

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 05<sup>TH</sup> DAY OF JULY, 2022**

**BEFORE**

**THE HON'BLE MR.JUSTICE S.G.PANDIT**

**WRIT PETITION No.9182/2022 (GM-RES)**

**BETWEEN:**

XIAOMI TECHNOLOGY INDIA PRIVATE LIMITED  
A COMPANY INCORPORATED UNDER THE  
PROVISIONS OF THE COMPANIES ACT, 2013  
HAVING ITS REGISTERED OFFICE AT  
ORCHID (BLOCK -E), GROUND FLOOR TO  
4<sup>TH</sup> FLOOR, EMBASSY TECH VILLAGE  
MARATHAHALLI-SARJAPUR  
OUTER RING ROAD  
BENGALURU-560103  
REP. BY ITS AUTHORIZED SIGNATORY  
MR. SAMEER B.S. RAO.

...PETITIONER

(BY SRI SAJJAN POOVAIAH, SR. COUNSEL A/W  
SRI ADITYA VIKARAM BHAT, ADV.)

**AND:**

1. UNION OF INDIA  
THROUGH THE MINISTRY OF FINANCE  
GOVERNMENT OF INDIA  
NORTH BLOCK, CABINET SECRETARIAT  
RAISINA HILL, NEW DELHI-110001  
REPRESENTED BY ITS SECRETARY.
2. DIRECTORATE OF ENFORCEMENT  
BANGALORE ZONAL OFFICE  
3<sup>RD</sup> FLOOR, B BLOCK

BMTC SHANTINAGAR TTMC  
KH ROAD, SHANTINAGAR  
BENGALURU-560027.

3. MR. SOMASHEKAR N  
ASSISTANT DIRECTOR  
DIRECTORATE OF ENFORCEMENT  
BANGALORE ZONAL OFFICE  
3<sup>RD</sup> FLOOR, B BLOCK  
BMTC SHANTINAGAR TTMC  
KH ROAD, SHANTINAGAR  
BENGALURU-560027.

4. MR.MANOJ MITTAL  
DEPUTY DIRECTOR  
DIRECTORATE OF ENFORCEMENT  
BANGALORE ZONAL OFFICE  
3<sup>RD</sup> FLOOR, B BLOCK  
BMTC SHANTINAGAR TTMC  
KH ROAD, SHANTINAGAR  
BENGALURU-560027.

5. MR. MANISH GODARA  
JOINT DIRECTOR  
DIRECTORATE OF ENFORCEMENT  
BANGALORE ZONAL OFFICE  
3<sup>RD</sup> FLOOR, B BLOCK  
BMTC SHANTINAGAR TTMC  
KH ROAD, SHANTINAGAR  
BENGALURU-560027.

....RESPONDENTS

(BY SRI M.B. NARGUND, ASG A/W  
SRI MADHUKAR DESHPANDE, CGC FOR R1 TO R5)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF  
THE CONSTITUTION OF INDIA PRAYING TO CALL FOR  
RECORDS IN THE PROCEEDINGS FROM THE OFFICE OF  
THE R2; QUASH THE IMPUGNED ORDER DATED APRIL 29,  
2022 ISSUED BY R2 SEIZING THE MOVABLE PROPERTIES  
(MONEY IN THE BANK ACCOUNTS) OF THE PETITIONER

MAINTAINED WITH THE PETITIONERS BANKERS, AS MENTIONED IN THE SCHEDULE ANNEXURE-A AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED ON **15/06/2022** COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:

**ORDER**

Petitioner, a company incorporated under the provisions of the Companies Act, 2013 is before this Court under Article 226 of the Constitution of India praying for a writ of certiorari to quash the order dated 29.04.2022 passed by the second respondent bearing No.F.No. T-3/BGZO/01/2022 under Section 37A[1] of Foreign Exchange Management Act, 1999 [for short "FEMA"], seizing the movable properties i.e., money in the bank account of the petitioner maintained with the petitioner's bankers as mentioned in the schedule to the petition and for a direction to the respondents to conduct all further investigation and interrogations, if any, with respect to the petitioner through its employees or otherwise under video/audio recording and also permit the legal counsel of

the petitioner be present during such investigations or interrogations, in order to prevent any form or harassment to the representatives of the petitioner.

2. Petitioner claims that it operates as a re-seller and distributor of mobile phones and related products in India. Petitioner purchases locally manufactured smart phones for resale from third party Indian manufacturers and apart from the above, petitioner imports spare parts, accessories, mobile phones, televisions and certain other internet items and lifestyle products from its group entities. Petitioner claims that it regularly files its income tax returns and it has been assessed up to the assessment year 2017-18. Petitioner states that Qualcomm Inc., and Qualcomm technologies Inc., are the world's leading wireless technology innovators including code division multiple access [CDMA] technology and manufactures semiconductors and provides software for wireless communications, especially in mobile devices. Petitioner

claims that it is beneficiary of Qualcomm's proprietary and licensed intellectual property, particularly standard essential patents (SEPs) that are used in the mobile phones sold by it and therefore pays royalty for the use of SEPs to Qualcomm. It also states that SEPs are patents which are essential for functioning of the mobile phone in a telecommunication network by implementing the technical specifications or standards and that the technology cannot be used or implemented without implant of that patent. Since the petitioner is using Qualcomm's proprietary licensed intellectual property, petitioner is said to have paid certain percentage of royalty to Qualcomm and Beijing Xiaomi Mobile Software Co., Ltd., which is as follows:

<b>Year</b>	<b>Payment made to Qualcomm</b>	<b>Payment made to Beijing Xiaomi Mobile Software Co., Ltd.,</b>
2016	870,885,769.1	Nil
2017	5,144,014,635	Nil
2018	13,224,021,361	4,217,291,050
2019	9,602,448,201	Nil
2020	7,682,814,048	71,253,494

2021	8,498,226,532	4,484,596,937
2022	1,717,163,796	NA
TOTAL	46,739,574,342	8,773,141,481

3. Respondent No.2, Directorate of Enforcement on the basis of information from the credible sources that petitioner had made certain foreign remittances in the name of royalty to foreign based entities in violation of the provisions of FEMA, initiated investigation. Summons under the provisions of FEMA were issued to the Ex-country head and Managing Director of the petitioner and their statements were recorded. Based on the collected information, the Authorized Officer passed seizure order under Section 37A[1] of FEMA, which is impugned in this writ petition.

4. Statement of objections filed by the respondent Nos.1 and 2 state that petitioner is engaged in the trading of mobile phones, electronic gadgets and other accessories under the brand name of Xiaomi. Petitioner purchases the completely manufactured, box packed ready to sell/use

mobile from four manufacturers based in India and directly sells it to distributors, without adding any technology or any other value to the purchased phones. Petitioner has not received any kind of service, software/IPR/technology directly or indirectly. When there is no use of any intellectual property by the petitioner, there arises no occasion for the petitioner to pay royalty.

5. The respondents have raised preliminary objection with regard to maintainability of writ petition on the ground that the petitioner is provided with alternate remedy and that the writ petition is premature.

6. Heard the learned senior counsel Sri.Sajjan Pcovaiah for petitioner and learned Additional Solicitor General Sri. M.B.Nargund along with learned Central Government Standing Counsel Sri.Madhukar Deshpande for respondents on preliminary objection with regard to maintainability of writ petition.

7. Learned Additional Solicitor General Sri.M.B.Naragund for respondents on the preliminary issue of maintainability of writ petition submits that writ petition at this stage challenging the order passed under Section 37A[1] of the FEMA would not be maintainable since the petitioner is provided with alternate remedy under Section 37A of FEMA itself and further he submits that there is no order from the Competent Authority passed under Section 37A[3] of the FEMA and as such it is a premature writ petition. Learned Additional Solicitor General would submit that the writ petition at this stage would not be maintainable for one more reason that the writ petition involves disputed questions of facts.

8. Learned Additional Solicitor General inviting attention of this Court to Section 37A of FEMA submits that under sub-Section[1], the Authorized Officer on receipt of any information or otherwise has reason to believe that any foreign exchange, foreign security, or any



immovable property, situated outside India, is suspected to have been held in contravention of Section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property. The Authorized Officer after passing the order of seizure along with relevant materials shall place before the Competent Authority within a period of 30 days from the date of such seizure. Under sub-Section [3], the Competent Authority shall dispose of the petition within a period of 180 days from the date of seizure by either confirming or by setting aside such order after giving opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

9. Learned Additional Solicitor General would submit that sub-Section [5] provides appeal to the Appellate Tribunal against the order passed by the Competent Authority. Learned Additional Solicitor General

on the basis of the above referred provisions submits that Authorized Officer, on credible information that there is violation of Section 4 of FEMA, after recording reasons in writing under order at Annexure-A, seized the value equivalent of such foreign exchange.

10. Learned Additional Solicitor General would submit that since the petitioner has not used any technology or IPR of the Qualcomm or Beijing Xiaomi Mobile Software Company Limited, petitioner could not have paid any royalty. According to the learned Additional Solicitor General, royalty is paid only when a manufacturer uses technology or IPR patent holder.

11. Learned Additional Solicitor General would contend that since the petitioner has not used any technology or IPR, could not have paid any royalty. Hence, amount transferred from the banker of the petitioner to Qualcomm or Beijing Xiaomi Mobile Software Company Limited would attract Section 4 of FEMA.

Petitioner could not have transferred the amount in the guise of royalty when he has not used the technology to the accounts of Qualcomm or Beijing Xiaomi Mobile Software Company Limited. Referring to Section 4 of FEMA, he submits that no person resident in India shall transfer any foreign exchange, foreign security or any immovable property situated outside India except as provided under FEMA. Since the case of the petitioner falls under Section 4 of FEMA, petitioner cannot contend or raise the question of jurisdiction to initiate proceedings under Section 37A of FEMA.

12. Learned Additional Solicitor General in support of his contention with regard to maintainability placed reliance on the judgments of Hon'ble Apex Court in ***Thansingh Nathmal and Others V/s. Superintendent of Taxes [AIR 1964 SC 1419]; Raj Kumar Shivhare V/s. Assistant Director, Directorate of Enforcement and Others [(2010) 4 SCC 772]***; and decision of the High

Court of Madras in the case of **Pradeep D. Kothari V/s. The Assistant Director, Directorate of Enforcement and Others [MANU/TN/0949/2018]**. Thus, learned Additional Solicitor General would submit that FEMA is a complete code in itself. It provides an opportunity at the time of adjudication as well as provides remedy of appeal to the Appellate Tribunal, and thereafter appeal to the High Court within 60 days of the order of the appellate authority. It is his submission that in the case on hand, the account of petitioner is seized but no amount is withdrawn from the petitioner's account, as such petitioner cannot be called as an aggrieved person at this stage. Further, it is submitted that Authorized Officer under Section 37A[1] after passing the seizure order, as required, within 30 days i.e., on 27.05.2022 has forwarded the seizure order along with materials to the Competent Authority and it is for the Competent Authority either to confirm or to set aside seizure order giving an opportunity to the petitioner as well as to the Directorate of

Enforcement. Therefore, learned Additional Solicitor General submits that petitioner be directed to appear before the Competent Authority and he could make out a case that petitioner's case would not fall under Section 4 of FEMA and could request for setting aside seizure order.

13. Learned senior counsel Sri Sajjan Poovaiah for petitioner submits that petitioner is before this Court under Article 226 of the Constitution of India, since the Authorities under Section 37A of FEMA have no competency or jurisdiction to initiate proceedings against petitioner, as the case of the petitioner would not fall under Section 4 of FEMA. It is his submission that petitioner has not transferred or parked foreign exchange, foreign security or any immovable property situated outside India. It is submitted that petitioner has paid royalty since 2016 to the patent holder for using mobile technology i.e., SEP. It is submitted that petitioner has indirectly paid royalty to Qualcomm. Though license

is indirect, payment of royalty is direct to Qualcomm. It is submitted that petitioner has paid royalty from 2016 to 2022 and the same is recognized and accepted by the Income Tax Authorities. It is submitted that Income Tax Authorities during assessment have accepted royalty paid by the petitioner to Qualcomm and when it was within the knowledge of the Authorized Officer with regard to acceptance of royalty by the Income Tax Authorities, the Authorized Officer ought not to have proceeded with. It is his submission that the ingredients of Section 4 are not satisfied so as to initiate proceedings under Section 37A of FEMA.

14. It is submitted that royalty paid to Qualcomm and Beijing Xiaomi Mobile Software Company Limited is pursuant to ordinary business transactions which have been duly disclosed and examined by the Income Tax Authorities. The conclusion of the respondents that payment of royalty in relation to Standard Essential

Patent, foreign exchange has been transferred out side India by the petitioner through Qualcomm and is held out side India in contravention of Section 4 of FEMA is totally baseless and opposed to the material on record. It is submitted that Qualcomm is the owner of Standard Essential Patent Technology, without the said technology, no mobile device sold by the petitioner will have access to the mobile network interoperability. Transfer of foreign exchange by the petitioner in the form of royalty cannot be considered as transfer of foreign exchange out of India in contravention of Section 4 of FEMA.

15. Learned senior counsel Sri.Sajjan Poovaiah further submits that Section 37A of FEMA was inserted by Act No.20 of 2015 under Notification dated 08.09.2015 empowering initiation of proceedings by Authorized Officer for contravention of Section 4 of FEMA. The impugned seizure is based on bald and vague allegations, without considering or appreciating the acceptance of payment of

royalty by the Income Tax Authorities. The Authorized Officer is required to record his reasons based on some material evidence and it cannot be on irrelevant material. He submits that the word used “suspected” in Section 37A must be based on the relevant material and unless there is sufficient material evidence, the Authorized Officer could not have suspected the transactions of petitioner in payment of royalty.

16. Learned senior counsel taking through Section 37A of FEMA would submit that petitioner is before this Court challenging seizure order passed under sub-Section [1] of Section 37A of FEMA and against the said order, petitioner has no alternate remedy of appeal and only remedy would be to approach this Court under Article 226 of Constitution of India. It is submitted that remedy of appeal available to the petitioner under Section 37A would be only after the Competent Authority under sub-Section [3] passes order. Further, learned senior counsel would



submit that this Court under Article 226 of Constitution of India could entertain writ petition even if there is statutory remedy of appeal under certain circumstances including that when jurisdiction itself is questioned or when order is passed in total violation of principles of natural justice. It is submitted that present writ petition is maintainable since petitioner is questioning the jurisdiction of the Authorized Officer under Section 37A of FEMA to initiate proceedings, when the ingredients of Section 4 is not fulfilled and further petitioner has no alternate remedy as contended by the learned Additional Solicitor General for respondents. With regard to contention of learned Additional Solicitor General that writ petition itself is premature, learned senior counsel would submit that order of attachment under Section 37A[1] of FEMA would have a far reaching effect on the petitioner's business and it would lead to civil death.

17. Having heard the learned Additional Solicitor General for respondents and learned senior counsel for petitioner, the only point which falls for consideration is as to,

*“Whether the writ petition is liable to be dismissed as not maintainable on the ground of availability of alternate remedy and the writ petition is premature?”*

18. The answer to the above point would be that petitioner has no alternate remedy against the seizure order under Section 37A[1] of FEMA but writ petition challenging the order passed under Section 37A[1] of FEMA would be premature, for the following reasons:

Availability of alternate remedy is not a total bar for the High Court to entertain writ petition under Article 226 of Constitution of India. Availability of alternate remedy must be effective and efficacious. Even if alternate remedy is available, when impugned order is passed without jurisdiction or competency or is passed in total violation of

principles of natural justice writ petition could be entertained. The Hon'ble Apex Court in ***City and Industrial Development Corporation V/s. Dosu Aardeshir Bhiwandiwalla and Others [(2009) 1 SCC 168]***, has held that the Court while exercising its jurisdiction under Article 226 of Constitution of India is duty bound to consider whether [a] adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved; [b] the petition reveals all material facts; [c] petitioner has any alternate or efficacious remedy for the resolution of dispute; [d] person invoking jurisdiction is guilty of unexplained delay and laches; [e] ex facie barred by any laws of limitation; [f] grant of relief is against public policy or barred by any valid law; and host of other factors.

19. In the case on hand, petitioner is before this Court questioning the order passed by Authorized Officer under sub-Section[1] of Section 37A of FEMA. Sub-

section[1] of Section 37A of FEMA empowers the Authorized Officer to pass seizure order if the Authorized Officer has reason to believe that foreign exchange has been transferred and is suspected to have been held in contravention of Section 4, by recording reasons in writing, seize value equivalent, situated within India, of such foreign exchange. The Authorized Officer after passing seizure order is required to place the seizure order with entire/relevant material before the Competent Authority within a period of 30 days from the date of such seizure. The Competent Authority shall dispose of the petition within a period of 180 days from the date of seizure by either confirming or by setting aside such order after giving an opportunity of being heard to the representatives of the Department as well as to the aggrieved persons. Against the order passed by the Competent Authority in the adjudication proceedings, person aggrieved is provided with remedy of appeal to the Appellate Tribunal under sub-Section [5] of Section 37A of

FEMA. At the stage of seizure order under sub-Section (1) by the Authorized Officer, petitioner is not provided any opportunity and the order is passed on the basis of material available with the Authorized Officer. The Authorized Officer would be in the process of passing order on the material from which he has reason to believe and suspect the transfer of foreign exchange in contravention of Section 4 of FEMA. Only when the Competent Authority issues notice on submission of seizure order along with material by the Authorized Officer, then the person against whom seizure order is passed would get an opportunity. The appeal provided is against the order passed by 'Competent Authority' and not against the order passed by Authorized Officer'. Therefore, at this stage, it cannot be accepted that petitioner is provided with alternate remedy as contended by the learned Additional Solicitor General.

20. The contention of learned Additional Solicitor General that writ petition is premature, since the

Authorized Officer has only passed seizure order under Section 37A[1] and thereafter the Competent Officer when seizure order along with relevant material is placed before him, would necessarily issue notice to the petitioner and petitioner would have an opportunity to disprove the case of respondents with regard to violation of Section 4 of FEMA, requires to be accepted. The Authorized Officer on the material available and on the statements recorded by him during investigation would proceed to pass order, if he has reason to believe that any foreign exchange situated outside India is suspected to have been held in contravention of Section 4 of FEMA, by recording reason, order seizure of the value equivalent, situated within India of such foreign exchange. Seizure order under sub-Section (1) is in the nature of provisional order. In other words, Bank account of the petitioner is attached, but no money of the petitioner is withdrawn or forfeited. But, the petitioner would not be in a position to touch the seized amount. In the case on hand, the impugned seizure order

is dated 29.04.2022. The Authorized Officer as required under sub-Section (2) has placed the seizure order along with entire material before the Competent Authority on 27.05.2022. Seizure order passed by the Authorized Officer is like a provisional decision, step in process of taking final decision by the Competent Authority. The seizure order passed by the Authorized Officer is not final and before confirming the said seizure order, petitioner would be provided with an opportunity to have his say in the matter. The petitioner could very well convince the Competent Authority that payment of royalty by the petitioner to Qualcomm and Beijing Xiaomi Mobile Software Company Limited is in the nature of running royalty and is being paid for the use of SEPs and other licensed intellectual property in respect of mobiles sold in India.

21. The Hon'ble Apex Court in **Raj Kumar Shivhare** (supra) was considering appeal arising from

FEMA and at paragraphs 17, 18 and 19, it is held as follows:

*“17. FEMA is a complete Code in itself. The long title of FEMA would indicate that the same is an "Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India".*

*18. The Act has seven Chapters and 49 Sections and out of which, Chapter V, which deals with adjudication and Appeal, contains detailed provisions starting from Sections 16 to 35, thus spanning 20 Sections. A rule styled as the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 have been framed in exercise of powers under Section 46 read with sub-section (1) of Section 16, sub-section (3) of Section 17 and sub-section (2) of Section 19 of FEMA.*

*19. It is thus clear that Chapter V of FEMA, read with the aforesaid rules, provides a*



*complete network of provisions adequately structuring the rights and remedies available to a person who is aggrieved by any adjudication under FEMA.”*

The above decision makes it abundantly clear that FEMA is a complete Code in itself and is an act to consolidate and maintain law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange management in India. It also states that when statute creates a special mechanism for adjudication and when statute itself provides for remedy that too in a physical statute, a writ petition should not be entertained ignoring the statutory dispensation. The above judgment in **Raj Kumar Shivhare** (supra) was rendered on 12.04.2010 much prior to insertion of Section 37A of FEMA, but it would not make any difference. Under Section 37A of FEMA also special mechanism is provided to determine the violation of Section 4 of FEMA.

22. It is contended that jurisdiction under Article 226 of Constitution of India would be available if the petitioner establishes that the impugned order under challenge is without jurisdiction. Normally, as stated above, writ petition under Article 226 of Constitution of India would be entertained when question of jurisdiction and violation of principles of natural justice is involved. In the instant case, even though the question of jurisdiction is raised, the same involves disputed questions of fact and law. The contention of petitioner is that neither there is violation of Section 4 of FEMA, nor the ingredients of Section 4 are fulfilled to initiate action under Section 37A of FEMA. It is the case of the petitioner that petitioner has paid or transferred foreign exchange to Qualcomm and Beijing Xiaomi Mobile Software Company Limited as royalty for usage of SEPs, technology, other licensed intellectual property in respect of mobiles sold in India of Qualcomm and Beijing Xiaomi Mobile Software Company Limited. On

the other hand, it is the case of the respondents that petitioner purchases completely manufactured box packed ready to sell/use mobiles from the manufacturers based in India and directly sells it to distributors without adding any technology or any other value to the purchased phones. Petitioner has not received any kind of service/software/IPR/technology directly or indirectly in order to pay royalty. Whether the payments made by the petitioner to Qualcomm and Beijing Xiaomi Mobile Software Company Limited could be considered as royalty or whether such payment in the facts of the case would attract Section 4 of FEMA is a question of fact which the Competent Authority has to decide appreciating or considering material placed by the petitioner as well as respondents. The respondents claim that there is no agreement between petitioner and the Qualcomm and royalty is being paid based on a letter dated 17.05.2016 and amended master software agreement dated 01.08.2016. Whether the petitioner has used the

technology or IPR of Qualcomm and whether there was agreement for usage of technology or IPR and whether the payment made by petitioner is for usage of technology or IPR is a question of fact which the Competent Authority has to decide. Normally, royalty is a payment made for usage of technology or IPR by the manufacturer to the IPR holder. In the case on hand, it is for the petitioner to establish that apart from manufacturer of mobile phones, the petitioner who purchases manufactured mobile phones would also be liable to pay royalty. Therefore, in the facts and circumstances of the case, I am of the opinion, that question with regard to jurisdictional issue may be urged before the Competent Authority and the Competent Authority could determine the same while passing order under sub-Section [3] of Section 37A of FEMA. The Hon'ble Apex Court in the case of ***Management of Express Newspaper (Private) Ltd., Madras V/s. The Workers and Others [AIR 1963 SC 569]***, has held that normally, the questions of fact though there may be

jurisdictional facts, decision of which depends upon appreciation of evidence, should be left to be tried by the Special Tribunals constituted for that purpose. In the case on hand also, based on the agreements placed on record by the petitioner, Competent Authority would have to decide whether the case of petitioner falls within four corners of Section 4 of FEMA or the payments are towards royalty.

23. Whether the Authorised Officer had reason to believe that any foreign exchange situated outside India is suspected to have been held in contravention of Section 4 or reasons recorded by the Authorised Officer would be sufficient to initiate action under Section 37-A of FEMA, are to be considered by the Competent Authority. At this stage, examining sufficiency of reason or otherwise under Article 226 of the Constitution of India would prejudice the case of either of the parties. It is best left to the Competent Authority to examine the same when it considers the entire issue under sub-Section (3) of Section 37-A of FEMA.

24. Learned counsel for the petitioner placed reliance on the decision of the Hon'ble Apex Court in ***RADHA KRISHAN INDUSTRIES v/s STATE OF HIMACHAL PRADESH AND OTHERS*** reported in **(2021)5 SCC 771** to contend that the provisional attachment could be termed as very drastic and has far reaching consequences. Such power could be used sparingly and only on substantive weighty grounds and reasons. The above decision arises from Himachal Pradesh Goods and Services Tax Act, 2017. The issue before the Hon'ble Apex Court was whether the orders of provisional attachment issued are in consonance with the conditions stipulated in Section 83 of the HPGST Act and whether the High Court was right in concluding that the provisional attachment could not be challenged in a petition under Article 226 of Constitution of India. The issue is answered at paragraph 66, observing that appeal is provided under HPGST Act against order passed by Adjudicating Authority and not against order passed by Commissioner. The Hon'ble

Supreme Court observed that the power of provisional attachment under Section 83 of the Act should be exercised by authority only if there is reasonable apprehension that the assessee may default the ultimate collection of demand that is likely to be raised on the completion of the assessment. The facts of the present case are entirely different. The CGST Act deals with revenue to the State whereas FEMA deals with transfer of foreign exchange in contravention of FEMA. The scheme of CGST as well as FEMA are altogether different. The provisional attachment under CGST cannot be compared to that of seizure order under Section 37-A(1) of FEMA.

25. Section 37A of FEMA provides mechanism to decide the contravention or otherwise of Section 4 of FEMA. The case of the petitioner is at the stage of sub-Section [1] of Section 37A of FEMA which is impugned in the present writ petition. Timeline is fixed under Section 37A of FEMA for conclusion of the proceedings initiated by the Authorized Officer. The Authorized Officer has passed

seizure order which is in the nature of provisional order is to be placed before the Competent Authority within 30 days from the date of such seizure order. The impugned order is dated 29.04.2022 and the learned Additional Solicitor General Sri.M.B.Naragund has submitted that within 30 days i.e., on 27.05.2022 itself the Authorized Officer has placed the seizure order along with relevant material before the Competent Authority. Since the seizure order and relevant material is already placed before the Competent Authority, it would be appropriate for this Court to direct Competent Authority to issue notice of hearing to the petitioner, hear the petitioner as well as representatives of the Directorate of Enforcement and pass appropriate orders in accordance with law. The timeline of 180 days mentioned in sub-Section [3] of Section 37A is an outer limit. In the facts and circumstances, since the petitioner contends that seizure order has affected day-to-day business of the petitioner, it would be appropriate for this Court to direct the



Competent Authority to dispose of the petition expeditiously but not later than 60 days from the date of making available copy of this order.

26. The Competent Authority appointed by respondent No.1 under Sub-section [2] of Section 37A of FEMA is directed to issue notice of hearing to the petitioner, hear the parties concerned and pass appropriate order either confirming or setting aside the seizure order within a period of 60 days from the date of making available a copy of this order.

27. This Court, by order dated 05.05.2022 stayed the impugned order dated 29.04.2022 (Annexure-A) subject to condition that the petitioner shall operate Bank accounts which are seized under the impugned order, only for the purpose of meeting expenses for carrying out day to day activities of the Company and observed that order shall not confer any right on the petitioner to make payment in the form of royalty or in any other form to the

Companies located outside India. Further, on 12.05.2022, this Court clarified that the petitioner is at liberty to take Overdraft and make payments from such Overdrafts to Foreign Entities excluding payment of royalty. Interest of justice would be met, if the above interim order is continued till orders are passed by the Competent Authority as stated above. The interim order passed by this Court on 05.05.2022 and clarified on 12.05.2022 would enure to the benefit of the petitioner, till the Competent Authority passes order under sub-Section (3) of Section 37-A of FEMA.

With the above, writ petition stands disposed of.

All the contentions of the parties on the merits of the case are left open.

**Sd/-  
JUDGE**

NC.  
CT:bms