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NATIONAL JUDICIAL ACADEMY

SEMINAR ON ROLE OF COURTS AND REGULATORS (P-969)

FEBRUARY 4-7, 2016

REFERENCE MATERIAL

COMPILED AND EDITED
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SEMINAR ON ROLE OF COURTS AND REGULATOR
February 4-7, 2016 (P-969) [Yoga classes-6 AM to 7 AM Daily]
TENTATIVE PROGRAMME SCHEDULE (Dated January 14, 2016)
Programme Coordinator: Ms. Shruti Jane Eusebius, Law Associate, National Judicial Academy

Thursday **February 4, 2016**	**10:00 AM – 11:00 AM** **SESSION 1** ***Constitutional Perspectives on Statutory Regulatory Authorities in India***	TEA BREAK	**11:15 AM – 12:15 AM** **SESSION 2** ***Regulatory Regime – Purposes, Achievements and Problem Areas***	TEA BREAK	**12:15 PM – 01:15 PM** **SESSION 3** ***Competition Commission of India as a regulator of trade practices***	LUNCH BREAK	**02:15 PM – 03:15 PM** **SESSION 4** ***Regulation of Financial Sector***	**03:15 PM – 04:00 PM** *Library Reading*	**04:00 PM – 05:00 PM** *Computer Skills Training*
Friday **February 5, 2016**	**10:00 AM – 11:00 AM** **SESSION 5** ***SEBI's power to regulate the Securities Market***		**11:15 AM – 12:15 AM** **SESSION 6** ***SEBI's power to regulate the Securities Market***		**12:15 PM – 01:15 PM** **SESSION 7** ***SEBI's power to regulate the Securities Market***		**02:15 PM – 03:15 PM** **SESSION 8** ***SEBI's power to regulate the Securities Market***	**03:00 PM – 04:00 PM** *Library Reading*	**04:00 PM – 05:00 PM** *Computer Skills Training*
Saturday **February 6, 2016**	**10:00 AM – 11:00 AM** **SESSION 9** ***Regulation of Corporate Governance – Role of Registrar of Companies***		**11:15 AM – 12:15 AM** **SESSION 10** ***IRDA and the Regulation of the Insurance Sector***		**12:15 PM – 01:15 PM** **SESSION 11** ***TRAI as a Telecom Regulator***		**02:15 PM – 03:15 PM** **SESSION 12** ***Regulation of Media***	**03:00 PM – 04:00 PM** *Library Reading*	**04:00 PM – 05:00 PM** *Computer Skills Training*
Sunday **February 7, 2016**	**10:00 AM – 11:00 AM** **SESSION 13** ***Role of Sports Regulators (BCCI & Others)***		**11:15 AM – 12:15 AM** **SESSION 14** ***Regulation of Public Utilities & Natural Resources***		**12:15 PM – 01:15 PM** **SESSION 15** ***Role of Judiciary in Regulatory Regime*** **01:15 PM – 01:30 PM** ***Feedback and Evaluation***				

S.No.	Title	Page No.
I	**Regulatory Regime – Perspectives, Purposes, Achievements & Problem Areas**	
1.	OECD (2014), *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, OECD Publishing. http://dx.doi.org/10.1787/9789264209015-en	
II	**Competition Commission of India as a Regulator of Trade Practices**	
2.	Rahul Singh, *"The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators*", 8 Wash. U. Global Stud. L. Rev. 71 (2009),	
III	**TRAI as a Telecom Regulator**	
3.	*Avishek Goenka Vs. Union of India*, (2012)5SCC275	
4.	*Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India*, (2014)3SCC222	
5.	*Delhi Science Forum Vs. Union of India*, (1996)2SCC405	
6.	*Union of India Vs. Association of Unified Telecom Service Providers of India*, (2011)10SCC543	
IV	**SEBI's Power to Regulate the Securities Market**	
7.	G Sabarinathan "*SEBI's Regulation of the Indian Securities Market: A Critical Review of the Major Developments*", Vikalpa Volume 35 No 4 October - December 2010	
8.	*Clariant International Ltd. Vs. Stock Exchange Board of India*, (2004)8SCC524	
9.	*Sahara India Real Estate Corporation Ltd. Vs. Securities and Exchange Board of India*, (2013)1SCC1	
V	**Regulation of Financial Sector**	
10.	Ashima Goyal, "*Regulatory Structure for Financial Stability and Development"* Economic and Political Weekly, Vol. 45, No. 39 (SEPTEMBER 25-OCTOBER 1, 2010), pp. 51 , 53-61	
11.	S. Subramanyan, "*Why the Financial Sector Needs a Single Regulator*" Economic and Political Weekly, Vol. 37, No. 2 (Jan. 12-18, 2002), pp. 169-172	
VI	**IRDA and the Regulation of the Insurance Sector**	

12.	*Heritage Insurance Brokers Pvt. Ltd. Vs.Insurance Regulatory and Devlopment Authority*, MANU/WB/0063/2013
VII	**Regulation of Corporate Governance**
13.	World Bank Report on the Observance Of Standards and Codes: Corporate Governance Country Assessment - India http://www.worldbank.org/ifa/rosc_cg_ind.pdf
VIII	**Regulation of Media**
14.	*Advocates Association Bangalore "Vakeelara B Havana" Vs. Union of India*, MANU/KA/0736/2012
15.	*Destruction of Public and Private Properties Vs. State of A.P.*, (2009)5SCC212
16.	*Deepak Maini Vs. Star Plus*, MANU/DE/1671/2009
17.	*Court on its Own Motion Vs. State*, MANU/DE/8932/2007
18.	*Secretary, Ministry of Information and Broadcasting, Govt. of India Vs. Cricket Association of Bengal*, (1995)2 SCC 161
IX	**Role of Sports Regulators**
19.	*Board of Control for Cricket in India Vs. Cricket Association of Bihar, 2015(1)SCALE608*
20.	*Zee Telefilms Ltd. Vs. Union of India, (2005)4SCC649*
X	**Regulation of Public Utilities & Natural Resources**
21.	*Multi Commodity Exchange of India Limited Vs. Central Electricity Regulatory Commission, New Delhi*, MANU/MH/0099/2011
22.	*Association of Natural Gas and Ors. Vs Union of India*, (2004)4SCC489

NOTE: The Cases in the Reference Material have been edited in order to highlight certain issues for discussion in the programme. Please read the full judgment for a conclusive opinion.

III

TRAI AS A TELECOM REGULATOR

(2012)5SCC275

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 285 of 2010 (Under Article 32 of the Constitution of India)

Decided On: 27.04.2012

Avishek Goenka Vs. Union of India (UOI) and Anr.

Hon'ble Judges/Coram: S.H. Kapadia, C.J.I., A.K. Patnaik and Swatanter Kumar, JJ

In terms of Section 11 of the Telecom Regulatory Authority of India Act, 1997 (for short, 'the Act'), it is a statutory obligation upon the TRAI to recommend a regulatory regime which will serve the purpose of development, facilitate competition and promote efficiency, while taking due precautions in regard to safety of the people at large and the various other aspects of subscriber verification. Similarly, the DoT is responsible for discharging its functions and duties as, ultimately, it is the responsibility of the Government to provide for the safety of its citizens. The TRAI has to regulate the interests of telecom service providers and subscribers, so as to permit and ensure orderly growth of telecom sector. The Government of India and TRAI, both, have to attain this delicate balance of interests by providing relevant instructions or guidelines in a timely manner and ensuring their implementation in accordance with law.

If one examines the powers and functions of TRAI, as postulated under Section 11 of the Act, it is clear that TRAI would not only recommend, to the DoT, the terms and conditions upon which a licence is granted to a service provider but has to also ensure compliance of the same and may recommend revocation of licence in the event of non-compliance with the Regulations. It has to perform very objectively one of its main functions, i.e., to facilitate competition and promote efficiency in the operation of the telecommunication services, so as to facilitate growth in such services. It is expected of this regulatory authority to monitor the quality of service and even conduct periodical survey to ensure proper implementation.

What emerges from the above discussion is that the stakeholders DoT, TRAI and the licencees are ad idem in regard to most of the issues in terms of the instructions prepared by the DoT. However, there are certain points on which there is a difference of opinion between the DoT and the TRAI. This limited divergence is required to be resolved by further clarification and issuance of more specific instructions. These issues fall under two categories: - firstly, what has been pointed out by the Petitioner and secondly, where the DoT and the TRAI hold different opinion as noticed above. Proper deliberation between the stakeholders possessed of technical knowhow can resolve such issues usefully and effectively.

The abovementioned points of divergence between TRAI and DoT are matters which will have serious ramifications not only vis-`-vis the regulatory authorities and the licensees but also on the subscribers and the entire country. These aspects demand serious deliberation at the hands of the technical experts. It will not be appropriate for this Court to examine these technical aspects, as such matters are better left in the domain of the statutory or expert bodies created for that purpose. The concept of 'regulatory regime' has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.

We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical knowhow and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring that public interest is safeguarded and arbitrary decisions do not prevail. This Court in the case of Delhi Science Forum and Ors. v. Union of India MANU/SC/0360/1996 : AIR 1996 SC 1356 : 1996) 2 SCC 405, while dealing with provision of licences to private companies as well as establishment, maintenance and working of such licences under the provisions of the Telegraph Act, 1885, applied the 'wednesbury principle' and held that 'as such the Central Government is expected to put such conditions while granting licences which shall safeguard the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act'. It is the specific case of the Petitioner and some of the affected parties in the present

proceedings that certain very important aspects, including security, have not been appropriately dealt with in the instructions dated 14th March, 2011.

Some divergence on certain specific issues of the regulatory regime has been projected in the instructions and comments filed by TRAI and DoT. They need to be resolved but, in absence of any technical knowhow or expertise being available with this Court, it will not be appropriate to decide, by a judicial dictum, as to which of the views expressed by these high powered bodies would be more beneficial to the regulatory regime and will prove more effective in advancing the public interest. Essentially this should be left to be clarified and the disputes be resolved by the expert bodies themselves. It is a settled canon of law that in a regulatory regime, the terms and conditions imposed thereunder should be unambiguous and certain. It is expected that the authorities concerned would enforce the regulatory regime with exactitude. Therefore, it is not only desirable but also imperative that TRAI and DoT seriously cogitate on the issues where divergence has been expressed between them and bring unanimity in the terms and conditions of licences which would form an integral part of the instructions dated 14th March, 2011.

(2014)3SCC222

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 5253 of 2010, 951-952, 3298, 3299, 4529, 5834-5836, 5837, 6049 of 2005, 802, 2731, 2794, 3504 of 2006, 4965-4966 of 2007, 177, 598-599 of 2008, 5184, 5873, 6068, 6255, D28298 of 2010, 271-281 of 2011 and T.C. (C) No. 39 of 2010

Decided On: 06.12.2013

Bharat Sanchar Nigam Limited Vs. Telecom Regulatory Authority of India and Ors.

Hon'ble Judges/Coram: G.S. Singhvi, B.S. Chauhan and F.M. Ibrahim Kalifulla, JJ.

By an order dated 6.2.2007 passed in Civil Appeal No. 3298 of 2005 *Telecom Regulatory TRAI of India (TRAI) v. Bharat Sanchar Nigam Limited (BSNL)* and connected matters, a two Judge Bench

made a reference to the larger Bench for determination of the following substantial questions of law of public importance:

1. Whether in the event of any inconsistency between the terms and conditions of the licenses issued under Section 4 of the Indian Telegraph Act, 1885 and the provisions of the Telecom Regulatory TRAI of India Act, 1997 (for short, 'the TRAI Act '), the provisions of the TRAI Act would prevail in view of the purpose and object for which the TRAI Act has been passed, i.e., for ensuring rapid development of telecommunications in the country incorporating the most modern technology and, at the same time, protecting the interests of the consumers and the service providers?
2. Whether TRAI has powers to fix the terms and conditions of inter connectivity between service providers, in respect of all the licenses, irrespective of the fact whether licenses issued before or after 24.1.2000-especially in view of the non-obstante clause in Sub-section (1) of Section 11 and Sub-clause (ii) of Clause (b) of Sub-section (1) of Section 11 of the TRAI (Amendment) Act of 2000?
3. Whether TRAI has no power to fix terms and conditions of interconnectivity between service providers in respect of licenses issued after 24.01.2000 including terms and conditions of interconnection agreements-in view of, inter-alia, the scheme laid down in the provisos to Section 11(1) of the TRAI Act , 1997 as amended on 24.01.2000 and if it does not have any such power what would be the harmonious construction of the amended Clause 11(1)(b)(ii) and the new scheme more specifically embodied in the provisos?
4. Whether under the amended provisions of the TRAI Act , 1997 introduced w.e.f. 24.01.2000-the harmonious construction of Section 11(1)(b)(ii) and the scheme of the provisos to Section 11(1) would allow the TRAI to have the power to fix the terms and conditions of interconnectivity with respect to licenses issued before 24.1.2000, only to the extent the licensor (Govt. of India) accepts the recommendations of the TRAI for incorporation in the new licenses, so as to achieve level playing field between the service providers granted licenses before and after the amendment of the TRAI Act ?
5. Whether the appeals are maintainable in the present form?

Held,

The term 'regulate' is elastic enough to include the power to issue directions or to make Regulations and the mere fact that the expression "as may be provided in the Regulations" appearing in Clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that Sub-section does not mean that the Regulations cannot be framed under Section 36 on the subjects specified in Clauses (i) to (vi) of Section 11(1)(b). In fact, by framing Regulations under Section 36, the TRAI can facilitate the exercise of functions under various clauses of Section 11(1)(b) including Clauses (i) to (vi).

Under Sub-section (1) thereof the TRAI can make Regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the Regulations must be consistent with the TRAI Act and the Rules made thereunder. There is no other restriction on the power of the TRAI to make Regulations. In terms of Section 37, the Regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under Sub-section (1)" specifies various topics on which Regulations can be made by the TRAI. Three of these topics relate to meetings of the TRAI, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by the TRAI. The remaining two topics specified in Clauses (e) and (f) of Section 36(2) are directly referable to Section 11(1)(b)(viii) and 11(1)(c). These are substantive functions of the TRAI. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by the TRAI under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).

It is settled law that if power is conferred upon an TRAI/body to make subordinate legislation in general terms, the particularization of topics is merely illustrative and does not limit the scope of general power. Section 11(1)(b)(iv) specifically postulates making of Regulations for discharging the functions specified in those clauses. Section 11(2), which contains non-obstante clause vis-`-vis the Indian Telegraph Act, 1885, lays down that the TRAI may, from time to time, by order notify the rates at which the telecommunication services within or outside India shall be provided under the TRAI Act subject to the limitation specified in

Section 11(3). Under Section 12(1), the TRAI is empowered to issue order and call upon any service provider to furnish such information or explanation relating to its affair or appoint one or more persons to make an inquiry in relation to the affairs of any service provider and direct inspection of the books of account or other documents of any service provider. Sections 12(4) and 13 of the TRAI Act on which reliance has been placed by the learned Counsel for the Respondents in support of their argument that the TRAI cannot frame Regulations on the subjects mentioned in these two sections are only enabling provisions. This is evinced from the expressions "shall have the power" used in Section 12(4) and "The TRAI may" used in Section 13. In terms of Section 12(4), the TRAI can issue such directions to service providers, as it may consider necessary, for proper functioning by service providers. Section 13 lays down that the TRAI may for discharge of its functions under Section 11(1), issue such directions to the service providers, as it may consider necessary. The scope of this provision is limited by the proviso, which lays down that no direction under Section 12(4) or Section 13 shall be issued except on matters specified in Section 11(1)(b). It is thus clear that in discharge of its functions, the TRAI can issue directions to the service providers. The TRAI Act speaks of many players like the licensors and users, who do not come within the ambit of the term "service provider". If the TRAI has to discharge its functions qua the licensors or users, then it will have to use powers under provisions other than Sections 12(4) and 13. Therefore, in exercise of power under Section 36(1), the TRAI can make Regulations which may empower it to issue directions of general character applicable to service providers and Ors. and it cannot be said that by making Regulations under Section 36(1) the TRAI has encroached upon the field occupied by Sections 12(4) and 13 of the Act.

A reading of the plain language of Section 33 makes it clear that the TRAI can, by general or special order, delegate to any member or officer of the TRAI or any other person such of its powers and functions under the TRAI Act except the power to settle disputes under Chapter IV or make Regulations under Section 36. This means that the power to make Regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the Regulations made under the TRAI Act are placed on par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and Regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the Regulations framed by the TRAI can be made ineffective or modified by Parliament and by no other body.

In view of the above discussion and the propositions laid down in the judgments referred to in the preceding paragraphs, we hold that the power vested in the TRAI under Section 36(1) to make Regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the TRAI Act and the Rules framed under Section 35 thereof. There is no other limitation on the exercise of power by the TRAI under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13.

(1996)2SCC405

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 691 of 1995 etc.

Decided On: 19.02.1996

Delhi Science Forum and others Vs. Union of India and another

Hon'ble Judges/Coram: N.P. Singh and K. Venkataswami, JJ.

Governmental policy for providing regulatory body for managing telecommunication affairs was questioned through several writ petitions by appellants. All the petitions were referred to Supreme Court for decision. The appellants contended that delegation of authority by licences to private body and non-governmental companies in telecommunication affairs against economic interest and dangerous for national security. The Supreme Court found Telecom policy adopted by Government necessary consequence of liberalisation of economy.

The new Telecom Policy is not only a commercial venture of the Central Government, but the object of the policy is also to improve the service so that the said service should reach the common man and should be within his reach. The different licensees should not be left to implement the said Telecom Policy according to their perception. It has rightly been urged that while implementing the Telecom Policy the security aspect cannot be overlooked. The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality

in the Telecom Sector. The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DOT/MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good.

(2011)10SCC543

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 5059 of 2007, 179-180 of 2008, 363 of 2008, 1229-1230 of 2008, 2065 of 2008, 2479 of 2008, 1552 of 2009, 3868 of 2009, 7049 of 2010, 7062 of 2010, 7063-7064 of 2010, 7443 of 2010, 7446 of 2010, 7126 of 2010, 7444 of 2010, 7445 of 2010, 9646-9661 of 2010, 2030 of 2011, 2031 of 2011, 2270 of 2011, 3245 of 2011, 5450-5451 of 2011, 311-314 and 317-318 of 2008, Civil Appeal Nos. 8627-8628 of 2011 (Arising out of SLP (C) Nos. 1786-1787 of 2009) and Civil Appeal Nos. 8625-8626 of 2011 (Arising out of SLP (C) Nos. 6641-6642 of 2010)

Decided On: 11.10.2011

Union of India (UOI) and Anr. Vs. Association of Unified Telecom Service Providers of India and Ors.

Hon'ble Judges/Coram: R.V. Raveendran and A.K. Patnaik, JJ.

(i). Whether after dismissal of Civil Appeal No. 84 of 2007 of the Union of India against the order dated 07.07.2006 of the TDSAT, by this Court by order dated 19.01.2007, the Union of India can re-agitate the question decided in the order dated 07.07.2006 that the Adjusted Gross Revenue will include only revenue arising from licensed activities and not revenue from activities outside the license of the licensee.

As per the express language of the order dated 19.01.2007 of this Court in Civil Appeal No. 84 of 2007, Union of India could raise each of the grounds extracted above before the TDSAT. Hence, even if we hold that the order dated 07.07.2006 of the TDSAT got merged with the order dated 19.01.2007 of this Court passed in Civil Appeal No. 84 of 2007, by the express liberty granted by this Court in the order dated 19.01.2007, Union of India could urge before the TDSAT all the contentions covered under Ground Nos. 1 to 6 extracted above including the contention that the definition of Adjusted Gross Revenue as given in the license could not be challenged by the licensee before the TDSAT and will include all items of revenue mentioned in the definition of Adjusted Gross Revenue in the license.

(ii). Whether the TRAI and the TDSAT have jurisdiction to decide whether the terms and conditions of license which had been finalized by the Central Government and incorporated in the license agreement including the definition of Adjusted Gross Revenue.

The provisions in the TRAI Act show that notwithstanding Sub-section (1) of Section 4 of the Telegraph Act vesting exclusive privilege on the Central Government in respect of telecommunication activities and notwithstanding the proviso to Sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of license including the payment to be paid by the licensee for the license, the TRAI has been conferred with the statutory power to make recommendations on the terms and conditions of the license to a service provider and the Central Government was bound to seek the recommendations of the TRAI on such terms and conditions at different stages, but the recommendations of the TRAI are not binding on the Central Government and the final decision on the terms and conditions of a license to a service provider rested with the Central Government. The legal consequence is that if there is a difference between the TRAI and the Central Government with regard to a particular term or condition of a license, as in the present case, the recommendations of the TRAI will not prevail and instead the decision of the Central Government will be final and binding.

The scheme of TRAI Act therefore is that the TRAI being an expert body discharges recommendatory functions under Clause (a) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under Clauses (b), (c) and (d) of Sub-section (1) of Section 11 of the TRAI Act. TRAI being an expert body, the recommendations of the TRAI under

Clause (a) of Sub-section (1) of Section 11 of the TRAI Act have to be given due weight age by the Central Government but the recommendations of the TRAI are not binding on the Central Government. On the other hand, the regulatory and other functions under Clauses (b), (c) and (d) of Sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject to only appeal in accordance with the provisions of the TRAI Act.

If the TDSAT found that there was no effective consultation with the TRAI on the opinion of the expert on accountancy, the TDSAT could have at best, if it had the jurisdiction to decide the dispute, directed the TRAI to consider the opinion of the expert on accountancy and send its recommendations to the Central Government and directed the Central Government to consider such fresh recommendations of the TRAI as provided in the provisos to Section 11(1) of the TRAI Act. Instead the TDSAT has considered the recommendations of the TRAI and passed the fresh impugned order dated 30.08.2007 contrary to the very provisions of Section 11(1)(a) of the TRAI Act and the provisos thereto. At any rate, as the Central Government has already considered the fresh recommendations of the TRAI and has not accepted the same and is not agreeable to alter the definition of Adjusted Gross Revenue, the decision of the Central Government on the point was final under the first proviso and the fifth proviso to Section 11(1) of the TRAI Act, 1997.

Once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. We, therefore, hold that the TRAI and the TDSAT had no jurisdiction to decide on the validity of the definition of Adjusted Gross Revenue in the license agreement and to exclude certain items of revenue which were included in the definition of Adjusted Gross Revenue in the license agreement between the licensor and the licensee. The orders impugned in these appeals are therefore set aside and the matters are remitted to TDSAT to pass fresh orders in accordance with law.

(iii). Whether as a result of the Union of India not filing an appeal against the order dated 07.07.2006 of the TDSAT passed in favour of some of the licensees, the said order dated 07.07.2006 had not become binding on the Union of India with regard to the issue that

revenue realized from activities beyond the licensed activities cannot be included in the Adjusted Gross Revenue.

the Tribunal in its order dated 07.07.2006 has not just decided a dispute on the interpretation of Adjusted Gross Revenue in the license, but has decided on the validity of the definition of Adjusted Gross Revenue in the license. As we have already held, the Tribunal had no jurisdiction to decide on the validity of the terms and conditions of the license including the definition of Adjusted Gross Revenue incorporated in the license agreement. Hence, the order dated 07.07.2006 of the Tribunal in so far as it decides that revenue realized by the licensee from activities beyond the license will be excluded from Adjusted Gross Revenue dehors the definition of Adjusted Gross Revenue in the license agreement is without jurisdiction and is a nullity and the principle of res judicator will not apply. We accordingly hold that the order dated 07.07.2006 of the Tribunal was not binding on the Union of India even in those cases in which the Union of India did not file any appeal against the order dated 07.07.2006 before this Court.

(iv). Whether the licensee can challenge the computation of Adjusted Gross Revenue, and if so, at what stage and on what grounds.

Section 14 (a)(i) of the TRAI Act, as we have seen, provides that the TDSAT can adjudicate any dispute between the licensor and the licensee. One such dispute can be that the computation of Adjusted Gross Revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the license agreement. This dispute however can be raised by the licensee, after the license agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the TDSAT will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement.

As stated for some of the licensees, demands have already been raised on them. Hence if the demands have been raised time is granted to the licensees to raise the dispute before TDSAT against the demands and during this period the demands will not be enforced.

IV

SEBI'S POWER TO REGULATE THE SECURITIES MARKET

(2004)8SCC524

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 3183, 3701 and 3872 of 2003 and D3952 of 2004

Decided On: 25.08.2004

Clariant International Ltd. and Anr. Vs. Securities and Exchange Board of India

Hon'ble Judges/Coram: N. Santosh Hegde, S.B. Sinha and A.K. Mathur, JJ.

Present appeals filed by acquirer company as well as SEBI against order whereby interest is made payable only to those shareholders who held shares of company on triggering date

Rate of interest :

Section 11 of the Act provides that it shall be the duty of the Board to protect the interest of investors in securities. Regulation 44 of 1997, however, empowered the Board to issue directions only in the interest of the securities market. The expression "in the interest of the investors" did not occur therein. Regulation 44 of 2002 Regulations, thus, confers a wider power upon the Board. The said power is without prejudice to its right to initiate action under Chapter VIA and Section 24 of the Act which deals with offences . Regulation 44 of 2002 Regulations, furthermore, empowers the Board to issue directions both in the interest of the securities market as well as for protection of interest of investors. Such directions may be issued in its discretion. It, however, in its discretion may or may not issue such directions. Regulation 44 (i) of Regulations, therefore, confers a power upon the Board to issue directions also in the interest of the investors which would include a direction to pay interest.

A direction in terms of Regulation 44 which was in the interest of securities market indisputably would have caused civil or evil consequences on the defaulters. Clause (i) of Regulation 44, however, does not provide for any penal consequence. It provides for only a civil consequence. By reason of the said provision, the power of the Board to issue directions is sought to be restricted to pay the amount consideration together with interest at the rate not less than the interest payable by

banks on fixed deposits. Both the Board and the Tribunal have proceeded on the basis that the interest is to be paid with a view to recompense the shareholders and not by way of penalty or damages. Such a direction, therefore, was for the purpose of protecting the interest of investors and not "in the interest of the securities market". The transactions in the market are not thereby affected one way or the other. The Board, as noticed hereinbefore, has a discretion in the matter and, thus, it may or may not issue such a direction. The shareholders do not have any say in the matter. As a necessary concomitant, they have no legal right.

The Board further having a discretionary jurisdiction must exercise the same strictly in accordance with law and judiciously. Such discretion must be a sound exercise in law. The discretionary jurisdiction, it is well- known, although may be of wide amplitude as the expression "as it deems fit" has been used but in view of the fact that civil consequence would ensue by reason thereof, the same must be exercised fairly and bona fide. The discretion so exercised is subject to appeal as also judicial review, and, thus, must also answer the test of reasonableness.

By reason of Regulation 44, as substituted in 2002, the discretionary jurisdiction of the Board is curtailed. It in terms of Regulations 1997 could award interest by way of damages but by reason of Regulation 2002, its power is limited to grant interest to compensate the shareholders for the loss suffered by them arising out of the delay in making the public offer. The courts of law can take judicial notice of both inflation as also fall in bank rate of interest. The bank rate of interest both for commercial purpose and other purposes had been the subject-matter of statutory provisions as also the judge-made laws. The statutory changes brought about must be noticed by the court keeping in view the fact that the nature of jurisdiction by the Board has been changed. The mischief rule also in this case should be applied. Furthermore while construing such provisions, the courts must take into consideration the provisions of the law as had been interpreted by courts prior thereto.

To whom interest is payable:

A shareholder having regard to the direction issued by the Tribunal must be one who was a shareholder on the triggering date. Purpose and object of creating a legal fiction is well-known. Once a fiction is created upon imagining a certain state of affairs, the imagination cannot be

permitted to be boggled when it comes to the inevitable corollaries thereof. Directions by the Board are required to be issued for the purpose of protecting the interest of the investors which would imply that such protection be extended to the persons who are entitled thereto and not any other shareholder who would get the same by windfall. The shareholders contemplated under clause (i) of Regulation 44 must be those shareholders whose shares have been accepted upon public announcement of offer and who have suffered loss owing to blockage of amount by not being able to sell the shares held by them. The object of the said provision is to protect the interest of such shareholders who had suffered a loss for delay in making the public announcement and, thus, may have to be compensated. The very fact that the bench-mark as regard the rate of interest has been fixed is also a pointer to the fact that the interest is to be paid to such investors who had suffered some loss. While compensating a person, the court should see that he is not unjustly enriched. Interest is directed to be paid on the default of the acquirer occasioning loss suffered by an investor of his money. The question of paying interest by way of compensation to persons who had not suffered any loss, thus, would not arise. Interest was, therefore, payable only to such persons who were shareholders of target company as on the triggering date.

The difference of amount calculated on the basis of interest at the rate of 10% and 15% would be about Rs.85 per equity share. If shareholders are to be compensated owing to the act of delay on the part of the acquirer in making the public announcement, in a case of this nature, an attempt should be made to strike a delicate balance. The bank rate of interest payable by the nationalized banks on a fixed deposit for the period from 1998 to 2003 was around 9%. This fact has been accepted by the Tribunal. It has also been accepted by the Tribunal that the decisions of this Court relating to rate of interest payable by nationalized banks on fixed deposits and on the compensation amount fixed under the Motor Vehicles Act would be 9% p.a. The Tribunal has applied the said test but, as discussed hereinbefore, committed two apparent errors, namely, it did not think fit to calculate the mean of the rate of interest payable by the banks and; it thought that quarterly rests is payable on the deposits made by an investor in a bank. Quarterly rests are only payable in commercial transactions when a bank grants loans. When any criteria is fixed by a statute or by a policy, an attempt should be made by the authority making the delegated legislation to follow the policy formulation broadly and substantially and in conformity thereof. The rate of interest fixed by the Board and the Tribunal, thus, in our opinion, was not correct.

Effect of Board being an expert body:

The modern sociological condition as also the needs of the time have necessitated growth of administrative law and administrative tribunal. Executive functions of the State calls for exercise of discretion. The executive also, thus, performs quasi judicial and quasi legislative functions and, in this view of the matter, the administrative adjudication has become an indispensable part of the modern state activity.

Administrative Tribunals may be called a specialized court of law, although it does not fulfil the criteria of a law court as is ordinarily understood inasmuch as it cannot like an ordinary court of law entertain suits on various matters, including the matter relating to the vires of legislation. However, such a Tribunal like ordinary law courts are bound by the rules of evidence and procedure as laid down under the law and are required to determine the lis brought before it strictly in accordance with the law.

A key feature of this Tribunal would be flexibility. Possible innovations would be the involvement of expertise from other professions (architects, surveyors, etc.); "multidiscipline adjudicating panels"; broad discretion over rights of appearance; power to instruct independent counsel on behalf of the Tribunal or members of the public; resources for direct investigation by the Tribunal itself; and incorporation into the Tribunal of the existing inspectorate to deal with "cases of a lesser dimension."

The Board is indisputably an expert body. But when it exercises its quasi judicial functions; its decisions are subject to appeal. The Appellate Tribunal is also an expert Tribunal. Only such persons who have the requisite qualifications are to be appointed as members thereof as would appear from Sub-section 2 of Section 15M of the said Act

The conflict of jurisdiction between an expert tribunal vis-`-vis the courts in the context of the doctrine of separation of powers poses a problem even in other countries. Throughout the world, specialized adjudicators are performing numerous roles. There are diverse specialized tribunals in America as also in the Commonwealth countries. In certain States, statutes have been enacted authorizing appeals to the Administrative Division which jurisdiction used to be exercised by the

High Court alone. The appeals range from questions of law to selected questions of fact, to full rehearing of all issues.

Had the intention of the Parliament been to limit the jurisdiction of the Tribunal, it could say so explicitly as it has been done in terms of Section 15Z of the Act whereby the jurisdiction of this Court to hear the appeal is limited to the question of law. The jurisdiction of the appellate authority under the Act is not in any way fettered by the statute and, thus, it exercises all the jurisdiction as that of the Board. It can exercise its discretionary jurisdiction in the same manner as the Board.

The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, run counter to the doctrine of separation of powers. Integration of power by vesting legislative, executive and judicial powers in the same body, in future, may raise a several public law concerns as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers.

Our Constitution although does not incorporate the doctrine of separation of powers in its full rigour but it does make horizontal division of powers between the Legislature, Executive and Judiciary. [See Rai Sahib Ram Jawaya Kapur and Ors. Vs . The State of Punjab, MANU/SC/0011/1955 : [1955]2SCR225].

The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise of such wide ranging power is that it must comply with the Constitution and the Act. In that view of the matter, where an expert Tribunal has been constituted, the scrutiny at its end must be held to be of wide import. The Tribunal, another expert body, must, thus, be allowed to exercise its own jurisdiction conferred on it by the statute without any limitation.

In *Cellular Operators Association of India and Ors. vs . Union of India and Ors.* [2002]SUPP5SCR222 , this Court observed :

> *"TDSAT was required to exercise its jurisdiction in terms of Section 14A of the Act. TDSAT itself is an expert body and its jurisdiction is wide having regard to sub- section*

(7) of Section 14A thereof. Its jurisdiction extends to examining the legality, propriety or correctness of a direction/order or decision of the authority in terms of sub-section (2) of Section 14 as also the dispute made in an application under sub-section (1) thereof. The approach of the learned TDSAT, being on the premise that its jurisdiction is limited or akin to the power of judicial review is, therefore, wholly unsustainable. The extent of jurisdiction of a court or a Tribunal depends upon the relevant statute. TDSAT is a creature of a statute. Its jurisdiction is also conferred by a statute. The purpose of creation of TDSAT has expressly been stated by the Parliament in the Amending Act of 2000. TDSAT, thus, failed to take into consideration the amplitude of its jurisdiction and thus misdirected itself in law"

The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees".

In *West Bengal Electricity Regulatory Commission vs . CESC Ltd.* AIR2002SC3588 , a Bench of this Court, (in which one of us Santosh Hegde, J. was a member), observed :

"...From s. 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a judicial member as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect to the judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. therefore, we recommend that the appellate power against an order of the state commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act 1997 in chapter IV, a similar provision is made for an appeal to a special appellate tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think

a similar appellate provisions may be considered to make the relief of appeal more effective."

The provisions of the 1992 Act and the Regulations framed thereunder squarely apply to the observations made by this Court in *West Bengal Electricity Regulation Commission (supra).*

We are of the opinion that while calculating the amount of interest, the amount of dividend paid to the shareholders should be excluded. The shareholders who by reason of default on the part of acquirer have been deprived of interest payable on the difference of the offer price and market price would be entitled to interest as direction to pay interest being not penal in nature, they cannot make double gains. The Tribunal, in our opinion, has committed an error in holding that the dividend being a participatory benefit available to a shareholder and being distinct from interest, the same should not be taken into consideration. The regulation fixes a benchmark as regard rate of interest. If any amount has been received by the shareholders by keeping the shares till a public offer was made, the amounts so received by him by way of dividend should be set off. We would reiterate that the shareholders did not have any right to get interest and in effect and substance they were only to be compensated for the loss of interest and nothing more. On the same analogy, if they had received some gains by holding the shares fairly for a long period of five years, the amount of dividend cannot be permitted to be retained by them. The amount of dividend should, thus, be adjusted towards the interest payable to them.

We, therefore, direct, having regard to the peculiar facts and circumstances of the case, that the interest of justice would be sub-served, if the rate of interest is directed to be paid at 10% per annum from March 1998 till 2003. The interest at the rate of 10% per annum is directed in stead and place of normal 9% having regard to the fact that the Appellants themselves in their Memorandum of Appeal filed before the Tribunal had contended that the Board should have granted interest at the rate of 10% per annum instead of 15%. If any dividend was paid during the said period, the same shall be adjusted with the amount of interest.

The appellants had deposited a total amount of 111.50 crores which sums have been invested. The interest accruing thereupon shall enure to the benefit of those shareholders who were entitled to

the payment of interest for the period during which the said amount remained invested in terms of the order of this Court..

We uphold that part of the decision of the Tribunal whereby it was held that those persons who were the shareholders till 24.2.1998 and continued to be shareholders on the closure day of public offer alone would be entitled to interest.

(2013)1SCC1

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 9813 and 9833 of 2011

Decided On: 31.08.2012

Sahara India Real Estate Corporation Ltd. and Ors. Vs. Securities and Exchange Board of India and Anr.

Hon'ble Judges/Coram: K.S. Panicker Radhakrishnan and J.S. Khehar, JJ.

The appellants were the companies controlled by Sahara Group. Appellants issued Optionally Fully Convertible Debentures (OFCDs) by way of private placement and filed details of OFCDs in the Red Herring Prospectus (RHP) with the Registrar of Companies (RoC). Appellants have specifically indicated in the RHP that they did not intend to get their securities listed on any recognized Stock Exchange. It was also stated in the RHP that only those persons to whom the Information Memorandum (IM) was circulated and/or approached privately who were associated/affiliated or connected in any manner with Sahara Group, would be eligible to apply. SEBI received complaint from 'Professional Group for Investors Protection' alleging that appellants were issuing convertible bonds to the public throughout the country. It was also alleged that appellants were issuing Housing bonds without complying with Rules/Regulations/Guidelines

issued by RBI/MCA. Thereafter, SEBI issued summons directing the appellants to furnish the requisite information. Appellants replied that they were not a listed company, nor did they intend to get its securities listed on any recognized Stock Exchange in India and that OFCDs issued by the appellants would not fall u/ss. 55A(a) and/or (b) of Company Act and hence the issue and/or transfer of securities and/or non-payment of dividend or administration of either the company or its issuance of OFCDs, were not to be administered by SEBI and all matters pertaining to the unlisted company would fall under the administration of the Central Government or RoC. It was also submitted that Regulations. 3 and 6 of Regulations would not apply, since there was no public issue either in the nature of an initial public offer or further public offer.

SEBI passed its order and held that OFCDs issued would come within the definition of 'securities' as defined u/s. 2(h) of SCR Act. SEBI also held that those OFCDs issued to the public were in the nature of Hybrid securities, marketable and would not fall outside the genus of debentures. It was further held that the OFCDs issued were debentures and the appellants have designed the OFCDs to invite subscription from the public at large through their agents, private offices and information memorandum. SEBI concluded that OFCDs issued were public issues and the appellants were bound to comply with s. 73 of the Company Act, in compliance with the parameters provided by the first proviso of s. 67(3) of the Company Act. SEBI took the view that OFCDs issued by appellants should have been listed on a recognized Stock Exchange and ought to have followed the disclosure requirement and other investors' protection norms.

On appeal, Tribunal upheld the order passed by the SEBI and directed the appellants to repay within 6 months, the amount collected from the investors, on the terms as set out by the order of the SEBI. Hence, the instant appeal

Whether SEBI has jurisdiction to administer the provisions of ss. 56, 62, 63, 67, 73 and the related provisions of the Company Act, after the insertion of s. 55A(b) of Company Act w.e.f. 13-12-2000. Held, so far as the provisions enumerated in the s. 55A of the Company Act, so far as they relate to issue and transfer of securities and non-payment of dividend was concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized Stock Exchange in India. In any other case, i.e. rest of the matters, that was excluding matters relating to issue and transfer of

securities and non-payment of dividend be administered by the Central Government in the case of listed public companies and those companies which intend to get their securities listed on any recognized Stock Exchange in India. Explanation to s. 55A of Company Act further clarifies the position so as to remove doubts, saying all powers relating to other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares, should be exercised by the Central Government, Tribunal or the RoC, as the case may be.

In the instant case, SEBI has the powers to administer the provisions referred to in the opening part of s. 55A of Company Act which relates to issue and transfer of securities and non-payment of dividend by public companies like appellants, which have issued securities to 50 persons or more, though not listed on a recognized Stock Exchange, whether they intended to list their securities or not. No illegality in the proceedings initiated by SEBI as well as in the order passed by SEBI and Tribunal and they were accordingly upheld. The order passed by SC in appeals filed by the appellants, praying for extending the time for refund of the amount of Rs.17,400 crores, as ordered by Tribunal, stands vacated and consequently the entire amount will have to be refunded by appellants with 15% interest. Appeals dismissed.

Whether the public companies was legally obliged to file the final prospectus u/s. 60B(9) of Act with SEBI - Held, prospectus was the principal medium through which the investors get information of the strength and weakness of the company, its creditworthiness, credence and confidence of promoters and the company's prospects. SEBI, u/s. 60B(9) of Act, as a Regulator was legally obliged to examine whether, upon the closing of the offer of securities, a final prospectus giving the details of the total capital raised, whether by way of debt or share capital and the closing of the securities and other details as were not complete in RHPs, have been filed in a case of listed public company with SEBI. This duty was cast on the Registrar alongwith SEBI in the case of a listed public company and in any other case only the Registrar. Hence, appellants were legally obliged to file the final prospectus u/s. 60B(9) of Act with SEBI, failure to do so attracts criminal liability. Appeals dismissed.

Whether s. 67 of the Act implies that the company's offer of shares or debentures to 50 or more persons would ipso facto become a public issue, subject to certain exceptions provided

therein and the scope and ambit of the first proviso to s. 67(3) of the Act. - Held, if an offer of securities was made to 50 or more persons, it would be deemed to be a public issue, even if it was of domestic concern or proved that the shares or debentures were not available for subscription or purchase by persons other than those received the offer or invitation. First proviso to s. 67(3) of Act casts a legal obligation to list the securities on a recognized Stock Exchange, if the offer was made to 50 or more persons, which appellants have violated which may attract the penal provisions contained in s. 68 of the Act. Appeals dismissed.

Legal obligations with regard to Listing of Securities on Stock Exchange - What s. 73 of the Act casts an obligation on a public company intending to offer its shares or debentures to the public, to apply for listing of its securities on a recognized Stock Exchange once it invites subscription from 50 or more persons and what legal consequences would follow, if permission u/s. 73(1) of Act was not applied for listing of securities. Held, as per the proviso to ss. 67(3) and 73(1) of Act, an application for listing becomes mandatory and a legal requirement. S. 73 of the Act casts an obligation on a public company to apply for listing of its securities on a recognized Stock Exchange, once it invites subscription from 50 or more persons, which appellants have violated and they have to refund the money collected to the investors with interest. Appeals dismissed.

Scope of Guidelines and Regulations (Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009,) What was the scope and ambit of Guidelines and Regulations and whether appellants have violated the various provisions of the Guidelines and Regulations, by not complying with the disclosure requirements or investor protection measures prescribed for public issue under Guidelines and Regulations, thereby violating s. 56 of the Act. Held, Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by Regulations. In the instant case, SEBI was not informed of the issuance of securities by the appellants while the Guidelines were in force and appellants continued to mobilize funds from the public which was nothing but continued violation which started when the Guidelines were in force and also when they were replaced by Regulations. Further, it may also be recalled that any solicitation for subscription from public can be regulated only after complying with the requirements stipulated

by SEBI. Appellants have violated the Guidelines and Regulations by not complying with the disclosure requirements and investor protection measures for public, and also violated s. 56 of the Act which attracts penal provisions. Appeals dismissed.

Whether the Unlisted Public Companies (Preferential Allotment) Rules, 2003. framed by the Central Government were applicable to any offer of shares or debentures to 50 or more as per the first proviso to s. 67(3) of the Act and what was the effect of Unlisted Public Companies (Preferential Allotment) Amendment Rules, 2011and whether it would operate only prospectively making it permissible for appellants to issue OFCDs to 50 or more persons prior to 14-12-2011. Held, 2003 Rules or the 2011 Rules cannot override the provisions of ss. 67(3) and 73 of Act, being subordinate legislations, 2003 Rules were also not applicable to any offer of shares or debentures to more than 49 persons and were to be read subject to the proviso to ss. 67(3) and 73(1) of the Act. Appeals dismissed.

Whether after the insertion of the definition of 'securities' in s. 2(45AA) of Company Act as 'including hybrids' and after insertion of the separate definition of the term 'hybrid' in s. 2(19A) of the Company Act, the provision of s. 67 of Company Act would apply to OFCDs issued by appellants and what was the effect of the s. 2(h) of Securities Contracts Regulations Act, 1956, Act on it. Held, the terms 'Securities' defined in the Company Act has the same meaning as defined in the SCR Act, which would also cover the species of 'hybrid' defined u/s. 2(19A) of the Company Act. Since the definition of 'securities' u/s. 2(45AA) of the Company Act includes 'hybrids', SEBI has jurisdiction over hybrids like OFCDs issued by appellants, since the expression 'securities' has been specifically dealt with u/s. 55A of the Company Act.

Whether OFCDs issued by appellants were convertible bonds falling within the scope of s. 28(1)(b) of the Act, therefore, not 'securities' or, at any rate, not listable under the provisions of Act. Held, s. 28(1)(b) of the Act indicates that it was only convertible bonds and share/warrant of the type referred to therein, which were excluded from the applicability of the Act and not debentures, which were separate category of securities in the definition contained in s. 2(h) of Act. Contention of appellants that OFCDs issued by them were convertible bonds issued on the basis of the price agreed upon at the time of issue and, therefore, the provisions of Act, would not apply, in view of s. 28(1)(b) of Act cannot be sustained.

Whether SEBI can exercise its jurisdiction u/ss. 11(1), 11(4), 11A(1)(b) and 11B of the 1992 Act and Regulation 107 of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, over public companies who have issued shares or debentures to 50 or more, but have not complied with the provision of s. 73(1) of 1956 Act. Held, SEBI can exercise its jurisdiction u/ss. 11(1), 11(4), 11A(1)(b) and 11B of 1992 Act and regn. 107 of Regulations over public companies who have issued shares or debentures to 50 or more, but not complied with the provisions of s. 73(1) of 1956 Act by not listing its securities on a recognized Stock Exchange.

Scope of s. 73(2) of the Act regarding refund of the money collected from the Public. Held, appellants were legally bound to refund the money collected to the investors, as provided u/s. 73(2) of the Act r/w. r. 4D of the Rules and the SEBI has the power to enforce those provisions.

Civil and Criminal liability under the Company Act, 1956 - Held, appellants' conduct invites civil and criminal liability under various provisions like ss. 56(3), 62, 68, 68A, 73(3), 628, 629 and so on of Act

ORDER

We, therefore, find, on facts as well as on law, no illegality in the proceedings initiated by SEBI as well as in the order passed by SEBI (WTM) dated 23.6.2011 and SAT dated 18.10.2011 and they are accordingly upheld. The order passed by this Court in C.A. No.9813 of 2011 filed by SIREC and in C.A. No.9833 of 2011 filed by SHICL, praying for extending the time for refund of the amount of Rs.17,400 crores, as ordered by SAT, stands vacated and consequently the entire amount, including the amount mentioned above will have to be refunded by Saharas with 15% interest. We have gone through each other's judgment and fully concur with the reasoning and the views expressed therein and issue the following directions in modification of the directions issued by SEBI (WTM) which was endorsed by SAT:

236. Saharas (SIRECL & SHICL) would refund the amounts collected through RHPs dated 13.3.2008 and 16.10.2009 along with interest @ 15% per annum to SEBI from the date of receipt of the subscription amount till the date of repayment, within a period of three months from today, which shall be deposited in a Nationalized Bank bearing maximum rate of interest.

237. Saharas are also directed to furnish the details with supporting documents to establish whether they had refunded any amount to the persons who had subscribed through RHPs dated 13.3.2008 and 16.10.2009 within a period of 10 (ten) days from the pronouncement of this order and it is for the SEBI (WTM) to examine the correctness of the details furnished.

238. We make it clear that if the documents produced by Saharas are not found genuine or acceptable, then the SEBI (WTM) would proceed as if the Saharas had not refunded any amount to the real and genuine subscribers who had invested money through RHPs dated 13.3.2008 and 16.10.2009.

239. Saharas are directed to furnish all documents in their custody, particularly, the application forms submitted by subscribers, the approval and allotment of bonds and all other documents to SEBI so as to enable it to ascertain the genuineness of the subscribers as well as the amounts deposited, within a period of 10 (ten) days from the date of pronouncement of this order.

240. SEBI (WTM) shall have the liberty to engage Investigating Officers, experts in Finance and Accounts and other supporting staff to carry out directions and the expenses for the same will be borne by Saharas and be paid to SEBI.

241. SEBI (WTM) shall take steps with the aid and assistance of Investigating Authorities/Experts in Finance and Accounts and other supporting staff to examine the documents produced by Saharas so as to ascertain their genuineness and after having ascertained the same, they shall identify subscribers who had invested the money on the basis of RHPs dated 13.3.2008 and 16.10.2009 and refund the amount to them with interest on their production of relevant documents evidencing payments and after counter checking the records produced by Saharas.

242. SEBI (WTM), in the event of finding that the genuineness of the subscribers is doubtful, an opportunity shall be afforded to Saharas to satisfactorily establish the same as being legitimate and valid. It shall be open to the Saharas, in such an eventuality to associate the concerned subscribers to establish their claims. The decision of SEBI (WTM) in this behalf will be final and binding on Saharas as well as the subscribers.

243. SEBI (WTM) if, after the verification of the details furnished, is unable to find out the whereabouts of all or any of the subscribers, then the amount collected from such subscribers will be appropriated to the Government of India.

244. We also appoint Mr. Justice B.N. Agrawal, a retired Judge of this Court to oversee whether directions issued by this Court are properly and effectively complied with by the SEBI (WTM) from the date of this order. Mr. Justice B.N. Agrawal would also oversee the entire steps adopted by SEBI (WTM) and other officials for the effective and proper implementation of the directions issued by this Court. We fix an amount of Rs.5 lakhs towards the monthly remuneration payable to Mr. Justice B.N. Agrawal, this will be in addition to travelling, accommodation and other expenses, commensurate with the status of the office held by Justice B.N. Agrawal, which shall be borne by SEBI and recoverable from Saharas. Mr. Justice B.N. Agrawal is requested to take up this assignment without affecting his other engagements. We also order that all administrative expenses including the payment to the additional staff and experts, etc. would be borne by Saharas.

245. We also make it clear that if Saharas fail to comply with these directions and do not effect refund of money as directed, SEBI can take recourse to all legal remedies, including attachment and sale of properties, freezing of bank accounts etc. for realizations of the amounts.

246. We also direct SEBI(WTM) to submit a status report, duly approved by Mr. Justice B.N. Agrawal, as expeditiously as possible, and also permit SEBI (WTM) to seek further directions from this Court, as and when, found necessary.

V

REGULATION OF FINANCIAL SECTOR

VI

IRDA AND THE REGULATION OF THE INSURANCE SECTOR

MANU/WB/0063/2013

IN THE HIGH COURT OF CALCUTTA

W.P. 23500 (W) of 2012

Decided On: 14.02.2013

Heritage Insurance Brokers Pvt. Ltd. & Anr. Vs. Insurance Regulatory and Development Authority & Ors.

Hon'ble Judges/Coram: Soumen Sen, J.

The order of the Chairman dated 5th October, 2012 refusing to renew the licence issued under the Insurance Regulatory and Development Authority (Insurance Brokers) Regulations, 2002 (hereinafter referred to as "Brokers Regulations 2002") is the subject-matter of challenge in this writ application. The petitioner was functioning as a composite broker in terms of a licence initially granted on 18th February, 2003 which was subsequently renewed on 13th March, 2006 for a period of 3 years on and from 18th February, 2003. In present Application challenge was made to order of Chairman refusing to renew the licence issued under Insurance Regulatory and Development Authority (Insurance Brokers) Regulations, 2002 (Brokers Regulations)

Issues –

i) Whether Chairman acted arbitrarily, discriminatorily and improperly in rejecting the Application for renewal of licence.

ii) Whether impugned order suffered from a hostile discrimination against Petitioner.

Held,

The Insurance Regulatory and Development Authority Act, 1999 (IRDA Act) was enacted in order to ensure that the Insurance Industry is under a Regulatory Authority. In the Statement of Objects and Reasons it was observed that the Insurance Act, 1938 provides for the institution of the Controller of Insurance to act as a strong and powerful supervisory and regulatory authority with powers to direct, advise, caution, prohibit, investigate, inspect, prosecute, search, seize,

fine, amalgamate, authorize, register and liquidate insurance companies. However, after the nationalization of the life insurance industry in 1956 and the general insurance industry in 1972, the role of the Controller of Insurance diminished in significance over a period of time.

In April, 1993, the Government set up a high-powered committee headed by Shri R.N. Malhotra, former Governor, Reserve Bank of India, to examine the structure of the insurance industry and recommend changes to make it more efficient and competitive keeping in view the structural changes in other parts of the financial system of the economy. The Committee which submitted its report on 7th January, 1994 felt that the insurance regulatory apparatus should be activated even in the present set up of nationalized insurance sector and recommended, inter alia, the establishment of a strong and effective Insurance Regulatory Authority (IRA) in the form of a statutory autonomous board on the lines of Securities and Exchange Board of India.

The recommendations of the Committee were discussed at different forums including the Consultative Committee of the Parliament attached to the Ministry of Finance, managements of Life Insurance Corporation, General Insurance Corporation and its subsidiary companies, trade unions, Chambers of Commerce and consumer interest groups. The recommendation to set up an autonomous Insurance Regulatory Authority found wide support. In view of the general support received, the then Government decided to bring in a legislation to establish an independent regulatory authority for the insurance industry. Since enacting legislation for creating the Insurance Regulatory Authority would take time, the then Government constituted through a Government resolution an Interim Insurance Regulatory Authority pending the enactment of a comprehensive legislation. The Chairman, Insurance Regulatory Authority has been notified as Controller of Insurance under the Insurance Act, 1938. The said Interim Regulatory Authority functioned for sometime and was discharging certain functions and exercising powers of the Controller.

In the main text of the Bill, provisions were incorporated to give a statutory character to the Interim Insurance Regulatory Authority and the Three Schedules incorporated which contained amendments to the Insurance Act, 1938, amendment to the Life Insurance Corporation Act, 1956, the General Insurance Business (Nationalization) Act, 1972.

The authority was required to perform the role of an effective watchdog and regulatory. The various provisions of the Insurance Act, 1938 and the regulations framed thereunder are required to be read and understood in the aforesaid context. In such a situation, the nature, object and scheme of the enabling Act, the power conferred under the Rule, the concept of purposive construction and the discretion vested in the delegated bodies are required to be considered.

If the object and scheme of both the acts are scrutinized, the importance of Regulation 9 can well be appreciated. The object and scheme of both the acts would clearly suggest that such regulations are required in order to achieve the object of both the Acts. The Regulations were framed in 2002 and the Preamble to the said Regulation makes it clear that such Regulations have been framed with a view to achieve the object of both the Acts. The law should serve the public interest. The said two enactments are for the benefit of the policyholders. The Court while considering in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention should presume that the legislator intended to observe this principle. It should, therefore, strive to avoid adopting a construction which is in any way adverse to the interest of the policyholders. The same consideration should also apply in advancing the object of the said two legislations even if it may appear that there could be a possibility of conflict.

Both the Acts are the central statutes. The endeavour of the Court in interpreting statutory provisions which may be found in two different statutes with some overlapping effect is to find out which one of the two statutes is a later statute and the purpose and object of the said statute. Section 42D(3), Section 114A of the Insurance Act, 1938 read with Sections 14 and 26 of the IRDA Act, 1999 and the regulations framed under the 1999 Act if read as a whole would support the interpretation given to the said sections by learned Advocate General. There is no apparent conflict between the statutes. When Section 42D(3) was introduced, there was no regulation framed under Section 114A of the Insurance Act, 1938 or Section 26 of the IRDA Act. Although, Section 114A contemplates framing of a regulation consistent with the provisions of the Insurance Act, 1938 and the rules framed thereunder to carry out the purposes of the Act.

The regulations were framed only in 2002 under the provisions of both the statutes, namely, the Insurance Act, 1938 and IRDA Act. Regulations 2002 was framed by taking into consideration the provisions of both the statutes. The preamble to the said regulations makes it clear. While Section 114A does not contemplate any consultation with the Insurance Advisory Committee, Regulation 23 of the IRDA Act does and it was upon such consultation, said regulations were framed. The licence was granted on the basis of the 2002 Regulations. All matters concerning suspension, cancellation, renewal, etc., of such licence are to be governed by the said statute read with the regulations. It has to be kept in mind that IRDA Act is a special statute by which an authority was created to regulate the business of insurance in an orderly manner. The IRDA Act, 1999 and Regulations, 2002 contain elaborate provisions to protect the interest of the policyholders. IRDA Act has, in fact, amended the Insurance Act, 1938. It is a regulatory statute. The said provisions Regulatory Authority applied keeping in mind the purpose and object of the said Act. It would be absurd to suggest that if a ground is available for cancellation of a licence, the same could not form the basis of refusing to renew a licence. The Regulatory Authority has to act with responsibility and cautiously in matters relating to issuance and/or renewal of such licence. On the face of the violation which is as many as 58 times, it cannot be said that any formation of opinion that it would not be in the interest of the policy-holders or that such licence should not be renewed in view of the violation of Code of Conduct is not a reasonable view which is capable of being taken in such facts and circumstances.

It is true that internal guidelines indicate the procedure that are required to be followed in such matters in absence of any defined procedure but even on the basis of such guidelines it cannot be said that the decision is perverse. The petitioners had removed sizeable amounts from the "IBA" in contravention of Regulation 23. It is, however, desirable that the Regulatory Authority comes up with a guideline which can be displayed in the public domain. In fact, member (Non-life) also suggested that such guidelines should be displayed in the public domain to ensure transparency. The Chairman while considering the office notes, did not ignore such internal guidelines all together. It appears that the Chairman considered the enormity of the violation both in terms of money and the number of occasions and formed an opinion. The said decision is informed with reason which could have been arrived at on the basis of the materials on record. After all, the breach of trust cannot be ruled out. It cannot be said that the said Chairman has applied any wrong principle to consider the matter that demanded consideration or there is an

error of law apparent on the face of order. On a true and proper construction of the various provisions of the Act, this Court is of the view that in considering an application for renewal, it was open for the authority concerned to consider requirements and conditions stipulated in Regulation 9 and 14 of the Brokers Regulations 2002 since any other interpretation would lead to absurdity and would be inconsistent with the purpose and object of the said Act. In any event IRDA Act, 1999 and Regulations, 2002 are to be read in harmony with Insurance Act, 1938 in order to effectuate the object of both the Acts.

Keeping in view the objects and reasons and preamble of IRDA Act, 1999 and Brokers Regulations, 2002, it can be stated with certitude that no latitude can be given and laxity can have no place when there is a violation of fiduciary duty and breach of trust pertaining to preservation and utilization of premium and/or claim amount. From a collective perusal of the provisions of the Insurance Act, 1938 and the IRDA Act, 1999 with the Regulations, 2002, there cannot be any doubt that in considering an application for renewal of licence, the Regulatory Authority is required to take into consideration Regulation 9 of the 2002 Regulations and such considerations are consistent with the purpose and object of the said two statutes. The petitioner as broker should be aware of the provisions of the said Act and the Regulations framed thereunder. The certificate of renewal clearly mentioned that such certificate was issued under IRDA Act, 1999 and Brokers Regulations, 2002. The Chairman considered the continuous unauthorized misuse of money during the period from 2003 to 2008 to be a serious matter for non-renewal of the licence. Once a trust is lost, a trustee or a person in fiduciary capacity forfeits its right to act as such and this appears to be the predominant consideration in refusing to renew the licence.

The Chairman referred to Section 42D(3), Section 42E, Section 42D(6) of the Insurance Act, 1938 and Section 14 and Regulation 9(1)(2)(i) of the 2002 Brokers Regulations in refusing to renew the licence. Considering the object of the 1999 Act and the Regulations 2002 which was framed under two statutes which are not in conflict with each other, the decision taken by the Chairman on proper consideration of the said statute and the Regulations framed thereunder, in my view, does not suffer from any error of law or without jurisdiction. In the narration of facts, and as summarized hereinabove, there cannot be any doubt that the Regulatory Authority in

considering an application for grant of renewal would be required to take into consideration the provisions laid down in Regulation 9. The same is also clear from Regulations 13 and 14.

In view of the discussions made above and having formed a considered view that reference to Regulation 9 or the other provisions of the Act in deciding the said application for renewal does not suffer from any illegality or any improper exercise of power, the order of the Chairman cannot be impinged.

VIII

REGULATION OF MEDIA

MANU/KA/0736/2012

IN THE HIGH COURT OF KARNATAKA

W.P.NO. 7623 of 2012

Decided On: 16.05.2012

Advocates Association Bangalore "Vakeelara B Havana" Vs. Union of India

Hon'ble Judges/Coram: Ajit J. Gunjal,J. and B.V. Nagarathna,J.

On 2nd March 2012, one of the former Ministers Janardhana Reddy was sought to be produced by the CBI, Bangalore Branch in the Court of 46th Additional City Civil and Special Judge, CBI at Bangalore City Civil Court Complex. The Electronic as well as the Print Media were in the precincts of the Court so as to film and video coverage and publish the news regarding the production of the former Minister Janardhana Reddy. It appears there was a scuffle, as a result of which, violence erupted and the police present in the premises resorted to lathi charge due to which several Advocates were injured. A number of vehicles were damaged and destroyed due to stone pelting and arson. In the said circumstances, the unprecedented crowding of the media in large numbers and the confrontation between the persons, who were in the garb of Advocates created altercations between the media and the genuine advocates, who are regularly practicing in the Civil Court. It is their case that at around 11.30 a.m. all of a sudden, a large group of police personnel entered the Court premises and started lathi charging the Advocates causing hurt/grievous hurt.

At some later point of time after 12.00 noon several electronic media displayed in their respective channels that a police personnel was killed by the Advocates and the eyes of another police constable were gouged. This prompted another attack and confrontation with renewed vigor between the policemen and the Advocates, which resulted in injuries to both the Advocates as well as the Policemen. It is the specific allegation of the petitioners that both the electronic and the print medias have played a vital role in the confrontation. It is their specific case that the provocative statements and captions by the media continued through out the day. Such provocative statements

by way of insults were only with the malafide intention to persuade, time and again lathi charging and assaulting the advocates.

The following points would arise for consideration:

(a) Whether the present petition could be termed as a Public Interest Litigation having regard to the contentions urged?

In the case on hand, it is to be noticed that in the first instance several writ petitions were filed seeking various reliefs at the hands of this Court. Some of them were in the nature of seeking a direction to the print media to restrain themselves while reporting and further to lay down certain guidelines while reporting. Various directions were also sought seeking compensation for the damage done to the property and also for the injuries suffered by the members of the association; seeking a direction to the Information and Broadcasting Ministry and Press Council of India to initiate Disciplinary Proceedings against Print and Electronic TV Medias who have defamed the Legal Professionals in general and to curtail forthwith on unethical reportings and broadcasting by the Karnataka based Electronic TV and Print Medias on Advocates any further; a direction to the Union of India and the State Government to initiate action against the Media and also to formulate proper/effective guidelines to the broadcasters of Television channels for the benefit of the public at large as stipulated under Article 19(2) of the Constitution of India. Indeed the reliefs sought for by the petitioner can be categorized and can be brought under the three points, which arise for determination in the present proceedings.

Even though the first prayer, which is sought for by the petitioner seeking a direction that the CBI should take up the investigation of the complaint on the incident, which occurred on 2nd of March 2012 may not fall within the realm of public interest, but other reliefs, which are sought for by the petitioners can partake the character of being in Public Interest inasmuch as all those reliefs are relatable to the incident, which has taken place on 2nd of March and do not confine themselves to the interest of the petitioner - Association per se. Hence, in the circumstances, we are of the view that even though insofar as the first relief, which is sought for could not be termed as being in public interest and the incident having been brought to our notice by way of writ petition and the grounds urged therein we propose to take note of the said proceedings suo moto having regard to

the public interest involved, more so, having regard to the directions issued by this Court directing hearing of one writ petition after consolidating all reliefs. Hence, we are of the view that the averments made in the writ petition could be classified as being in the nature of public interest litigation.

We are of the considered view that this writ petition can be treated as a Public Interest Litigation. Even if it is not considered to be a petition in public interest there can be no cap to the exercise of power under Article 226 of the Constitution of India having regard to the nature of reliefs sought for in this petition. It was also submitted at the bar that the writ petition was not filed as a PIL but the registry has treated it as a PIL.

(b) Whether there are justifiable grounds for this Court to direct investigation by the CBI?

The investigation is presently in the hands of the police of the State. We are of the view that in the given set of circumstances, we do not propose to entrust the investigation to the CBI. But nevertheless, we cannot shut our eyes to the fact that it is the State police itself, which once again will be investigating into the complaints of the petitioners, the members of the Association as well as the police and the media. In these circumstances, we are of the view that an outside agency is required to investigate into the matter. But however, the investigation cannot be entrusted to the Central Bureau of Investigation.

We are of the view that the situation is not an exceptional one having either national or international ramification, which calls for entrustment of the investigation to CBI. But nevertheless, we hasten to add that an independent agency other than CBI is required to investigate into the incident of 2.3.2012 having regard to the complaints lodged by the police, media and the Advocates against one another.

Undoubtedly extraordinary situations demand extraordinary remedies. Even though as observed it is an extraordinary situation, in our view, it certainly does not demand an investigation by the CBI. But if an independent agency other than the State police is directed to investigate into the complaint that would suffice.

Indeed, we observe that however faithfully the local police may carry out the investigation the same is likely to lack credibility since allegations are against them. It is only hearing that in mind, we have prompted ourselves that it is advisable and desirable and in the interest of the justice to entrust the investigation to an outside agency.

In the circumstances, we direct that an appropriate notification shall be issued by the State Government regarding the creation of a SIT, the constitution, of which shall be as follows:

(i) Dr. R.K. Raghavan, Retired Director of CBI.

(ii) Mr. Roopak Kumar Dutta, Director General of Police of CID, Bangalore.

The team of the two officers who are appointed shall pick a team of their own which will consist of additional three more officers. The said officers may be drawn from the branches of the State Police who will operate and conduct investigation under the guidance and leadership of Dr. R.K. Raghavan. The notification by the State will be issued as early as practically within 10 days from the date of receipt of copy of this order. Mr. R.K. Raghavan shall be the Chairman of the Committee and Mr. R.K. Datta would be the convenor. The committee so formed shall in its first meeting work out the modalities to be adopted for the purpose of enquiry for investigation. If any person wants to make a statement before the SIT by giving his/her version of the alleged incident, the SIT shall record it. Those who want to give a version shall in writing intimate the convenor of the committee so that SIT can call in him/her for the purpose of recording his/her statement. It is needless to say that the SIT shall not confine the investigation by recording statement of those who come forward to give his/her version but shall have power to make such inquiries, investigation as felt by it. The committee shall investigate into the incident, which has taken place on 2.3.2012 and also with reference to the complaints lodged by all concerned, the Advocates, police as well as the media.

(c) Whether the directions are to be issued to the media both print as well as electronic with reference to the reporting of news?

Justice Ajit J. Gunjal

Insofar as the role of media is concerned Mr. F.S. Nariman Committee has suggested certain modalities, which are essentially as follows:

(i) The trusteeship principle - Professional Journalist operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.

(ii) The self-Regulation principles- A model self -regulation should be based upon the principles of impartiality and objectivity in reporting, ensuring, neutrality, responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security in respect of privacy.

(iii) Content relations - in principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statutes. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self-restraint) goes to the root of censorship and is unsuited to the role of media in democracy.

(iv) Complaints Principle - There should be an effective mechanism to address complaints in a fair and just manner.

(v) Balance Principle - A balance has to be maintained which is censorial on the basis of the principles of proportionality and least invasiveness, but which effectively ensures democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

We sincerely hope that the print and electronic media would adhere to the guidelines as suggested by F.S. Nariman Committee, which refer to the self regulation principles regarding principles of impartiality, objectivity and responsible reporting of sensitive issues.

Justice B.V. Nagarathna

The freedom of speech and expression envisaged under Article 19(1)(a) of the Constitution is indeed guaranteed and extends to both Freedom of Press as well as to Broadcasting Media. The

Constitutional Courts, and particularly, the Apex Court in India have always expanded the freedom envisaged under Article 19(1)(a) and have set at naught all decisions or orders which have tried to strifle the freedom guaranteed under the Article. Right from the commencement of the Constitution, freedom of the press has always been underscored by the courts, which is one of the reasons for having a vibrant democracy in India. While freedom of speech and expression is a haloed right, which should always be cherished and upheld, at the same time, one cannot lose sight of reasonable restrictions under Article 19(2) of the Constitution. While there can be no two opinions that there has to be freedom guaranteed to the press as well as the broadcasting media in the context of Article 19(1)(a), yet, one cannot lose sight of Article 19(2), which strikes to achieve a balance. Therefore, the essence of Article 19(1)(a) read with Article 19(2) is to have a free and balanced press and broadcasting media.

Therefore, there has to be compliance with professional ethics in the dissemination of information by the Media, particularly the Electronic Media without any bias, malice or bringing about a conflict in society. If there is already a code of ethics and broadcasting standards in place with regard to the regulation of the Electronic Media, I wonder as to whether there was any violation of the same in the reporting of the incidents that occurred on 02/03/2012 at the City Civil Court Complex and if so, what steps have been taken in that regard. In view of the role of the media on 02/03/2012 what has stated supra and in the absence of any assistance by the various TV News Channels who have been served in this matter, I am of the considered view that it is necessary to issue a direction to the Union of India to consider the establishment of a mechanism to regulate Broadcasting Media, including television channels having regard to Article 19(1) (a) read with Article 19(2) of the Constitution. The concept of regulation of broadcasting media should not be understood to mean control by the Government or the powers that be. No doubt, self-regulation is the most ideal form of regulation. But having regard to the upsurge in innumerable broadcasting channels, some of which are in their nascent stage, self-regulation without the intervention of any legal framework is in my view, inefficacious. Therefore, regulation within a statutory framework is necessary. This is not to be understood as a mechanism to control the media from an outside authority.

A statutory framework is necessitated for regulation of the media by the media itself and not by an outside agency. In support of this view, reliance could be placed on the manner of regulation

adopted by certain professionals such as, Advocates, Chartered Accountants, Doctors whereby, within the framework of a statute, professional bodies such as, the Bar Council of India, Institute of Chartered Accountants and the Medical Council of India regulate professional standards and also bring to book erring persons.

When it comes to the broadcasting industry, such a mechanism is conspicuous by its absence. No doubt, the News Broadcasting Standards Authority has been constituted as a self-regulatory body. But the directions if any, issued by such an Authority or the National Broadcasting Authority does not carry the legal sanctity, which is a pre-requisite for compliance in most cases of falling standards or professional transgression by media men/broadcasters.

Hence, in my view, the following directions are required to be issued to the Union of India - respondent No.1 and also directions with regard to orderly conduct of Media personnel in Courts are required. Therefore:-

(i.) The Union of India to consider the modalities of regulating Broadcasting Media, including provision of a mechanism for addressing grievances in the realm of broadcasting in the light of Article 19(1) (a) r/w Article 19(2) of the Constitution of India;

(ii.) The Registrar General, High Court of Karnataka and the Registrar, City Civil Court, Bangalore City, are directed to evolve a system whereby, the Media personnel are provided an opportunity to report Court proceedings without disturbing the proceedings or without creating any inconvenience for the Advocates, the litigant public and general public,, including a system of accreditation for the press as well as for the Broadcasting Media;

(iii.) The Special Investigation Team (SIT) is also directed to investigate into the broadcasting of certain News items by certain Television Channels on 02/03/2012 and on subsequent dates, having regard to the material on record, and initiate action in accordance with law.

(iv.) Registry is directed to forward a copy of this order to the Registrar General, High Court of Karnataka and Registrar of City Civil Court, Bangalore City.

Order of the Court

Hence, in our view, the following directions are required to be issued to the Union of India - respondent No.1 and also directions with regard to orderly conduct of Media personnel in Courts are required. Having said so the following order is passed:

The writ petition stands disposed of with the following directions:

(i.) The constitution, of members of SIT shall be as follows:

(i) Dr. R.K. Raghavan, Retired Director of CBI - Chairman

(ii) Mr. Roopak Kumar Dutta, Director General of Police of CID, Bangalore * Convenor.

(ii.) The team of the above two officers who are appointed shall pick a team of their own which will consist of additional three more officers. The said officers may be drawn from the branches of the State Police who will operate and conduct investigation under the guidance and leadership of Dr. R.K. Raghavan.

(iii.) The notification by the State Government to the aforesaid effect will be issued as early as practically within 10 days from the date of receipt of copy of this order.

(iv.) The Committee so formed shall in its first meeting work out the modalities to be adopted for the purpose of enquiry for investigation.

(v.) If any person wants to make a statement before the SIT for giving his/her version of the alleged incident, the SIT shall record it. Those who want to give a version shall in writing intimate the convenor of the committee so that SIT can call in him/her for the purpose of recording his/her statement. It is needless to say that the SIT shall not confine the investigation by recording statement for those who come forward to give his/her version shall have power to make such inquiries, investigation as felt by it.

(vi.) The Committee shall investigate into the incident, which has taken place on 2.3.2012 and also with reference to the complaints lodged by all concerned, the Advocates, police as well as the media.

(vii.) The State Government shall provide necessary infrastructure and provide resources for the effective working of the SIT.

(viii.) The SIT for the purpose of the said investigation shall be trapped with all the powers of the investigating agency as contemplated under the Code of Criminal Procedure as well

as the Police Manual and are entitled to file a Final Report before the jurisdictional Magistrate.

(ix.) The entire exercise shall be concluded in three months from the date of Government Notification.

(x.) The Union of India to consider the modalities of regulating Broadcasting Media, including provision of a mechanism for addressing grievances in the realm of broadcasting in the light of Article 19(1) (a) r/w Article 19(2) of the Constitution of India;

(xi.) The Registrar General, High Court of Karnataka and the Registrar, City Civil Court, Bangalore City, are directed to evolve a system whereby, the Media personnel are provided an opportunity to report Court proceedings without disturbing the proceedings or without creating any inconvenience for the Advocates, the litigant public and general public,, including a system of accreditation for the press as well as for the Broadcasting Media;

(xii.) The Special Investigation Team (SIT) is also directed to investigate into the broadcasting of certain News items by certain Television Channels on 02/03/2012 and on subsequent dates, having regard to the material on record, and initiate action in accordance with law.

(xiii.) Registry is directed to forward a copy of this order to the Registrar General, High Court of Karnataka and Registrar of City Civil Court, Bangalore City.

(2009)5SCC212

IN THE SUPREME COURT OF INDIA

Writ Petition (Crl.) Nos. 73 and 77 of 2007

Decided On: 16.04.2009

Destruction of Public and Private Properties Vs. State of A.P. and Ors.

Hon'ble Judges/Coram: Dr. Arijit Pasayat, L.S. Panta and P. Sathasivam, JJ.

Taking a serious note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, suo motu proceedings were initiated by a Bench of this Court on 5.6.2007.

Two Committees were appointed; one headed by a retired Judge of this Court Justice K.T. Thomas. The other members of this Committee were Mr. K. Parasaran, Senior Member of the legal profession, Dr. R.K. Raghvan, Ex-Director of CBI, and Mr. G.E. Vahanavati, the Solicitor General of India and an officer not below the rank of Additional Secretary of Ministry of Home Affairs and the Secretary of Department of Law and Justice, Government of India. The Other Committee was headed by Mr. F.S. Nariman, a Senior Member of the Legal Profession. The other members of the Committee were the Editor-in-Chief of the Indian Express, the Times of India and Dainik Jagaran, Mr. Pranay Roy of NDTV and an officer not below the rank of Additional Secretary of Ministry of Home Affairs, Information and Broadcasting and Secretary, Department of Law and Justice, Government of India, Mr. G.E. Vahanavati, Solicitor General and learned Amicus Curiae.

So far as the role of media is concerned the Mr. F.S. Nariman Committee has suggested certain modalities which are essentially as follows:

a) The Trusteeship Principle

Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.

b) The Self Regulation Principles

A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; respect for privacy.

c) Content Regulations

In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statues. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self restraint) goes to the root of censorship and is unsuited to the role of media in democracy.

d) Complaints Principle

There should be an effective mechanism to address complaints in a fair and just manner.

e) Balance Principle

A balance has to be maintained which is censorial on the basis of the principles of proportionality and least invasiveness, but which effectively ensures democratic governance and self restraint from news publications that the other point of view is properly accepted and accommodated.

It is felt that the appropriate methods have to be devised norms of self regulation rather than external regulation in a respectable and effective way both for the broadcasters as well as the industry. It has been stated that the steps constitute a welcome move and should be explored further.

Media that is meant to expose the lapses in government and in public life cannot be obviously be regulated by government, else it would lack credibility. It is a fundamental paradigm of freedom of speech that media must be free from governmental control in the matter of "content" and that censorship and free speech are sworn enemies. It therefore falls upon the journalistic profession to evolve institutional checks and safeguards, specific to the electronic media, that can define the path that would conform to the highest standards of rectitude and journalistic ethics and guide the media in the discharge of its solemn Constitutional duty. There are models of governance evolved in other countries which have seen evolution of the electronic media, including the news media, much before it developed in India. The remarkable feature of all these models is "self-governance", and a monitoring by a "jury of peers".

The Committee has recommended the following suggestions:

(i) India has a strong, competitive print and electronic media

(ii) Given the exigencies of competition, there is a degree of sensationalism, which is itself not harmful so long as it preserves the essential role of the media viz: to report news as it occurs and eschew comment or criticism. There are differing views as to whether the media (particularly the electronic media) has exercised its right and privilege responsibly. But generalisations should be avoided. The important thing is that the electronic (and print) media has expressed (unanimously) its wish to act responsibly.

The media has largely responsible and more importantly, it wishes to act responsibly.

(iii) Regulation of the media is not an end in itself; and allocative regulation is necessary because the 'air waves' are public property and cannot technically be free for all but have to be distributed in a fair manner. However, allocative regulation is different from regulation per se. All regulation has to be within the framework of the constitutional provision. However, a fair interpretation of the constitutional dispensation is to recognize that the principle of proportionality is built into the concept of reasonableness whereby any restrictions on the media follow the least invasive approach. While emphasizing the need for media responsibility, such an approach would strike the correct balance between free speech and the independence of the media.

(iv) Although the print media has been placed under the supervision of the Press Council, there is need for choosing effective measures of supervision - supervision not control.

(v) As far as amendments mooted or proposed to the Press Council Act, 1978 this Committee would support such amendments as they do not violate Article 19(1)(a) - which is a preferred freedom.

(vi) Apart from the Press Council Act, 1978, there is a need for newspapers and journals to set up their own independent mechanism. (vii) The pre censorship model used for cinema under

the Cinematography Act, 1952 or the supervisory model for advertisements is not at all appropriate, and should not be extended to live print or broadcasting media.

(viii) This Committee wholly endorses the need for the formation of

(a) principles of responsible broadcasting

(b) institutional arrangements of self regulation

But the Committee emphasised the need not to drift from self regulation to some statutory structure which may prove to be oppressive and full of litigative potential.

(ix) The Committee approved of the NBA model as a process that can be built upon both at the broadcasting service provider level as well as the industry level and recommend that the same be incorporated as guidelines issued by this Court under Act 142 of the Constitution of India - as was done in Vishaka's case.

The suggestions are extremely important and they constitute sufficient guidelines which need to be adopted. But leave it to the appropriate authorities to take effective steps for their implementation. At this juncture we are not inclined to give any positive directions.

MANU/DE/1671/2009

IN THE HIGH COURT OF DELHI

W.P. (C) 10383 and 10396/2009

Decided On: 29.07.2009

Deepak Maini Vs. Star Plus and Ors.

AND

Prabhat Kumar Pushp Vs. Star Plus and Anr.

Hon'ble Judges/Coram: A.P. Shah, C.J. and Manmohan, J.

Petitions filed under Article 226 of Constitution of India seeking a ban on telecast of a television show - Present batch of two writ petitions have been filed under Article 226 of Constitution of India seeking a ban on telecast of Sach Ka Samna. shows. It has further been prayed that this Court should issue appropriate writ, order or direction to respondents to take appropriate steps for regulating TV broadcasting and for setting up a regulatory body like Central Board of Film Certification.

Held, Freedom of speech and expression have been guaranteed as a Fundamental Right by Article 19(1)(a) of Constitution of India. The Right of Free Speech has been hailed as the most important charter of liberty as well as the crux of fundamental rights.. Undoubtedly, freedom of speech and expression can be restricted on the ground of decency. or morality.

But obscenity., indecency. and immorality. are relevant concepts. In fact, standards of morality and decency in the same society vary from time to time and from person to person. In the case of *Madhu Mukul Tripathi and Anr. v. Union of India and Ors*. in W.P. (C) 1194-95/2006 decided on 10th September, 2008, wherein the petitioners had prayed for framing of guidelines to regulate the print and electronic media pending enactment of statutory provisions, this Court had observed that the said prayer cannot be granted as the issues involved were of a complex nature and several competing interests had to be balanced. Consequently, in our opinion, it is not for Courts to frame guidelines to regulate the content on TV as this exercise is best left to the Government itself.

In any event, we are of the opinion that there is no vacuum /hiatus inasmuch as the Programme and Advertisement Code framed under Act, 1995 is applicable to downlinking of television channels like the respondent-TV Channel. In this connection, we may refer to the policy guidelines for downlinking of television channels dated 11th November, 2005

Wherein it has been mandared that no person/entity shall downlink a channel, which has not been registered by the Ministry of Information and Broadcasting under these guidelines. All persons/entities providing Television Satellite Broadcasting Services (TV Channels) uplinked

from other countries to viewers in India as well as any entity desirous of providing such a Television Satellite Broadcasting Service, receivable in India for public viewership, shall be required to obtain permission from Ministry of Information and Broadcasting, in accordance with the terms and conditions prescribed under these guidelines. The Company permitted to downlink registered channels shall comply with the Programme and Advertising Code prescribed under the Cable Television Networks (Regulation) Act, 1995.

It is open to Government to take action under Act, 1995. Consequently, we are of the opinion that as our interference is not called for, the present petitions are dismissed,

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MANU/DE/8932/2007

IN THE HIGH COURT OF DELHI

WP(Crl.) No. 1175/2007

Decided On: 14.12.2007

Court on its Own Motion Vs. State

Hon'ble Judges/Coram: Dr. M.K. Sharma, C.J. and Sanjiv Khanna, J.

Issue related to conduct of sting operation by news channel showing a teacher involved in organized prostitution racket. Subsequent investigation revealed that whole sting operation was stage managed to frame the teacher.

Regulation of electronic media has always invoked sharp and divergent views with emotive and logical pleas and counter arguments. We are informed that the Ministry has invited suggestions from the general public including the media on a proposed Broadcasting Bill and Code of Conduct. A decision in this regard has to be taken by the government. But it cannot be denied that electronic

media should and must protect innocent people so that their reputation cannot be sullied and damaged by false and incorrect depictions in the name of sting operation.

Such incidents should not happen and false and fabricated sting operations directly infringing upon a persons right to privacy should not recur because of desire to earn more and to have higher TRP rating. Right to freedom of press is a valuable right but the right carries with it responsibility and duty to be truthful and to protect rights of others.

There is no doubt and there is no second opinion that truth is required to be shown to the public in public interest and the same can be shown whether in the nature of sting operation or otherwise but what we feel is that entrapment of any person should not be resorted to and should not be permitted.

Giving inducement to a person to commit an offence, which he is otherwise not likely and inclined to commit, so as to make the same part of the sting operation is deplorable and must be deprecated by all concerned including the media. Sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.

The duty of the press as the fourth pillar of democracy is immense. It has great power and with it comes increasing amounts of responsibility. No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise he is not known and likely to commit. In such cases there is no predisposition. If one were to look into our mythology even a sage like Vishwamitra succumbed to the enchantment of "Maneka". It would be stating the obvious that the Media is not to test individuals by putting them through what one might call the "inducement test" and portray it as a scoop that has uncovered a hidden or concealed truth. In such cases the individual may as well claim that the person offering inducement is equally guilty and a party to the crime, that he/she is being accused of. This would infringe upon the individual's right to privacy. We believe and trust that all TV channels/Media shall take steps and prohibit its

reporters from producing or airing any programme which is based on entrapment and which are fabricated, intrusive and sensitive. We also believe that responsible and senior TV journalists/reporters and editors who are involved in production and airing of programmes through electronic media should take steps for drawing up a self-regulatory code of conduct. The Press Council of India should also examine and can take initiative in this regard.

Certain proposed guidelines were also placed before us by the learned amices. The said proposed guidelines are as follows:

1. A channel proposing to telecast a sting operation shall obtain a certificate from the person who recorded or produced the same certifying that the operation is genuine to his knowledge.
2. There must be concurrent record in writing of the various stages of the sting operation.
3. Permission for telecasting a sting operation be obtained from a committee appointed by the Ministry of Information and Broadcasting. The said committee will be headed by a retired High Court Judge to be appointed by the Government in consultation with the High Court & two members, one of which should be a person not below the rank of Additional Secretary and the second one being the Additional Commissioner of Police. Permission to telecast sting operation will be granted by the committee after satisfying itself that it is in public interest to telecast the same. This safeguard is necessary since those who mount a sting operation themselves commit the offences of impersonation, criminal trespass under false pretence and making a person commit an offence.
4. While the transcript of the recordings may be edited, the films and tapes themselves should not be edited. Both edited and unedited tapes be produced before the committee.
5. Sting operation shown on TV or published in print media should be scheduled with an awareness of the likely audience/reader in mind. Great care and sensitivity should be exercised to avoid shocking or offending the audience.
6. All television channels must ensure compliance with the Certification Rules prescribed under the Cable Television Network (Regulation) Act 1995 and the Rules made there under.
7. The Chief Editor of the channel shall be made responsible for self regulation and ensure that the programmes are consistent with the Rules and comply with all other legal and

administrative requirements under various statutes in respect of content broadcast on the channel.

8. The subject matter of reports or current events shall not:

   (a) Deliberately present as true any unverified or inaccurate facts so as to avoid trial by media since a "man is innocent till proven guilty by law";

   (b) Present facts and views in such a manner as is likely to mislead the public about their factual inaccuracy or veracity;

   (c) Mislead the public by mixing facts and fiction in such a manner that the public are unlikely to be able to distinguish between the two;

   (d) Present a distorted picture of reality by over-emphasizing or under-playing certain aspects that may trivialize or sensationalize the content;

   (e) Make public any activities or material relating to an individual's personal or private affairs or which invades an individual's privacy unless there is an identifiable large public interest;

   (f) Create public panic or unnecessary alarm which is likely to encourage or incite the public to crime or lead to disorder or be offensive to public or religious feeling.

9. Broadcasters/Media shall observe general community standards of decency and civility in news content, taking particular care to protect the interest and sensitivities of children and general family viewing.

10. News should be reported with due accuracy. Accuracy requires the verification (to the fullest extent possible) and presentation of all facts that are necessary to understand a particular event or issue.

11. Infringement of privacy in a news based/related programme is a sensitive issue. Therefore, greater degree of responsibility should be exercised by the channels while telecasting any such programmes, as may be breaching privacy of individuals.

12. Channels must not use material relating to persons' personal or private affairs or which invades an individual's privacy unless there is identifiable larger public interest reason for the material to be broadcast or published.

The Ministry of Information and Broadcasting is already examining whether a statute and/or a code of conduct should be enacted. The above proposed guidelines should be considered by the concerned Ministry and if they find favor, they may be incorporated in the enactment/guidelines, with modifications as deemed fit and proper.

(1995)2SCC161

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 1429-30 of, 1995 Writ Petn. (C) No. 836 of 1993

Decided On: 09.02.1995

Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and others

With

Cricket Association of Bengal and another Vs. Union of India and others

Hon'ble Judges/Coram: P.B. Sawant, S. Mohan and B.P. Jeevan Reddy, JJ.

The questions of law are :

1) Has an organiser or producer of any event a right to get the event telecast through an agency of his choice whether national or foreign?
2) Has such organiser a choice of the agency of telecasting, particularly when the exercise of his right, does not make demand on any of the frequencies owned, commanded or

controlled by the Government or the Government agencies like the Videsh Sanchar Nigam Limited (VSNL) or Doordarshan (DD)?

3) Can such an organiser be prevented from creating the terrestrial signal and denied the facility of merely uplinking the terrestrial signal to the satellite owned by another agency whether foreign or national?

4) What, if any, are the conditions which can be imposed by the Government department which in the present case is the Ministry of Information and Broadcasting (MIB) for (a) creating terrestrial signal of the event and (b) granting facilities of uplinking to a satellite not owned or controlled by the Government or its agencies?

Held,

1(a). Game of cricket, like any other sports event, provides entertainment. Providing entertainment is implied in freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution subject to this rider that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests. The petitioners (CAB and BCCI) therefore have a right to organise cricket matches in India, whether with or without the participation of foreign teams. But what they are now seeking is a license to telecast their matches through an agency of their choice - a foreign agency in both the cases -and through telecasting equipment brought in by such foreign agency from outside the country. In the case of Hero Cup Matches organised by CAB, they wanted uplinking facility to INTELSAT through the government agency VSNL also. In the case of later international matches organised by BCCI they did not ask for this facility for the reason that their foreign agent has arranged direct uplinking with the Russian satellite Gorizon. In both cases, they wanted the permission to import the telecasting equipment along with the personnel to operate it by moving it to places all over the country wherever the matches were to be played. They claimed this license, or permission, as it may be called, as a matter of right said to be flowing from Article 19(1)(a) of the Constitution. They say that the authorities are bound to grant such license/permission, without any conditions, all that they are entitled to do, it is submitted, is to collect technical fees wherever their services are availed, like the services of VSNL in the case of Hero Cup Matches. This plea is in principle no different from the right to

establish and operate private telecasting stations. In principle, there is no difference between a permanent TV station and a temporary one; similarly there is no distinction in principle between a stationary TV facility and a mobile one; so also is there no distinction between a regular TV facility and a TV. facility for a given event or series of events. If the right claimed by the petitioners (CAB and BCCI) is held to be constitutionally sanctioned one, then each and every citizen of this country must also be entitled to claim similar right in respect of his event or events, as the case may be. I am of the opinion that no such right flows from Article 19(1)(a).

(b) Airwaves constitute public property and must be utilised for advancing public good. No individual has a right to utilise them at his choice and pleasure and for purposes of his choice including profit. The right of free speech guaranteed by Article 19(1)(a) does not include the right to use airwaves, which are public property. The airwaves can be used by a citizen for the purpose of broadcasting only when allowed to do so by a statute and in accordance with such statute. Airwaves being public property, it is the duty of the State to see that airwaves are so utilised as to advance the free speech right of the citizens which is served by ensuring plurality and diversity of views, opinions and ideas. This is imperative in every democracy where freedom of speech is assured. The free speech right guaranteed to every citizen of this country does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the free speech right of the body of citizens inasmuch as only the privileged few - powerful economic, commercial and political interests - would come to dominate the media. By manipulating the news, views and information, by indulging in misinformation and disinformation, to suit their commercial or other interests, they would be harming - and not serving - the principle of plurality and diversity of views, news, ideas and opinions. This has been the experience of Italy where a limited right, i.e., at the local level but not at the national level was recognised. It is also not possible to imply or infer a right from the guarantee of free speech which only a few can enjoy.

(c) Broadcasting media is inherently different from Press or other means of communication/information. The analogy of press is misleading and inappropriate. This is

also the view expressed by several Constitutional Courts including that of the United States of America.

(d) I must clarify what I says; it is that the right claimed by the petitioners (CAB and BCCI) - which in effect is no different in principle from a right to establish and operate a private TV station - does not flow from Article 19(1)(a); that such a right is not implicit. The question whether such right should be given to the citizens of this country is a matter of policy for the Parliament. Having regard to the revolution in information technology and the developments all around, Parliament may, or may not decide to confer such right. If it wishes to confer such a right, it can only be way of an Act made by Parliament. The Act made should be consistent with the right of free speech of the citizens and must have to contain strict programme and other controls, as has been provided, for example, in the Broadcasting Act, 1991 in the United Kingdom. This is the implicit command of Article 19(1)(a) and is essential to preserve and promote plurality and diversity of views, news opinions and ideas.

(e) There is an inseparable inter-connection between freedom of speech and the stability of the society, i.e., stability of a nation-State. They contribute to each other. Ours is a nascent republic. We are yet to achieve the goal of a stable society. This country cannot also afford to read into Article 19(1)(a) an unrestricted right to licensing (right of broadcasting) as claimed by the petitioners herein.

(f) In the case before us, both the petitioners have sold their right to telecast the matches to a foreign agency. They have parted with the right. The right to telecast the matches, including the right to import, install and operate the requisite equipment, is thus really sought by the foreign agencies and not by the petitioners. Hence, the question of violation of their right under Article 19(1)(a) resulting from refusal of licenses/permission to such foreign agencies does not arise.

2. The Government monopoly of broadcasting media in this country is the result of historical and other factors. This is true of every other country, to start with. That India and not a free country till 1947 and its citizens did not have constitutionally guaranteed fundamental

freedoms till 1950 coupled with the fact that our Constitution is just about forty five years into operation explains the Government monopoly. As pointed out in the body of the judgment, broadcasting media was a monopoly of the Government, to start with, in every country except the United States where a conscious decision was taken at the very beginning not to have State monopoly over the medium. Until recently, the broadcasting media has been in the hands of public/statutory corporations in most of the West European countries. Private broadcasting is comparatively a recent phenomenon. The experience in Italy of allowing private broadcasting at local level (while prohibiting it at national level) has left much to be desired. It has given rise to powerful media empires which development is certainly not conducive to free speech right of the citizens.

3(a). It has been held by this Court- and rightly - that broadcasting media is affected by the free speech right of the citizens guaranteed by Article 19(1)(a). This is also the view expressed by all the Constitutional Courts whose opinions have been referred to in the body of the judgment. Once this is so, monopoly of this medium (broadcasting media), whether by Government or by an individual, body or organisation is unacceptable. Clause (2) of Article 19 does not permit a monopoly in the matter of freedom of speech and expression as is permitted by Sub-clause6) of Article 19 vis-a-vis the right guaranteed by Article 19(1)(g).

(b) The right of free speech and expression includes the right to receive and expression includes the right to receive and impart information. For ensuring the free speech right of the citizens of this country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry. Diversity of opinions, views, ideas and ideologies is essential to enable the citizens to arrive at informed judgment on all issues toughing them. This cannot be provided by a medium controlled by a monopoly -whether the monopoly is of the State or any other individual, group or organisation. As a matter of fact, private broadcasting stations may perhaps be more prejudicial to free speech right of the citizens than the government controlled media, as explained in the body of the judgment. The broadcasting media should be under the control of the public as distinct from Government. This is the command implicit in Article 19(1)(a). It should be operated by a public statutory corporation or corporations, as the case may be, whose Constitution and composition must be such as to ensure its/their impartiality

in political, economic and social matters and on all other public issues. It/they must be required by law to present news, views and opinions in a balanced way ensuring pluralism and diversity of opinions and views. It/they must provide equal access to all the citizens and groups to avail of the medium.

4. The Indian Telegraph Act. 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted. This is the result of the law in this country not keeping pace with the technological advances in the field of information and communications. While all the leading democratic countries have enacted laws specifically governing the broadcasting media, the law in this country has stood still, rooted in the Telegraph Act of 1885. Except Section 4(1) and the definition of telegraph, no other provision of the Act is shown to have any relevance to broadcasting media. It is therefore, imperative that the Parliament makes a law placing the broadcasting media in the hands of a public/statutory corporate or the corporations, as the case may be. This is necessary to safeguard the interests of public and the interests of law as also to avoid uncertainty, confusion and consequent litigation.

5. The CAB did not ever apply for a license under the first proviso to Section 4 of the Telegraph Act nor did its agents ever make such an application. The permissions, clearances or exemption obtained by it from the several departments (mentioned in judgment) are no substitute for a license under Section 4(1) proviso. In the absence of such a license, the CAB had no right in law to have its matches telecast by an agency of its choice. The legality or validity of the orders passed by Sri N. Vithal, Secretary to the Government of India, Telecommunications Department need not be gone into since it has become academic. In the facts and circumstances of the case, the charge of malafides or of arbitrary and authoritarian conduct attributed to Doordarshan and Ministry of Information and Broadcasting is not acceptable. No opinion need be expressed on the allegations made in the Interlocutory Application filed by BCCI in these matters. Its intervention was confined to legal questions only.

6. Now the question arises, what is the position till the Central Government or the Parliament takes steps as contemplated in Para (4) of the summary, i.e., if any sporting event or other event is to be telecast from the Indian soil? The obvious answer flowing from the judgment (and Paras (1) and (4) of this summary) is that the organiser of such event has to approach the nodal Ministry as specified in the decision of the Meeting of the Committee of Secretaries held on November 12,1993.1 have no reason to doubt that such a request would be considered by the nodal Ministry and the AIR and Doordarshan on its merits, keeping in view the public interest. In case of any difference of opinion or dispute regarding the monetary terms on which such telecast is to be made, matter can always be referred to an Arbitrator or a panel of Arbitrators. In case, the nodal Ministry or the AIR or Doordarshan find such broadcast/telecast not feasible, then may consider the grant of permission to the organisers to engage an agency of their own for the purpose. Of course, it would be equally open to the nodal Ministry (Government of India) to permit such foreign agency in addition to AIR/Doordarshan, if they are of the opinion that such a course is called for in the circumstances.

IX

ROLE OF SPORTS REGULATORS

Equivalent Citation: 2015(1)SCALE608

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4235 of 2014, Civil Appeal No. 4236 of 2014 and Civil Appeal No. 1155 of 2015 (Arising out of SLP (C) No. 34228 of 2014)

Decided On: 22.01.2015

Board of Control for Cricket in India and Ors. Vs. Cricket Association of Bihar and Ors.

Hon'ble Judges/Coram: T.S. Thakur and Fakkir Mohamed Ibrahim Kalifulla, JJ.

1) **Whether the Respondent-Board of Cricket Control of India is 'State' within the meaning of Article 12 and if it is not, whether it is amenable to the writ jurisdiction of the High Court Under Article 226 of the Constitution of India? `**

Held,

The majority view favours the view that BCCI is amenable to the writ jurisdiction of the High Court Under Article 226 even when it is not 'State' within the meaning of Article 12. The rationale underlying that view if we may say with utmost respect lies in the "nature of duties and functions" which the BCCI performs. It is common ground that the Respondent-Board has a complete sway over the game of cricket in this country. It regulates and controls the game to the exclusion of all others. It formulates rules, Regulations norms and standards covering all aspect of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and Supporting State Associations. It frames pension schemes and incurs expenditure on coaches, trainers etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India have allowed the Board to select the national team which is then recognized

by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home. Those distinguishing themselves in the international arena are conferred highest civilian awards like the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri apart from sporting awards instituted by the Government. Such is the passion for this game in this country that cricketers are seen as icons by youngsters, middle aged and the old alike. Any organization or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to takeover the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action. Our answer to question No. 1, therefore, is in the negative, qua, the first part and affirmative qua the second. BCCI may not be State Under Article 12 of the Constitution but is certainly amenable to writ jurisdiction Under Article 226 of the Constitution of India.

2) **Whether Gurunath Meiyappan and Raj Kundra were 'team officials' of their respective IPL teams-Chennai Super Kings and Rajasthan Royals? If so, whether allegations of betting levelled against them stand proved?**

The Probe Committee has on the basis of the material available to it further held that Gurunath Meiyappan was indulging in betting. That finding was not seriously assailed before us We have, however, made it clear and we do so again that any finding as to the involvement of Mr. Gurunath Meiyappan in betting activities recorded by the Probe Committee or by this Court shall remain confined to the present proceedings which are addressing the limited question whether any administrative/disciplinary action needs to be taken against those accused of such activities. Having said so, we must make it clear that given the nature of the proceedings entrusted to the Probe Committee and the standard of proof applicable to the same, we see no reason to disagree with the conclusion of the Probe Committee that Gurunath Meiyappan was indeed indulging in

betting. The material assembled in the course of the investigation by the Probe Committee provides a reasonably safe basis for holding that the accusations made against Gurunath Meiyappan stood established on a preponderance of probabilities. We are at any rate not sitting in appeal against the findings of a Domestic Tribunal set up to enquire into the allegations of misconduct levelled against a team official of a participating team. We are not, therefore, reappraising the material that has been assembled by the Probe Committee and relied upon to support its finding. The finding is by no means without basis or perverse to call for our interference with the same.

This Court taking note of the observations made by the Probe Committee not only directed further investigation into the allegations against Mr. Raj Kundra but also provided necessary support to the Probe Committee to do so effectively. The Committee has on the basis of the said further investigation and enquiry come to the conclusion that Mr. Raj Kundra was a 'team official', a 'player support personnel' and 'participant' within the meaning of the relevant rules and that he had indulged in betting. So long as Mudgal Committee has conducted the proceedings in consonance with the principles of natural justice, the Committee's finding that Raj Kundra was a team official of Rajasthan Royals and that he had indulged in betting cannot be faulted. Our answer to question No. 2 is, therefore, in the affirmative.

3) If question No. 2 is answered in the affirmative, what consequential action in the nature of punishment is permissible under the relevant Rules and Regulations, and against whom?

Permissible action in terms of the IPL Operational Rules:

Every franchisee, player, team official, and/or match official is subject to the said rules. In terms of Rule 2.1 (supra) participation or other involvement with the league is deemed to constitute an acceptance by each person subject to these operational rules of an agreement with an obligation owed to BCCI to be bound by the Regulations, the laws of cricket, the terms of the player contract and the jurisdiction of the BCCI in connection therewith. In terms of Rule 2.1.4 (supra) each person subject to these rules is restrained from acting or omitting to act in any way that would or might reasonably be anticipated to have an adverse affect on the match and/or reputation of such person, any team, any player, any team official, the BCCI, the league and/or the game or which would

otherwise bring any of the foregoing into disrepute. More importantly, each franchisee is in terms of Rule 4.1.1 under an obligation to ensure that each of its team official complies with the Regulations, and in particular Article 2 of the BCCI and Anti-Corruption Code. The rule, however, provides that all those persons who are accredited for the league by BCCI either centrally or locally, shall be deemed to be team officials for the purposes of those Regulations. In terms of Regulation 6.4 (supra) BCCI can impose any one of the sanctions enumerated thereunder which includes suspension of the player or other person subject to the Operational Rules from playing or involving in matches for a specified period and suspension of the team or franchisee from the league. Payment of money from a person subject to these Operational Rules either to BCCI or to any other person subject to those rules is also provided as one of the permissible sanctions. once Mr. Gurunath Meiyappan and Mr. Raj Kundra are accepted as team officials, their misconduct which has adversely affected the image of the BCCI and the league as also the game and brought each one of them to disrepute can result in imposition of one or more of the sanctions stipulated under Rule 6.4. It is noteworthy that those sanctions are not limited to Gurunath Meiyappan and Raj Kundra alone but may extend to suspension of the team or the franchisee from the league also.

Permissible action under the Anti Corruption Code for participants:

In terms of Article 6 of the Code, upon consideration of relevant factors the disciplinary committee of the BCCI is empowered to impose an appropriate sanction upon the delinquent having regard to the provisions of Article 6.2 and the Table appearing thereunder. There is, therefore, no manner of doubt that even under the Anti-Corruption Code for participants any act like betting can attract sanctions not only for the person who indulges in such conduct but also for all those who authorise, cause, knowingly assist, encourage, aid, abet, cover up or are otherwise complicit in any act of omission or commission relating to such activity.

Permissible action under the "Code of Conduct for Players and the Team Official":

Code of conduct for Players and Team Officials also prescribes punishment/sanctions for players or team officials found guilty of different levels of offences stipulated in the said Code. Articles 2.1-2.5 stipulate different levels of offences which, if committed by the players or team officials, can lead to imposition of sanctions against them. Article 2.4.4 is, however, a catch all provision to

cover all types of conduct which are not covered by specific offences set out in the Code. Article 7 of the Code empowers the match Referee or the Commissioner to impose suitable sanction upon the person concerned depending upon the level of the offence which is committed. The punishment can range between warning to suspension for a lifetime depending upon the nature and the gravity of the offence committed.

In terms of Clause 11.3 (c) of the Franchise Agreement executed between BCCI on the one hand and the franchisees on the other if the franchisee, any franchisee group company and/or any owner acts in a manner that has a material adverse effect upon the reputation or standing of the league, BCCI-IPL, BCCI, the franchisee, the team or any other team and/or the game of cricket, the BCCI-IPL is empowered to terminate the agreement. the BCCI-IPL is in situations stipulated under Clause 11.3 competent to direct the termination of the agreement. What would constitute "material adverse effect" upon reputation or standing of the league or BCCI-IPL, BCCI, the franchisee, the team or game of cricket shall, however, depend upon the facts and circumstances of each case. What cannot be disputed is that the right to terminate the agreement is available to the BCCI-IPL even in accordance with the provisions of the franchise agreements themselves.

4) Whether allegations of cover up, levelled against Mr. N. Srinivasan stand proved. If so, to what effect?

It is, in our opinion, difficult to hold that the circumstances enumerated proved by preponderance of probability the charge of cover up leveled against Mr. Srinivasan. The appointment of a Probe Committee comprising former Judges of the High Court cannot be seen as an attempt to cover up nor can Mr. Srinivasan be accused of withholding any incriminating material from the Probe Committee especially when there is nothing to show that Mr. Srinivasan was indeed in possession of any incriminating material that was withheld by him. Mr. Srinivasan had in fact stepped aside while the probe was on to avoid any accusation being made against him. Similarly, the allegation that an effort was made to suppress facts before the Mudgal Committee or that Mr. Gurunath was shown only as a cricket enthusiast whereas he was a team official, may, at best, raise a suspicion against Mr. Srinivasan but suspicion can hardly be taken as proof to hold him guilty of the alleged cover up. We cannot, therefore, with any amount of certainty, say that the charge of attempted

cover up leveled against Mr. Srinivasan stands proved. Our answer to question No. 4 is, therefore, in the negative.

5) Whether Regulation 6.2.4 to the extent it permits administrators to have commercial interest in the IPL, Champions League and Twenty-20 events is legally bad?

Public Policy is not a static concept. It varies with times and from generation to generation. But what is in public good and public interest cannot be opposed to public policy and vice-versa. Fundamental Policy of Law would also constitute a facet of public policy. This would imply that all those principles of law that ensure justice, fair play and bring transparency and objectivity and promote probity in the discharge of public functions would also constitute public policy. Conversely any deviation, abrogation, frustration or negation of the salutary principles of justice, fairness, good conscience, equity and objectivity will be opposed to public policy. It follows that any rule, contract or arrangement that actually defeats or tends to defeat the high ideals of fairness and objectivity in the discharge of public functions no matter by a private nongovernmental body will be opposed to public policy. Applied to the case at hand Rule 6.2.4 to the extent, it permits, protects and even perpetuates situations where the Administrators can have commercial interests in breach or conflict with the duty they owe to the BCCI or to the people at large must be held to be against public policy, hence, illegal. That is particularly so when BCCI has in the Anti Corruption Code adopted by it recognized public confidence in the authenticity and integrity of the sporting contest as a fundamental imperative. It has accepted and, in our opinion rightly so, that all cricket matches must be contested on a level playing field with the outcome to be determined solely by the respective merits of the competing teams. The Anti Corruption Code of the BCCI does not mince words in accepting the stark reality that if the confidence of the public in the purity of the game is undermined then the very essence of the game of cricket shall be shaken. The BCCI has in no uncertain terms declared its resolve to protect the fundamental imperatives constituting the essence of the game of cricket and its determination to take every step in its power to prevent corrupt betting practices undermining the integrity of the sport including any effort to influence the outcome of any match. Unfortunately, however, the amendment to Rule 6.2.4 clearly negates the declarations and resolves of the BCCI by permitting situations in which conflict of interest would grossly erode the confidence of the people in the authenticity, purity and

integrity of the game. An amendment which strikes at the very essence of the game as stated in the Anti Corruption Code cannot obviously co-exist with the fundamental imperatives. Conflict of interest situation is a complete anti-thesis to everything recognized by BCCI as constituting fundamental imperatives of the game hence unsustainable and impermissible in law.

BCCI is a very important institution that discharges important public functions. Demands of institutional integrity are, therefore, heavy and need to be met suitably in larger public interest. Individuals are birds of passage while institutions are forever. The expectations of the millions of cricket lovers in particular and public at large in general, have lowered considerably the threshold of tolerance for any mischief, wrong doing or corrupt practices which ought to be weeded out of the system. Conflict of interest is one area which appears to have led to the current confusion and serious misgivings in the public mind as to the manner in which BCCI is managing its affairs.

The expression 'Administrator' appearing in Rule 6.2.4 has been defined to mean and include present and past Presidents, Honorary Secretaries, Honorary Treasures, Honorary Joint Secretaries of the BCCI. Presidents and Secretaries present or past of members affiliated to BCCI are also treated as administrator along with representative of a member or an associate member or affiliate member of the Board. That apart, any person connected with any of the committees appointed by the Board are also treated as administrator; none of whom could have any commercial interest in any BCCI event but for the impugned amendment to Rule 6.2.4. What is important, however, is that the challenge in the present proceedings arises in the context of Mr. Srinivasan, President of BCCI having commercial interest in the IPL by reason of the company promoted by him owning Chennai Super Kings. It is common ground that the owner of a team buys the franchise in an open auction. India Cements Ltd. owner of CSK has also bought the Chennai franchise in an open auction held by BCCI. This sale and purchase of the franchises is a purely commercial/business venture for India Cements Ltd. involving investment of hundreds of crores. The franchise can grow as a 'brand' and in terms of franchise agreement executed between franchisee and the BCCI be sold for a price subject to the conditions stipulated in the agreement. There is, therefore, no manner of doubt that the investment made by India Cements Ltd. is a business investment no matter in a sporting activity. To the extent the business investment has come from India Cements Ltd. promoted by Mr. Srinivisan and his family, India Cements and everyone connected with it as shareholders acquire a business/commercial interest in the IPL events organised by BCCI. The

association of India Cements Ltd. and Mr. Srinivasan with IPL is being faulted on account of this commercial interest which India Cements Ltd. has acquired for itself. Whether or not players engaged as mentors, coaches, managers or commentators in connection with the events for remuneration payable to them will also be ineligible for any such assignment does not directly fall for our consideration in these proceedings. That apart, it may well be argued that there is a difference between commercial interest referred to in Rule 6.2.4 and 'professional engagement' of a player on account of his proficiency in the game. It may be logically contended that the engagement of a player even though made on a remuneration remains a professional engagement because of his professional skill in the game of cricket and not because he has made any investment like India Cements Ltd. has done in acquiring a franchise or in any other form. Be that as it may, we do not consider it necessary or even proper to authoritatively pronounce upon the question whether such engagement of players, as are mentioned above, would fall foul of the prohibition contained in Rule 6.2.4 as it stood before amendment. The issue may be examined as and when the same arises directly for consideration. All that we need say at this stage is that whether or not a player who is an 'administrator' by reason of an existing or earlier assignment held by him can acquire or hold a commercial interest in any BCCI event, will depend upon the nature of the interest that such person has acquired and whether the same is purely professional or has any commercial element to it. Beyond that we do not propose to say anything at this stage. Question No. 5 is accordingly answered in the affirmative and Amendment to Rule 6.2.4 permitting Administrators of BCCI to acquire or hold commercial interests in BCCI like IPL, champions league and T-20 held to be bad.

6) Whether allegations levelled against Mr. Sundar Raman, Chief Operating Officer IPL, stand proved? If so, to what effect?

Mr. Sundar Raman was, and continues to be the Chief Operating Officer of IPL. He has held and continues to hold a very important position in the entire system. On his own showing he was dealing with practically all aspects of organization of the game, including facilitating whenever necessary the appearance and participation of celebrities and organizing tickets, accreditation cards and such other matters. He was, therefore, the spirit behind the entire exercise and cannot be said to be unconcerned with what goes on in the course of the tournament especially if it has the

potential of bringing disrepute to the game/BCCI. We are, therefore, not inclined to let the allegations made against Mr. Sundar Raman go un-probed, even if it means a further investigation by the investigating team provided to the probe committee or by any other means. Truth about the allegations, made against Mr. Sundar Raman, must be brought to light, for it is only then that all suspicions about the fraudulent activities and practices floating in the media against the BCCI and its administrators in several proceedings before different courts can be given a quietus.

7) What orders and directions need be passed in the light of the discussions and answers to questions 1 to 5 above?

One of the issues that would fall for determination in the light of these findings would be whether we should impose a suitable punishment ourselves or leave it to the BCCI to do the needful. Having given our anxious consideration to that aspect we are of the view that neither of these two courses would be appropriate. We say so because the power to punish for misconduct vests in the BCCI. We do not consider it proper to clutch at the jurisdiction of BCCI to impose a suitable punishment. At the same time we do not think that in a matter like this the award of a suitable punishment to those liable for such punishment can be left to the BCCI. The trajectory of the present litigation, and the important issues it has raised as also the profile of the individuals who have been indicted, would, in our opinion, demand that the award of punishment for misconduct is left to an independent committee to exercise that power for and on the behalf of BCCI. This would not only remove any apprehension of bias and/or influence one way or the other but also make the entire process objective and transparent especially when we propose to constitute a committee comprising outstanding judicial minds of impeccable honesty.

The other aspect, which needs attention, is the need for a probe into activities of Mr. Sundar Raman. We are of the view that, once we appoint a Committee to determine and award punishment, we can instead of referring the matter back to Mudgal Committee, request the proposed new Committee to examine the role played by Mr. Sundar Raman, if necessary, with the help of the investigating team constituted by us earlier.

The proposed Committee can also, in our opinion, be requested to examine and make suitable recommendations on the following aspects:

(i.) Amendments considered necessary to the memorandum of association of the BCCI and the prevalent rules and Regulations for streamlining the conduct of elections to different posts/officers in the BCCI including conditions of eligibility and disqualifications, if any, for candidates wanting to contest the election for such posts including the office of the president of the BCCI.

(ii.) Amendments to the memorandum of association, and rules and Regulation considered necessary to provide a mechanism for resolving conflict of interest should such a conflict arise despite Rule 6.2.4 prohibiting creation or holding of any commercial interest by the administrators, with particular reference to persons, who by virtue of their proficiency in the game of Cricket, were to necessarily play some role as Coaches, Managers, Commentators etc.

(iii.) Amendment, if any, to the Memorandum of Association and the Rules and Regulations of BCCI to carry out the recommendations of the Probe Committee headed by Justice Mudgal, subject to such recommendations being found acceptable by the newly appointed Committee.

(iv.) Any other recommendation with or without suitable amendment of the relevant Rules and Regulations, which the Committee may consider necessary to make with a view to preventing sporting frauds, conflict of interests, streamlining the working of BCCI to make it more responsive to the expectations of the public at large and to bring transparency in practices and procedures followed by BCCI.

Order

1. Amendment to Rule 6.2.4 whereby the words 'excluding events like IPL or Champions League Twenty 20', were added to the said rule is hereby declared void and ineffective. The judgment and order of the High Court of Bombay in PIL No. 107 of 2013 is resultantly set aside and the said writ petition allowed to the extent indicated above.

2. The quantum of punishment to be imposed on Mr. Gurunath Meiyappan and Mr. Raj Kundra as also their respective franchisees/teams/owners of the teams shall be determined by a Committee comprising the following:

   i) Hon'ble Mr. Justice R.M. Lodha, former Chief Justice of India-Chairman.

ii) Hon'ble Mr. Justice Ashok Bhan, former Judge, Supreme Court of India-Member.

iii) Hon'ble Mr. Justice R.V. Raveendran, former Judge, Supreme Court of India-Member.

The Committee shall, before taking a final view on the quantum of punishment to be awarded, issue notice to all those likely to be affected and provide to them a hearing in the matter. The order passed by the Committee shall be final and binding upon BCCI and the parties concerned subject to the right of the aggrieved party seeking redress in appropriate judicial proceedings in accordance with law.

3. The three-member Committee constituted in terms of Para (II) above, shall also examine the role of Mr. Sundar Raman with or without further investigation, into his activities, and if found guilty, impose a suitable punishment upon him on behalf of BCCI.

Investigating team constituted by this Court under Shri B.B. Mishra shall for that purpose be available to the newly constituted Committee to carry out all such investigations as may be considered necessary, with all such powers as were vested in it in terms of our order dated 16th May, 2014.

4. The three-member Committee is also requested to examine and make suitable recommendations to the BCCI for such reforms in its practices and procedures and such amendments in the Memorandum of Association, Rules and Regulations as may be considered necessary and proper on matters set out by us in Para number 109 of this order.

5. The constitution of the Committee or its deliberations shall not affect the ensuing elections which the BCCI shall hold within six weeks from the date of this order in accordance with the prevalent rules and Regulations subject to the condition that no one who has any commercial interest in the BCCI events (including Mr. N. Srinivasan) shall be eligible for contesting the elections for any post whatsoever. We make it clear that the disqualification for contesting elections applicable to those who are holding any commercial interest in BCCI events shall hold good and continue till such time the person concerned holds such commercial interest or till the Committee considers and awards suitable punishment to those liable for the same; whichever is later.

6. The Committee shall be free to fix their fees which shall be paid by the BCCI who shall, in addition, bear all incidental expenses such as travel, hotel, transport and secretarial services, necessary for the Committee to conclude its proceedings. The fees will be paid by the BCCI to the members at such intervals and in such manner as the Committee may decide. The venue of the proceedings shall be at the discretion of the Committee.

(2005)4SCC649

IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No. 541 of 2004 with S.L.P. (C) No. 20186 of 2004

Decided On: 02.02.2005

Zee Telefilms Ltd. and Anr. Vs. Union of India (UOI) and Ors.

Hon'ble Judges/Coram: N. Santosh Hegde, B.P. Singh, H.K. Sema, S.B. Sinha and S.N. Variava, JJ.

Whether BCCI was 'State'under Article 12 of the Constitution of India

Held,

Majority Opinion

The facts of the case in hand will have to be tested on the touch stone of the parameters laid down in *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology and Ors.* [2002]3SCR100. Before doing so it would be worthwhile once again to recapitulate what are the guidelines laid down in *Pradeep Kumar Biswas's* case (supra) for a body to be a State under Article 12. They are :-

(1) Principles laid down in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.

(2) The Question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.

(3) Such control must be particular to the body in question and must be pervasive.

(4) Mere regulatory control whether under statute or otherwise would not serve to make a body a State.

The facts established in this case shows the following :-

1. Board is not created by a statute.

2. No part of the share capital of the Board is held by the Government.

3. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.

4. The Board does enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected.

5. There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.

6. The Board is not created by transfer of a Government owned corporation. It is an autonomous body.

To these facts if we apply the principles laid down by seven Judge Bench in *Pradeep Kumar Biswas* (supra), it would be clear that the facts established do not cumulatively show that the Board

is financially, functionally of administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more.

Assuming for argument sake that some of the functions do partake the nature of public duties or State actions they being in a very limited area of the activities of the Board would not fall within the parameters laid down by this Court in *Pradeep Kumar Biswas's* case. Even otherwise assuming that there is some element of public duty involved in the discharge of the Board's functions even then as per the judgment of this Court in *Pradeep Kumar Biswas* (supra) that by itself would not suffice for bringing the Board within the net of "other authorities" for the purpose of Article 12.

There is no doubt that Article 19(1)(g) guarantees to all citizens the fundamental right to practise any profession or to carry on any trade occupation or business and that such a right can only be regulated by the State by virtue of Article 19(6). Hence, it follows as a logical corollary that any violation of this right will have to be claimed only against the State and unlike the rights under Articles 17 or 21 which can be claimed against non state actors including individuals the right under Article 19(1)(g) cannot be claimed against an individual or a non State entity. Thus, to argue that every entity, which validly or invalidly arrogates to itself the right to regulate or for that matter even starts regulating the fundamental right of the citizen under Article 19(1)(g), is a State within the meaning of Article 12 is to put the cart before the horse. If such logic were to be applied every employer who regulates the manner in which his employee works would also have to be treated as State. The pre-requisite for invoking the enforcement of a fundamental right under Article 32 is that the violator of that right should be a State first. Therefore, if the argument of the learned counsel for the petitioner is to be accepted then the petitioner will have to first establish that the Board is a State under Article 12 and it is violating the fundamental rights of the petitioner. Unless this is done the petitioner cannot allege that the Board violates fundamental rights and is therefore State within Article 12. In this petition under Article 32 we have already held that the petitioner has failed to establish that the Board is State within the meaning of Article 12. Therefore assuming there is violation of any fundamental right by the Board that will not make the Board a "State" for the purpose of Article 12.

The Board selects a team to represent India in international matches. The Board makes rules that govern the activities of the cricket players, umpires and other persons involved in the activities of cricket. These, according to the petitioner, are all in the nature of State functions and an entity which discharges such functions can only be an instrumentality of State, therefore, the Board falls within the definition of State for the purpose of Article 12. Assuming that the abovementioned functions of the Board do amount to public duties or State functions, the question for our consideration is: would this be sufficient to hold the Board to be a State for the purpose of Article 12. While considering this aspect of the argument of the petitioner, it should be borne in mind that the State/Union has not chosen the Board to perform these duties nor has it legally authorised the Board to carry out these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self-arrogated). In such circumstances when the actions of the Board are not actions as an authorised representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorisation, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State. The Union of India has tried to make out a case that the Board discharges these functions because of the de facto recognition granted by it to the Board under the guidelines framed by it but the Board has denied the same. In this regard we must hold that the Union of India has failed to prove that there is any recognition by the Union of India under the guidelines framed by it and that the Board is discharging these functions on its own as an autonomous body.

However, it is true that the Union of India has been exercising certain control over the activities of the Board in regard to organising cricket matches and travel of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. But this control over the activities of the Board cannot be construed as an administrative control. At best this is purely regulatory in nature and the same according to this Court in Pradeep Kumar Biswas's case (supra) is not a factor indicating a pervasive State control of the Board.

Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is

any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

That when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a nongovernmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in *Pradeep Kumar Biswas* case (supra), hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable.

There can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. It is noticed earlier in this judgment that in Article 12 the term "other authorities' was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the Statute and which discharge State functions. However, because of the need of the day this Court in *Rajasthan State Electricity Board* v. *Mohan Lal and Ors.* (1968)ILLJ257SC and *Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr.* (1975)ILLJ399SC noticing the socio-economic policy of the country thought it fit to expand the definition of the term "other authorities" to include bodies other than statutory bodies. This development of law by judicial interpretation culminated in the judgment of the 7-Judge Bench in the case of *Pradeep Kumar Biswas* (supra). It is to be noted that in the meantime the socio-economic policy of the Government of India has changed [See *Balco Employees' Union (Regd.)* v. *Union of India and Ors.*] MANU/SC/0779/2001 : (2002)ILLJ550SC and the State is today distancing itself from commercial activities and

concentrating on governance rather than on business. Therefore, the situation prevailing at the time of *Sukhdev Singh* (supra) is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that as noticed above, in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

In the above view of the matter, the second respondent-Board cannot be held to be a State for the purpose of Article 12.

Minority Opinion

In Article 12 the 'State' has not been defined. It is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word 'or' is disjunctive and not conjunctive.

The expression "Authority" has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation. To arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12, we may notice the meaning of the word "authority".

The word "Other Authorities" contained in Article 12 is not to be treated as ejusdem generis. Broadly, there are three different concepts which exist for determining the question which fall within the expression "other authorities".

(i) The Corporations and the Societies' created by the State for carrying on its trading activities in terms of Article 298 of the Constitution where for the capital, infrastructure, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control there over.

(ii) Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.

(iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government.

There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether it fulfills the requirements of law therefore or not.

What is necessary is to notice the functions of the Body concerned. A 'State' has different meanings in different context. In a traditional sense, it can be a body politic but in modern international practice, a State is an organization which receives the general recognition accorded to it by the existing group of other States. Union of India recognizes the Board as its representative. The expression "other authorities" in Article 12 of the Constitution of India is 'State' within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by Part-III of the Constitution and Directive Principles of the State Policy contained in Part-IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its told whatever comes within the purview thereof so as to instill the public confidence in it.

The feature that the Board has been allowed to exercise the powers enabling it to trespass across the fundamental rights of a citizen is of great significance.

. If the 'Constitution Bench judgment of this Court in Sukhdev Singh and Ors. v. Bhagatram Sardar Singh MANU/SC/0667/1975 : (1975)ILLJ399SC and development of law made therefrom is to be given full effect, it is not only the functions of the Government alone which would enable a body to become a State but also when a body performs governmental functions or quasi-governmental functions as also when its business is of public importance and is fundamental for the life of the people. For the said purpose, we must notice that this Court in expanding the definition of State did not advisedly confine itself to the debates of Constitutional Assembly. It considered each case on its own merit. . "Other authorities" inter-alia would be there which inter alia function within the territory of India and the same need not necessarily be the Government of

India, the Parliament of India, the Government of each of the States which constitute the Union of India or the legislation of the States.

Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a charter of liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred - the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government established, under the Constitution and the establishments of organizations funded or controlled by the Government. It is not that every body or association which is regulated in its private functions becomes a 'State'. What matters is the quality and character of functions discharged by the body and the State control flowing therefrom.

In the instant case, there does not exist any legislation made either by any State or by the Union of India regulating and controlling the cricketing activities in the country. The Board authorized itself to make law regulating cricket in India which it did and which it was allowed to do by the States either overtly or covertly. The States left the decision making responsibility in the hands of the Board, otherwise so-called private hands. They maintain silence despite the Board's proclamation of its authority to make law of sports for the entire country.

Performance of a public function in the context of the Constitution of India would be to allow an entity to perform the function as an authority within the meaning of Article 12 which makes it subject to the constitutional discipline of fundamental rights. Except in the case of disciplinary measures, the Board has not made any rub to act fairly or reasonably. Governmental functions are multi-facial. There cannot be a single test for defining public functions. Such functions are performed by variety of means.

Furthermore, even when public duties are conferred by statute, powers and duties do not thereunder limit the ambit of a statute as there are instances when the conferment of powers involves the imposition of duty to exercise it, or to perform some other incidental act, such as obedience to the principles of natural justice. Many public duties are implied by the courts rather than commanded by the legislature; some can even be said to be assumed voluntarily. Some

statutory public duties are prescriptive patterns of conduct' in the sense that they are treated as duties to act reasonably so that the prescription in these cases is indeed provided by the courts, not merely recognized by them.

There are, however, public duties which arise from sources other than a statute. These duties may be more important than they are often thought to be or perceived. Such public duties may arise by reason of (i) Prerogative, (ii) Franchise and (iii) Charter The functions of the Board, thus, having regard to its nature and character of functions would be public functions.

The traditional tests which had impelled this Court to lay down the tests for determining the question as to whether a body comes within the purview of "Other Authorities" in Ajay Hasia (supra), inter alia are :

(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

The six tests laid down there are not exhaustive.

We in this case, moreover, are required to proceed on the premise that some other tests had also been propounded by Mathew, J. in Sukhdev Singh (supra), wherein it was observed:

The growing power of the industrial giants, of the labour unions and of certain other organized groups, compels a reassessment of the relation between group - power and the modem State on the one hand and the freedom of the individual on the other. The corporate organisations of business and labour have long ceased to be private phenomena."

In our view, the complex problem has to be resolved keeping in view the following further tests :

(i.) When the body acts as a public authority and has a public duty to perform;

(ii.) When it is bound to protect human rights.

(iii.) When it regulates a profession or vocation of a citizen which is otherwise a fundamental right under a statute or its own rule.

(iv.) When it regulates the right of a citizen contained in Article 19(1)(a) of the Constitution of India available to the general public and viewers of game of cricket in particular.

(v.) When it exercises a de facto or a de jure monopoly;

(vi.) When the State out-sources its legislative power in its favour ;

(vii.) When it has a positive obligation of public nature.

These tests as such had not been considered independently in any other decision of this Court.

We, thus, would have to proceed to determine the knotty issues involved therein on a clean slate.

These traditional tests of a body controlled, financially, functionally and administratively by the Government as laid down in Pradeep Kumar Biswas (supra) would have application only when a body is created by the State itself for different purposes but incorporated under the Indian Companies Act or Societies Registration Act.

Those tests may not be applicable in a case where the body like the Board was established as a private body long time back. It was allowed by the State to represent the State or the country in international fora. It became a representative body of the international organizations as representing the country. When the nature of function of such a body becomes such that having regard to the enormity thereof it acquires the status of monopoly for all practical purposes; regulates and control the fundamental rights of a citizen as regard their right of speech or right of occupation, becomes representative of the country either overtly or covertly and has a final say in the matter of registration of players, umpires and other connecting with a very popular sport. The organizers of competitive test cricket between one association and another or representing different States or different organizations having the status of a state are allowed to make laws on the subject which is essentially a State function in terms of Entry 33 List II of the Seventh Schedule of the Constitution of India. In such a case, different tests have to be applied.

The question in such cases may, moreover, have to be considered as to whether it enjoys the State patronage as a national federation by the Central Government; whether in certain matters a joint action is taken by the body in question and the Central Government; its nexus with the

Governments or its bodies, its functions vis-a-vis the citizens of the country its activities vis-a-vis the government of the country and the national interest/ importance given to the sport of cricket in the country. The tests, thus, which would be applicable are coercion test, joint action test, public function test, entertainment test nexus test supplemental governmental activity test and the importance of the sport test.

An entity or organization constituting a State for the purpose of Part III of the Constitution would not necessarily continue to be so for all times to come. Converse is also true. A body or an organization although created for a private purpose by reason of extension of its activities may not only start performing governmental functions but also may become a hybrid body and continue to act both in its private capacity or as public capacity. What is necessary to answer the question would be to consider the host of factors and not just a single factor. The presence or absence of a particular element would not be determinative of the issue, if on an overall consideration it becomes apparent that functionally it is an authority within the meaning of Article 12 of the Constitution of India.

Similarly significant funding by the Government may not by itself make a body a State if its functions are entirely private in character. Conversely absence of funding for the functioning of the body or the organization would not deny it from its status of a State; if its functions are public functions and if it otherwise answers the description of "Other Authorities". The Government aid may not be confined only, by way of monetary grant. It may take various forms, e.g., tax exemptions minimal rent for a stadia and recognition by the State, etc. An over emphasis of the absence of the funding by the State is not called for.

It is true that regulatory measures applicable to all the persons similarly situated, in terms of the provisions of a statute would by itself not make an organization a State in all circumstances. Conversely, in a case of this nature non-interference in the functioning of an autonomous body by the Government by itself may also not be a determinative factor as the Government may not consider any need therefore despite the fact that the body or organization had been discharging essentially a public function. Such non-interference would not make the public body a private body.

An authority necessarily need not be a creature of the statute. The powers enjoyed and duties attached to the Board need not directly flow from a statute. The Board may not be subjected to a statutory control or enjoy any statutory power but the source of power exercised by them may be traced to the legislative entries and if the rules and regulations evolved by it are akin thereto, its actions would be State actions. For the said purpose, what is necessary is to find out as to whether by reason of its nature of activities, the functions of the Board are public functions. It regulates and controls the field of cricket to the exclusion of others. Its activities impinge upon the fundamental rights of the players and other persons as also the rights, hopes and aspirations of the cricket loving public. The right to see the game of cricket live or on television also forms an important facet of the Board. A body which makes a law for the sports in India (which otherwise is the function of the State), conferring upon itself not only enormous powers but also final say in the disciplinary matter and, thus, being responsible for making or marring a citizen's sports career, it would be an authority which answers the description of "other authorities". The activities undertaken by the Board were taken note of in the case of Cricket Association of Bengal (supra). Therein this Court inter alia rejected the contention of the Ministry of Information and Broadcasting that the activities of the Association was a commercial one and it had been claiming a commercial right to exploit the sporting event as they did not have the right to telecast the sporting event through an agency of their choice in the following terms:

> "We have pointed out that that argument is not factually correct and what in fact the BCCI/CAB is asserting is a right under Article 19(1)(a). While asserting the said right, it is incidentally going to earn some revenue. In the circumstances, it has the right to choose the best method to earn the maximum revenue possible. In fact, it can be accused of negligence and may be attributed improper motives, if it fails to explore the most profitable avenue of telecasting the event, when in any case, in achieving the object of promoting and popularizing the sport, it has to endeavour to telecast the cricket matches."

The aforementioned findings pose a question. Could this Court arrive at such a finding, had it not been for the fact that the association exercises enormous power or it is a 'State' within the meaning of Article 12. If Cricket Association of Bengal (supra) was considered to be a pure private body where was the occasion for this Court to say that 'if it fails to explore the most profitable avenue

of telecasting the event whereby it would achieve the object of promoting and popularizing the sport, it may be accused of negligence and may be attributed improper motives?'

Applying the tests laid down hereinbefore to the facts of the present case, the Board, in our considered opinion, said description. It discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfill the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor.

We, therefore, are of the opinion that law requires to be expanded in this field and it must be held that the Board answers the description of "Other Authorities" as contained in Article 12 of the Constitution of India and satisfies the requisite legal tests, as noticed hereinbefore. It would, therefore, be a 'State'.

X

REGULATION OF PUBLIC UTILITIES & NATURAL RESOURCES

MANU/MH/0099/2011

IN THE HIGH COURT OF BOMBAY

Writ Petition No. 1197 of 2010 and Notice of Motion No. 100 of 2010

Decided On: 07.02.2011

Multi Commodity Exchange of India Limited Vs. Central Electricity Regulatory Commission

[AlongWith Writ Petition No. 1604 of 2009 and Notice of Motion No. 71 of 2010]

Hon'ble Judges/Coram: P.B. Majmudar and Anoop V. Mohta, JJ.

Conflict between Regulatory Authorities - Exercise of jurisdiction over forward contracts and futures in electricity - Forward Contracts (Regulation) Act, 1952 and Electricity Act, 2003 – Whether the forward contract is exclusively within the jurisdiction of Forward Market Commission (FMC) and whether Central Electricity Regulatory Commission (CERC) can deal with futures contract in the matter of electricity in view of the Regulations framed by it

Justice P.B. Majmudar

The regulatory authority functioning under the Consumer Protection Act i.e. Forward Market Commission (FMC) claims sole right in the matter of forward contract whereas the authority functioning under the Electricity Act, 2003 i.e. Central Electricity Regulatory Commission (CERC) claims exclusive right in the matter of dealing with the trading activities in connection with the electricity including dealing in forward contract.

It is no doubt true that Section 174 of the Act provides for overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. In our view, in view of the specific provisions in FCRA, which is a central legislation enacted earlier in point of time, by which in a notified commodity forward contract can be undertaken only through the machinery

under the said Act, the futures contract in electricity cannot be exclusively dealt with by the authority under the FCRA. Similarly, in view of the specific provisions under the FCRA, CERC also cannot deal with the futures contract on its own and have no power to deal with the same in the futures contract, unless appropriate enactment has been made by way of statutory provision regulating the futures contract giving powers only to one authority out of the aforesaid two authorities.

It is no doubt true that electricity is a special legislation provided for a specific purpose wherein the interest of consumer is also required to be taken into consideration. In our view, both the enactments operate in the respective fields. If any futures contract in case of a notified commodity under the FMC is concerned, it can be done only through the machinery provided under the FMC. Looking to the special nature of the electricity commodity and even considering the controlling of prices, etc. in our view, the futures contract in electricity cannot be exclusively dealt with by FMC. Similarly, the CERC has no jurisdiction to frame any Regulation in connection with the futures contract in electricity. With a view to harmonise the provisions of both the Acts, in our view, the futures contract no doubt is within the domain of FMC. Even if futures contract is to be taken into consideration in the matter of electricity, the same can be done only in consultation with the CERC. Each domain is exclusive under the respective statutes. One cannot transgress into another domain. In our view, CERC cannot be totally taken out of consideration as the physical delivery of the electricity and electricity derivative products also form part of various aspects of the electricity market structure under the Electricity Act.

It is also required to be noted that the CERC under the Electricity Act is required to promote development of market including trading in power, in a specified manner. The CERC is assigned a duty to promote development of market in power through the Regulations. The CERC has, therefore, jurisdiction to regulate development of market in electricity in all forms but in view of the specific provisions under the FCRA regarding futures contract, at present it is not possible to hold that the CERC is entitled to even act in the futures contract in view of the clear provisions in this behalf in the FCRA. In our view, neither of the regulatory authorities will have exclusive jurisdiction to deal with in the futures contract so far as electricity is concerned. Since statutory duty is cast upon the CERC under the Electricity Act regarding market development, the Commission, in our view, is entitled to issue appropriate guidelines in connection with regulating

the development of market in electricity. It is also the duty of the CERC under the Electricity Act to see that the transactions on the exchanges are conducted in a free and fair manner, while keeping the interest of the consumer in mind. As on today, the Regulations framed by the CERC also cannot be given any effect to as the power to deal with futures contract is specifically dealt with by other statute and in view of the same, it is not necessary to examine as to whether the CERC was justified in exercising jurisdiction on the basis of the application filed by Respondent No. 3 before the CERC or not. As stated above, neither the FMC nor the CERC can exclusively deal with electricity in the matter of futures contract. The CERC cannot act in the futures contract in the matter of electricity unless appropriate enactment has been made by the Parliament in this behalf. The Regulations under challenge cannot be given effect to and it will have no effect so far as futures contract in electricity is concerned. In so far as the power of CERC to deal with electricity in the futures contract is concerned, as pointed our earlier, even the Cabinet Secretary also asked both the Regulatory authorities not to act further and CERC has been specifically asked not to give effect to the Regulations till the dispute can be sorted out.

So far as Electricity Act is concerned, it is a special Act which deals with various aspects of electricity including fixation of rates, etc. However, so far as futures contract is concerned, the CERC cannot frame any Regulations in connection with futures contract. Considering the same, the Regulations framed by CERC cannot be given any effect to unless proper enactment is made in this behalf. After considering the provisions of the FCRA and Electricity Act and the Regulations framed thereunder and considering the nature of controversy as well as considering the case laws cited by the learned Counsel appearing for the parties, in our view, neither of the regulatory authorities will have exclusive jurisdiction to deal with in the futures contract in electricity independently. In view of the above, the provision regarding "term ahead market" in the Regulations providing for futures contract or term ahead contract beyond eleven days cannot be made applicable, unless proper enactment in this behalf is made by the Parliament. Till appropriate legislation is enacted by the Parliament, the Regulations framed by the CERC is held to be not applicable so far as futures contract in electricity is concerned.

54. In view of the above, the following order:

(a) The Central Electricity Regulatory Commission (Power Market) Regulations, 2010 are declared inoperative hereinafter, so far as the futures/forward contracts in electricity is concerned;

(b) The orders dated 28th April, 2009 passed in Petition No. 159 of 2008 and 11th January, 2010 passed in Review Petition No. 115 of 2009 are quashed and set aside so far as reasoning and directions with regard to futures/forward contract in electricity;

(c) It is further declared that the Petitioner FMC and authority/commission under it have no sole and exclusive jurisdiction to regulate and control forward trading/futures contract in electricity and also CERC and authorities/commission under it.

(c) In view of the above, both these Petitions are partly allowed and disposed of accordingly, with no order as to costs. Rule in each of the petitions is accordingly partly made absolute to the extent indicated above.

(d) The Notices of Motion are also disposed of in view of disposal of the petitions. No costs.

Justice Anoop V. Mohta

In my view, the development of power market under the Electricity Act 2003 nowhere contemplates speculative business/ market in electricity. The concept "development of power market" may cover all related and relevant steps including trading and all types of contracts for the electricity development. Therefore, CERC through its regulations is not specifically empowered to do speculative trading and/or forward trading or future contract, independently, by overlooking the mandate of FCR Act. The FMC and MCX are also not in a position to do the same business exclusively, by overlooking the Electricity Act and its authorities.

The Ministry of Consumer Affairs, Food and Public Distribution, vide Gazette by Notification dated 9th January, 2006 by invoking Sections 15 and 16 of the FCR Act has covered "Electricity" and "Natural Gas". FMC has by order of January, 2009 permitted MCX to have trading of electricity in future/forward market. This was probably in view of national and international developing market of electricity. Therefore, the conflict so far as the trade of Futures contract in electricity.

The respective entries of the Constitution of India and the Acts based upon it need to keep in mind, while considering development of power/electricity market in India and/or for facilitating permission of investment in electricity sector and for protecting the interest of the consumers. The mandate of Electricity Act needs to be noted while dealing with the marketing and/or trading in electricity. When it comes to futures contracts or forward market, the provisions of Sections 14, 15 and 81 of FCR Act which govern the field by its rules and regulations and authorities also just cannot be overlooked. The power market in electricity developing and is at evolving stage which needs clear and unqualified rules, regulations and controlling authorities in view of specific provisions of the Electricity Act, that itself is not sufficient to permit FMC and MCX to do business of futures contract in electricity exclusively. All commodities/goods are storable. The electricity is not storable goods, except produced by HydroProjects. There cannot be any comparison of electricity as goods with the other goods/commodities. This typical characteristic of electricity as goods, goes to the root of the matter. The Electricity Act deals with and covers all aspect of electricity rights from an establishment of projects of electricity, manufacturing, process, production, supply, distribution, tariff, rate of electricity and its regulations. The CERC controls and deals with such issues in the respective States. The Electricity Act basically permits/provides the trading and supply of electricity as goods for actual physical use.

The FCR Act deals with futures market and forward contracts in all goods which in essence are financial contracts for delivery of goods, which may or may not be physical and/or may settle by the payment of differences. Any market/ trading basically means physical delivery of the goods but the FCR Act also provides specialized financial market to permit the traders to do business in the realm of price discovery and price risk management.

The futures market is a centralized place for buyers and sellers, who could be speculators, from around the nation and/or around the World, who enters into futures contracts. Such contracts provides for the quality, the quantity, the fixed price and the date of delivery. The spot/ cash market is different than future market. The profits and losses of future contracts based on the daily movements in the market of the commodity. The concepts and importance of "margin", "leverage", "hedging", "price discovery" and "risk reduction" are well known in the field. Various factors have a major effect on supply and demand and price of a commodity. The future markets always quite risky, complex and volatile. All above elements are essential of any future contract and need to be

governed and controlled by regulatory authority/commission, which in India at present constituted under FCR Act only. No such power or authority is available under the Electricity Act and/or provided in any other such statute to the CERC or other authority at present.

Such future trading or future markets of electricity which non storable goods, cannot be permitted without expertized body or statute or regulator under the guise of nation power policy or global market for development of electricity. The electricity falls within the ambit of "commodity features". The maintaining of update index like other commodity is also important factor. It is only the exchange decides whether the future contract is cash settled or settlement is delivery based.

The Electricity Act nowhere permits the CERC to use and/or suspend the control and/or delegate and/or handover the charges/control of electricity to FMC or to other associations under the FCR Act, considering the speciality of electricity as a non storable goods. No other authorities even under the FCR Act can have exclusive and independent control and authority to trade in the electricity in futures market/ forward market. No other authority/ commission is entitled to challenge and control the trading power of CERC by any modes in any markets, but this can be subject to appropriate rules/regulations as contemplated under Section 178(2) of the Electricity Act based upon the desirable and workable electricity power policy. Mere notification and/or approval under Sections 15/16 of the FCR Act itself is not sufficient to empower the authorities/ commission to do the future markets of electricity under its existing rules and regulations.

Any electricity market/ trading covers and means availability of electricity, electricity producers, Central, State, private projects/sectors, suppliers, distributors, transmitters and transporters from one place to another, from one State to other State and/or within a State considering the demand and supply for the consumers. The demand and supply of electricity, the price and/or tariff of electricity at all levels/ stages need to be under the strict control of the CERC and its authorities.

The business of future market in any exchange is always based upon the national level. The speculations in electricity trading as contemplated and understood in futures market or forward market may create complications and problems, because of various market factors. The fixed forward price and fixed forward quantity and the date of delivery are the basic elements of any such contract/ trading. The price uncertainty always impact on the certainty of supply/ price. The

interest of the supplier, the manufacturer and the consumers and traders need to be considered in all respect, at all the stages. Therefore, it is necessary to have an efficient and a harmonized system in the country for futures trading in electricity. There is central system in futures market for other goods under the FCR Act. In contrast to that, there is only State based controlled systems in electricity under the Electricity Act. The domestic and international trade business and taxes at various stages also play an important role in futures market.

MCX has been permitted by order of January, 2009 by the FMC to trade daily electricity contracts, weekly electricity contracts and monthly electricity contracts also raises doubts. The notification dated 9th January, 2006 is also of no assistance. The transactions/contracts where physical delivery of goods "spot market" takes place, the same will not fall within the ambit of forward contract. Such contract falls within the exclusive jurisdiction of CERC. However, in view of the specialized goods and its requirement of infrastructure, technical expertise/tariff/price, fixation in the interest of consumers at large, the CERC, cannot be permitted to transgress its jurisdiction by venturing into futures market, forward contracts and/or derivative as contemplated and covered under the FCR Act, in the guise of trading and developing the market of electricity. The orders and guidelines therefore, issued by the CERC in questions are in conflicts with the provisions of FCR Act in so far as the business in futures contract and forward market. Any such future contract or forward market of electricity falls within the scope and Sections of 15 and 16 of the FCR Act, the Power Exchange of India Limited (PXI) and Indian Energy Exchange Limited (IEX) therefore, also cannot be permitted to the future trading, even though it is approved by the CERC. Merely because Electricity Act also deals with subjects like railway, telegraph, telephone that itself is not sufficient to do futures trading in electricity. Any trading of power on PXI/IEX where delivery and payment is made beyond 11 days, falls within the ambit of forward contracts. But any contract having fixed delivery period, fixed parties and certain price stands on different footing.

Furthermore, apart from knowledge of law, engineering, finance, commerce, economics and management and various factual and technical details are required even for commission and also to the appropriate appellate body to deal with the various aspects of tariff and electricity. The availability and/or non availability of transmission facility, generation facility at sale point and/or availability of demand or electricity at the point of purchase, the wheeling facilities, all these are important aspects which are necessary while dealing with the trading in electricity. The notification

issued under Section 15 of the FCR Act, itself is not under challenge, but in view of above, it is difficult and not practicable and feasible for FMC and MCX to deal with the physical delivery of the electricity. To say that there would not be necessary to have physical delivery in every matter is not contemplated under FCR Act and regulations made thereunder. The speculative trading in electricity, in the circumstances, is impracticable and impermissible.

The concept of "trading and development of power or electricity" nowhere contemplates the speculative trading, but still the provisions of FCR Act and its regulations with regard to the futures contract or forward contract cannot be taken away, under the existing provisions of law. CERC also therefore, cannot be permitted to do the same nature of trading, exclusively by running parallel exchanges. I am not inclined to accept that for futures contract/forward contract of electricity is taken out and placed under the jurisdiction of regulatory commission under the Electricity Act, though inter State trade, licensee is also permitted to do intraState trading without permission/ licence from the State Commission to do intraState trading. The requirement and necessity as contemplated under FCR Act and rules and regulations made thereunder, are again just cannot be overlooked for permitting the CERC for trading in futures/ forward contracts. There is no question of which entry and/or schedule should prevail and/or conflict of two entries, but the point is a practical and a feasible deal of the electricity in future/forward markets exclusively under one authority/commission. We need to read and consider both these Acts together and find out a solution by appropriate rules, regulations and/or amendment, if market available to permit futures trading in electricity, though in wider sense, trading covers trade and commerce including spot and forward contract for sale and purchase of electricity. The point is, who should control and regulate such contracts/ trading protecting the interest of consumer, specially when at present in India power markets is not yet fully developed.

The CERC cannot be permitted to have regulations under Section 66 and 178(2)(y) by virtue of Section 174 of the Electricity Act, to prevail over the provisions of Section 14A and 15 of the forward contracts in such fashion with regard to the futures contracts/ forward contracts. The Supreme Court judgment in Gujarat Urja Vikas Nigam Limited (supra) no way assist the CERC to prevail over different and distinct provisions of FCR Act. In the present circumstances, though the Electricity falls within ambit of commodities /goods in FCR Act, by notification in the year 2006, which was definitely after Electricity Act of 2003, the conflict therefore, definitely needs to

be resolved by appropriate laws and regulations. In view of the above, the grant of approval in January, 2002 by the FMC to MCX permitting to trade in Electricity forward contracts based upon notification of January, 2006 is by itself not sufficient.

The domain and jurisdiction of respective authorities/ commission is totally different and distinct in every aspect. CERC is a statutory authority being constituted under the Electricity Act, cannot be provided that the power beyond the statutes permitting to do futures, forward, derivative contracts which is admittedly a domain jurisdiction of authorities/commission under the FCR Act. It is difficult to go beyond for both these authorities to cross and/or interfere with the powers, functions and duties as provided under their parents statute, unless relevant provisions including Section 18 and 27 of the FCR Act and also of Electricity Act are invoked.

There is no question of giving any overriding effect in case of statutory conflicts, as it is impracticable, uncontrollable and it will not be in the interest of consumers to permit any of the authorities to do forward future and derivative market in electricity in the present scenario without proper and effective revised national power policy and/or guidelines and laws under the supervision of expert bodies. Apart from the conflict, it is difficult to control and regulate forward market of electricity excluding respective authorities under both Acts.

In the present case, as it is a question of interpretation of constitutional entries and the provisions of the central Acts, the authorities or departments could not have resolved the issues/conflicts.

The power and the jurisdiction of these statutory tribunals are quite limited and normally governed by their own rules and regulations. These tribunals are not the Court having jurisdiction to decide complicated question of law and/or the conflict of laws, based upon the constitutional entries and the related enactments. Therefore, the CERC and/or even the Appellate authority under the Electricity Act have no jurisdiction to decide the validity of regulations framed by CERC under Section 178 of the Act. It is subject to challenge by invoking judicial power under Article 226 of the Constitution of India.

To conclude:

(a) The Electricity Act deals with in every respect including trading in electricity. The electricity is a non storable goods, except produced by hydro projects. The trading of electricity falls within the concept of commodity trading. Therefore, it may or may not physically available all the time, unless generated on the day and/or the date of delivery. The Electricity Act, 2003.

(b) In view of the reasoning's earlier recorded, it will not be possible either for FMC or MCX to control and regulate the mandatory requirements of electricity, at various stages, which are well within the exclusive domain and control of the CERC and/or authorities/commissions. It will create more complications than solving it, unless an expert's body constituted and specialized rules and regulations are framed. Both authorities/commissions cannot deal in futures/forward contract in electricity excluding other and/or independently.

(c) It is not only question of resolving the conflict between two entries and/or mandates of the respective specialized Act, but actual and physical workable solution to permit and/or to allow either authorities/ commissions/ exchanges to deal with the electricity in the futures/ forward market. Both authorities/ commissions under the respective Acts may not be in a position to control and regulate the futures contract in electricity exclusively, unless those Acts and regulations are amended /revised and reframed. Both cannot have exclusive jurisdiction as claimed in the present scenario in India.

(d) It is clarified that the Union of India and/or the concerned commission and/or the regulatory authorities are free to revise and/or to reframe the rules and the regulations and/or to amend the concerned statutes to permit the futures/ forward and derivatives contract in electricity, if so advised.

(e) The regulations of CERC as notified on 20 January, 2010, which deals with the aspects of futures contracts or forward contracts, therefore, are inoperative to that extent only. The impugned order dated 28th April, 2009 and order dated 11th January, 2010 upholding the regulations are also unsustainable to the extent of reasoning and direction relates to forward contracts in electricity.

(2004)4SCC489

IN THE SUPREME COURT OF INDIA

Special Reference No. 1 of 2001 with W.P.(C) No. 852/91 and civil Appeal No. 3575 of 1991

Decided On: 25.03.2004

Association of Natural Gas and Ors. Vs Union of India (UOI) and Ors.

WITH

Assn. of N.G. Consmg. Indu. of Gujarat and Ors. Vs. The Oil and N.G. Commission and Ors.

[Alongwith civil Appeal No. 3576 of 1991]

Hon'ble Judges/Coram:

S. Rajendra Babu, K.G. Balakrishnan, P. Venkatarama Reddi, B.N. Srikrishna and G.P. Mathur, JJ.

The following questions were referred to this Court under Clause 1 of Article 143 of the Constitution of India:

(1) Whether natural gas in whatever physical form including Liquefied Natural Gas (LNG) is a Union subject covered by Entry 53 of List I and the Union has exclusive legislative competence to enact laws on natural gas.

(2) Whether States have legislative competence to make laws on the subject of natural gas and Liquefied Natural Gas under Entry 25 of List II of the Seventh Schedule to the Constitution.

(3) Whether the State of Gujarat had legislative competence to enact Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act 2001.

The Constitution of India delineates the contours of the powers enjoyed by the State Legislature and the Parliament in respect of various subjects enumerated in the Seventh Schedule. The rules relating to distribution of powers are to be gathered from the various provisions contained in Part XI and the legislative heads mentioned in the three lists of the Schedule. The legislative power of

both Union and State Legislatures are given in precise terms. Entries in the lists are themselves not powers of legislation, but fields of legislation. However, an Entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless. In case of apparent conflict, it is the duty of the court to iron out the crease and avoid conflict by reconciling the conflict. If any entry overlaps or is in apparent conflict with another entry, every attempt shall be made to harmonise the same.

. Although Parliament cannot legislate on any of the Entries in the State List, it may do so incidentally while essentially dealing with the subject coming within the purview of the Entry in the Union list. Conversely, State Legislature also while making legislation may incidentally trench upon the subject covered in the Union List. Such incidental encroachment in either event need not make the legislation *ultra vires* of the Constitution. The doctrine of pith and substance is sometimes invoked to find out the nature and content of the legislation. However, when there is an irreconcilable conflict between the two legislations, the Central legislation shall prevail. However, every attempt would be made to reconcile the conflict

All the materials produced before us would only show that the natural gas is a petroleum product. It is also important to note that in various legislations covering the field of petroleum and petroleum products, either the word 'petroleum' or 'petroleum products' has been defined in an inclusive way, so as to include natural gas. In Encyclopaedia Britannica, 15 th Edn. Vol. 19, page 589 (1990), it is stated that "liquid and gaseous hydrocarbons are so intimately associated in nature that it has become customary to shorten the expression 'petroleum and natural gas' to 'petroleum' when referring to both." The word petroleum literally means 'rock oil'. It originated from the Latin term petra-oleum. (petra-means rock or stone and oleum-means oil). Thus, Natural Gas could very well be comprehended within the expression 'petroleum' or 'petroleum product,'

Natural gas being a petroleum product, we are of the view that under Entry 53 List I, Union Govt. alone has got legislative competence. Going by the definition of gas as given in Section 2(g) of the Gujarat Act wherein "gas" has been defined as "a matter of gaseous state which predominantly consists of methane", it would certainly include natural gas also. We are of the view that under Entry 25 List II of the Seventh Schedule, the State would be competent to pass a legislation only in respect of gas and gas-works and having regard to collocation of words 'gas and gas works', this

Entry would mean any work or industry relating to manufactured gas which is often used for industrial, medical or other similar purposes. Entry 25 of List II, as suggested for the States, will have to be read as a whole. The expressions therein cannot be compartmentally interpreted. The word 'gas' in the Entry will take colour from other words 'gasworks'. In Ballantine's Law Dictionary, 3rd edition, 1969 'Gas Works' is defined as "a plant for the manufacture of artificial gas". Similarly in Webster's New 20th Century dictionary, it is defined as "an establishment in which gas for heating and lighting is manufactured". In the *www.freedictionary.com* 'gas works' is explained as "a manufactory of gas, with all the machinery and appurtenances; a place where gas is generated." The meaning of the term 'gas works' is well understood in the sense that the place where the gas is manufactured. So it is difficult to accept the proposition that 'gas' in Entry 25 of List II includes Natural Gas, which is fundamentally different from manufactured gas in gas works. therefore, Entry 25 of List II could only cover manufactured gas and does not cover Natural Gas within its ambit. This will negative the argument of States that only they have exclusive powers to make laws dealing with Natural Gas and Liquefied Natural Gas. Entry 25 of List II only covers manufactured gas. This is the clear intention of framers of the Constitution. This reading will no way make that entry a 'useless lumber' as feared by the States, because Natural Gas was never intended to be covered by that entry. It is also difficult to accept the argument of States that all 'gas' could be categorized as dangerously inflammable and thus arriving at the conclusion that Natural Gas is also covered in State List because this differentiation is based not on the characteristics of gas, but on the manner of its origin. Entry 25 of List II covers the gas manufactured and used in gas works. In view of this specific Entry 53, for any petroleum and petroleum products, the State Legislature has no legislative competence to pass any legislation in respect of natural gas. To that extent, the provisions-contained in the Gujarat Act are lacking legislative competence.

In the result, the Reference is answered in the following terms :

Q.1. Whether Natural Gas in whatever physical form including Liquefied Natural Gas (LNG) is a Union subject covered by Entry 53 of the List I and the Union has exclusive legislative competence to enact.

A .1. Natural Gas including Liquefied Natural Gas (LNG) is a Union subject covered by Entry 53 of List I and the Union has exclusive legislative competence to enact laws on natural gas.

Q. 2. Whether States have legislative competence to make laws on the subject of natural gas and liquefied natural gas under Entry 25 of List II of the Seventh Schedule to the Constitution.

A. 2. The States have no legislative competence to make laws on the subject of natural gas and liquefied natural gas under Entry 25 of List II of the Seventh Schedule to the Constitution.

Q. 3. Whether the State of Gujarat had legislative competence to enact the Gujarat Gas (Regulation of Transmission, Supply & Distribution) Act, 2001.

A.3. The Gujarat Gas (Regulation of Transmission, Supply & Distribution) Act, 2001, so far as the provisions contained therein relating to the natural gas or liquefied natural gas (LNG) are concerned, is without any legislative competence and the Act is to that extent ultra vires of the Constitution.
