

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

WRIT PETITION NO.1250 OF 2009

Dominique Dziurzynski : Petitioner
versus
The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue : Respondent

WITH
NOTICE OF MOTION NO.85 OF 2019
IN
WRIT PETITION NO.1250 OF 2009

The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue : Applicant/Respondent

In the matter of

Dominique Dziurzynski : Petitioner
versus
The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue : Respondent

WITH
WRIT PETITION NO.1251 OF 2009

Schroder and Co. Bank AG
(formerly known as J. Henry Schroder
Bank AG) : Petitioner
versus

The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue : Respondent

WITH
NOTICE OF MOTION NO.88 OF 2019
IN
WRIT PETITION NO.1251 OF 2009

The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue : Applicant/Respondent

In the matter of

Schroder and Co. Bank AG
(formerly known as J. Henry Schroder
Bank AG) : Petitioner
versus

The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue : Respondent

WITH
NOTICE OF MOTION NO.122 OF 2019
IN
WRIT PETITION NO.1251 OF 2009

Schroder and Co. Bank AG
(formerly known as J. Henry Schroder
Bank AG) : Applicant/Petitioner

In the matter of

Schroder and Co. Bank AG
(formerly known as J. Henry Schroder
Bank AG) : Petitioner
versus

The Special Director,
Directorate of Enforcement
Government of India
Ministry of Finance
Department of Revenue

: Respondent

Mr. Ashish Kamat a/w Mr. Rishabh Jaisani and Mr. Harit Lakhani i/by Mr. Ameya Gokhale for Petitioners in both the Petitions.

Mr. Ashish Chavan a/w Mr. Zishan Quazi for Respondent-ED

CORAM : K.R. SHRIRAM &
A.S. DOCTOR, JJ.

DATED : 29th JULY 2022

P.C.

1 Mr. Ashish Kamat, appearing for Petitioners, though after explaining to the Court in brief the background of the matters, submitted that Rule granted in both the Petitions should be made absolute in view of an order dated 22nd March 2018 passed by Respondent.

Prayer clause (a) of the Petitions reads as under :-

(a) issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India quashing the Show Cause Notice dated 12.04.2005 and Order dated 30.03.2009 issued by the Respondent."

2 Petitioner in Writ Petition No.1251 of 2009 has taken out Notice of Motion No. 122 of 2009 praying for disposal of Writ Petition in view of order dated 22nd March 2018 passed by Respondent. It will be useful to reproduce the order dated 22nd March 2018 passed by Respondent and same is scanned

and reproduced herein below :-

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EXHIBIT- A

IN THE OFFICE OF THE SPECIAL DIRECTOR OF ENFORCEMENT,
(Western Regional Office), Government of India,
Ministry of Finance, Department of Revenue
Tanmabhooni Chambers, 1st floor, Walchand Hirachand Marg, Mumbai-400 001.


| | | |
|---|--|----------------------|
| Adj. Order No. ADJ/02-B/SDE/VA/2018/FEMA | File No. T-4/12-B/SDE/KNR/FEMA/2005 | Date: 22/03/ 2018 |
|---|--|----------------------|

Passed by: Vineet Agarwal, IPS,
Special Director

CSEB

A Show Cause Notice bearing No T-4/12-B/SDE/KNR/FEMA/2005 dated 12.04.2005 was issued to M/s, J. Henry Schroder Bank A.G, Switzerland (now known as Schroder & Co Bank A.G.) and Deutsche Bnk A.G, Mumbai & its concerned officials, for contravention of section 6(3)(b) of FEMA 1999 read with Regulation 5(2) & Clause (2) of Schedule 2 of FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 and section 42(1) & (2) of FEMA, 1999, for the purchase and sale of shares in the off-market trades, without routing the same through the concerned Stock Exchange.

2. Briefly, the allegations contained in the said Show Cause Notice was that M/s JHSB, a FII registered with SEBI and allowed by the RBI to invest in the Indian Capital Market, during the period February 2000 to April 2000, had carried out purchase and sale transactions in the various scrips of Indian Companies, as detailed at Annexures I & II of the SCN, totally valued at RS. 20,69,55,750/- and Rs. 10,00,51,425 respectively, in the off-market trades, without routing the same through the concerned stock exchange, which were found to be contrary to the permission given / stipulations laid down by the RBI and in contravention of the provisions of FEMA, 1999; and that the Deutsche Bank, Mumbai, as being the custodian of the said JHSB, had allowed / permitted and honoured the contract notes pertaining to purchase and sale of shares traded by JHSB without verifying whether or not the above trades were routed through the concerned stock exchanges.



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3. On receipt of the aforesaid Show Cause Notice, *M/s. Amarchand & Mangaldas & Suresh A. Shroff & Co., Advocates for JHSB*, raised a preliminary objection that the SCN issued to JHSB would not sustain, as the charges alleged in the said SCN were barred by limitation of time, as the investigation in the case was initiated in the year 2004 and the SCN was issued in the year 2005, much after the repealment of FERA, 1973 on 01.06.2000, extended upto 31.05.2002, as per the saving clause provided under section 49(3) of FEMA 1999.

4. The aforesaid objection raised by the Advocates of the Noticee was addressed in the Preliminary Order dt. 30.03.2009 passed by the then Adjudicating Authority, wherein it was held that though the transactions referred to in the SCN took place during the FERA period, the effect of said transactions continued, even after the advent of FEMA, in the nature of 'continuing offence' and hence, the issue of subject Show Cause Notice, for contravention of the provisions of FEMA, 1999 was justified, in terms of section 49(5) & (6) of FEMA 1999.

5. Against the aforesaid Preliminary Order dt. 30.03.2009 passed by the then Adjudicating Authority, the noticee filed a Writ Petition No.1250 of 2009 before the Hon'ble High Court of Bombay and obtained a stay on the adjudication proceedings as per the Hon'ble High Court's Order dated 16.07.2009. Pending final verdict in the matter by the Hon'ble High Court, the interim relief granted to the petitioners/noticee, continues, till date.

6. After taking over charge as the Adjudicating Authority in Western Region of this Directorate, I have re-examined the whole issue by scrutinizing the records of this case, the charges alleged in the SCN issued under the provisions of FEMA; the preliminary objections raised by the Advocates of the noticee on the sustainability of the SCN issued under FEMA for the transactions related to the FERA period; the Preliminary Order / Interim Order dated 30.03.2009 issued by the then Adjudicating Authority on the objection raised by the Advocates and also the Order dated 16.07.2009 passed by the Hon'ble Bombay High Court in the Writ Petition filed by the noticee, granting a stay on the adjudication proceedings in the subject SCN, etc.

7. I observe that the charges alleged in the subject SCN against *M/s J. Henry Schroder Bank, AG*, & its officials related to the purchase and sale of certain shares of Indian companies outside the platform of the concerned Stock Exchanges, was in

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violation to the permission given / stipulations laid down by the RBI to the effect that the purchase and sale of shares by a registered FII with SEBI, should be done under the Portfolio Investment Scheme (PIS). I further find that the said notices in the subject SCN viz. M/s J. Henry Schroder Bank, AG, Switzerland & its officials, had carried out the said transactions between February 2000 to April 2000, the period when FERA 1973 was in force.

8. In this connection, I have examined the Order dated 16.11.2016 passed by the Hon'ble Supreme Court in the SLP No. SLP (C) No. 357-359/2012 filed by the Directorate of Enforcement, in the case of M/s. Shangrila Latex Industries Pvt. Ltd. The said SLP was filed by the Directorate of Enforcement against the Order dated 07.12.2010 passed by the Hon'ble ATFE, New Delhi, quashing both the SCN as well as the Adjudication Order passed by the Department against the notices / appellants. The Hon'ble ATFE, New Delhi, in the said Order, had observed that the alleged offence against the appellants took place during the year 1998, when the FERA was in force and therefore, the case could be covered under section 49(3) of FEMA and not under section 49(5) of FEMA. Further, the Hon'ble Supreme Court had also confirmed the aforesaid Order of the ATFE, New Delhi and dismissed the SLP filed by the department.

9. I have also examined the Order dated 06.10.2015 passed by the Hon'ble Delhi High Court, in the LPA No. 965/2013 filed by the Directorate of Enforcement in the case of Shri Bhupendra V. Shah & Ors. In the said Order, the Hon'ble High Court had confirmed the Order dated 26.03.2010 passed by the Learned Single Judge of the Hon'ble Delhi High Court, by observing that in terms of Section 49(3) of FEMA, after the expiry of period of two years from 01.06.2000, no action could be taken for a violation under FERA.

10. It is noticed that the legal position of the case covered under the Order passed by the Hon'ble ATFE and confirmed by the Hon'ble Supreme Court's Order dated 16.11.2016 and also the Delhi High Court's Order dated 06.10.2015, referred to above are found to be synonymous with the facts in the subject SCN under adjudication, in so far as the period of occurrence of the alleged offence (i.e. the FERA period) and the charges framed under the provisions of FEMA are concerned. Hence, the ratio applied in the case of M/s Shangrila Latex Industries Pvt. Ltd. and



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also in the case of Sh. Bhupendra V. Shah, appear to hold good in the relevant SCN issued to M/s J. Henry Schroder Bank AG, Switzerland, as well.

11. Moreover, the fact remains that the FERA, 1973 stands repealed for all practical purposes with effect from 31.05.2002 and the FEMA, 1999 has come into force with effect from 01.06.2000 and adjudication of such cases has to be in accordance with the provisions of the said Act. Since the date of commencement of the provisions of FEMA is with effect from 01.06.2000, its provisions cannot be given retrospective effect so as to bring the provisions of the repealed Act within its ambit and scope, even though, such provisions may be identical. Therefore, in FERA cases, where no cognizance taken by the Adjudicating Authority upto 31.05.2002, adjudication would be barred by section 49(3) of FEMA, 1999.

12. Thus, in view of the aforesaid judicial pronouncements and in also view of the fact that no Show Cause Notice for a contravention committed during the FERA period could be issued under the FEMA, after the expiry of the sun-set period i.e. 31.5.2002, I find that the subject Show Cause Notice No. T-4/12-8/SDE/KNR/FEMA/2005 dated 12.04.2005 issued to M/s J. Henry Schroder Bank AG, Switzerland & others, is not in accordance with law and hence not maintainable and hence the same is ordered to be filed.



Sealed and signed at Mumbai, this 22nd day of March, 2018.


(VINEET AGARWAL, IPS)
SPECIAL DIRECTOR (WR)

To

1. J. Henry Schroder Bank AG,
Central - 2, 8021, Zurich,
Switzerland.
2. Mr. Dominique Dziurzynski
J. Henry Schroder Bank AG,
Central - 2, 8021, Zurich,
Switzerland.

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3. Mr. Rainer Lotter
J. Henry Schroder Bank A.G.,
Central - 2, 8021, Zurich,
Switzerland.

for Sl. Nos. (1-3) above, sent to their Advocate's addresses as below:

(M/s. Amarchand Mangaldas & Suresh A. Shroff & Co.,
Advocates & Solicitors;
Amarchand Towers,
216, Okhla Industrial Estate, Phase-III,
New Delhi - 110 002

4. Deutsche Bank A.G.,
Kodak House, 222, Dr. D.N. Road,
Bombay - 400 001.
5. Mr. Javed Shirazi,
(Formerly Country Head)
C/o. Deutsche Bank A.G.
Kodak House, 222, Dr. D.N. Road,
Bombay - 400 001.
6. Mr. Venkatesh Raddem
Former Discharge - Custodial Services,
C/o. Deutsche Bank A.G.
Kodak House, 222, Dr. D.N. Road;
Bombay - 400 001.

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*Thus copy
sent to
Adv. for P.D.*

4 In view of what is stated in paragraph 12 of the order reproduced above, nothing survives in the show cause notice itself that has been issued on 12th April 2005 to Petitioner.

5 In the circumstances, Rule made absolute in both the Petitions.
Petitions disposed.

6 In view of above, all interim applications also stand disposed.

[A.S. DOCTOR, J]

[K.R. SHRIRAM , J]