusteeship Services Limited has filed the above Summary Suit for recovery of a sum of Rs. 532,11,29,364.05 (Rupees Five hundred and thirty two crores eleven lacs twenty nine thousand three hundred sixty four and five paise only) with interest at the rate of 14.75% till the date of actual payment or realization as prayed for in prayer clause (a) of the suit. In the above Summary Suit, the Plaintiff has taken out the above Summons for Judgment praying that judgment be entered for the Plaintiff in the above Suit against the Defendant for the sum set out hereinabove along with interest.

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2. The facts in the matter are briefly set out hereunder:

3. The Plaintiff is a Company incorporated under the Companies Act, 1956 and is a Debenture Trustee of the debentures issued to Vinca Developers Pvt. Ltd. ("Vinca") by Amazia Developers Pvt. Ltd. ("Amazia") and Rubix Trading Pvt. Ltd. ("Rubix"). Amazia and Rubix are wholly owned subsidiaries of Vinca. The Defendant and its individual promoters collectively own 90 per cent shareholding in Vinca.

4. Nederlandse Financierings – Maatschappiji Voor Ontwikkelingslanden N.V. ("FMO") is a Corporation constituted under the Laws of Netherlands. FMO holds 10 per cent shareholding in Vinca. FMO also holds 3 Compulsorily Convertible Debentures (CCDs) issued by Vinca. The said three CCDs are convertible within a period of 60 months from December 2009. Upon such conversion, FMO will hold 90% shareholding in Vinca.

5. The investment made by FMO in Vinca in the form of three CCDs was used by Vinca to purchase Optionally Convertible Debentures ("OPCDs) issued by Amazia and Rubix. In respect of the OPCDs, a Debenture Subscription and Debenture Trust cum Mortgage Deed was executed on 1st December 2009 between Amazia, the Defendant and the Plaintiff. Similarly in respect of the OPCDs issued by Rubix, a Debenture Subscription and Debenture Trust cum Mortgage Deed dated 1st December 2009 was executed between Rubix, the Defendant and the Plaintiff as amended by OPCD Amendment Agreement dated 8th September 2010. The aforesaid deeds shall hereinafter be collectively referred to as "the Debenture Trust Deeds"(DTDs). In respect of the liability arising under OPCDs, the Defendant

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executed a Deed of Corporate Guarantee dated 9th December 2009 in favour of the Plaintiff (the said guarantee).

6. Under the Articles of Association of Vinca, the Defendant can nominate two Directors and two alternate Directors of Vinca. The Promoters of the Defendant viz. Hemant Shah and Vyomesh Shah can nominate two Directors and two alternate Directors of Vinca. Under the Articles of Association of Vinca, these Directors nominated by the Defendant and the Promoters of the Defendant are called ACL Directors. Under the Articles of Association of Vinca, FMO has a right to nominate two Directors (being the nominee Directors) and two alternate Directors of Vinca.

7. According to the Articles of Association of Vinca, ACL Directors are deemed to be interested Directors in relation to all matters pertaining to OPCD documents which include inter alia the guarantee as also the DTDs. Article 2 (uu) lists out the various reserved matters and Article 63 mandates that no decision, action or omission by the management of Vinca pertaining to the reserved matters shall be taken without the consent of Vinca's Board and such consent shall require the affirmative approval of the nominee Directors on the Board of Vinca. Further any decision taken without such affirmative approval is null and void.

8. From 2nd May 2012, the Plaintiff issued notices of default to Amazia and Rubix in respect of the liability under the respective OPCDs issued by Amazia and Rubix. On 27th June 2012, the Plaintiff issued notices of redemption calling upon Amazia and Rubix to fully redeem all the OPCDs at par value. On 3rd August 2012, the Plaintiff issued a demand certificate to the Defendant invoking the guarantee issued by the Defendant in favour of the Plaintiff on account of the failure of Amazia

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and Rubix to redeem the OPCDs. On 6th August 2012, a letter was issued on behalf of Vinca, purportedly terminating the appointment of the Plaintiff as Trustee under the DTDs. The Plaintiff on 14th August 2012 sent a reply that Vinca was not entitled to terminate the Plaintiff as a Trustee since the said decision could not be taken by the Directors nominated by the Defendant and its promoters on the Board of Vinca and in any event the said decision could not be taken without affirmative decision of the nominee Directors of FMO and the nominee Directors of FMO had not given affirmative vote for termination of Trusteeship of the Plaintiff.

9. On 19th December 2012, Vinca wrote to the Plaintiff purportedly discharging the guarantee. The Plaintiff by its reply dated 26th December 2012 addressed to Vinca recorded that the purported discharge of guarantee by Vinca was invalid and inoperative.

10. On 3rd January 2013, the Plaintiff through its Advocates issued a notice to the Defendant under the provisions of Section 433 (e) read with Section 434 (1) (a) of the Companies Act, 1956. The Defendant by its reply dated 22nd January, 2013 raised several defences and refused to make payment to the Plaintiff. The Plaintiff through its Advocates letter dated 18th April, 2013, has denied and disputed the contentions raised by the Defendant in its reply letter dated 22nd January 2013.

11. The Plaintiff filed the above Summary Suit on 16th May, 2013 against the defendant for recovery of dues under the said Guarantee. Prior to the filing of the Suit, the Plaintiff on 10th May, 2013 filed Company Petition No. 644 of 2013 seeking winding up of the Defendant on the ground that the Defendant has failed to comply with the statutory notice to pay the amount under the guarantee. On 12th February

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2014, the Plaintiff filed Summary Suit No. 480 of 2014 for recovery of the back end coupon dues payable under the said guarantee which amount was not included in the above Summary Suit.

12. The Defendant has filed its affidavit in the Summons for Judgment raising several contentions. The Plaintiff too has filed affidavits dealing with the contentions raised by the Defendant.

13. An additional affidavit is filed on behalf of the Plaintiff dated 4th July 2014 in Company Petition No. 644 of 2013 bringing on record the following facts:

(a) The Board of Directors of Vinca issued an agenda for holding a meeting of its Board on 3rd July 2014 inter alia for the following purposes:

(i) to consider amendment to Article 2 (uu) (I) under the heading "Reserved Matters";

(ii) to approve convening of EGM of Vinca to alter the Articles of Association;

(iii) to consider and approve modification of the terms and conditions of the OPCDs by fully converting OPCDs into equity shares;

(iv) to consider and approve modification of the terms and conditions of OPCDs issued by Amazia and Rubix by fully converting OPCDs into equity shares.

(v) to consider and approve and direct the Directors of Amazia and Rubix to convene its Board Meeting and General Meeting in connection with the decision taken by the Board of Directors of Vinca and to take all necessary steps to implement the same.

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(b) In view thereof, FMO filed Suit being Suit (L) No. 626 of 2014 against Vinca and others challenging the said agenda and seeking injunction restraining the Defendants therein from passing the resolutions and/or implementing the said resolutions, acting on the basis of the said resolutions.

(c) An ad-interim order dated 2nd July 2014 was passed in the Notice of Motion in the said Suit whereby the statement of the Defendants is recorded that pending further orders the Defendants will not act on the resolutions passed in the meeting of Vinca held on 3rd July 2014.

(d) The Nominee Directors of FMO attended the meeting and participated in the meeting through video conferencing and though the majority directors were in favour of the resolution, the nominee Directors of FMO opposed the same.

(e) Thought the resolutions as proposed were passed, in view of the statement made, the said resolutions have not been implemented pending further orders in the said Notice of Motion.

14. Dr. Tulzapurkar, the Learned Senior Advocate appearing for the Plaintiff submitted that the Defendant has failed to pay the amounts due to the Plaintiff under the Deed of Corporate Guarantee dated 9th December 2009. The defences raised by the Defendant are mere moonshine. They are not bona fide and the claim of the Plaintiff cannot be disputed. Dr. Tulzapurkar submitted that the contentions raised by the Defendant in the Affidavits are totally unsustainable and without any merit whatsoever.

15. Mr. Dwarkadas, the Learned Senior Advocate appearing for the Company has taken me through clauses 1.1.2, 2.1.5, 2.1.11, 3.2.1, 3.3.1, 3.3.2, 6.1, 6.2, 6.2.11,

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6.2.11.1 and 6.2.11.2 of the Foreign Direct Investment (FDI) Policy and clauses 2 (ii), 3, 4 , 5, along with Schedule -I and Annexures A and B to the said Schedule of the FEMA Regulations and also the Reserve Bank of India (RBI) Circular No. 86 dated 9th January, 2014 in support of his contention that the FDI policy and the statutory FEMA Regulations (which incorporate the FDI Policy as a schedule thereto) permit FDI in townships, construction of houses, only by way of equity and do not permit any other form of investment or the giving of a fixed rate of return in the said sector and that the said Circular demonstrates that the assured rate of return is not permissible in FDI. Mr. Dwarkadas also took me through the Share Subscription Agreement ("SSA") and the DTDs, the Articles of Vinca, in support of his contention that if the entire transaction is looked into as a whole, it is clear that the same was a colourable and artificially structured transaction, the object and purpose of which was to enable FMO to secure a fixed rate of return on its FDI investments in townships/construction of housing, notwithstanding the FEMA Regulations/FDI policy, which permit only an equity investment without any fixed/agreed rate of return in the said sector. Mr. Dwarkadas submitted that the said Guarantee was an integral part of this artificial and illegal structure and therefore not enforceable in law.

16. Since according to the Defendant, the above submission is their main submission in the present matter, the same is elaborated as follows:

16.1 That the FDI Policy and the statutory FEMA Regulations (which incorporate the FDI Policy as a Schedule thereto), permit FDI in townships, construction of houses, only by way of equity investments (which is defined to also include

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debentures which are compulsorily required to be converted into equity: CCDs). The FDI Policy and the FEMA Regulations prohibit any other form of investment (non equity) in the said sector with an assured return/rate of return.

16.2 That FMO, a foreign entity wanted to invest a substantial sum by way of FDI in a slum rehabilitation project being undertaken in Mumbai by Rubix and an Industrial Park being undertaken/owned by Amazia. FMO was however only willing to invest in the said projects on the basis of an assured /fixed return, which was and is not permissible under the FEMA Regulations/FDI Policy. To enable FMO to bypass/circumvent the said FEMA/FDI prohibitions and get a fixed return of 14.5% per annum on its investment of Rs. 418 crores, the investment structure (i.e. investment by way of CCDs in Vinca and Vinca purporting to invest the said amounts in OPCDs of Amazia and Rubix) was devised/adopted as follows:

i) Vinca was interposed as the Holding Company of Amazia and Rubix and Vinca was the nominal recipient of the FDI of Rs. 418 crores from FMO by way of equity investment and CCDs (in apparent compliance with the FDI/FEMA Regulations).

ii) The documents executed for the FDI investment (Subscription Agreement and Debenture Trust Deed annexed as Schedule 13 thereto), however establish that the FDI received from FMO, was not intended for/could not be used by Vinca for any project of its own but was specifically required to be immediately invested by/through Vinca in OPCDs of Rubix & Amazia, bearing a fixed rate of return of 13.5%.

iii) Under the FEMA/FDI regulations/policy FMO could not have invested the

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said amounts in Amazia and Rubix through OPCDs bearing a fixed rate of return. By interposing Vinca (an Indian Company) the amounts received from FMO were invested in OPCDs of Amazia and Rubix bearing the fixed 14.5% rate of return.

iv) At the same time it was provided (a) that on conversion of the CCDs FMO would own 99% of the equity of Vinca and further that (b) the Articles of Vinca were amended to provide that any decision regarding the OPCDs/investment could only be taken by FMO nominees on the Board of Vinca. (c) the DTDs for the Amazia and Rubix OPCDs provided that the Debenture Trustee/the Plaintiff would only act on the instructions of the Nominee Directors of FMO.

v) Accordingly though Vinca was an "Indian Company" and the nominal recipient of the FDI, the transaction was so structured that:

(a) the FDI amount would be immediately routed by Vinca to Amazia & Rubix against issue by them of OPCDs bearing a return of 14.5%.

(b) FMO/its Nominee Directors could exclusively deal with the OPCDs and the Debenture Trustee/IDBI.

(c) after receipt by Vinca of the fixed rate of return (14.5 per cent per annum) from Amazia and Rubix under the OPCDs, FMO would on conversion of the CCDs, become the owner of Vinca and thereby receive/become entitled to the amounts received by Vinca by way of the fixed rate of return from Amazia and Rubix.

vi) The Deed of Guarantee was contemporaneously executed by the Respondents on 9th December, 2009 in favour of the Debenture Trustee(the Plaintiff herein) for securing the "due and punctual payment" of the principal and the interest by Amazia and Rubix to Vinca, actually to FMO and was part of the

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structure devised to ensure the receipt by FMO at the fixed rate of return of 14.5%.

16.3 That, if the entire transaction is looked at as a whole, it is clear that the interposing of Vinca as the nominal recipient of the FDI (against issuance of equity shares and CCDs) was a colourable and artificially structured transaction, the object and purpose of which was to enable FMO to secure a fixed rate of return on its FDI investments in townships/construction of housing, notwithstanding the FEMA Regulations/FDI Policy which permit only an equity investment without any fixed/agreed rate of return in the said sector. The said structure was and is not lawful and was and is opposed to public policy as it was designed to defeat and would defeat the provisions of law, the FEMA Regulations read with the FDI Policy.

16.4 That, the present Suit has been filed to effectuate the said illegal object of securing the said fixed rate of return for FMO. Although IDBI ,the Plaintiff, claims to be nominally acting on behalf of Vinca, it is in fact admittedly acting only at the instance of FMO/FMO's Nominee Directors on the Board of Vinca. FMO through its Nominee Directors on the Board of Vinca has instructed IDBI to demand the said sums (principal and agreed rate of return) from Amazia and Rubix and has further instructed/required IDBI to invoke the said Guarantee and file the present Petition. This is apparent from the correspondence annexed as Exhibits-C to V to the Petition.

16.5 That, in the Plaintiff's Affidavit-in-Rejoinder filed in Company Petition No. 644 of 2013, the Plaintiff (Petitioner therein) admits that it has made its claim /demand and initiated proceedings at the instance of FMO/FMO's Nominee Directors (Refer para 10 (xv) page 14). In para 10 (x) the Plaintiff deals with the issue of violation of the FEMA Regulations and has only submitted that FEMA is not

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applicable to the Guarantee "since it has been issued by an Indian entity in favour of another Indian entity". In paras 10 (xi), (xii) and (xiii) pages 11 and 12, the Plaintiff has merely denied that, "FMO or the Plaintiffs have in any manner breached their obligations under the Indian Exchange Control Regulations, the FDI policy, or any other applicable law." The Plaintiff has also submitted that, (i) the Company is estopped from raising this contention and (ii) that the said defence "lacks commercial morality".

16.6 That, by the present suit, the Plaintiff, acting at the instance of FMO, is seeking to utilise the process of this Court to secure for FMO a 14.5 per cent fixed rate of return on its FDI investment, contrary to the statutory stipulation/prohibition contained in the FEMA Regulations (which incorporate/embody the FDI Policy), which require FDI in townships/housing/construction development projects to be made only by equity participation(including compulsorily convertible debentures) and prohibits/precludes any assured return/rate of return. It is submitted that this would be contrary to law, public policy and public interest.

17. Relying on the decision of the Hon'ble Supreme Court of India in the case of *Vodafone International Holdings BV vs. Union of India*[1], *Mr. Dwarkadas* submitted that whilst ascertaining the legal nature of the transaction, it is the task of the Court to look at the entire transaction as a whole and not to adopt a dissecting approach. Mr. Dwarkadas submitted that if unconditional leave is not granted to the Defendant to defend the above suit the same would amount to actively assisting the Plaintiff

1 (2012) 70 Com Cases 369

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to give effect to the fraud to which the Plaintiff was a party. Relying on the decision of the Hon'ble Supreme Court in the case of *Renusagar Power Co. Ltd. vs. General Electric Company*[2], Mr. Dwarkadas that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India.

18. Apart from the above main submission the Defendant has also submitted as follows:

(i) Relying upon (a) Chapter 3, paragraphs 3.10, 3.10.1 and 3.10.2 of the FDI Policy,(b) Chapter 4, paragraphs 4.1.1, 4.1.2 and 4.1.3 of the FDI policy, and (c) Chapter 6, paragraph 6.2, 6.2.11 of the FDI Policy, it is submitted that an Indian Company, which has received foreign direct investment, can employ its funds downstream viz. moving funds into its subsidiaries only by making investments in the form of Equity Capital or compulsorily and mandatorily convertible preference shares or debentures. Vinca therefore could only have subscribed for convertible debentures of Amazia and Rubix and consequently, Vinca's investment in Amazia and Rubix in the form of OPCDs does not satisfy the definition of capital in clause 2.1.5 and is in clear violation of the FDI policy for downstream investments made by an Indian Company in which there is any foreign investment.

(ii) That investment by an Indian Company in OPCDs issued by its subsidiary (also an Indian Company) would amount to an external commercial borrowing. Therefore Vinca's investment in OPCDs issued by Amazia and Rubix in real estate sector is forbidden by the ECB guidelines.

2AIR 1994 SC 860

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(iii) That the Plaintiff is nothing but a puppet of the FMO and is required to act only on the instructions of the Nominee Directors of FMO;

(iv) That the guarantee issued by Vinca has been discharged and that the appointment of the Plaintiff as Debenture Trustee has been terminated;

(v) That Vinca, Amazia and Rubix are the alter egos of FMO;

(vi) That even if the doctrine of *pari delicto* may not apply to the parties to the impugned transaction, the Defendant is entitled to rely upon the provisions of Section 23 of the Contract Act which are clearly applicable to the facts of the present case and which render the corporate guarantee cum mortgage void and unenforceable;

(vii) That in view of the decisions of the Hon'ble Supreme Court in *Mechelec Engineers and Manu vs. Basic Equipment Corporation*[3] *and Sunil Enterprises & Anr. vs. SBI Commercial and International Bank Ltd.*[4] the Defendant is entitled to unconditional leave to defend the suit.

19 Dr. Tulzapurkar, the Learned Senior Advocate appearing for the Plaintiff, has submitted that all the submissions advanced on behalf of the Defendant including that the transaction documents are violative of the FDI policy and FEMA Regulations are incorrect and untenable. Dr. Tulzapurkar inter alia made the following submissions:

19.1 That Vinca has a township project at village Kanjur which is an FDI eligible project under Press Note 2 of 2005 and that accordingly the FDI investment in Vinca was in accordance with Press Note 2 of 2005.

3 (1976) 4 SCC 686
4 (1998) 5 SCC 354

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19.2 That once the investment was made by FMO in Vinca, the amounts received from the FMO was a fund belonging to Vinca and there was no prohibition either in the FDI Policy or in FEMA or any law for the time being in force for an Indian Company to invest its funds in any other Indian Company except that if that money had been received by the first Indian Company i.e. Vinca from a Non Resident , the same could not be invested in equity or compulsorily convertible securities in any Sectors prohibited under the FDI policy. The businesses carried on by Rubix and Amazia were in permissible sectors under the FDI policy and therefore there was no bar or prohibition against Vinca from investing funds in Amazia and Rubix in the form of OPCDs. The investment by Vinca in Amazia and Rubix could not be treated as an investment by FMO.

19.3 That the FMO could have directly invested in CCDs of Amazia and Rubix carrying a fixed rate of return. There is no prohibition in the FDI policy or FEMA Regulations against issuance of CCDs bearing interest.

19.4 That even after conversion of Vinca CCDs and FMO becoming the 99 per cent shareholder of Vinca, FMO will have to follow the RBI's pricing guidelines if it wants to sell its Vinca shares and that the price that FMO can receive for the shares cannot exceed the price prescribed by the RBI.

19.5 That the doctrine of Pari delicto is not applicable; that the Plaintiff is not a party to the conspiracy and the Plaintiff is not acting on behalf of FMO. Even if the Plaintiff is acting on behalf of FMO, the doctrine of pari delicto would not be applicable as the Defendant had induced FMO to make the FDI/investment by representing that the transaction was FDI/FEMA complaint. The representations and

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assurances made by the Defendant in the relevant documents are reproduced by the Plaintiff in sub-clause (iii) of Clause (b) of paragraph 13 of the further submissions dated 6th August, 2014.

19.6 That the alleged illegal purpose of securing a fixed return has not been carried out and if the proceedings are allowed, the monies under the OPCDs will go to Vinca and not to FMO. The said monies will therefore be an asset of Vinca and no shareholder of a Company can be regarded as an owner of an asset belonging to the Company. FMO cannot receive the said amounts without complying with the FDI Regulations for sale of shares and repatriation.

19.7 That the provisions of the FDI policy extracted by and relied upon by the Defendant in Chapter II of its submissions only provide for guidelines for calculation of total foreign investment (both direct and indirect) in an Indian Company, at every stage of the investment, including downstream investment and are applicable in cases where an Indian Company which has received foreign direct investment chooses to make investment by way of equity instruments (i.e. in the form of Equity Capital or compulsorily and mandatorily convertible preference shares or debentures) in its subsidiary companies. The said Regulations are inapplicable in cases (like the present case) where the Indian Company which has received foreign direct investment chooses otherwise and makes investment in debt of an Indian Company, in permitted sectors.

19.8 It is submitted that there is no prohibition under the FDI policy or any other regulation which forbids an Indian Company which has received foreign direct investment from making downstream investments in the form of Optionally Partially

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Convertible Debentures in permitted sectors. It is submitted that it was wholly permissible for Vinca to make investments in Amazia and Rubix by way of OPCDs since such investment was in a permitted sector;

19.9 That the ECB guidelines apply only in cases where an investment by way of foreign monies in debt instruments is made by a non resident entity into a resident entity. It is submitted that ECB guidelines are inapplicable in cases where the investment in debt instrument is made by an Indian/resident entity into another Indian/resident entity. ECB guidelines neither regulate nor prohibit any investment made by an Indian/resident real estate company in another Indian/resident real estate Company.

19.10 The suggestion of the Defendant that the investments by Vinca into Amazia and Rubix, by way of the Optionally Partially Convertible Debentures is covered by the ECB guidelines is flawed and baseless.

20. Dr. Tulzapurkar has in support of his above submissions relied upon the decisions of the Hon'ble Supreme Court in the case of *Bacha F. Guzdar vs. CIT*[5], *Gurmukh Singh v. Amar Singh*[6], *Kedar Nath Motani v. Prahlad Rai*[7], and *Sita Ram v. Radha Bai*[8]. Dr. Tulzapurkar therefore submitted that the Summons for judgment be allowed.

21. I have perused the relevant extracts of the FDI Policy, FEMA Regulations relied upon by the learned Senior Advocates appearing for the parties. I have also perused the transaction documents and have considered the submissions advanced

5 AIR 1955 SC 740
6 1991) 3 SCC 79
7 (1960) 1 SCR 861
8 AIR 1968 SC 534

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by the Learned Advocates appearing for the parties as well as the case law relied upon by them in support of their respective contentions.

22. From the aforestated facts it appears that FMO, a foreign entity wanted to invest a substantial sum by way of FDI in a slum rehabilitation project being undertaken in Mumbai by Rubix and an Industrial park being undertaken by Amazia. The FDI policy and the statutory FEMA Regulations (which incorporates the FDI policy as a Schedule thereto) permit FDI in townships, construction of houses, only by way of equity investments (which is defined to also include debentures which are compulsorily required to be converted into equity : CCDs). The FDI policy and the FEMA Regulations prohibits any other form of investment (non equity) in the said sector with an assured return/rate of return. However, FMO was interested in an investment which would ensure an assured fixed return to the FMO. Since this was not permissible under the FEMA Regulations/FDI policy, the following investment structure was devised/adopted.

(i) Vinca was interposed as a holding Company of Amazia and Rubix;

(ii) The SSA dated 20th November, 2009 and the annexed DTDs were executed wherein it was provided that the FDI amount of Rs. 418 crores received by Vinca from FMO against issuance of 10 per cent equity and 3 CCDs to the FMO, was not to be retained by Vinca or used by Vinca in its own FDI eligible township/construction projects but the said SSA and the DTDs expressly stipulated that the FDI amount received by Vinca from FMO was to be immediately passed on to Amazia and Rubix against issuance by them of their OPCDs. Accordingly as submitted on behalf of the Defendant, Vinca

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was only the “nominal recipient”” of the FDI and the real recipients of FMOs FDI were Amazia and Rubix.

(iii) Amazia and Rubix in turn issued OPCDs to Vinca bearing interest at 14.5 per cent per annum. It will not be out of place to mention here that OPCDs are not treated as equity and the FDI policy and FEMA Regulations do not permit FDI against the issuance of OPCDs. Accordingly a direct investment by FMO into Amazia and Rubix against issuance of OPCDs would not have been permitted /would have been prohibited under the FDI policy /FEMA Regulations.

(iv) Contemporaneously the Articles of Vinca were amended to provide that (i) on conversion of the three CCDs, FMO would hold/own more than 99% of Vinca’s total equity shares and (ii) that the FMO nominee Directors on Vinca’s Board of Directors would alone be entitled to take all decisions/deal with the OPCDs and the Debenture Trustee i.e. the Plaintiff herein.

(v) On receipt back by Vinca of the FDI amount of Rs. 418 crores and interest thereon at 14.5 per cent per annum, FMO could at its will become the 99 per cent owner of Vinca’s shares and therefore in fact receive/be entitled to the said amount. As submitted by the Defendant, FMO could then either dissolve Vinca and receive the amount, or could sell the shares of Vinca at a fair value based on the said amount and also the value of Vinca’s own housing/slum redevelopment project.

(vi) Accordingly the interposing of Vinca had no real business or commercial purpose. Vinca was interposed as the nominal recipient company, only in

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order to route the FDI investment amount received from FMO, to Amazia and Rubix against issuance by them of OPCDs bearing interest at 14.5 per cent per annum and to receive back the amount invested (i.e. the FDI amount of Rs. 418 crores) and interest thereon at 14.5 per cent per annum from Amazia and Rubix and to make the same available to FMO.

(vii) The guarantee executed by the Company for repayment by Amazia and Rubix of the FDI amount of Rs. 418 cores and 14.5 per cent interest thereon though ostensibly in favour of Vinca/Plaintiff-IDBI Trusteeship Services, was actually to ensure that FMO received the said amount back with interest as aforesaid, through Vinca.

(viii) In claiming the said amount, invoking the Defendant's said guarantee and in filing the present Suit, the Plaintiff is admittedly acting on behalf of FMO/FMO Nominee and is seeking to receive/recover the said FDI amount and interest thereon at 14.5 per cent per annum for FMO (through Vinca) contrary to the FDI policy and the statutory FEMA Regulations.

23. The Judgment of the Supreme Court in the case of *Vodafone International Holdings BV vs. UOI* (supra) held that:

(i) *"It is the task of the Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach"* and that a *"device which was colourable in nature had to be ignored as fiscal nullity."* (page 401 para 60)

(ii) "That whether a transaction is used principally as a colourable device or the distribution of earnings, profits and gains is determined by a review of all the

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facts and circumstances surrounding the transaction. (page 403 para 67)

(iii) That *"where the revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax, then in such cases applying the test of fiscal nullity it would be open to the revenue to discard the interposing of that entity....It is the task of the revenue/court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach.* (page 404 para 68)

24. In the case of *Immami Appa Rao and others vs. Gollapalli Ramalingamurthi & Ors.* [9] the Appellant and Respondent No. 2 were members of an HUF. Respondent No. 2 had suffered heavy business losses. Apprehending that the property would be lost to the family and taken by his creditors, Respondent No. 2 had executed a collusive and nominal mortgage of his property in favour of the Respondent No.1. During the ensuing insolvency proceedings the Respondent No.1 through a benami purchased the said property. Thereafter Respondent No.1 filed the present proceedings seeking a declaration of his title to the property and for possession thereof from the Appellant and Respondent No.2. The High Court recorded a finding that Respondent No. 2 had successfully played fraud on his creditors by getting the property purchased by Respondent No. 1 benami. However the High Court held that the Appellant and Respondent No. 2 were estopped from setting up the fraud against Respondent No.1 and the High Court decreed the claim of Respondent No.1. The Hon'ble Supreme Court allowed the Appeal and held:

9 AIR 1962 SC 370

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(i) *"Out of the two confederates in fraud, Respondent No.1 wants a decree to be passed in his favour and that means he wants the active assistance of the Court in reaching the properties possession of which has been withheld from him by Respondent No.2 and the Appellants". … … "In the circumstances, passing a decree in favour of Respondent No. 1 would be actively assisting Respondent No. 1 to give effect to the fraud to which he was a party and in that sense the Court would be allowed to be used as an instrument of fraud and that is clearly and patently inconsistent with public interest" (*para 13 page 375*)*

(ii) *"There can be no question of estoppel in such a case for the obvious reason that the fraud in question was agreed to by both the parties and both the parties have assisted each other in carrying out the fraud. When it is said that a person cannot plead his own fraud, it really means that a person cannot be permitted to go to a Court of Law to seek its assistance and yet base his claim for the Court's assistance on the ground of his fraud…. Yet if the plea of fraud is not allowed to be raised in defence, the Court would in substance be giving effect to a document which is void ab initio. Therefore we are inclined to hold that the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried and if it is upheld the estate should be allowed to remain where it rests. The adoption of this course, we think is less injurious to public interest than the alternative course of giving effect to a fraudulent transfer" (*para 15 pg. 375 and 376 *)*

25. In the case of *Renusagar Power Co. Ltd. vs. General Electric Co. (*supra), the Supreme Court has held (in para 76 at page 891) that *"the provisions contained in the FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as*

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envisaged in Section 7 (1) (b) (ii) of the Act".

26. Applying the law laid down in the above judgments:

(i) it is apparent/established that Vinca was only interposed as the nominal recipient of the FDI from FMO and the nominal recipient of the OPCD amount and 14.5% interest thereon back from Amazia & Rubix, and the transaction interposing Vinca was only a colourable device/structure designed to enable FMO to claim and receive back its FDI amount/investment and interest thereon at 14.5 % per annum.

(ii) The said structure device was an attempt by FMO to bypass/circumvent /nullify the restrictions imposed by the FDI policy and the FEMA Regulations which embody the Public Policy of India.

(iii) Since right from the outset the FMO was aware that the FDI policy and the statutory FEMA Regulations permit FDI in townships, construction of houses, only by way of equity investments and the FDI policy and the FEMA Regulations prohibits any other form of investments (non-equity) in the said sector with an assured return/rate of return and therefore structured the above device to bypass/circumvent/nullify the FDI policy and the FEMA Regulations, the Plaintiff which is admittedly acting at the instance of FMO cannot be heard to say that FMO was induced by the Defendant to make the FOI/Investment through incorrect representations/assurances. The FMO is as much a party to the aforestated colourable device/structure designed as the Defendant Company. The case law relied upon by the Plaintiff therefore does not lend any assistance to the Plaintiff.

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(iv) The Plaintiff is acting at the instance of FMO/FMO nominees on the Board of Directors of Vinca and are by the present Suit, seeking the assistance of this Court, to enforce and recover the FDI amount and interest thereon at 14.5% per annum for FMO (through Vinca), contrary to the prohibition contained in the FDI policy and FEMA Regulations. This as the Supreme Court has held is clearly and patently inconsistent with the paramount consideration of public interest.

27. It is contended on behalf of the Plaintiff that Vinca has a township project at Village Kanjur which is an FDI eligible project under Press Note 2 of 2005 and that accordingly the FDI investment in Vinca was in accordance with Press Note 2 of 2005.

27.1 From the aforestated facts it is clear that Vinca was interposed as the holding Company of Amazia and Rubix only for the purposes of the said transaction/FDI by FMO and Vinca was only the nominal recipient of the FDI. The SSA and the annexed DTDS made it clear that Vinca was not entitled to retain the FDI amount, or to utilize the same in any of its own projects. The SSA and DTD required Vinca to immediately pass on the FDI amount received from FMO to Amazia and Rubix against subscription of OPCDs issued or to be issued by them (i.e. Amazia and Rubix). Press Note 2 of 2005 permits FDI investment in the real estate sector only if it is for a township/construction project. Accordingly the purported "investment in Vinca" cannot be said to be in accordance with Press Note 2 of 2005 and was not FDI/FEMA complaint.

28. It has been further contended on behalf of the Plaintiff that Vinca is a

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separate legal entity and that it was open for Vinca to invest its funds in Amazia and Rubix. Once the FDI investment was made by FMO in Vinca, the funds belonged to Vinca and there was no prohibition against Vinca investing the said amount received by it from FMO, in OPCDs of Amazia and Rubix and the investment by Vinca could not be treated as an investment by FMO.

28.1 The above submission advanced on behalf of the Plaintiff also cannot be accepted. The SSA and DTD establish that there was no question of Vinca deciding of its own volition to invest the FDI amount received by it from FMO in the OPCDs of Amazia and Rubix. The specific/express terms of the SSA and DTD stipulated that Vinca could not retain, or itself utilize the FDI amounts received by it from FMO, but was required to immediately pass on the same to Amazia and Rubix against subscription of the OPCDs issued/to be issued by them. Accordingly there was no question of Vinca choosing to invest in Amazia and Rubix or of Vinca investing "its funds" in the OPCDs of Amazia and Rubix. The investment of the FDI amounts by FMO in OPCDs of Amazia and Rubix through Vinca, was contractually pre-ordained/predetermined.

29. It is contended on behalf of the Plaintiff that the FMO could have directly invested in CCDs of Amazia and Rubix carrying a fixed rate of return and that there is no prohibition in the FDI policy or the FEMA Regulations against issuance of CCDs bearing interest.

29.1 The Plaintiff seems to have lost sight of the fact that the FDI policy/FEMA Regulations only permit FDI by way of equity investments in Companies undertaking eligible Townships/construction projects. Accordingly under the FDI

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policy/FEMA Regulations the foreign investor has necessarily to undertake the equity risk of the project and cannot stipulate for return of its investment/FDI with a fixed rate of return. CCDs (bearing interest) which are mandatorily and compulsorily convertible into equity are treated as equity under the FDI policy and the FEMA Regulations. Accordingly, while FMO could have directly invested in CCDs bearing interest of Amazia & Rubix, the amounts invested would be compulsorily required to be converted into equity shares of Amazia and Rubix and FMO could not have required Amazia or Rubix to repay/return the FDI amounts invested.

30. The Plaintiff has also contended that the Plaintiff even after conversion of the Vinca CCDs and FMO becoming the 99 per cent shareholder of Vinca, FMO will have to follow RBI's pricing guidelines if it wants to sell its Vinca shares and that the price that FMO can receive for the shares cannot exceed the price prescribed by the RBI.

30.1 Again the Plaintiff has lost sight of the fact that after receipt back by Vinca of the FDI amount of Rs. 418 crores and interest thereon at 14.5% per annum from Amazia and Rubix, or from the Defendant's Guarantee, FMO could at will on conversion of the three CCDs become the 99% shareholder/owner of Vinca. Under the RBI's pricing guidelines FMO could then sell its 99% shares in Vinca at a fair value, which would necessarily reflect/include the receipt of the said sum and interest thereon at 14.5 per cent per annum from the OPCDs /the Defendant's guarantee. In fact a sale by FMO of its 99% Vinca shares would also include the value of Vinca's development/redevelopment project.

31. According to the Plaintiff, the doctrine of Pari Delicto is not applicable, that

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IDBI is not a party to the conspiracy and IDBI is not acting on behalf of FMO. Even if IDBI is acting on behalf of FMO, the doctrine of Pari Delicto would not be applicable as the Defendant had induced FMO to make the FDI/Investment by representing that the transaction was FDI/FEMA complaint.

31.1 The above submission of the Plaintiff cannot be accepted. The conduct of FMO in routing its FDI nominally through Vinca to Amazia and Rubix against issuance by them of OPCDs and the amendments/provisions made in Vinca's Articles of Association, establishes that FMO was fully aware that it could not under the FDI policy and FEMA Regulations directly invest in the OPCDs, or require that its FDI amount/investment be returned back to it with a fixed rate of return after a stipulated period i.e. without bearing an equity investment risk. The complex structure devised for FMO's FDI investment establishes that all parties (including FMO) were aware that the transaction which was premised on return back of the FDI amount along with a fixed rate of return thereon, was not permissible under/in violation of the FDI policy and the FEMA Regulations. It is clear that in claiming the amount and initiating the present proceedings, the Plaintiff is acting at the instance of FMO/FMO nominees on the Board of Directors of Vinca. This is the stipulation in Vinca's articles and under the DTD. In any event, inasmuch as the transaction (based on return of the FDI/principal amount invested along with a fixed rate of return thereon) is not permissible/prohibited under the FDI policy and the FEMA Regulations, neither IDBI nor FMO can seek the assistance of the Court to effectuate/implement/enforce such a prohibited/illegal transaction.

32. The Plaintiff has lastly contended that the alleged illegal purpose of

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securing a fixed return has not been carried out and that if the proceedings are allowed, the money will go to Vinca and not to FMO. It has been contended that FMO cannot receive the sums without complying with the FDI Regulations for sale of shares and repatriation.

32.1 This submission too of the Plaintiff cannot be accepted. The present claim has been made and the present proceeding has been initiated/filed by the Plaintiff at the instance of FMO/FMO nominees on Vinca's Board of Directors, in order to secure repayment/return of the FDI amount invested along with a fixed rate of return thereon i.e. for seeking the active assistance of this Court to implement/effectuate/enforce a transaction prohibited by the FDI policy and the FEMA Regulations. The contractual documents (SSA & DTD) establish that it was always agreed and understood that Vinca was only the nominal recipient of the FDI amount received from FMO and was also only nominally the recipient of the FDI amount and interest thereon at 14.5 per cent per annum to be received back from Amazia and Rubix. On receipt back by Vinca of the FDI amount and 14.5 per cent interest thereon, FMO can and will by conversion of the three CCDs become the 99% shareholder of Vinca. Under the FDI policy/FEMA Regulations, FMO can thereafter sell the shares of Vinca at the fair value, which will necessarily include the value/benefit of the FDI amount and interest at 14.5 per cent thereon.

33. However, I must also state that I do not find substance qua the following defences raised by the Defendant:

33.1 That the Suit deserves to be dismissed on the ground that the guarantee as well as trusteeship of IDBI has been discharged/terminated;

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33.2 That under the provisions of the FDI Policy, an Indian Company which has received foreign direct investment can utilise its funds downstream only for making investment by way of equity instruments (i.e. in the form of equity capital or compulsorily and mandatorily convertible preference shares or debentures);

33.3 That Investment by an Indian Company in OPCDs issued by subsidiary (also an Indian Company) would amount to an external commercial borrowings.

34. Much after the Learned Senior Advocates appearing for the parties concluded their submissions qua the above issue, the Learned Senior Advocate appearing for the Plaintiff circulated a judgment of the Division Bench of this Court dated 18/19th July, 2014, in *Videocon Industries Limited vs. Intesa Sanpaolo S.P.A.* and in support of its submissions relied on paragraphs 23, 24, 28 to 32 and 34 of the same. The Learned Senior Advocate appearing for the Plaintiff also circulated a judgment of the Division Bench of the Delhi High Court dated 30th July, 2014 in *Zaheer Mauritius vs. Director of Income Tax (International Taxation)-II* and in support of its above submissions relied on paragraphs 21 to 34 of the same.

35. As regards the decision of the Division Bench of this Court in Videocon Industries Ltd. (supra), the Learned Senior Advocate for the Plaintiff has made the following submissions:

35.1 That the Division Bench of this Court after going through the relevant provisions of FEMA (including the Rules and Regulations thereunder) and the FDI policy in relation to a Patronage Letter issued by Videocon Industries Ltd. to Intesa Sanpaolo S.P.A. has inter alia held in paragraph 34 of its judgment as under:

> "*Assuming that Videocon have committed any wrong in issuing the*

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Patronage Letter without obtaining permission of the Reserve Bank, as per the settled legal position, it is not open to a party to take advantage of its own wrong. In Eurometal Ltd. v. Aluminium Cables and Conductors (U.P.) Pvt. Ltd.[(1983) 53 Comp Cas 744 Cal] and SRM Exploration Pvt. Ltd. v. N &S & N Consultants S.R.O. [(2012) 4 Comp L.J. 178 (Del)], Calcutta and Delhi High Courts respectively have frowned upon Company facing a winding up petition taking up such dishonest defence".

35.2 That in relation to the aforesaid dishonest defence taken by Videocon Industries that the Patronage Letter was issued in contravention of the provisions of FEMA or in breach of other legal requirements, the Division Bench of this Court has inter alia held in para 34 of its judgment as under:

" *In Eurometal Ltd. v. Aluminium Cables and Conductors (U.P.) Pvt. Ltd. [(1983) 53 Comp Cas 744 Cal] and SRM Exploration Pvt. Ltd. v. N &S & N Consultants S.R.O. [(2012) 4 Comp L.J. 178 (Del)], Calcutta and Delhi High Courts respectively have frowned upon Company facing a winding up petition taking up such dishonest defence. In these decisions High Courts have taken the view that in matters of commercial transactions involving crores of amount where the Company facing winding up proceedings had stood a guarantor, if any such defence were to be accepted, we would be giving a wrong signal and dissuading foreign commercial entities from relying on the guarantees given by Indian Companies and which would ultimately undermine the role of India the world of trade and commerce. We could not agree less. We, therefore, do not find any merit in submissions of Dr. Tulzapurkar that the order of admission of the winding up petition was erroneous on any such count."*

35.3 That in the present proceedings, the Defendant has raised defences,

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including that the transaction and/or the guarantee are contrary to FEMA and the FDI policy only in its response dated 22nd January, 2013, to the statutory notice addressed by the Plaintiff that is after about three years of having entered into the transaction. In this regard, the relevant observations of this Court in para 34 of the Videocon Appeal are as under:

> *"In any view of the matter, it is also necessary to know that Videocon had never contended in any of its correspondence between 2007 till giving reply to the statutory notice that the Patronage Letter was issued in contravention of the provisions of FEMA or in breach of any other legal requirements. The defence is, therefore, raised for the first time only after receiving statutory notice i.e. after almost four years of issuance of the Patronage Letter.:"*

35.4 That additionally in para 40 of the Videocon Appeal, this Court has held as under:

> *"Applying the above principles, we have no hesitation in holding that the dispute raised by Videocon is not at all bonafide, much less substantial. The defence adopted by Videocon is not merely moonshine but dishonest and therefore the learned Company Judge was fully justified in passing the order directing Videocon to pay the amount of the guarantee called Patronage Letter dated 5th June 2007 for 38 Millions Euro".*

36. In response, the Learned Senior Advocate appearing for the Defendant has inter alia submitted that the said judgment is totally inapposite and irrelevant to the issues in the present Petition.

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37. I have gone through the above decision of the Division Bench of this Court in Videocon Industries Ltd. (supra). In that case, Videocon Industries Ltd. had given a Patronage Letter to Intesa Bank as a condition for the Bank granting a loan of Euro 35 Million to its subsidiary VDC Technologies SPA. Videocon contended that the Patronage Letter/Guarantee was issued in breach of the FEMA Guarantee Regulations 2000 which provided that no person could, without the general or special permission of the RBI, give a Guarantee, which had the effect of guaranteeing a debt or liability owed by a person resident in India to a person resident outside India, as the prior permission of the RBI was not obtained before issuing such letter/guarantee. (Judgment para 11 (c) Pg. 7/8 and para 23 Pg. 17).

37.1 The Hon'ble Division Bench therefore held that:

(i) the words "*with the general or special permission of the RBI*" could not be construed as requiring the prior permission of the RBI (Para 30 pg. 21).

(ii) The RBI Circular of 27th May 2011 read with Notification dated 8th May 2013 and the FAQ : answers to "Frequently Asked Questions" given by the RBI re. Questions 34 and 35 in the FEMA Manual of 2007 "*leaves no manner of doubt that it was permissible for Videocon to give Guarantees for its step down subsidiary, provided such exposures were within its permissible financial commitments*" and that Videocon had never contended that the same was not within its permissible financial commitments (Paras 31-33 pgs. 22-25).

(iii) "Assuming that Videocon had committed any wrong in issuing the patronage letter without obtaining permission of the RBI, as per the settled legal position, it is not open to a party to take advantage of its own wrong". (Para 34 pg. 25).

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37.2 In the case in hand, I am prima facie of the view that the structure/device of routing FMO's FDI amount of Rs. 418 crores to Amazia and Rubix through the newly interposed Vinca (as the nominal recipient of the FDI) was a colourable device structured only to enable FMO to secure repayment (through Vinca) of its FDI amount and interest thereon at 14.75%, contrary to the statutory FEMA Regulations and the FDI policy embodied therein, which only permit FDI investment in townships/real estate development sector to be made in the form of equity (including Compulsorily Convertible Debentures) and preclude any assured return. I am also prima facie of the view that the Defendant's guarantee (which is the basis of the Company Petition No. 644 of 2013) though ostensibly in favour of Vinca, an Indian Company, was part of the aforesaid illegal structure/scheme and was given to ensure that FMO received back its FDI amount with interest as aforesaid through Vinca. The Guarantee was therefore part of the aforesaid illegal structures/scheme and therefore prima facie illegal and unenforceable.

37.3 Further the question of the Defendant not being allowed to plead its own wrong also does not arise in the facts of the present case. Through the present Petition, the Plaintiff (who is admittedly acting at the instance of FMO/FMO's nominees) is in effect seeking the assistance of this Court to enable/enforce recovery by FMO of its FDI amount and interest thereon (through Vinca), contrary to the provisions of the FEMA Regulations and FDI policy embodied therein. As has been held by the Hon'ble Supreme Court in the case of Immami Appa Rao vs. G. Ramalingamurthi (supra), the Plaintiff who wants orders in his favour, is actually seeking the active assistance of the Court to achieve what the law

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prohibits/declares illegal **and that is clearly and patently inconsistent with public interest.** Moreover, as has been held by the Supreme Court in the above case, in such a case there can be no question of estoppel and **the paramount consideration of public interest** requires that the plea be allowed to be raised and tried.

37.4 Therefore in my view the Plaintiff cannot draw support from the Judgment in Videocon Industries Ltd. (supra).

38. Relying on the case of Zaheer Mauritius (supra), it is submitted on behalf of the Plaintiff that the Delhi High Court has considered a similar transaction/structure, which mandated the payment of fixed interest thereunder and has upheld the same. It is further submitted that the Delhi High Court has in paragraphs 21 to 34 of the Zaheer Mauritius's case enquired into the transaction to see as to whether any case was made out therein for 'lifting the corporate veil'. It is submitted that the findings in the said paragraphs support the following contentions of the Plaintiff.

(i) The structure/transaction is valid and is not in contravention of FEMA (including the Rules and Regulations framed thereunder) and/or the FDI policy.

(ii) The Defendant has sought to make out a case for lifting the corporate veil for the purpose of considering Vinca, Amazia and Rubix, being parent and subsidiaries, as one Company. The Defendant has not brought on record a shred of material to show how the facts of the present dispute would mandate lifting of the corporate veil, but has instead sought to make a case for lifting the corporate veil on the basis that Amazia and Rubix are subsidiaries of Vinca and are therefore one entity. The

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aforesaid contention is preposterous to say the least, as the sequitur thereto would be that all subsidiaries are the same entity as their respective parent.

(iii) No case has been made out for lifting the corporate veil. Without prejudice, it is submitted by the Plaintiff that Vinca, Amazia and Rubix are separate and distinct legal entities with their respective Board of Directors and Articles of Association. The said Articles of Association would clearly show that the affairs of Amazia and Rubix were always intended to be managed separately and distinctly from that of Vinca. Accordingly, without prejudice and for the sake of argument, even if this Court is inclined to lift the corporate veil, Vinca, Amazia and Rubix cannot be said to be the same entity.

39. It is submitted on behalf of the Defendant that the judgment in the case of Zaheer Mauritius (supra) is inapposite and irrelevant to the issues presently under consideration.

40. I have considered the submissions advanced by the Learned Advocates appearing for the parties qua the judgment in the case of Zaheer Mauritius (supra).The relevant facts in that case are briefly set out hereunder:

(i) Vatika which owned land reserved for being developed as a cyber park, had set up a JV company SH Tech Park Developers P. Ltd. and had transferred development rights in the said land to the JV Company.

(ii) Zaheer Mauritius had entered into a Securities Subscription Agreement and a Shareholders' Agreement with Vatika and the JV Company, and had invested 100 crores in the JV Company against issuance of equity shares and CCDs by the JV Company in its favour.

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(iii) The Shareholders Agreement provided for a call option by Vatika to acquire the said shares and CCDs and also provided a put option to Zaheer Mauritius requiring Vatika to buy the said CCDs and shares.

(iv) Pursuant to the put and call options, Vatika had acquired all the said shares and CCDs allotted to Zaheer Mauritius.

(v) The Income Tax Officer held that the receipt by Zaheer Mauritius from the transfer of the shares/CCDs would be taxed as interest and not as capital gains. The AAR confirmed the ITO's view and held that as the put and call options were based on a fixed rate of return on the investment made by Zaheer Mauritius, the transaction was essentially a loan to Vatika and had only been structured as an equity investment in the JV Co. to avoid the incidence of tax.

(vi) This order of the AAR was challenged before the Delhi High Court.

(vii) Accordingly the only issue in the Writ Petition was whether the AAR/ITO were justified in treating the amounts received by Zaheer Mauritius from the sale of CCDs as interest income or whether the amount was a capital gain and was exempted from tax under the India Mauritius Treaty.

40.1 The Court has in the said case referred to the fact that under the FDI policy, FDI in the real estate sector was permitted only through Equity or CCDs and held that the put and call options were commercial arrangements between the parties and did not change the legal nature of the transaction which was an investment in and subsequent sale of CCDs of the JV company. The judgment only considered, dealt with and decided whether in the context of such call and put options, the Revenue was entitled to treat the sale proceeds of the CCDs received by

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the Foreign Investor as interest income, or whether the same constituted a capital gain which was exempt under the treaty between India and Mauritius. No issue was raised whether such put or call option in respect of CCDs allotted under FDI (which provided for buy back at a pre-determined/agreed price) violated the FEMA Regulations/FDI policy and the judgment accordingly does not consider or decide whether such put/call options, were valid under the FEMA Regulations/FDI policy. The submission of the Plaintiffs that the judgment supports the Plaintiff's case that "the structure transaction is valid and is not in contravention of FEMA and/or the FDI Policy" does not appear to be correct. The structure devised by the Plaintiff -FMO in the instant case to get back its FDI with a return of 14.75% was not based on a buy back agreement as in the case before the Delhi High Court. Moreover, the RBI has expressly clarified/stipulated that even such buy back agreements at pre-agreed prices are not permissible in the case of CCDs allotted to foreign investors against FDI as the FDI policy/FEA Regulations does not permit an agreed return on FDI investment being made in the real estate sector. The RBI has by its circular No. 86 dated 9th January, 2014, bearing Ref. No. RBI/2013-2014/436 specifically clarified that option clauses in equity shares and CCDs allotted against FDI in real estate sector, can only provide for a buy back of securities from the investor at the price prevailing at the time "so as to enable the investor to exit without any assured return". The RBI circular also expressly stipulates that for transfer/buy back of CCDs "the guiding principle would be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at the price prevailing at the time of exit."

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40.2 In my view, the Plaintiff is also not correct when they state/submit that the judgment supports the Plaintiff in contending that the Defendant had not "brought on record a shred of material to show how the facts of the present dispute would mandate lifting of the corporate veil..." Even if it is assumed that the corporate veil is not to be lifted or Vinca, Amazia and Rubix are to be treated as one Company, as has been mentioned hereinabove, Vinca interposed as the holding Company of Amazia and Rubix only for the purpose of structuring FMO's FDI investment into Amazia and Rubix, through Vinca as the nominal recipient. The SSA and the annexed Debenture Trust Deed, specifically provided that the FDI amount to be received by Vinca from FMO against issuance of CCDs and equity shares by Vinca, was not to be retained by Vinca or used by Vinca in its own projects. The SSA and Trust Deed in fact expressly stipulated that the FDI amount received by Vinca from FMO, was to be immediately passed on by Vinca to Amazia and Rubix, against issuance by them of OPCDs. Accordingly the SSA and the Trust Deed itself established that Vinca had been interposed only to provide a facade of compliance with the FEMA Regulations/FDI policy and was only a nominal recipient of the FDI and that Vinca was immediately required to route the entire amount received from FMO to Amazia and Rubix, against issuance by them of OPCDs.

40.3 Therefore in my view the decision of the Delhi High Court in Zaheer Mauritius (supra) is also of no assistance to the Plaintiff.

41. The aforesaid facts prima facie support the contention of the Defendant that the factual matrix and the transaction documents establish that the transaction of routing the FDI through the newly interposed Vinca was a colourable device and

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was structured to enable FMO to secure repayment of its FDI amount (Rs. 418 crores) and a rate return of 14.5% per annum thereon, contrary to the FDI policy and the statutory FEMA Regulations and in any event the transaction is illegal and prohibited by law is unenforceable and consequently the Bank Guarantee issued by Vinca being part of the said structure is also unenforceable.

42. In the circumstances I am of the view that the Defendant has raised triable issues which require adjudication on further evidence at the time of final disposal of the suit. Hence the following order:

(i) Unconditional leave is granted to the Defendant to defend the above suit;

(ii) The suit is transferred to the list of commercial causes and the Defendant is directed to file its written statement on or before 15th June, 2015;.

(iii) The hearing of the suit is expedited and the Court will endeavour to dispose of the suit within a period of one year from the date of this order. It is clarified that the Suit shall be decided without being influenced by any of the observations made in the present order.

(iv) Place the suit for framing of issues on 29th June, 2015.

The Summons for Judgement is accordingly disposed of.

(S. J. KATHAWALLA, J.)

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