Transfer of Shares:  
Control by Reserve Bank of India

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Every country has to enact laws to control the flow of capital. This control involves the regulation of both inflow and outflow of capital from one country to another country in whatever manner it be. Since this inflow and outflow is nothing but a movement of foreign exchange, its proper regulation is very essential to all countries to preserve their foreign exchange resources to enable stable growth of their economy.

Considering the industrial backwardness, a country like India is bound to encourage foreign investment in limited areas. Foreign investment is nothing but purchase of shares in Indian companies and thereby transferring the shares to the people outside India. The two main objects to be achieved by allowing foreign investment are, the increase of foreign exchange reserves and the development of industry with new and advanced technology. Since our industry failed to produce export oriented goods, our foreign exchange reserves fell substantially short of our demands. Therefore, earning of foreign exchange is essential especially to a developing country like India because of the huge debts payable to external sources.

The urge for earning more foreign exchange and the urgent need to develop industrial units with new and advanced technology necessitated the policy makers to take a liberal approach to foreign investment so as to attract people outside India to

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invest in the country. Unrestricted investments naturally result in destabilisation of the management of our industries and the misuse of foreign exchange. To prevent these unhappy consequences laws and rules were enacted.

One of the ways by which the flow of foreign exchange can be controlled is by the restriction placed by Foreign Exchange Regulation Act (hereafter FERA) on transfer of shares. Two conflicting interests are involved in the genuine transaction. On one side, the Indian Government intends to uphold the interests of the nation by earning more foreign exchange and development of industrial sector. But on the other side the investor looks for maximum profit from their investment. To balance these conflicting interests, a systematic process of regulation of transaction is essential. For this purpose, every authority entrusted with the regulation must be detached from all the pulls and pressures and be guided by thorough knowledge of the implications of this complex problem.

An examination of the statutory provisions, schemes introduced, rules framed and judicial interpretations discloses the fact that we are not moving in the right direction of achieving their goals. The ill framed schemes and the liberal policies adopted under various pulls and pressures led to the indiscriminate foreign investment and import of foreign technology which ultimately destroyed the Indian industries and created severe imbalance in our economy. The episode of the investment in Reliance Company and the successful attempt made by Mr. Swaraj Paul are the clear instances of the misuse of the schemes. The decision of the Supreme Court in Escorts case makes it clear about the lacuna in the scheme in achieving the goals. The Supreme Court's failure to foresee the consequences of the impugned transaction caused further damage to the foreign exchange reserves.

2a. Ibid
An attempt is made here to trace out the basic need behind the restrictions imposed by FERA on the transfer of shares and to appraise the schemes, especially Portfolio Investment Scheme (hereafter called PIS) introduced by Central Government under the investment policy. With the limited available case law, a critical study of the judicial interpretation of relevant provisions of FERA is carried out. The need to create a research cell attached to the higher judiciary is also emphasised.

Regulation by FERA on Transfer of Shares - Purpose

It must be remembered that the Act was modelled closely on the British pattern and was intended to establish a system of exchange control that would enable India to carry out the obligations incumbent on the members of the International Monetary Fund (I.M.F.)

Role of RBI - An authority under FERA

Under the scheme of FERA, it is the RBI (Reserve Bank of India) that constituted and entrusted with the task of regulating and conserving the foreign exchange. Almost every provision of the Act either starts or ends with the words, "except with the general or special permission of the Reserve Bank of India." Supreme Court has also observed that Reserve Bank is the 'Custodian General' of foreign exchange. Provisions of FERA are there intended to consult the Reserve Bank for exchanging the foreign currency and for transferring the shares held by the residents of India, both in the Companies incor-

3. Section 8(1) of FERA 1973 reads,
"Restrictions on dealing in foreign exchange:
Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange."


porated in India and outside, to the residents outside India and also for the transfer of shares held by foreigners in Indian Company to the residents of India or to the non-residents. It is because, the means of exchange in inventor's country would certainly be different from that of the country in which he is investing. The seller or transferor of shares has to realise his share value only in term of rupees. So the Reserve Bank has to exchange the foreign currency paid by non-residents into Indian rupee and vice versa after calculating the rate of exchange on particular date of transaction. Hence, there are provisions under FERA to regulate these transactions.

Section 19 governs issue and transfer of shares and securities in favour of non-residents. 6 Section 29 governs the

6. Relevant provision of S. 19 of FERA 1973 reads,

"S. 19. Regulation of Export and transfer of Securities:

(1) Notwithstanding anything contained in Section 81 of the Companies Act, 1956, no person shall, except with the general or special permission of the Reserve Bank,

(a) ............... 

(b) transfer any securities, or create or transfer any interest in a security, to or in favour of a person resident outside India.

(c) ............... 

(d) issue, whether in India or elsewhere, any security which is registered or to be registered in India, a person resident outside India,

(e) ............... 

(2) ............... 

(3) ............... 

(4) Notwithstanding anything contained in any other Law, no person shall, except with the permission of the Reserve Bank -

(a) enter any transfer of securities in any register or book in which securities are registered or inscribed if he has any ground for suspecting that the transfer involves any contravention of the provisions of this section or

(b) enter in any such register or book, in respect of any security, in connection with or the issue or transfer of the security or otherwise, an address outside India except by way of substitution for any such address in the same country or for the purpose of any transaction for which the permission has been granted under this section with knowledge that if involves entry of the said address.

(f. n. contd.)
establishment of a place of business by non-residents for carrying on trading, commercial or industrial activities or acquiring shares in Indian Companies. It must be noticed that the word 'securities' includes under section 2 of FERA and one should not be confused when the two words are used interchangeably.

According to Section 19 (1), a resident of India can not issue, sell, pledge or mortgage securities to a non-resident Indian. Under subsection 4 of Section 19 a Company is pro-

(c) transfer any share from a register outside India to a register in India.

(5) Notwithstanding anything contained in any other law, no transfer of any share of a company registered in India made by a person resident outside India or by a national of a foreign state to another person whether resident in India or outside India shall be valid unless such transfer is confirmed by the Reserve Bank on an application made to it in this behalf by the transferor or the transferee”.

7. Relevant provisions of S. 29 of FERA 1973 reads,
“S. 29. Restriction on establishment of place of business in India:
(1) without prejudice to the provisions of section 28 and section 47 and notwithstanding anything contained in any other provision of this Act or the provisions of the Companies Act, 1957, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a Company (other than a banking Company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty percent or any branch of such company, shall not, except with the general or special permission of the Reserve Bank,

(a) . . . . . . . . . . .
(b) acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such Company”.

8. See for definition of 'non-resident' section 2(p) and (q) of FERA 1973. The whole emphasis is on the word non-resident under FERA. This word possesses a particular legal meaning, but broadly speaking, if an Indian goes overseas, earns his living there and makes his home there, he ceases to be resident of India and becomes resident of that country where he lives and works. Conversely, if an English man sets up his abode in India, he becomes a resident here. In each case the test is partly one of time (how long
hibited to register any transfer of shares in the name of a non-resident if there is any ground for suspicion that the transfer involves any contravention of the provisions of the same section. A non-resident holding shares in Indian companies cannot transfer his shares to either a resident of India or to a person residing outside India without the permission of Reserve Bank under sub-section 5 of Section 19. Restrictions on transfer of shares to persons residing outside India are introduced to see that the payment for shares is received from the purchaser through proper means and that shares are not transferred to acquire foreign exchange contrary to the provisions of this Act and to control investment of the foreign exchange in the country.

Section 29 seems to be intended to keep a watch and regulate the acquisition of the whole or any part of such business in India by a non-resident or a transfer even if he be a resident in India or by a non-resident company, i.e., a Company in which non-resident interest is more than forty per cent. Section 29 also lays down that a person resident outside India, whether a citizen of India or not and a company, which is incorporated outside India and in which non-resident interest is more than forty per cent, “shall not” acquire any shares in Indian Company “except” with the general or special permission of the Reserve Bank of India.9

Objectives of imposing conditions by RBI -

RBI is empowered to impose conditions under Section 5 (1) (a) of FERA while granting permission and must be guided by objects of this Act. Section 76 of FERA provided for guidelines in this regard.10 The factors to be taken into consideration under the Act are.

(i) Conservation of foreign exchange resources of the country;

9. Whether it is “prior permission” or “ex post facto permission” contemplated under section 29 is discussed in the subsequent pages.

10. See FERA 1973, Section 76.
(ii) all foreign exchange accruing to the country is properly accounted for;

(iii) the foreign exchange resources of the country are utilised as best to subserve the common good; and

(iv) such other relevant factors or the circumstances of the case require. The RBI is not allowed to invoke provision of any other statutes for imposing conditions while granting permission.

Functional Analysis of the P.I.S.

For the effective implementation of substantive law and to reap the fruits of a particular legislation, there must be proper procedural safeguards. We must design our laws, schemes and rules so as to advance the objectives enshrined in them. Very often, failures to achieve the objects of many of our legislation are attributed to the procedural laxities and inefficiency of the enforcement machinery. Flexibility is necessary in framing the rules but this should not be inconsistent with the provision of the legislation. Various schemes introduced under the liberal economic policies of government should not be allowed to eat away the limited fruits of the legislation.

Statutory provisions enabling the procedure -

Under Section 79 (1) of FERA, the Central Government is empowered to make rules for carrying out the provisions of the Act. The rules can be framed to prescribe the procedure to be followed by the authorised dealers.\textsuperscript{11} All the rules framed under the Act must be placed before each house of Parliament as soon as possible for its consideration and to make any modification, if necessary. However, it was provided, that such modification or annulments shall be made without prejudice to the validity of any act previously done under that rules. The aforesaid provisions are introduced, it appears, to give undue vali-

\textsuperscript{11} See Section 6 of the FERA 1973. Under this Section Reserve Bank may on application made to it in this behalf, authorise any person to deal in foreign exchange.
dity to the rules framed by the executive which is often guided by the lobbying groups of the big business centres.

Under Section 75 of FERA, again the Central Government is invested with the power to issue such general or special directions as it thinks fit from time to time to the Reserve Bank of India with a view to augment foreign exchange resources of the country. Reserve Bank was also given powers under section 73 (3) of FERA to make rules, give directions, orders and issue circulars to the authorised dealers and stock-brokers which are necessary or expedient for the purpose of securing compliance with the provisions of the Act.

Structure and Objects of the Portfolio Investment Scheme -

Assuming the power under the above provisions both Central Government and Reserve Bank had issued a number of notification and circulars liberally facilitating the non-residents of Indian origin to invest in Indian companies. With a view to earn the foreign exchange by attracting non-resident individuals of Indian nationality or origin to invest in shares of Indian companies, the Government of India decided to provide incentives to such individuals and formulated a "Portfolio Investment Scheme (PIS)". This scheme was announced by the Government and was incorporated in the various circulars of Reserve Bank of India under section 73 (3) of the Foreign Exchange Regulation Act, 1973.

Originally, the scheme was introduced only for the benefit of non-resident individuals. A prohibition was also placed not

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13. Person shall be deemed to be of Indian origin if he, at any time held the Indian passport, or he or either of his parents or any of his grand parents was an Indian and had a permanent resident in undivided India at any time. And a wife of a citizen of India or of a person of Indian origin shall also be deemed to be of non-Indian origin. See Foreign Exchange Regulation Act, 1973, section 2(p) and (q) and also Government Notification published in (1983) 2 Comp.L.J.81 (Rules and Notifications).
to exceed such investments more than one percent of the total paid up capital of the company in which the investments are to be made. But by the subsequent circular, the Government extended this benefit to overseas companies, partnership firms, societies and other corporate bodies. Overall ceiling imposed on the investment in a particular company was also extended upto 5 percent of the paid-up capital of that company. The net result of all these circulars is that the non-resident individuals of Indian nationality as well as overseas companies, firms, trust, societies and other corporate bodies are made beneficiaries of the scheme. The condition for investment under the Portfolio Investment Scheme is that, if it is firm, company or corporate body, the beneficial ownership of these entities to the extent of 60 percent must be held by the non-resident Indians. Every individual or a company or firm is entitled to invest in the shares of Indian companies to the extent of one percent of the paid up capital of such Indian company, provided that the aggregate of such investment did not exceed the ceiling of 5 percent in one company. Under the scheme, the investors are entitled for all the repatriation benefits.

It was immaterial whether the investment was made directly or indirectly. What was essential was that 60 percent of the ownership or beneficial interest in non-resident companies should be in the hands of non-resident individuals of Indian nationality or origin. For the purpose of ensuring the predominant ownership of these entities with the non-resident Indians,


15. According to the present agreements under Portfolio Investment Scheme, the non-resident Indians are entitled to take their capital out of India after one year of their investment. As per the repatriation agreement we have to reimburse their capital at the market rate calculated with existing rate of exchange after deducting the capital gains tax. But this benefit will be given only to those non-resident Indians who purchased the shares through recognised stock exchanges in compliance with other conditions of the scheme. See id. at p. 84.
it was made compulsory for such entities to submit a certificate in the prescribed form (OAC) from overseas Auditor or Chartered Accountant or Certified Public Accountant, along with their application for investment. The application must be submitted to the Reserve Bank of India through the designated banks authorised to deal with foreign exchange.
is possibility to create a company even without disclosing the ownership of the company. For example the companies incorporated in 'Isle of Man' and 'British Virgin Islands' are governed by different laws of enabling the promoters for limited disclosure of their company affairs. Though these islands are under the control of Britishers, companies incorporated in these islands are not governed by the English Company Law. The International Business Companies Rules 1984 (I.B.C. Rules 1984) are followed by these colonies in incorporating a company. These rules provide an impenetrable curtain on company ownership and finance. No details are to be filed with the authorities regarding the ownership and financial position. Under these rules a company is free to do the following things:

1. Issue shares to a named owner, or even an unnamed bearer who can vote at the meeting of the company.
2. Differentiate between voting and non-voting shares.
3. Issue shares with or without face value.
4. Hold meetings of directors and shareholders by telephone.
5. Issue shares to partnership firms or trusts unrepresented by individuals.
6. Have only a corporate body as director.

These provisions seem to be strange. Under these provisions a non-resident Indian can own 60 percent of a company's capital without having voting rights. Similarly a person can hold certain number of shares without any value being ascribed to the holding. This means that a company can be registered in these islands with no restrictions imposed on it. An operator can use an incorporated name to carry on fraudulent business. A Company registered under the International Business Companies Rules is a phantom unit and the laws proclaim loudly and clearly that the ownership of such firms are inviolable.

19. Ibid.
20. Ibid.
It appears that the restrictions imposed by the Reserve Bank of India in the Portfolio Investment Scheme have no impact on the investment made by these phantom units. This is evident from the investment made under the scheme by the companies registered in ‘Isle of Man’ in an Indian company.\(^{21}\) According to a statement placed before Parliament, eleven companies registered in ‘Isle of Man’ invested not less than 98 percent of the total non-resident Indian investments that came into India between April 1982 and May 1983 immediately after the Scheme was introduced.\(^{22}\) All these investments are made in the Reliance industry. It is true that, apparently, non-resident Indians hold predominant ownership in these eleven companies and complied with provisions of the investment scheme. But in reality it is not so. Since it is possible under the International Business Companies Rules even for an unnamed member to participate and vote in the meetings, the so-called non-resident Indians who are named as members of these companies need not be true owners having control over the company. An unnamed member can receive all the dividends and decide the fate of the companies while the named non-resident Indians hold 60 percent of the shares in record without these benefits. This shows that even though the non-resident Indian can hold 60 percent of the shares in the company the administration of the company can be done by other.

Another important fact is that these companies have no other assets except these shares they hold in Indian company. The dangerous nature of it is that the assets of these companies can be transferred to some unidentified persons without affecting our domestic laws or the provision of Portfolio Investment Scheme. Then there is no possibility of knowing the changes in the ownership. In fact it was also reported that the whole ownership in these companies were transferred to some companies registered in “British Virgin Islands”.\(^{23}\) All this is contrary to the intention of the scheme. The intention of the Government in granting the facilities is to encourage non-

\(^{21}\) “Deserting the Isle of Man”, \textit{Indian Express}, 11th June, 1986.
\(^{22}\) \textit{Ibid.}
\(^{23}\) \textit{Ibid.}
residents of Indian origin to invest in shares of Indian companies. It is to earn long term returns with capital appreciation by making them to share in the economic prosperity of the country.24

Now the question is, how to know who owns these shares in the Reliance Industry? Are they in fact owned by non-resident Indians or Indian residents? Whether our procedural safeguards give powers to the Reserve Bank to seek the information essential to find out the exact ownership of these companies registered not under Indian law? Does our courts have the power to lift the corporate veil of these companies to know whether there is any violation of the rules of Portfolio Investment Scheme? It was reported that the real owners of these phantom companies are the residents of India and not the non-resident Indians.

It was also revealed that those who are at the helm of affairs of the Reliance Industry have managed and manipulated the Scheme in collusion with the then Government to facilitate themselves to invest in their company in the name of non-resident Indians. 25 One may be forced to believe this as true because the facts were synchronised with circumstances. The company was in heavy crisis as its share value has come down considerably at a time when the company wanted to issue a new series of debentures.26

Therefore, if the reports are correct, we would have earned no foreign exchange from any non-resident Indian through external sources but must have received the black foreign currency hidden by the Indian nationals and invested in India in a dubious way under the guise of non-resident investment. At the same time we would have met with a great loss to the foreign exchange reserves since we are obligated to pay

25. See the series of Articles published in Indian Express, November and December, 1986 on this issue.
26. See Supra, n. 18 and 21.
both the dividends and capital benefits to the unidentified persons in the form of foreign exchange under the repatriation agreements.

Need to alter the Scheme

The very fact of the existence of this type of phantom companies is a strong ground for the apprehensions about the effective implementation of the Portfolio Investment Scheme (PIS). The scheme is doomed to be collapsed if its benefits now given to the firms, trusts and incorporate bodies of outside India are going to be continued. Therefore, it appears necessary to reconsider the rules of Portfolio Investment Scheme and to remodelate it to include only non-resident individuals of Indian nationality for the benefit under Scheme. To protect our foreign currency the facility now given to the firms, trusts and incorporated bodies must be taken away.

Role of the authorised dealer

Another important factor to be considered is the mode of scrutinising the investment to check whether the investments are actually flowing from the external sources. Unless monitoring and remittances of foreign exchange reserves. Though the analysis of the procedure make it clear that the procedure are complex and stringent, an evaluation of the actual implementation of the scheme reveals the fact that authorised dealers entrusted with responsibilities made it ineffective.

Procedure regarding the payment of the value of the shares purchased and the formalities of application for permission to the Reserve Bank are prescribed in the Exchange Control Manual. 27

One of the unique feature of the scheme, is that the power to monitor the remittance and investment on the scheme is delegated to the banks who are authorised dealers appointed under section 6 of Foreign Exchange Regulation Act. 28 These

27. See generally, supra, n. 16.
28. See supra, n. 11.
dealers can freely open non-Resident External Account (NRE Account) in the name of a person who is eligible to invest under the scheme. As per the conditions, the account holder has to transfer the funds necessary for this purpose to these accounts in the approved manner, i.e., the funds must be transferred though the recognised foreign banks. Prior permission of the Reserve Bank of India necessary before funds from the Non-Resident External Account is invested in shares of the Indian company.

The reasons for these complex controls and stringent regulations are varied. The principal object is to ensure that the foreign exchange remitted is fully and properly accounted. It also helps to ensure that the foreign exchange is actually flowing to the country in the approved manner. Apart from these major objectives, the regulatory measures have been introduced to ensure that the transaction is not harmful to the internal economy of the country. Thus the main thrust of the regulation is to prevent any step from the part of the parties involved in the transaction which detrimentally affect the inflow of the foreign exchange.

Applications in the specified forms (Form RPC) seeking permission are to be submitted to the controller through the designated bank. For purchase or sale of shares a non-resident Indian Investor can appoint an Indian resident as his agent with power of attorney. Such agents include stock brokers but not authorised dealers. It was, however made clear that permission for investment in shares on behalf of such investors can be granted to the designated banks authorised to deal in foreign exchange. This is so because these banks are bound to comply with the relevant exchange control requirements. The duties of the designated banks were prescribed by

29. Here, controller refers to the Controller, Exchange Control Department, Reserve Bank of India, Central Office (Foreign Investment Division), Bombay.

30. See supra, n. 16 at para 8.
the Exchange Control Manual. It obligates the banks,

"...to maintain separately proper records of investments made in shares with repatriation benefits and without repatriation benefits on account of each investor, showing the relevant particulars including the number of share certificates and distinctive number of shares. Likewise, the designated branches of authorised dealers should keep a systematic and up-to-date investor wise record of the shares purchased by them through stock exchange on repatriation basis on behalf of their overseas customers of Indian Nationality or origin." 31

Therefore, authorised dealers are required to submit to the Reserve Bank a consolidated statement of the total purchases and sales of equity shares made by their designated branches. The daily statements have to be serially numbered and submitted to the Controller of Reserve Bank positively on the following day. The date of transaction is material to know the exact rate of exchange prevailing on the date of purchase. The important aspect of it is to protect the ultimate rupee realization due on the transaction.

**Failure of the authorised dealer to comply with the procedure**

The above analysis of the various procedures highlight the vital role that has to be played by the authorised dealers under the Portfolio Investment Scheme. Even after the availability of all these safety measures, it appears that there are clear violations of the procedural safeguards in the implementation of the Portfolio Investment Scheme. The recent decision of the Supreme Court in *L.I.C. of India v. Escorts Ltd.* 32 is a clear example of such violations. The Supreme Court while considering whether the permission contemplated under section 29 (1) (b) is prior or *ex-post-facto*, 33 also discussed the role of the

31. *Id.* at para 11.
33. Court's decision as to whether the permission can be *ex-post facto*, has been discussed in the subsequent pages.
authorised dealers in the enforcement of Portfolio Investment Scheme. Court made adverse remarks on the Punjab National Bank, an authorised dealer, for its failure to comply with the provisions of the Foreign Exchange Regulation Act and various rules framed under it. Though the decision of the Court is important on different aspects of Company Law and interpretation of the various provisions of Foreign Exchange Regulation Act, here, we are concerned with the response of the Court as to the concrete allegations of violation of Foreign Exchange Regulation Act and its scheme by the non-resident companies, its agents and designated banker.

Caparo group of companies are owned by Mr. Swaraj Paul, a non-resident. He intended to buy the shares in Escorts Ltd., an Indian Company. He appointed Punjab National Bank as his authorised dealer.\(^\text{34}\) The Punjab National Bank (PNB) as the authorised dealer designated by the Caparo Group of Companies have to keep daily accounts of remittances into Non-Resident External Accounts by these Non-Resident Indians and share purchases made every day and send the daily statement to Reserve Bank in the following day. From the available records before the courts it was established that there was a vast difference between the amount of actual remittances into the Non-Resident External account and the value of the shares purchased at every point of time.

The Bombay High Court categorically established the difference between the value of the shares purchased and the amount of foreign remittances made at different dates on which shares were purchased.\(^\text{35}\) It was found that between 9th and 24th March 1983, the foreign remittances received fell short by Rs. 1,23,79,000 and between 25th March and 11th April, 1983 the total funds invested in excess of the funds actually

\(^{34}\) Full facts of the case are discussed in the subsequent pages.

\(^{35}\) For the detailed facts in High Court decision which were not dissented by Supreme Court but indirectly accepted, see *Escorts Ltd. and another v. Union of India and others*, (1984) 3 Comp. L.J. 387 at pp. 416-417.
received in foreign remittances were Rs. 3,21,74,000. When the third instalment of foreign remittances were received and further purchases were made on 12th April, the investment was still in excess of the remittances by Rs. 1,01,39,000 and between 13th and 14th of April, when this deficit rose up to Rs. 1,19,99,000. On 28th April, when the fifth instalment of foreign remittances were received and further purchases were made by that date, the deficit overseas remittance rose up to Rs. 3,78,85,000.

These facts were not disproved by the Supreme Court. Portfolio Investment Scheme and rules framed for its implementation are clear that a non-resident cannot purchase shares except from the funds remitted from overseas. But here there are glaring evidence of severe infraction of these provisions by non-residents and authorised dealers. The value of the shares purchased at a given time is far more than the actual remittances made into the Non-Resident External Account. The Punjab National Bank has confessed their ignorance about remittances of a substantial amount of Rs. 1,30,000 made in one of their branches. It was evident from the facts of the case that the Bank did not maintain the day-to-day records and failed to send the daily statement of remittances of purchases to the Reserve Bank.

Escorts company alleged that rupee funds to the tune of Rs. 4 crores appeared to have been unauthorisedly diverted for the purchase of shares for and on behalf of the 13 non-resident companies. They requested the Reserve Bank of India to enquire into the dates and rates of the purchases of the shares and ascertain whether the Punjab National Bank had a day-to-day record the transactions. It is to be noted there that the ultimate decision of the Supreme Court went in favour of the non-resident companies though it was accepted both by the High Court and Supreme Court that the monitoring of purchases have not been done in accordance with the procedure framed under the Scheme.
Court's inadvertence towards infractors

Responding to the allegations against the Punjab National Bank, Supreme Court went on record by saying,

“We may straight away say that the Punjab National Bank apart from receiving the remittances from the Caparo Group Ltd. and passing on the amounts to the stock brokers, Raja Ram Bhasin and Company did nothing whatsoever to discharge their prescribed duties as authorised dealers. It is now admitted that they did not give any instructions to Rajaram Bhasin and Co. regarding the purchase of shares that never maintained any systematic, up-to-date and proper record of the investments made in shares and that they did not submit daily statements of the purchases and sale of shares to the Controller.” 36

The Court was also not convinced that the whole purchases were made by foreign investment. Commenting on the irregularities committed Punjab National Bank, the Court further observed,

“It was a sorry confession to hear from Punjab National Bank that their E C E House Branch which was monitoring the NRE Accounts and the purchase of shares by the Caparo Group of companies was not aware of the remittance received by the Parliament Street Branch. We are now told that this amount of Rs. 1,30,000 was also utilized for purchasing shares for the Caparo Group of Companies. If that was so E C E House Branch should have known about it. Otherwise one wonders what was the monitoring that was done by the E C E House Branch, if it was not even aware of that large remittance of Rs. 1,30,000 received by the Parliament House Branch had been utilized for purchase of shares for the Caparo Group of Companies.” 37

36. Supra, n. 32 at p. 142.
37. Id. at p. 141.
The court added,

"[I]f the amount was not utilized for the purchase of shares for the Caparo Group of Companies, it must necessarily follow that locally available funds and not purchasing some of the shares." 38

After finding that entire conduct of the Punjab National Bank as most irresponsible, the Court failed to be pragmatic while giving the directions and reaching the final conclusions. Court concluded by saying that,

"On our finding that there was no monitoring whatsoever of the purchases of shares made on behalf of the Caparo Group of Companies by the Punjab National Bank and on our further finding that though the Reserve Bank of India was not actuated by malice and was not guilty of non-application of mind, the reliance placed by the Reserve Bank of India on the Punjab National Bank having totally abandoned its duties as authorised dealer, it follows that the permission granted by the Reserve Bank must be reconsidered by the Reserve Bank in the light of the failure of the Punjab National Bank discharge its duties". 39

The objects of Foreign Exchange Regulation Act and Portfolio Investment Scheme would have been better achieved, and the Supreme Court struck down the permission granted by the Reserve Bank to reconsider its decision. The suggestion is so fallacious that no prudent authority would in ordinary circumstances implement it wholeheartedly. Therefore, it is unfortunate that the highest Court of India also indirectly fell prey to those infractors.

The Court, further, directed the Reserve Bank of India to make full and detailed enquiry into the purchase of shares of Escorts Ltd., by the Caparo Group of Companies and to reconsider afresh the question whether the permission ought or

38. Ibid.
ought not to have been granted. On these findings of the Court, one may say, that the Court took the risk of criticism for attributing unnecessary bonafides to the Reserve Bank. How can one say that Reserve Bank of India has applied its mind while granting permission when it was not clear from the records before it whether the payments for some of the purchases of shares were made from the foreign remittances or from local rupee funds? In fact there is very little to be enquired further as it is evident from the files before the court that there is a huge bungling in the purchase of shares. The Court’s direction to enquire into the purported irregularities committed both by the Punjab National Bank and non-resident companies in purchase of shares, would only be a mockery. No prudent authority will be willing to concede their earlier decision as wrong. In the light of the dramatic facts of this case the Court ought not to have placed any faith on the positive result of on enquiry to be conducted by the Reserve Bank.

After-events of the decision in fact proved the futility of the enquiry conducted by the Reserve Bank of India and exposed the fallacy of the decision of the Court. Reserve Bank enquiry gave a clean chit to the Punjab National Bank. Unfortunate thing was that it remains still a mystery as to how much foreign exchange we have earned through this deal in the form of foreign remittances into the Non-Resident External Account from foreign resources. At the same time it is a great loss to our foreign exchange reserves when the Reserve Bank granted the permission again to sell these shares to Indian residents and allowing the non-residents with all dividends and capital gains in the form of repatriation benefits. One may have to express the regrets over the state of affairs. Every decision making authority, whether it is the Punjab National Bank, Reserve Bank of India or even the Supreme Court, claimed itself that its decision was based on national interest and by keeping in mind the object of preserving the foreign exchange. But in reality the ultimate result of all these decisions have gone to negate

41. Ibid.
the very object of the Foreign Exchange Regulation Act due to their short-sightedness. It may be true if one says that 'the *Escorts* judgement is an unfortunate dark spot in the progressive image which the Supreme Court has so carefully built up.'

On the whole, over ambition of executive in earning foreign exchange has not been materialised. Part of this failure is due to slackness in the scheme and part of it is due to irresponsible attitude of agencies entrusted to implement the Scheme. Court's failure to appraise the implications of its own final finding has only added to the injury already caused to the foreign exchange reserves.

**An Appraisal of Judicial Scrutiny on Regulation**

Whether permission envisaged under Section 29(1)(b) of F.E.R.A. is needed prior to the purchase or as *ex-post-facto* is a question to be probed into. Issues concerning the interpretation of section 29 came before the Supreme Court in *L.I.C. of India v. Escorts Ltd.* This section is calculated to control the purchase of shares in Indian Companies by non-residents. For purchasing shares in Indian companies by non-residents, permission by Reserve Bank of India under section 29 is necessary. It lays down that non-resident investor 'shall not except with the general or special permission of the Reserve Bank of India purchase shares in any Indian company'. Section 29 in its terms does not stipulate prior permission; it speaks of only 'permission'. Dispute has arisen as to what the legislature has in fact contemplated. Is it necessarily be 'prior permission' or even *ex-post-facto* permission?

In the *Escorts* case, Mr. Swaraj Paul, a London based industrialist who owned more than 61 percent of shares in 13 overseas companies intended to purchase shares in Indian com-

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43. For the full text of section 29 see *supra*, n. 7.

44. (1986) 1 Comp. L.J. 91 (S.C.); see for High Court's decision (1984) 3 Comp. L.J. 387 (Bom).
pany, i.e., Escorts Ltd. under the Portfolio Investment Scheme introduced by the Central Government. He named Punjab National Bank, an authorised dealer of foreign exchange, as his designated bank to remit foreign exchange and appointed Raja Ram Bashin and Co., a stock broker, as his agent to purchase the shares listed in the stock exchange. The agent purchased, on behalf of the 13 overseas companies, viz. Caparo Group of Companies Ltd., huge bulk of shares in Escorts Ltd. and applied for the Reserve Bank of India’s permission under section 29 of Foreign Exchange Regulation Act. While the permission was pending they placed some of the purchased shares before the Escorts Company for registration of transfer. The Board of Directors of Escorts Company refused the registration on the ground that they were barred from registering shares under section 19(4) of Foreign Exchange Regulation Act. Later the Reserve Bank of India gave permission to the purchases already made. When the directors were pressurised to register the shares, they moved the Bombay High Court challenging the permission granted by the Reserve Bank of India as violation of section 29(1) (b) of Foreign Exchange Regulation Act and other provisions.

Though the petitioners placed before the court so many irregularities committed in the process of purchase, they had specifically pleaded both in High Court and Supreme Court that they did not want adjudication on any other grounds except on the ground of failure to obtain prior permission under section 29 of Foreign Exchange Regulation Act. So the principal question for consideration before the court was whether the Reserve Bank of India had the power or authority to grant “ex-post-facto permission” under section 29 of Foreign Exchange Regulation Act for the purchase of shares in India by a non-resident or whether such permission has necessarily to be “previous” permission. It must be remembered that the Bombay High Court held that unless the word “permission” occurring in section 29 was not construed as meaning ‘prior permission’, it would defeat the very purpose for which it was devised.45

When the matter came before the Supreme Court the Attorney-General referred to several provisions of the Foreign Exchange Regulation Act and pointed out that wherever the legislature intended that permission should be secured before a particular act was done, it employed the words “prior permission” in contradistinction to the word “permission” used in section 29. He argued that where the legislature has deliberately used two different expressions in the same enactment they must necessarily convey different meaning and when the expression prior permission does not occur in section 29, such a requirement should not be imported by any process of interpretation.

On the other hand Mr. Nariman, learned counsel for Escorts Company argued that the language of section 29 was clear to hold that permission contemplated by section 29 must be obtained before the shares are purchased. Supreme Court while responding to this contention accepted the arguments of the Attorney-General. Justice O. Chinnappa Reddy answered:

“We find on a perusal of the several different sections of the very Act, that the parliament has not been unmindful of the need to clarify expressly its intention by using the expression ‘previous permission’ whenever it was thought that ‘previous permission’ was necessary.”

He added:

“The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. Significance of the use of the qualifying word in one provision may not be disregarded.”

With regard to the contention of counsel for Escorts Ltd., Supreme Court Judges simply overruled by general terms saying that they do not think that Parliament intended to lay down in absolute terms that the permission contemplated by Section 29(1) had necessarily to be previous permission.

47. Id. at p. 130.
48. Id. at p. 131.
Holding the opposite view Chief Justice K. Madhava Reddy of Bombay High Court gave the convincing reasoning. He said: “The words ‘shall not’ are mandatory. They enjoins the prohibition .... The negative language used in this provision is intended to emphasize the imperative nature of the prohibition.” 49 The High Court took support from the decision of the Supreme Court in Sarifuddin v. Abdul Gani. 50 In this case the court while discussing the difference between a mandatory rule and the directory rule declared that if the object of the law is likely to be defeated by non-compliance with it, it has to be regarded as mandatory. The Supreme Court in the above case concluded by saying:

“Whenever a statute prescribed that a particular act is to be done in a particular manner and also lays down that a failure to comply with the said requirement leads to a specified consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.” 51

Accepting the contention of the Attorney-General that the statute must be read as a whole and every provision of the Code must be construed with reference to the context and other clauses in the statute so as to make it consistent with the whole statute, the High Court made a slight deviation in the interpretation. The High Court took the view that it is necessary to read the whole statute only if the impugned provision is in conflict with some other provisions of the same statute. The court held that since the word ‘permission’ in section 29 of the Foreign Exchange Regulation Act read by itself does not come into conflict with any other provisions of the Foreign Exchange Regulation Act, the above rule of interpretation cannot be applicable. 52

49. Supra, n. 45. at p. 429.
51. Id. at p. 306.
52. Supra, n. 45. p. 434.
Court's attention was drawn by learned counsel for Escorts Company, Mr. Nariman, to the serious consequences that would follow due to the failure to obtain permission of the Reserve Bank. He explained the circumstances under which even the burden of proof that requisite permission has been obtained was on the accused which would consequently rule out the *mens rea* as an essential ingredient of an offence. Supreme Court while accepting the legal position as true hold the view that that itself cannot lead to the inevitable conclusion that the permission contemplated by section 29 is necessarily previous permission. The Supreme Court reasoned that the prosecution under section 56 of Foreign Exchange Regulation Act is not obligatory but only discretionary based upon the complaint made by a specified officer under section 61(2) (ii). Supreme Court opined that the person accused of an offence would be prosecuted, that he had applied for permission and that there was no reasonable prospect of his obtaining the permission.

One may express the view, with dissent, over this reasoning of the Court by saying that Supreme Court virtually made the regulatory provision for the purchase of shares under section 29 (1) (b) and the penalty provisions under various provisions of the Foreign Exchange Regulation Act for its failure to comply with regulatory provisions, a dead letter. Commenting on this case Samaraditya Pal visualised a situation by which the whole regulatory and penal provisions will become impotent in their operation. He opined:

“One can visualise the impossible situation of adjudicating authority when the accused takes up the plea: “Do not punish me now; I assure you the Reserve Bank of India is going to grant me the permission”. Of necessity, if the Supreme Court principle is to be applied, the adjudicating authorities must reply: “Then let us wait and see

53. *Supra* n. 32 at p. 132.
what happens.” The situation becomes more interesting because the waiting period is not limited in any manner.”

The fallacy of the Supreme Court’s view on this point can be further exposed when one looks at the reasoning given by the Bombay High Court in this regard. High Court said:

“. . . [i]f it were to be held that permission may be obtained even after the transaction of purchase is completed, buyer may not apply for permission at all. In any case even there is no knowing when they would apply.”

In other words, obtaining permission envisaged by section 29 would be left to the sweet will of the purchaser. No non-resident Indian investor could ever be accused of purchasing shares without permission. Penalties prescribed under Foreign Exchange Regulation Act for failure to obtain permission under section 29 could never be imposed. In the result it would be impossible for the Reserve Bank and other authorities to regulate or monitor transaction involving foreign exchange and foreign remittance. Would that ever be the intention of the legislature? Certainly not.

Apart from the fact that the judgment of the Supreme Court has nugated the objective behind the regulatory provisions, it is difficult, as has been pointed out by Samaraditya Pal, to accept the logic of the Court’s decision on moral grounds. One can foresee a situation where an eligible foreign investor invests large amount of foreign capital in Indian industry by purchasing shares in an Indian company in the **bona fide** expectation that permission would be granted subsequently by Reserve Bank of India. The company with the aid of this foreign investment grows and the value of the foreign investment increases. Reserve Bank of India on **bona fide** consideration refuses to grant **ex post facto** permission and initiates proceedings under the punitive provisions of Foreign Exchange Regulation Act. The **bona**

56. Ibid.
57. Supra, n. 45 at p. 432.
58. Supra, n. 55 at p. 149.
fide foreign investor finds that his shares in Indian company are confiscated which would, by any civilized standards, be considered as highly immoral. Is it not better to tell the foreign investor before he actually purchases shares instead of watching him while he is purchasing and then ask him to leave after confiscating his assets? Interpretation which leads to such immoral consequences should have been rejected by the Supreme Court.

Under Section 29 (2) (c) of Foreign Exchange Regulation Act, the Reserve Bank while according permission is to look into objectives of the Foreign Exchange Regulation Act. If we accept the Supreme Court's decision as to the power of Reserve Bank of India to grant *ex-post facto* permission, imposing of any condition to purchases already made would be superfluous and, in any event, enforcing compliance of such conditions would be difficult. That would also create an anomalous situation. If the conditions which could not be complied by the investors were to be imposed by Reserve Bank of India, the purchasers would be unnecessarily exposed to penal consequences.

Supreme Court also ignored another important reasoning on which the Bombay High Court decided. High Court referred to the comparative provisions in the Exchange Control Act of England which lays down specific provisions viz. section 8 and 9 for the validation of purchases made without obtaining prior permission. Since there is no such provision in Foreign Exchange Regulation Act, High Court came to the conclusion that it was a significant deviation and Indian legislature intended that non-resident Indian investor should obtain prior permission of the Reserve Bank of India.

Though argued before Supreme Court, it did not take cognizance of another important provision relating to prohibition of some agreements or contracts under Foreign Exchange Regulation Act. Section 47 of the Foreign Exchange Regulation Act prohibits any contract or agreement entered into by parties


60. *Supra*, n. 45 at p. 433.
which directly or indirectly results in evading or avoiding the operation of any provision of the Act. Sub section (2) of section 47 lays down that even if there is no specific stipulation in any agreement between the parties that prior permission shall be obtained in respect of anything that is prohibited from being done, it shall be deemed to be a term of the contract and it shall not be done unless such permission is granted. Purchase is an act which involves a seller and buyer. Unless the buyer and seller are _ad idem_ in regard to the terms of the agreement, there cannot be a transaction of sale. The statutory term of the contract envisaged by section 47(2) obligates the parties that the act of purchase “shall not be done without the permission of the Reserve Bank”. In other words, whenever, a non-resident Indian investor intends to purchase shares in Indian company, section 47(2) would be automatically attracted and the conditions of obtaining prior permission of the Reserve Bank of India would become an implied term of every such contract. By holding that permission envisaged under section 29 could be _ex-post-facto_, Supreme Court rendered section 47(2) as useless one in the Statute book.

Lastly, the counsel for Escorts placed an important submission before the Court that paragraph 24-A.1 was a statutory direction issued under section 73(3) of Foreign Exchange Regulation Act which clearly requires prior permission for the purpose of Section 29. Responding to this argument Supreme Court said that paragraph 24 A. 1 is an explanatory statement of guidance for the benefit of the authorised dealers. Holding that it is only a helpful suggestion rather than a mandate, the Court observed that the expression ‘prior permission’ used in para 24-A.1 is not meant to restrict the range of the expression ‘general and special permission’ found in section 29(1)(b). When Mr. Nariman, counsel for Escorts argued that none of the prescribed forms provided for the application and grant of subsequent permission, Court answered that the

62. _Supra_, n. 32 at p. 133.
63. _Ibid._
'form cannot control the Act' and the Supreme Court also quoted one learned Judge of Madras High Court who was fond of saying 'it is the dog that wags the tail and not the tail that wags the dog.'

Again the High Court took the opposite view on this point also. It gave the reasons as to how the failure to comply with the regulation 24A.1 would become arbitrary by discriminating among the foreign investors. Expressing the view that it is pre-condition validly imposed and is obligatory upon every investor to comply with the requirement, the High Court held:

"Every public authority, much more so the Reserve Bank of India, which is a statutory authority, having laid down under regulation 24-A.1 framed in exercise of the power vested in it under section 73 of the Foreign Exchange Regulation Act that prior permission should be obtained, is under an obligation to observe it strictly. It can not choose to insist upon prior permission being obtained in some cases as being required under regulation 24-A.1 and in other cases grant permission in its arbitrary discretion even after the purchase of shares are completed on the plea that section 29 enables grant of permission even subsequent to purchases also."

The Bombay High Court reinforced its conclusion by taking support of the principle of administrative law i.e., 'every public authority which has laid down certain norms, is obligated to act according to the said norms' enunciated in Ramana v. I.A. Authorities of India. This may be considered as the most convincing argument raised by the Escort's counsel and accepted by the High Court but unfortunately negatived by Supreme Court. It is also doubtful how the Supreme Court will digest the

64. Ibid.
65. Ibid.
66. Supra, n. 45 at p. 444.
67. Ibid.
logical consequence of this decision which will definitely discriminate among the non-resident investors.

The judges, both in the High Court and the Supreme Court, took the support of different contradictory rules of interpretation to reach their respective conclusions at every point for consideration before them. On the whole judgement of the Bombay High Court delivered by Justice Madhava Reddy, appears to be more convincing, properly reasoned and well studied rather than the decision of the Supreme Court.

The Supreme Court must have been persuaded by the Attorney General’s strongly pressed argument that any interpretation that is likely to deter or scare away foreign investors should be avoided. If that is the inarticulated premise from which the Court decided, it was certainly misguided. Is it the object of the Foreign Exchange Regulation Act to earn Foreign Exchange at any cost, by any means and even by contravening the specific provisions of the Statute? In fact the court failed to take the totality of the situation and to understand whether the country will be actually gaining or losing foreign exchange from this particular transaction. Since one of the objects of the Foreign Exchange Regulation Act is to regulate the outflow of foreign investment and profits from India and conserve the Foreign Exchange, one might have expected that Supreme Court would act more cautiously by visualising the circumstances as to how this impugned transaction will detrimentally affect our foreign exchange reserves indirectly.

The mysterious transaction has taken place three years before the decision of the Supreme Court. Meanwhile the value of each share purchased by non-resident Indians raised by more than 300 per cent of what they purchased.69 The company has to pay huge amount of dividends in the form of foreign exchange if the non-resident Indian intends to continue as shareholder. If the particular non-resident Indian wants to take way his capital, this burden will be much more since Reserve Bank of India has to give permission, and pay the capital gains as

per the repatriation agreements. In fact some reports say that the dispute was settled after purchasing these shares by Indian residents by paying foreign exchange more than triple to what they supposed to have brought to India. Therefore, the Court failed to appraise the consequences of the decision. Of course, it is not always suggestable that the courts should take into account the probable consequences of their decision. But, where in a statute words used are capable of more than one construction, the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail. This way of interpretation is not peculiar to our judicial process.

Apart from this, it is not new to the courts of any country to sway towards their national interest when the dispute before the court is between an Indian national and a foreign resident and especially when one of parties at default is a non-resident. Courts required strict compliance by the foreign nationals to their domestic laws and any slightest failure to comply with the required procedure on the part of the foreign national was taken as an opportunity to seize upon him by the courts to their national advantage. In Re Fry, Chase National Executors and Trustees Corporation, Ltd. v. Fry and others, the English Court was confronted with such situation. A foreign national who has substantial share capital in a company incorporated in England intended to transfer his shares to his son. Under regulation 3A(1) of Defence (Finance) Regulation, 1939, an intending transferor has to get consent from the Treasury for this purpose. The gift deed was executed by the transferor and placed before the Treasury for its consent. Meanwhile the transferor died. It was held that though the intention of the transferor is clear, since the requisite consent of the Treasury had not been obtained, the transferor has not done everything required of him in order to divest himself of the legal and equitable title to the

70. Ibid.
securities, and the company was therefore prohibited from registering the transfer.\textsuperscript{73}

It is unfortunate that the Supreme Court cited \textit{Re Fry} with approval without appreciating the \textit{ratio decidendi} of the case. Another instance of this kind was reference to the case of \textit{Swiss Bank Corporation v. Lloyds Bank Ltd. and others}.\textsuperscript{74} In this case House of Lords was called upon to interpret a term of condition imposed by Bank of England while it was granting permission to take loan from the Swiss Bank. The condition was that loan has to be repaid out of the securities acquired with loan and required the securities to be kept in separate account and cannot be transferred to any one in sterling area without the Bank's permission. When the Swiss Bank contended that this condition constituted equitable assignment in favour of Swiss Bank, House of Lords opined that the term of condition was capable of two meanings. It said that it can create an obligation to apply the 'loan portfolio' to repayment of the loan and for no other purpose or it might create an obligation to repay only out of the loan portfolio and not from any other funds unless authorised.\textsuperscript{75} The English court was conscious that the consequence of giving the former interpretation would benefit the Swiss Bank and that of the latter, the Bank of England. Therefore the Court held:

"...in a document emanating from the Bank of England, in a context of exchange control, the second is the only possible. Bank of England would have no interest in whatever in protecting a foreign lender. Its concern would be and certainly was, to prevent foreign currency (Swiss Francs) acquired at the official rate from being sold with the investment currency premium."\textsuperscript{76}

In the above two cases the English courts took the slightest opportunities, the failure to comply with the strict procedure in

\textsuperscript{73} \textit{Id.} at p. 112.
\textsuperscript{74} [1981] 2 All E.R. \textsuperscript{449} (H.L.)
\textsuperscript{75} \textit{Id.} at p. 453.
\textsuperscript{76} \textit{Ibid.}
Re Fry and the interpretative techniques in the Swiss Bank's case and utilised those for their national interest. Escorts court has referred the above two cases with approval and failed to adopt ratio of the case to the present decision for the benefit of our foreign exchange reserves.

Apart from these two cases, there are instances where the Escorts court has referred cases meaninglessly and was caught before the academic writer to get its decision criticised so adversely. 77

Need for a Research Cell Attached to the Higher Judiciary

While analysing the decision in Escorts and finding fault with the Supreme Court's defective interpretation of the provisions of Foreign Exchange Regulation Act, one may have to appraise properly the limitations and difficulties of the Court. Escorts case is first of its kind with its diverse facts involving huge finance and delicate economic policy. Court was confronted with a peculiar problem with no judicial precedent to get guidance. The difficulty in appraising the complex issues and Supreme Court's inability and lack of sufficient knowledge on these economic matters was openly confessed by Justice Chinnappa Reddy in his opening remarks:

"Problems of high finance and broad fiscal policy which truly are not and cannot be the province of the court for the very simple reason that we lack the necessary expertise." 78

This only suggests the need for some research staff for the Supreme Court and High Courts. The idea may still appear to be radical but the need for research assistance for the Appellate Judiciary cannot just be ignored. The suggestion is not made here without being aware of the conflict of opinions with regard

77. See Supra, n. 55.
78. Supra, n. 32 at p. 102.
to the efficacy of having an approach of Brandies brief. Anyhow, it is not disputed that in commercial cases both in Germany and England this famous Brandies brief model has evolved as the most effective machinery.

In India also bodies like MRTP Commission have already some provision for adequate research both in law and economics. Professor Upendra Baxi expressed the view that in the complex matters affecting the law, policy, economy and technology, judges ought to have additional and independent research assistance to be able to make sound judicial policy as well as sound law. According to him it will also contribute to the efficiency and speed by minimizing claims on judicial time for individual research by judges. The need for such a facility would be more felt if one reads the decision of the Supreme Court in Escorts case. The highest court of India expressed its pitiable condition:

"...innumerable documents were filed in the High Court, a truly mountainous record was built up running several thousand pages and more have been added in this court.... In the name of justice, we paid homage to the causes of high and mighty by devoting precious time to them, reduced as we were, at times to the position of helpless spectators."

One can understand the difficulty faced by the Supreme Court in appraising the issues. These words must reach the ears and eyes of those responsible, who has to see that the minimum needs of judiciary be met. It is doubtful whether the State will

82. Ibid.
83. Supra, n. 32 at p. 103.
meet such an enlightened claim for effective administration of justice.

Conclusion

Section 29 of FERA caused considerable controversy and the judicial interpretation exposed the lacuna in the provision. After analysing the bare provision and schemes, one would be inclined to suggest for the legislative intervention to heal the wound by making "prior permission" mandatory under the Section. This amendment will avoid the ambiguity in future and effectively block further misuse of foreign exchange.

It was also noticed that section 79 attempts to evade the legislative process since it enables the central government to make any rules under the Act with limited safeguards. Section 79 empowers the central government to issue notifications and frame rules. The defect of the legal provision is that if parliament annuls a particular notification or rule, that will not invalidate any act that has already been done under that annulled rule or notification. These provisions do not appear to be sound or legal. It is not sound because the situation has already become worst since the active big business lobbies are able to circumvent the law with bureaucratic set-up with the help of their lobby in higher echelons. It is not legal because it is a clear way to avoid the legislative process.

As the analysis of the P.I.S. revealed, it has been so convenient for the residents of India to create some phantom companies having bogus non-residents as the owners and thereby facilitate the Indian residents to bring their huge hidden black foreign currency into circulation in the name of non-resident investment to the detriment of the country. Since the introduction of the scheme, this has become one of the main sources of leakage of foreign exchange. Therefore, the benefit now extended to the incorporated bodies must be taken away to achieve the real goal of P.I.S. This is suggested not with an illusory vision that all malpractices of earning black foreign currency will be cured by this, but it will atleast discourage them by blocking
the way for its re-investment in huge sums through these bogus companies incorporated outside India under the ostensible ownership of non-residents.

Foreign investment policy is another important subject matter of discussion among the professional economists and planners in the country. Legal system is not simply a body of rules. The regulatory function of foreign investment is no longer an isolated phenomenon to be determined by the RBI alone. In fact no major practical problem can be resolved without being comprehended and explained in the light of its policy. The policies adopted by the government on this have changed from time to time. These changes from self-reliance to dependence on the foreign capital have detrimentally affected the national interests in several ways.  

No doubt, in the historical perspective, one has to remember that the changes in the policies of the State were mainly determined by the contemporary needs of the ruling class.  

It appears that the so-called liberal policy presently adopted will lead us into a trap and compromise our very ability to adopt a policy of self-reliance and independent foreign policy. Perhaps, it is too soon to suggest that everything has gone beyond repair, but clearly it has reached a crisis proportion. The adverse results of the new liberal policy have even disappointed the supporters of that policy.  

Clearly our slavation lies not in drifting along as we are doing today, but in taking requisite steps for averting the impending crisis. The qualitative reappraisal of the policy thrusts is the need of the hour and it must be based on the knowledge as to what to achieve,


how to achieve and how soon.\(^8\) The rhetoric of taking a quantum leap into 21st century to benefit the privileged rich of the urban areas hardly helps the country's development when one considers the fact that the impoverished rural masses continue to languish in their daily routine, feeling sorry for their 'fate' under the conditions which represent perhaps, those of 17th or 18th century.

\(^8\) “Editorial Note”, The Hindu, 15-12-1986.