

J. Sri Nisha
v.
The Special Director, Adjudicating Authority,
Directorate of Enforcement and Anr.

(Civil Appeal No. 4167 of 2026)

01 April 2026

[Vikram Nath and Sandeep Mehta,* JJ.]

Issue for Consideration

The writ petitions instituted by the appellants assailing the show cause notice (SCN) issued by the Adjudicating Authority under Foreign Exchange Management Act, 1999, came to be dismissed. Whether the impugned order passed by the High Court is liable to be set aside.

Headnotes[†]

Foreign Exchange Management Act, 1999 – ss.4, 37A – Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 – Appellants alleged to have contravened the provisions of s.4 of FEMA, r/w. FEMA Regulations, on the premise that they had acquired and held shares of a foreign entity without the requisite approval and in violation of the statutory framework – Properties seized by the Authorised Officer – Competent Authority held that there was no contravention of s.4, provisions of s.37A were held inapplicable and prayer for confirmation of seizure of assets was rejected – Parallely, Adjudicating Authority issued show cause notice (SCN) alleging violation of the provisions of FEMA along with allied regulations – A corrigendum was issued to the SCN – Writ petitions were filed by the appellants – The High Court dismissed the writ petitions – Correctness:

Held: A *prima facie* satisfaction was recorded by the Competent Authority that there was no evidence of the appellants being involved in foreign security transactions having any value – Consequently, there did not exist the “reasons to believe” referred to in s.37A(1) – This Court has consistently held that although ordinarily a writ petition against an SCN may not be entertained, however, the said proposition is not an inviolable rule – Interference at the stage of

* Author

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SCN is permissible in exceptional circumstances, such as where the notice suffers from patent lack of jurisdiction, reflects non-application of mind, is issued with a pre-determined or premeditated approach, amounts to an abuse of the process of law, or results in a violation of the principles of natural justice – Thus, the rejection of challenge laid by the appellants to the SCN on the ground of non-maintainability was not justified in the peculiar facts of the case at hand – The High Court repeatedly referred to the effect of the seizure order passed by the Authorised Officer u/s.37A of FEMA and the scope of consideration thereof by the Adjudicating Authority while passing the final order u/s.16 – The observations made by the Division Bench impliedly efface the findings recorded by the Competent Authority while refusing to confirm the seizure, thereby foreclosing the outcome of the appeal pending before the appellate authority – In effect, the Adjudicating Authority has undone the order of the Competent Authority even while the appeal against the said order is pending – Such a course of action tantamounts to abdicating the powers of the Appellate Authority, even when the order of the Competent Authority was still under challenge in appeal at the instance of the department – The impugned order passed by the High Court and the order passed by the Adjudicating Authority imposing penalty and ordering confiscation of the property held by appellants are declared to be arbitrary and contrary to law – The same are hereby set aside – The proceedings are revived from the stage of the SCN. [Paras 32, 33, 35, 38, 39]

Case Law Cited

Union of India v. VICCO Laboratories [2007] 12 SCR 534 : (2007) 13 SCC 270 : 2007 SCC OnLine SC 1420 – referred to.

List of Acts

Foreign Exchange Management Act, 1999; Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004; Constitution of India.

List of Keywords

Show cause notice (SCN); Corrigendum; Seizure of assets; Acquisition of shares in foreign entity; Reason to believe; Adjudicating Authority; Confiscation of the property; Section 37 of Foreign Exchange Management Act, 1999; Abuse of process; Foreign securities.

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Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4167 of 2026

From the Judgment and Order dated 23.07.2024 of the High Court of Judicature at Madras in WA No. 3521 of 2023.

With

Civil Appeal No(s). 4168, 4169, and 4170 of 2026

Appearances for Parties

Advs. for the Appellant(s):

Siddharth Luthra, Harin P Raval, Hari P Raval, Sr. Advs., E. Sudarsanan, K. Suresh, Rajendra Singvi, V. Ramesh, K. Stalin Raja, C. Balaji, R. M. Narendran, Sam Jayaraj Houston, S. Manoj Kumar.

Advs. for the Respondent(s):

Anil Kaushik, A.S.G., Zoheb Hussain, Arkaj Kumar, Bhuvan Kapoor, Animesh Upadhyay, Arvind Kumar Sharma, Ms. Anushka Gupta, Ms. Aakriti Mishra.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. Heard.
2. Leave granted.
3. This batch of appeals arises out of the common judgment and final order dated 23rd July, 2024 passed by the Division Bench of the High Court of Judicature at Madras¹ in W.A. Nos.3520 to 3524 of 2023 and C.M.P. Nos.28745, 28749, 28748, 28750, 28756 of 2023 and 2240 of 2024.
4. The appellants herein had approached the learned Single Judge of the High Court, assailing the order/show cause notice² dated 22nd

¹ Hereinafter, referred to as the "High Court".

² For short, 'SCN'.

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December, 2021 issued by the Adjudicating Authority under the provisions of the Foreign Exchange Management Act, 1999³, and the consequential corrigendum dated 13th March, 2023.

5. The writ petitions instituted by the appellants assailing the said SCN and corrigendum came to be dismissed by the learned Single Judge *vide* common final order dated 30th November, 2023. The intra-Court appeals preferred against the said order also stand rejected by the impugned judgment dated 23rd July, 2024. It is in these circumstances that the appellants are before us by way of these appeals with special leave.
6. Since all the appeals involve identical questions of fact and law, they were heard analogously and are being decided by this common judgment.

Background: -

7. The appellants herein are the Company named M/s. Accord Distilleries & Breweries Pvt. Ltd. and its Directors. The allegations against the appellants in the questioned SCN emanate from a transaction of acquisition of 70 lakh shares of an entity named M/s. Silver Park International Pte. Ltd., a Singapore based Company, registered as per the laws of Singapore and subsequent transfer/distribution of these shares.
8. The transactions referred to above triggered the proceedings for violation of provisions of FEMA against the appellants herein. The foundational facts of these proceedings are that the appellant in Civil Appeal @ SLP (C) No.34269 of 2025, J. Sundeep Anand, an Indian citizen, being the Director of M/s. Accord Distilleries & Breweries Pvt. Ltd. had subscribed to and acquired shares/foreign securities (without consideration) in M/s. Silver Park International Pte. Ltd. allegedly without the requisite approval of the Reserve Bank of India⁴ and in violation of the provisions of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004⁵. The said shares were subsequently transferred to the other appellants, who are the wife and children of J. Sundeep Anand, also without

3 For short, 'FEMA'.

4 For short, 'RBI'.

5 For short, 'FEMA Rules'.

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the requisite regulatory approval. Consequently, the appellants were alleged to have contravened the provisions of Section 4 of FEMA, read with the aforesaid Regulations, on the premise that they had acquired and held shares of a foreign entity without the requisite approval and in violation of the statutory framework. As a result, the Authorised Officer seized the properties of the appellants *vide* order dated 11th September, 2020 under Section 37A(1) of FEMA.

9. Pursuant to the initiation of proceedings, the Authorised Officer-respondent No.2⁶ herein, resorting to the procedure provided under Section 37A(2) of FEMA moved the Competent Authority, *i.e.*, the Commissioner of Customs (Appeals-I), for seizure of the assets of the appellants herein.
10. The Competent Authority, exercising powers under Section 37A(3) of FEMA after due consideration of the material placed before it, came to a conclusion that there was no proof that any of the appellants had ever paid for the shares floated by M/s. Silver Park, since the said company never made a call for the same. Consequently, no contravention of Section 4 was made out, and the provisions of Section 37A were held to be inapplicable. Accordingly, the prayer for confirmation of seizure of assets was rejected *vide* a detailed order dated 3rd February, 2021. The said order is presently under challenge at the instance of the Directorate of Enforcement before the Appellate Tribunal under SAFEMA at New Delhi in FPA-FE No. 33/CHN/2021.
11. Parallely, with the proceedings for seizure and on identical set of allegations, the Authorised Officer, moved the Adjudicating Authority-respondent No. 1⁷ herein (the Special Director of Enforcement Directorate) under Section 16(3) of FEMA, pursuant where to an SCN dated 22nd December, 2021 was issued to the appellants alleging violation of the provisions of FEMA along with allied regulations. The appellants appeared before the Adjudicating Authority in response to the SCN and advanced preliminary as well as additional submissions during the course of the proceedings. After the personal hearing was concluded and the matter was reserved for orders by the Adjudicating Authority, a corrigendum dated 13th March, 2023 came to be issued

6 Hereinafter, referred to as the "Authorised Officer".

7 Hereinafter, referred to as the "Adjudicating Authority".

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to the SCN. Both the SCN as well as the corrigendum were subjected to challenge in the writ petitions filed by the appellants before the learned Single Judge of the High Court.

12. The foundational challenge to the SCN and the corrigendum was that once the Competent Authority had recorded categoric findings of lack of basis for seizure in the order made under Section 37A(3) of FEMA, rejecting the prayer for confirmation of seizure of assets, there was no tangible material in the hands of the authorities to conclude that the appellants had violated Section 4 of FEMA. The very essence of the SCN stood struck off with the order passed by the Competent Authority under Section 37A(3) of FEMA, and hence, the SCN was *non est* in the eyes of law. The writ petitions were rejected by the learned Single Judge by order dated 30th November, 2023, and the intra-court appeals preferred against the said order were also dismissed by the Madras High Court by judgment dated 23rd July, 2024, which are the subject matter of challenge in these appeals by special leave.

Submissions on behalf of the appellants: -

13. Mr. Siddharth Luthra and Mr. Harin P. Raval, learned senior counsel representing the appellants, vehemently and fervently contended that once the Competent Authority had concluded in the proceedings under Section 37A of FEMA that there was no ground to confirm the seizure of the assets of the appellants herein, the very foundation of the SCN stood effaced. In those circumstances, the SCN was fit to be quashed in exercise of the writ jurisdiction under Article 226 of the Constitution of India because the foundational facts for sustaining the said SCN proceedings were lacking.
14. It was further submitted that the order of the Competent Authority dated 3rd February, 2021 refusing to confirm the seizure of the assets has been passed in favour of the appellants and that the appeal against the said order at the instance of the respondent (Directorate of Enforcement) is still pending adjudication before the Appellate Tribunal under SAFEMA at New Delhi in FPA-FE No. 33/CHN/2021. Under these circumstances, the outcome of the said appeal ought to have been awaited before issuance of the SCN.
15. Learned senior counsel further pointed out that the plea of the respondents that the appellants have concealed the factum of the

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SCN having been finally adjudicated is wholly misconceived, inasmuch as, in the pleadings of the civil appeals, the appellants have clearly mentioned that the SCN culminated into a final order against which statutory appeal(s) have also been preferred.

16. Learned senior counsel submitted that the findings recorded by the Division Bench of the High Court in para Nos.32, 33, and 34 of the impugned order, virtually setting at nought the order passed by the Competent Authority under Section 37A of FEMA, have prejudiced the case of the appellants because the Adjudicating Authority has heavily relied upon these very observations while passing the final adjudication order.
17. Learned senior counsel further submitted that it is a fit case in which this Court should feel persuaded to quash the SCN along with the corrigendum and the adjudication order dated 26th August, 2024 as there existed no foundation for the same.
18. Their alternative submission was that the order of adjudication dated 26th August, 2024 deserves to be set aside and the respondents should be directed to await the outcome of the appeal pending under Section 19 of FEMA before the SCN can be adjudicated on merits. They further prayed that the observations and adverse findings recorded by the Division Bench on the order passed by the Competent Authority under Section 37(A)(3) of FEMA should not prejudice the case of the appellants at any stage of the proceedings.

Submissions on behalf of the respondents: -

19. *Per contra*, Mr. Anil Kaushik, learned Additional Solicitor General representing the respondents, strenuously, arduously, and vociferously opposed the submissions advanced by the appellants' counsel. He urged that the nature of proceedings under Section 37A of FEMA is intermediary/interim in nature and has no bearing on the adjudication of the SCN.
20. He further submitted that irrespective of the outcome of the appeal against the order under Section 37A of FEMA, the Adjudicating Authority has independent jurisdiction to decide the show cause proceedings on its own merits, and the appellants cannot seek any advantage from the fact that the Competent Authority has not confirmed the seizure.

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21. He referred to sub-section (4) of Section 37A to buttress the contention that the adjudication proceedings are independent of the seizure proceedings to urge that the High Court was absolutely justified in observing that the findings recorded in the order passed by the competent authority in proceedings under Section 37A would have no bearing on the outcome of the adjudication proceedings.
22. He emphasized that the appellants have concealed the fact of the final order having been passed pursuant to the SCN and hence, they do not deserve any indulgence in these matters.

Discussion and Analysis

23. We have considered the submissions advanced by learned counsel for the parties and have gone through the impugned orders. We have also carefully perused the statutory framework governing the dispute at hand.
24. Before we delve into the merits of the case, it is necessary to deal with the preliminary objection raised on behalf of the respondents that the appellants had suppressed the fact that a final adjudication order had been passed pursuant to the SCN and, for that reason, they do not deserve any indulgence in the present proceedings. Upon a consideration of the record, we find no merit in the said contention. There is nothing to indicate any deliberate concealment or lack of candour on the part of the appellants so as to disentitle them from seeking relief. On the contrary, the pleadings in the civil appeals clearly manifest that the SCN had culminated in a final adjudication order, against which statutory appeal(s) have also been preferred. The allegation of suppression is thus wholly misconceived and does not furnish a ground to non-suit the appellants.
25. Now, we shall advert to the merits of the case. For the ease of reference, Section 37A of FEMA on which the fulcrum of the controversy lies, is reproduced hereinbelow: -

“37-A. Special provisions relating to assets held outside India in contravention of Section 4.—

(1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property,

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situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property: Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

(3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person. Explanation.— While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1):

Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as

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the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).

(5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.

(6) Nothing contained in Section 15 shall apply to this section.”

[Emphasis supplied]

26. A perusal of the aforesaid provision would clearly indicate that the same has been enacted in order to ensure that the assets of a person suspected to be involved in foreign exchange or foreign security violations may be seized to the extent equivalent to such foreign exchange or foreign security, which may be under scrutiny of the Adjudicating Authority.
27. Hence, the provision is in nature of a preventive measure for ensuring that the assets equivalent to the foreign exchange or foreign security may be kept secured for future proceedings pursuant to adjudication.
28. Sub-section (4) gives an impression that the order passed by Competent Authority confirming the seizure would remain alive only till the disposal of the adjudication proceedings, and that the Adjudicating Authority would be authorized to proceed with further action, *i.e.*, SCN, etc. without being fazed by the confirmation of the seizure proceedings.
29. The effect of sub-section (4) is evidently to leave the seized assets at the disposal of the Adjudicating Authority for realisation of the adjudicated amount, if any and to prevent frustration of the adjudication order. However, sub-section (4) is restricted to an order of the Competent Authority “*confirming seizure of equivalent assets and the continuance thereof till the disposal of the adjudication proceedings*”. The said provision literally does not deal with a situation where the seizure has not been confirmed.

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30. The controversy in the present cases is more appropriately examined within the framework of sub-sections (1) to (3) of Section 37A. A plain reading of Section 37A(1) indicates that the power of seizure is predicated upon the existence of a “reason to believe” that foreign exchange, foreign security or immovable property situated outside India is suspected to have been held in contravention of Section 4. Such satisfaction by the Authorised Officer at the stage of preliminary seizure under Sub-section (1) is only tentative and is expressly subject to scrutiny under Sub-sections (2) and (3), wherein the Competent Authority is required to independently examine whether the reasons recorded justify continuation of the seizure. The exercise undertaken by the Competent Authority is thus not an empty formality, but a substantive evaluation of whether the material on record is sufficient to sustain even a *prima facie* inference of contravention in relation to foreign exchange. In the present case, upon such evaluation, the Competent Authority declined to confirm the seizure by a well-reasoned order, thereby indicating that the material did not meet even this preliminary threshold. The refusal to confirm the seizure, therefore, reflects a considered finding that the foundational requirement of a “reason to believe” was not satisfied on the material available.
31. For the sake of convenience, the reasons recorded in the order dated 3rd February, 2021, whereby the Competent Authority refused to confirm the seizure made under Section 37A(1) are extracted below: -
- “In this case none of the respondents i.e., R1 to R4 were holding any foreign security having a value at any point of time. The subscribed shares remained only in paper for the time being. None of the documentary evidences in this matter have been countered by the enforcement directorate. The Enforcement Directorate has not proved by way of evidence that the money indicated in the “subscribed shares” have been paid either “legally or illegally”. As held by the Hon’ble SC, in the above cited case law, the suspicion must be reasonable i.e. have a degree of objectivity and basis/foundation for the suspicion must be based on ‘certain reasons’. In my considered opinion, unless it is shown by the investigating department that. “something” was “held” in contravention of Section 4 of FEMA, Section 37A(1) will not come into play. In this case

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no share of any value was held in Singapore. Therefore suspicion has no foundation. As the department. has failed to prove, Section 37A (1) of FEMA, 1999 cannot be invoked to seize the properties owned by Mr. S. Jagathrakshakan (R1), Ms. Anusuya Jagathrakshakan (R2), Ms. Sri Nisha (R3) & Mr. Sundeep Aanand (R4). Therefore, the prayer made by the authorised officer vide petition dated 05.10.2020 under Section 37A(2) to confirm the seizure of properties as mentioned in the Annexures A, B, C & D of the Order of Seizure dt.11.09.2020 is rejected and the impugned Order of Seizure is set aside.”

32. Thus, a *prima facie* satisfaction was recorded by the Competent Authority that there was no evidence of the appellants being involved in foreign security transactions having any value. Consequently, it has to be taken that there did not exist the “reasons to believe” referred to in Sub-section (1) of Section 37A. These findings definitely support the cause of the appellants herein. It is not in dispute that the appeal preferred by the Department against the order dated 3rd February, 2021, is still pending consideration. The Division Bench of the High Court, while deciding the writ appeal, observed that the writ petition against the SCN is not entertainable. We feel that the said observation may not be correct in every situation. This Court has consistently held that although ordinarily a writ petition against an SCN may not be entertained, however, the said proposition is not an inviolable rule. Interference at the stage of SCN is permissible in exceptional circumstances, such as where the notice suffers from patent lack of jurisdiction, reflects non-application of mind, is issued with a pre-determined or premeditated approach, amounts to an abuse of the process of law, or results in a violation of the principles of natural justice. In such situations, the High Court would be justified in exercising its jurisdiction under Article 226 of the Constitution to prevent manifest injustice. In this context, we may gainfully refer to the following observations from ***Union of India v. VICCO Laboratories***^a: -

“31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities.

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In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinance from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. **Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice.** The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out.”

[Emphasis supplied]

33. Thus, the rejection of challenge laid by the appellants to the SCN on the ground of non-maintainability was not justified in the peculiar facts of the case at hand.
34. We shall now advert to the observations made by the Division Bench that the interim seizure under Section 37A may not have any implication in respect of the final order to be passed by the Adjudicating Authority, and that it would be apposite for such authority to deal with the effect and import of the seizure order passed by the Authorised Officer under Section 37A of FEMA while passing the final order under Section 16 of FEMA. Further, in para 34, the High Court again referred to the seizure made under sub-section (1) and directed the Adjudicating Authority to take note of the said provision. For ease of reference, paras 32, 33, and 34 of the impugned order are reproduced hereinbelow: -

“32. Therefore, the very purpose and object of inserting Section 37A is to seize value equivalent situated within India of such foreign exchange, foreign security or immovable

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property during pendency of the adjudication proceedings and such seizer proceedings initiated under Section 37A, undoubtedly cannot stand as a bar to proceed with the adjudication proceedings under Section 16 of the FEMA by the Adjudicating Authority. As noted under the definition, the functions of the Adjudication Authority, Authorised Officer and Competent Authority are distinguishable and each Authority is conferred with powers under the Act to carry out certain actions. Therefore, the contention on behalf of the appellants that the Authorised Officer is below the Competent Authority has no relevance as far as Section 37A of FEMA is concerned

33. In fine, we could arrive at an irresistible conclusion that a writ against a show cause notice is not entertainable. The adjudication proceedings have completed and the final order is about to be passed by the Adjudicating Authority. Regarding an interim seizure under Section 37A is concerned, it may not have any implication in respect of the final order to be passed by the Adjudicating Authority and it would be appropriate on his part to deal with the effect of seizure order passed by the Authorised Officer under Section 37A of FEMA, while passing final order under Section 16 of FEMA.

34. The above position has been amply made clear in Sub Section (4) to Section 37A of the Act, wherein, it is contemplated that the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further actions as regards to seizure made under Sub Section (1) to Section 37A and in this case, the Adjudicating Authority is directed to take note of said provision and take an appropriate decision with reference to the order passed by the Authorised Officer under Section 37A(1) of the FEMA.”

35. On a bare perusal of the aforesaid observations, we find that the High Court repeatedly referred to the effect of the seizure order passed by the Authorised Officer under Section 37A of FEMA and the scope of consideration thereof by the Adjudicating Authority while passing the final order under Section 16. We may note that the

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observations (*supra*) made by the Division Bench impliedly efface the findings recorded by the Competent Authority while refusing to confirm the seizure, thereby foreclosing the outcome of the appeal pending before the appellate authority.

36. The High Court referred to sub-section (4) of Section 37A as if it were concluding that the seizure had been confirmed, whereas the factual situation reads otherwise. In case the finding of the Competent Authority refusing to confirm the seizure for substantive reasons stands affirmed in appeal, manifestly, the same would have a bearing on the outcome of the adjudication proceedings.
37. The Adjudicating Authority, while passing the final order under Section 16 of FEMA, extensively referred to and relied upon the aforesaid observations of the Division Bench. The relevant conclusions from the adjudication order dated 26th August, 2024 are reproduced hereinbelow for ease of reference: -

“

(iii) The above analysis was strengthened by the Hon'ble High Court of Madras in judicial pronouncement dated 30.11.2023 in the matter of Writ Petitions in WP Nos. 21105/2023, 21359/2023, 21100/2023, 21096/2023 and 21102/2023, filed by the Noticees against the Adjudicating Authority, and as such, the Hon'ble High Court was pleased to dismiss the Writ Petitions

(iv) The Noticees preferred Writ Appeal against the order of Hon'ble High Court of Madras in the above WPs. The Division Bench of Hon'ble High Court of Madras vide its order dated 23.07.2024 in the Writ Appeals in WA No.s 3520 to 3524 of 2023 has observed that:

“31. We concur with the learned Additional Solicitor General of India, in view of the fact that the special provision under Section 37A is all about an interim seizer value equivalent situated within in India of such foreign exchange, foreign security or immovable property. In the event of seizer during the pendency of the adjudication proceedings, the procedures to be followed by the authority are enumerated under Sub Section (6) of Section 37A of FEMA.

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32. Therefore, the very purpose and object of inserting Section 37A is to seize value equivalent situated within India of such foreign exchange, foreign security or immovable property during pendency of the adjudication proceedings and such seizer proceedings initiated under Section 37A, undoubtedly cannot stand as a bar to proceed with the adjudication proceedings under Section 16 of the FEMA by the Adjudicating Authority. As noted under the definition, the functions of the Adjudication Authority, Authorized Officer and Competent Authority are distinguishable and each Authority is conferred with powers under the Act to carry out certain actions. Therefore, the contention on behalf of the appellants that the Authorised Officer is below the Competent Authority has not relevance as far as Section 37A of FEMA is concerned.”

As such, the Division upheld the Single Bench Order of Hon'ble High Court of Madras on 23.07.2024 and dismissed the Writ Appeals.

(v)

(vi) The Competent Authority has passed an Order setting aside the Seizure Order dated 11.09.2020, vide his order Petition No. 01/2021 dated 03.02.2021. Having perused the said order of the Competent Authority, I find that Section 4 of FEMA has been mis-interpreted holding that the terms acquire, hold, own, possess or transfer of foreign security were only in respect of paid-up shares. I find that the Competent Authority has not considered the observations from the Financial Statement of the overseas entity, showing the shares as fully paid-up. In terms of Section 4 of FEMA, the act of holding of foreign security is sufficient, and it does not mandate that the foreign securities are necessarily paid up. FEMA defines the term “Direct Investment Outside India” that the investment means by way

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of contribution to the capital or subscription to the Memorandum of Association of a Foreign entity or by way of purchasing existing shares of a foreign entity..... However, in the case on hand, during the impugned period the Noticees were holding shares of M/s. Silver Park International Pte. Ltd. Singapore, and also that the said shares were fully paid-up.

(vii) It is observed from the Reserve Bank of India - Frequently Asked Questions, that RBI while clarifying “whether an Indian Party/resident Indian acquire shares of a Foreign entity without upfront payment or on deferred payment basis” clarified that “No. The provisions of Notification No. FEMA 120/RB-2004 dated July 7th 2004 as amended from time to time, do not permit acquisition of foreign shares without payment or deferred payment basis.” In view of the above, it is obvious that the Noticees have acquired Foreign Shares of M/s. Silver Park International Pte. Ltd. without obtaining prior RBI approval to make Direct investment outside India. From the above, it is obvious that the Noticees have acquired and held foreign shares in violation of Section 4 of FEMA.

(viii) However, I find that the Competent Authority, without considering the above statutory stand points, has passed Order setting aside the Seizure Order of the Authorized Officer. Therefore, I do not concur with the order of the Competent Authority. As such, I find that the impugned seized properties are in accordance with the provisions of Section 37A of FEMA.”

[Emphasis supplied]

38. In effect, the Adjudicating Authority has undone the order of the Competent Authority even while the appeal against the said order is pending. Such a course of action, in the opinion of this Court, tantamounts to abdicating the powers of the Appellate Authority, even when the order of the Competent Authority was still under challenge in appeal at the instance of the department.

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39. In wake of the above discussion, we are of the opinion that the impugned order dated 23rd July, 2024 passed by the Division Bench of the High Court and so also the order of the learned Single Judge of the High Court dated 30th November, 2023, rejecting the writ petition preferred by the appellants and as a consequence, the final order dated 26th August, 2024 passed by the Adjudicating Authority imposing penalty and ordering confiscation of the property held by appellants are declared to be arbitrary and contrary to law. The same are hereby set aside. The proceedings are revived from the stage of the SCN.
40. As an upshot, we provide that the Appellate Authority shall first decide the appeal preferred by the Department against the order of the Competent Authority under Section 37A(5) of FEMA after hearing the parties and by passing a reasoned order within a period of two months from today. Pursuant to the disposal of the appeal pending before the Appellate Authority, the proceedings arising out of the SCN may be commenced and shall be taken to their logical conclusion without being prejudiced by any of the observations made hereinabove or in the orders passed by the High Court.
41. The appeals are disposed of in these terms.
42. Pending application(s), if any, shall stand disposed of.

Result of the case: Appeals disposed of.

[†]Headnotes prepared by: Ankit Gyan