

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO. 130 OF 2015

IN

WRIT PETITION NO. 2743 OF 2014

Financial Technologies (India) Limited	}	Applicant
in the matter of		
Financial Technologies (India) Limited	}	
and Ors.	}	Petitioners
versus		
The Union of India and Ors.	}	Respondents

WITH

WRIT PETITION NO. 2985 OF 2014

WITH

WRIT PETITION NO. 387/2015

Mr. Ravi Kadam-Senior Advocate with Mr. Vineet Naik-Senior Advocate with Mr. Tushad Cooper, Ms. Shaheen parikh, Mr. Nooruddin Dhilla and Ms. Priyanka Vora i/b. M/s. Cyril Amarchand Mangaldas for the Petitioners in WP/2743/2014 and Applicant in CHSW/130/2015 and for Respondent No. 4 in WP/2985/2014.

Mr. Janak Dwarkadas-Senior Advocate i/b. M/s. Cyril Amarchand Mangaldas for the Petitioner in WP/387/2015.

Mr. Zal Andhyarujina with Mr. Amit Vyas and Ms. Saloni Kulkarni i/b. M/s. Economic Laws Practice for the Petitioner in WP/2985/2014.

Mr. Darius Khambata-Senior Advocate with Mr. Aditya Mehta, Dr. G. R. Sharma, Mr. Parag Vyas and Mr. D. P. Singh i/b. Mr. Jay K. Bhatia for Respondent No. 1 in CHSW/130/2015.

Mr. Iqbal Chagla-Senior Advocate with Mr. Shiraz Rustomjee-Senior Advocate, Mr. Mihir Mody and Mr. Rushin Kapadia i/b. M/s. Ashar and Co. for Respondent No. 2 in WP/2985/2014.

Mr. Virag Tulzapurkar-Senior Advocate with Mr. Ameet Naik, Mr. Vaibhav Bhure, Mr. Chirag Kamdar, Mr. Asadulla Thangel i/b. M/s. Naik Naik and Co. for Respondent No. 3 in WP/2743/2014, WP/2985/2014 and WP/387/2015.

Mr. Gaurav Joshi with Mr. Piyush Raheja i/b. M/s. Karkand Gandhi and Co. for Respondent No. 4 in WP/2743/2014.

Mr. Sandeep Parekh with Ms. Bijal Mehta, Ms. Nidhi Shukla i/b. M/s. Deven Dwarkadas and Partners for Respondent No. 6 in CHSW/130/2015.

Mr. Shubhabrato Chakraborti i/b. M/s. Juris Corp for Respondent Nos. 7 to 11.

Mr. Akshay Patil with Mr. Hiral Thakkar and Mr. Ashwin Bhadang i/b. M/s. Federal Rashmikant for the Intervener.

Mr. Arif Bookwala i/b. M/s. FZB Partners for Intervener.

CORAM :- S. C. DHARMADHIKARI & G. S. KULKARNI, JJ.

DATED :- AUGUST 7, 2015

P.C. :-

By this Chamber Summons, the Applicant is seeking the following reliefs:-

“a. to direct the 1st Respondent to provide the 1st Petitioner with inspection of the originals and copies of:

i. FMC's report to the Department of Consumer Affairs dated April 10, 2012;

ii. FMC's report to the Department of Consumer Affairs that the undertaking provided by National Spot Exchange Limited was not in conformity with the directives of the Government;

iii. Any document evidencing the Department of Economic Affairs' (DEA) support to the FMC's proposal merging National Spot Exchange Limited with FTIL;

iv. FMC's letter dated October 17, 2014 and representations forwarded from various members/investors requesting for merger of National Spot Exchange Limited with FTIL;

v. Findings/report/observations arrived at during the inspection under Section 209A of the Companies Act, 1956 of the Books of Accounts of National Spot Exchange Limited and FTIL; and

vi. All internal communication/memoranda exchanged by:

a. the officers of the MCA and FMC including but not limited to all the committee reports received by the MCA and FMC,

b. the officers of the MCA and FMC with the officers of the DEA;

c. the officers of the MCA and FMC with the officers of the Ministry of Law and Justice, Government of India in relation to the proposed merger of the National Spot Exchange Limited with FTIL'

(b-1) to direct the 1st Respondent to provide inspection and copies of the opinions of the Ministry of Law and Justice in relation to the proposed amalgamation of the 3rd Respondent with the 1st Petitioner.

(b-2) to direct the 1st Respondent to adjourn the hearing fixed by it on July 7, 2015 (in terms of their letter no. 1/1/2014-CL.II(PF) dated June 26, 2015), for a period of two weeks after the Respondent No. 1 has provided inspection and copies of the Relevant Documents to the 1st Petitioner;

(b-3) to direct the 1st Respondent to take on file and consider any additional submissions/objections that the 1st Petitioner may make/raise after receiving inspection and copies of the Relevant Documents.

2) Thus, a direction is sought and to the 1st Respondent to provide the 1st Petitioner with inspection of the originals and copies of the above documents.

3) When this Chamber Summons was placed before us today and in pursuance of our earlier order, for hearing and final disposal, on instructions, Mr. R. M. Kadam-learned Senior Counsel appearing for the Applicant submits that presently the 1st Petitioner is not seeking a direction to provide it with inspection of the originals and copies of the representations forwarded from various members/investors requesting for merger of National Spot Exchange Limited with the 1st Petitioner.

4) Mr. Khambata-learned Senior Counsel appearing for Respondent No.1, on instructions, stated that the inspection of the originals and copies of the documents, save and except which has not been pressed and from prayers a(i) to (v) will be provided and copies thereof will also be allowed to be taken within a period of one week from today at the office of the Deponent of the affidavit in reply filed by the 1st Respondent to this Chamber Summons, namely, the Joint Director to the Government of India, Ministry of Corporate Affairs, Office of the Regional Director, Western Region, 100, Everest, N. S. Road, Marine Drive, Mumbai 400 002.

5) We also clarify that as far as prayer a(iii) is concerned, Mr.Khambata's statement on instructions is referable to a document which is a Ministry of Finance letter dated 15th October, 2014 addressed to the Ministry of Corporate Affairs, Government of India.

6) However, Mr. Kadam would submit that the prayer is for inspection of the originals of any documents evidencing the support of the Department of Economic Affairs to the proposal of the Forward Market Commission, merging National Spot Exchange Limited with FTIL. Therefore, the 1st Respondent should clarify that there is no other document and what is offered is the only one on this aspect particularly in support of the merger proposal.

7) Mr. Kadam has also canvassed extensive arguments insofar as the directions sought and in relation to documents at prayer a(vi). There, the argument is that the inspection and copies of the opinions of the Ministry of Law and Justice in relation to the proposed amalgamation, the internal communications/memoranda exchanged by the officers of the Ministry of Corporate Affairs and the Forward Market Commission and such officers with the officers of the Department of Economic Affairs in relation to the proposed merger are vital for the purposes of an effective and proper representation and at the hearing in pursuance of this Court's order dated 4th February, 2015.

8) Relying upon this order, Mr. Kadam would submit that the Court, at this stage, is not required to express any opinion on the ambit and scope of the right that could be claimed and in terms of section 396 of the Indian Companies Act, 1956. He would submit that this is a first

proposal and in relation to private companies which is under active consideration of the Government. The Government has already made up its mind and has made a draft order. However, by virtue of sub-section (4) of this provision, the Government has an obligation to consider the objections and representations and of the affected companies to the draft order within the meaning of sub-section (1) of section 396 of the Indian Companies Act, 1956. Mr. Kadam would submit that what is paramount in this case is the satisfaction that such amalgamation is in public interest. Therefore, the disclosure of the information and contained in documents and reports is equally in public interest. The affidavit in support of this Chamber Summons indicates as to how after this Court's order was passed, a request has been made to the concerned authority to provide the originals for inspection and give copies thereof if desired by the Petitioner No. 1/Applicant at the costs, charges and expenses to be borne by them. This request has been granted partially and today. There is no impediment in therefore giving the entire set of documents or copies thereof even of the papers as sought under the prayers a(vi) and b(1). The affidavit in reply to this Chamber Summons does not indicate any objection and relating to each document but it is the right of the Petitioner No. 1/Applicant to object and represent against the proposal as contained in the draft order. The right to object and make representation against the draft order of

amalgamation is created in favour of the present Petitioner/Applicant. It is an affected company. Therefore, whether the documents as sought are relevant or not cannot be left to be judged and solely by the 1st Respondent. Whether these documents have a bearing on the issue or not is a matter which must be determined and decided by the Court. It cannot be left to the Central Government, which is accused in this Writ Petition of a serious charge of bias and malafides as well. In the circumstances, there is no question of the documents being held back. Withholding of the documents is not subserving the public interest, but only protects the commercial interest or somebody who is trading at the Exchange. Therefore, the inputs received and which have a bearing on the issue of amalgamation and to be decided requires them being furnished to the Petitioner/Applicant. The Petitioner/Applicant, at this stage is not obliged to satisfy that these documents which are referred may be or may not be relied upon. So long as these documents are needed for complete and effective defence by the objectors, then, there is no question of any fishing inquiry being made.

9) Our attention is invited to the affidavit filed by Respondent No. 1 and particularly the objection which has been raised for the report not being shared. According to Respondent No. 1, this may contain discussion on other regulatory steps taken or proposed to be taken by

the Government as well as other regulatory agencies. Mr. Khambata would submit that the documents if disclosed at this stage may hamper prosecution which has been launched by the Ministry of Corporate Affairs and pending in Court. Mr. Kadam urges that the objection can be taken care of by calling upon the first Respondent to produce the record for perusal of this Court. The Court may then satisfy itself as to what extent the disclosure should be made and what would be not in public interest so as to hamper any regulatory measures and prosecution. However a blanket defence of this nature should not be accepted. Further contention in the affidavit in reply that the opinion of the Law Ministry is a privileged and confidential document and therefore, the Petitioner is not entitled to inspect the same completely contravenes the mandate of sections, 123, 126 and 129 of the Indian Evidence Act. These are departmental officials with whom the correspondence is exchanged and equally the communications. The so called departmental officials and of the Ministry of Law and Justice may be legally trained and qualified but they are salaried employees. They are whole time employees and cannot therefore be termed as Advocates within the meaning of the Advocates Act, 1961. There is no client professional relationship. In such circumstances, for their benefit the Government cannot rely upon these legal provisions.

10) In the submissions in rejoinder, Mr. Kadam would submit that the order of the Division Bench of this Court dated 4th February, 2015 now binds all parties. In that, for vacating the status quo granted earlier, a specific statement was made by the Central Government and through the learned Solicitor General of India that a hearing would be given and the draft order will not be finalized before the objections and representations are considered. That hearing is in relation to the proposed amalgamation and the confirmation of the draft order. In these circumstances, this Court should direct disclosure of the information, providing inspection of originals and furnishing of copies thereof. Alternatively and to determine as to whether a privilege can be claimed in relation to these documents particularly the opinion of the Ministry of Law and Justice, this Court should adopt the course as suggested in the Judgments of the Hon'ble Sureme Court in the case of *The State of U. P vs. Raj Narain and Ors.* reported in (1975) 4 SCC 428. It should also bear in mind the principles laid down in the decision of the three Judge Bench of the Hon'ble Supreme Court in the case of *R. K. Jain vs. Union of India* reported in (1993) 4 SCC 119.

11) For the purpose of the role that is played and by the departmental legal advisors, officials of the Ministry of Law and Justice, Mr. Kadam relies upon Judgment of the Hon'ble Supreme Court of India

in the case of *Satish Kumar Sharma vs. Bar Council of Himachal Pradesh* reported in **AIR 2001 SC 509**.

12) On the other hand, Mr. Khambata appearing for the 1st Respondent submits that the reliefs as sought and pressed in the manner noted above are really premature. Today, within the parameters of section 396 of the Indian Companies Act, 1956, the Central Government is allowing the objections to be raised and the representations against the draft order. That would be duly considered. It is not a matter between two commercial entities as is projected but there is a larger public interest and intended to be subserved. The Government has taken a decision to initiate action under section 396 of the Indian Companies Act, 1956. The draft order in terms of sub section (1) thereof has been issued. By virtue of sub section (4)(b) and sub section (5), the documents and information presently in possession of the Government would enable the Government to arrive at the requisite satisfaction and also to consider the objections and suggestions. Today this Court cannot presume that the order and which is to be passed in furtherance of this Court's directions and also the steps that would be taken under sub section (4) of this provision would necessarily be adverse and to the interest of the Petitioner/Applicant. In the event, an order, which is adverse to their interest, is passed, then, in the pending Writ Petition, or such other proceedings permissible in law,

that can be assailed and challenged. While challenging the same, all contentions can be raised. Presently, this Court has not passed an order which can be any way termed as final. If this Court has relied upon a statement that the affected parties would be given a brief hearing that does not mean that the Petitioner can file a Chamber Summons and seeking reliefs of the present nature. They do not have any right in law to seek disclosure and inspection. In any event, no such right can be claimed unless the relevancy is established and in relation to the documents of which inspection and copies are sought. There is no entitlement in law.

13) Our attention is invited to the affidavit in support of the Chamber Summons. The deponent only states that the documents are relevant, germane and necessary for the purpose of making a complete and effective representation and in compliance with this Court's order. Mr. Khambata would submit that such a general statement will not suffice, when internal documents and communications are sought to be inspected and the request is to provide copies thereof. As long as it is not established and proved that these internal notings, communications will necessarily form the part of the final decision and coupled with the relevancy thereof, then, this Court should not allow any such request. There is no apprehension that a brief hearing, which is scheduled to be given, in pursuance of this Court's order, would be meaningless and

futile and in the absence of the documents not agreed to be provided. This is not a case of a challenge to the draft order. The final order is yet to be passed. There is no prejudice and which is likely to be caused even if these documents are not provided. Therefore, on the basis of any vague and general plea, this Court should not grant the relief as prayed for.

14) According to the Central Government, this is a clear case of absence of any pleadings and fishing inquiry. Mr. Khambata has sought to rely upon several decisions of the Hon'ble Supreme Court of India on the nature of the proceedings, ambit and scope of provisions of section like 396 of the Indian Companies Act, 1956. He has also relied upon several Judgments rendered by the Hon'ble Supreme Court of India and in the context of disciplinary proceedings. Merely because certain documents are referred necessarily does not mean that they are going to be relied upon and to pass an adverse order. Secondly, file, notings, communications and opinions by themselves do not partake the character of an order of binding nature and passed by the Government. Therefore, the understanding of the officers as reflected in these documents and pertaining to legal matters can never be said to be conclusive. These decisions are as follows:-

- (i) *Sundarjas Kanyalal Bhatija vs. Collector, Thane, Maharashtra and Ors. (1989) 3 SCC 396.*

- (ii) *State of T. N. vs. Thiru K. V. Perumal and Ors. (1996) 5 SCC 474.*
- (iii) *Syndicate Bank and Ors. vs. Venkatesh Gururao Kurati (2006) 3 SCC 150.*
- (iv) *Babaji Kondaji Garad and Ors. vs. Collector of Parbhani District and Ors. AIR 1984 SC 192.*
- (v) *Sethi Auto Service Station and Anr. vs. Delhi Development Authority and Ors. (2009) 1 SCC 180.*

15) We have given our anxious consideration to the submissions canvassed by either sides. We are of the view that the statements that are made on instructions by Mr. Khambata, based on which some of the documents can be inspected and copies furnished sufficiently protect the interest of the Petitioner/Applicant at this stage. It is not necessary for us to determine and decide any larger issue. Suffice it to note that there is some basis in the apprehensions of the 1st Respondent and those awaiting a decision of the Central Government on this issue that attempts of this nature are made to delay the proceedings. Such requests are made and pressed repeatedly only after the order passed on 4th February, 2015. Whether the order passed and stated to be in draft form would be finalized by the Central Government and in what terms and what shape it would finally take cannot be speculated and at this stage. We are equally mindful of the fact that the order passed by this Court on 4th February, 2015 is only interim in nature. The issue raised in the Writ Petition is of the constitutional

validity and legality of the legal provision, namely, section 396 of the Indian Companies Act, 1956 and which is sought to be invoked by the Central Government. That it is being invoked and for the first time in relation to entities other than public enterprises or public sector undertakings is the submission which fails to impress us. It may be that such a provision has been invoked but so long as it is not declared unconstitutional, the same was capable of being invoked. The consequence thereof, the ambit and scope of the powers conferred thereunder are matters which must await the final outcome of the Writ Petition and all opportunities at the hearing of the Writ Petition to raise contentions either supporting the validity and legality or opposing it would be available. The prayer in the Writ Petition and which is essential and main prayer is yet to be granted. When the Writ Petition is pending and the Court has permitted the Central Government to pass a final order or act in furtherance of what it had already initiated with suitable protection to the Petitioner and all this is without prejudice to the rights and contentions of both sides, then, we do not see any reason for the relief of the present nature being granted. There is no need to decide a wider controversy. That this Court must presume that the Petitioner is adversely affected by any act of the 1st Respondent in not providing all the documents, that at the hearing which is to be scheduled and based on which the order has to be passed, the

Petitioners will not be able to make an effective and proper representation, that the final order or the order proposed by the Central Government in terms of section 396(1) would necessarily refer, rely and incorporate all the matters concerned and contained in the documents, inspection of which is sought and copies requested, is thus the basis for the reliefs claimed. As already held above, the matter is brought before us at a premature stage. We do not think that all arguments should be dealt with at this stage. It is only when such opinions or documents which are sought to be relied upon and adverse to the interest of the Petitioner and if any privilege is claimed in relation thereto, then, whether such documents or communications are privileged or not would be decided. Therefore, we refrain from expressing any opinion on the rival contentions and particularly whether without establishing and proving the relevancy of documents can any argument be made on disclosure and inspection thereof. It is also not necessary for our decision to determine as to whether the procedural aspects as contemplated in Order XI and Rules of the Code of Civil Procedure 1908 would be applicable to the hearing before the Central Government and of the limited nature. It would be also premature to go into the contentions and particularly as to whether at the hearing of the nature contemplated in the order dated 4th February, 2015, a question of a document being withheld necessarily would raise the plea of it being

privileged and whether any such privilege is contemplated in the law of evidence in relation to such proceedings as are contemplated by this Court's order dated 4th February, 2015. We would keep open all contentions and on this issue for being raised at an appropriate stage. By accepting the statements of Mr. Khambata and declining the request in relation to the other documents, at this stage, we reject this Chamber Summons.

16) The ad-interim order passed on the Chamber is vacated forthwith. As already directed above, the originals of the documents, in relation to which we have accepted the statements of Mr. Khambata, can be inspected at the office of the Deponent of the affidavit in reply. Equally, copies would be provided at the same place at the costs, charges and expenses of the Applicant.

17) The hearing shall not be held without such inspection and copies being provided. Within 10 days of the compliance of above, it would be open for the Petitioner/Applicant to file any representation/additional representation only based on the documents inspected and in furtherance of this Courts order passed today. The hearing be thereafter scheduled by the 1st Respondent and to be held any time after two weeks of the date of receipt of any additional representation. We extend the time granted by this Court to pass the

final order from 31st July, 2015 to 30th October, 2015. No further extension will be granted.

18) The Writ Petition be placed for “directions” on 19th November, 2015.

(G.S.KULKARNI, J.)

(S.C.DHARMADHIKARI, J.)

Bombay High Court