IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

ORIGINAL SIDE

**Present : The Hon'ble Justice Dipankar Datta**

**W.P. No. 725 of 2011**

M/s. Rose Valley Real Estate & Construction Ltd. & anr.
vs.
Union of India & ors.

For the petitioners : Mr. Samaraditya Pal, Sr. Advocate
Mr. Sudipta Sarkar, Sr. Advocate
Mr. Siddhartha Mitra, Sr. Advocate
Mr. Surajit Nath Mitra, Sr. Advocate
Mr. A.K. Chatterjee, Advocate
Mr. Arup Nath Bhattacharya, Advocate
Ms. Moushumi Bhattacharya, Advocate
Ms. Sutapa Sanyal, Advocate
Mr. Sujit Kr. Singh, Advocate

For the first respondent : Mr. Paras Kuhad, Additional Solicitor General
Mr. Subir Paul, Advocate

For the second to the Fourth respondents : Mr. Hirak Kumar Mitra, Sr. Advocate
Mr. Prasanta Kr. Dutt, Advocate
Mr. Rupak Ghosh, Advocate
Mr. Susanta Dutt, Advocate

Hearing concluded on : May 3, 2013

Judgment on : July 23, 2013

1) The aam aadmi of the country, over the years, has been drenched in a series of crises arising either due to nature's fury or the greed of fellow human beings like him, and is often found at the receiving end without the possibility of recovery of lost ground. Disaster management groups have been brought into existence by the State to tackle natural calamities. Indeed they toil hard, whenever called upon, to give succour and relief to the affected people. The purpose sought to be achieved by the disaster management system being noble and attempts to save the aam aadmi being sincere and laudable, none can possibly have any grievance in respect of its functioning except the bereaved who silently mourn the loss of their near and dear one. However, disasters which are man-made belong to classes of their own. From times immemorial, men have been attracted to the triumvirate of 'W's. Investment companies had mushroomed in the last century comprising of people, having no scruples and sense of morality. They cashed on the opportunity to enrich themselves by luring the aam aadmi with a triumvir, i.e. 'wealth'. Attractive schemes, craftily thought of, were put in place followed by tantalizing advertisements to lure the aam aadmi to invest his hard earned money with the promise of hefty returns, if he were to invest. The gullible aam aadmi having numerous responsibilities to shoulder, which perhaps may not have been possible without liquid cash, relied whole-heartedly on such companies without even thinking of the risk factors and the need to take an informed

decision and plunged towards disaster investing whatever he had with the cherished hope of obtaining the returns that were promised. Little did he know that such companies had surfaced to swindle him. Out of the innumerable people who had invested, some had received returns early prompting them to invest even that. Darkness, however, was not too far away. Soon, the returns stopped coming and the deposits were not returned on the due dates. With depletion of funds, gradually the companies went into liquidation and all the money that the aam aadmi had invested was practically gone. Faced with such a situation where everything seemed to be lost, people started taking their own lives. One may not be able to count the number of such unfortunate people who survived, losing everything in the process and being reduced to mere animal existence. In this State, people would not easily forget the untold misery and tragic circumstances brought about by the 'Sanchaita' syndrome in the eighties. Those at the helm of the affairs responsible for taking policy decisions had to act. Though the Security and Exchange Board of India (hereafter the SEBI) was authorized under the Securities and Exchange Board of India Act, 1992 (hereafter the SEBI Act) to register and regulate "Collective Investment Scheme" (hereafter CIS), absence of a suitable regulatory framework hindered orderly development of the market for units/instruments. The jurisdiction of the SEBI was limited to protection of the interest of the investors in securities and it could not take steps to protect the interest of investors in CIS units, which were not securities. A committee was constituted under the Chairmanship of Dr. S. A.

Dave, known as the Dave Committee. It submitted a report highlighting the high risks that were associated with the ventures and recommended remedial measures. It was suggested that appropriate regulatory framework ought to be introduced to curb the menace of the aam aadmi being swindled because of the inability on his part to take a well informed decision and to arrest the pernicious innovations thought of by the swindlers to make easy money at the cost of the aam aadmi. The representatives of the people entrusted with making laws were quick to respond. The Parliament effected amendments in the SEBI Act by the Securities Law (Amendment) Act, 1999 (hereafter the 1999 Amending Act) with effect from 22nd February, 2000. The amendments, inter alia, included amendment of the definition of "securities" in the Securities Contract (Regulation) Act, 1956 (hereafter the SCR Act) to include within its ambit the units or any other instruments issued by any CIS to the investors in such schemes, and insertion of clause (ba) in sub-section (1) of Section 2 and introduction of Section 11AA in the SEBI Act. The amendments in the SEBI Act, as aforesaid, also necessitated framing of appropriate regulations, resulting in the SEBI (Collective Investment Scheme) Regulations, 1999 (hereafter the CIS Regulations) being brought into existence. Undoubtedly, such measures were in the nature of 'damage control' intended to save the aam aadmi from ruination.

2) It is the constitutional validity of clause (ba) of sub-section (1) of Section 2, Section 11AA, the third proviso to clause (f) of sub-section (4) of Section 11 and sub-section (1B) of Section 12 of the SEBI Act and Regulations 2(1)(b)(i),

3, 5, 9, 13, 14, 65, 73 and 74 of the CIS Regulations that are questioned by the petitioners in this writ petition under Article 226 of the Constitution dated July 19, 2011. Incidentally, this is the third round of litigation between the parties.

3) The first petitioner (established in 1999) is a public limited company and registered under the Companies Act 1956. Real Estate Development is its principal business. The second petitioner is the Chairman of the first petitioner.

4) It is claimed in the writ petition that the first petitioner, though has acquired and/or purchased land in the States of West Bengal, Tripura, Assam, Maharashtra, Madhya Pradesh, Orissa, etc. for the purpose of developing housing projects and other forms of real estate development, it has no activity in the securities market nor has floated securities in any form to the members of the public for investment. In its usual course of business, the petitioners offer sale of plots of lands out of its land bank situated at various parts of the country at a price fixed by the first petitioner upon assessment of all costs of procurement and development of the same including incidental expenses thereto. In the process, earnest money is accepted in instalments the tenure whereof is spread over one year to five years and once the payments are received, allotment letter is issued to the intending purchaser by physically demarcating the plot of land. In paragraph 9 of the writ petition it is stated as follows:

> *"9. The petitioner company as a business policy allows a 'credit value' (which is nothing but a discount), to be adjusted against the consideration*

*money over and above the payment of installments as the possession of the land is to be handed over only upon payment of full consideration money. The purchasers are at all times entitled to transfer their allotment to any persons as they may intend to do. In the event the purchasers do not intend to purchase the land after payment of installments towards earnest money, the credit value to be adjusted against the consideration money is given to the purchasers. Such business policy has been framed by the petitioner company to avoid procedural complications and to prevent the land being encumbered."*

5) The SEBI had initiated a process of inquiry by its letter dated 8th January, 2010. It was alleged in such notice, addressed to the second petitioner, that he had been mobilizing deposits from the public. Reference was made to Section 12(1B) of the SEBI Act and the CIS Regulations, which envisaged that no entity can carry on or sponsor or launch a CIS without obtaining a certificate of registration. Accordingly, information was sought for on the points mentioned therein.

6) The petitioners replied on 22nd January, 2010 that they were in the process of preparing all documents and requested that they may be granted 15 days' time to submit the required documents/information. The SEBI extended the time to respond by 8th February, 2010, by its letter dated 4th February, 2010.

7) Apprehending coercive action at the end of the SEBI prior to submission of reply, the petitioners had launched the first round of litigation (W.P No. 136 of 2010) before this Court. It stood disposed of by an order dated 5th February, 2010 recording the submission of the learned counsel of the SEBI that till 8th February, 2010 or till submission of reply by petitioners, whichever is earlier, no coercive action shall be taken. The petitioners were granted liberty to furnish the requisite information/documents by 8th February, 2010.

8) After disposal of the writ petition, by its reply letter dated 8th February 2010, the first petitioner informed the SEBI that neither it nor its group companies were carrying on any business within the meaning of CIS or had sponsored or launched any CIS.

9) The first petitioner and the SEBI thereafter exchanged number of correspondences. Ultimately, an order dated 3rd January, 2011 was made by the whole time member of the SEBI. The last three paragraphs of the order read as follows:

> *"14. The interest of investors is the first and foremost mandate for SEBI. Under the facts and circumstances of the case, SEBI has to take emergent steps to prevent activities indulged into by companies or entities defrauding the investors, damaging the orderly development of the securities market. I note that M/s. Rose Valley Real Estate and Construction Ltd. has to be prevented from further carrying on the activities of a CIS, including soliciting money from the public, without due registration from SEBI.*
>
> *15. In view of the same, I, in exercise of the powers conferred upon me under section 11B of the SEBI Act, 1992 and regulation 65 of CIS Regulations, hereby direct the company:*
>
> *a. not to collect any money from investors or to launch any scheme;*
> *b. not to dispose of any of the properties or delineate assets of the scheme;*
> *c. not to divert any fund raised from public at large kept in bank account and/or at the custody of the company.*
>
> *16. The above directions shall take effect immediately and shall be in force until further orders. The company may file its objections to this order, if any, within 15 days from the date of this order. Further, the company may, if it so desires, avail itself of an opportunity of personal hearing on a date and a time to be fixed on specific request, to be received in this behalf from the company within 15 days from the date of this order."*

10) At this stage, the second round of litigation (W.P. 45 of 2011) commenced before this Court on 14th January, 2011. By judgment and order dated 23rd March, 2011, the writ petition was dismissed. It was observed that the

petitioners are at liberty to carry the order of the SEBI in an appeal before the Securities Appellate Tribunal under Section 15T of the SEBI Act.

11) By a letter dated 24th March, 2011, the second petitioner was granted an opportunity of personal hearing before the whole time member of the SEBI on 13th April 2011.

12) A writ appeal (APOT 142 of 2011) followed at the instance of the petitioners challenging the judgment and order dated 23rd March, 2011. The stay application filed in connection with the writ appeal was disposed of on 5th April, 2011 recording the submission of the learned senior counsel for the SEBI that no hearing in pursuance of the notice dated 24th March, 2011 would be taken for the time being.

13) The writ appeal was disposed of on 13th July, 2011. The order of the Division Bench reads as follows:

> *"Mr. Sen, learned Senior Counsel appearing for the appellant with Mr. Pal and above learned counsels submits on instruction that his clients do not want to press this provisions of law. Hence, his client may be allowed to withdraw the same as well as the writ petition. Mr. H. K. Mitra, learned Sr. Counsel contends that question of withdrawal of the writ petition does not arise as it has been dismissed, however, the appeal may be dismissed as not being pressed. We have considered the respective submissions of the learned Counsel.*
> *It appears that learned Trial Judge has dismissed the writ petition on the ground of existence of alternative remedy and at that point of time in the writ petition there was no challenge as to vires of regulation. The right to challenge against legislation by any citizen or for that matter any person under Constitution is guaranteed in the Constitution itself and this action can be brought at any point of time. Under these circumstances the appeal is dismissed as not being pressed and allow to take action as it is suggested.*
> *It is clarified that if no challenge is made regarding vires in the proposed writ petition and the identical relief are claimed therein the order of the learned Trial Judge will be conclusive and binding. If challenge as to the vires is made obviously the point decided by the learned Trial Judge will be a debatable issue, and it will not be treated as final one.*

*Accordingly all connected applications are dismissed and disposed of. All parties are to act on a photostat signed copy of this order on the usual undertakings."*

14) It is in these circumstances that the petitioners have approached the writ court once again.

15) The writ petition was heard on 3rd August, 2011. Admission hearing was deferred to 23rd August, 2011. The SEBI was restrained from proceeding further. By an order dated 12th September, 2011, the writ petition was admitted and the parties were called upon to exchange affidavits. The interim order passed earlier was directed to remain in force till the disposal of the writ petition.

16) The SEBI applied for vacating the interim order dated 12th September, 2011. The application, however, was not posted for hearing.

17) At this juncture, a special leave petition was filed by the SEBI before the Supreme Court against the order dated 12th September, 2011. After condoning the delay in its presentation, the Supreme Court by order dated 2nd July, 2012 dismissed the special leave petition with a request to this Court to take up the writ petition for hearing preferably within 2 weeks from date or at least consider vacating the interim relief.

18) The writ petition together with the application for vacating the interim order filed by the SEBI was listed before me on 16th July, 2012 when an adjournment was prayed for on behalf of the petitioners on the ground that an application for recall of the order dated 2nd July, 2012 was pending before the Supreme Court. The prayer was granted and the writ petition was posted for

hearing on 23rd July, 2012. The application for recall having been dismissed by the Supreme Court on 23rd July, 2012, I proposed to commence regular hearing of the writ petition. In view thereof, Mr. Ghosh, learned counsel for the SEBI submitted that the application for vacating the interim order shall not be pressed. Consequently, the application stood dismissed as not pressed.

19) Regular hearing having commenced, extensive arguments were advanced on behalf of the parties. After close of hearing, written arguments have also been filed on behalf of the petitioners and the SEBI.

20) It is considered necessary, before I proceed to note the detailed submissions of the parties, to place on record the fact of making it clear to Mr. Pal, learned senior counsel for the petitioners at the inception of the hearing that in view of the order of the Division Bench dated 13th July, 2011, no argument touching the legality and/or propriety of the order of the whole time member of the SEBI dated 3rd January, 2011 would be allowed to be advanced unless the petitioners succeed in their challenge to the constitutional validity of the SEBI Act and the CIS Regulations. Mr. Pal had prayed for and was granted an adjournment to seek instructions from the petitioners. He obtained instructions and commenced his arguments confined to the issue of constitutional validity of the statutory provisions. Unfortunately, it transpires from the written arguments filed on behalf of the petitioners that a point has been taken that the said order of the Division Bench dated 13th July, 2011 cannot operate to deprive the petitioners from contending that the SEBI Act and the CIS Regulations do not apply to the petitioners and that the

impugned order (read 3rd January, 2011) was the result of an arbitrary exercise of power and in violation of the principles of natural justice and without jurisdiction. An impression has been sought to be given that my reading of the order of the Division Bench at the inception of the hearing was not correct. If indeed the petitioners felt so, they ought to have said so and allowed me to give my ruling on the point. Having condescended to urge points in respect of the constitutional validity of the statutory provisions and thereafter raising the point in the written submissions is indeed most unfortunate and unbecoming of the high traditions of the Calcutta High Court bar. Be that as it may.

21) From the oral submissions of Mr. Pal, and the written notes of arguments filed on behalf of the petitioners, it could be perceived that while the challenge to the concerned provisions of the SEBI Act is based on the argument that the same suffer from an 'over-breadth' i.e. a sea of uncertainty and vagueness thereby conferring unguided and unfettered discretion, which is arbitrary and violative of Article 14 of the Constitution, the impugned provisions of the CIS Regulations have been attacked on the ground that the same are *ultra vires* the SEBI Act.

22) While developing his arguments on the point that Section 11AA of the SEBI Act violates Article 14, Mr. Pal contended that no particular policy is discernible from the SEBI Act, as such, which could possibly be the policy for inserting Section 11AA therein by the 1999 Amendment Act. The section has been couched in such language that it confers unguided power and/or

discretion to select an entity as carrying on the activity of what is termed as a CIS. Section 11AA is too vague, uncertain and wide, and the degree of uncertainty and vagueness of the provision is such that pronouncement on its validity is not dependent upon how it has been applied in a given case. There is absence of an intelligible criteria based whereon scope of its application could be ascertained. Such incomprehensible provision and its inherent vice of uncertainty cannot be made certain, by reference to any internal guidelines (like the long title) or any external aid (like reports). Sub-section (3) of Section 11AA categorises specific 8 (eight) types of activities, which do not amount to CIS. The said 8 (eight) categories are not exhaustive, for, several entities carrying on business with money contributed by investors could also be labelled as CIS. The Dave Committee recognized the over-breadth of the expression CIS while considering its definition in Chapter II of its report when it observed that *"(w)hile finalizing the definition, the Committee recognizes that it may be possible that some arrangements of this nature like time shares, club memberships etc. would also get covered in the definition."* Such unguided factoring leads to discriminatory application as exemplified in the instant case of treating the first petitioner as a company carrying on business activity falling within CIS, as sought to be defined. The Dave Committee, however, failed to narrow down or provide guidelines for narrowing down the concept of CIS. In fact, it has or perhaps was directed to do the opposite.

23) It was further contended by Mr. Pal that the legislature must provide discernible guidelines so that citizens and persons including those persons

carrying on business can understand and appreciate whether or to what extent a particular law will apply or not. The vice of discriminatory application of Section 11AA is writ large on the face of it and law is well settled that capability of discriminatory application or treatment is also violative of Article 14 of the Constitution.

24) Further, it was urged that reference to "securities" and "securities market" does not in any way make the provisions of Section 11AA(2) meaningful or clear. In the context of CIS, they beg the question since nothing is indicated as to how one identifies what is a security.

25) According to Mr. Pal, each of the four conditions in clauses (i), (ii), (iii) and (iv) could be applicable in respect of companies limited by shares (as per the Companies Act, 1956). Every company has a business scheme or a business arrangement. Every company in its Memorandum of Association as well as its prospectus states what is the scheme or arrangement of its business. Every company makes an offer to the public to subscribe to its capital and shares are issued to those who respond to the offer for a price i.e. there is a pooling of funds with which the business scheme is carried on. A person who accepts the offer and contributes to the company's capital is an "investor" and he does so with a view to "receive profits", "income", "products" or "property" from the business scheme or arrangement of the company. Every such company is managed by its Board of Directors. In every such company the investors or shareholders do not have day to day control over the management and operation of the business schemes or arrangements. There is nothing in

Section 11AA to show that the business scheme or arrangement is restricted to any particular activity. It is cast in the widest possible terms and there is no indication of any factor which could assist in ascertaining the true meaning, nature and scope of the activity of a company to be covered by Section 11AA. It is this uncertainty in breadth which, he has contended, is the inherent vice of Section 11AA.

26) Reference was next made by Mr. Pal to sub-section (3) of Section 11AA enumerating 8 (eight) business schemes or arrangements which *"shall not be a Collective Investment Scheme"*. He contended that it would be absurd to suggest that these 8 (eight) classes specified in sub-section (3) are exhaustive. The activities of these 8 (eight) classes are also referred to as scheme or arrangement as is apparent from the non-obstante clause occurring at the beginning of sub-section (3) which says: -

> *"Notwithstanding anything contained in sub-section (2), any scheme or arrangement ***".*

This means that the activities of the 8 (eight) categories also come within the ambit of "scheme" or "arrangement". Exclusionary operation of sub-section (3) shows that but for this exclusion, all kinds of business schemes or arrangements are within the scope of Section 11AA(2) and can be treated as a CIS. Significantly business schemes or arrangements by individual proprietors, partnership firms, registered societies etc. are not excluded nor are they included because Section 11AA(2) applies only to companies. There is no rational basis for this discriminatory treatment disclosed in the SEBI Act. Such uncertainty renders the section unconstitutional as it gives rise to a

power of arbitrary selection and the very conferment of such power offends Article 14 as held by the Constitution Bench of the Supreme Court in its decision in State of West Bengal v. Anwar Ali Sarkar, reported in AIR 1952 SC 75.

27) Other decisions have also been cited by Mr. Pal to buttress his contention that Section 11AA of the SEBI Act due to its vagueness and uncertainty is violative of Article 14 of the Constitution, which I shall refer to and deal with at a later part of this judgment.

28) While assailing the CIS Regulations, Mr. Pal first sought to dwell on the elementary principles of administrative law relating to delegated legislation, viz. a subordinate legislation made by a regulation making authority cannot travel beyond the substantive provisions of the Act or create a substantive law. The report of the Dave Committee, according to him, required consideration by the Central Government for ensuring a binding rule of conduct having regard to the recommendations made by such committee and the extent of its acceptance, and it was ultimately for the Parliament to decide on formulation of the policy. Substantive legislative policy had to be introduced in the Parliament and debated upon having regard to the doctrine of separation of powers that the Constitution contemplates. However, unfortunately, the Central Government bypassed the Parliament and under the garb of regulation framing power (Section 30 of the SEBI Act) purported to lay down an entire code relating to CIS with the effect that the CIS Regulations now constitute the whole body of substantive provisions of law

rendering Section 11AA a subsidiary legislation. To illustrate that the CIS Regulations travel far beyond the regulation making power and introduces new concepts of which there is no trace in the SEBI Act, pointed references were made to Chapters II, III, IV and VIII, the 4th to 6th and the 9th Schedules, the Accounting Norms for plantation and livestock schemes, format of financial statements and the Art Funds. Based on the aforesaid submissions, Mr. Pal prayed that the CIS Regulations ought to be declared *ultra vires* the SEBI Act.

29) The CIS Regulations were also assailed on the ground of the same being unreasonable. It was contended by Mr. Pal that though the petitioners were not involved in business that could be characterized as CIS, Regulation 9(b) requires it to provide it in its Memorandum of Association. On the same analogy, Regulation 9(g) cannot sustain. Reference was also made to provisions contained in Regulations 11(c), 24(2), 26(1), 25, 26(2) read with the 6th Schedule of the CIS Regulations, which are incapable of compliance by the petitioners. According to him, whether a regulation is reasonable or not is justiciable and having regard to its utter unreasonableness qua the petitioners, it ought to be struck down as *ultra vires* the Act under which it is framed.

30) The decisions of the Supreme Court in Special Ref. No. 1 of 1951, reported in AIR 1951 SC 332; General Officer Commanding-in-Chief v. Dr. Subhas Chandra Yadav, reported in (1988) 2 SCC 351; Kunj Behari Lal Butail v. State of Himachal Pradesh, reported in (2000) 3 SCC 40; Additional District

Magistrate (Rev.) Delhi Admn. v. Siri Ram, reported in (2000) 5 SCC 451; and Municipal Committee, Malerkotla v. Haji Ismail, reported in AIR 1967 Punjab 32 were relied on in support of the aforementioned contentions.

31) In course of his submissions, Mr. Pal placed the decision in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N. C. Budharaj (Deceased) by LRS., reported in (2001) 2 SCC 721, to show the contrast between "substantive law", which creates, defines and regulates rights and adjective or remedial law, which provides the method of enforcing rights.

32) Mr. Pal, accordingly, urged the Court to grant the declarations, as prayed for by the petitioners.

33) Mr. Mitra, learned senior counsel representing the SEBI and its officers argued for adoption of a different approach while testing the vires of a legislation providing for regulatory mechanism. According to him, more elbow room has to be given for the policy behind the legislation to be operative bearing in mind the evils sought to be remedied thereby. Even if it were not scientifically accurate, it is the nexus between the policy and the object that is of importance. Collection of money from the public without any check in regard to its future application was one of the reasons for the enactment. The amendments introduced in the SEBI Act have to be considered not from the standpoint of the petitioners but from that of the poor investors, who are incapable of looking after themselves. The investors may not be aware of the risks that are involved, and protection of the investors is the object of the legislation. The petitioners cannot claim any fundamental right to carry on

business in a particular way; the restrictions that have been imposed are reasonable, and the justification therefor is available for which the challenge is without merit.

34) It was submitted by Mr. Mitra that in determining the validity of an Act, one has to look into the problem or the evil that the legislature intended to remedy. Attempt should always be made to uphold the Act, rather than interfere with the legislative judgment. Insofar as Regulations are concerned, all that is required to be looked into is to find out the nexus between the Act and the Regulations. If the Regulations advance and implement the policy of the Act, then the Regulations should be accepted as valid.

35) The decision in Kedar Nath Bajoria v. State of West Bengal, reported in AIR 1953 SC 404, was cited by Mr. Mitra. The accepted principle that if any state of facts can reasonably be conceived to sustain a classification the existence of that state of facts must be assumed, was noted there. He urged that here such assumption was not required since the Parliament had before it the Dave Committee's report. The circumstances leading to constitution of the Dave Committee and its report were referred to extensively before me and it was submitted that proper consideration of the requirement to immediately introduce provisions for protecting the interest of the poor investors and due application of mind led to introduction of the impugned provisions in the SEBI Act by the 1999 Amendment Act.

36) Countering the submission of Mr. Pal that Section 11AA of the SEBI Act suffers from an over-breadth, that is to say, it is susceptible to be made

applicable to myriad situations which are not regulated or defined by the Act, it was contended by Mr. Mitra that the concept of over-breadth is almost totally alien in India. One judgment that contains reference to it is reported in Minerva Mills Ltd. v. Union of India, reported in AIR 1980 SC 1789. In paragraph 50, it has been referred to by mentioning the case of Barbara Elfbrandt vs. Imogena Russel, (1966) 16 L ed 2d 321, 326. It was further contended that such decision is clearly distinguishable, as would appear from paragraph 49 and the relevant extract from paragraph 50 itself, containing the opinion of Justice Douglas of the American Supreme Court speaking for the majority. The same are quoted hereunder:

> *"49. It is needless to cite decisions which have extolled and upheld the personal freedoms – their majesty, and in certain circumstances, their inviolability. It may however be profitable to see how the American Supreme Court, dealing with a broadly comparable Constitution, has approached the claim for those freedoms.*
> *50. ****Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' ……. 'The objectionable quality of …..overbreadth' depends upon the existence of a statute susceptible of sweeping and improper application …..These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions".*

37) The decision in Barbara Elfbrandt (supra) was placed by Mr. Mitra. He submitted that the constitutionality of an Arizona Act was challenged, which required a State loyalty oath from the State employees. The legislature put a gloss on the oath by subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who 'knowingly and wilfully becomes or remains a member of the communist party of the United States or

its successors or any of its subordinate organizations' or 'any other organization' having for 'one of its purposes' the overthrow of the Government of Arizona or any of its political sub-divisions where the employees had knowledge of the unlawful purpose. It was held that in the absence of a requirement of a showing of active membership and specific intent to assist in achieving the unlawful ends of an organization, which has as one of its purposes the violent overthrow of the Government, a state loyalty oath statute which proscribes knowing membership in such an organization infringes unnecessarily on the freedom of association protected by the First Amendment to the Federal Constitution, made applicable to the states through the Fourteenth Amendment, and it was unconstitutionally broad. According to him, the 'guilt of the association' was the basis for the judgment and the ratio thereof ought to be confined to cases of breach of personal freedoms and not to issues which this writ petition raises.

38) While arguing that the principle of over-breadth is not to be found in any cases to decide legality and validity of any Indian statute, Mr. Mitra submitted that the principles enunciated in the decision in Jyoti Pershad v. Administrator for the Union Territory of Delhi, reported in AIR 1961 SC 1602, are universally followed. To cull out the relevant principles, reliance was placed on the following passages:

> *"17. *** In the context of modern conditions and the variety and complexity of the situations which present themselves for solution, it is not possible for the Legislature to envisage in detail every possibility and make provision for them. The Legislature, therefore, is forced to leave the authorities created by it an ample discretion, limited, however, by the guidance afforded by the Act. This is the ratio of delegated legislation, and is a process which has come to*

*stay, and which one may be permitted to observe is not without its advantages. So long therefore, as the Legislature indicates, in the operative provision of the statute with certainty, the policy and purpose of the enactment, the mere fact that the legislation is skeletal, or the fact that a discretion is left to those entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of legislative power as to amount to an abdication of its functions, or that the discretion vested is uncanalised and unguided as to amount to a carte blanche to discriminate. The second is that if the power or discretion has been conferred in a manner which is legal and constitutional, the fact that Parliament could possibly have made more detailed provisions, could obviously not be a ground for invalidating the law.*

*18. The next point argued by learned counsel for the petitioner was that the power conferred on the competent authority by S. 19(3) of the Act was an excessive delegation of legislative power. As we have pointed out earlier, this submission is really another form, or rather another aspect of the objection based on the grant of an unfettered discretion or power which we have just now dealt with. It is needless to repeat, that so long as the legislature indicates its purpose and lays down the policy it is not necessary that every detail of the application of the law to particular cases should be laid down in the enactment itself. The reasons assigned for repelling the attack based on Art. 14 would suffice to reject this ground of objection as well.*

*21. *** If law failed to take account of unusual situations of pressing urgency arising in the country, and of the social urges generated by the patterns of thought-evolution and of social consciousness which we witness in the second half of this century, it would have to be written down as having failed in the very purpose of its existence. Where the legislature fulfils its purpose and enacts laws, which is its wisdom, are considered necessary for the solution of what after all is a very human problem the tests of "reasonableness" have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and particularly in judging of their validity the Courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote, for the Courts are not, in these matters, functioning as it were in vacuo, but as parts of a society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole."*

39) Mr. Mitra also read out paragraph 12 from the said decision, summarizing the principles of law declared in previous decisions of the Supreme Court on the import, content and scope of Article 14 and referred to the facts of that case. Three writ petitions under Article 32, challenging the constitutionality of

Section 19 and particularly sub-section (3) of the Slum Areas (Improvement and Clearance) Act, 1956 on the ground that it offends the fundamental right of the petitioners guaranteed to them by Articles 14 and 19(1)(f) of the Constitution, came up for consideration. The contents of paragraph 10 were referred to, which outlined the arguments advanced on behalf of the petitioners before the Supreme Court, and while bringing it to my notice that none of the contentions succeeded and the writ petitions were dismissed, it was submitted by Mr. Mitra that Mr. Pal's contentions are quite similar and ought to be meted similar treatment.

40) Next, Mr. Mitra referred to the decision in Pathumma v. State of Kerala, reported in AIR 1978 SC 771, wherein a challenge to the constitutionality of Section 20 of the Kerala Agriculturists' Debt Relief Act, 1970 was raised on the ground that the said provision and the sub-sections thereof were violative of Article 19(1)(f) of the Constitution. It was urged that they sought to deprive the appellants of their right to hold property, and that sub-sections (3) and (6) of Section 20 of the Act were violative of Article 14 of the Constitution inasmuch as the stranger decree-holder was selected for hostile discrimination whereas a bona fide alienee who stood on the same footing as the stranger decree-holder was excepted from the operation of the Act. On the approach that a Court ought to adopt and the principles by which it has to be guided in matters relating to challenge in such matters, it was held therein following the decision in Jyoti Pershad (supra) as follows:

> *"5. ***Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness*

*of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom, through beneficial legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather that rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such a right clashes with the larger interest of the country it must yield to the latter.***"*

41) Further, Mr. Mitra argued that in case of Section 11AA of the SEBI Act, guidelines are in the section itself and there is no vagueness about the method of determination of a CIS. It is well accepted principle that classification need not and in fact cannot be scientifically perfect. Reliance was placed on the decision in Dharam Dutt v. Union of India & ors., reported in (2004) 1 SCC 712, wherein it has been ruled that laying down of intelligible differentia does not mean that the legislative classification should be scientifically perfect or logically complete.

42) Insofar as the observation in the report of the Dave Committee to the effect that promoters of a building as also business of time sharing in resorts would also be covered by the expression CIS, it was submitted that the above view was taken care of by the Parliament by introducing clause (ii) in sub-section (2) of Section 11AA. Timeshares, it was contended, did not fulfil the requirements contained in Section 11AA(2)(ii). The same characteristics were also wanting in the business of promotion of flats etc.

43) Heavy reliance was placed by Mr. Mitra on the decision in Srinivasa Enterprises v. Union of India, reported in (1980) 4 SCC 507 to drive home his

point of argument that the ratio thereof is a complete answer to all the contentions raised on behalf of the petitioners in relation to constitutional invalidity of the impugned provisions. The Prize Chits and Money Circulation Schemes (Banning) Act, 1978 defined 'prize chits' inclusively but a 'conventional chit' stood excluded. The noxious net cast by the prize chit promoters was large and the grim picture of the luckless many, who were losing their money appetized by gambling prospects, and the sterilization of people's resources which were siphoned off by private adventurists through prize chits to the detriment of national development ignited the impugned legislation. The State moved to stop this menace by enacting the Act. It was challenged as unconstitutional for three reasons, viz. (i) violation of Article 19 in that a package of proper safeguards would adequately protect the community and a total ban was recklessly excessive, unintelligently over-broad and, therefore, unconstitutional; (ii) conventional chits and prize chits are substantially similar and, therefore, permission to continue 'conventional chits' and prohibition of prize chits altogether may be discriminatory violating Article 14 and that there is a discriminatory exemption from the operation of the prohibition in regard to those categories of prize chits which fall within Section 11; and (iii) legislative incompetence.

44) What the Supreme Court said for overruling the first contention needs to be noticed:

> *"12. The twin requirements of Art. 19 (6) are (a) the reasonableness of the restriction upon the fundamental right to trade, and (b) the measure of the reasonableness being the compelling need to promote the interest of the general public. Public interest, of course, there is. But the controversy rages*

*round the compulsive necessity to extinguish the prize chit enterprises altogether as distinguished from hand-cuffing them with severe conditions geared to protection of public interest. We have already indicated that the Raj Report does recommend a total ban on prize chits. In matters of economics, sociology and other specialised subjects, courts should not embark upon views of halflit infallibility and reject what economists or social scientists have, after detailed studies, commended as the correct course of action. True, the final word is with the court in constitutional matters but judges hesitate to 'rush in' where even specialists 'fear to tread". If experts fall out court, perforce, must guide itself and pronounce upon the matter from the constitutional angle, since the final verdict, where constitutional contraventions are complained of, belongs to the judicial arm. The alternative proposals to save the public from prize chit rackets attractively presented by Shri Venugopal do not impress us. In many situations, the poor and unwary have to be saved from the seducing processes resorted by unscrupulous racketeers who glamourize and prey upon the gambling instinct to get rich quick through prizes. So long as there is the resistless spell of a chance though small, of securing a prize, though on paper, people chase the prospect by subscribing to the speculative scheme only to lose what they had. Can you save moths from the fire except by putting out the fatal glow? Once this prize facet of the chit scheme is given up, it becomes substantially a 'conventional chit' and the ban of the law ceases to operate. We are unable to persuade ourselves that the State is wrong in its assertion, based upon expert opinions that a complete ban of prize chits is an over-kill or excessive blow. Therefore, we decline to strike down the legislation on the score of Article 19 (1) (f) and (g) of the Constitution.*

*13. We may not be taken to mean that every prize chit promoter is a bloodsucker. Indeed, Shri Venugopal persuasively presented the case of his client to make us feel that responsible business was being done by the petitioner. May be. But when a general evil is sought to be suppressed some martyrs may have to suffer for, the legislature cannot easily make meticulous exceptions and has to proceed on broad categorization, not singular individualizations."*

The second contention did not meet with approval because :

*"14. *** We do not agree. Not only do the definitions show the differentiation between the two schemes, but the Raj Report also brings out the fact that 'conventional chits' and 'Prize chits' are different categories with different financial features and different damaging effects. We see no force in the plea of violation of Article 14."*

45) The opinion in paragraph 17, according to Mr. Mitra, represents the correct position in law and, therefore, ought to be followed without much ado. It has been said :

> *"17. Judicial validation of a social legislation only keeps the path clear for enforcement. Spraying legislative socio-moral pesticides cannot serve any purpose unless the target area is relentlessly hit. We hope that this legislation enacted in response to expert recommendation and popular clamour will be implemented by dynamic State action."*

46) Mr. Mitra also relied on the decisions in

(i) Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India, reported in AIR 1992 SC 1033, for the proposition that the Courts are not to interfere with economic policy, which is the function of experts, and it is not the function of the Courts to sit in judgment over matters of economic policy, which must necessarily be left to the expert body;

(ii) Bangalore Development Authority v. Aircraft Employees' Cooperative Society Limited, reported in (2012) 3 SCC 442, for the proposition that it is not possible for the legislature to enact laws with minute details to deal with increasing complexities of governance in a political democracy and that the legislature can lay down broad policy principles and guidelines and leave the details to be worked out by the executive and the agents/instrumentalities of the State and that the delegation of the powers upon such authorities to implement the legislative policy cannot be castigated as excessive delegation of the legislative power;

(iii) State of Tamil Nadu v. M/s. Hind Stone, reported in AIR 1981 SC 711, for the proposition that a statutory rule, while ever subordinate to the parent statute is otherwise to be treated as part of the statute and as effective;

(iv) Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, U.P., reported in AIR 1961 SC 1381, for the proposition that the legislature has to perform its essential legislative function of determining and choosing the legislative policy and of formally enacting that policy into a binding rule of conduct, and further that it is open to the legislature to formulate that policy as broadly and with as little or as much details as it thought proper, and once a policy is laid down and the standard established by statute, there is no question of delegation of legislative power and all that remains is the making of subordinate rules within the prescribed limits which may be left to selected instrumentalities;

(v) Harishankar Bagla v. The State of Madhya Pradesh, reported in AIR 1954 SC 465, for the proposition that the grant or refusal of a permit was to be governed by the policy of the impugned Control Order i.e. to regulate the transport of cotton textile in a manner that would ensure even distribution of the commodity in the country and to make it available at a fair price to all, and the discretion given to the Textile Commissioner had to be exercised in such a way as to effectuate this policy, and the conferment of such a discretion was

not invalid and if there were abuse of the power, the Courts had ample power to undo the mischief;

(vi) Shri Sitaram Sugar Company Limited v. Union of India, reported in (1990) 3 SCC 223, for the proposition that the person assailing a classification on the ground that it is not founded on an intelligible differentia having a rational nexus with the object sought to be achieved carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences, and that ;

(vii) P.P. Enterprises v. Union of India, reported in AIR 1982 SC 1016, for the proposition that reasonable restrictions in Article 19(6) signifies that the limitation imposed on a person in enjoyment of his right to carry on business should not be arbitrary or of an excessive nature beyond what is required in the interest of the public and that the Government is the best judge to decide as to what would advance the cause of public interest;

(viii) Securities and Exchange Board of India v. Alka Synthetics Ltd., reported in AIR 1999 Gujarat 221, for the proposition that SEBI Act is a regulatory act ensuring investors' protection and it has to be contrasted with any fiscal or taxing statute, and further that the SEBI has to regulate a speculative market and in case of speculative market varied situations may arise and all such exigencies and situations cannot be contemplated in advance and, therefore, looking

to the exigencies and the requirements, it has been entrusted with the duty and function to take such measures as it thinks fit.

47) Proceeding with his arguments, Mr. Mitra urged that in contrast to the earlier approach of the Supreme Court, Directive Principles of State Policy now occupy a more elevated status. The fundamental rights, which the Constitution guarantees to its citizens to carry on business have to be viewed not in isolation but considering the plight of the marginalized, the under-privileged and the depraved bearing in mind the directive principles. State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, reported in (2005) 8 SCC 534, a decision rendered by a bench of seven judges was referred to in this connection. Paragraph 41 thereof reads:

> *"41. The message of Kesavananda Bharati, (1973) 4 SCC 225, is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging the reasonability of restrictions imposed on fundamental rights the relevant considerations are not only those as stated in Article 19 itself or in Part III of the Constitution: the directive principles stated in Part IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any fundamental right, aimed at securing directive principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution."*

Mr. Mitra submitted that if the two tests referred to in the above extract, ordinarily, the private interest of an individual has to yield to the public interest and the law legislated for the common good ought to be allowed its

full play, for, there can be no dispute that the impugned provisions are directed to sub-serve public good and well-being and the Parliament was competent to enact Section 11AA.

48) To support his contention that the Supreme Court has recently upheld the constitutional validity of Section 11AA of the SEBI Act by holding that the Parliament had the necessary competence to amend the SEBI Act and to introduce Section 11AA there, my attention was drawn to the decision in M/s. P. G. F. Ltd. & Ors. v. Union of India & Anr., Civil Appeal No. 6572 of 2004. It was, therefore, submitted that the twin tests referred to in the aforesaid decision in Mirzapur Moti Kureshi Kassab Jamat (supra) stand satisfied.

49) Answering the contention of Mr. Pal on the *vires* of the CIS Regulations, Mr. Mitra referred to Section 31 of the SEBI Act. According to him, the CIS Regulations in compliance with the statutory mandate contained therein had been laid before both houses of Parliament and since no modification was effected thereto, the CIS Regulations must be construed to have been ratified by the Parliament.

50) In this connection, the decision in Delhi Cloth & General Mills Co. Ltd. v. Union of India, reported in (1983) 4 SCC 166, was relied on. The Supreme Court observed there that Article 46 having mandated the State to promote economic interests of weaker sections of the people from all forms of exploitation, a fortiori, every provision of the Companies Act must receive such interpretation as to suppress the mischief to remedy which it was enacted and advance the object as also to achieve and translate into action the underlying

intendment of the enactment for the realization of the constitutional goals as set out in Part IV of the Constitution and that in economic legislation, the Court should feel more inclined to judicial deference to legislative judgment. Paragraph 32 of the decision was strongly relied on to sustain the CIS Regulations, reading as under:

> *"32. *** Section 642 requires that every rule enacted in exercise of the power conferred by it, must be placed before each House of Parliament for a period of thirty days and both Houses have power to suggest modification in the proposed rules. This control of Parliament is sufficient to check any transgression of permissible limits of delegated legislation by the delegate. In D. S. Garewal v. State of Punjab, 1959 Supp 1 SCR 792, the Constitution Bench of this court observed that the requirement that the rules are to be placed before both Houses of Parliament with power to suggest modification would make it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate."*

51) Based on the submissions noted above, Mr. Mitra urged that absolutely no case had been set up by the petitioners for interference and prayed for dismissal of the writ petition with heavy costs.

52) Mr. Kuhad, learned Additional Solicitor General representing the Union of India submitted that the SEBI Act and in particular the provisions under challenge have been enacted to secure the interests of investors, and more than adequate safeguards exist to prevent abuse of power and to guide exercise of discretion in a reasonable manner to achieve the purposes of the statute. The argument of overbreadth advanced on behalf of the petitioners by Mr. Pal, according to Mr. Kuhad, would not apply in the present case since the authorities under the SEBI Act have not been conferred unfettered discretion and, therefore, cannot misuse their power. He further contended

that the object of Section 11AA of the SEBI Act is not to target legitimate commercial activities but to suppress such commercial activities by organisations, which are involved in deceitful innovation to dupe investors. Referring to clauses (i) to (iv) of sub-section 2 of Section 11AA of the SEBI Act, he contended that the Parliament rightly decided to provide coverage to encompass the entirety of the problem so as to ensure pruning at every stage. The total coverage contemplated by the regulatory mechanism was put in place after the Parliament noticed gaps, which commercial organisations born with unscrupulous principles were taking advantage of. The attributes of regulatory measures could be perceived from Section 11AA itself, in that not every scheme or arrangement is covered but only those which are covered by each of the clauses (i) to (iv) read together. Investor involvement resulting in pooling of contributions/payments and being utilized for the purpose of the scheme or the arrangement, the scheme or the arrangement offering returns attracting investors, the contribution or investment being managed on behalf of the investors, and the investors having no control over the management and operation of the scheme or arrangement are the essential indicia that are required to be satisfied to bring a scheme or arrangement within CIS and only if all these conditions are satisfied that the regulatory mechanism would work. The argument of overbreadth need not be examined since there is no overbreadth.

53) Next it was contended by Mr. Kuhad that clause (ii) of sub-section (2) of Section 11AA of the SEBI Act was introduced, although the report of the Dave

Committee had not so recommended. The Parliament was abreast of the need to incorporate such a condition having regard to the pros and cons, which demonstrates the degree of industrious research and study that contributed to plugging the loopholes.

54) It was further contended by Mr. Kuhad that the regulatory mechanism that had been introduced has to be distinguished from an exercise that imposes curbs. Section 11AA does not entail any infraction of right; on the contrary, it is all about conferment of power for regulatory scrutiny, with a view to protect the investors but without encroaching on any right of those involved in clever structuring of a scheme/arrangement. Section 11AA of the Act has been brought into the statute book to provide coverage for every clever structuring that can be thought of to dupe investors; the mischief that might ensue if the clever structuring were allowed to have free play being the problem to be addressed. That clever structuring would be rendered unfruitful if the regulatory mechanism were to work, he contended, can never be an argument before a Court of law and the challenge does not merit interference.

55) Relying on the judgment in P.G.F. (supra), it was submitted that the bona fides of the litigant seeking to challenge the statutory provisions ought to be examined, viz. whether there is any hidden agenda behind the challenge or not, or whether the endeavour is to prolong the litigation or not. According to Mr. Kuhad, the petitioners have been attempting to stall the inevitable.

56) Referring to the various chapters of the CIS Regulations and the Regulations appearing thereunder, it was submitted as under:-

i) each one of the conditions for eligibility in Regulation 9 are aimed at protecting the interest of the investors and there could be no conceivable ground for a reasonable person to nurse a grievance in respect of such conditions of eligibility;

ii) the restrictions referred to in Regulation 13 and the obligations of the CIS company envisaged in Regulation 14 are in effect a demand for focused expertise in the area of business activities rather than curbs imposed on such activities;

iii) the provisions requiring, inter alia, holding of the corpus in trust, control in the hands of the trustee, the requirement to launch a scheme with the approval of the trustee and the requirements to obtain rating from a credit rating agency and appraisal of scheme by an appraising agency are intended to ensure complete independence and neutrality and do not constitute infraction of any substantive right of the company, - on the contrary each one is regulatory in nature and the object is to create a mature financial market;

iv) power has been conferred by Regulation 65 on the SEBI to issue directions in the interest of the securities market and the investors, and recourse cannot be taken to this power unless a set of circumstances exists warranting exercise of the power, and on the face of these two-fold safeguards it is too late in the day to contend that there has been conferment of unfettered power; and

v) the elements of social interest are sought to be protected by Regulation 73 and what it seeks to regulate is exercise of the right involving investors with adequate expertise and to disallow handling of the property of the investors in trust, if not submitted to the regulatory mechanism.

57) Mr Kuhad urged that not a single clause seeks to interfere with carrying on of bona fide schemes. The genesis of the grievance of the petitioners although initially was in respect of steps taken by the SEBI, it seems now to be their contention that they ought not to be subjected to regulatory control under the regulations and should be allowed to function without any interference from any quarter, meaning thereby that they should be left free to operate the scheme/arrangement without registration, and that too with the licence to operate without credit rating and appraisal, as required. According to him, the argument of over-breadth cannot be torn out of the context of alleged infringement of right and applied de hors the context. Specific indicia has been laid down and only to those covered by it that the regulatory ambit would apply. Provisions which are in the realm of regulatory character can never be castigated on the anvil of Article 14. Viewed in the context of regulatory provisions, it was reiterated that there is no element of over-breadth.

58) Opposing the argument that there has been delegation of legislative functions to the executive which is incurably bad and ought to be interdicted, Mr. Kuhad

reiterated the submissions of Mr. Mitra in respect of placement of the CIS Regulations before the Parliament as mandated by Section 31 of the SEBI Act.

59) In course of submission, Mr. Kuhad stressed that the impact of the regulations cannot be overlooked. Not a single creditworthy and appraisal worthy scheme has been operated after the CIS Regulations were put in place. If a company bona fide wished to continue, it would have to abide by the CIS Regulations and this bears testimony that the menace of gullible investors being duped has been arrested.

60) Mr. Kuhad concluded by submitting that the State has the constitutional obligation to protect the poor and it would amount to a failure of performance of its obligations to protect the poor unless control mechanisms were introduced. The statutory provisions are capable of precise application and there being no invasion of Article 14 of the Constitution, the writ petition merits dismissal.

61) In reply Mr. Pal reiterated that the wide discretion that has been conferred, on the face of Section 11AA of the SEBI Act having no standard at all, is violative of Article 14. The field being undefined, the executive power to pick and choose ought to result in the impugned provisions being struck down on the authority of the decisions cited by him. The bogey of public interest has been set up for saving the impugned statutory provisions from being struck down but public interest is not of any relevance if the Constitution is violated. The arguments of Mr. Mitra and Mr. Kuhad are based on assumptions and, therefore, ought not to be given credence. The boundaries of the net of Section 11AA are not well-demarcated and its scope cannot be understood by reading the CIS

Regulations. The CIS Regulations show that it is to be restricted to plantation, life stock and art funds schemes, yet, the petitioners have been sought to be covered on the premise that so long any effort is directed towards public interest being served, the executive is at liberty to choose its course of action by reason of the wide net of Section 11AA. Insofar as laying of the CIS regulations before the Parliament in terms of Section 31 of the SEBI Act is concerned, it was contended that compliance with the main requirement does not confer any validity for the subordinate legislation if it is in excess of power conferred by the relevant act and in this connection reliance was placed on the decision of the Supreme Court in Kerala SEB v. Indian Aluminium Co. Ltd., reported in 1976 (1) SCC 466.

62) The decision in Srinivasa Enterprises (supra) was sought to be distinguished by submitting that there was no occasion for advancing any argument that the Price Chits and Money Circulation Schemes (Banning) Act, 1978, conferred unguided discretionary powers or powers of arbitrary selection; Article 14 was pressed on the argument that conventional chits and prize chits are substantially similar and therefore banning the price chits was discriminatory. The argument was repelled with reference to the definitions, differentiating between the two schemes. The other facet of the argument that banning of prize chits was violative of Article 14 was based on exemption granted to prize chits under Section 11 of the Act. This provided that it would not apply to any prize chits or money circulation scheme promoted by the State Government, public

sector banks or charitable or educational institutions notified by the State Government, etc. On this aspect, the Court had observed :

> *"A bare reading of that provision makes it clear that the exempted categories do not possess the vices of private prize chits. For one thing, what are exempted are prize chits and money circulation schemes promoted by or controlled by the State Governments, the Central Government or the State Bank of India or the Reserved Bank. Even rural banks and cooperatives covered by Section 11, are subject to public control. Likewise, charitable and educational institutions are exempted only if they are notified by the State Government in consultation with the Reserve Bank. There are enough arguments to justify the different classification of these items and their exemption cannot be called in question on the ground of violation of Article 14. Reasonable classification wins absolution from the charge of discrimination if the differentia has nexus with the statutory object."*

63) The aspect dealt with in paragraph 13 (on which reliance was placed by the SEBI), according to Mr. Pal, is not the declaration of law under Article 141, but the observation of V.R. Krishna Iyer, J. (as His Lordship then was) in his inimitable style. In any event, it was made on the basis that 'the Legislature cannot easily make meticulous exceptions and has to proceed on broad categorizations.' Insofar as the instant case is concerned, Mr. Pal contended that these are irrelevant considerations because no guidelines are given identifying what constitutes CIS. In Srinivasa Enterprises (supra) the expression prize chit was defined in detailed terms and to understand this in true perspective the Court proceeded to consider the report of a study group which clearly indicated what precisely was covered by the expression prize chits.

64) Mr. Pal thus reiterated that the petitioners are entitled to relief and prayed for quashing of the impugned provisions.

65) I have heard learned senior counsel for the parties and perused the written notes of arguments submitted on behalf of the petitioners and the SEBI.

66) Since the challenge as raised herein was sought to be buttressed by Mr. Pal by referring to several decisions where the impugned statutory provision was held to be unconstitutional on the touchstone of Article 14, and that in framing subordinate legislation essential legislative functions were parted with by the legislature amounting to abdication of legislative powers and rendering such subordinate legislation invalid, I propose to note first the decisions cited (not in the order they were cited but chronologically) to ascertain what the facts were giving rise to the proceedings before the Supreme Court and the Punjab High Court, and what exactly was held. This, in my view, would assist me in ascertaining the materiality and relevance of the ratio decidendi thereof for application to the factual and legal issues at hand.

67) In Romesh Thappar v. The State of Madras reported in AIR 1950 SC 124, the respondents in exercise of their powers under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 issued an order dated March 1, 1950 imposing a ban upon the entry and circulation of the journal published by the petitioner in that State. It was claimed by the petitioner in his Article 32 writ petition that the said order contravened his fundamental right to freedom of speech and expression conferred on him by Article 19(1)(a) of the Constitution. He also challenged the validity of Section 9(1-A) of the Act claiming that it was void under Article 13(1) of the Constitution by reason of its being inconsistent with his fundamental right aforesaid. The Court proceeded to hold that unless a

law restricting freedom of subjects and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it sought to impose may have been conceived generally in the interest of public order. It followed that Section 9(I-A) which authorized imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order fell outside the scope of authorized restrictions under clause (2), and was, therefore, void and unconstitutional. The argument of the respondents that Section 9(I-A) could not be considered wholly void, as, under Article 13(1) an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more and that securing of the public safety or the maintenance of public order would include the security of the State, and thus the impugned provisions were covered by clause (2) of Article 19 and ought to be held to be valid was repelled by holding that clause (2) of Article 19 having allowed the imposition of restriction on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, could not be held to be constitutional and valid to any extent. The writ petition was thus allowed and the order of the respondents prohibiting the entry and circulation of the petitioner's journal in the State of Madras was quashed.

68) Chintaman Rao v. The State of Madhya Pradesh, reported in AIR 1951 SC 118, also arose out of an Article 32 writ petition. The Central Provinces and Berar

Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 1948 prohibited manufacture of bidis in the villages during the agricultural season. In terms thereof, none residing in the villages could employ any other person, nor engage himself, in the manufacture of bidis during the agricultural season. The provisions were intended to ensure adequate supply of labour for agricultural purposes. Import of labour from outside by the bidi manufacturer was also prohibited, resulting in suspension of bidi manufacturing activities during the agricultural season. Even old people, women and children, etc., who supplemented their income by making bidis in their spare time, and who were not capable of engaging in agriculture, were also prohibited from engaging themselves in manufacturing bidis without any reason. The law was impugned. The question that arose for decision was whether the statute under the guise of protecting public interests arbitrarily interfered with private business and imposed unreasonable and unnecessarily restrictive regulations upon lawful occupations; in other words, whether the total prohibition of carrying on the business of manufacture of bidis during the agricultural season amounted to a reasonable restriction on the fundamental rights guaranteed by Article 19(1)(g) of the Constitution. The Court observed that unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it. The prohibition was held to be unreasonable in the following words:

> *"The statute as it stands, not only compels those who can be engaged in agricultural work front not taking to other avocations, but it also prohibits persons who have no connection or relation to agricultural operations from engaging in the business of bidi making and thus earning their livelihood.*

*These provisions of the statute, in our opinion, cannot be said to amount to reasonable restrictions on the right of the applicants and that being so, the statute is not in conformity with the provisions of Part III of the Constitution. The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void."*

69) Paragraph 246 of the decision in Special Reference No.1 of 1951 (supra) was placed by Mr. Pal. Relevant portions therefrom are quoted below:

*"246. We are not concerned with the actual decisions in these cases. The decisions are to be valued in so far as they lay down any principles. The manner of applying the principles to the facts of a particular case is not at all material. The decisions referred to above clearly lay down that the legislature cannot part with its essential legislative function which consists in declaring its policy and making it a, binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law. The policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse. ***"*

70) The Supreme Court in Anwar Ali Sarkar (supra) was considering an appeal by the State of West Bengal from a judgment of a Full Bench of this Court quashing the conviction of the respondent by the Special Court established under Section 3 of the West Bengal Special Courts Ordinance, 1949 [Ordinance III (3) of 1949], which was replaced in March, 1950 by the West Bengal Special Courts Act, 1950 (West Bengal Act X of 1950). The law permitted setting up of special courts for the 'speedier trial' of such 'offences',

or ‘classes of offences’ or ‘cases’, or ‘classes of cases’ as, by a general or special order, the State Government might direct. The impugned law required the special court to follow a procedure that was less advantageous to the accused to defend himself compared to the procedure followed by the ordinary criminal courts. The Government had the power to pick out a case of a person and hand it over to the special court while leaving the case of another person similarly situated to be tried by the ordinary criminal courts. The executive was given ‘uncontrolled authority’ to discriminate. The necessity of ‘speedier trial’ was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification. Since the Act made no reasonable classification, laid down ‘no yardstick or measure for the grouping either of persons or of cases or of offences’ so as to distinguish them from others outside the purview of the Act, it was held invalid.

71) State of Madhya Pradesh v. Baldeo Prasad, reported in AIR 1961 SC 293, was a decision on an appeal that was carried to the Supreme Court with a certificate issued by the Nagpur High Court under Article 132(1) of the Constitution. It raised a question about the validity of the Central Provinces and Berar Goondas Act, 1946, as amended by the Madhya Pradesh Act XLIX of 1950. The law that was challenged by the respondent authorized the district magistrate, in an area declared by the State Government as disturbed, to direct a ‘goonda’ not to remain within, or enter into, a specified part of the district, if he was satisfied that his presence was prejudicial to the interests of the general public. ‘Goonda’ had been defined as meaning a hooligan, rouge or

a vagabond and included a person who was dangerous to public peace or tranquility. This was an inclusive definition. The law did not indicate any tests to be applied to decide whether a person fell in the first part of the definition, and it was left to the unguided discretion of the magistrate to treat any citizen as a goonda which was hardly proper. The Supreme Court declared the Act invalid on the ground, inter alia, that the definition of a 'goonda' afforded no assistance in deciding who fell in that category. The Court insisted that the Act must have clearly indicated when and under what circumstances a person could be called a 'goonda'.

72) Kunnathat Thathunni Moopil Nair v. State of Kerala, reported in AIR 1961 SC 552, was a decision rendered on a batch of 22 writ petitions under Article 32. The petitioners impugned the constitutionality of the Travancore-Cochin Land Tax Act, 1955, as amended by the Travancore-Cochin Land Tax (Amendment) Act, 1957. From a review of the provisions of the impugned Act as well as the amendments effected thereto, the Supreme Court was of the opinion that the same laid down in barest outline the policy to impose a uniform and, what was asserted to be, a low rate of land tax on all lands in the State of Kerala, and unlike other taxing statutes, it did not make any provision for issue of notice to the assesse, nor did any provision exist for submission of a return by the assesse. Section 5A authorizsed the Government to make a provisional assessment in respect of land, which had not been surveyed, and such provisional assessment was payable by the person made liable under the Act. It did not make any provision for any appeal in a case where the assesse may

feel dissatisfied with the assessment. The Act did contemplate the making of 'a regular assessment of the basic tax', but it did not indicate as to when the regular assessment would be made, except indicating that it could be made only after a survey had been made in respect of the land assessed. The Act could not have been cast in more general terms and the proceedings under the Act could not have been more summary. It had thus the merit of brevity as also of simplicity, derived from the fact that a tax was levied at a flat rate, irrespective of the quality of the land and consequently of its productive capacity. Under the Act, the charge had to be levied whether or not any income was derived from the land. The Legislature was so much in earnest about levying and realizing the tax that it could not even wait for a regular survey of the lands to be assessed with a view to determining the extent and character of the land. According to the Court, in view of the stand taken by the State of Kerala, the most important question that arose for consideration was whether Article 265 of the Constitution is a complete answer to the attack against the constitutionality of the Act. It was held that if the Legislature has classified properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes

of properties. But if the same class of property similarly situated is subjected to an incident of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. A taxing statute was not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the Courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the Court might think more just and equitable. The Act was examined with reference to the attack based on Article 14 of the Constitution and it was held that clearly inequality was writ large on the Act and no attempt at classification was made. It was held to be one of those cases where the lack of classification created inequality and was hit by the prohibition to deny equality before the law contained in Article 14 of the Constitution. Section 7 of the Act vesting the Government with the power wholly or partially to exempt any land from the provisions of the Act, was also found to be clearly discriminatory in its effect and, therefore, infringed Article 14 of the Constitution since it did not lay down any principle or policy for the guidance of the exercise of discretion by the Government in respect of the selection contemplated by Section 7. For other reasons, the operative sections of the Act, viz. Sections 4, 5A and 7 were also held to offend Article 19(1)(f) of the Constitution.

73) Validity of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959 fell for consideration before the Supreme Court in Northern India Caterers (Private) Ltd. v. State of Punjab, reported in AIR 1967 SC 1581. To

evict a person from unauthorized occupation of public premises, the impugned Act provided a summary procedure. The collector had two choices, - he could either himself order eviction under the special law, or could file an ordinary suit in a court for eviction under the general law. The Act was declared void under Article 14 on the ground that it was a drastic law, laid down no policy to guide the collector's choice as to which law to follow in what cases, and the matter was left to his unguided discretion and so there could be discrimination within the same class inter se, viz. unauthorised occupants of public premises.

74) In Haji Ismail (supra) the Division Bench of the Punjab High Court was considering an appeal filed by the Municipality against the judgment of the learned single Judge allowing a writ petition. The bye-laws framed by the Municipal Committee of Malerkotla, whereby the sale of vegetables and fruits, wholesale or by auction, had been limited to those obtaining a right to do so under a public auction in four shops only in the Sabzi Mandi of Malerkotla, were declared void and ineffective. Two questions arose for consideration, (a) whether the bye-laws in question were *ultra vires* the provisions of the Pubjab Municipal Act, 1911, and (b) whether the same were to be struck down as creating a monopoly for the wholesale sale of vegetables and fruits in favour of four persons only who obtained right to do so on a public auction in regard to the four shops in the Sabzi Mandi of Malerkotla. The Division Bench upheld the finding of the learned single Judge that the bye-laws imposed more than a reasonable restriction on the right of Haji Ismail.

75) Whether the Gold (Control) Act, 1968 was constitutionally valid was the common question that arose for determination on several writ petitions under Article 32 of the Constitution in Harakchand Ratanchand Banthia v. Union of India, reported in (1969) 2 SCC 166. The petitioners questioned the competence of the Parliament to enact the impugned Act with reference to entry 52 of List I and entry 33 of List III. According to them the legislation fell within the exclusive competence of the State Legislature under entry 27 of List II. They also urged that Sections 4(4), 4(5), 5(1) and 5(2) of the Act suffered from excessive delegation of legislative power, that restrictions imposed by Sections 27, 32, 46, 88 and 100 of the Act were unreasonable and not in public interest and hence violated Article 19(1)(g) and (f) of the Constitution, and that Sections 27 and 39 also were violative of Article 14 thereof. In-depth analysis of the provisions of the Act led to the decision holding Sections 5(2)(b), 27(2)(d), 27(6), 32, 46, 88 and 100 of the impugned Act as invalid.

76) In Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd., reported in AIR 1984 SC 1064, the appellant was an employee of the respondent. Having served it for nearly 30 years, he resigned. Although provident fund dues were paid to the appellant, payment of Rs.14,040/- on account of gratuity was withheld by the respondent. A suit was instituted by the appellant claiming gratuity with interest. The respondent contended that in terms of the contract of service and particularly having regard to the relevant rules under which gratuity could be claimed, the same was payable on certification of satisfactory service by the head of the department, and it was payable at the

absolute discretion of the respondent irrespective of whether the employee had or had not performed all or any of the conditions stated in the rules, and no employee howsoever otherwise eligible was entitled as of right to any payment under the rules. The suit was decreed with costs. The respondent was directed to pay the amount claimed in the plaint with future interest at 6% per annum. In appeal, the High Court interfered and set aside the decree with the result that the suit stood dismissed. Contention of the respondent that gratuity cannot be claimed as a matter of right and the claim to gratuity cannot be enforced in the civil court was accepted by the High Court. The Supreme Court reversed the decision of the High Court. Rule 10 of the Retiring Gratuity Rules of the respondent came up for consideration. In paragraph 12, a finding was recorded that payment of gratuity was an express or statutory condition of service. The Supreme Court then observed:

> *"19. The question then is: can the court ignore Rule 10? If gratuity is a retiral benefit and can be earned as a matter of right on fulfilling the conditions subject to which it is earned, any rule conferring absolute discretion not testable on reason, justice or fair play must be treated as utterly arbitrary and, unreasonable and discarded. If rules for payment of gratuity became incorporated in the Standing Orders and thereby acquired the status of statutory condition of service, an arbitrary denial referable to whim, fancy or sweet will of the employer must be rejected as arbitrary. Section 4 of the 1946 Act which confers power on the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions would enable this Court to reject that part of Rule 10 conferring absolute discretion on the employer to pay or not to pay the gratuity even if it is earned as utterly unreasonable and unfair. It must be treated as ineffective and unenforceable. It is well settled that if the Certifying Officer and the appellate authority under the 1946 Act while certifying the Standing Orders has power to adjudicate upon the fairness or reasonableness of the provisions of any standing orders, this Court in appeal under Art. 136 shall have the power to do the same thing when especially it is called upon to enforce the unreasonable and unfair part of the Standing Order. It therefore follows that part of Rule 10 which confers absolute discretion on the employer (not) to pay*

*gratuity even if it is earned, at its absolute discretion is ineffective and unenforceable.****"*

It was also held :

*".....Our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the antithesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is therefore violative of Art. 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist."*

77) A.L. Kalra v. Project and Equipment Corporation of India Ltd., reported in (1984) 3 SCC 316, is another decision of the Supreme Court between a master and his servant. The appellant was charge-sheeted for not refunding the advance taken for house building within the time stipulated under the Rules framed for granting house building advance. He was also charged of not returning within the stipulated time advance taken for purchasing a motor cycle. His entire salary was also withheld before initiation of the inquiry. Inquiry that followed resulted in submission of a report holding him guilty. Reasons for the conclusion were conspicuous by its absence, yet, agreeing therewith the appellant was removed from service on the ground that violation of the rules for granting house building advance amounted to not maintaining absolute integrity and thus was a misconduct in terms of the conduct, discipline and appeal rules. The decision was upheld in appeal and the penalty confirmed. The Delhi High Court dismissed in limine the writ petition filed by the appellant questioning the adverse orders. The Supreme Court held that the rules regulating grant of advances themselves provided the consequences of breach

and, therefore, such breach did not constitute misconduct under the conduct, discipline and appeal rules. What in a given context would constitute conduct unbecoming of a public servant to be treated as misconduct would expose a grey area not amenable to objective evaluation. Where misconduct when proved entails penal consequences, it was obligatory for the employer to specify and if necessary define it with precision and accuracy so that any ex post facto interpretation of some incident may not be camouflaged as misconduct. There was thus no ground for initiating inquiry. Moreover with-holding of salary and then removing the appellant from service would expose him to double jeopardy. It was held in paragraph 18 as follows:

> *"It is difficult to accept the submission that executive action which results in denial of equal protection of law or equality before law cannot be judicially reviewed nor can it be struck down on the ground of arbitrariness as being violative of Article 14. Conceding for the present purpose that legislative action follows a legislative policy and the legislative policy is not judicially reviewable, but while giving concrete shape to the legislative policy in the form of a statute, if the law violates any of the fundamental rights including Article 14, the same is void to the extent as provided in Article 13. If the law is void being in violation of any of the fundamental rights set out in Part III of the Constitution, it cannot be shielded on the ground that it enacts a legislative policy. Wisdom of the legislative policy may not be open to judicial review but when the wisdom takes the concrete form of law, the same must stand the test of being in tune with the fundamental rights and if it trenches upon any of the fundamental rights, it is void as ordained by Article 13."*

The Court in the next paragraph ruled:

> *"It thus appears well-settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law."*

78) In State of Maharashtra v. Mrs. Kamal Sukumar Durgule, reported in AIR 1985 SC 119, the Supreme Court invalidated the Maharashtra Vacant Lands (Prohibition of Unauthorised Occupation and Summary Eviction) Act, 1975 qua Article 19(1)(f) of the Constitution. To discourage unauthorized occupation of lands in urban areas in Maharashtra and to provide for the summary eviction of persons from such land, was the underlying purpose of the Act. The Act conferred the discretion on the competent authority to declare a piece of land as vacant land without there being any guidelines to control the exercise of such discretion therein or the statement of objects and reasons attached to the relevant bill. Thus the competent authority had the freedom to pick and choose lands on which there were unauthorized structures and declare some of them as vacant lands, and leave other and similarly situated untouched. The Supreme Court while accepting the truth that abuse of power is not to be assumed lightly, observed that experience belies the expectation that discretionary powers are always exercised fairly and objectively. The Court also emphasized that it would make no difference to the position that the power to make the requisite declaration under the Act was vested in the officers of the higher echelons and that this was *'not a palliative to the prejudice which is inherent in the situation'*. Also, no safeguards against any arbitrary exercise of discretion by the competent authority were provided by the impugned Act and no procedure was laid down for any notice to the concerned parties or hearing before the competent authority. The Court emphasized that the matters to which the Act extended, a hearing preceding a decision was of the essence of

the matter. Further, no distinction was made by the Act between land-owners who had themselves constructed unauthorized structures on their land and those on whose lands trespassers had constructed such structures. Massive encroachments on private lands had led to the virtual deprivation of the title of rightful owners of those properties. The Act penalized such owners for no fault of theirs and, that too, without giving them an opportunity of being heard. This class of owners were silent spectators to the forcible and lawless deprivation of their title to their lands but had been placed on par with the trespassers who, taking the law into their hands, defied not merely the private owners but even the public authority. The lack of classification was held to be hit by Article 14 as it suffered from the infirmity of according equal treatment to unequals.

79) In Subhash Chandra Yadav (supra), the respondent was appointed a Sub-Charge, Cantonment General Hospital, Lucknow by the Cantonment Board by an appointment letter dated 23rd April, 1969. He was confirmed in that post on 1st December, 1969 by an order issued by the Cantonment Board. The conditions of service of the employees of the Cantonment Board, a statutory body, were governed by the provisions of the Rules. At the time the respondent was appointed, the Rules then prevailing did not contemplate transfer. His appointment letter also did not include any condition for transfer from one Board to another. By a notification dated 16th December, 1972, the Rules were amended and a new rule, being Rule 5-C was added to the Rules laying down that the service of a servant shall be transferable from one post in one Board to another post in another Board subject to the riders mentioned therein. For the

first time, Rule 5-C provided for the transfer of the services of the employees of the Cantonment Boards from one post in one Board to another post in another Board within the same State. The GOC-in-Chief, Central Command, by his order dated 27th October, 1986 transferred the respondent from the Cantonment General Hospital, Lucknow, to the Cantonment General Hospital, Varanasi, in place of one Dr. Bansal, who was also transferred by the same order to the Cantonment General Hospital, Bareilly. The order of transfer was challenged by the respondent successfully before the Allahabad High Court on the ground that Rule 5-C was ultra vires the provisions of the Cantonments Act and, as such, void. The High Court struck down Rule 5-C holding, inter alia, that the services of the employees of the Cantonment Board are neither centralised nor is there a common State-level service and that the impugned Rule 5-C, having provided for the transfer of the employees of one Board to another Board by the GOC-in-Chief, Central Command, was beyond the rule making power of the Central Government as contained in clause (c) of sub-section (2) of Section 280 of the Cantonment Act as it stood before it was amended. The Cantonment Boards being statutory and autonomous bodies controlled entirely by the Cantonments Act, each Cantonment Board is an independent body functioning within its limited jurisdiction. The Board being the appointing authority of its employees, the service under the Cantonment Board was not a centralised service nor was it a service at the State-level. The Court found much force in the contention of the respondent that as service under the Cantonment Board was not a centralised service or a service at the

State-level, the transfer of an employee from one Cantonment Board to another would mean the termination of appointment of the employee in the Cantonment Board from which he is transferred and a fresh appointment in the Board where he is so transferred. The GOC-in-Chief, Central Command, was not the appointing authority of the respondent or the employees of the Cantonment Board, and so transfer of the respondent by the GOC-in-Chief was not permissible. In any event, it was further held that one autonomous body cannot transfer its employee to another autonomous body even within the same State, unless the services of the employees of these two bodies were under a centralised or a State-level service.

80) B. B. Rajwanshi v. State of Uttar Pradesh, reported in AIR 1988 SC 1089, the Supreme Court had to consider Section 6(4) of the U.P. Industrial Disputes Act, 1947 and to decide on its validity bearing in mind Article 14 of the Constitution. The provision authorized the State Government to remit an order of a labour tribunal for reconsideration of the adjudicating authority and that authority was to submit the award to the Government after reconsideration. The Court noted that Section 6(4) did not require the Government to hear the parties before remitting the award to the concerned adjudicating authority, the Government was not required to give reasons for remitting the award, the Government was not required to inform the authority the specific points on which it was to reconsider the award. Section 6(4) was so widely worded that it was likely to result in grave injustice to a party in whose favour an award was made as it could be used to reopen the whole case. It conferred 'unguided and

uncontrolled powers' on the Government. The power could be used arbitrarily to favour one party or the other; the power was capable of serious mischief. There was also the likelihood of the Government exercising the power arbitrarily, if the labour tribunal were to pass an award adverse to the interest of an industry owned by the Government. The Court refused to accept the argument that the Government could seek necessary guidance from the object and content of the Act. Section 6(4) was declared by the Court *ultra vires* Article 14 of the Constitution observing that the provision cannot be upheld in the absence of necessary statutory guidelines for the exercise of the power conferred by it having regard to the fact that the proceeding before the labour court or the industrial tribunal is in the nature of quasi-judicial proceeding where parties have adequate opportunity to state their respective cases, to lead evidence and make all their submissions.

81) A.N. Parashuraman v. State of Tamil Nadu, reported in (1989) 4 SCC 683, dealt with the constitutional validity of Sections 2(c), 3(a), 3(b), 6, 7, 15, 22 and 28 of the Tamil Nadu Private Educational Institutions (Regulation) Act, 1956. The Act introduced a system of licensing of private educational institutions. The relevant statutory provision merely said that the State Government 'may grant or refuse to grant permission'. The only procedural safeguard that was provided was that the permission would not be refused without giving the applicant an opportunity of making his representation. No criteria were laid down for adoption by the Government while exercising its licensing power. The task of implementing the object of the Act by the delegated authority had to be based

on adequate guidelines laid down for exercise of power. Examined in such light, the impugned provisions were found miserably failing to reach the required standard. The result was, the power to grant or refuse permission could be exercised according to the whims of the authority and it could differ from person to person holding the office. The Government was left with 'unrestricted and unguided discretion' rendering the provision 'unfair and discriminatory' vis-à-vis Article 19(1)(g) of the Constitution. The power to cancel a license on contravention of any direction issued by the competent authority was held to suffer from the vice of arbitrariness.

82) In Kumari Shrilekha Vidyarthi v. State of Uttar Pradesh, reported in AIR 1991 SC 537, en bloc removal of District Government Counsel by the State Government of Uttar Pradesh, even though the appointments were all individual, without showing a common reason applicable to all justifying termination was held to be arbitrary and liable to be struck down under Article 14 of the Constitution. It was held that even in contractual matters, public authorities have to act fairly, and if they fail to do so, approach to Article 226 would always be permissible because exclusion of Article 14 in contractual matters is not permissible in our constitutional scheme.

83) To consolidate and amend the laws relating to ceiling on land holdings in the State of Himachal Pradesh, the Legislative Assembly of Himachal Pradesh enacted the Himachal Pradesh Ceiling on Land Holdings Act, 1972. Sub-section (1) of Section 26 of the Act conferred power on the State Government to make rules, by notification, for carrying out the purposes of the Act. Sub-sections (2)

and (3) thereof provided for previous publication of the rules and the rule being laid on the floor of the State Legislature as soon as may be after it was made. In exercise of the power so conferred, the State Government framed the Himachal Pradesh Ceiling on Land Holdings Rules, 1973. The constitutional validity of an amendment made in the Rules by notification dated 4th April, 1986 (published on 26th April, 1986) and the circular order dated 21st August, 1990 were challenged by the appellants in Kunj Behari Lal Butail (supra) by a writ petition. The cause of action for the appellants was that their effort at alienating a piece of land subservient to tea plantation was sought to be put into jeopardy. Section 5 of the Act exempted tea plantations from the purview of the Act. The Court found merit in the submission that in exercise of the delegated power to legislate, the State Government could not have brought within the net of the rules what was excluded by the Act itself. It was ultimately held that:

> *"The amendment made vide notification dated 4-4-86 places an embargo on right to transfer such subservient land though exempted from the operation of the Act. Clearly the impugned proviso is beyond the rule making power of the State Government as conferred by the Act. It is well settled that the Legislature cannot delegate its essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up the details."*

84) The Delhi High Court held that the amendments made to Rules 49, 63, 65 and 67 and also to Form P5 of the Delhi Revenue Rules by the notification dated 8th November, 1989 were ultra vires the provisions of the Delhi Land Revenue Act, 1954. The decision was challenged before the Supreme Court. While dismissing the appeal, the Supreme Court in Siri Ram (supra) held that the Land Revenue

Act did not empower the rule making authority either to classify land or exclude any area from preparation of record-of-rights and Annual Register and therefore if the amendments were upheld, the result would be that a person would be deprived of his valuable right of possession in the excluded area as his name would not be recorded in the record-of-rights. It was also held that by amending the rule, the rule making authority had excluded certain classes of land defined as "Extended Abadi" from the operation of preparation of map and the field book and that the Act did not authorise the rule making authority to exclude any area from the purview of Section 16 of the Land Revenue Act. While holding that the rule making authority acted beyond its power, it was observed as follows:

> *"It is well recognised principle of interpretation of a statute that conferment of rule making power by an Act does not enable the rule making authority to make rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.***"*

85) The majority in N. C. Budharaj (supra) decided a reference holding that the arbitrator appointed with or without the intervention of the Court, has jurisdiction to award interest on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. While holding so, what is substantive law and what is remedial or adjective law were discussed.

86) District Registrar and Collector, Hyderabad v. Canara Bank reported in (2005) 1 SCC 496, was a case where the Supreme Court held Section 73 of the Stamp Act, 1899, as amended and applicable in Andhra Pradesh, to suffer from the

vice of excessive delegation (i) in the absence of guidelines as to the persons who may be authorised by the Collector, and the requirement for reasons to be recorded by the Collector or the person authorised for his belief necessitating search, (ii) for conferring the power to impound documents without giving notice or a chance to make good the deficit stamp duty, except in case of documents in custody of a bank, for which also no reason for the distinction was given, and (iii) for authorizing adjudication upon need to impound documents in all cases being vested in the person authorized. It was held that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on the authority to decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as violative of Article 14. The Act permitted inspection to be carried out by the Collector by having access to the documents, which were in private custody i.e. custody other than that of a public officer. According to the Court, it was clear that such provision empowered invasion of the home of the person in whose possession the documents tending to or leading to the various facts stated in Section 73 were in existence. Section 73 being one without any safeguards as to the probable or reasonable cause or reasonable basis or materials, was held to violate the right to privacy both of the house and of the person. It was further held that under the garb of the power conferred by Section 73, the person authorized could go on rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote,

but then on the framing of Section 73 the possibility could not be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise could turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved. A reasonable nexus between stringency of the provision and the purpose sought to be achieved must exist.

87) State of Kerala v. Unni, reported in (2007) 2 SCC 365, was a case where writ petitions were filed, inter alia, questioning the validity or otherwise of Rule 9(2) of the Kerala Abkari Shops (Disposal in Auction) Rules, 2002 and/or applicability of Section 57(a) of the Abkari Act, in the event sample of toddy was found to have exceeded the specified limit. The Court found Rule 9(2) to be unworkable and unreasonable, for, there did not exist any mechanical devise to measure the contents of ethyl alcohol present in toddy. Contents of ethyl alcohol in toddy would depend upon various factors including weather, season or pot in which it is kept etc. Each village would not have a chemical laboratory where the process of analysis of ethyl alcohol can be carried out. For example, if a sample is taken in a village, by the time the sample is sent for and is analyzed, the volume of ethyl alcohol may increase. The definition of 'toddy' did not limit the extent of fermentation. Fermented toddy would, therefore, come within the purview of definition of toddy. Manufacture and sale of toddy, which is fermented, were not prohibited. The Excise Manual provided that the contents of ethyl alcohol by reason of fermentation in toddy could go up to 12%, whereafter only it would cease to be toddy. It was held that when a subordinate

legislation imposes conditions upon a licensee regulating the manner in which the trade is to be carried out, the same must be based on reasonable criteria. A person must have means to prevent commission of a crime by himself or by his employees. He must know where he stands. He must know to what extent or under what circumstances he is entitled to sell liquor. The statute in that sense must be definite and not vague. Where a statute is vague, the same is liable to be struck down.

88) It follows from the principles laid down in the aforesaid authorities that the legislature is precluded from enacting a provision that confers arbitrary power on an authority to be exercised in its absolute discretion. It is always open to the Court to veto conferment of arbitrary discretionary power. A law which seeks to confer discretionary power ought to contain guidelines based whereon the discretionary power is to be exercised, which without doubt would have to be reasonable and non-arbitrary and capable of achieving the object for which the law has been enacted, viz. to advance the cause of justice and to suppress the mischief. If it is otherwise, the provision would offend Article 14 of the Constitution and liable to be interdicted.

89) The rest of the decisions are authorities for the principle that while a rule can supplement but not supplant the Act that is its source, similarly an executive instruction can supplement but not supplant the rule; if it does, it is an invalid piece of law. There can be no dispute on this score.

90) It is noteworthy that not a single decision cited by Mr. Pal where the Supreme Court declared the impugned law *ultra vires* the Constitution dealt with any

economic legislation and, therefore, the occasion to interfere with such economic legislation did not arise. I hold the said decisions not at all material and relevant for a decision on this writ petition.

91) It is now time to look into the other decisions cited by the parties that commend to me to be relevant.

92) The vires of Section 11AA of the SEBI Act has been considered by the Supreme Court in M/s P.G.F. Ltd. (supra). It was contended by the petitioners before the Supreme Court that introduction of Section 11AA by the Parliament was *ultra vires* the Constitution on the ground of lack of competence. The contention failed and the civil appeal was dismissed with costs of Rs.50,00,000/-.

93) Mr. Pal contended that Section 11AA of the SEBI Act and the other provisions have been challenged in this writ petition on the ground that the same are repugnant to Article 14 of the Constitution and it was not an issue before the Supreme Court; therefore, the decision in PGF Ltd. (supra) would be of no assistance.

94) Mr. Pal seems to be right to the limited extent that the ground of challenge was different, but the observations made in paragraphs 31, 32, 37 to 40 and 42 of the decision are not irrelevant for the present exercise. In the said decision, the Supreme Court ruled as follows :

> *"31. Before adverting to the various contentions raised in challenging the vires of Section 11AA of the SEBI Act, we feel that it is worthwhile to state and note certain precaution to be observed whenever a vires of any provision of law is raised before the Court by way of a writ petition. It will be worthwhile to lay down certain guidelines in that respect, since we have noticed that on very many occasions a challenge to a provision of law, as to its constitutionality is raised with a view to thwart the applicability and rigour of those provisions and as an escape route from the applicability of*

*those provisions of law and thereby create an impediment for the concerned authorities and the institutions who are to monitor those persons who seek such challenges by abusing the process of the Court. Such frivolous challenges always result in prolongation of the litigation, which enables such unscrupulous elements who always thrive on other peoples money to take advantage of the pendency of such litigation preferred by them and thereby gain, on the one side, unlawful advantage on the monetary aspect and to the disadvantage of innocent victims, and ultimately, gain unlawful enrichment of such ill-gotten money by defrauding others. In effect, such attempts made by invoking the extraordinary jurisdiction of the writ Courts of many such challenges, mostly result in rejection of such challenges. However, at the same time, while taking advantage of the long time gap involved in the pending proceedings, such unscrupulous litigants even while suffering the rejection of their stand at the end as to the vires of the provisions, always try to wriggle out of their liabilities by stating that the time lag had created a situation wherein those persons who were lured to part with huge sums of money are either not available to get back their money or such unscrupulous petitioners themselves are not in a position to refund whatever money collected from those customers or investors. It is, therefore, imperative and worthwhile to examine at the threshold as to whether such challenges made are bona fide and do require a consideration at all by the writ courts by applying the principle of 'lifting the veil' and as to whether there is any hidden agenda in perpetrating such litigation. With that view, we lay down some of the criteria to be kept in mind whenever a challenge to a provision of law is made before the Court.*

*32. The Court can, in the first instance, examine whether there is a prima facie strong ground made out in order to examine the vires of the provisions raised in the writ petition. The Court can also note whether such challenge is made at the earliest point of time when the statute came to be introduced or any provision was brought into the statute book or any long time gap exist as between the date of the enactment and the date when the challenge is made. It should also be noted as to whether the grounds of challenge based on the facts pleaded and the implication of provision really has any nexus apart from the grounds of challenge made. With reference to those relevant provisions, the Court should be conscious of the position as to the extent of public interest involved when the provision operates the field as against the prevention of such operation. The Court should also examine the extent of financial implications by virtue of the operation of the provision vis-à-vis the State and alleged extent of sufferance by the person who seeks to challenge based on the alleged invalidity of the provision with particular reference to the vires made. Even if the writ Court is of the view that the challenge raised requires to be considered, then again it will have to be examined, while entertaining the challenge raised for consideration, whether it calls for prevention of the operation of the provision in the larger interest of the public. We have only attempted to set out some of the basic considerations to be borne in mind by the writ Court and the same is not exhaustive. In other*

*words, the Writ Court should examine such other grounds on the above lines for consideration while considering a challenge on the ground of vires to a Statute or provision of law made before it for the purpose of entertaining the same as well as for granting any interim relief during the pendency of such writ petitions. For the above stated reasons it is also imperative that when such writ petitions are entertained, the same should be disposed of as expeditiously as possible and on a time bound basis, so that the legal position is settled one way or the other."*

*"37. Therefore, the paramount object of the Parliament in enacting the SEBI Act itself and in particular the addition of Section 11AA was with a view to protect the gullible investors most of whom are poor and uneducated or retired personnel or those who belong to middle income group and who seek to invest their hard earned retirement benefits or savings in such schemes with a view to earn some sustained benefits or with the fond hope that such investment will get appreciated in course of time. Certain other Section of the people who are worstly affected are those who belong to the middle income group who again make such investments in order to earn some extra financial benefits and thereby improve their standard of living and on very many occasions to cater to the need of the educational career of their children.*

*38. Since it was noticed in the early 90s that there was mushroom growth of attractive schemes or arrangements, which persuaded the above vulnerable group getting attracted towards such schemes and arrangements, which weakness was encashed by the promoters of such schemes and arrangements who lure them to part with their savings by falling as a prey to the sweet coated words of such frauds, the Parliament thought it fit to introduce Section 11AA in the Act in order to ensure that any such scheme put to public notice is not intended to defraud such gullible investors and also to monitor the operation of such schemes and arrangements based on the regulations framed under Section 11AA of the Act. When such was the laudable object with which the main Act was enacted and Section 11AA was introduced as from 22.02.2000, the challenge made to the said Section will have to be examined by keeping in mind the above said background and test the grounds of challenge as to whether there is any good ground made out to defeat the purport of the enactment.*

*39. A reading of sub-Section (3) of Section 11AA also throws some light on this aspect, wherein it is provided that those institutions and schemes governed by sub-clause (i) to (viii) of sub-Section (3) of Section 11AA will not fall under the definition of collective investment scheme. A cursory glance of sub-clause (i) to (viii) shows that those are all the schemes, which are operated upon either by a cooperative society or those institutions, which are controlled by the Reserve Bank of India Act, 1934 or the Insurance Act of 1938 or the Employees Provident Fund and Miscellaneous Provisions Act, 1952 or the Companies Act, 1956 or the Chit Fund Act of 1982 and contributions, which are made in the nature of subscription to a mutual fund, which again is governed by a SEBI (Mutual Fund) Regulations 1996.*

*Therefore, by specifically stipulating the various ingredients for bringing any scheme or arrangement under the definition of collective investment scheme as stipulated under sub-Section (2) of Section 11AA, when the Parliament specifically carved out such of those schemes or arrangements governed by other statutes to be excluded from the operation of Section 11AA, one can easily visualize that the purport of the enactment was to ensure that no one who seeks to collect and deal with the monies of any other individual under the guise of providing a fantastic return or profit or any other benefit does not indulge in such transactions with any ulterior motive of defrauding such innocent investors and that having regard to the mode and manner of operation of such business activities announced, those who seek to promote such schemes are brought within the control of an effective State machinery in order to ensure proper working of such schemes.*

*40. It will have to be stated with particular reference to the activity of the PGF Limited, namely, sale and development of agricultural land as a collective investment scheme, the implication of Section 11AA was not intended to affect the development of agricultural land or any other operation connected therewith or put any spokes in such sale-cum-development of such agricultural land. It has to be borne in mind that by seeking to cover any scheme or arrangement by way of collective investment scheme either in the field of agricultural or any other commercial activity, the purport is only to ensure that the scheme providing for investment in the form of rupee, anna or paise gets registered with the authority concerned and the provision would further seek to regulate such in order to ensure that any such investment based on any promise under the scheme or arrangement is truly operated upon in a lawful manner and that by operating such scheme or arrangement the person who makes the investment is able to really reap the benefit and that he is not defrauded. Sub-clauses (i) to (viii) of sub-Section (3), which excludes those schemes and arrangements from the operation of Section 11AA in as much as those schemes are already governed under various statutes and are operated upon by a cooperative society or State machinery and there would be no scope for the concerned persons or the institutions who operate such schemes within the required parameters and thereby the common man or the contributory's rights or benefits will not be in any way jeopardized. It is, therefore, apparent that all other schemes/arrangements operated by all others, namely, other than those who are governed by sub-section 3 of Section 11AA are to be controlled in order to ensure proper working of the scheme primarily in the interest of the investors."*

*"42. Therefore, in reality what sub-section (2) of Section 11AA intends to achieve is only to safeguard the interest of the investors whenever any scheme or arrangement is announced by such promoters by making a thorough study of such schemes and arrangements before registering such schemes with the SEBI and also later on monitor such schemes and arrangements in order to ensure proper statutory control over such promoters and whatever investment made by any individual is provided necessary*

*protection for their investments in the event of such schemes or arrangements either being successfully operated upon or by any misfortune happen to be abandoned, where again there would be sufficient safeguards made for an assured refund of investments made, if not in full, at least a part of it."*

95) One decision of the Constitution Bench of the Supreme Court that has formally not been cited at the bar but considered in the decisions in Delhi Cloth & General Mills Co. Ltd. (supra) and Peerless General Finance and Investment Co. Ltd. (supra) and referred to by Mr. Mitra while placing the latter decision is R.K. Garg v. Union of India, reported in AIR 1981 SC 2138. That was a case where the writ petitions under Article 32 raised a common question of law relating to the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and the Special Bearer Bonds (Immunities and Exemptions) Act, 1981. The principal ground for challenging the constitutional validity of the Ordinance and the Act was, they were violative of the equality clause enshrined in Article 14 of the Constitution. I quote below certain passages from the majority opinion authored by Hon'ble P.N. Bhagwati, J. (as His Lordship then was) :

*"7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the Courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the*

*history of the times and may assume every state of facts which can be conceived existing at the time of legislation.*

*8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes. J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud, (1957) 354 US 457 where Frankfurter, J. said in his inimitable style :*

> *'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.'*

*The Court must always remember that, 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry' that exact wisdom and nice adaption of remedy are not always possible and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Court cannot, as pointed out by the United States Supreme Court in Secy. of Agriculture v. Central Roig. Refining Co., (1950) 94 L ed 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of*

*being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."*

96) In Shri Sitaram Sugar Company Limited (supra) too, it has been reiterated as follows:

> *"57. Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the 'feel of the expert' by its own views.***"*

97) It follows from the cited decisions that once the legislative policy is determined and formally transposed in an enactment laying down a binding rule of conduct, the power that is exercisable under the enactment has to be in furtherance of the objects sought to be achieved by such enactment but necessarily limited by its terms. The power has to be exercised bona fide, with due application of mind and on relevant consideration of all material facts, and in accordance with principles of natural justice to the extent applicable. A decision, either legislative or administrative or quasi-judicial, if not in harmony with the Constitution and other laws of the land, would be susceptible of being declared invalid. Reasonable relation of the action with the purposes of the enabling legislation is what should be attempted to save it from being declared unconstitutional. Insofar as challenge to an enactment seeking to bring about

economic reforms is concerned, deference to the legislative judgment should be followed by the Courts.

98) In the conspectus of the principles that emerge from the several cited decisions of the Supreme Court and the prefatory observations in R.K. Garg (supra), I now proceed to examine the worth of the contentions raised in respect of constitutional invalidity of the provisions inserted in the SEBI Act by the 1999 Amendment Act, and the CIS Regulations.

99) Securing JUSTICE, social, economic and political, and EQUALITY of status and of opportunity to all the citizens of the country is the promise that the people of this great nation made at the inception of the Constitution. The concept of distributive justice is embedded in the expression social and economic justice. The people of the country, for removing economic inequalities and to prevent injustice resulting from dealings or transactions between unequals in the society, have empowered their representatives in the Parliament and in their respective legislatures to enact laws to remove social imbalance by harmonizing the interests of different groups/sections of the society and to make equality of status meaningful and life worth living. The doctrine of equality embodied in Article 14 as well as the other articles in the Constitution have to be understood in the light of social justice assured by Articles 38, 39, 39A, 41 and 46 thereof. The State exists for serving the public good and to advance public interest. While considering a challenge to a provision of law enacted by the Parliament or by any of the legislatures as offending any of the fundamental rights that the Constitution guarantees, the Court has to presume that the law is valid and

has validly been enacted. The onus of establishing that the law in question is ultra vires is quite heavy. Nevertheless, whatever be the impugned law and the ground on which a challenge is thrown, the aforesaid principles are imperatively to be borne in mind. After all, Article 14 guarantees equality before law and equal protection of the laws not only to the petitioners before me who challenge a particular law but also to the vast cross-section of the society with whom they have and intend to have business relationships.

100) I am tempted at this juncture to refer to the decision in Dalmia Cement (Bharat) Ltd. v. Union of India, reported in (1996) 10 SCC 104. The petitioners (manufacturers of cement, sugar and other commodities and plastic bags, and who had secured loans from banks) alleged that due to operation of the Jute Packaging Material (Compulsory Use in Packing Commodities) Act, 1987, their industries were running into losses and many of them had been compelled to close their business. The capital obtained from the nationalised banks had become bad debt. Repeal of the Act or gradually phasing out compulsory packing of the commodities with gunny bags, it was claimed, would relieve their hardship. The constitutionality of the Act and the Jute Packaging Material (Compulsory Use in Packing Commodities) Rules and Statutory Order No. 539(E) dated 29th May, 1987 were impugned as *ultra vires* and mandatory direction to the respondents to forbear enforcement thereof in packing their finished products with jute bags etc., was sought for. The Court, while upholding the impugned insistence of the State to use jute bags for packing purpose and dismissing the claims took into consideration various decisions,

out of which some have been cited before me by Mr. Mitra, and observed that the concept of equality and equal protection of laws guaranteed by Article 14 in its proper spectrum encompasses social and economic justice in a political democracy; the preamble of the Constitution is the epitome of the basic structure built in the Constitution to establish an egalitarian social order; and the trinity – the preamble, the Fundamental Rights in Part III and the Directive Principles of State Policy in Part IV delineated the socio-economic justice. The principal end of society is to protect the enjoyment of the rights of the individuals, subject to social order, well-being and morality. While relying on the decision in R.K. Garg (supra) and holding the impugned provisions as not violative of Articles 14 or 19(1)(g), it was held :

> *"31. Equally, the competing right to carry on trade or business guaranteed to a citizen or person is also to be protected. In the clash of competing rights of socio-economic justice of the producers of agricultural commodities and the individual right of a citizen to carry on trade or business, the latter yield place to the paramount social right. *** "*

101) A case of the present nature, in my view, should not be approached with a narrow legalistic view. Alleviation of human predicament arising out of craftily carved systems with sinister motives and aimed at swindling people, and exercise of regulatory control over companies attracting and inviting deposits from the public being the predominant considerations in introducing the provisions that have been impugned herein, the focus should be on the larger public interest that is sought to be advanced. Whenever a statutory provision providing for economic measures is challenged on the ground that it is not constitutionally valid, the Court ought to examine the policy leading to the

impugned legislation and then to ascertain whether implementation of the policy is directed towards achieving social justice and to protect and develop national economy or not. If examination of the impugned provisions reveals an intention of the legislature to protect the rights of the aam aadmi and is based on reasons, which are shown to be coherent and justifiable, the policy has to be allowed to have full play and the Courts ought to keep its hands off unless it is permissible to judicially review the policy through the windows of "manifest unreasonableness" or "patent arbitrariness". If a rational nexus between the policy and the object it seeks to achieve is discernible, the Court would unhesitatingly guard against substituting its view for the legislative judgment. Should the policy be found sustainable, it would then exercise the consideration of the Court as to how implementation of the policy is to be worked out by the administrative authority. If guidelines exist for regulating the exercise of power, which are not unreasonable or unworkable, the Court would stay at a distance. It is in cases such as those cited by Mr. Pal, where the conflict was between a party and the administration without affectation of the rights of the common people, or where the regulations were so unreasonable that it became unworkable, that judicial interference could be considered necessary. However, if the policy, its object and ways and means to implement it are found to serve the cause of public good, irrespective of some crudity here and there, prejudicial affectation of one's business interest by reason of the regulatory framework being put in place has to yield to larger public interest or else the latter would be the casualty.

102) On the authority of the decisions in R.K. Garg (supra) and those following it and considering the limited extent of judicial scrutiny of a legislation that seeks to bring on economic reforms, the challenge to the provisions of the SEBI Act ought to fail. However, is it the law that an economic legislation can never be challenged? If such legal position has to be conceded, then much of the authorities on the import, content and scope of Article 14 would be wasted eloquence. I am minded to hold that even legislation laying down economic policy could be challenged on the very limited grounds of being so manifestly unreasonable, that is to say there is absolutely no nexus between the policy and the object it seeks to achieve and such finding could be recorded with much less intrusive judicial scrutiny as compared to scrutiny of other non-economic policy decisions, and/or that such policy is so patently arbitrary that the differentia is either unintelligible or outrageous to common sense, and the petitioner ought not to be told off at the gate merely because the challenge involves such legislation. It would require sound exercise of discretion by the Court whether to entertain the challenge or not. Bearing in mind that an economic legislation could be challenged on very limited grounds, I propose to examine the impugned provisions.

103) CIS has been defined in Section 2(1)(ba) of the SEBI Act to mean *"any scheme or arrangement which satisfies the conditions specified in Section 11AA".*

104) Section 11AA of the SEBI Act, for facility of reference, is quoted hereunder :

> *"Collective Investment Scheme*
> *11AA. (1) Any scheme or arrangement which satisfies the conditions referred in sub-section (2) shall be a collective investment scheme.*

*(2) Any scheme or arrangement made or offered by any company under which, -*

*i) the contributions, or payment made by the investors, by whatever name called, are pooled and utilized solely for the purpose of the scheme or arrangement;*

*ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable from such scheme or arrangement;*

*iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;*

*iv) The investors do not have day-to-day control over the management and operation of the scheme or arrangement.*

*(3) Notwithstanding anything contained in sub-section (2), any scheme or arrangement -*

*i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912), or a society being a society registered or deemed to be registered under any law relating to cooperative societies for the time being in force in any State;*

*ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);*

*iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;*

*iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);*

*v) under which deposits are accepted under section 58A of the Companies Act, 1956 (1 of 1956);*

*vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society under Section 620A of the Companies Act, 1956 (1 of 1956);*

*vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Fund Act, 1982(40 of 1982);*

*viii) under which contributions made are in the nature of subscription to a mutual fund;*

*shall not be a collective incentive scheme."*

105) The preamble of an Act is said to afford useful light as to what the statute intends. To examine the point of over-breadth, it would be useful to look into the preamble of the SEBI Act. It says that it is an *"Act to provide for the*

*establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto"*. To understand what the word "securities" means, one has to look into the definition clause in Section 2 of the SEBI Act. It is found that unless the context otherwise requires, the meaning of the said word has to be gathered from its definition in the SCR Act. Section 2(h) of the SCR Act defines "securities". It is an inclusive definition and includes, inter alia, *"derivative"* [clause (ia)] and *"units or any other instrument issued by any collective investment scheme to the investors in such schemes"* [clause (ib)]. These were incorporated in the SCR Act by the 1999 Amendment Act.

106) One other amendment of vital importance brought about by the 1999 Amendment Act in the SEBI Act is the inclusion of Section 11AA, which is at the heart of the controversy here.

107) Why was it considered necessary to effect these amendments? I have dwelled on this aspect briefly in the first paragraph. An answer may also be found in the Statement of Objects and Reasons of the Securities Law (Amendment) Bill, 1999, which was adopted and the 1999 Amendment Act came into the picture. It reads:

> "In the last few years there have been substantial improvements in the functioning of capital markets in India. Market and credit risks have been reduced by requirement of adequate capitalisation, margining and establishment of clearing corporations in stock exchanges, etc. Systemic improvements have been made by introduction of screen based trading and depositories to allow book entry transfer of securities, etc. However, there are inadequate advanced risk management tools. With a view to provide such tools and to strengthen and deepen markets, there is an urgent need to include derivatives as securities in the Securities

Contracts (Regulation) Act, 1956 whereby trading in derivatives may be possible within the framework of that Act.

2. Recently many companies especially plantation companies have been raising capital from investors through schemes which are in the form of collective investment schemes. However, there is not an adequate regulatory framework to allow an orderly development of this market. In order that the interests of investors are protected, it has been decided that the Securities and Exchange Board of India would frame regulations with regard to collective investment schemes. It is, therefore, proposed to amend the definition of 'securities' so as to include within its ambit the derivatives and the units or any other instrument issued by any collective investment scheme to the investors in such schemes.

3. It is also proposed to substitute section 29A of the aforesaid Act relating to delegation of powers. At present powers can be delegated to the Securities and Exchange Board of India. It is now proposed to also delegate powers to the Reserve Bank of India.

4. The Securities Contracts (Regulation) Amendment Bill, 1998 was introduced in Lok Sabha on the 4th July, 1998 proposing amendments in the Securities Contracts (Regulation) Act, 1956 to give effect to the amendments mentioned above. The Bill was referred to the Standing Committee on Finance on the 10th July, 1998 for examination and report thereon by the Hon'ble Speaker, Lok Sabha. The Committee submitted its report on the 17th March, 1999. The committee was of the opinion that the introduction of derivatives, if implemented with proper safeguards and risk containment measures, will certainly give a fillip to the sagging market, result in enhanced investment activity and instil greater confidence among the investors/participants. The Committee after having examined the provisions of the Bill and being convinced of the needs and objectives of the Bill, approved the same for enactment by Parliament with certain modifications/recommendation which, *inter alia*, are stated as under:-

(i) A view was expressed before the Standing Committee that since under section 30 of the Indian Contract Act, 1872, the contracts which are cash settled are classified as wagers and trading in wagers is null and void, the index futures which are always cash settled would also be classified as wagers under the said Act. Due to this, no proceedings to enforce an index future contracts either by an exchange against a defaulting broker or client against his broker would stand the legal scrutiny before the court of law. The Committee was, therefore, of the view that there was no harm in having an overriding

provision as a matter of abundant caution. They, therefore, suggested the incorporation of the following provision in the Bill, namely: -

> 'Notwithstanding anything contained in any other Act, contracts in derivatives as per this Act shall be legal and valid'.

(ii) The Committee was convinced that stock exchanges which are presently working would be better equipped to undertake trading in derivatives in a sophisticated environment. They further observed that most of these exchanges have already been modernised having state-of-the-art technology, the facility of depository and clearance house and moreover, since they are in a better position to handle the risk profiles of the retail investors, institutional investors and corporate bodies, it would be prudent to allow trading in derivatives by such exchanges only. The Committee had, therefore, proposed that the following Explanation may be added in the Bill, namely:-

> 'The derivatives shall be traded and settled on the stock exchange and clearing house of the stock exchange respectively in accordance with the rules and bye-laws of the stock exchanges.', and

(iii) The Committee was of the opinion that there was a need to define collective investment schemes in the Act. They had recommended that a definition of collective investment scheme suitably worded in consonance with the definition recommended by the Dave Committee should be included in the Act.

The Central Government have accepted the above recommendations and incorporated the same in the Bill.

5. The Bill seeks to achieve the above objectives."

(underlining for emphasis by me)

108) It would appear from the above extract that the Standing Committee on Finance examined the Securities Contracts (Regulation) Amendment Bill, 1998 pursuant to an order of the Hon'ble Speaker of the Lok Sabha and, inter alia, reported on the need to define CIS on the lines of the recommendation of the

Dave Committee and to include the same in the SCR Act. Proceedings of the Lok Sabha dated 30th November, 1999 would also show that the motion was adopted after thorough deliberations.

109) A conjoint reading of the relevant Acts, viz. the SEBI Act and the SCR Act together with the objects and reasons of the 1999 Amending Act would leave no manner of doubt that protection of the investors in securities and the manner of ensuring such protection in fullest measure is the heart and soul of the SEBI Act. However, Mr. Pal argued that Section 11AA is so wide that businesses of diverse nature may be caught in the net and in the absence of adequate guidelines, there is likelihood of abuse of discretionary power. I shall assume that the legislation is open-ended, but one has to pose a question here as to whether there was any valid reason for such open-ended legislation? To my mind, it would be quite reasonable to presume that the legislature deliberately intended the legislation to be open-ended to ensure that people with limited financial means are not ruined in the process of trying to get rich quickly and at the same time, no company would have the freedom to fleece. This being the object of the 1999 Amending Act, I feel it is not only the duty of the judiciary to show deference to the legislative judgment but to zealously thwart any attempt by any company to wriggle out of the regulatory mechanism by ingenious legal arguments, which were not even thought of at least up to the first day the Division Bench considered the appeal filed by the petitioners against the order dismissing the second writ petition filed by them. In M/s. P.G.F. Limited (supra), the Supreme Court cautioned that the motives of laying a belated

challenge to a statutory provision is a factor that the Court should bear in mind. I am of the view, having regard to the facts and circumstances discussed above and more particularly the attempt of the petitioners to urge the Supreme Court to recall an innocuous order (of requesting the High Court to take up the writ petition for hearing within two weeks or to consider vacating of the interim relief) as well as to assert that the order of the Division Bench does not preclude them from contending before me to examine the decision dated 3rd January, 2011 of the whole time member of the SEBI on merits, that the legislation was challenged to prolong the proceedings as well as negate the objection to the entertainability of the writ petition because of availability of an alternative remedy. That apart, in Govt. of A.P. v. Laxmi Devi, reported in (2008) 4 SCC 720, the Court has reiterated the principle that mere likelihood of abuse of discretionary power conferred under statute would not render the statutory provision unconstitutional. Mr. Mitra and Mr. Kuhad are thus right in their submission that the challenge to the provisions of the SEBI Act is devoid of merit.

110) In this connection, the decision in M/s. P.G.F. Limited (supra) may once again be referred to. Introduction of Section 11AA has been upheld not only on the ground of competence of the Parliament but the Court found it to be a step in the right direction for saving the gullible investors from falling prey to unregulated and uncontrolled schemes leading to their ruination (paragraphs 37, 38, 40 and 42). The reason for devising exclusionary operation of activities of certain classes, as in sub-section (3) of Section11AA, has also been clearly

discussed as evident from paragraph 39 thereof and I see no reason to dilate thereon.

111) Insofar as the charge of excessive delegation of essential legislative functions is concerned, the same is equally without merit. As regards laying down of principles or guiding norms, law seems to be well-settled that it is not essential that the very section in the statute which confers the power should also lay down the rules of guidance, or the policy for the administrator to follow. If the same can be gathered from the preamble, or the long title of the statute and other provisions therein, the discretion would not be regarded as uncontrolled or unguided and the statute in question will not be invalid. At times, even vague policy statements to guide administrative discretion have been held by the courts as complying with Article 14. I have no hesitation to hold that the CIS Regulations viewed in the light of the object that the SEBI Act after its amendment seeks to achieve, in view of the principles laid down in paragraph 17 of Jyoti Pershad (supra), have to be upheld.

112) Besides, it appears that the CIS Regulations were duly placed before the Lok Sabha on December 10, 1999 and the Rajya Sabha on December 14, 1999 in accordance with the statutory mandate in Section 31 of the SEBI Act. If indeed the SEBI, as delegate, had transgressed the permissible limits, the Parliament had the authority to intervene to set things right. No modification having been suggested by the Parliament, it is clear that the CIS Regulations were found to be in order. Abdication of authority by the Parliament, on facts and in the circumstances, also does not arise. The decision in Kerala SEB (supra) does not

come to the rescue of the petitioners since the terms of the CIS Regulations are neither unreasonable nor unworkable.

113) In my final analysis, the impugned provisions do not suffer from any over-breadth. The net of coverage had to be spread wide and high to check each and every attempt to loot the hard earned money of the aam aadmi for one's personal wrongful gain and so long as abuse of discretionary power is not demonstrated, the petitioners cannot expect any relief.

114) The writ petition stands dismissed, with costs assessed at Rs.10,00,000/- to be deposited with the Registrar, Original Side, within a month from date. On such deposit being made, the Registrar shall arrange transfer of equal shares in such sum to the State Legal Services Authority and the Calcutta High Court Legal Services Authority within a fortnight thereafter.

115) This order shall, however, not preclude the petitioners to challenge the order dated 3rd January, 2011 before the Tribunal in accordance with law.

Urgent photostat certified copy of this judgment and order, if applied for, may be furnished to the applicant at an early date.

(DIPANKAR DATTA, J.)

Prayer for stay of operation of the order has been made by Ms. Sutapa Sanyal, learned advocate for the petitioners. The prayer is considered and refused.

(DIPANKAR DATTA, J.)