REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 4323 OF 2007**

Reserved on : 9th July, 2009.
% **Date of Decision** : 31st July, 2009.

DHIRAJ DHAR GUPTA AND ANR. ... Petitioners.
Through Mr. Ritin Rai and Mr. Manik Dogra, Advocates.

VERSUS

FOREIGN INVESTMENT PROMOTION BOARD & ORS... Respondents.
Through Mr. Vineet Malhotra & Mr. Sanjay Kumar, Advocates for respondent Nos. 1 and 2.

Mr. R.K.P. Shankardass, Sr. Advocate with Mr. M.G. Ramachandran, Mr. P. Nagesh, Mr. Anand K. Ganeshan and Ms. Swapna Seshadri, Advocates for respondent No. 3.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SANJIV KHANNA, J:

1. Mr. Dhiraj Dhar Gupta and Mr. Arun Wahi have challenged the order dated 20th February, 2007 passed by the Foreign Investment Promotion Board (hereinafter referred to FIPB, for short) granting approval to Takata Corporation, Japan (hereinafter referred to as Takata for short) to invest US$ 10 million to establish a wholly owned

subsidiary to manufacture, distribute and sell automotive air bag modules and steering wheels in India.

2. The petitioners' have interest in Abhishek Auto Industries Limited which was established in the year 1985 and had pioneered manufacture of safety seat belts in India.

3. Takata is a foreign company.

4. FIPB by the order dated 3rd/4th August, 2000 had approved foreign exchange equity participation by Takata in Abhishek Auto Industries Ltd. to the extent of 30% amounting to Rs.39 lacs by issue of shares for manufacture of safety products for passenger cars. Consequent thereto Takata had entered into agreements with the petitioners or Abhishek Auto Industries Limited on 22.12.2000. The agreements included a Shareholder's Agreement and a Collaboration Agreement for transfer of technology.

5. Learned counsel for the petitioners has submitted that FIPB by allowing Takata to manufacture automotive airbag modules and steering wheels in India through a Takata subsidiary has violated press notes 1 and 3 (2005 series). It is further submitted that FIPB has erred and has committed an error in granting approval by wrongly observing that the Collaboration Agreement and the Shareholder's Agreement related to automobile seat belts and not other automobile safety equipment. It is submitted that the FIPB, therefore, has committed a fundamental error, which goes to the root of the matter and this amounts to an error in the decision making process.

Reference in this regard was made to the Minutes of the 88th meeting of the reconstituted FIPB held on 12th January, 2007.

6. Press notes 1 and 3 (2005 series) read as under:-

> " **Press Note No. 1 (2005 Series)**
>
> Subject: Guidelines pertaining to approval of foreign/technical collaborations under the automatic route with previous ventures/tie-up in India.
>
> The Government has reviewed the guidelines notified vide Press note 18 (1998 series) which stipulated approval of the Government for new proposals for foreign investment/technical collaboration where the foreign investor has or had any previous joint venture or technology transfer/trademark agreement in the same or allied field in India.
>
> 2. New proposals for foreign investment/technical collaboration would henceforth be allowed under the automatic route, subject to sectoral policies, as per the following guidelines:
>
> (i) Prior approval of the Government would be required only in cases where the foreign investor has an existing joint venture or technology transfer/trademark agreement in the 'same' field. The onus to provide requisite justification as also proof to the satisfaction of the Government that the new proposal would or would not in any way jeopardize the interests of the existing joint venture or technology/trademark partner or other stakeholders would lie equally on the foreign investor/technology supplier and the Indian partner.
>
> (ii) Even in cases where the foreign investor has a joint venture or technology transfer/trademark agreement in the 'same' field prior approval of the Government will not be required in the following cases:

a. Investments to be made by Venture Capital Funds registered with the Security and Exchange Board of India (SEBI); or

b. Where in the existing joint-venture investment by either of the parties is less than 3%; or

c. Where the existing venture/collaboration is defunct or sick.

iii) In so far as joint ventures to be entered into after the date of this Press Note are concerned, the joint venture agreement may embody a 'conflict of interest' clause to safeguard the interests of joint venture partners in the event of one of the partners desiring to set up another joint venture or a wholly owned subsidiary in the 'same' field of economic activity.

3. These guidelines would come into force with immediate effect."

PRESS NOTE NO. 3 (2005 SERIES)

"Subject: Clarification regarding Guidelines pertaining to approval of foreign/technical collaborations under the automatic route with previous ventures/tie-ups in India.

1. The Government, vide Press Note 1 (2005 series) dated 12.1.2005, notified fresh guidelines for approval of new proposals for foreign/technical collaboration under the automatic route with previous venture/tie up in India. According to these guidelines, prior approval of the Government would be required for new proposals for foreign investment/technical collaboration, in cases where the foreign investor has an existing joint venture or technology transfer/trademark agreement in the same field in India.

2. The Government had, earlier vide Press Note 10 (1999 Series) notified the definition of "same field" as the 4 digit National Industrial Classification (NIC) 1987 Code. It is hereby reiterated that for the purposes of Press Note 1 (2005 Series), the definition of 'same' filed would continue to be 4 digit NIC 1987 Code.

3. It is also clarified that proposals in the Information Technology sector, investments by multinational financial institutions and in the mining sector for same area/mineral were exempted from the application of Press Note 18 (1998 Series) vide Press Note 8 (2000), Press Note 1 (2001) and Press Note 2 (2000) respectively. Investment proposals in these sectors would continue to be exempt from Press Note 1 (2005 Series).

4. From para 2(i) of the guidelines notified vide Press Note 1 (2005 Series), it is clear that prior Government approval for new proposals would be required only in cases where the foreign investor has an existing joint venture, technology transfer/trademark agreement in the 'same' field subject to provisions of para 2(ii) of the Press Note 1 (2005 Series).

5. For the purpose of avoiding any ambiguity it is reiterated that joint ventures, technology transfer/trademark agreements existing on the date of issue of the said Press Note i.e., 12.1.2005 would be treated as existing joint venture, technology transfer/trademark agreement for the purposes of Press Note 1 (2005 Series)"

7. The two press notes are inter connected and have to be read together. Press note 1 applies when a foreign investor had entered into a joint venture or technology transfer/trade mark agreement with

a party in India and wants to set up a new venture requiring foreign investment/technical collaboration in the “same or allied field” as the existing joint venture or technology transfer or trademark agreement in India. The term “same field” has been defined in the Press Note 3 as the four digit National Industrial Classification (NIC) 1987 Code.

8. In the present case, it is admitted by both the parties that Takata had a joint venture/technology transfer agreement with the petitioners/Abhishek Auto Industries Limited and had submitted a fresh proposal dated 18th July, 2006 for setting up a wholly owned subsidiary for developing automotive airbag modules and steering wheels in India. The previous joint venture with the petitioners/Abhishek Auto Industries Limited and the new proposal dated 18th July, 2006 submitted by Takata was in respect of the “same field” and therefore, Press Notes 1 and 3 (2005 series) apply. As per the first part of paragraph 2 (i) of Press Note 1 (2005 series), prior approval of the Government was required by Takata. The second part of the said paragraph states that onus to justify and satisfy that the new proposal would not jeopardize the interest is equally on both the Indian partner and the foreign collaborator. This part of paragraph 2(i) indicates that “jeopardy” to the interest of the existing joint venture or existing partner or shareholders is the primary factor and concern, when FIPB considers a new proposal by the foreign investor.

9. I need not examine other paragraphs of Press Notes 1 and 3 as the same are not relevant. However, to be fair to the counsel for the petitioner, I may refer to paragraph 2(iii) of Press note 1 and paragraph 5 of Press Note 3 (2005 series). Learned counsel for the respondent-Takata could not counter that paragraph 5 of Press Note 3 (2005 Series) applies and that the parties would be governed by Press Note 1, in spite of the fact that the bilateral agreements were cancelled and the shares held by Takata were transferred to the petitioners. Paragraph 5 of Press Note 3(2005 Series) applies as the Collaboration Agreement and the Shareholder's Agreement between the parties were in force as on 12.1.2005.

10. With regard to paragraph 2(iii) of Press Note 1 (2005 series), learned counsel for the petitioners had submitted that the Government was conscious that Indian partners in past, due to lack of experience, awareness etc., had failed to take adequate precautions to protect their interest in the joint venture/technical collaboration agreements and had not protected themselves by incorporating a conflict of interest clause. Learned counsel for the Takata, on the other hand, submitted that FIPB had taken due notice of Press Note 1 paragraph 2 (i) and while allowing Takata to make fresh investment in India had taken care that the interest of the petitioners/Abhishek Auto Industries Limited is not jeopardized. He specifically referred to the concession of the Takata recorded in the record of minutes that they shall provide engineering assistance and

components for four years from the date they ceased to be shareholders in the existing venture and they would also supply components and materials for two new Maruti Suzuki models, viz., SX4 and Swift. The commitments per the agreement of shareholders was only for a period of two years and not four years and thus Takata had gone beyond what was legally binding under the bilateral agreements between the parties.

11. Mutual rights and obligations under the Shareholder's Agreement, trademark agreement or technology agreement create contractual rights. Contractual rights of private parties and breach thereof have to be adjudicated before a civil court and not in writ proceedings. The only question before this Court relates to FIPB approval dated 20th February, 2007 to Takata to make investment and establish a subsidiary undertaking for manufacture of automotive airbag modules and steering wheels in India and whether the same is contrary to paragraph 2(i) of the Press Note 1 (2005 series).

12. Paragraph 2(i) of Press Note 1 (2005 series) has been interpreted above. While examining the FIPB approval dated 20th February, 2007, this Court in a writ jurisdiction is not to re-examine relative merits and demerits of the impugned order as an appellate forum. The Court in a matter of judicial review of administrative action is concerned with the decision making process, the manner in which the decision is taken and the order is made, rather than the decision itself. The administrative authority has discretion and latitude

of choice to decide among possible courses of action but within the boundaries of the law, without being arbitrary and on consideration of facts and circumstances which are necessary for a fair and just decision. Power of judicial review is normally exercised when there is illegality, irrationality or procedural impropriety. Illegality implies failure to understand the law. Irrationality applies when a decision is outrageous in its defiance of logic or acceptable moral standards succinctly referred to as "Wednesbury unreasonableness". Procedural impropriety occurs when principles of natural justice are violated or there is failure to act with procedural fairness, when relevant facts have not been taken into consideration and irrelevant material has been given undue weightage.

13. As stated above, the primary and main concern of FIPB while deciding whether a foreign investor should be allowed to make investment in India, when they already have a joint venture or technical collaboration agreement with the Indian partner in the same/allied field, is whether the said investment will jeopardize the interest of the Indian partner/shareholders/ joint venture. A perusal of the minutes of the 88th Meeting dated 12th January, 2007 would indicate that FIPB was conscious of the test/standard to be applied and need and requirement to ensure that interest of the Indian partner is not jeopardized. The press notes have been rightly understood. The said minutes record:-

"…..

(iii) The non competition clause i.e. Article 15.1 of the share holders agreement is also restricted to seat belt manufacturing business only. This is clear from a reading of Article 15.1. Article 15.1 is the non-competition clause which says that

Each of the Shareholders (each of whom in this clause 15 is called a "Covenantor") covenants with each other that the Covenantor (whether alone or jointly with any other person, firm or company and whether directly or indirectly, and whether as shareholder, participator, partner, promoter, director, officer, agent, manager, employee or consultant of, in or to any other person firm or company) shall at any time whilst the Covenantor is the holder of any Shares and (in the case of the obligations contained in clauses 15.1(a) to 15.1(e) inclusive) for a period of 2 years after the date on which the Covenantor ceased to be a Shareholder (the "Relevant Date")

(a) not compete directly or indirectly with the Company;

(b) not solicit or endeavour to entice away from or discourage from dealing with the Company any person who at any time during the period of one year preceding the Relevant Date a manufacturer for or supplier or customer or client of the Company;

(c) not supply or provide any goods or services competing directly or indirectly with those supplied by the Company to any person who was at any time during the period of one year preceding the Relevant Date a customer or client of the Company to whom the Company had during that period supplied or provided goods or services in the ordinary course of its business. However, it also goes on to say as follows.

Provided that the restrictions set out above shall only apply in respect of seat belt manufacturing business in India and shall not apply to A Shareholders for activities permitted to be carried out by the A Shareholders or its Affiliate (as defined in the

> Collaboration Agreement) under the Collaboration Agreement. Furthermore such restriction shall not prohibit the acquisition or holding by any of the aforementioned parties of Share amounting to less than five per cent of the share capital of a company.
>
> (iv) It was also observed that the applicant Takata Corporation has agreed to provide engineering assistance and components for four years from the date on which the applicant has ceased to exist as a share holder in the existing venture. It has also agreed to include supply of components and material for two new Maruti Suzuki models namely SX4 and Swift which were not supplied so far. This commitment is a goodwill gesture beyond what is required legally under the bilateral agreements between the parties.
>
> (v) The sale of shares held by the foreign collaborator to the Indian shareholders executed on Dec.22 2006 has also to be taken into account.
>
> 7.5. After careful examination of the arguments of both sides and on the basis of above mentioned observations the Board recommended that the proposal filed by M/s.Takata Corporation, Japan be recommended for approval and the undertaking given by the applicant before the board regarding the additional assistance beyond what was required by the Shareholders' and Collaboration be also made conditions of the approval."

14. In the circumstances, Takata had agreed to provide engineering assistance and components for four years from the date they ceased to be shareholders and even provide components and material for two new Maruti Suzuki models, viz., SX4 and Swift relating to seat belts. This is in spite of the fact that as per Clause 15.1 of the shareholders agreement, the non-compete clause,

imposed an obligation on Takata not to compete directly or indirectly with the Indian partner, etc. for a period of two years only. FIPB also noticed that Takata had already transferred their shares in the joint venture with the petitioners/Abhishek Auto Industries Limited in terms of agreement dated 22nd December, 2006. In other words, FIPB while granting approval had ensured and granted greater protection and recorded safeguards in the interest of the petitioners/Abhishek Auto Industries Limited beyond the contractual obligations mentioned in Clause 15.1. This is obviously done to protect the interest of the Indian partner, i.e., petitioners/Abhishek Auto Industries Limited, is not jeopardized. Whether some more directions/protections should have been incorporated, is not within the domain of the Writ Court to decide. Directions and protection granted cannot be regarded as *per se* unreasonable and unfair by applying Wednesbury standard of unreasonableness.

15. Learned counsel for the petitioners relying upon the first approval dated 3rd/4th August, 2000, which refers to manufacture of safety products for passenger cars and the term "business" as defined in the shareholders agreement to mean manufacture and supply of safety car systems, submitted that manufacture of steering wheels and air bags by Takata jeopardizes the interest of the Indian partners/ joint ventures and those more particularly described in business plan. Specific reference was made to the following portion of the "Minutes of Meeting" dated 12th January, 2007:

> "6.5 On the basis of above the Board observed that :
>
> (i) Both these agreements as well as the business plan entered into between the partners in pursuance of these two agreements are applicable only for the "product" as defined in this agreement which is limited to "Automobile seat belt system and their respective component designed for adults having such models of ASSW as listed in Schedule I" attached to the collaboration agreement. The schedule I enumerates products products as follows:
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> (i) C7R Retractor
> (ii) C2R Retractor
> (iii) AB Buckle
> (iv) 520 Buckle
> (v) Shoulder Adjuster: type number F75.
>
> The business plan also refers only about the induction of seat belt technology, manufacturing of seat belt and its increased domestic and export sale.
>
> (ii) The original application filed by the foreign collaborator before FIPB also mentions that Abhishek Industries Limited is engaged in the business of manufacturing safety seat belt for passenger car at its factory in Gurgaon and has recently diversified its product range to add power window regulator both manual and automatic. The foreign collaborator ASSW had proposed to license its technical knowhow and expertise to the company to improve the product of the company,"

16. At first blush, the argument is attractive but on deeper deliberation it commends rejection. The first FIPB approval dated 3rd/4th August, 2000 enabled Takata and the petitioners/Abhishek Auto Industries Limited to enter into collaboration/shareholders agreements and transfer of technology agreement in the field of "car

safety products". The FIPB approval permitted and allowed the parties to enter into specific agreements for manufacture of "car safety products". Specific agreements were a matter of contract and could be for the one, two or more car safety products. Press Notes do not state that the field as mentioned in the approval is determinative. Rather the field mentioned in the collaboration agreement/technology agreement/trade mark agreement is determinative and relevant for deciding the question of jeopardy. The business or product line as per mutual agreements is to be reasonably protected as a consequence of the foreign investor setting up a new venture. As stated above paragraph 2(1) consists of two parts. The first part refers to the "same/allied field" and requirement to take FIPB approval. The second part prescribes the parameter to be applied. Jeopardy to the existing joint venture, partners or the shareholder is the concern and has to be accounted for. Jeopardy to the mutual agreed business set up is to be protected i.e. the joint venture which is a matter of contract and not the entire product range of the foreign investor or other products under the same/allied filed. Press Note 3 (2005 Series) paragraph 5 also refers to the date of the agreements between the parties and not the date of the first FIPB approval.

17. The shareholder's agreement and technology transfer agreements were entered into on 22nd December, 2000. The terms "business" and "business plan" as defined in shareholder's agreement read as:-

> "**Business**" means the manufacture and supply of car safety systems and those services more particularly described in the Business Plan:
>
> "**Business Plan**" means the strategic plan of the Company in relation to the operation of the Business in the agreed form;"

18. The business plan adumbrates and stipulates the field of collaboration and business as :

> "1. To introduce and incorporate into the Company's business through ASSW and its associates the seat belt technology developed by Takata Corporation ("Takata") or its associates for the Indian domestic and export markets as soon as commercially and technically viable;
> 2. To localize seat belt products developed by Takata or its associates as part of the Company's business to meet Indian domestic and export market requirements;
> 3. To increase the Indian domestic and export seat belt market shares for the Company's business with quality and cost effective products developed by or in conjunction with Takata or its associates;
> 4. To manufacture quality and cost competitive components for export markets;
> 5. To adopt appropriate management, operational, financial and Quality Assurance philosophy and systems to compete effectively in both Indian domestic and global markets; and
> 6. To develop an annual marketing and financial plan designed to achieve the above general objectives as soon as possible.
>
> It is agreed that this Business Plan will be further refined and expanded to replace this Business Plan as agreed between the parties in accordance with the Shareholders Agreement as soon as possible after completion of the review by the Joint Technical Review Team as referred to in

> Clause 3.1 of the Collaboration Agreement provided however that the above general principles shall remain. Notwithstanding Clause 11.3 of the Shareholders Agreement, Clauses 11.1 and 11.2 shall apply in relation to the business of the Company in implementing the above general principles."

19. The term "business" for the purpose of shareholder's agreement, it at first broadly defined to mean manufacture and supply of car safety systems but restricted to services more particularly described in the business plan. The business plan as quoted above refers only to safety car seat belt parts and not other car safety equipments.

20. Clause 15.1 of the shareholder's agreement incorporates a non-compete clause and provides that in case of termination of the agreement, Takata or Indian partners shall not compete with each other for a period of two years with the joint venture partner after they ceased to be a shareholder. In the proviso, the shareholder's agreement specifically refers to only the seat belts and not any other product. The parties had mutually agreed that restriction/obligations as imposed will only apply to production of seat belts and not other products. The relevant portion of clause 15.1 and the proviso read as under:-

> "15.1 Each of the Shareholders (each of whom in this clause 15 is called a "Covenantor" covenants with each other that the Covenantor (whether alone or jointly with any other person, firm or company and whether directly or indirectly, and whether as

> shareholder, participator, partner, promoter, director, officer, agent, manager, employee or consultant of, in or to any other person firm or company) shall at any time whilst the Covenantor is the holder of any Shares and (in the case of the obligations contained in clauses 15.1(a) to 15.1(e) inclusive) for a period of 2 years after the date on which the Covenantor ceased to be a Shareholder on the "Relevant Date"):-
>
> (a) not compete directly or indirectly with the Company;
>
> (b) x x x x x
>
> (c) x x x x x
>
> (d) x x x x x
>
> (e) x x x x x
>
> Provided that the restrictions set out above shall only apply in respect of seat belt manufacturing business in India and shall not apply to A Shareholders for activities permitted to be carried out by the A Shareholders or its Affiliate (as defined in the Collaboration Agreement) under the Collaboration Agreement. Furthermore such restriction shall not prohibit the acquisition or holding by any of the aforementioned parties of Shares amounting to less than five per cent of the share capital of a company."

21. The collaboration agreement, on the other hand, defines the word "products" for which the collaboration had been entered into and refers only to seat belts and its components and not to any other product. The relevant clauses read:

> "Products" means automobile seatbelt systems and their respective components designed for adults having such models of ASSW as listed in Schedule 1 attached hereto and made a part hereof'

"SCHEDULE 1

PRODUCTS
C7R Retractor
C2R Retractor
AB Buckle
520 Buckle
Shoulder Adjuster: type number F75"

22. It is also an admitted fact that Abhishek Auto Industries Limited was only manufacturing seat belts when the collaboration agreement and the shareholder's agreement were entered into and thereafter till 2006 Abhishek Auto Industries Limited had not ventured into or expanded into other car safety products. Abhishek Auto Industries Limited till 2006 when the two parties separated did not manufacture any other automotive safety equipment.

23. It is possible, as urged by the learned counsel for the petitioners that the parties had contemplated that they would expand their business into other automotive safety equipments in future. However, FIPB after examining the relevant clauses of the shareholder's agreement and the technology transfer agreement has arrived at an equally possible but a different finding. Merely because a different view is possible it will not be appropriate for a writ court to exercise power of judicial review and strike down the decision of FIPB. Case for procedural impropriety i.e. ignoring materials and relying upon irrelevant therefore fails.

24. In 2006, after termination of the agreements and transfer of shares held by Takata to the petitioners, Abhishek Auto Industries

Ltd. has entered into collaboration/agreement with a U.S.A. company. Both the parties have therefore parted company.

25. In view of the aforesaid discussion, the present Writ Petition is dismissed. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

JULY 31, 2009.
VKR/P