Alka Synthetics Ltd. Vs Securities and Exchange Board of India and Others
 D.M. Investments Vs Securities and Exchange Board of India

Court: Gujarat High Court

Date of Decision: Feb. 19, 1997

Acts Referred: Constitution of India, 1950 â€" Article 265, 300A
Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 1995 â€" Regulation 11, 12
Securities and Exchange Board of India Act, 1992 â€" Section 11, 11(2), 11B, 32

Citation: (1995) 95 CompCas 663

Hon'ble Judges: Rajesh Balia, J

Bench: Single Bench

Advocate: B.R. Shah, for the Appellant; Kirit Raval, for the Respondent

Judgement

R. Balia, J.
The two petitions raise substantively identical questions and have been heard together at the request of counsel for the parties.

Hence, I propose to deal with the same by a common order.

First about facts :

The facts and preliminary objections relating to Special Civil Application No. 2224 of 1996.

2. This petition has been filed in the circumstances to be stated hereinafter and raises the issue about the authority of the Securities and Exchange

Board of India (for short, ""the SEBI"") to order impounding and/or confiscation of the whole or a part of the consideration of a completed

transaction, which in ordinary circumstances concerned the party to the transaction is entitled to receive and for whom it is an actionable claim,

under the existing provisions of law under which the Securities and Exchange Board of India functions. This issue is similar to the one raised in

Special Civil Application No. 5483 of 1996 - D. M. Investments v. Securities and Exchange Board of India (SCA No. 5483 of 1996), which also

has been heard along with this petition.

3. The petitioner is a company registered under the Companies Act, 1956, and is having its registered office at Ahmedabad. As per the case set

out in the petition, in pursuance of notice No. B. 20 of 1996 dated February 7, 1996, issued by the Bombay Stock Exchange (hereinafter called,

the stock exchange"") inviting from the members of the exchange offers for sale of shares of Magan Industries Limited (for short, ""MIL"") because

transaction of purchases of shares of MIL, remaining outstanding for want of availability of adequate number of shares with the sellers to fulfil their

corresponding selling obligation. In response to the said notice dated February 7, 1996 (annexure ""A""), the petitioner who was holding shares in

MIL offered 50,000 shares for sale at auction to the stock exchange through its member, respondent No. 3, Inderlal Agarwal. The transaction of

sale of the petitioner''s shares at the auction was at Rs. 118 per share inclusive of chargeable expenses. After deducting charges the petitioner was

to receive consideration for the said shares from the stock exchange through the said broker at Rs. 116.80 per share. The price of the shares so

offered by the petitioner at the auction for sale was recovered by the stock exchange respectively from purchasers and short sellers. As per its

bye-laws and practice of auctioning, the exchange was to recover part of the consideration for such shares from the purchasers, at the rate at

which the transaction of purchase has been entered into by the purchasers who were to take delivery of shares, and the difference between the

auction price and the purchase price so payable by the purchasers was to be recovered from respective short sellers. The amount so recovered by

the stock exchange becomes payable to the offerer by crediting his account after deducting chargeable expenses. The Securities and Exchange

Board of India in its impugned order dated July 4, 1996, has referred to this aspect.

4. The consideration for the transaction at auction was received by the stock exchange. However, before the amount could be paid to the offerers,

the stock exchange issued notice on February 15, 1996, stating that as per the directives received from the Securities and Exchange Board of

India the payments due to the members on account of acceptance of their MIL shares offered in pursuance of auction notice No. B. 20 of 1996 is

to be retained by the clearing house until completion of investigation and further decision in this regard. A petition was originally filed challenging the

directives of the Securities and Exchange Board of India referred to in notice dated February 15, 1996, issued by the stock exchange (annexure

B), for retaining the amount already collected by the stock exchange from being paid to the members through whom the petitioner has offered its

shares for sale, thus affecting its claim to that money.

5. In its reply, it was submitted by the Securities and Exchange Board of India that it has prima facie indication that there was artificial manipulation

of the price of the scrips of MIL and preliminary investigation indicates that the petitioner has been heavily buying and selling in this scrip in

consortium with its other group of companies. In view of this circumstance, the respondent is actively pursuing its investigation which is likely to

take some time, it was pleaded that in the interest of investigation, the auction proceeds may not be disbursed to any person till the investigation

report is available and the said directive was only an interim measure.

6. The petitioner had raised a very fundamental issue whether even in case investigation results in indication of the petitioner, the Securities and

Exchange Board of India has jurisdiction to make a final order for confiscating or depriving the petitioner of the consideration which has already

become due in respect of the transaction about its scrips and which has been received by the stock exchange from the respective parties from

whom the consideration was to be received, without there being any specific provision of law to that effect.

7. Keeping in view the pleadings and respective contentions on May 6, 1996, it was directed by way of interim relief that the Securities and

Exchange Board of India shall complete the investigation in respect of share transactions of MIL latest by June 3, 1996 (which was extended later

on an application being made in this behalf). Respondent No. 1 was also directed to consider whether the petitioner has any role to play in the

alleged irregularities in the transaction under investigation. It was also stated in the order that if the petitioner is not involved in the alleged

malpractices and irregularities, respondent No. 2 shall modify its order pertaining to retention of the amount in question by the stock exchange and

permit the stock exchange to release the proceeds of transaction of shares in question in full or in part in favour of the petitioner as it deems fit

proper and equitable.

8. Thereafter, the order dated July 4, 1996, came to be made by the chairman of respondent No. 1. Regarding the amount, it was directed to be

retained by the stock exchange. Concerning the receipts of the auction, it was ordered :

As regards the amounts retained in respect of the auction proceeds, it may be mentioned that according to the normal stock exchange practices

whenever a seller is not able to deliver the securities and when the auction is called for, the monies are taken from the buyer to the extent of the

transaction price/standard price and from the seller to the extent of the difference between the transaction price/standard price and the auction

price and given to the offerer who has given the securities in the auction proceedings.

In this case, the securities were taken from the offerers but the auction proceeds were not released to the offerers in view of the Securities and

Exchange Board of India directions as there was alleged price rigging and market manipulation in the trading of the security so that the offerer

would not be able to take away undue and ill gotten profits arising out of such manipulations. The investigations carried out have concluded that

there was price rigging and market manipulation in the trading of this scrip and, therefore, the auction price does not reflect the true market value of

the scrip. It is also found in investigations that some of the offerers were directly involved in the manipulation. However, at the same time in the

interest of fairness and justice it is to be considered that the securities offered by the offerers have some value and, therefore, the amounts equal to

the standard price of the security for the respective settlement should be released to the offerers as the intention is only to ensure that the offerers

should not get undue or ill gotten profits arising out of the rigged/manipulated price.

9. The order also says that while it is necessary to give opportunity to the affected persons in terms of the principles of natural justice, it decided to

dispense with the formal prior hearing, however it left it open to the aggrieved parties to make a written representation within fifteen days of receipt

of the intimation of the order from the respective stock exchange and such representations were to be decided by a committee to be set up by the

Securities and Exchange Board of India, which would exclude the members of the investigating team to be on the adjudicating committee. Though

this order was made on July 4, 1996, the same was not communicated to the petitioner or any of the affected parties.

10. However, on the direction of the court a copy of the order was delivered to counsel for the petitioner by counsel for the respondent in the

court during the course of hearing, and, thereafter, amendment was sought by the petitioner for challenging the order dated July 4, 1996, as well,

on various grounds to be noticed hereafter.

11. However, before proceeding further, learned counsel for respondent No. 1 raised preliminary objections which may be considered at this

stage. Firstly, it has been urged that as no part of the cause of action has arisen within the State of Gujarat, the petitions under article 226

challenging the impugned orders are not maintainable in the High Court of L. Gujarat. Clause (2) of article 226 provides that the power conferred

by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising

jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding

that the seat of such Government or authority or the residence of such person is not with those territories. Clause (2) of article 226 was inserted as

clause (1A) by the Constitution (Fifteenth Amendment) Act, 1963, and was renumbered as clause (2) by the Constitution (Forty-second

Amendment) Act, 1976. The amendment in the Constitution was brought as a consequence of difficulties arising out of decisions rendered prior to

such insertion that the writs issued by any High Court do not run beyond the territories in relation to which each High Court exercises jurisdiction.

As a result of the insertion of the said provision any Government or authority : person became amenable to the jurisdiction of the High Court

notwithstanding that the seat of such Government or authority or the residence if such person happened to be beyond the territories in respect of

which the High Court exercises its jurisdiction if the cause of action for issuing any writ, direction or orders whether wholly or in part has arisen

within the territory in respect of which the High Court is exercising its jurisdiction.

12. Though ""cause of action"" has not been defined either in the CPC or under the Constitution, the expression ""cause of action"" has acquired a

well-settled meaning. It means a bundle of facts which the petitioner must prove, if traversed, to be entitled to a judgment in his favour by the court.

In determining the objection of lack of territorial jurisdiction, the court is required to take all the facts pleaded in support of the cause of action into

consideration without embarking upon an enquiry into the correctness or otherwise of such facts. The question is to be decided on the basis of the

facts pleaded in the petition or plaint, the truth or otherwise of the averments made in the petition being immaterial.

13. The principle was enunciated by Lord Watson in Chand Kour v. Partab Singh ILR [1889] Cal 98.

The cause of action has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the

relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon

which the plaintiff asks the court to arrive at a conclusion in his, favour.

14. This principle has been approved by the Supreme Court in Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, , wherein the

court said after quoting the aforesaid principle (page 717) :

Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action

into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question

whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the

truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the

petition.

15. If we examine the pleading of the petitioner in this respect, the salient features which may be called bundle of facts on which the claim for relief

of the petitioner is founded are - (1) that on February 7, 1996, the petitioner offered 50,000 shares of MIL for sale at auction as per invitation by

the stock exchange; (2) the price settled for such transaction of auction was at Rs. 118 per share of which after deducting expenses, consideration

at the rate of Rs. 116.80 became payable to the petitioner. The amount was received from those persons from whom the consideration of such

shares was to flow, by the stock exchange; (3) the stock exchange notified that such amount is ordered to be retained by it by the Securities and

Exchange Board of India and, therefore, it cannot be paid; (4) the amount was ordered to be retained by the Securities and Exchange Board of

India for completion of investigation and further decision in that regard; (5) as a result of completion of investigation order dated July 4, 1996,

came to be made for release of part of the money retained by the stock exchange to the extent referred to in the order and the remaining amount

was ordered to be impounded; (6) respondent No. 1 has no authority to order impounding of money which had become due to the petitioners for

various reasons including lack of authority and breach of principles of natural justice, affecting the order founded on the basis of investigation. It is

also to be noted that there is no dispute that but for the intervention of the Securities and Exchange Board of India, as a result of investigation the

petitioner would have been entitled to that sum in the ordinary course. It has also been the averment of the petitioner that the summons for

attendance of various representatives of the petitioner issued by the investigating officer appointed by respondent No. 1 u/s 11(3) of the Securities

and Exchange Board of India Act, 1992 (""the Act"" for short), in connection with enquiry instituted by respondent No. 1 in the case of buying or

selling or dealing with the shares of the company was served upon the petitioner on April 2, 1996, at Ahmedabad. On the basis of said summons

on Shri Satish Pancholia, managing director of the petitioner at Ahmedabad, his statement was recorded at Ahmedabad, on April 2, 1996. The

documents as demanded by the investigating officer was handed over to him by the petitioner on the same day at Ahmedabad.

16. Though the pleadings in defence of the claim made by the petitioner are not required to be gone into for the purpose of determining the issue of

objection about the territorial jurisdiction of the court, it is pertinent to notice that but for the investigation ordered by respondent No. 1, and the

order made as a consequence of such investigation, the petitioners'' claim to the amount recovered by the stock exchange as a result of auction

transaction in pursuance of notice dated February 7, 1996, is not disputed and the facts about service of summons, recording of statement, and

recovery of documents in connection with the said investigation against the petitioner-company at Ahmedabad on April 2, 1996, are also not

disputed.

17. In these circumstances, the conclusion is irresistible that the holding of an investigation into the affairs of buying and selling and dealing with the

shares by the petitioner-company qua the shares of MIL, is an integral part of the whole cause of action giving rise to the present claim of the

petitioner and, therefore, the situs of investigation will obviously be a situs of at least a part of the cause of action giving territorial jurisdiction to the

court exercising jurisdiction over that situs. On the facts averred by the petitioner, which remain undisputed, lending additional support to the

pleadings about investigation, if part of investigation at least has been held at Ahmedabad, and the investigation being the foundation of the

impugned order and such investigation in the case of the petitioner for bringing into existence the impugned order has taken place at Ahmedabad,

which undisputedly and undeniably is within the territory over which this court exercises jurisdiction. This alone is sufficient to hold that the High

Court of Gujarat had territorial jurisdiction to examine the issue and issue appropriate directions in respect of the impugned orders which have

been founded on an investigation, part of which has taken place at Ahmedabad, within its territorial jurisdiction.

18. It has also been urged that though the situs of service of order has also determinative relevance for deciding the question of jurisdiction of the

court, and the principle has not been disputed by the respondents, but since the order under challenge has been served on the petitioners at

Ahmedabad only during these proceedings in the court by handing over the order to the counsel for the petitioner, it cannot be used as ground for

furnishing cause of action at Ahmedabad.

19. On a close scrutiny, I find no substance in this submission. The order dated July 4, 1996, in no unmistakable terms states that aggrieved

persons may be given opportunity of hearing. For this purpose, the order was required to be served on the affected parties to enable the aggrieved

person to file objections. Instead of the Securities and Exchange Board of India effecting service itself, it directed the concerned stock exchange to

intimate the affected parties. The stock exchange had the necessary details about the persons whose shares were offered at auction and were thus

affected by the order and were entitled to receive intimation. It can not be said that the intimation was required to be given to the aggrieved parties

by calling them to stock exchange only. It may further be noticed that in its written submission also this much has been stated on behalf of the

Securities and Exchange Board of India that the order was served on the Bombay Stock Exchange for suitable intimation to its members and other

parties. That is clear indication that the impugned order was required to be served not only on members of the stock exchange but also on the

other affected parties. Undoubtedly, the petitioner is one of the affected parties, which fact is not seriously disputed nor could it be. Even

otherwise, without this direction, if the order in terms affected a person''s right and was meant to furnish a post decisional hearing to the affected

parties, without requiring serving of the copy of the order, it would have been meaningless. It is not the case of the respondent that the order was

not required to be served on the petitioner at all. What is argued is that since the Securities and Exchange Board of India itself was not to serve the

order but it was to be served by the stock exchange its furnishing a copy in the court will not furnish a cause of action.

20. Once it is held, as it must be, that the order was required to be served on the petitioner, the fact whether the author of the order itself effects

the service or someone else is directed to discharge the ministerial duty of service will not affect the position. What is required to be seen is where

the order was required to be served on the person whose rights are affected by it. If the order was required to be served within the territory where

this court exercises jurisdiction, it will not alter the situation if the order has been served in court during proceedings at Ahmedabad. The position

may be otherwise, if but for court proceedings the order on the affected party would not be served at a place within the court''s territorial

jurisdiction.

21. In the present case, it is not disputed that the petitioner''s registered office is at Ahmedabad, within the territorial jurisdiction of this court. The

notice of investigation was served at Ahmedabad. Statements in pursuance of that were recorded at Ahmedabad. As a result of said investigation

the impugned order which came into existence affecting the petitioner was also required to be served at Ahmedabad, and in fact the same has been

served at Ahmedabad.

22. In this connection, learned counsel for the respondent placed reliance on the decision of the Supreme Court in State of Rajasthan and Others

Vs. Swaika Properties and Another, . A close reading of the decision makes it clear that whether in a given set of circumstances service of notice

is a part of the cause of action or not is not to be determined on any absolute rule in the abstract but depends on entirety of facts, the nature of the

order, the nature of the right affected, etc. The court had laid down the ratio that (page 1292) :

The answer to the question whether service of notice is an integral part of the cause of action within the meaning of article 226(2) of the

Constitution must depend upon the nature of the impugned order giving rise to cause of action.

23. Applying the above test to the facts of the case before the Supreme Court, which had arisen in the matter of land acquisition proceedings under

the Rajasthan Urban Improvement Trust Act the court found that notice u/s 52(2) of the said Act, was published in Rajasthan, proposing the

acquisition of land situated in Rajasthan at Jaipur, service of notice inviting objections against proposed acquisition which was to take place in

Rajasthan, was served on the petitioner in Calcutta, where he was residing. Thereafter, all proceedings took place in Rajasthan, viz., enquiry and

hearing. Thereafter, notification u/s 52(1) was published in Rajasthan which resulted in vesting of property in the State of Rajasthan. The petitioner

challenged the notification u/s 52(1) of the Act. In those circumstances, where the situs of the property affected, the enquiry into objections about

it, its rejection, and final order vesting of property in Rajasthan, had all taken place in Rajasthan. In these circumstances, obviously, mere service of

notice of the proposal to acquire property u/s 52(2) was held to be not part of the cause of action at all.

24. Here, we are not concerned with a case where mere notice of proposed auction is served at one place, but the proceeding itself has been

completed at other place including the situation of property affected was situated in the other place. Here we are concerned about a case which is

not of service of mere notice of enquiry at Ahmedabad, but where the order itself has been served at Ahmedabad. State of Rajasthan and Others

Vs. Swaika Properties and Another, , was not a case of service of final order. Nor was it a case where the final order was required to be served,

nor was it a case of quasi-judicial order, which unlike a statutory order of acquiring land does not depend for its efficacy on service. The court

found as a matter of law that the order u/s 52(1) of the Act became effective as soon as it was published inasmuch as the property affected by it

vests in the State on its publication. A judicial order pronounced in open court becomes effective as soon as it is pronounced. Where the order is

made by a quasi-judicial authority, and is not made in the presence of the parties ordinarily it becomes effective, when served on the affected

parties.

25. Moreover, in the present case, the order has been made as a result of the enquiry. It had been made without hearing the affected parties. It

envisaged a post-decisional hearing to the affected parties. Therefore, service of the order, in the very nature of things, was an essential part of the

whole gamut. To save it from being void for want of fair procedure, in fact, the order itself made it requisite for its effectiveness, that it be served

on all members of the stock exchange and other affected parties. Therefore, in the circumstances of the present case service of the order, as

distinguished from service of notice prior to enquiry as was the case before the Supreme Court in State of Rajasthan and Others Vs. Swaika

Properties and Another, , is an integral part of the cause of action. Rather service of it itself furnished cause of action to seek remedy against it. As

discussed, the order was required to be served at Ahmedabad and was in fact served at Ahmedabad, the decision in State of Rajasthan and

Others Vs. Swaika Properties and Another, , does not further the case of objections.

26. In Modern Food Industries (India) Ltd. Vs. M.D. Juvekar, , a Division Bench of this court, speaking through A. M. Ahmadi j., as he then was,

in a case where the order of termination was made at New Delhi, but was served on the affected party at Ahmedabad, where he was at the

relevant point of time on leave and the question as to territorial jurisdiction was raised, said (page 500) :

Be that as it may, the fact remains that the order of termination of service, though passed at New Delhi, was communicated to the respondent-

employee at Ahmedabad, since he was at the relevant time on leave. Whether, it was for the convenience of the respondent-employee or for any

other reason is not material, what is material is the fact that it was communicated to him at Ahmedabad. In our view, therefore, the decision on

which Mr. Bhatt places reliance cannot come to the rescue of the appellants since it in terms states that the cause of action would arise not only at

the place where the order of termination of service was made but also at the place where its consequences fell on the employee. We cannot

subscribe to the submission that the consequence of the termination order fell on the respondent-employee at Calcutta, the fact that it was

communicated about had notwithstanding, merely because the employee was posted at the Calcutta unit. It may be that on the receipt of the order

by the Calcutta unit, a part of the cause of action can be said to have arisen at Calcutta also but that cannot nullify the fact that the consequences of

the order fell on the respondent-employee when he was informed about the same at Ahmedabad. We are, therefore, of the opinion that the

aforesaid decision in fact is an authority for the proposition that a part of the cause of action arose at the place where the order of termination of

service was communicated to the concerned employee.

27. The petitioner-company has its registered office at Ahmedabad. The situs of its movable property is at Ahmedabad. By the impugned order

the rights of the petitioner-company arising out of the transaction of that movable property are affected. Thus, applying the test in Modern Food

Industries (India) Ltd. Vs. M.D. Juvekar, , it can well be said that the consequence of the impugned order fell on the petitioner at Ahmedabad,

where the order was served, where the situs of the petitioner''s property in share was situated. The principle applicable to determine the jurisdiction

of court in a suit for recovery of movable property cannot be applicable, obviously because this lis is not for recovery of movable property. The

petition is to protect the petitioners'' right in movable property which has been impaired not by a person possessed of such property but by an act

of a statutory authority in purported exercise of its powers under the Act. The situs where such right is affected or where the effect of such order to

affect the right becomes the relevant consideration.

28. In Damomal Kausomal Raisinghani Vs. Union of India and Others, , the issue was raised about the territorial jurisdiction of the Bombay High

Court, in respect of a petition challenging the order made under the Displaced Persons (Claims) Supplementary Act, 1954, verifying the claim of

displaced persons at Delhi. A preliminary objection as to the jurisdiction of the Bombay High Court to entertain the petition was negatived by their

Lordships of the Bombay High Court. The court held (page 358) :

The question that arises is whether the cause of action for the exercise of the power invoked by the petitioner arose wholly or in part within the

territories in relation to which this court exercises jurisdiction. The petitioner, as it appears, was a resident of Ullasnagar, a place situated in the

District of Thana of Maharashtra State. The impugned order itself shows that the case was heard in Bombay. It is indeed true that the order on the

face of it does not show the place where it was made. Even assuming that this order was made by the third respondent in New Delhi, there can

hardly be any doubt that the effect of this order fell on the petitioner at Ullasnagar, where he resides.

29. This decision had been followed by this court in Modern Food Industries (India) Ltd. Vs. M.D. Juvekar, referred to above.

30. In L.V. Veeri Chettiar and Another Vs. Sales Tax Officer, Bombay, , their Lordships considered the impact of a notice issued by an authority

under fiscal statutes for the purpose of considering the cause of action giving territorial jurisdiction to a court, while the authority issuing the notice is

situated outside the jurisdiction of the court. It held (AIR 1971 Mad 160) :

The person primarily affected by the respondent issuing the notices from time to time to the petitioners and calling upon them to produce the

accounts of their business carried on in the State of Tamil Nadu, and again by proposing to assess them to the best of his judgment on the

assumption of certain jurisdictional facts, is the addressee of such notice and such affection relates to the bundle of facts in the totality of the lis or

proceeding concerned, and such impact necessarily gives rise to a cause of action, though it may be in part. It is established that in fiscal laws a

proposal to assess forms part and parcel of the machinery of assessment and thus understood, the service of notice to assess and calling upon the

petitioner to explain has given rise to a cause of action as is popularly and legally understood and the machinery of assessment has been set in

motion and the impact of that motion is felt by the petitioners within the territorial limits of this state. We have, therefore, no hesitation in holding

that a part of the cause of action has arisen in the State of Tamil Nadu.

31. This decision gives a clear indication that wherever issuance of a notice is a necessary part of setting a machinery in motion for the purpose of

affecting the rights of the person against whom the machinery is to be mobilized the service of the ultimate order affecting the rights of the person

concerned, forms part of the cause of action, in relation to a dispute challenging the final order affecting the rights affected by that order. Mere

issuance of a notice to a person concerned may not be a necessary part of the cause of action but where issuance of such notice is a pre-condition

for setting the machinery in motion and not the conditions subsequent for the purpose of furthering the cause which has already been set in motion,

the service of notice itself becomes part of the cause of action. It has also been noticed that the place ultimately where the order is served affecting

the rights of the person affected, whether such service be for the convenience of the authority or for some other reason furnishes a ground for the

courts within whose territorial jurisdiction such place is situated, to exercise jurisdiction to entertain such disputes.

32. The above decisions fortify the conclusions which I have reached that the place where the order is served on the person affected affecting his

rights at that place is a part of the cause of action, and gives territorial jurisdiction to the courts within whose territory the place at which service of

the order has been effected affecting the rights of the person concerned is situated or to say the court within whose territorial jurisdiction lies the

situs of the right which is affected by the impugned order and that right is actually affected by service of the impugned order within that territory has

the jurisdiction to entertain a challenge as to the validity of such orders.

33. These conditions demonstrably exist in the present case.

34. The petitioner held some shares in MIL, which are movable property. The right to recover the amount which arose out of transaction of sale of

50,000 shares is a right in the nature of an actionable claim vesting in the petitioner, which again is a movable property at Ahmedabad. It is an

undisputed fact that before that right can be affected the petitioner was required to be served with notice. Whether at the time of initiating enquiry

or before making an order of impounding such consideration received by the stock exchange as a result of the conclusion of the transaction and in

pursuance of that notice enquiry so far as the petitioner was concerned, as an accused as distinct from merely as a witness, was conducted at

Ahmedabad. On completion of the enquiry and on the basis of conclusions reached in that enquiry before taking further action of impounding fair

procedure required that the person affected must be given a hearing was accepted by the authority making the order himself, though he thought that

it was in his discretion to dispense with the hearing at that stage and to fill in the lacuna by proposing post-decisional hearing by directing the stock

exchange to inform the affected parties about the order inviting them to file objections, if any, to be decided by a committee to be appointed for

that purpose. This clearly indicated the rights of such person to notice before making any effective order has to be accepted. Thus, service of the

order itself furnished part of the cause of action for raising objections against the impugned order. The fact that the petitioner instead of availing of

the opportunity of post-decisional hearing before the committee has chosen to challenge the order by invoking the extraordinary jurisdiction of this

court does not detract from the fact that the order itself envisaged service of the order to furnish a cause of action for challenging the same.

35. In this connection, the plea that if the petitioner were to file a suit for recovery of the claim, he might have to file a suit at Bombay, has no

bearing on the question of jurisdiction in the present case. It has to be borne in mind that the present is a case which concerns itself about impairing

of the right of the petitioner in movable property distinct from a suit for the recovery of money simpliciter.

36. Hence, where a suit for recovery of money against his would lie cannot ipso facto govern the question of jurisdiction about a claim where the

right to such recovery has itself been affected, not by the debtor but by an act of statutory function. In the latter case, what furnishes ground for

impairing such right forms part of the cause of action.

37. Learned counsel for the respondent in support of their preliminary objections have relied on a decision of the Supreme Court in Oil and

Natural Gas Commission Vs. Utpal Kumar Basu and Others, .

38. The court had laid down the ratio as to what should be the determinative factors in consideration of the question determining the territorial

jurisdiction of the High Court under article 226. The court opined (page 717 of 4 SCC) :

It is well-settled that the expression ''cause of action'' means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a

judgment in his favour by the court ...

39. It further observed (page 717 of 4 SCC) :

... in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into

consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts ..... To put it differently, the question of

territorial jurisdiction must be decided on the facts pleaded in the petition.

40. This ratio is not a departure from the principle discussed above. On the facts of the case at hand, the Supreme Court found that merely

because the petitioner has read the advertisement, at Calcutta, and submitted offers from Calcutta and made representations from Calcutta would

not constitute facts forming an integral part of the cause of action. So also the mere fact that it sent a fax message from Calcutta, and received a

reply thereto at Calcutta would not constitute an integral part of the cause of action. The controversy-related to invitation for tenders for setting up

a kerosene recovery processing unit at Hazira complex in Gujarat by the ONGC. No invitation to the petitioner in person was issued which could

be termed as service of notice addressed to the petitioner at his place of business. Obviously, only an advertisement inviting tenders from the public

at large by the ONGC emanated from the office of the ONGC. The question of service of personal notice for initiating enquiry or notice necessary

for conduct of an enquiry against the person affected and a general public notice cannot be treated at par. A public notice in the nature of general

information cannot be equated with the service of notice to a specific person necessary for the conduct of an enquiry to follow, which furnishes

foundation for making of the final order nor it could be equated with the service of the final order which affects the person"s rights effectively at the

place of service, as is the case in the present case, as discussed above. Therefore, for the reasons discussed above, the case is clearly

distinguishable on the facts.

41. I, therefore, find no substance in the preliminary objection about lack of territorial jurisdiction and the same is hereby overruled.

42. Another contention is that the petitioner has no privity of contract with respondent No. 1, Securities and Exchange Board of India. He has

dealt in the stock exchange only through respondent No. 3, a member of the stock exchange. All dealings having been done through respondent

No. 3, and respondent No. 3 having accepted the position that all disputes relating to dealings at Bombay Stock Exchange are subject to Bombay

courts, the petitioner can avail of the remedy only at Bombay and not anywhere else. The argument looks felicitious but is fallacious. The petition is

not to enforce the agreements. What is the subject-matter of the petition ? According to the petitioner, the transaction of 50,000 shares of Magan

Industries offered by him for sale at auction has culminated in certain rights accruing to him in the form of a right to actionable claim against one or

more persons who can be said to be privy to the contract. His such right, existence of which is not in dispute, to enforce his claim against those

who are party to the contract has been affected by the act of the Securities and Exchange Board of India, by order which it purports to have

passed in exercise of its statutory powers under the Securities and Exchange Board of India Act. The petitioner seeks to challenge that order

which has affected his rights against persons who are privy to contracts. I am unable to appreciate to determine the locale of jurisdiction of court,

how the question of privity of contract, and agreement to submit to jurisdiction of one territorial court to enforce the contractual claim between the

stock exchange and its members become relevant. The challenge to the impugned orders does not arise between any persons who are privy to that

contract. But the challenge is to an act of a statutory authority whose action has allegedly affected rights of the petitioner qua those persons against

whom he can enforce such rights, but for the intervention by the said statutory functionary. The order is not the outcome of any act of a party who

is privy to contract. The fact that respondent No. 3 also could have challenged the impugned order and he could have done so only at Bombay,

also is of little assistance. The fact that the other affected person also has a right to challenge the order but at a different place cannot take away the

right of the petitioner, which is his independent right, for challenging the very order at a place, where also the court has otherwise jurisdiction. The

case has to be examined whether the courts at Ahmedabad, had jurisdiction to try the lis, from the point of view of action having affected the rights

of the petitioner and bundle of facts furnishing cause of action to the petitioner and none else. Also, it is of little consequence that respondent No. 3

has not joined the petition as petitioner. Learned counsel for the respondent has been unable to support in any manner that joining of respondent

No. 3 in any way affects the question of locus of the petitioner, jurisdiction of the court or the maintainability of the petition for not being arraigned

as petitioner. It is the freedom of any person to choose whether to join or not to join a person as claimant, plaintiff or suitor. If he is a necessary

party, it is only required that he is to be joined as party, whether as suitor or respondent, depends upon his freedom.

43. The next preliminary objection which has been raised by learned counsel for the respondents is that the impugned order dated July 4, 1996, be

treated only as an interim order until decision is taken on the representations made before it by respondent No. 1, the petition is premature and

must not be entertained. Having carefully read the impugned order, I am unable to sustain the objection. Firstly, the order read as a whole leaves

no room for doubt that the authority has reached its conclusion finally about the course of action to be adopted by it of impounding that part of the

auction proceeds received by the stock exchange on completion of the transaction in question could be used as per its Securities and Exchange

Board of India''s directions which represents the difference between the price which it considers to be the fair market price to be paid to the

petitioner for the shares offered by him at auction for sale, to complete the pending transaction and the actual price received by the stock exchange

by concluding the pending transactions by delivering those shares to the purchasers on recovering the purchase price from the purchasers at the

transaction rate and difference from the short sellers, which according to respondent No. 1 represents profits earned by the petitioners but tainted

with illegality. This conclusion is not revisable or reviewable by the authority, nor the decision as a whole is to be finalised after hearing the other

side. What has clearly been stated in the order is that according to the authority, no hearing is really required to be given but since it is required of

justice and fairplay, that though hearing should be afforded to affected parties as a fundamental principle of nature justice, no formal hearing be

given at this stage before making the order of impounding the auction proceeds to the extent it is not to be paid to the petitioners or others like him

but a post-decisional hearing may be given to those who may opt to make representations in that regard within fifteen days and their cases alone

may be examined by the committee set up for the purpose of examining those representations. This is clear from the following directions :

In view of the above discussion, formal prior hearing has been dispensed with at this stage. It may, however, be mentioned that many of these

affected persons had the opportunity of placing their cases to the investigating team which had taken those into account while arriving at its

conclusion it may also be mentioned that some of them had not even availed of this opportunity. In view of this, perhaps no further hearing was

needed specially when the decision is of a regulatory and remedial nature. Still to give them further opportunity, I decide that any person who is

affected by impounding of auction proceeds to the extent of difference between the auction price and standard rate and the close out proceeds

representing the difference between the close out price and the standard rate may be given an opportunity to be heard. Regarding hearing by the

Securities and Exchange Board of India, the intimation will be given by the stock exchange, Mumbai, in the manner usually followed by the

exchange. The aggrieved persons may submit a written representation within 15 days. The Securities and Exchange Board of India on receipt of

such intimation by the exchange.

44. From the aforesaid, it is abundantly clear that there is no way in which the impugned order can be treated as an interim order. It expresses itself

in no uncertain terms. The authority has reached a final conclusion about its decision to impound the part of consideration received by stock

exchange by dispensing with the requirement of a hearing of the affected parties and has after making final order left it open for those who are

aggrieved to seek post-decisional hearing. Thus, post-decisional hearing has been offered to those who are desirous of availing of the opportunity

of post-decisional heating for review of their cases but is not an interim order as such subject to final decision after hearing all concerned. It may be

noticed that so far as the Securities and Exchange Board of India is concerned, it has not even thought it fit to inform about this order to the

affected parties when it admits the fact that members as well as other persons are affected, nor even discloses who are the affected parties but left

it to the stock exchange to find out and inform such parties about the order.

45. Secondly, the contention which has been raised and requires consideration in the present petition and the other petition which has been heard

along with it is whether the Securities and Exchange Board of India had the authority of law to make such an order which results in depriving a

person of his property. If it is not authorised by law, the authority cannot have such power to bring this result by way of an interim order as well.

Without going into the merits of the contention at this stage, suffice it to say that the contention which goes to the root of the matter about authority

to make any order of impounding at all whether by way of interim order or final order and concerns the very existence of jurisdiction with the

Securities and Exchange Board of India to deal with the proceeds which have reached the stock exchange as a result of concluded transactions

and has become an actionable claim of respective parties, cannot be shut out solely on the ground of the order being interim in character, it is not

the case of the respondents either that the decision about the authority of the Securities and Exchange Board of India to pass such order is the

subject-matter of post-decisional hearing and revisable on reaching another conclusion after hearing.

46. Alternatively, it has been urged by the respondents that if the order dated July 4, 1996, is to be treated as a final order it can be made the

subject matter of further appeal and, therefore, this court ought not to entertain this petition at this stage by permitting the petitioner to bypass the

alternative remedy.

47. Having carefully considered this objection, in the facts and circumstances of the present case, it also does not commend itself.

48. Law is trite that ordinarily the courts do not invoke extraordinary jurisdiction when a petitioner has an equally efficacious alternative remedy

available to him to ventilate his grievance and seek remedy, but does not bar the jurisdiction of the court to entertain such petitions in appropriate

cases. It is a matter which vests ultimately with the discretion of the court which is to be exercised, keeping in view the facts and circumstances of

each case. The two well known exceptions which have been well recognised by the courts in not insisting upon availing of alternative remedies

before invoking the extraordinary jurisdiction under article 226 are firstly where the challenge is founded on complete lack of jurisdiction in the

office or authority to take the action impugned and, secondly, where the order prejudicial to the petitioner has been passed in violation of the

principles of natural justice and could, therefore, be treated as void or non-est. It may be made clear that these two are not the only exceptions to

the exercise of discretion by the court in favour of entertaining a petition under article 226, notwithstanding availability of alternative remedy but

only for the purpose of emphasising that in the aforesaid two circumstances, ordinarily courts, do not insist on availing of alternative remedy before

entertaining the petition under article 226.

49. In this connection, enunciation of the principle by the apex court in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand

Sobhraj Wadhwani and Another, , may be usefully referred to. The court said (headnote) :

The rule that the party who applies for the issue of a highly prerogative writ should, before he approaches the court, have exhausted other

remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a

rule which courts have laid down for the exercise of their discretion.

The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under article 226 of the Constitution

unless, (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the

writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other

cases, courts should not entertain petitions under article 226, or in any event not grant any relief to such petitioners cannot be accepted. The two

exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond

them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative

remedy. The broad lines of the general principles on which the court should act having been clearly laid down, their application to the facts of each

particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court,

and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible

rules which should be applied with rigidity in every case which comes up before the court.

50. The principle has not been departed from since and the authorities need not be multiplied.

51. In the present case, as has been noticed, the challenge to the impugned order is founded on lack of inherent jurisdiction in the form of lack of

authority of law for making such order, and orders having been made in breach of the principles of natural justice have been made the ground of

attack. If either of the contentions is sustained it would render the orders impugned void or non est and the case comes under the two propositions

generally accepted as normal exceptions to the general rule against entertaining the petitions under article 226 in the face of availability of alternative

remedies.

52. Apart from the fact that the present case falls with the ordinary exception to the rule against entertaining petitions before exhausting alternative

remedies, all the parties have addressed in detail on the merits of the issues raised.

53. In the like circumstances in L. Hirday Narain Vs. Income Tax Officer, Bareilly, , it was expressed by the Supreme Court that where the

petitioner files a writ petition instead of availing of statutory remedy and the High Court entertains petitions and gives hearing on the merits, the

petition should not ordinarily thereafter be rejected on the ground of availability of alternative remedy.

54. Moreover, this petition has been heard along with Special Civil Application No. 5483 of 1996 with the consent of counsel for the parties

appearing in both the petitions and have argued at length on the common question of law having substantial importance. In the other petition, the

impugned order passed by the Securities and Exchange Board of India has been challenged before the appellate authority, and the appellate

authority has sustained the authority of respondent No. 1, the Securities and Exchange Board of India, to impound the proceeds of a transaction

recovered by the stock exchange whether as a result of having recourse to auction or on closing up of transactions as a whole or in part on the

ground of not permitting the holders of security, excess profits which are tainted with illegality or are the result of abnormal market conditions in the

view of the Securities and Exchange Board of India. Thus apart from the fact that ordinarily after the matter has been argued fully on the merits, it is

not desirable to throw out the petition solely on the ground of availability of alternative remedy, insisting upon the present petitioner to avail of

alternative remedy, before the appellate authority whose views are already known will be a futile exercise.

55. In my opinion, therefore, in the circumstances of the present case, it is not a case, in which discretion ought to be exercised in favour of the

objectors. Therefore, this preliminary objection is also overruled.

56. It was faintly urged in both the cases that the impugned orders of retaining the amount of difference between the purchase price and the market

price recovered from the short sellers on closing up of the transactions to be invested in the Investors Protection Fund which may be used at the

direction of the Securities and Exchange Board of India in future affects the members of the stock exchange inasmuch as the stock exchange

becomes directly responsible for making such payments recovered by it on closing up of the transactions or settle the transactions by auction only

to the respective members. The petitioners being not members of stock exchange have no locus standi to challenge the impugned orders, they

being not affected by them. However, it was not disputed that the order does affect the rights of the respective petitioners to cover the amount

which otherwise would have become due to them on settlement of the transactions in the matter stated above from their respective brokers. It is

also not disputed that but for the orders of the securities and Exchange Board of India, the respective amounts were actionable claims which the

petitioners were entitled to recover from the respective agents and amounted to their property. In view of this premise, it cannot be argued that the

impugned orders do not affect the petitioners'' right. If that be so, the locus standi of the petitioners to challenge the impugned orders cannot be

affected merely on the ground that they are not members of the stock exchange. It is not the case of either of the counsel for the respondent Board

that the rights of the petitioners to lay claim to which they are otherwise entitled under the terms of contract respectively, is affected by the

impugned orders. This preliminary objection, therefore, also is overruled.

57. The facts and preliminary objections relating to Special Civil Application No. 5483 of 1996.

58. The petitioner is a registered partnership firm having its place of business at Revdi Bazar, Ahmedabad. In November 1994, a company called

Rupangi Impex Limited (RIL) came out with a public issue of 15,37,500 equity shares of Rs. 10 each at a premium of Rs. 5 per share. The issue

was oversubscribed by sixty times as on the closing date of subscription, i.e., November 10, 1994. On December 3, 1994, RIL started allotment

of shares. The prevailing market price of the shares of RIL on December 12, 1994 at the Ahmedabad Stock Exchange was Rs. 90; on December

19, 1994, at the Bombay Stock Exchange it was Rs. 101.25; and on October 11, 1995 at the National Stock Exchange it was Rs. 345. Between

October 18, 1994, and October 24, 1995, the petitioner with the help of Lloyds Finance Limited and with the help of others purchased in all

94,800 Equity shares of the RIL and during the same period it sold 32,900 shares of RIL through Lloyds Brokerage Ltd. As a net result of these

transactions the petitioner was to receive delivery in all of 61,900 shares of RIL through Lloyds Brokerage Limited at on overall price of Rs.

471.06. Because of the failure of the sellers in honouring their commitment about the delivery of shares, the petitioner received only 5,200 shares

resulting in transactions for purchase of the remaining 56,700 shares outstanding, for which the petitioner was to pay consideration of Rs.

2,67,09,102. On October 25, 1995, that is to say after the date when the petitioner had already entered into transactions of purchases and sales

the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations,

1995 (hereinafter called ""the Regulations of 1995""), (See [1996] 85 Comp Cas (St.) 33) were promulgated. On October 30, 1995, the Chairman

of the Board directed that an investigation about buying and selling of RIL shares is to take place. It also directed that no notices to persons to be

investigated is to be given. On the same day, trading in the shares of RIL was suspended until further orders. The area of investigation under the

order dated October 30, 1995, was stated to be :

(a) whether there are any circumstance which would render any person guilty of having contravened any of the regulations of the Securities and

Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 1995;

(b) whether any provisions of the Securities and Exchange Board of India (Insider Trading) Regulations, 1992, have been violated by any person

who is an insider or any person who is deemed to be an insider or connected person; and

(c) whether any person who is a stock broker is guilty of having contravened the provisions of the Securities and Exchange Board of India Act,

1992, (""the SEBI Act"") or the Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations framed thereunder.

59. The order also permitted the completion of outstanding transactions as per stock exchange bye-laws.

60. The order of the Executive Director of the Securities and Exchange Board of India issuing directions to the stock exchange about the

outstanding transaction, to the extent relevant for the present purposes is as below :

Such shortage should be auctioned as per usual procedure in your stock exchange. However, it has been decided that the auction price shall not

be allowed to exceed the last recorded highest price on the exchange. If the auctions do not succeed with such a ceiling, the outstanding

transactions (undelivered) should be closed out at the last highest price. While the difference between the transaction price and the highest price

would be collected from the selling brokers, the same should be held by the stock exchanges in the separate account and should not be passed on

to the buyers till the Securities and Exchange Board of India investigation is completed and suitable instructions are given to the exchanges in this

regard.

61. In pursuance of this directive on November 3, 1995, auction was conducted by the National Stock Exchange (NSE). However, it appears

that as only a meager number of about 800 shares were offered at auction, the NSE decided to close the outstanding transactions at the price of

Rs. 565 per share recorded as on October 24, 1995 and recovered the difference between the transaction price and the closing up price from the

short sellers. By order dated January 25, 1996, issued by the Executive Director of the Board monies collected in adherence of the circular dated

October 30, 1995, were to be transferred to the investor protection fund of the concerned stock exchange. It also recorded that that the

investigation has been completed, necessary action is being taken against the persons involved in the price manipulation under sections 11B and 24

of the Securities and Exchange Board of India Act, 1992, for violation of the Regulations of 1995, and the trading in RIL was allowed to continue

from January 29, 1996. The petitioner was not named as a person responsible for the alleged manipulated market condition. This order was made

without affording an opportunity of hearing to the petitioner and resulted in forfeiting his claim to get the difference price collected by the stock

exchange as a result of closing up of a transaction at Rs. 565.

62. The petitioner appealed before the Central Government who by its order dated May 22, 1996 (annexure A), were rejected. The appellate

authority did not decide the question raised by the petitioner that since the Regulations 1995 were promulgated and came into force after the close

of the trading period, during which the transactions aforesaid were conducted they, therefore, had no application to these transactions on the

ground that since the impugned order of transferring the difference price in the investors protection fund is not punitive in character, it is not

necessary to be decided. For the same reason it also held that the fact that the petitioners were not granted an opportunity of hearing cannot negate

the impugned order because the appellants had not suffered any substantial injury because in the opinion of the appellate authority.

63. While in the normal course the purpose of investment is to make financial gains, when the conditions prevalent are abnormal the denial of

windfall profits can hardly be described as a denial of a right, because such gains can only be made at the expense of another. It is the Securities

and Exchange Board of India''s obligation to ensure that its dispensations are equitable between the various parties on the market and that the

market conditions are such that investor confidence is retained.

64. Regarding the transfer of difference of transaction price and the price at which the closing up was ordered, it accepted the Securities and

Exchange Board of India''s plea that :

. . . the transfer to the investigation protection fund was not punitive vis-a-vis the purchaser of shares, but was merely a device for the placement

of the funds representing the difference between the squaring up price and the purchase price in appropriate custody, for the benefit of investors as

a class.

65. It also opined that in the view of the Securities and Exchange Board of India the placement of the funds generated from the squaring up

process in the case of Rupangi Impex was equitable and served the broader good of investors as a class. It also held that the stock exchange was

justified in denying the benefit of such abnormal profits based on manipulation to the buyers and this act did not result in any infringement of rights.

No hearing was possible in a case of this type, specially as the buyers in any case did not lose in the process. It also ignored the procedural

irregularities of not affording an opportunity of hearing as a minor procedure infirmity and affecting the substratum of the order, and finally relying

on the order to be equitable and appropriate dismissed the appeal on May 22, 1996.

66. These two orders, namely, order dated January 25, 1996, made by the Executive Director of the Securities and Exchange Board of India and

the appellate order dated May 22, 1996, affirming that orders have been challenged by the petitioner on various grounds to be noticed hereafter.

67. To complete the narration of facts it may be noticed that the petitioner has been contending that while the Securities and Exchange Board of

India directed as per its order dated October 30, 1995, to conduct the auction or close out the transaction at the last highest price, the stock

exchange has violated these directives by closing out the transactions at Rs. 565, the price prevailing on October 24, 1995, instead of at Rs. 669,

the highest price prevailing before the date of closing out. Suffice it to say that so far as this contention of the petitioner was concerned, another

investor has on an earlier occasion come before this court challenging the fixation of the price at which squaring up has taken place by way of

Special Civil Application No. 9450 of 1995 which was rejected by order of this court dated January 22, 1996. Moreover, that act of violating the

Securities and Exchange Board of India"s direction is attributed to the National Stock Exchange which is not a party before us in this special civil

application.

68. In its reply, the facts about the issuance of direction of the Securities and Exchange Board of India on October 30, 1995, the transactions 9

having been ultimately settled by way of closing out at the price referred to above, and collection of the difference in transaction price and the

closing up price from the short sellers by the stock exchange, the passing of the order of transferring the same amount to the investors protection

fund and the absence of affording an opportunity of hearing to the petitioners have not been disputed. It has also been specifically pleaded that

there is no element of punishment involved in the directions of the Board, the directions only deprive the petitioners of the windfall profits arising out

of manipulated market and is not a measure of penalty at all. It was also pleaded that there is no breach of article 300A of the Constitution of

India, as the directions do not involve acquisition of the property and there is no breach of article 20 also. It was stated that the provisions of the

Act are comprehensive enough to enable the Board to issue directions which deny the advantage of artificial and rigged prices to anyone. This was

in reply to the contention raised in the petition and the relief claimed by the petitioner :

. . . to issue a writ of mandamus or a writ in the nature of mandamus or a writ of certiorari or a writ in the nature of certiorari, or any other

appropriate writ, order or direction/quashing and setting aside the impugned order dated May 22, 1996 (annexure A hereto), passed by the

respondent No. 2 herein, as well as the impugned order dated January 25, 1996 (annexure A hereto), passed by the Executive Director of

Securities and Exchange Board of India, as being illegal, arbitrary, without authority of law and violative of provisions of articles 14, 19(1)(g) and

300A of the Constitution of India.

69. Before proceeding to consider the petition on the merits, the preliminary objections raised by the respondents may be considered. In the first

place, the respondents have urged that no part of the cause of action having arisen within the State of Gujarat this court does not have territorial

jurisdiction to entertain the petition. During the course of hearing the petitioners were granted an opportunity to place facts if not already on record

to support their plea that the dispute can be entertained by this court by showing that the cause of action or part of the cause to action has arisen

within its territorial jurisdiction. It has come on record firstly that the impugned order dated May 22, 1996, which affected the rights of the

petitioners was served upon the petitioner at Ahmedabad. Thus, the petitioners" rights governed by the impugned order were directly affected at

Ahmedabad as its effect fell on the petitioners at Ahmedabad and, secondly, in view of the increased volume of activities of members of the

National Stock Exchange of India Limited, in view of its nation-wide operations it has with the permission of the Securities and Exchange Board of

India linked to offices of its members at various title, including Ahmedabad whereby the members have been provided full fledged trading facilities

through the National Stock Exchange terminals installed in the offices of the respective members situated in various cities including the cities of

Ahmedabad, Calcutta, Delhi, Madras, etc. It was under the said set up that the petitioner placed its orders for purchase of shares of RIL with

Lloyds Brokerage Limited, Ahmedabad, a member of the NSE at Ahmedabad only and it was in furtherance of the said orders of the petitioner

that the said member of the National Stock Exchange through its National Stock Exchange terminal at Ahmedabad entered into a contract for

purchase of 94,800 equity shares on behalf of the petitioner against the payment made by the petitioner at Ahmedabad for the said equity shares.

The respondents have not thought it fit to deny these averments in the rejoinder affidavit of B. A. Gandhi which was furnished with the permission

of the court, by any counter. In view of the aforesaid undisputed facts, and for the reasons already discussed, while considering the like objections

hereinabove in a cognate matter Special Civil Application No. 2224 of 1996 which is being heard and decided along with this petition, this

objection is overruled.

70. The second preliminary objection relates to non-joining of National Stock Exchange as a party particularly in view of prayer (B) for issuing

directions to the stock exchange for paying the differential amount to the petitioners with interest which has been directed to be transferred to the

investors protection fund.

71. It was urged by learned counsel for the petitioner that prayer (B) has only been asked as a consequential of prayer (A) because even without

making that prayer if the petitioner succeeds in his first prayer as a consequence the petitioner would be entitled to recover the amount from the

stock exchange under law, and he is free to avail of his remedies under any law against the stock exchange for the recovery of the sum if in spite of

the setting aside of the order it does not discharge its obligation. In view thereof he urged that prayer (B) may be not considered and he be left free

to pursue his remedy against the National Stock Exchange or any other person to recover the sum under ordinary law, if he succeeds in this

petition and in that view of the matter the National Stock Exchange is not a necessary party for impugning the orders passed by the Securities and

Exchange Board of India and the appellate authority confirming that order. Having carefully considered, I am of the opinion that so far as the

challenge to orders passed by the Securities and Exchange Board of India on January 25, 1996, as affirmed by the appellate authority on May 22,

1996 is concerned, the stock exchange is not a necessary party. At best, it can be said to be a proper party but it cannot be said that in the

absence of it, the validity of the two orders cannot be challenged. No action of the stock exchange is challenged in the petition nor is required to be

challenged for the purposes of the relief against the impugned orders claimed by the petitioner. The petitioners challenge rests primarily on the

contentions that there is no legal authority for making the impugned order and that the impugned orders have been made without affording an

opportunity of hearing. Both the contentions do not impinge upon any actions of the stock exchange which are required to be gone into. The stock

exchange merely acted under the directions of the Securities and Exchange Board of India and if the directions failed, the consequence would

follow automatically. Therefore, this objection is also not sustained. It is further made clear that in case the petitioner succeeds he is free to pursue

his remedies in accordance with law to enforce his claims in the appropriate forum if the occasion for the same arises.

72. It was also urged that at best the impugned order can be treated to be cancellation of the transaction of purchase entered into by the petitioner

and by cancellation of the transaction he has suffered no loss, nor has he been deprived of any of his property because he has never acquired

shares or right in the shares delivery of which was not available. At best if the order of transferring the price recovered by the stock exchange is

held to be illegal, the persons entitled to refund would be the short sellers.

73. The arguments on their face though felicitous do not stand the test of scrutiny. Firstly, this cannot be termed as preliminary objection but

concerns the merits of the order. Secondly, orders having come into existence as a result of holding an enquiry and/or subject to further appeal it

does indicate the quasi-judicial nature of the orders. It is now well established that where an authority whether in exercise of its administrative

functions or quasi-judicial functions makes an order the order speaks for itself and reasons cannot be supplied, by reading something in it which is

not there. If the order is read in plain terms, it nowhere reflects that the order is for cancelling the transactions of purchases which remained

outstanding. The cancellation of the order would automatically mean that nothing in consequence of those transactions would take place. In that

event the question of recovery of sums from the short sellers for having acted in contravention of any regulations (would not arise). There is no such

averment nor any indication from any material to suggest that recovery of difference in price from the short sellers has been made as a punitive

measure against the short sellers with any intention to cancel the transactions. On the other hand, from the directives of the Securities and Exchange

Board of India dated October 30, 1995, reproduced hereinabove it is abundantly clear that from the very start it was the intention of the Board

that standing transactions should be carried out and be closed as per the practice of the stock exchange either by securing the delivery of the

shares at the auction at the last prevalent highest price, and on failure to secure delivery of shares by resorting to close up by collecting the

difference between the transaction price and the last prevailing highest price from short sellers. It has been stated in the reply affidavit that the

alleged loss which the petitioner claims is denial of profit arising out of market manipulation, which no trader is entitled to. This clearly indicates that

but for the impugned measure it was the profit of the transaction to which the petitioner was entitled and the impugned order has directly resulted in

denial of that profit. The petitioner nowhere lays claim to shares or interest in shares. His case is squarely that the amount of difference in price

recovered by the National Stock Exchange becomes his money after adjusting charges of stock exchange on closing up of transaction.

74. It would be apposite to refer to the relevant provisions relating to closing out contracts contained in the regulations framed by the National

Stock Exchange and known as the National Stock Exchange Trading Regulations, 1994. According to the latest Regulations placed for the perusal

of the court by learned counsel for the respondents regulation 9 in Part B deals with the closing out. Clause 9.1.1 states that a contract for

securities made subject to rules, bye-laws and regulations of the exchange may be closed out by buying in or selling out against a clearing member

on his failure to comply with any of the provisions relating to delivery, payment and settlement of deals or on any failure to fulfil the terms and

conditions subject to which the deal has been made. Closing out for deals settled through clearing house is dealt with in clause 9.3 which entitles

the stock exchange to close out the transactions against any party in default on behalf of the receiving or delivering member, as the case may be.

Clause 9.8 says that the closing out by buying-in or selling-out shall be effected by exchange, initiated auction or by any other method which the

Executive Committee or delegated authority may decide from time to time. Clause 9.9 makes it clear that save as otherwise provided the member

at whose instance or on whose behalf the buying-in or selling-out is effected by the exchange for the purpose of closing-out shall be responsible for

the deal made and no liability or responsibility shall attach to the exchange or its employees for any deal made in pursuance of such closing-out.

This clause makes it abundantly clear that closing out transactions affect the rights and liabilities of transacting parties alone and does not in any

manner hold the stock exchange responsible for the transaction. Clause 9.10 which is relevant in the present case deals with a situation when

securities are not bought-in, that is to say, where securities are not available to be delivered to the purchasers where auction is resorted to. It reads

:

9.10 Securities when not bought-in. - When in spite of the best efforts the securities cannot be bought-in and when the Executive Committee or

delegated authority is satisfied that such security cannot be obtained except at an arbitrary price the contract in such security shall be deemed to be

closed-out at a price which is not less than the highest price touched at any time in the preceding six months or such price as the Executive

Committee or delegated authority may decide from time to time. This price shall be paid to the member entitled to the security to be bought-in.

75. These provisions indicate that, the price at which an outstanding transaction is concluded otherwise than as a result of actual delivery by the

party to the contract is the highest price touched at any time in the preceding six months or such price as the Executive Committee or delegated

authority may decide from time to time and it is the person who is entitled to purchase the security who becomes entitled to the money recovered

by the stock exchange in pursuance of closing out. The charges for such closing are to be borne by the member against whom closing out has

taken place in terms of clause 9.16. Therefore, once closing out of a transaction takes place and culminates in the conclusion of the transactions

thereof the consequence is that if the closing out results in availability of scrips for actual delivery by delivery of scrips to the purchaser at the

transaction price and payment of the price at which the scrips are delivered by the person at auction is entitled to the highest price prevalent within

the last six months or the price as fixed by the stock exchange, the transaction price being recoverable from the purchaser and the balance from the

short seller. In case the transaction is settled not by delivery of actual scrips, then, the entire price as per the highest price within the last six months

or as fixed by the exchange which consists of the recoveries made from the purchasers at the transaction price and short sellers of the difference

becomes payable to the person who is entitled to purchase the security under transaction, if available. That is to say he not only gets refund of his

part of consideration paid but also the difference recovered from the short sellers.

76. Auction procedure or closing out is a method by which outstanding transactions are concluded, and not a process of cancellation of transaction

and the purchaser who is entitled to buy the securities becomes entitled to such amount as a result of conclusion of his contract of purchase by

closing out. It also clearly indicates that the price at which closing out is to take place is the highest prevalent price during the last six months, that is

to say on failure of the short sellers to deliver the scrips, the ingredient of earning profit at the difference of the highest price prevailing during the

last six months and the transaction price is the legitimate expectancy of profit, in case of closing out. No ground for assuming a wind-fall of

illegitimate profit can be attributed to a person who enters the market, unless he himself is found to be guilty of fraud or unfair market practice to

that end. Every investor enters the market for earning good profit on his investment. How much he is able to make or lose may depend on his own

judgment and the market at the time of transactions. Therefore, because of hugeness of profit, it cannot be termed as windfall profit. Moreover, the

regulation of profits that can be earned at the share market is not the authority assigned to the Securities and Exchange Board of India under any of

the provisions of the Act.

77. This has exactly happened in the present case. In the first instance when the Securities and Exchange Board of India intended to hold

investigation into the transactions in the shares of RIL it had directed that the standing transactions should be closed as per the prevalent practice of

either inviting auction or by closing out and it also directed the stock exchange to recover the amount as per its bye-laws. Therefore, from the

beginning there was no intention on the part of the Securities and Exchange Board of India to cancel the outstanding transactions but it had toyed

with the idea of dealing with the funds generated as a result of culmination of transaction as it thought fit. The transaction had in fact been concluded

on non-delivery of scrips by shortsellers as per stock exchange bye-laws, in consonance with which the Securities and Exchange Board of India

also issued directions, by recovering the price from the short sellers. Therefore, as per the regulations of the stock exchange on such recovery it

became an amount payable to the purchaser. In fact as per the averments made by the petitioner in this petition his part of the consideration which

has been made good to the stock exchange for concluding the transactions by auction were paid to him but the balance money, the difference

recovered from the short sellers, as a result of closing out had not been made to him. If as per the regulations the money becomes payable to the

purchaser on being out, any order which affects such right of the purchaser cannot be said to be an order which does not result in affecting the

rights of the petitioner adversely so as to keep him away from the category of person aggrieved or a person who has suffered loss. The plea of

want of locus standi in the petition for the reason of non-existence of any loss or any order adverse to him cannot be sustained.

78. As has been discussed in detail while considering the objections in Special Civil Application No. 2224 of 1996, I reach the conclusion that the

right to receive the full consideration by the offerer of shares at auction or the right of the purchaser to receive the differential amount received by

the stock exchange as a result of closing out of the transaction or nonavailability of scrips for delivery is an actionable claim of the offerer of scrips

at the auction or the purchaser whose transaction has not been honoured and forms his property, which as a result of directives of the Board to

retain that amount to be utilised at the directions of the Board instead of being paid to the persons who are entitled to it. As the rights of the

petitioners to enforce such actionable claim are adversely affected by the intervention of the Securities and Exchange Board of India, their locus

standi to maintain this petition cannot be doubted.

79. Before proceeding further in the discussions, it may be noticed the common premise about which there is no dispute between the parties.

Firstly, on the culmination of the transactions in the manner they have been culminated, the amount affected by the impugned orders would be the

property of the respective petitioners as their actionable claim which they were entitled to recover, but for the orders under challenge. Secondly,

the impugned orders result in depriving the petitioners of that property. Thirdly, it is the constitutional requirement under article 300A that no

person can be deprived of his property save by authority of law.

80. Requirement as to authority of law :

On the aforesaid premise, apart from the various grounds challenging the orders including grounds of violation of the principles of natural justice,

abuse of authority, non-application of mind, absence of any material and other grounds, the contention at the forefront has been that there does not

exist authority of law under which the Securities and Exchange Board of India could issue directions to deprive a person of the property. The

Board on the other hand contends that it has necessary authority of law to issue direction depriving a person of such profits which in its opinion,

formed as a result of enquiry, are results of transactions from a manipulated market, whether the persons themselves are responsible for such

manipulations or not, as a measure of protecting the interest of the investors and orderly development of securing the market or to prevent the

affairs of any intermediary or other persons, referred to in section 12 of the Act of 1992 being conducted in a manner detrimental to the interest of

the investors or to the orderly development of the securities market. For this purpose, it places reliance on sections 11, 11B of the Act and

regulation 12 of the National Stock Exchange Capital Market Trading Regulations, 1995 (hereinafter referred to as ""Regulations of 1995""), for

asserting the requisite authority of law at its command.

81. Article 300A of Constitution of India reads as under

No person shall be deprived of his property save by authority of law.

82. This article was inserted by the Constitution (44th Amendment) Act, 1978, with effect from June 20, 1979. A brief look at the background of

insertion of this article will be apposite. The right to property at the inception of the Constitution held its place in Part III of the Constitution as part

of the fundamental rights. Article 19(1)(f) guaranteed every citizen the right to acquire, hold and dispose of the property and article 31 (relevant

clauses (1) and (2)) provided that no person shall be deprived of his property save by authority of law and that no property shall be company

pulsorily acquired or requisitioned save for public purpose and save by authority of law which provides for compensation for the property acquired

or requisitioned. With the 44th Amendment of the Constitution, the right to property lost its place as a fundamental right guaranteed under Part III

of the Constitution. It did not lose its recognition none the less as a right which was protected. While article 19(1)(f) and article 31 both were

omitted by the 44th Amendment, article 31 clause (1) was re-enacted by inserting it as article 300A reproduced hereinabove. This omission from

Part III and insertion as article 300A affected the remedies available to a citizen against its violation and took the right away from the inhibition of

article 13. At the same time, it did not alter the precondition required before a person is deprived of his property that there must exist authority of

law. The scope and ambit of this requirement, did not alter with the aforesaid amendment.

83. The first question that calls for our attention is what is meant by deprivation of property. Deprivation of property may take place in various

ways. It may take place by way of destruction of property, by way of confiscation; by way of revocation of property rights granted by a private

proprietor; it may be by way of seizure of goods or immovable property from the possession of an individual or it may result on account of taking

over control of the business by State. Compulsory acquisition being one of the forms of deprivation was specifically dealt with by clause (2) of

article 31. While property had its character as fundamental right, acquisition of property by the State was not possible without compensation,

omission of that clause altogether had made it possible that acquisition by the State, may be without payment of compensation also, without facing

the plea of breach of fundamental right or constitutional guarantee of the right to property, if the law otherwise has validly been enacted and

satisfies other tests about it being intra vires envisaged under the Constitution. However, I need not dwell in detail on this aspect of the matter

inasmuch as the parties are not seriously at issue on the question that the impugned order will result in depriving the petitioners of their property,

viz., their right to recover the amount from the respective parties. which was otherwise recoverable.

84. Existence of a ""law"" as a necessary pre-requisite of certain State actions has been envisaged in various other provisions of the Constitution.

Article 265 inhibits imposition of levy and collection of any tax unless authorised by law. Article 266(3) prohibits appropriation of any amount of

the consolidated fund except in accordance with law. Article 13 inhibits making of law, which infringes rights protected in Part III of the

Constitution except to the extent permitted under such provisions of Constitution.

85. The expression ""authority of law"" which has been used in article 31(1) or article 300A or the term used in article 265 which provides that no

tax shall be levied or collected except by authority of law and the phrase ""in accordance with law"" used in article 266(3) have been since then

subject to judicial interpretation.

86. It has now come to be well settled that "law" means, by or under a law made by the competent Legislature or law made by subordinate

legislation by way of bye-law, rule or regulation, if the statute under which subordinate legislation is made, specifically authorises the making of such

law for deprivation of property. The authority of law envisaged under article 300A is authority which must be specific in the form of some law

made by appropriate legislative process but not by way of executive instructions or by exercise of administrative discretion.

87. It was pointed out by the Supreme Court, as early as in 1954, in Wazir Chand Vs. The State of Himachal Pradesh, :

.... that State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises

their acts.

88. In Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, , Mukherjee, C.J., speaking for the court, while considering the

provisions of article 266(3) of the Constitution which provides that no money out of the Consolidated Fund of India or Consolidated Fund of the

State shall be appropriated except in accordance with law opined (page 556) :

Under article 266(3) of the Constitution, no moneys out of the Consolidated Fund of India or Consolidated Fund of a State shall be appropriated

except in accordance with law and for the purpose and in the manner provided in this Constitution. The expression "law", here obviously includes

the Appropriation Act.

89. In Bishan Das and Others Vs. The State of Punjab and Others, , the court reiterated its view in Wazir Chand Vs. The State of Himachal

Pradesh, that the State or its executive officers cannot interfere with the rights of citizens unless they can point to some specific rule of law which

authorises their acts.

90. In Firm Gulam Hussain Haji Yakub and Sons Vs. State of Rajasthan, , the question arose whether the Collector, Sirohi, had authority of law to

levy and collect customs duty on export of charcoal out of the State of Sirohi. The State took the plea that the order issued under the signature of

the Rajmata of Sirohi, President of the Board of Regency and Administering State of Sirohi, was the law conferring authority to levy and collect

customs duty. The court rejected the contention by holding (page 384) :

Since the Board of Regency was alone clothed with the necessary legislative authority and unless "the Board passes a resolution, it cannot take

effect as a law in the State of Sirohi, the approval of the Rajmata to the resolution passed by the State Council cannot cure the infirmity arising from

the fact that the State Council had no legislative power.

91. In the absence of any legislative enactment, the court did not uphold the levy notwithstanding the fact that Rajmata was the de facto ruler of the

State at the time and was competent to exercise the necessary power to pass the impugned order which weighed with the High Court, but did not

find favour with the Supreme Court.

92. In the case of R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, , a question arose before the Supreme Court in respect of the

Hyderabad General Sales Tax Act, section 11(2) which provided that though the amount may have been collected by the dealers by way of tax, it

was not eligible as tax under the Act shall be paid to the Government; and if not paid over, the same shall be recovered from such person as if it

were arrears of land revenue, whether it was a valid provision of law. The court held with reference to article 265 (headnote) :

If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and

the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law

make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly, for it is not a tax at all within the

meaning of entry 54 of List II nor can the State Legislature under the guise of incidental or ancillary power do indirectly what ii cannot do directly.

93. A controversy of the like nature again came up before the Supreme Court in different circumstances in R.S. Joshi, Sales Tax Officer, Gujarat

and Others Vs. Ajit Mills Limited and Another, . That was in relation to section 37 of the Bombay Sales Tax Act, which provides for forfeiture of

sums collected by dealers by way of sales tax though not exigible to the public exchequer punitively. The court, while generally agreeing with the

principles enunelated in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, , drew a distinction between the ratio laid down in R. Abdul

Quader and Co. Vs. Sales Tax Officer, Hyderabad, , on the ground that while it was construing a provision providing for recovery simpliciter, the

case in the Bombay Sales Tax Act, arose out of a provision for forfeiture of a sum collected by a dealer which was not tax payable under the Act

and was construed as a punitive measure for something done by the dealer contrary to the provisions of sales tax concerning the authority of the

dealer to collect the amount of tax payable to the State exchequer of sales transacted by him from the purchasers. The court opined that since the

authority of the dealer to collect the tax payable on a transaction was a part of substantial law authorising levy and collection of tax, if a tax has

been collected in breach of that law, and the law provides for penalty for such breach of law, such penalty provision is incidental to the main

provision of levy and collection. The legislative competence to enact on a particular subject includes authority to enact in respect of all ancillary and

incidental matters, providing for penalty measure being authority to provision of recovery was also within the competence of the State legislation.

However, it is to be noticed in both cases, that while in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, , recovery was authorised

by statute, in R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, , the sum recovered by the dealer contrary to

the provisions of the Act was subjected to the forfeiture. In both the cases, before action for recovery or levy of penalty could be taken, statutory

sanction was felt necessary. The two cases also bring out the distinction between the provision authorising mere recovery of the sum recovered by

a person from another person unauthorisedly which was treated only as a tax and providing for forfeiture of such unauthorised recoveries by way

of penalty in such case, it is to be treated as an authority incidental to execute the provisions of law. For want of legislative competency or

necessary constitutional authority for mere recovery of the sum even the statutory authority was held to be invalid. While in the latter case, it was

held to be ultra vires.

94. In State of Madhya Pradesh v. Thakur Bharat Singh, AIR 1967 SC 1170, the question arose slightly in a different shade. Article 73 of the

Constitution envisages that subject to the provisions of the Constitution the executive power of the Union extends to the matters to which

Parliament has power to make laws. Likewise article 162 provides for executive power of the State to extend to the matters with respect to which

the Legislature of the State has power to make laws, i.e., to say the executive power of the State is co-extensive with the legislative power of the

State Legislature.

95. In Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, , the Supreme Court has held that the language of article 162 clearly

indicates that powers of the State executive are co-extensive with the matters upon which the State Legislature is competent to legislate and is not

confined to the matter over which the legislation has been passed already. It was urged before the Supreme Court in State of M. P. v. Thakur

Bharat Singh AIR 1967 SC 1170, that even if there is no legislation in support of the impugned act, as the State has legislative power to enact in

respect of the subject matter in respect of which the State action has been challenged, hence it has necessary authority to support the action while

exercising its executive power which is co-extensive with legislative power. The court repelled the contention and explained the observation made

in Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, , by pointing out that though the action in Rai Sahib Ram Jawaya Kapur and

Others Vs. The State of Punjab, , was not supported by legislation but it did not operate to the prejudice of any citizen and the court had held that

by the action of the State Government no rights of the petitioners were infringed since a mere chance of having particular customers cannot be said

to be a property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen; the

State has merely entered upon a trading venture, it did not infringe their rights and concluded (page 1174) :

Viewed in the light of these facts, the observations relied on do not support the contention that the State or its officers may in exercise of the

executive authority infringe the right of the citizens merely because the Legislature of the State has power to legislate in regard to the subject on

which the executive order is issued.

96. This decision was further reaffirmed and clarified in a later decision in Harivansh Lal Mehra Vs. State of Maharashtra, . The question had

arisen regarding the levy of customs duty in a case where some one had sent goods from Goa to Bombay, in 1962, after Goa had been liberated

and became part of the Indian territory. It had ceased to be a foreign State and became a Union Territory. As it was a transport of goods within

the territory of India, a question was raised that there was no authority of law to levy the customs duty. The plea was taken that customs duty on

the articles in question was levied because of certain administrative instructions. Hegde J., speaking for the court, said (page 1131) :

No tax or duty can be levied or collected except by authority of law. Hence, no customs duty was leviable on the basis of any administrative

instructions. Every levy or customs duty or any other tax must be sanctioned by law.

97. Thus, in the absence of any legislative sanction authorising the levy of tax, the imposition of tax in exercise of executive power was negatived. It

may be noticed that exercise of executive power under article 162 or article 73 is subject to other provisions of the Constitution which includes

articles 265 and 300A as well.

98. The question directly arose in Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, , and a batch of writ

petitions before the Supreme Court on the interplay of article 162, the executive power of the State in matters for which it has legislative

competence and article 300A. The question was about seizure of wheat. Justice A. P. Sen, speaking for the court said (AIR 1982 SC 48) :

There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300A

provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the

executive power of the State under article 162, deprive the person of his property. Such power can be exercised only by authority of law and not

by a mere executive fiat or order. Article 162 as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore,

necessarily subject to article 300A. The word "law" in the context of article 300A must mean an Act of Parliament or of a State Legislature, a rule

or a statutory order having the force of law, i.e., positive or State made law.

99. The court also reaffirmed the view stated in Wazir Chand Vs. The State of Himachal Pradesh, and Bishan Das and Others Vs. The State of

Punjab and Others, , that an illegal seizure amounts to deprivation of property without the authority of law. It clearly spells that an order of seizure

of property by any authority dealing with enforcement of law or as an investigating agency as a measure of making law effective amounts to

deprivation of property and unless such seizure is authorised by statute under which it is acting, the seizure will be illegal and cannot be considered

authorised by law which could be saved, merely because it can be said to be to fulfil the object of the enactment as being remedial against breach

of law.

100. From the aforesaid authorities, it is abundantly clear that whether it is a question of finding whether a tax is authorised by law or a person is

deprived of his property by authority of law or appropriation of the consolidated fund is in accordance with law, the law in the context means an

Act of Parliament or of a State Legislature or a rule or statutory order having force of law, i.e., a positive or State made law and not mere

executive instructions or guide lines issued in exercise of the executive power of the State or in exercise of such power conferred on any statutory

functionary.

101. There is ample authority for the proposition that if the law is not framed by a competent legislative body having plenary power in respect of

the subject-matter but by a subordinate authority the delegation in this respect must be specific and not generally for the purpose of carrying out the

object of the Act.

102. In the case of Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , the question directly arose. Excise duty on the quantity of liquor

was levied which the licensee failed to take delivery. The levy was sought to be supported with the authority of law conferred by rules. The

provisions of the Madhya Pradesh Excise Act, 1915, conferred on the State power to make rules for the purpose of carrying out the provisions of

the Act and also specified certain areas specifically in respect of which rules can be framed. However, there was no specific delegation of power

to impose duty on anything in addition to duty which was payable in terms of section 25. The court said (headnote) :

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises

the imposition even if it is assumed that the power to tax can be delegated to the executive.

103. In M/s. Lilasons Breweries (Pvt.) Ltd. and another Vs. State of Madhya Pradesh and others, , the question arose that rule 22 which provided

for empowering the Excise Commissioner to appoint officer in charge in effect also provided that the pay of all such officers shall be made by the

Government provided that when the annual charges exceed five per cent. of the duty leviable on the issue made from the brewery to districts within

the State the excess shall be realised from the brewer. The raising of the additional demand of excise duty under rule 22 was challenged. The duty

was sought to be defended on the ground that this was a measure to recoup the State of the charges of appointing officers in charge of the various

breweries in the State by demanding a sum equal to the duty leviable. The provision of the rule was sought to be defended on the basis of the

generality of the powers of framing the rules for the purposes of the Act, and whether such delegation satisfied the test of article 265 of a tax

imposed under the authority of law. The court negatived the contention by holding (page 1397) :

Now, with regard to the suggested wide amplitude of section 62(2)(h) and section 28 and condition of licence, all we need to say is that though

u/s 28 licences are issued on the prescribed forms and on payment of such fee as prescribed and licences containing such particulars as the State

Government may direct, etc., this power even though wide is yet confined within its frame and can in no event assume the power to impose or levy

a tax or excise duty by means of a rule without the sanction of the Act.

104. In Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, , affirming the view taken by this court

in Shardulkumar Jayantkumar Pasawala and Others Vs. Ahmedabad Urban Development Authority and Another, , the Supreme Court held that

since there is no express provision for imposition of fee and the State Government has not delegated any power to the Development Authority to

impose fee for development, the regulations framed for such imposition of fees and the demands made therefore are wholly unauthorised and illegal

and reiterating the view taken by the Supreme Court in The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, ,

Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another, , and Municipal Corporation of Delhi and Others Vs.

Mohd. Yasin, , it reaffirmed (AIR 1992 SC 2042) :

It has been consistently held by this court that whenever there is compulsory exaction of any money, there should be specific provision for the

same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used.

105. The court unequivocally held that (AIR 1992 SC 2042) :

In a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our

view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for

imposition of such tax or fee.

106. This case lays down in no uncertain terms that there is no room for intendment where the question arose about exercise of the power for

exacting moneys from subjects. In view of the constitutional mandate of like character in articles 265 and 300A, it applies with equal force to cases

of levy of tax or fees or an action resulting in depriving a person of his property.

107. The proposition may be viewed slightly from different angle even with reference to article 300A. In Tuck and Sons v. Priester [1887] 19 QB

629, Lindley L.J. said (page 645) :

The well-settled rule that the court will not hold that the penalty has been incurred unless the language of the clause which is said to impose it is so

clear that the case must necessarily be within it.

108. The principle was applied by House of Lords in London and North Eastern Railway Co. v. Berriman [1946] 1 All ER 255, Lord Macmillan,

in his opinion said (page 260) :

Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair

and ordinary meaning of its language.

109. The same view was expressed by Lord Porter when he opined :

A man is not to be put in peril upon ambiguity however much or little the purpose of the Act appeals to the predilection of the court.

110. Construing the provisions of the Bombay Act No. 57 of 1947, in the case of Tolaram Relumal and Another Vs. The State of Bombay, , the

court approved the opinion of Lord Macmillan in London and North Eastern Railway Co. v. Berriman [1946] 1 All ER 255 by holding (page 498

of AIR) :

It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the

Legislature.

111. These were with reference to interpreting existing penal provisions. It is a clear indication that even where a provision for levy of penalty exists

and is ambiguous in its expression a person cannot be subjected to such provision by stretching the same. Therefore, it is not possible to subject a

person to the penal consequences of his act without there being a specific provision at all, on the basis of intendments alone.

112. The decision in Indian Council for Enviro-Legal Action and Others Vs. Union of India (UOI) and Others, , was also referred to, where the

apex court in a petition under article 32 directed the Central Government to recover costs of remedial measures from companies to urge that

recovery of costs from a polluting company amounted to depriving the company of its property under the general power of taking remedial

measures to prevent pollution. In my opinion, their contention is not well founded. It is to be noticed that the court in the said case applied the law

enunciated in the M.C. Mehta and another Vs. Union of India and others, , holding respondents-companies Nos. 4 to 8 liable to compensate for

harm caused by them to villagers and bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area and

to defray the cost of remedial measure required to restore the soil and the underground water, sources. The court also applied the principle that the

polluter pays. The court held (page 1465) :

We are convinced that the law stated by this court in M.C. Mehta and another Vs. Union of India and others, , is by far the more appropriate

one-apart from the fact that it is binding upon us. (We have disagreed with the view that the law stated in the said decision is obiter). According to

this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss

caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is

premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity "can be tolerated only on the

condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying

on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not".

The Constitution Bench has also assigned the reason for stating the law in the said terms. It is that the enterprise (carrying on the hazardous or

inherently dangerous activity) alone has the resource to discover and guard against hazards or dangers and not the person affected and the

practical difficulty (on the part of the affected person) in establishing the absence of reasonable care or that the damage to him was foreseeable by

the enterprise.

Once the law in the M.C. Mehta and another Vs. Union of India and others, , is held to be the law applicable, it follows, in the light of our findings

recorded hereinbefore, that respondents Nos. 4 to 8 are absolutely liable to compensate for the harm caused by them to villagers in the affected

area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants

lying in the affected area.

113. The court further said (page 1466) :

The question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now

come to be accepted universally as a sound principle, viz., the polluter pays'' principle.

The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings

which cause the pollution or produce the goods which cause the pollution. Under the principle it is not the role of Government to meet the costs

involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of

the pollution incident to the taxpayer.

114. Thus, the obligation to defray the cost of remedial measures of removing pollution was held to be of the polluter under common law. Issuing

directions for recovery of such cost was, therefore, held to be implicit in provisions of sections 3 and 4 of the Environment (Protection) Act, 1986.

115. Thus, the liability to incur cost being already implicit in existing law no new or fresh authority was required in this regard. It was not a case

where the court has countenanced any forfeiture as a penal measure for breach of some provisions without any pre-existing authority of law to

bring that effect.

116. Reference was made to Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc., . The issue related to acquisition of

agrarian and mineral rights under the Bombay Land Revenue Code and Land Tenure Abolition Laws (Gujarat Amendment) Act, 1982, without

payment of compensation. The statute was placed in the Ninth Schedule to the Constitution under article 31A. Apart from other contentions, it was

also contended that section 69A being violative of article 300A cannot be under the protective umbrella of article 31A.

117. The court held, firstly, that (page 154) :

After the deletion of the right to property omitting articles 19(1)(f) and 31 of the Constitution by the Constitution 44th Amendment Act, the right

to property which was hitherto a fundamental right was dethroned from Part III and became a constitutional right under article 300A resuscitating

only article 31(1) of the Constitution as originally made.

118. It also reiterated the view taken by Bose J. in The State of West Bengal Vs. Subodh Gopal Bose and Others, , that the words ""taken

possession or acquisition"" under clause (2) amount to deprivation within the meaning of clause (1) of article 31. No hard and fast rule can be laid

down. Each case must depend on its own facts. The court said in para 42 :

Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and

interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and

to exclude every one else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully exercise over

particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters.

Therefore, the word "property" connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or

invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore,

within the constitutional protection, denotes group of rights inhering citizen"s relation to physical thing, as right to possess, use and dispose of it in

accordance with law.

119. It reiterated (page 162) :

The word "property" used in article 300A must be understood in the context in which the sovereign power of eminent domain is exercised by the

State and expropriated the property. No abstract principles could be laid. Each case must be considered in the light of its own facts and setting.

The phrase "deprivation of the property of a person" must equally be considered in the fact situation of a case. Deprivation con-notes different

concepts. Article 300A gets attracted to an acquisition or taking possession of private property, by necessary implication for public purpose, in

accordance with the law made by Parliament or of a State Legislature, a rule of a statutory order having force of law. Public interest has always

been considered to be an essential ingredient of public purpose. But every public purpose does not fall under article 300A nor exercise of eminent

domain an acquisition or taking possession under article 300A. Generally speaking, preservation of public health or prevention of damage to life

and property are considered to be public purposes. Yet deprivation of property for any such purpose would not amount to acquisition or

possession taken under article 300A. It would be by exercise of the police power of the State. In other words, article 300A only limits the power

of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without any sanction of law.

Deprivation by any other mode is not acquisition or taking possession under article 300A. In other words, if there is no law, there is no

deprivation. Acquisition of mines, minerals and quarries is deprivation under article 300A.

120. It transpires from above that the court was dealing with extinguishment of mineral right, which was held to be deprivation of property within

the meaning of article 300A, in the specie of acquisition by invoking u the principle of assuming eminent domain over the rights in minerals. It also is

clear that what is ""deprivation"" in a given case must be decided in the context of facts of that case. It also cleared that deprivation by acquisition or

taking possession is different from deprivation by reference to police powers because the context of the controversy was that whether in the case

of deprivation by acquisition existence of public purpose and concept of adequate compensation are implicit. While the court answered the first

requirement of existence of public purpose in affirmative, the latter was negatived by holding (page 163) :

Since article 30(2) itself provided payment of compensation, when property was acquired preceding the 25th Constitution Amendment Act,

1971, this court interpreted the word ''compensation'' as aforesaid, but when article 30(2) itself was omitted from the Constitution, the question

arises whether payment of compensation is a sine qua non for deprivation of property under article 300A ?

121. It is clearly reflected from the observation that deprivation of property for any purpose other than public purpose would not amount to

acquisition or possession taken under article 300A.

122. It did not lay down that what is not acquisition is not deprivation of property and could be sustained without authority of law envisaged under

article 300A contrary to the principle enunciated in Wazir Chand Vs. The State of Himachal Pradesh, and in Bishambhar Dayal Chandra Mohan

and Others Vs. State of Uttar Pradesh and Others, , which laid down that forfeiture of property for alleged breach of law amounted to deprivation

of property and unless authorised by specific law could not be sustained under article 31(1)/300A.

123. The decision rather reaffirms and reiterates the principle above, the necessary requisites of authority of law laid down by the Supreme Court

in each case as discussed above, and has also drawn attention to the effect of omission of clause (2) of article 31 in resuscitated provision of article

31 in article 300A on the question of requirement of payment of compensation on assuming eminent domain of any property by way of acquisition.

The question of finding the ambit and scope of deprivation through taking possession or acquisition of property by assuming eminent domain not

arising in this case, the question, whether impounding, full or part of amount, otherwise, recoverable in law from a person, amounts to deprivation

was not the subject-matter of issue in Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc., . However, this much can be

said that the decision in Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc., , reaffirms the principle, firstly, that there

can be no deprivation of property without authority of law, secondly, what amounts to deprivation of property cannot be subject to any abstract

principle. No hard and fast rule can be laid down. Each case must depend upon its own facts, and that the word ""law"" used in article 300A must

be an Act of Parliament or of a State Legislature, rule or statutory order having force of law.

124. Learned counsel for the respondent urged us to draw a distinction between imposition of tax required to be authorised by law under article

265 and authority of law required for depriving a person of his property under article 300A by holding that while construing fiscal enactments

which are to be construed strictly, the authority to impose tax may be required to be specific in the matter of deprivation of property under

remedial statutes. Such authority may be inferred from generality of powers conferred. This distinction pointed out by the learned counsel appears

to be without difference. It may be pointed out at the cost of repetition, that in Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar

Pradesh and Others, , the question had directly arisen with reference to the question of forfeiture of wheat under the Essential Commodities Act,

and orders framed thereunder. It was not a taxing statute but where seizure and confiscation of wheat had taken place. Stock of wheat was held

by the petitioner in contravention of the provisions of the Act, imfringing the object for which such regulatory measure has been enacted. The

question directly arose whether such confiscation in effecting the object of the Act results in deprivation of property and if so whether necessary

authority of law for such deprivation was needed and existed under article 300A. The Essential Commodities Act, is as much a remedial Act as the

present one is, though in a different field of economic activity. Both the Acts are not enacted merely with the object of depriving any person of his

property or conferring mere police powers on the authority constituted under it. A rule or a statutory order having the force of law that is positive

or State made law was held to be essential to back such act. In view of the aforesaid, it is not possible to accept the contention of learned counsel

about drawing a distinction of requisite authority under article 265 or under article 300A, where the Constitution requires a like pre-condition

before a tax is imposed or a person is deprived of his property. I may also notice that since a separate provision has been made for imposition of

tax under article 265, the imposition of tax has not been held to be deprivation of property to be governed by article 300A.

125. Learned counsel for the respondent placed reliance in this connection on the decisions in the District Council of the Jowai Autonomous Distt.,

Jowai and Others Vs. Dwet Singh Rymbai etc., , and in Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others,

distinguished in the decision in Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, , on the ground

that the Supreme Court itself has distinguished the two cases relied or by the Ahmedabad Urban Development Authority in its favour to come to a

different conclusion. The fact that the decision in Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others,

, distinguishes the two authorities does not lead to the conclusion that it supports the respondents'' plea about inferring an authority of law without

there being specific provision merely from the entitlement of the Board to take appropriate measures without actually taking such measure which

can properly be permitted as law prescribing the deprivation of property which could be permitted as a legislative measure prescribing for such

consequences by law. As pointed out by the Supreme Court itself the decision in District Council of the Jowai Autonomous Distt., Jowai and

Others Vs. Dwet Singh Rymbai etc., , Jowai was justified on the ground that the authority to levy fee by the District Council flew from the special

provisions of the Constitution itself under which it was constituted. The court notwithstanding holding that the District Council could levy fee under

paragraph 3 of the Sixth Schedule to the Constitution, but the levy was not upheld because no material was placed before the court to justify the

fees which must be levied as quid pro quo for service rendered by the District Council for forest owners as contractors. It was a case where

specific authority for levy was existing under the constitutional provision itself and does not render any assistance to the respondents in their plea to

the contrary.

126. The case of Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others, also does not throw any light on the controversy

raised before me which concerns the requisite authority of law envisaged under article 300A for sustaining any State action and results in

deprivation of his property. It was a case where the panchayat samiti while exercising power to grant a premise to hold a hat or fair on account of

there being two competitive agencies holding hat on the same day after a chequered history of litigation had specified a day in the case of each one

of the holders of hat or fair. It was challenged on the ground that the panchayat samiti had no power to specify a day on which the said hat or fair

should be held. The court reversing the decision of the High Court held that (page 87) :

The conferment of the power to grant a licence for the holding of a hat or fair u/s 117 of the Act includes the power to make incidental or

consequential orders for specification of a day on which such hat or fair shall be held .... It is well accepted that the conferral of statutory powers

on these local authorities must be construed as impliedly authorising everything which could fairly and reasonably be regarded as incidental or

consequential to the power itself.

127. It is this later part of the aforesaid ratio which is emphasised by learned counsel for the respondents for making a distinction between the

decision in AUDA which concerned levy of fee from the person which concerns deprivation of property. With all deference to learned counsel it

may be noticed that the reason for inapplicability of the case to such requirement of a specific provision has been stated by the Supreme Court in

the following words (page 2242) :

That the decision in Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others, also deals with the exercise of incidental and

consequential power in the field of administrative law and the same does not impose tax and fee the same can be said with respect to the present

proviso. Here we are concerned with the power of authority to deprive a person of the property and in exercise of power in the field of

administrative law by way of making orders incidental or ancillary power actually conferred on it.

128. In view of the consistent view taken by the Supreme Court as discussed above whether under article 265 or article 31 as it existed prior to its

deletion by the Constitution 44th Amendment Act, 1978, or under article 300A, it is not possible to accept the plea of distinguishing the scope and

ambit of authority of law required under article 300A by separate rules of construction.

129. The authority of law envisaged under the constitutional provisions has a precondition. Before imposition of tax or sustaining said action

depriving a person of his property there must exist an authority of law in the form of a positive or State made law whether as an Act of Parliament

or of a State legislation or rule or a statutory order having the force of law, that is to say a rule of conduct framed by some legislative process or

under some legislative authority having the force of law and such law must be specific in conferring such authority on the State functionaries

implementing the law. There is no room for intended authority, or exercise of power resulting in deprivation of property as a necessary adjunct of

the main power, by way of its ancillary or incidental requirement as in the field of administrative action is no answer to law of specific legislative

authority.

130. Learned counsel also placed reliance on State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, . For the purpose of

contending for interpretation of a statute that well-accepted principle of being strictly construed and requirement of power before a tax can be

imposed is a different proposition compared to the interpretation of a remedial legislation concerned, inter alia, with imposing suitable action to

remedy a breach of the Regulations and Act. The decision in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, does not

concern the issue with which the case in hand required concern. The issue before the Supreme Court related to field of operation of entry 54 of

List 2 of the Seventh Schedule empowering the said Legislature to levy sales tax and entry 52 of List 1 under which Parliament has enacted the

Industries (Development and Regulation) Act. The contention had been raised that while in the field occupied by the law enacted by Parliament

challenging the levy of purchase tax on industrial alcohol it was in the light of the contention raised that exercise of power by Parliament in enacting

law relating to the development and regulation of industry of industrial alcohol, whether the power of the State Legislature to levy purchase tax or

sales tax on sale of industrial alcohol correctly under entry 54 of List 2, it was in the context of this contention that one of the judges of the

Supreme Court, Justice Thomas, held that the control held and exercised by the Central Government by virtue of provisions of the Industries

(Development and Regulation) Act is not a field far removed from the tax under entry 54, List 2. So long as it is within the control of the Central

Government in its power under the Act in respect of a controlled industry falling under entry 52 of List 1 cannot in any manner prevent the State

from imposing the tax on the sales of purchase of goods which are the products of such industry and which are referred to in entry 33 of List 3. As

seen above, the taxing power of the State under entry 21 of the power of control. Sahai J., concurring with Justice Thomas, held (page 165) :

Therefore, the entire basis for striking down the levy that even though the State had plenary power to impose tax on sales/purchase of goods it

can exercise taxing power under entry 54 of List II so long as it does not militate against the legislative field occupied by the Central Government

under the IDR Act or any other enactment made under entry 52, List I, proceeded on complete misconception of taxing powers of the State. In

fact as stated earlier the entire theory of occupied field or State legislation being repugnant to Central legislation is available when the two

Legislatures exercise their powers under the Concurrent List. Therefore, the order of the High Court striking down the levy cannot be upheld.

131. The decision in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, nowhere militates against the earlier views

expressed by the apex court about the requirement of a specific provision of law whether of an Act of Parliament or the State Legislature or Rules

or Regulations or statutory order having force of law by way of positive State made law or that while examining the issue about the existence of a

law authorising deprivation of property a different yard-stick about finding out the existence of law be applied is not sustainable for the reasons

discussed above.

132. It was strenuously urged by learned counsel for the respondents that the Act being remedial in nature must receive broad interpretation which

furthers the object of the Act rather than that which allows the mischief to remain unsuppressed.

133. There cannot be any doubt about the principle which has been settled since HeydonBNJ[1584] 3 Co Rep 7a. However, this question cannot

be answered in a pedantic way by reading the requirements of law to be there in a statute even if they are not there particularly when existence of

such requirements are to be considered in the light of constitutional mandate. The contention that there should be a different methodology while

construing the taxing statute and a welfare statute for the purposes of giving effect to it also cannot be seriously doubted. However, this principle

has to be read in the context of purpose for which tools of interpretation are applied. Where the question under consideration is whether under the

existing provision a subject can be subjected to levy, the rule of strict construction is invoked. The paramount consideration is that no subject can

be put to more burden than what flows strictly within the four corners of statute. By expansive meaning on the basis of the intendment the burden

cannot be extended. Where the question arises whether the benefit extended by the statute, reaches the beneficiaries for whom such benefits are

intended, a liberal construction is resorted to to make the reach of such benefits expansive to the subjects intended to be benefited by it. But at the

same time one has to keep in mind that the constitutional provisions which are salutary in nature and provide certain constraints on the State action

for bringing about a desired result, the scope and ambit of such restraints cannot be different while construing the exercise of State power in that

regard. As has been noticed above, and about which there is no dispute either, that the impugned action results in depriving the petitioners of their

property within the meaning of article 300A of the Constitution and for bringing about that desired result, authority of law is needed. It is also not in

serious dispute that the authority of law required must be an authority conferred by legislative process and not by way of administrative discretions.

In fact the learned counsel in his written submissions has candidly stated that authority of law envisaged under article 265 for the purpose of

imposing tax requires a specific power before it can be imposed. What is contended by learned counsel is that interpretation of a taxing provision,

with this well-accepted principle of being strictly construed and requiring of a specific power before a tax can be imposed, is a different proposition

compared to the interpretation of a remedial legislation concerned, inter alia, while taking action to remedy a breach of Regulation and Act. Pausing

here, it is the constitutional mandate that no tax shall be imposed without authority of law. It is also constitutional mandate that no person shall be

deprived of his property unless authorised by law. So far as this requirement of the Constitution of existence of authority of law before tax can be

imposed or a person can be deprived of his property, in my opinion, cannot be different in either case, and the existence of authority of law as

distinguished from the question of mere acceptance of the fact that such authorisation is made may be justified being incidental to the object of the

Act cannot be accepted. If authority of law for the purposes of imposition of tax is required to be specific because of the constitutional mandate,

the authority of law authorising the State or instrumentality of a State to deprive a person of his property must also be held to be specific and

cannot be left to be justified on the basis of acceptance of such authority for the purpose of achieving the object.

134. In Heydon''s case [1584] 3 Co Rep 7a, it was resolved by the Barons of the Exchequer by stating (page 639 of 32 ITR) :

That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things

are to be discerned and considered : (1) What was the common law before the passing of the Act; (2) What was the mischief and defect for which

the common law did not provide; (3) What remedy Parliament has resolved and appointed to cure the disease of the common wealth; and (4) The

true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the

remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and pro privato commodo, and to add force and life to

the cure and remedy according to the true intent of the makers of the Act.

135. This principle has since then been approved by the Supreme Court on more than one occasion. The limits of applying the rule in Heydon''s

case [1584] 3 Co Rep 7a were also pointed out by the apex court time and again. In The Commissioner of Income Tax, Madhya Pradesh and

Bhopal Vs. Sodra Devi, , the Supreme Court said that the rule in Heydon''s case [1584] 3 Co Rep 7a is applicable only when the words in

question are ambiguous and are reasonably capable of more than one meaning.

136. In Kanai Lal Sur Vs. Paramnidhi Sadhukhan, , Gajendragadkar, J., speaking for the court, said that in applying the observations in Heydon''s

case [1584] 3 Co Rep 7a to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the

intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it

would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent

with the alleged object and policy of the Act.

137. It was further pointed out that the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when

such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the

material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is

likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction. It is only in such cases that it

becomes relevant to consider the mischief and defect which the Act purports to remedy and correct.

138. In a recent case from the House of Lords in Maunsell v. Olins [1975] 1 All ER 16 (HL), Lord Simon explained that the rule in Heydon''s

case [1584] 3 Co Rep 7a is available at two stages, primary and secondary. The primary rule of construction is to consider the plain meaning and

if there is no plain meaning, the mischief rule is the most important rule amongst the secondary canons of construction.

139. As we shall presently see, a number of authorities have been cited by learned counsel for the respondents in this regard but none relates to a

situation where a question had arisen in the context of satisfying the constitutional requirements for sustaining the said action particularly in the field

of requirement of authority of law, nor does such authority support the contention that for finding whether authority of law exists for the purposes of

imposition of tax or for the purposes of depriving a person of his property different standards of such requirement has been applied by adverting to

the Heydon''s case [1584] 3 Co Rep 7a principle to satisfy the test of constitutional requirement of such an authority.

140. M. Narayanan Nambiar Vs. State of Kerala, , on which reliance was placed by learned counsel for the respondents for the liberal

interpretation of section 11, was a case in which provision for punishment was made by statute. The question which fell to be considered before

the Supreme Court was whether a particular act could be considered to be within the scope of the provisions of the Prevention of Corruption Act,

for the purposes of prosecuting and punishing a person. It was not a case where a penalty or punishment was sought to be imposed without there

being a provision for it. Here also we are not concerned with the case for considering the question ""should a consequence provided by statute

befall a person for an act of his which could be construed as falling in prohibited practices to make the provision effective"".

141. Learned counsel referred to Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi

and Another, , wherein the court said (page 424) :

Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the

court is not to make inroads by making etymological excursions.

142. The court was concerned with interpretation of section 25F of the Industrial Disputes Act, 1947, in the context of relief to be granted where

termination was held to be contrary to the provisions of section 25F. Against the claim of the workman whose retrenchment was found to be in

breach of the provisions of section 25F of the Industrial Disputes Act to reinstatement with full back-wages, a plea was put forward by the

management that the Industrial Disputes Act did not render the termination of a service of the workman void ab initio and would make it invalid

and inoperative, that the court without setting aside the termination of the services of the workman on the ground of failure to apply the provisions

of section 25F has full discretion not to reinstate the workman with full back-wages and may mould the relief to reinstatement with payment of

suitable compensation. Parity was drawn between the cases under sections 33 and 33A of the Industrial Disputes Act.

143. It is in the context of the said contention, the court made it clear (page 424) :

The court is not to make inroads by making etymological excursions. "Void ab initio","invalid and inoperative" or call it what you will, the

workmen and the employer are primarily concerned with the consequence of striking down the order of termination of the services of the

workmen. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement

of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back-wages too.

144. The court further made it clear (page 424) :

That there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct

reinstatement with full back wages.

Obviously, the present is not a case of this nature.

145. In The Works Manager, Central Railway Workshop, Jhansi Vs. Vishwanath and Others, , the court was required to consider whether the

timekeepers who were preparing pay sheets of workshop staff, maintained leave account, disposed of settlement cases, maintained records for

statistical purposes, maintained attendance of staff, job card particulars of the various jobs under operation and time sheets of the staff working on

various shops dealing with the production of Railway spare parts and repairs, etc., fall within the definition of ""worker"" in the Factories Act so as to

be entitled to the benefits of Factories Act. Rejecting the plea that the deletion of the word ""whatsoever"" after ""any other kind of work"" from the

definition of the workmen made any difference between the meaning of the word ""workman"" in the Act, the court held (page 491) :

Keeping in view the duties and functions of the respondents as found by the learned Additional District Judge, we are unable to find anything

legally wrong with the view taken by the High Court that they fall within the definition of the word ''worker".

146. It, therefore, held that (page 491) :

The definition of ''worker'' in the Factories Act, therefore, does not seem to us to exclude those employees who are entrusted solely with clerical

duties, if they otherwise fall within the definition of the word ''worker"""".

147. This case also, therefore, refers to whether within the definition provided in the Act, a particular class of worker would fall within the

operating field of the Act so as to be entitled to the beneficial provisions of the Act and did not concern whether the specific requirement of the

Constitution necessary for conferring the power has been fulfilled or not by applying the principle of liberal interpretation of a welfare legislation.

148. Reliance was also placed on Krishna Chandra Gangopadhyaya and Others Vs. The Union of India and Others, . It was a case where in the

first instance rule 20(2) of the Bihar Minor Mineral Concession Rules, 1954, framed by the Bihar Government u/s 15 of the Mines and Minerals

(Regulation and Development) Act, 1957, were held by the Supreme Court to be ultra vires the authority of the Bihar Government''s power to

frame rules u/s 15 in Baijnath Kadio Vs. State of Bihar and Others, . Parliament enacted thereafter the Validation Act, 1969, which provided the

laws specified in the Schedule as valid as if the provisions contained therein had been enacted by Parliament. The Act also validated the action

taken under the rules which have been declared invalid by the above referred decision of the Supreme Court. The court held (headnote) :

If a validating law by Parliament merely validates invalid State law which is outside the State list such a Validating Act would be invalid. It is for

the Constitution, not Parliament, to confer competence on State Legislatures. But where Parliament, which has power to enact on a topic actually

legislates within its competence but, as an abbreviation of drafting, borrows into the statute by reference the words of a State Act, not qua State

Act but as a convenient shorthand, as against a long hand writing of all the sections into the Central Act, such legislation stands or falls on

Parliament''s legislative power, vis-a-vis the subject. The distinction between the two legal lines may sometimes be fine but always is real"".

149. In its Validation Act, 1969, Parliament clearly stated two things, firstly, that the laws specified in the Schedule shall be and shall be deemed

always to have been, as valid as if the provisions contained therein had been enacted by Parliament and secondly that they shall be deemed to be

valid as if the provisions contained therein had been enacted by Parliament.

150. Therefore, clearly it was a case of Parliament adopting the language of the statute framed by the State Legislature as if it was enacted by

Parliament itself. It, therefore, was not a case where Parliament''s competence to enact on the subject but was clearly a case where Parliament

instead of itself giving a detailed draft adopted the language of law enacted by the State for the purpose of its own enactment. The court was called

upon to consider this latter situation and answered the question as quoted above with reference to the principle of giving purposive interpretation,

to the fiscal or remedial statutes. It cannot be said that the Supreme Court applied the principle of legislation by reference or incorporation de hors

existing constitutional limits to infer the fulfilment of the constitutional requirement when the same had not been complied with.

151. In this connection reference was also made to Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, , to buttress the aforesaid

contention of purposive interpretation of a remedial legislation. I am unable to read any such proposition in the said case. The case concerns the

interpretation of article 222 of the Constitution of India, which provides for transfer of a judge of the High Court from one High Court to another

High Court. The question arose whether before transfer takes place consent of the concerned judge is required. The question had arisen in the

absence of specific provision. The question which the court posed for its decision was, since article 221(1) does not provide for such consent as

necessary, whether one can still read into this article words which are not to be found by tools of statutory interpretation. Statutory interpretation,

when conflicting rules operate in different directions, becomes a murky area. One contention raised was that constitutional provisions must be

construed literally and rules of interpretation of statutes applied to legislation made by Parliament may not be applied to interpretation of the

Constitution. It is in that context the court said (page 2337) :

What is true of the interpretation of an ordinary statute is not any the less true in the case of a constitutional provision, and the same rule applies

equally to both. But if the words of an instrument are ambiguous in the sense that they can reasonably bear more than one meaning, that is to say, if

the words are semantically ambiguous, or if a provision, if read literally, is patently incompatible with the other provisions of that instrument, the

court would be justified in construing the words in a manner which will make the particular provision purposeful.

152. In saying so the court referred to its earlier decision in M. Pentiah and Others Vs. Muddala Veeramallappa and Others, , wherein the court

quoted with approval the words of Lord Denning illustrating the role of the interpreter in such cases by holding that :

a judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

153. In the context of the present controversy, it is not the contention of the any of the parties that any provision or Act, Regulation or Rules is not

compatible with each other and requires harmonious construction requiring the ironing out of creases with reference to the requirement of article

300A, the remnant of article 19(1)(g) and article 31 since deleted, is that the authority of law for depriving a person of his property requisitioned

under the Constitution need be specifically through a law framed by legislative process. No decision contrary to the one referred to above have

been cited at Bar. If that be so, the question whether the court should supply the authority which is not existing in the Act, rules or Regulations

framed therein by reading something there which is not there or applying the principle of casus omissus really had called for application of the

principle of interpreting the words of an existing remedial statute, in a meaning different from what they convey to the words used in it. As has been

noticed above, what has been envisaged u/s 11 confers power on the Board to adhere to the plan of action for achieving the objects of the Act for

which a duty has been cast upon it. It necessarily means that it requires in the first instance drawing up a plan of action which may be called a

measure to be taken by the Board and then to act in accordance with the action plan. However, the existence of the action plan or chalking out of

action plan before the action can be taken in furtherance thereof is a sine qua non. It has also been noticed that chalking out of that action plan may

be through the legislative process which may be fulfilling the requirement, subject to other constitutional restraints or not can be fully examined only

when such an action plan is formulated. But until that is done, it is difficult to accept the contention of the learned counsel for the respondents to

arrive at a desired result by applying the principles in Heydon''s case [1584] 3 Co Rep 7a, to read requisite legislative authority of law requisite for

depriving a person of his property in terms of article 300A, in terms of section 11 read with section 11B.

154. The next decision to which reference in this connection has been made is N.K. Jain and others Vs. C.K. Shah and others, .

155. Again, that was not a case where the question of having necessary authority of law required for the purpose of taking action resulting in

deprivation of property or imposition of tax, etc., was at issue. The question that specifically had arisen was a provision for levying penalty on an

exempted establishment under the Employees" Provident Funds and Miscellaneous Provisions Act, 1952, was existing u/s 14(2A) of the Act

where such exempted establishment has contravened any of the conditions subject to which exemption was granted. A question has arisen in the

circumstances on such contravention of conditions, exemption certificate has been cancelled, whether cancellation of such exemption amounted to

levy of another penalty envisaged u/s 14(2A) so as to render section 14(2A) inapplicable to such exempted establishment. The court after referring

to the principle enunciated by Lord Denning referred to above, and considering the meaning of penalty has stated categorically that while

considering the scope of section 14(2A) they have proceeded adhering to the language of the section (page 1297) :

We are, therefore, satisfied that some of the conditions subject to which the exemption was granted have been violated. So this part of section

14(2A) is satisfied. Now, we shall see whether the cancellation u/s 17(4) is a penalty provided by or under the Act.

156. The court did not read the existence of a provision providing consequence in the clause providing for breach itself. It looked for another

provision for supporting the consequential punitive measure. It was only on finding that the other provision authorises penalty, that the court upheld

the action. It does support that there must exist a provision for inflicting the consequence of penalty on the subject.

157. It was urged that in construing the provisions of a statute which is remedial in nature to suppress certain mischief as its object ought not to be

placed at par with statutes with object of taking or deprivation of property. To put it another way the principles about tests satisfying the

requirement of authority of law envisaged under article 265 or 300A should not be made applicable as touchstone to remedial statute. Reliance

was placed on Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [1996] 85 Comp Cas 920 (SC), wherein the court

said section 45K of the Reserve Bank of India Act, 1934, is in the nature of an enabling provision. In the matter of enabling statutes, the principle

applicable is that if the Legislature enables something to be done it gives power at the same time by necessary implication to do everything which is

indispensable for the purpose of carrying out the purpose in view. On this premise, it has been contended that, in the like manner sections 11 and

11B of the Act are enabling provisions and must be construed to have conferred the power to make the impugned orders as necessary for the

purpose of carrying out the purpose of the Act.

158. The contention does not stand close scrutiny. No such distinction about the Constitution"s requisite of having a specific authority before a

person can be deprived of his property on the ground of statute being for acquisition of property or for conferring police powers on the State or of

beneficial or remedial character has been made in the case. The issue about deprivation of property and fulfilment of requirement of authority of

law under article 300A were not at all the subject-matter before the court. The case directly concerned the issuance of certain directions as an

additional regulatory measure, which were incidental to the directions already issued and were to be effective having the force of law and the

question raised was about the ambit of the provision of the parent statute to have within its sweep authority for making such provision regulating the

conduct of non-banking companies as a matter of law, quite distinct from making an order as a result of enquiry bringing one the desired

consequences on a person, without there being an existing rule of discipline or code of conduct having the force of law authorising the making of

such order.

159. It will be necessary in the context to note some facts in the Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.

[1996] 35 Comp Cas 920 (SC). It related to a challenge to the validity of a direction contained in paragraph 4A inserted in the Residuary Non-

Banking Companies (Reserve Bank) Directions, 1987, by notification dated April 19, 1993, as under as ultra vires the Reserve Bank of India Act,

1934 (Page 933) :

4A. No residuary non-banking company shall take from any depositor/subscriber to any schemes run by the company, with or without his

consent, any amounts towards processing or maintenance charges or any such charges, by whatever name called, for meeting its revenue

expenditure :

Provided that a company may charge to a new depositor a one time initial sum not exceeding Rs. 10 towards cost or expenses for issuing

brochures/application form, servicing the depositor"s account, etc.

160. The background of this controversy was that in order to regulate the activities of non-banking companies in receiving deposits from the public

on a large scale, the Reserve Bank of India Act, 1934, was amended by Act No. 55 of 1963 by inserting Chapter 11B containing sections 45H to

45Q. Section 45J of the Act empowers the bank to regulate or prohibit the issue of prospectus or advertisement by a non-banking institution

soliciting deposits of money from the public. Section 45K enables the bank to collect information from the non-banking institution as to deposits

and give directions to such institution. Paras. 6 and 12 of the 1987 Directions issued under these provisions were challenged before the Supreme

Court and repelled.

161. After Peerless II case [1996] 85 Comp Cas 920 (SC), upholding paragraphs 6 and 12 of the 1987 Directions, Peerless resorted to the

course of splitting up the amounts received by it in such a way that it was not necessary for it to have complied with the Directions contained in

paras. 6 and 12 of the 1987 Directions. It is to plug this loophole para. 4A was inserted. The contention again was that the direction contained in

para. 4A was ultra vires the Act and violative of article 19(1)(g).

162. From the aforesaid, it is abundantly clear that the court was dealing with a set of directions issued by the Reserve Bank of India having the

force of law governing the conduct of non-banking non-financing institutions which were issued in exercise of power u/s 45K. It was not a case of

directly issuing an order bringing consequences on the alleged defaulter of some nature which did not already form a part of operative statutory

order. It may be noticed that paragraph 4A prohibiting certain manipulative practices, which were affecting the existing direction, was required to

be inserted by exercise of the Reserve Bank of India''s power to regulate deposits from the public by non-banking institutions so as to make their

conduct responsible for conforming to those set of directions. Those directions, were in the form of laying down the rule of discipline of which

future conduct of object covered by it could be tested. Distinction has to borne in the case of taking some measure by the Securities and Exchange

Board of India in the sphere specified for it which may be treated as law on the one hand and making an order depriving a person of his property

without first laying down such legal authority. A measure which could be treated as a positive law laying down a rule of discipline and providing

also for consequences of breach of discipline which is incidental and necessary for its main purpose, can be treated within the authority, conferred

on such authority for making such orders, rules, regulations, directions or orders having force of law. As seen above, the Supreme Court was

dealing with a case where a direction issued by the RBI inserting paragraph 4A, designed to have force of law laying down the code of conduct for

the institutions covered by it was challenged on the ground of it being ultra vires the Act. Whether laying down of such a code of conduct was

within the authority of the RBI under the Act or not, the court answered the question in the affirmative by referring to sections 45K and 45L of the

Act. Likewise, if the Securities and Exchange Board of India were to lay down a code of conduct to be applied by persons who could be dealt

with by it under the Act, and also prescribes consequences of breach thereof, the question will be of the Securities Exchange Board of India''s

competence to lay down such code of conduct with all ancillary and necessary incidents which is quite distinct from the question whether the

Securities and Exchange Board of India could act in a manner affecting rights of people in a manner without prescribing such provision which

results in depriving any person of his property. While the former may be sustained with reference to section 11, the latter cannot be.

163. In this context the statement of law in State of Kerala and Others Vs. P.J. Joseph, , may be usefully referred to, which brings out clearly the

distinction.

164. In State of Kerala and Others Vs. P.J. Joseph, , the question arose about validity of demand of additional payment of 20 per cent. on sale of

liquor from licence in pursuance of an endorsement made by the Government on a reference made to it by the Board of Revenue. The court held

that the endorsement was not a statutory order passed by the State in exercise of statutory power under the statute. It was nothing more than what

it purported to be, namely, a departmental instruction that excise authorities might allow extra quota to wholesale licensees on payment of requisite

commission. It also repelled the contention that the order be treated as a rule, amending existing rule 7 under the Cochin Abkari Act, by holding

that even if it was possible to regard the endorsement made by the Government on the reference made to it by the Board of Revenue, as a rule or

notification prescribing the rate of duty, it not having been published in accordance with requirement of section 69 of the Act it cannot have the

force of law. In view of these conclusions, the court held that :

Even as an order it was, therefore, an executive order which had no authority to support it and, therefore, the imposition was illegal.

165. This clearly envisages that unless an order though within the province of law making authority, is framed properly as a legislative measure, it

cannot furnish requisite authority of law to sustain the impost. In other words merely because it comes within the existing field of legislative power

of the authority, whether parent or subordinate, unless that power is actually exercised by framing law, it is not sufficient to sustain the impost of

tax, deprivation of property or appropriation of consolidated fund. A law must be in existence to which the order can be referable for its support.

166. Learned counsel for the respondent placed reliance on the following observation of the Supreme Court in Delhi Development Authority v.

Skipper Construction Co. (P.) Ltd. [1997] 89 Comp Cas 362 (SC), wherein the court directed restitution of position arising out of fraud of Delhi

Development Authority officers which action included forfeiture of their ill-gotten money and acquisition of assets through bribes.

The absence of statutory provision will not inhibit this court while acting under the said article from making appropriate orders for doing complete

justice between the parties. The fiduciary relationship may not exist in the present case nor is it a case of a holder of public office, yet, it is found

that someone has acquired properties by defrauding the people and it is found that the persons defrauded should be restored to the position in

which they would have been but for the said fraud, the court can make all necessary orders. This is what equity means and in India the courts are

not only courts of law but also courts of equity.

167. However, one is unable to find any support for the plea of learned counsel to read the provision of statute to include power to forfeit even if

the same does not exist or to confer power on the statutory authority created under the Act or by other courts in India. The court clearly observed

that provisions of forfeiture of property of those in office indulging in corrupt practice is needed to be made part of law. It said :

May we say in parenthesis that a law providing for forfeiture of properties acquired by holders of public office (including the offices/posts in the

public sector corporations) by indulging in corrupt and illegal acts and deals, is a crying necessity in the present state of our society. The law must

extend not only as does SAFEMA to properties acquired in the name of the holder of such office but also to properties held in the names of his

spouse, children or other relatives and associates ..... It is for Parliament to act in this matter, if they really mean business.

168. These observations of the court negate learned counsel''s contention that in the matter of conferring authority for depriving a person of his

profits by impounding or forfeiture, the statute should be read in an expansive field even if such power is not clearly spelt out from the existing

provision to overcome the requirement of article 300A. The fact that the Supreme Court exercised its plenary power of issuing directions to do

complete justice inspite of absence of law under article 142 does not detract from the necessity of an existing authority of law made by Parliament

before such authority can be vested in executive functionaries. The court itself made it clear that it is exercising its power under article 142 and said

that absence of statutory provision will not inhibit the court (Supreme Court) while acting under article 142 from making appropriate orders for

doing complete justice between the parties.

169. Reference to Attorney-General for India v. Amratlal Prajivandas [1995] 83 Comp Cas 804 (SC), in this connection was also made. That

was a case in which the SAFEMA provided for forfeiture of illegal properties acquired in violation of law was provided by statute. The question

was about the vires of such provision but not about action of forfeiture without statutory provision. It is one thing to say that the appropriate

legislative body can enact a particular provision or not than to say whether an act of an authority can be supported without there being any

statutory provision, if such statutory provision is a condition precedent for exercise of such power.

170. While the Constitution provides that no person shall be deprived of his property save by authority of law and as we have seen above the law

in the context means positive statutory law, whether framed by the Legislature under its plenary powers or by the subordinate Legislature on being

authorised to make such law, one thing must be accepted that existence of law must be antecedent to the actual act of deprivation enabling the

authority to take that action. Such a power cannot be exercised in the absence of pre-existing authority or such a power cannot be deemed to exist

merely on the ground that action taken by the authority can be related to the purposes of the statute for which the power has been in fact exercised

unless the statute under which power has fleet exercised, also authorises such action which has the effect of depriving a person of his property.

171. When we speak about the law under article 300A or under article 265 or under article 266(3), it means the statutory law or rules or code of

conduct prescribed by the legislative process. Legislation itself signifies the act of giving or enacting laws, the function of the Legislature is to frame

and enact laws or formulation of rules for the future, that is to say, in the first place, rules governing a particular course of conduct are framed and

thereafter any conduct which is governed by the sphere of such rules is to be adjudged, whether it is valid or ultra vires the rules on the touch stone

of those rules.

172. In Black''s Law Dictionary, Vth edition, the word ""legislative"" has been stated to mean making or giving laws pertaining to the function of law

making or to the process of enactment of laws. It also says actions which relate to subjects of permanent or general character are legislative.

173. A legislative act in the same book has been stated to mean ""one which prescribes what the law shall be in future cases arising under it"".

174. So also ""legislation"" has been explained to mean the act of giving or enacting laws, the power to make laws; the act of legislating; preparation

and enactment of laws; formulation of the rules for the future.

175. Law generally has been understood to mean a rule of action to which men are obliged to make their conduct conforming.

176. In the context of the issue at hand, where law has been interpreted to mean a positive or State made law in order to conform to that it must

follow the customary form of law-making and must be expressed as a binding rule of conduct. There is generally an established method of

enactment of law and laws when enacted have also a distinct from. It may be by an act of Parliament or the State Legislature, the rule or statutory

order of bye-law, the Regulations having the force of law.

177. Reference may be made to State of Rajasthan Vs. Bundi Electric Supply Co. Ltd., Bundi, . In that way, the regulations framed in exercise of

delegated authority which have the binding character and force of law fall in the definition of law because regulations ordinarily means prescription

of rules for control of conduct, that means that regulations may provide such a norm to which future conduct of the subject must conform.

178. The conclusion that law for the purposes like one at hand must pre-exist that taking of action referable to it is strengthened by the very nature

of the necessary requirement of a mandate of the State to be construed as law. I cannot do better than to reproduce what Justice Vivian Bose said

in Harla Vs. The State of Rajasthan, :

We are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of

which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural

justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so

that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such

knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a

chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally

know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a resolution without anything more is abhorrent to

civilised man. It shocks his conscience. In the absence, therefore, of any law, rule, regulation or custom, we hold that a law cannot come into being

in this way. Promulgation or publication of some reasonable sort is essential.

179. The fact that law is to be published and made known in some way, before it can become operative to affect the subjects implies that before

any action can be subjected to test of code of conduct provided by law and be visited with consequence that may follow breach of such code of

conduct or law, the code of conduct which is required to be followed, and consequences that are to follow on its breach, both must be made

known. This inheres in it specific provision for depriving one of property by forfeiture or other penal measures. Unless law making such specific

provision is made known, the law cannot be held to exist for sustaining such action.

180. Somewhat similar view was expressed by the Supreme Court again in Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, :

The imposition of a pecuniary liability, which takes the form of a penalty or fine for a breach of a legal obligation, cannot be relegated to the region

of mere procedure and machinery, for the realisation of tax. It is more than that. Such liabilities must be created by clear, unambiguous, and

express enactment. The language used should leave no serious doubts about its effect so that the persons who are to be subjected to such a liability

for the infringement of law are not left in a state of uncertainty as to what their duties or liabilities are. This is an essential requirement of a good

Government of laws. It is implied in the constitutional mandate found in article 265 of our Constitution : No tax shall be levied or collected except

by authority of law.

181. This establishes in no uncertain terms not only that pronouncing of law must precede the act referable to such authority of law but that law

which results in depriving a person of his property by way of liability in the form of penalty must be created by clear, unambiguous and express

enactment, there cannot be any room for inferring the existence of necessary authority of law by attributing inferential intention.

182. WHETHER REQUIRED AUTHORITY OF LAW EXISTS :

Viewed from aforesaid point of view, let us examine whether the provisions of the Act of 1992, or Regulations framed thereunder provide for any

such power of depriving the person dealing on the stock exchange of the consideration which has crystallised into an actionable claim in favour of

one of the parties on the ground of being unjust enrichment.

183. The Securities and Exchange Board of India (hereinafter referred to as ""the Board"") was established u/s 3 of the Securities and Exchange

Board of India Act, 1992. The preamble reads ""to provide establishment of the Board to protect the interest of the investors in securities, to

promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto."" Section 11 casts a

duty on the Board to achieve the aforesaid objectives by such measures as it thinks fit subject to provisions of this Act. Sub-clause (2) provides

that without prejudice to the generality of the foregoing provisions, the measures referred to in sub-section (1) may provide for various specified

matters enumerated therein which include under clause (e) ""prohibiting fraudulent and unfair trade practices relating to securities markets"". Section

11B empowers the Board to issue such directions as may be appropriate in the interest of investors in securities and securities market, if, after

making or causing to be made an enquiry, it is satisfied that it is necessary in the interest of investors or orderly development of the securities

market or to prevent the affairs of an intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest

of investors or securities market or to secure the proper management of any such intermediary or persons. The persons referred to in section 12

are stock brokers, sub-brokers, share transfer agents, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter,

portfolio manager, investment advisor and such intermediary which may be associated with the securities market. Section 29 confers authority on

the Central Government by notification to make rules for carrying out the purposes of this Act and particular reference to the matters in respect of

which rules can be framed have been referred to in section 29(2). Section 30 empowers the Board to make regulations consistent with the Act and

the rules made thereunder to carry out the purposes of this Act. Apart from the generality of the provisions enabling the Board to make regulations,

sub-section (2) of section 30 also enumerates certain specified areas in respect of which regulations may be framed by the Board. Section 31

requires every rule or every regulation made under the Act to be laid before each House of Parliament while it is in session for a period of 30 days

which may be comprised in one session or in two in such successive sessions and if before the expiry of the session immediately following the

session or the successive session, as the case may be, both Houses agree in making modification in the rule or regulation or both Houses agree that

the rule or regulation should not be made the rule or regulation shall thereafter have effect only in such modified form or be of no effect as the case

may be. Section 32 makes it specific that the provisions of this Act shall be in addition to and not in derogation of any provision of another law for

the time being in force. Apart from this aforesaid Chapter VIA of the Act specifically provides for penalties and adjudication for contraventions of

certain provisions of the Act, Rules or Regulations and section 24 declares contravention of the Act Rules and Regulations as an offence

punishable with imprisonment and fine. It is in the scheme of these provisions it has to be examined whether there exists authority of law for

depriving a person like the petitioners of their right to recover the amount which has crystallised into actionable claim as the result of completion of

transactions of securities, whether by actual execution of contract through delivery of securities or by act of stock exchange in settling the

transactions by inviting auction or closing out the transactions, under any provision of the Act, Rules or Regulations.

184. The argument in the broadest sense is that section 11 which casts a duty on the Board to achieve the objectives and purposes of the Act and

for that purpose empowers the Board to adopt and take such measures as it thinks fit embraces within its fold in appropriate cases to forfeit the

profit which it considers are the result of a manipulated market, particularly in respect of those persons about whom it is satisfied that they are

responsible for such manipulation, and the contention at its narrower point is two fold that in regulation 12, there has been specific empowerment

of depriving a person of his profits arising out of such manipulated market and even if it is not covered by regulation 12, such power is to be read in

provision of section 11B which empowers the Board to issue such directions as may be appropriate in the interest of the investors in securities and

the securities market to any person which includes any person associated with the securities market Where the Board is satisfied after making or

causing to be made an enquiry about the necessity of issuing such directions. In this context, it has also been urged that the Regulations framed u/s

30 are a specie of subordinate legislation and have binding force as statute after the same are laid before Parliament and have not been modified or

disapproved by the Parliament and if modified by Parliament in its modified form.

185. It is the contention of none of the parties that there is any specific provision whether under the Act, Rules or the Regulations for making of the

order for impounding monies by the Board like the one which has been made in the present case. Thus, in view of the requirement of specific

authority of law as laid in Wazir Chand Vs. The State of Himachal Pradesh, , and reaffirmed in later decisions, the issue would have ended here.

However, it was urged that this authority of law for depriving a person transacting on the stock exchange of its profit for given case must be

inferred from these provisions, by necessary intendment. Is it so ?

186. Section 11(1) envisages a duty on the Board, on the one hand, to fulfil the objective for which the Act has been enacted and the authority, on

the other hand, to take such measures which it deems necessary for the purposes of achieving such objectives. The authority of the Securities and

Exchange Board of India u/s 11 thus is to take measures.

187. What is meant by measure ? According to the Oxford England Dictionary word ""measure"" means ""A plan or course of action intended to

attain some object"". This, in the context of the provision in question which casts a duty on the Board to achieve certain objectives and also confers

authority to act in furtherance of achieving the intended objectives is the most appropriate meaning that could be assigned to word ""measure"". In

Corpus Juris Secundum the word ""measure"" has been assigned the meaning as anything devised or done with a view to accomplishment of a

purpose, a plan or course of action proposed or adopted by a Government.

188. In the context, the enabling provision empowering the Securities and Exchange Board of India to take measures can only mean that it has

authority to devise or adopt an action plan to achieve its objectives. Devising or adopting an action plan obviously has to precede before

subsequent acts are required to conform to such action plan devised.

189. Thus construed, the ambit of authority of the Board u/s 11 is to make a plan or adopt a course of action for regulating securities market or

safeguard interests of investors in securities. The action plan of the Board to achieve the objectives may be in the form of executive instructions, it

may be by way of subordinate legislation or in the form of directions or order which the Board is otherwise specifically authorised to make under

various provisions of the Act or Rules framed thereunder or even if authorised by any other law for the time being in force as envisaged u/s 32 of

the Act. However, before action in terms thereof is taken in order to be a touchstone to which any actions of persons to be dealt with by the

Board are to be tested and action of the Board to deal with such persons can be tested, such plan or course of action which the Board may adopt

to achieve its object, shall obviously have to be delineated. Such plan of action or measure envisaged, may be in the form of a legislative act or

direction which may be issued on arising of such a situation having relation to the objectives of the statute. Obviously, in the former case, if a plan

or course of action has been charted which can be said to have force of law, it must satisfy the test of being a valid law enforceable. In the latter

case, where action is guided subsequent to the happening of the event to deal with a situation arising from such happening to be collated to the plan

adopted by the Board, as a remedial act to repair the breach, or to create a situation conducive to the plan. The former falls in the sphere of

adopting legislative measure for achieving the objectives of the statute and the latter falls in the sphere of administrative actions to achieve the

purposes of the Act. If the latter action results in depriving a person of his property, unless it is backed by proper legislative sanction, the action

would fall. In the former case, adoption of legislative measure by the Board, if it is empowered to legislate on the subject, will not fall for want of

authority to legislate.

190. This is so because apart from the generality of the provisions, there is a specific provision empowering the Board to take appropriate

measures for prohibiting fraudulent and unfair trade practices relating to securities market. Such specific empowerment would include power to

take legislative measures, where necessary, providing for ancillary matters for achieving that object. This indicates that no prohibition by itself is

envisaged u/s 11 of any activity. Prohibition to indulge in fraudulent transaction or unfair trade practice will result from taking some action imposing

prohibition of such acts. The consequence of breach of prohibition will naturally follow the measure of dictates of prohibition. Thus, neither

prohibition, in respect of certain sphere for which measures can be taken, nor power to visit with intended consequence of breach of prohibition

could be inferred by necessary intendment u/s 11 de hors the actual measure taken or action plan laid for achieving the specific object u/s 11(2)(e).

191. Reference may usefully be made to the meaning assigned to the word ""measure"" in Words and Phrases legally defined, second edition, which

says,

measures means legislative measure intended to receive the royal assent and have effect as an Act of Parliament in accordance with the provisions

of the Act (Church of England Assembly Powers Act, 1919)"".

192. In this connection, it may also be noticed that the Church of England Assembly Powers Act, 1919, empowered the National Assembly of the

Church of England to take measures concerning the Church of England. The measure passed by the National Assembly of the Church of England

by itself was nor a statute, but if such a measure was laid before Parliament and presented to the Queen in pursuance of the resolution of each

House of Parliament, it had the force and effect of an Act of Parliament. It was also the case that Parliament had no power to amend such measure

passed by the National Assembly of the Church. This distinction was clearly made in Halsbury''s Laws of England, fourth edition, 44th volume in

para. 802 where it said that a general synod measure is not a statute. However, if such a measure is laid before Parliament and is then presented to

the Queen in pursuance of the resolution of each House of Parliament, it has the force of law. It has the force and effect of an Act of a royal assent

being given to it.

193. In 34th Volume, para. 1226, of Halsbury''s Laws of England stated the proposition about power of General Synod of the Church of England

to take measures as under :

1226. General Synod Measures. - The General Synod of the Church of England may frame and pass legislative proposals, termed measures,

concerning the church of England. A measure agreed to by the General Synod is submitted by its legislative committee to the Ecclesiastical

Committee of members of both houses whose duty it is to report to Parliament upon the nature and legal effect and expediency of the measure.

The report and the text of the measure are laid before Parliament, and a resolution is submitted to each house directing that the measure, in the

form laid before Parliament, be presented to Her Majesty. When this resolution has been passed by each house and the royal assent signified, the

measure has the force and effect of an Act of Parliament. Parliament has thus no power to amend a measure, but either house, by declining to

agree to the resolution, is able to effect its rejection.

194. Reference in this context may be made to Attorney-General v. Wilts United Dairies Ltd. [1922] 127 LT 822. It was a case where the Food

Controller, during the war period, was empowered by the Defence of the Realm Regulations to make regulations or give directions with respect to

the production, manufacture, treatment, use, consumption, distribution, supply, sale or purchase or other dealing in any article as appears to him to

be necessary or expedient. Finding there was disparity in prices of milk in different areas, in order to equalise these prices, the defendant company

was permitted to purchase milk within certain areas on the condition of paying two pence per gallon to the Controller for this privilege. The

company refused to pay, on the ground that in the purported exercise of power to regulate and issue orders for achieving the object as appears to

the Controller to be necessary or expedient did not include the power to impose such burden. Agreeing with the plea of the Food Controller that

the measure was adopted upon the extreme difficulty of the situation in which the country found itself owing to the war and the importance of

securing and maintaining vital supplies essential for life, Lord Buckmater, while hearing the appeal by the Attorney-General, in the House of Lords,

dismissed the appeal by holding that the statute has confined the duties of the Food Controller to regulating the supply and consumption of food

and taking the necessary steps for maintaining proper supplies and observed :

The powers so given are no doubt very extensive and very drastic but they do not include the power of levying upon any man payment of money;

which the Food Controller must receive as part of a national fund can only apply under proper sanction for national purposes. However, the

character of this payment may be clothed ..... the result is that the money so raised can only be described as a tax the levying of which can never

be imposed upon subjects of this country by anything except plain and direct statutory means.

195. Lord Wrenbury, expressed the same view in slightly different language when he opined :

The Crown, in my opinion, cannot here succeed except by maintaining the proposition that where statutory authority has been given to the

executive to make regulations controlling acts to be done by His Majesty''s subjects or some of them, the Minister may without express authority

so to do demand and receive money as the price of exercising power of control in a particular way, such money to be applied to some public

purpose to be determined by the executive.

196. Thus, it is apparent that the House of Lords did not agree with the contention of the Attorney General, that wide executive power to regulate

and make any order it deems appropriate and expedient to achieve the objective includes the authority to burden the subject with monetary liability

without express provision of statute to that effect. The fact that the action has nexus to achieve the objective for which authority is conferred on the

Board, does not absolve the requirement of an express statutory authority in that regard, when it comes to deprive a person of his property. The

view found its approval in A. Venkata Subba Rao Vs. State of Andhra Pradesh, .

197. Here, we may notice one of the contentions of learned counsel for the Securities and Exchange Board of India was that no element of

punishment is involved in the directions of the Board. The direction only deprived the petitioner of windfall profit arising out of manipulated market

and is not a measure of penalty. The plea is also raised to support the contention that for this reason no hearing was required to be given.

198. If the order has direct nexus with any act of the petitioner to visit him with its consequences, it will undoubtedly be a penalty requiring specific

provision of law providing for forfeiture or confiscation as noticed in the case of Wazir Chand Vs. The State of Himachal Pradesh, , Bishambhar

Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, .

199. If the order is not punitive in character or does not amount to penalty, then there does not remain any basis at all for raising such demand,

except to treat it as tax.

200. In A. Venkata Subba Rao Vs. State of Andhra Pradesh, , under orders issued by the Andhra Pradesh State Government in exercise of its

powers u/s 3 of the Essential Supplies (Treasury Powers) Act, 1946, paddy and rice was to be procured by Government agents and distributed to

authorised persons. Procuring agents were getting the difference between the purchase price and the sale price. The Government enhanced the sale

price which resulted in excess profit to the procuring agents. The Government laid claim to the excess profit, treating it to be a windfall to procuring

agents to which they were not entitled. There was no breach of any provision of the order on their part. The court held that if the principle of

relationship of principal and agent is accepted then the procuring agents were entitled to retain the difference as their remuneration. If the theory of

principal and agent was discarded, as suggested by the Andhra Pradesh Government (sic). Ayyangar, J., speaking for majority, said (page 1790) :

Besides if there is no legal basis for these demands by the Government, we consider that it is not possible to characterise them as anything else

than as taxes. They were imposed compulsorily by the executive and are sought to be collected by the State by the exercise inter alia of coercive

statutory powers, though these latter are vested in Government for very different purposes.

201. The ratio of the aforesaid decision comprehensively repels the contention of the Board to justify the order by treating it as not a measure of

penalty, as falling under the authority of section 11 read with section 11B of the Act.

202. From the tenor of the orders and pleadings, it is apparent that the primary object of the orders in the present case is to reach the funds

generated as a result of close up/auction transaction by carrying them to the investors'' protection fund. On specific query it was stated that as on

that day no such fund has been created or is existing which is administered by the Securities and Exchange Board of India. That is to say the action

of the Board was clearly directed to the object of getting funds for the purpose of establishing a fund for the protection of investors'' interest, which

is one of the objects for it to fulfil. It betrays that the action was not collated as ancillary to regulating the stock market but primarily to get funds for

its activity. That is in the nature of raising money. This amounts to levy of fees or tax. The Act does not authorise levy of fees on tax, for any

purpose. The delegation of authority under the parent statute does not get such power by necessary intendment, which is not even authorised by

the parent statute.

203. It is to be seen that in its order dated July 5, 1996, in Special Civil Application No. 2224 of 1996, the Board has ordered to impound the

proceeds with the stock exchange by directing that the auction proceeds and close out proceeds which have been withheld by the stock exchange,

to the extent they represent difference between auction price/close out price and standard price be not given to offerers/buyers and should be

impounded. The exchange was directed to credit the monies impounded to its investor protection fund. In Special Civil Application No. 5483 of

1996, the Board in its order dated January 25, 1996, has ordered simpliciter to transfer the monies collected in adherence to its earlier order dated

October 30, 1995, to the investor protection fund of the concerned stock exchange.

204. Impounding has a definite meaning in legal parlance. Literally translated ""impound"" means, as per Oxford Dictionary, ""to take legal possession

of or confiscates Confiscate connotes appropriation to public treasury as penalty or to adjudge to be forfeited to state. Impounding as per Black''s

Law Dictionary means to seize and take into custody of law or court. The character of order impounding, therefore, cannot but be penal in

character resulting in forfeiture of holder of property. Forfeiture, as per enunciation by the Supreme Court in R.S. Joshi, Sales Tax Officer, Gujarat

and Others Vs. Ajit Mills Limited and Another, is penalty for non-compliance of statutory provisions. Such consequence could follow only in

pursuance of specific provision.

205. Transfer to investors'' fund simpliciter, without assigning it any character, will amount to expropriation by the Board of somebody''s property

for its own use. That obviously can be termed only as tax on profits which also needs specific authority of law for its levy and collection and cannot

be left to inferences.

206. In this light if we examine the scheme of the Act in question, it is to be found that section 11 empowers, the Board to take such measures as it

may deem fit to achieve the objective for fulfilment of which duty has been cast on it. The measures may be of legislative character as well as of

administrative character. Sub-section (2)(e) specifically authorises the Board to take measures for prohibiting fraudulent and unfair trade practices.

This provision unfolds the scheme that the Board can make a plan or provide for such prohibition. This necessarily implies that the Board while

prohibiting may have to define what are fraudulent and unfair trade practices vis-a-vis any security market. As an ancillary measure it may also

provide for consequences of indulging in practices prohibited. It may be noticed that the Act itself has not provided for any such prohibition of

fraudulent or unfair trade protection, nor has defined the same, but has left such measures to be taken by the Board. Hence, some positive act by

the Board providing for prohibition of such practices must precede before any action could be taken against any person for alleged crossing the

prohibition lines. Only on breach of such prohibition by such person the question would arise for determining whether the act of that person is in

breach of such prohibitory measure and for taking a decision on what consequences to be visited on the defaulter. Since prohibition itself is not

part of the main provision. Ancillary authority conferring power to deprive a person of any property on acting against prohibitory measure, which is

ancillary to the main power cannot be inherently inferred in the enabling provision. Such provision can only follow the prescription of prohibiting

measure. Obviously, measure here refers to legislative measure in the sphere covered by section 11(2)(e).

207. For the purposes of adopting measures of legislative character, the Board has been conferred with power to frame Regulations u/s 30 which

in order to be effective, have to be placed before each House of Parliament during its session for a period of 30 days. Parliament has necessary

power to modify or decline to agree with the same. In case Parliament decides to modify the Regulations in their entirety or a part of them, the

Regulations become effective in their modified form. If Parliament declines to pass them, they cease to have any effect, but if Parliament does not

interfere in either way, the regulations continue to have force of law and are binding as statute as per the provision of main Act. But unless the same

are placed before Parliament and continue to remain before Parliament for the requisite period only then they acquire the force of law in case no

rejection has taken place during that period, whether in the same form or modified form as the case may.

208. This view has been taken by this court in Karnavati Fincap Ltd. v. SEBI [1996] 2 GLH 241.

209. At best it can be said that section 11 by itself does not confer authority of depriving a person of his property merely by issuing administrative

instructions, but it authorises the Board to frame necessary regulations in the manner prescribed under the Act, which may have the force of law,

furnishing necessary authority for the purpose. But unless that is done, the Board cannot have recourse to issue administrative instructions nor in its

capacity as a quasi judicial authority holding an enquiry, make an order depriving a person of his property which it thinks has not been obtained

through fair practice. Deprivation of property through administrative action or adjudicating order must conform to existing law on the touch stone of

which alone such action can be sustained.

210. It was also contended by Mr. Shelat learned counsel for the respondent Board that the fact that the Board is authorised to frame regulations,

does not oblige the Board to frame regulations. It is a mere enabling provision. It can take appropriate measures even without framing regulations,

which it is empowered to take under the Act and that by framing certain regulations, ambit of its power generally to take measures to fulfil its

objectives is not exhausted. Hence, even if the impugned orders do not fall within the Regulations of 1995, the same do not become beyond its

authority to take measures u/s 11. As already discussed the power to take measures can be considered akin to executive power of State to do and

act in all the fields to which legislative power of the State or Union, as the case may be extends.

211. In such cases, the executive authority extends to the entire field not covered by statutory provisions. However, that is subject to one

inhibition. If doing of certain act or exercise of certain power in a particular field is required by constitutional provision to be sanctioned by

legislative process, the exercise of authority in that field can only be subject to existence of such legislative sanction and cannot be traced to its

wide powers to act in the entire field of State authority left uncovered by legislative enactments. Hence, the contentions of Mr. Shelat cannot be

accepted in abstract, where the question is in the context of deprivation of property of a person, which under the Constitution can only be

sustained if authorised by law, law in the context means positive statutory law. Therefore unless the power to make any order or issue direction

which results in depriving a person of his property, is traceable to some specific provision of law, the same cannot be upheld.

212. It may further be pertinent to notice if conferment of such enabling powers to take appropriate measure on an authority entrusted with the

duty to achieve the objective in respect of which law could be framed by itself were to satisfy the requirement of authority of law needed under

article 31 or now under article 300A, executive power on the Union of India or the State as, the case may be, co-existing and co-extensive with

the legislative power of Parliament and the State Legislature envisaged under articles 73 and 162 respectively would not have fallen short of the

authority of law required under article 31 or for that matter under article 300A enabling the State to deprive a person of his property for want of

appropriate law having been brought into existence by legislative process, as per principles enunciated by their Lordships of the Supreme Court in

State of M. P. v. Thakur Bharat Singh, AIR 1967 SC 1170 and Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and

Others, referred to above.

213. Therefore, where power has been conferred on the Board to adopt such plan or course of action, it can also be said to have been conferred

with necessary authority as a subordinate Legislature to frame regulations for specific purpose apart from the generality of the provisions, unless

such law has been framed either by the parent law-making agency or by the subordinate authority in accordance with the provision of statute under

which power has been conferred. Section 11 of the Act by itself falls short of the authority of law needed for sustaining the orders unless it can be

sustained under some other provisions.

214. Mr. Shelat placed reliance on The Adoni Cotton Mills Ltd. and Others Vs. The Andhra Pradesh State Electricity Board and Others, , for the

proposition that power to take measures includes power to enforce breach of measures. The framing of regulations for such measures as desired to

be taken by the Board is not a necessary requirement for action taken to enforce the breach of measures adopted by the Board. The issue had

arisen in connection with the power of the Electricity Board to ration the supply of electricity. The action of the Board in fixing higher rates for

consumption of excess of ration quota consumed by a consumer was challenged. The Supreme Court was called upon to decide the issue in the

context of the contention that the Board had no power u/s 49 of the Act of 1948 either to impose rationing and introduce the different categories of

rationing without framing regulations. It was in that context, the court had observed that the recognition of the fact that the Board can introduce

rationing amounts to a concession that the Board has power to enforce rationing and to enunciate the principles for determining the scheme of such

rationing, and the source of power to introduce rationing flew from the Act itself. For exercise of that power framing of regulations was not

necessary. It may be noticed that when power of rationing was given under the statute and power to frame regulations was also given, the question

was whether the incidental power could be exercised only by framing a regulation. The court negatived this contention and held that it is manifest

that if the power existed it must be exercised according to valid principles consistent with the provisions of the Act and the language of section 49

of the Act showed that the power was exercised without making any regulation. As discussed above, the question was not about absence of

power but the manner of exercise of power according to the provisions of the Act. Prescribing a higher rate for consumption of excess quota on

introduction of rationing, was considered to be part of the existing power. Power to impose rationing was an executive policy decision of law to

distribute existing supply equitably and prescribing price of supply of electric supply. It was a case of recovery of a particular price in exchange for

the commodity supplied. In a given case on certain conditions existing higher or lower rates may be charged for supply of commodity. The

objective behind prescribing higher rates was to enforce that the order of rationing is properly complied with by the consumers. The decision

neither enunciates a principle that an act can be permitted in the name of enforcement of the objective of the Act itself, without there being any

authority, for taking such action within the Act. Secondly, it inhibited that the power should be exercised on valid principles which are otherwise

applicable. That is to say a power could be exercised to enforce the rationing only within the limits prescribed by the act or other constitutional

limits. It was not a case at all referable to exercise of authority which resulted in depriving a person of his property which under the constitutional

scheme requires an authority of law specific in character. On the contrary, the decision supports the view that if regulations in pursuance of that

power have been framed in a particular field, then the Board must act only in accordance with regulations, The court said (page 2420) :

If regulations were made, such regulations would have to be in conformity with section 49(4) of the 1948 Act and in the exercise of its power the

Board would have to abide by regulations.

215. That is to say on the formation of the regulations in the field, it could not fall back on its untrammeled power.

216. For the reasons aforesaid, I am of the opinion that the decision relied on by the learned counsel in this context in The Adoni Cotton Mills Ltd.

and Others Vs. The Andhra Pradesh State Electricity Board and Others, ; Ahmedabad Kelavani Trust v. State of Gujarat 19 (1) GLR 671 and

AIR 1971 Guj 62 (sic) do not carry further the contention of learned counsel.

217. Section 11B to which reference has been made, closely read, indicates that it is in the nature of issuing a command to persons referred to in

the provision, if as a result of an enquiry, the Board is satisfied about the necessity of issuing such direction for the twin purpose, viz., if the same is

considered to be in the interest of investors in the securities and the orderly development of the securities market. Obviously, it is not a power in

the nature of adjudication by way of imposing penalty or bringing about civil consequences to an affected party as a result of adverse finding in an

enquiry in particular, but for commanding a person to do a certain act or to forbear from doing such an act, such commands for the purposes of

furthering the interest of investors in the securities in general or furthering the interest of the orderly development of the securities market or for

preventing the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the investors in the

securities market or to secure a proper management of such intermediary or persons. As such, section 11B does not envisage the adjudication and

making an order adverse to a person having a causal connection between the finding recorded against that person and consequence to be visited

upon that person. For that, under the scheme of the statute, separate provisions have been made for imposing penalties and visiting the concerned

person with punishment of imprisonment and fine by making such an act as an offence punishable with imprisonment and fine after appropriate trial.

218. Chapter VI-A provides for penalties and adjudication. Section 24 makes contravention or attempt to contravene or abatement to contravene

the provisions of the Act or any rules or regulations made thereunder as an offence punishable with imprisonment for a term which may extend to

one year or with fine or both, which are to be tried by ordinary courts not inferior to the Metropolitan Magistrate or Judicial Magistrate, 1st Class

and cognisance of which is not taken except on the complaint made by the Board u/s 26. Thus, while action against the person involved in

contravention of the regulations, rules or provisions of the Act, is to be dealt with separately under the provisions of authorising levy of penalty or

imposing punishment, direction of such a nature which has a direct nexus and causal connection between the act of the person alleged to be in

contravention of the Act, Rules or Regulations made thereunder vis-a-vis his connection with any such act cannot be part of the scheme of issuing

direction u/s 11B of the Act.

219. Learned counsel for the respondents laid emphasis on the observation of Krishna lyer, J. in R.S. Joshi, Sales Tax Officer, Gujarat and Others

Vs. Ajit Mills Limited and Another, :

In a developing country, there is sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to

an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in

incidentality.

220. It may be noticed that it was a case where forfeiture of the tax recovered by a dealer which was not leviable was provided in the statute. The

question was about the vires of the statute on the ground of it being beyond the scope of legislative power under entry 54 of II List of the Seventh

Schedule of the Constitution. The court construed the provision of ""forfeiture"" to be penalty and not a civil liability to pay tax. When forfeiture was

treated as a penalty for committing breach of a taxing statute, such provisions for penalty were held to be within the scope of power to levy and

collect tax on the principle that power to legislate for levy and collect tax include power to make all incidental and ancillary provision to make the

levy effective. It was not a case where the order of forfeiture was made by the taxing authorities without any specific provision but was supported

on the anvil of substantive power to tax itself to include power to do all acts which are incidental and ancillary for levy and collection of tax.

221. The context in which the power to issue direction has been conferred on the Board u/s 11B to any person or class of persons referred to in

section 12 or persons associated with the securities market or to any company in respect of matters specified in section 11A further goes to show

that while section 11 authorises, empowers and enables the Board to lay down whether an action plan is to be adopted for the various purposes

whether in the form of guidelines by way of executive instructions or regulations by way of legislative measures by itself or by incorporating such

measures in rules through the Central Government in exercise of its power to frame rules, section 11B empowers the Board to issue such

guidelines for the purposes of regulating conduct of the persons named in section 11B with reference to its satisfactions about the matters referred

to therein, on the basis of an enquiry which has been conducted by itself or which it has caused to be conducted. In other words, it can be said that

while section 11 operates in the field of laying down general regulatory measures as a matter of policy, section 11B operates in the field of

prescribing a specified code of conduct in relation to specified persons or classes of persons referred to in section 11 or associated with the

securities market or to any company in respect of matters specified in section 11A as the case may be referable to its finding in enquiry. That is to

say it can direct such persons to do or not to do certain acts in a particular manner. But certainly power to impose penalties or punishments as a

result of such enquiry without there being any specification of the nature of penalties or punishments that can be visited cannot be inferred.

222. In this connection, it would be also relevant to notice that section 11B is not couched in a normal manner of conferring adjudicatory power of

finding a person guilty or adjudicating upon the rights of a person and making consequential orders as a result of such adjudication on the person

concerned de hors the provision governing such impositions of penalties or bringing out certain consequences specified by law. The very fact that

directions could be issued not only to persons but also to classes of persons and with respect to specified matters in respect of the company rules

out the directions of the nature of imposing penalty or a power to forfeit any amounts. The term used is not to make orders in respect of persons

found guilty of a breach of regulation, rule or law which is well known terminology in the field of prescribing consequences to be visited in case of

breach of law. But the term used is ""issue such directions"". The functional object of issuing directions is to issue guidance for the purpose of actions

to be taken by the persons to whom directions are made or forbearance for doing certain acts to whom such directions are aimed.

223. The term ""directions"" denotes issuance of instructions to be followed by the persons who are subjected to such direction. The New Shorter

Oxford Dictionary gives the meaning of direction, as (i) action or function of directing, guiding, instruction, management; (11) instruction of what to

do, how to proceed or where to go.

224. The Oxford English Dictionary Vol. III also defines expression ""direction"" as guidance, conduct; of instruction how to proceed or act right

authoritative guidance, instruction.

225. In Black''s Law Dictionary, the meaning assigned to word ""direction"" is as that which is imposed by directing; a guiding or authoritative

instruction order or command.

226. In view of the above, it cannot be said that section 11 by itself or section 11B by itself or both read together furnish specific authority of law

needed before a person could be deprived of his right to recover the sale price of scrips sold by him which has been recovered by and reached the

stock exchange, in terms of article 300A, though it can be said that by adopting the legislative method which may result in coming into force of a

regulation or force of law, such a measure may be supportable by the Securities and Exchange Board of India on the anvil of its power to take

measures for achieving the objects stated in section 11 if the same can be treated as ancillary and incidental to achieve the main objective and are

otherwise within other constitutional limits.

227. The next question that arises it whether the Regulations of 1995 of the SEBI provide for such ancillary measure. It has been pointed out by

learned counsel for the respondent that regulations 11 and 12 read together confer such specific authority of depriving the person of the

consideration of the completed transactions. For ready reference regulations 11 and 12 are quoted below :

Power of the Board to issue directions. - The Board may after consideration of the report referred to in regulation 10, and after giving a

reasonable opportunity of hearing to the person concerned, issue directions for ensuring due compliance with the provisions of the Act, Rules and

Regulations made thereunder, for the purposes specified in regulation 12.

Purpose of directions. - The purposes for which directions under regulation 11 may be issued are the following, namely :-

(a) directing the person concerned not to deal in securities in any particular manner;

(b) requiring the person concerned to call upon any of its officers, other employees or representatives to refrain from dealing in securities in any

particular manner;

(c) prohibiting the person concerned from disposing of any of the securities acquired in contravention of these regulations;

(d) directing a person concerned to dispose of any such securities acquired in contravention of these regulations, in such manner as the Board may

deem fit, for restoring the status quo ante.

228. For the present purposes, it is to be examined whether authority to make an order of the nature with which we are concerned can be spelt

out. Regulation 11 empowers the Board to issue directions for ensuring due compliance with the Act, Rules and Regulations made thereunder. It

further inhibits the ambit and scope of directions which could be issued in exercise of power in regulation 11 by prescribing that such directions can

be issued for the purpose specified in regulation 12. If the word, "purposes" to be used in its ordinary sense as the object for which directives can

be issued, then, the only object discernible from the entire reading of regulation 12 is for restoring the status quo ante; because the rest of the entire

provision reflects the nature of directions that can be issued to any person who is concerned with compliance with any provisions of the Act, Rules

or Regulations as a result of a finding in the enquiry. The Regulations thus directly deal with the person, who is found to be concerned with non-

compliance with the Act, Rules or Regulations to be dealt with by the Board for the purposes of ensuring due compliance with the provisions of the

Act, Rules and Regulations as a result of enquiry and to whom specific type of directions can be issued for the purposes of securing the

compliance. One way of reading regulation 12 is to read for restoring the status quo ante with each of the clauses as a purpose for which direction

can be issued. Another way of reading the provision is to limit the condition of issuing directions for the purpose of restoring status quo ante only to

sub-clause (d) and other sub-clauses of regulation 12 to operate independently. We shall examine from both the points of view.

229. At the first instance, it was urged that clause (a) of regulation 12 empowers issuing of direction to a person not to deal in securities in any

particular manner which may include power not to deal in securities above a particular price and, therefore, it must be deemed that when the

petitioner was paid a part of the consideration received by the stock exchange it was a direction to the petitioner not to sell his securities above that

price. As a corollary of this argument, it was further contended that if the contention to this extent is acceptable then what happened to the excess

price received by the stock exchange is no concern of the petitioner and, therefore, the issue of direction to pay the petitioner a part of the price

received by the stock exchange should be deemed to be governed by clause (a) and rest of it, namely, impounding of the excess price received by

the stock exchange to be invested in the investors protection fund is nobody"s concern least of all, of the petitioner.

230. In the background of facts noticed above, this contention, in my opinion is not well founded.

231. Firstly, clause (a) read in isolation independent of the purpose of restoring status quo ante only refers to issuing directions in respect of dealing

in securities subsequent to the issuance of directions and not before. Here, we are concerned with a case of making an order in respect of a

transaction that has been completed even before any directives of the Board were received by the stock exchange, in respect of the dealings in

securities. More particularly, about the transactions of inviting shares to be offered at auction. Therefore, the directions that could be issued under

clause (a) cannot be relatable to transactions already completed.

232. Secondly, clause (a) only provides issuing general prohibitory directions in respect of dealing in securities by a person concerned. Directions

to deal in a particular security in any particular manner is not envisaged under clause (a) as will be apparent from the provisions of clause (c) and

clause (d) which deal with issuing directions in respect of specific securities, namely securities acquired in contravention of the Regulations.

233. Moreover, even assuming that clause (a) permits a person to be directed to offer his securities in the stock market at a particular rate, then,

too it can relate only to carrying out such transaction of securities at that rate, it cannot take within its fold directions to complete the transactions in

accordance with the stock exchange regulation at existing market rate or market situation and then to direct the person entitled to such amount to

be paid a part of the amount only and impound the balance. The very fact that the balance price is to be impounded inheres in it that the transaction

as carried out stands valid requiring the passing of the stipulated consideration in accordance with the transaction and stock exchange regulations.

Once that stage has reached the seller becomes entitled to the sale proceeds and thereafter directing him to take part of the consideration and

retaining part of it by the Board defies the logic of contention of the respondents that it is the manner in which the person concerned has been

directed to deal in securities as it would directly amount to selling of the scrips at price ""A"" and then split it between the seller and the Board;

whether by way of imposing penalty on the seller or sharing the proceeds earned by him. In either way, such a direction cannot be a direction for

the concern to deal in securities in any particular manner, but is a clear case of sharing consideration or profit. Therefore, the contention that clause

(a) spells the authority of law for issuing the directions of the nature with which we are concerned cannot be accepted.

234. It was strenuously urged that at any rate it is governed by clause (d) which authorises the Board to direct the person concerned to dispose of

any such securities acquired in contravention of these regulations in such manner as the Board may deem fit. This provision in its clear terms applies

only to the securities acquired in contravention of the regulations. In respect of securities acquired by a person concerned, he can be directed to

dispose of it in a manner so as to restore status quo ante. The directives envisaged under clause (d) cannot go beyond these two limits. This also

clearly envisages that the preconditions of this are as a result of contravention of any provisions of the Act, Rules or Regulations the person

concerned has acquired some securities.

235. The person concerned only in that event can be directed to dispose of those securities in a particular manner, and that manner of disposal

under the directions of the Board must be aimed at restoring status quo ante in respect of those securities. Obviously, when the acquisition of

securities and its disposal of such securities as per the directions to restore status quo is the basic requirement of clause (d), one cannot accept the

contention of Mr. Raval that the securities here must mean to include proceeds of securities. Securities have been defined to mean under clause

2(1)(b) as securities defined u/s 2 of the Securities (Contracts) Regulation Act, 1956. u/s 2 of the Securities (Contracts) Regulation Act, 1956,

securities has been defined to include shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in

or of any incorporated company or other body corporate, Government securities and such other organizations as may be declared by the Central

Government to be securities and rights or interest in securities. Therefore, it is not possible to accept the contention of learned counsel for the

respondents that authority to issue directions to the person concerned to deal in securities acquired by contravention of the regulations can be

referable to proceeds of securities. It may be noticed, that rights or interests in securities are to be included in the definition of securities. Once the

securities are sold and proceeds are recovered, the recipient becomes the acquirer of proceeds and he loses all rights, interest in the securities

which have been sold by him and delivered to the parties. The rights or interests in such securities vests in the transferee and not in the transferor

whose only right or interest that survives as a result of sale transaction is to receive the consideration and not the securities.

236. Moreover, the regulation envisages directions to ""deal in"" the securities concerned. The term ""deal in"" indicates a commodity that may be

subject to dealing in stock exchange in the context of the whole scheme. It cannot be said that the proceeds of the scrips is a commodity which can

be dealt with by a person as security on the stock exchange. Therefore, on the plain reading of the provision and also in the context of the facts and

controversies raised before me, it is not possible to accede to the contention of the learned counsel for the respondents that under clause (d) the

Board could issue directives in respect of consideration of securities arising out of a completed transaction, by treating the proceeds of a

completed transaction as ""security"" for the purpose of clause (d).

237. Assuming for the sake of argument even if the sale proceeds could be dealt with under clause (d) the same can only be for the purpose of

restoring status quo ante and not for the purposes of visiting the contravener with a penalty by forfeiting his rights in such proceeds the right to

which has vested in him. Such direction cannot be considered to be a direction to deal with proceeds by the person concerned but amounts to

exaction of money by the Board. A direction to deal with envisages something to be done by the person concerned with the subject of the

direction to bring status quo ante but cannot be an authority to exact money for itself. That is not a dealing with proceeds by the person concerned.

238. I need not dwell much on clause (b) or (c) of regulation 12 inasmuch as neither it is the case of any of learned counsel for the respondents nor

it can be that the impugned directions could be covered under clause (b) and clause (c). Clause (b) is applicable to the officers or other employees

or representatives of the person concerned in clause (a) about whom a person concerned may be required to issue directions to them to refrain

from dealing in securities in any particular manner and clause (c) relates to prohibiting the person concerned from disposing of any of the securities

acquired in contravention of these regulations at all. Obviously, the two provisions have nothing to do with the authority of the Board in issuing

directions to impound the sale proceeds of a completed transaction.

239. In this connection, it may also be pertinent to notice regulation 13 which provides for penal consequences in the case of breach of regulations.

It specifically provides that in the circumstances, specified under regulation 11 the Board without prejudice to its power under regulation 12 may

initiate action for suspension or cancellation of registration of an intermediary holding a certificate of registration u/s 12 of the Act. If the power to

impose penalty was generally included which is ancillary or incidental to the attainment of the main objective, it would not have necessitated specific

provision for suspending or cancelling the registration of the intermediary.

240. It may, also be noticed that if the condition for restoring the status quo ante is applicable to all the clauses (a), (b), (c) and (d) without

determining the issue, in that event the only directives in any case which can be issued must have relation to restoration of status quo ante. In a

power to issue directives to restore status quo ante there cannot be any room for forfeiture of the amounts received by the stock exchange to be

utilised at the behest of the Board as that cannot be a directive for restoring status quo ante. That can only be in the nature of curtailing the right of

some-one. If as a result of directions certain transactions can be cancelled or held to be void, the consideration recoverable under the directives

would be nil and there will be nothing left for the Board to impound. If the transactions are directed to be completed at a particular price, then the

transaction would be completed at that price crystallizing the rights of the two parties at which the transfer of shares had taken place and there will

be no occasion for recovery of additional consideration which could be available for impounding. The question can only arise in a case of

completed transaction and proceeds have reached some one''s hands. Thereafter, if the impounding of any sum is to be made, in the event such

impounding would be of the property of the person concerned who is entitled to such consideration. It would assume the character of penalty, if

not a tax on profit therefore, in no circumstances, the authority to impound in full or part of consideration received under a completed transaction

which cannot but be by way of penalty by forfeiture or exaction of profits is authorised under any of the regulations referred to by the respondents.

241. Considering the act of impounding as a causal consequence of any breach of regulation the question may be viewed from yet another angle.

242. The statute itself has provided for penalties and punishments, for committing breach of the regulations. Section 24 makes contraventions or

attempts to contravene the provisions of the Act, Rules or Regulations as offences punishable with imprisonment and with fine and as provided

under Chapter IV-A penalties for various contraventions of the Act, Rules or Regulations. This makes it abundantly clear that so far as the exercise

of providing for incidental matters in achieving the objectives of the Act through the levy of penalty and imposing punishments for breaches of the

provisions of the Act, Rules or Regulations, the Legislature itself has occupied the field by specifically providing for specific penalties and

punishments for breach of the Act, Rules or Regulations wherever it felt necessary. Therefore, power to impose penalty or punishment for breach

of the Regulations cannot be considered to be part of powers of the Board to take measures as it thinks fit for achieving its object. It may be

noticed that even the power of framing Regulations and taking legislative measures are also subject to the provisions of the Act and Rules,

therefore, in the occupied field of legislation by the statute itself or the Rules, the Board''s authority to frame Regulations are also restricted.

243. Assuming it to be that to the extent specific penalties have not been provided for specific breaches of the Regulations, the field of legislation is

unoccupied and as an ancillary measure, the Board could provide for levy of penalty as distinct from punishment for an offence that too without

making specific provision for levy of such penalty for the breach of regulation specific itself; it cannot be said that merely because power has been

conferred on the Board to take appropriate measures, without taking appropriate measure to authorise such action of levy of penalty, the action of

the Board could be sustained as authorised by law within the meaning of article 300A when the action of the Board results in depriving a person of

his property. As discussed above, authority of law required for sustaining the deprivation of a person of his property so as to be valid must be an

authority of law made through some legislative process, or so to say, of a positive law, within the scope of legislative competence of the law-

making authority.

244. It may be viewed from yet another point of view. The parent Act had provided for consequences of breach of any regulation, framed under

the Act as an offence punishable u/s 24. It also provided for penalties for breaches of certain regulations under Chapter IV-A. In exercise of its

powers, particularly with reference to section 11(2)(e), it has particularly framed the Regulations of 1995 in the field of providing for prohibition of

fraudulent and unfair trade practices. These regulations also provided for certain consequences to flow to the persons concerned who are found to

be concerned with fraud or unfair trade practices as a result of enquiry held under regulation 8. Therefore, the field of providing consequences of

breach of the Regulations particularly prohibiting fraudulent and unfair trade practices is occupied. In that event as per the principle enunciated in

The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, , which lays down that ""if Regulations were made

such regulations would have to be in conformity with section 49(4) of the 1948 Act and in exercise of its power the Board would have to abide by

regulation"". Exercise of executive power within the province of administrative discretion of the authority extends only to the extent the field is not

occupied by statutory provision is well established by decisions of the Supreme Court in Sant Ram Sharma Vs. State of Rajasthan and Another,

and State of Haryana, Vs. Shamsher Jang Bahadur, etc. etc., . On this view of the issue also the Board is not entitled to act beyond the sphere

circumscribed by the provisions of the Regulations, 1995, in the matters connected therewith.

245. It was also urged in the alternative that the impounding of such amount is not by way of penalty or punishment, but a measure to stabilise the

market condition by depriving the person concerned of his profit, which the Securitids and Exchange Board of India considers to be unduly high

due to abnormal market condition, to give a message to dealers to refrain from operating with abnormal market condition. This according to the

Board"s counsel need not be in respect of any person, concerned with prohibited practices but irrespective of that.

246. If the action of depriving a person of his consideration that has arisen out of transactions on the stock exchange by directing the stock

exchange to retain the amount collected by it is not referable to imposition of penalty or punishment incidental to committing breach of the

regulation, it partakes of the character of a tax impinging on his profit or an act regulating the limits of profit that can be earned on the stock

exchange. It is not anybody''s case, that the Board has been authorised to make any order or take any measure by way of levying any tax, on any

person with whom it is authorised to deal, or to regulate the limits of profits that can be carried out on the stock exchange. Nor does any part of

the regulation put a restriction on earnings made by a person on existing or his estimated market trends and conditions.

247. It may also be noticed in this context, that the Regulations referred to above also primarily authorise the Board if it is satisfied after an enquiry

and after affording an opportunity to the person concerned that a person has acted in breach of the Regulations by dealing in a manner which can

be considered as a fraudulent or adoption of unfair trade practices. The authority conferred on the Board is to issue directions to restore status quo

in respect of the transactions which have been conducted fraudulently or by adopting unfair trade practices, and to restrict the person concerned to

deal in securities in any particular manner, but it neither authorises imposition of any penalty for breach of such regulation nor authorises the

Securities and Exchange Board of India to retain the amounts recovered by the stock exchange as a result of completion of transactions which

have become actionable claims in the hands of the offerers, for the purpose of its user at the direction of the Securities and Exchange Board of

India. It is also clear that action under the Regulations does not reach any person who is not a person concerned with the alleged irregularities.

Therefore, it is difficult to hold that there exists an authority of law whether under the Regulations or under the Act in favour of the Board to retain

the amount of completed transactions in accordance with the prevalent stock exchange practices and its bye laws which have been received by the

stock exchange for the purposes of third parties.

248. The order in Special Civil Application No. 2224 of 1996 concedes that the security offered at auction had some value and the holder thereof

is entitled to its price. What is found objectionable is that the offerers should not get undue or ill gotten profits arising out of rigged/manipulated

price. The reach of the order, is clearly intended to curb the extent of profits that are earned by a party to a transaction. Likewise in Special Civil

Application No. 5483 of 1996 though the order of the Board does not say anything like that, the Central Government in its appellate order speaks

that while in the normal course the purpose of investment is to make financial gains, when the conditions prevalent are abnormal the denial of

windfall profits can hardly be described as denial of a right because such gains can only be made at the expense of another. It is the Securities and

Exchange Board of India''s obligation to ensure that its dispensations are equitable between the various parties on market . . . . In the reply affidavit

also in para 10 : 4 it has been unequivocally stated that the direction only deprives the windfall profit arising out of manipulated market and is not a

measure of penalty.

249. The orders and averments are clearly indicative that they are directed to deprive the petitioners of the profit, which are considered abnormal,

though the right to make gains at market is granted. Thus, in spite of all contentions to the contrary it must be accepted that the action was intended

to deprive the petitioners of their profit, which was considered to be excessive windfall or abnormal. The object of the Act, anywhere is neither

stated to be nor is discernible from any provision that the Board is empowered to regulate the prices of scrips or is authorised to take measures to

regulate the market for the purpose of restricting the limits of profits that can be earned. Earning a windfall is not prohibited under any law. Even a

treasure finder is entitled to retain the same or share with the occupier of the site from where it is recovered for himself. If the State wants to

acquire the same, it has to acquire the same as per the provisions of the Treasure Trove Act. The prizes earned by any person from lotteries

cannot be said to be ill-gotten to be forfeited or impugned, though the same are windfall. When the State wants to share such windfall profits it has

resorted to statutory provisions within its legislative field by enacting appropriate taxing provisions. Windfall profits are as much amenable to taxing

statutes as earned profits. The statute, in my opinion, does not take within its sweep the measures, which are intended to regulate prices for limiting

profits that can be earned by trading activity. This is not to say that the Board cannot take measures to regulate the market to ensure fairness in

trading activity and to keep it free from fraudulent or manipulative practices and to provide for penal consequences as an ancillary measure, as

distinct from a measure primarily to curb profits. Though in either case there will be deprivation of profits, the one will be in the realm of ancillary

and incidental to achieve the object of regulatory measure under a statute, the other will be collated to levy of tax. The former may be justified

exercise of legislative authority delegated under the Act, the latter may not be except as a levy of tax authorised by law under the appropriate

entry, by the parent Legislature.

250. In Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, , the court held the provisions of the Bombay Labour

Welfare Fund Act for constitution of a Labour Welfare Fund and which provided that notwithstanding anything contained in any other law for the

time being in force the sum specified in sub-section (2) of section 3 shall be paid into the Fund, to be invalid, and not protected under article 31. It

was so because that amounted to not mere deprivation of property by authority of law, but amounted to tax or fee. So also in State of Madhya

Pradesh Vs. Ranojirao Shinde and Another, , the court drew the distinction between deprivation of property and taxing powers and held that

power under article 31 cannot be utilised for enriching the coffers of the State.

251. The purpose of the aforesaid discussion about the Board''s authority to take legislative measures is confined to the question whether there

exists authority of law for the Board to make the order like the impugned order which result in deprivation of property and not to declare on the

validity or otherwise of any law that may be made in future. That will have to be tested on its own strength within the constitutional precincts, as

and when occasion for the same may arise.

252. As a result of the aforesaid discussion, it must be held that the Board had no authority under any provisions of the Act, Rules or Regulations

under which it functions to impound the whole or any part of the consideration of a completed transaction which the person entitled to receive

consideration has acquired the right to claim.

253. NATURAL JUSTICE :

The orders have been challenged on the ground of having been made in breach of the principles of natural justice. The impugned orders in both

cases under consideration have been undisputedly made without affording an opportunity of hearing to the petitioners whose rights have been

affected. While the order under challenge in Special Civil Application No. 2224 of 1996 itself speaks of the futility of giving a hearing it tries to

soften the import of keeping the principles of natural justice at bay by proposing to afford a post decisional hearing to the person aggrieved by the

order of impounding of the proceeds in question, the impugned order of the Board in Special Civil Application No. 5483 of 1996 simply makes an

order of impounding of all money received at the closing of the transactions in respect of RIL shares on the ground of manipulated market

conditions. It has been clearly averred in the reply affidavit that the order is not by way of penalty but for restoring the market condition.

254. The Central Government while hearing the appeal has found it unnecessary to afford an opportunity of hearing at all in respect of the

impugned order, because in its opinion it did not at all affect the petitioner adversely to raise any grievance about it. Since I have reached the

conclusion that the orders do affect the petitioners adversely, ordinarily this lack of opportunity to the persons affected by the order would alone

be sufficient to vitiate the order and render them void ab initio unless adherence to the principles of natural justice can be deemed to have been

excluded by statutory provisions expressly or by necessary implication. In the instant case, there is no plea, nor can it be that there is any such

exclusion of applying the principles of natural justice before making orders affecting the rights of parties. On the contrary, it will be seen presently

that there is an express mandate in the parent statute itself as well as in the regulations for affording an opportunity of hearing before orders can be

made. However, two alternative pleas have been raised by the respondents to save the situation. Firstly, it has been urged that in the circumstances

of the case by necessity the principles of natural justice have been excluded. The principle enunciated by the Supreme Court in the matter of

cancellation of examinations on account of mass scale use of unfair means in conducting examinations by the education authority or for selecting

candidates for offering employment, the entire examinations were cancelled without affording an opportunity of hearing to the affected students or

candidates. Particular reliance was placed on Union Territory of Chandigarh Vs. Dilbagh Singh and others, ; Krishan Yadav and another Vs. State

of Haryana and others, ; Union of India and Others Vs. Anand Kumar Pandey and Others, and alternatively it was urged that at any rate the

Board is prepared to give post-decisional hearing now, therefore, the illegality, if any, in the procedure adopted by the Board in making the

impugned orders, may be permitted to be cured by affording a post-decisional hearing. Reliance was placed on the Supreme Court decisions in

Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ; Mrs. Maneka Gandhi Vs. Union of India (UOI)

and Another, ; Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, Charan Lal Sahu Vs. Union of India, .

255. So far as the first contention of the respondents is concerned, it is sought to be supported on the principle which has been applied to

cancellation of examinations or selections en masse in a case of mass scale illegality or irregularity having been noticed in the conduct of such

examination without affording an opportunity of personal hearing to those who have undertaken examinations.

256. In Union Territory of Chandigarh Vs. Dilbagh Singh and others, , the court categorically held that neither the members of the Selection Board

acquired any vested right or interest in sustaining selection list nor a candidate included in the selection list acquires an indivisible right to

appointment. He could be aggrieved by non-appointment only when the administration does so either arbitrarily or for no bona fide reason. In

these circumstances, the court held that neither the members of the Selection Committee nor the candidate can claim the right to be heard before

the selection list is quashed for bona fide and valid reasons and not arbitrarily.

257. In the like manner the decisions in Krishan Yadav and another Vs. State of Haryana and others, , concerned cancellation of selection list on

finding that the process of selection was stinking, conceived in fraud and delivered in deceipt, and Union of India and Others Vs. Anand Kumar

Pandey and Others, dealt with a case where candidates at the selection examination adopted mass scale unfair means, obviously cannot apply to

the facts of the present case inasmuch as it is not a case where transactions which have taken place during the manipulated market conditions or

culminated in manipulated market conditions are sought to be cancelled so as to leave a clean slate to start again. It is a case where the transactions

in question in respect of which impugned orders of impounding considerations received on conclusion of outstanding transactions by the respective

stock exchanges have not been made to score out the transactions that took place during manipulated conditions as a result of irregularities or

illegalities.

258. Biswa Ranjan Sahoo and others Vs. Sushanta Kumar Dinda and Others, also was a case in which the principle of natural justice was held to

be excluded where cancellation of the entire selection was directed as a result of mass malpractice. The court observed (page 517) :

. . . that in the case of selection of an individual his selection is not found correct in accordance with law, necessarily a notice is required to be

issued and opportunity be given. In a case like mass malpractice as noted by the Tribunal, as extracted hereinbefore, the question emerges :

whether the notice was required to be issued to the persons affected and whether they needed to be heard ? Nothing would become fruitful by

issuance of notice. Fabrication would obviously either be not known or no one would come forward to bear the brunt. Under these circumstances,

the Tribunal was right in not issuing notice to the persons who are said to have been selected and given selection and appointment.

259. The case is on par with Krishan Yadav and another Vs. State of Haryana and others, .

260. Another case relied on by counsel Hanuman Prasad v. Union of India [1996] 8 JT 510 was also a case where examinations/selections were

cancelled after perusal of the CBI report disclosing mass scale malpractices in writing examinations. As in Union Territory of Chandigarh Vs.

Dilbagh Singh and others, , the court held that the selection committee recommendation do not give a vested right or legitimate expectation to

candidates till they are appointed according to rules.

261. In fact, the transactions out of which sale proceeds have reached the stock exchange are not tainted with any illegalities or irregularities. The

transaction of squaring up the transactions by auction in Special Civil Application No. 2224 of 1996 has already taken place in accordance with

the practice and bye-laws of the stock exchange concerned, on the invitation of the concerned stock exchange before the intervention by the

Securities and Exchange Board of India. The order does not deal with any transaction prior to auction. No illegality or irregularity has been

attached to that act of the stock exchange nor about the conduct in offering at such auction and there has been no illegality in the conduct of the

said auction. So also in Special Civil Application No. 5483 of 1996, the conclusion of the outstanding transaction whether by auction or closing up

of the transactions as per the stock exchange regulations have taken place under the directions of the Board itself and the monies recovered under

the said transactions are not tainted with any irregularities or illegalities and the same rightfully belong to persons whose transactions have been

squared up, or who have offered their shares on auction sale. In fact those transactions have not been cancelled either but they have been allowed

to be completed by recovery of the consideration as would have taken place on completion of transactions in the ordinary market even without the

intervention of the stock exchange. In fact, the order in one case results in splitting up of the consideration between the parties to the transaction

and the statutory functionary by allowing payment of part consideration to the claimant and impounding the balance to be used at its direction and

in the second case forfeiture of the amount of difference recovered by the stock exchange which was required to be handed over to the purchasers

whose transaction could not be carried out due to breach of contract by the other party, on the ground that windfall profits are not liable to be

retained by the person concerned irrespective of the fact whether he is party to manipulation or not. Such an order by no means can be construed

to restore status quo leaving the slate clean for future operations. Therefore, the principles applied to set at naught the results en masse as a result

of mass scale irregularities, without fixing individual liability or responsibility on persons concerned so as to characterise it as a penalty cannot be

applicable to the present circumstances.

262. As has been seen earlier in such an event the orders can either be in the nature of inflicting penalty on the person concerned or amount to levy

of tax on profit, if the nature is not punitive. In either case, there is no room for holding that application of rules of natural justice have been

excluded by necessary implication arising from the circumstances of the case.

263. It would be proper to quote from Charan Lal Sahu Vs. Union of India, :

Audi alteram partem is a highly effective rule devised by the courts to ensure that a statutory authority arrives at a just decision and it is calculated

to act as a healthy cheek on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly

made. The general principle as distinguished from an absolute rule of uniform application is that where a statute does not in terms exclude this rule

of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on the merits then such a statute would

be construed as excluding the audi alteram partem rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the

giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good.

264. It offers an answer to both the contentions of learned counsel for the respondents for exclusion of the need of hearing and the offer of a post-

decisional hearing to cure the defect. The principle that a post-decisional hearing in certain circumstances can cure the defect of not affording a

pre-decisional hearing applied in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and

Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, and Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, arose

in situations where pre-decisional hearing did not form part of the statutory requirement or where post decisional hearing was contemplated by the

statute itself.

265. A distinction has to be borne in mind that where prior hearing is required to be given as a part of the rule of natural justice failure to give it

would inevitably invalidate the exercise of power and it cannot be saved by post-decisional hearing. It is all the more applicable where the

necessity of prior hearings readable into the statute itself. It is only where the necessity of prior hearing cannot be read into the statute either on

account of there being express provision for post-decisional hearing or in the absence of necessary provision for pre-decisional hearing in the rule

itself that it can be held that the purpose of exercise of the power may itself be defeated if pre-decisional hearing is insisted upon and the post-

decisional hearing is required to be given and if that is done in such cases the exercises of power would not be vitiated.

266. It can be seen that in the precedents relied on by the respondents in none of the cases there was any specific requirement of hearing in statute.

Post-decisional hearing was considered to be proper only as an exceptional measure in very emergent nature of action required to be taken, in the

absence of statutory requirement.

267. In Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, the court was interpreting the provisions of the Bombay Municipal

Corporation Act which provided that the Municipal Commissioner may without notice take steps for removal of encroachments. Thus it was a

case in which pre-decisional hearing was not a necessary part of statutory requirement and statutes also enabled the authority to act even without

notice. It is in these circumstances the court held that it being an enabling provision conferring power on the Commissioner to cause an

encroachment to be removed with or without notice. The court did not infer exclusion of the rules of natural justice but stressed that the discretion

to exclude notice has to be exercised in a reasonable manner sparingly and in exceptional cases only.

268. In Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , the court emphasised that the rule of natural justice is applicable in the

exercise of power of impounding a passport, even in the absence of specific provision. It was not held to be excluded by necessary implication

notwithstanding the emergent nature of action required to be taken. It was also taken to be well-settled that rules of natural justice are not inflexible

and can be moulded being sufficiently flexible to permit modifications and variations to suit exigencies of myriad kinds of situations which may arise.

In the circumstances of emergent nature of taking action in impounding a passport to prevent a person from leaving the country the court

countenanced a post-decisional hearing as proper compliance with the rule of audi alteram partem. It said, ""it would not be right to conclude that

the rule is excluded merely because the power to impound a passport might be frustrated if prior notice and hearing were given to the person

concerned. The passport authority may impound the passport without giving any prior opportunity to the person concerned but as soon as the

order impounding the passport is made an opportunity of hearing remedial in aim should be given.

269. It may be noticed that it was a case in which there was no specific statutory requirement of pre-decisional hearing and the court has

countenanced post-decisional hearing, not as a rule, but only in exceptional circumstances like the one where a pre-decisional hearing may frustrate

the very purpose of prompt action.

270. Likewise in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , which related to the decision

making powers of the Election Commissioner during elections, the court keeping in view the requirement of promptitude essential in an election,

where elaborate and sophisticated methodology of a formalised hearing may be injurious to the object of expeditious proceeding, observed.

No doctrinaire approach is desirable but the court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it

is not obligatory that counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even

imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally

or otherwise may, in many cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at

an hour"s notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to

be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed

immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election

Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under

way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on

what, in the critical circumstances, should have been done for a fair play of fair hearing. This is a matter pre-eminently for the Election Tribunal to

judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent

variable not an easy casualty.

271. This is ample indication of the fact that a post-decisional hearing as fulfilling the requirement of natural justice is only an exception to the

general rule of pre-decisional hearing only in cases of very exceptional circumstances of need for prompt and emergent action failing which the very

purpose of exercising power is likely to fail. That too in cases where the rules of natural justice are required to be followed as an inherent ingredient

of fair play and not as a part of statutory requirement. All the cases relied on by the respondent are cases where the need to adhere to principles of

natural justice was read into the requirement to act with reasonableness even in the absence of any statutory requirement. Also the court did not

permit the pre-hearing to be an easy casualty. However, none of the cases, lay down that even where the statute requires pre-decisional hearing

the authority can insist on post-decisional hearing to cure initial, defect. Even in the case of Union of India and Another Vs. Tulsiram Patel and

Others, , the court read the requirement of post-decisional hearing where natural justice was held to have been excluded in cases covered by the

proviso to article 311(2).

272. Section 11B of the Act to which power to issue directions are traced, empowers the Board to issue directions only on its being satisfied

about the conditions referred to in the provision, as a result of making or causing to be made an enquiry. The very fact that before issuing directions

an enquiry is required to be made and conclusions are to be reached necessarily implies a pre-decisional hearing, before the conclusion of enquiry.

Section 11B by itself does not exclude the application of rules of natural justice during hearing nor does it speak about giving post-decisional

hearing. Where the statute itself has provided penalties to be levied in the case of breaches of the provisions of the Act, Rules or Regulations under

Chapter VA, it has specifically provided u/s 15-I that for the purpose of adjudging any breaches pointed out in sections 15A to 15H, the

adjudicating officer shall hold an enquiry in the prescribed manner and an adjudication will only be after giving the concerned person a reasonable

opportunity of being heard for the purpose of imposing any penalty. In the Regulations 1995, to which also the authority for making the impugned

order has been traced, while insisting on pre-decisional hearing under regulation 8 when causing investigation under regulation 7, by providing that

the Board is required to give notice before such investigation but also confer power to dispense with the requirement of issuing notice before

investigation if the Board is satisfied that it is not in the interest of investors or in the public interest to issue notice, but when it comes to taking a

decision and issuing directions after completion of the investigation as a consequence thereof, such order cannot he made without giving a

reasonable opportunity of hearing to the concerned person. This is the mandatory requirement of regulation 11. It clearly obliges the Board that it

can issue directions for the purposes of regulation 12 only after considering the report referred to in regulation 10, i.e., the report of the

investigation officer and after giving a reasonable opportunity of hearing to the person concerned, issue directions specified in regulation 12.

However, unlike regulation 8 it does not provide for dispensing with the requirement of predecisional hearing before issuing directions in any

circumstances. As has been noticed in the observations of the Supreme Court referred to above in Charan Lal Sahu Vs. Union of India, , the post-

decisional hearing is not a cure where pre-decisional hearing is a statutory requirement. In view of the aforesaid, the contention that the impugned

orders are not vitiated for want of pre-decisional hearing and by offering post-decisional hearing the defect is cured cannot be accepted in the facts

and circumstances of the cases under consideration and it is held that in the present cases, post-decisional hearing cannot cure the invalidity

attached to the impugned orders having been made for want of adherence to the principles of natural justice.

273. It cannot be doubted that a post-decisional hearing itself is fraught with danger of inherent unfairness of procedure and can be resorted to

only in exceptional circumstances. The ordinary rule of natural justice, whether under statute or on general principles is that an opportunity to be

heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order. A post-decisional

hearing is only a substitute for a pre-decisional hearing in cases where the requirement of hearing is not part of the express provisions of the statute,

in very emergent and exceptional circumstances.

274. In this connection reference may be made to K.I. Shephard and Others Vs. Union of India (UOI) and Others, , wherein services of

employees were terminated without opportunity of hearing, when rules required such hearing to be a pre-condition. A learned single judge of the

Kerala High Court proposed a post-decisional hearing. R. N. Mishra J., speaking for the court, observed (page 434) :

There is no justification to think of post-decisional hearing. On the other hand the normal rule should apply ..... There is no justification to throw

them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred

to above as a condition precedent to action. It is common experience that once a decision has been taken, there is tendency to uphold it and a

representation may not really yield any fruitful purpose.

275. The view was reiterated by the Supreme Court in K.I. Shephard and Others Vs. Union of India (UOI) and Others, :

The view that has been taken by this court in the above observation is that once a decision has been taken, there is a tendency to uphold it and a

representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the

impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by

article 14 of the Constitution. The High Court, in our opinion, was perfectly justified in quashing the impugned circular.

276. In this connection, a contention was also raised that an appeal has been provided against the orders made by the Board before the Central

Government and since appeal has been provided it must be construed as a provision for post-decisional hearing and even if the original authority

has committed a breach of the principles of natural justice it should be deemed to have been cured by affording an opportunity of hearing before

the appellate authority who is competent to set aside that order.

277. There is ample authority for the proposition that if natural justice is violated by the original authority the right of appeal is not a remedy which

can correct the initial lack of fair trial by the original authority, as it would result in an unfair trial followed by a fair trial as a substitute for a fair trial

followed by appeal. Dealing with the question of post-decisional hearing by way of appeal, Wade in his Administrative Law observed :

In principle there ought to be an observance of natural justice equally at both stages, and if natural justice is violated at the first stage, the right of

appeal is not so much a true right of appeal as a corrected initial hearing; instead of fair trial followed by appeal, the procedure is reduced to unfair

trial followed by fair trial.

278. In Leary v. National Union of Vehicle Builders [1971] Ch. 34 :

If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body,

this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the

right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal ? Even if the

appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him.

I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the

effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a

powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice

does not mean perfect justice. A a general rule, at all events. I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency

of natural justice in an appellate body.

279. The aforesaid view of Megarry J. was followed by the Ontario High Court in Canada in Cardinal and Board of Commissioners of Police of

City of Cornwall, In re [1974] 42 DLR 323. The Supreme Court of New Zealand in Wislang v. Medical Practitioners Disciplinary Committee

[1974] 1 NZLR 29 and also the Court of Appeal of New Zealand, in Reid v. Rowland [1977] 2 NZLR 472 favoured the view. The aforesaid

view of Megarry J., found its approval with the Supreme Court in Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, . The

like plea as has been made before me was rejected by the apex court after quoting with approval the aforesaid observations of Megarry J. by

adding another dimension (page 277 of Comp Cas) :

But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases

where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on

subsequent appeal ..... Not all the King"s horses and all the King"s men" can ever salvage the situation completely, notwithstanding the widest

scope provided to an appeal ..... And, therefore, it seems to us, there is a manifest need to ensure that there is no breach of fundamental procedure

in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceedings.

280. The impugned orders, therefore, suffer from the vice of procedural unfairness inasmuch as they have been made in breach of principles of

natural justice.

281. It was also urged that the impugned orders also suffer from the vice of being non-speaking orders. As the reasons for impounding the

consideration received by the respective stock exchanges are not stated in the order and the reasons cannot now be supplied by way of affidavit.

282. This contention on behalf of the petitioners does not appear to be well founded. Both the orders primarily proceed on the ground that the

prevalent high market price of the scrips in question was a result of certain manipulatory activities which have resulted in windfall profits to persons

operating in the market, besides the fact whether the persons concerned are themselves responsible for the prevalent market conditions or not,

since it has resulted in windfall profits, the parties who are entitled to receive such profits otherwise cannot be allowed to retain the same. This

reason is very much apparent on the face of the impugned orders. If the matter rests with the correctness of the reasons alone, it would be for the

appellate authority to examine its validity, wherever statutory appeals are provided against the order. But in such cases, the order cannot be

attributed with the vice of absence of reason. The impugned action is impounding of the proceeds as a result of squaring up of the transactions, end

of transaction period because of the reason that in the opinion of the Board the prevailing prices are manipulated one should enure for the benefit of

anyone. Whether there is authority for taking such decision or not and whether such orders are otherwise lawful and sustainable are clearly

different questions than to say that the impugned action is founded on orders which do not disclose the reasons for its making. However, learned

counsel for the petitioner are right in their submission that the order must stand or fall on what has been stated therein and no additional reasons or

facts can be supplied to sustain the order which does not speak from the order itself.

283. WHETHER RELIEF BE DENIED ON PRINCIPLE OF UNJUST ENRICHMENT :

Lastly, it was urged that since the amount which has been impounded by the Board as a result of manipulated market conditions, it amounts to

unjust enrichment if it goes in the hands of persons who are party to the transactions and, therefore, no relief be granted to the petitioners under

article 226.

284. The policy underlying the doctrine of unjust enrichment is that one person should not be permitted to enrich himself at the expense of another,

but should be required to make restitution of or for property or benefits received, retained or appropriated where it is just and equitable that such

restitution be made and where such action involves no violation or frustration of law or opposition to public policy. Unjust enrichment of a person

occurs when he has retained money or benefits which in justice and equity belong to another. Reference may be made to Black"s Law Dictionary.

285. The principle of unjust enrichment requires first that the person against whom this principle is to be applied has been enriched by receipt of a

benefit. Secondly that such enrichment is at the expense of another person by whom refund has been claimed, and thirdly, that the retention of the

enrichment by the person so enriched is unjust. Reference in this connection may be made to Mahabir Kishore and others Vs. State of Madhya

Pradesh, . In commercial transaction therefore the principle of unjust enrichment can be applied for refund of the amount to someone at whose cost

the alleged unjust enrichment has taken place or not permitting a person to retain the same, in order to bring a situation that it can be made

available for return to the rightful claimant. But certainly this cannot be applied to money retained by a person in trust for the rightful claimant by not

permitting its return to the claimant and exacting of it by the State for its public purposes unless the law by competent Legislature has been validly

enacted or framed which may properly be termed as a positive law to reach it within constitutional limits. The principle of unjust enrichment cannot

be invoked for the purpose of conferring upon the Board an authority to exact such enrichments by executive authority.

286. The principle of unjust enrichment has been applied where the money has already been recovered by the State authority under the existing

provisions of law which may ultimately be held to be ultra vires and such money in fact in given circumstances may not belong to a person who has

actually paid but belonged to third persons who are entitled thereto or at whose cost he has become unjustly rich. It is in such cases or where tax is

assumed to have been passed on to consumers or to the persons from whom actually the taxpayer is assumed to have collected so that by retaining

such amount there is no deprivation of the property of the person concerned by the State which is not authorised by law, inasmuch as an amount

which is held not to be belonging to the claimant and who is claiming refund on the ground that he may be refunding it to the actual claimants really

do not result in depriving that person of anything which can be said to be a property of the claimant.

287. In State of Madhya Pradesh Vs. Vyankatlal and Another, , the court after referring to its earlier decisions in the cases of Sales Tax Officer,

Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, ; The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, ;

The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, ; Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, ; Amar

Nath Om Prakash and Others Vs. State of Punjab and Others, ; The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI)

and Others, , said (page 904) :

The principles laid down in the aforesaid cases were based on the specific provisions in those Acts but the same principles can safely be applied

to the facts of the present case inasmuch as in the present case also the respondents had not to pay the amount from their coffers. The burden of

paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund.

288. Likewise in U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, , the court denied the relief under article 26 on the

ground (page 886) :

The learned counsel for the City Board was not able to state that the City Board had not recouped itself by collecting the charges from the

consumers. In this situation, we have to presume that the City Board had not suffered any loss by the levy of seven and half percent by way of

additional charges. We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected

from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the court should not ordinarily

direct any refund in exercise of its discretion under article 226 of the Constitution.

289. The same principle was reiterated in the context of commercial transactions in Renusagar Power Co. Ltd. Vs. General Electric Co., :

The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain the benefit received at the expense

of another person. It provides the theoretical foundation for the law governing restitution.

290. The court refused to consider the case of the appellant for recovering the sum from the other side which was founded on the ground that if the

applicants are not allowed the sum it would result in retaining unjust enrichment to the respondents. This also supports that apart from the plea of

restitution the recovery of damages even by a party to transaction is not permitted to be founded on the basis of unjust enrichment, and the

retention by the statutory functionary in the public interest is countenanced only where the sum in question does not belong to the person from

whom it has been recovered.

291. Circumstances of the present case reveal obvious lack of circumstances in which the doctrine of unjust enrichment does not arise in this case

at all. As has been noticed the impugned order in either case does not impinge upon any act referable to any party in respect of the transactions in

question as a result of which the alleged windfall profits have arisen to parties concerned. In Special Civil Application No. 2224 of 1996 at the

close of the period offers at auction were invited by the stock exchange. On the date when the offer was invited, the market price prevailing during

past six months was very well known to all concerned. The scrips were offered in pursuance of the invitation by the stock exchange at its own

terms, and the stock exchange had recovered the money from the purchasers and short sellers respectively as per the prices known on that date. It

is not the case that such invitation by the stock exchange was in any way part of manipulation. It was open to the stock exchange not to intervene.

Therefore, so far as the transaction in question was concerned, no manipulation on the part of any of the parties concerned is even alleged, nor can

profit arising out of such transaction be said to be an unlawful enrichment at somebody else''s cost. Moreover, it was open, assuming that it had

power to do so, for the Board, to have cancelled the transaction altogether and obliterated the unlawful profits, and prevented the alleged windfall

profits to have arisen at all. Instead by its own action it has permitted the windfall profits to come into existence which in its opinion should not at all

have arisen and then proceeded to exact it for its own purposes and deprived the person who were otherwise entitled to receive it. This does not

warrant the invocation of the principle of unjust enrichment in the present case. Likewise, in Special Civil Application No. 5483 of 1996 the

auction purchase or the close out of the transaction on the close of the period were carried out at the direction of the Board itself. Therefore, in the

squaring up of the transaction either by calling in offers at auction or by closing out the transactions by recovering the difference of price between

the transaction price and the highest price prevailing during the last six months is no part of resorting to any manipulation, on the part of anyone. In

this latter case, even there is no suggestion that the petitioner was at all concerned with the manipulation of the market price even otherwise. How

in the circumstances, a person securing a profit unaware of any manipulation in the market can be held to be holding a claim to an undue

enrichment. No power has been either conferred under the statute on the Board to limit the margin of profits which a scrip holder can earn by his

own estimation of the market conditions nor can he be hauled up for securing returns of his legitimate profits for default of others on the principle of

unjust enrichment when such transaction itself is the outcome of the directives of the statutory body itself. If the plea of the respondents about it

being an illegal or void transaction is to be considered it would mean that any transaction which had come into existence as a result of violation of

Regulations of 1995, must be deemed to be void bearing no fruits, in that event, so far as the completion of transaction itself would not take place.

In such circumstances the question of receiving any price/difference by the stock exchange will not at all arise. Nor does the stock exchange

receive such amount for itself. Nor is it anybody''s case that the amount impounded rightfully belongs to the short sellers. In the case of auction

sale, the transaction of sale and purchase has actually taken place in which scrips of the offerer have been sold by the stock exchange at a

particular price and recovered from those who were responsible to make the payment. To such amount the offerer could only be lawfully entitled

and none of the other parties involved, viz., parties to the outstanding transaction of the stock exchange could lay any claim or for that matter the

Board, could say that it was a profit belonging to someone else at whose expense the offerer of shares has been benefited. Since the impugned

order nowhere impinges upon the directions as a result of which the sale proceeds or the different proceeds have reached the stock exchange the

person concerned are entitled to get that consideration as a result of a valid transaction. In my opinion, without attacking the validity of the said

transaction on any ground whatsoever the proceeds or profits arising out of such transactions cannot be considered to be an undue or unlawful

much less unjust enrichment at the cost of someone or adverse to the interest for whose benefit such profit must have arisen. The plea simply does

not arise for consideration. Therefore, the plea founded on the principle of unlawful and unjust enrichment cannot be a relevant consideration for

rejecting the petitioner''s claim.

292. The transactions out of which the proceeds have arisen and reached the hands of the stock exchange were as a result of lawful culmination of

outstanding transactions of purchases for want of availability of delivery with shortsellers, through the intervention of the stock exchange by

adopting well established practice, recognised by the regulations of stock exchange itself, of squaring up transactions either by auction call or by

closing up. On such lawful conclusion of squaring up process, the proceeds recovered by the stock exchange lawfully belong to the deliverer of

scrips/purchaser of shares as the case may be. The amount held by the stock exchange was only for the benefit of those in respect of whose

transactions it has acted. The buyer of the scrips or deliverer of scrips at auction sale, does not receive or hold consideration proceeds for the

benefit of anyone else. The consideration also did not reach the Securities and Exchange Board of India. If the transaction were to be cancelled, no

proceeds will at all arise to give occasion for applying the doctrine of unjust enrichment. If transactions are allowed to be completed in a regular

manner then only the person lawfully entitled to receipts made by the stock exchange is the person who has offered the shares at the auction of

stock exchange or of the buyer in whose transaction the difference in price has been recovered from the short sellers only for the benefit of the

buyer. In either case for reaching such proceeds to brand he same to be ill gotten is nothing but an order of exaction of money which have become

part of actionable claim of the person who are entitled to it under law but for the impugned orders. The impugned orders do not propose to or

purport to act for the benefit of those to whom the rains rightfully belong, and it could not be because, it rightfully belonged to the receiving party to

contract. The impugned orders directly purport to deprive the petitioners or persons like petitioners of the property which belongs to them under

law.

293. Moreover, this is not a case where a person is claiming refund or return of money which has come into the possession of the State the

paramount repository of public interest and it does not want to return it or individual benefit, which lawfully does not belong to him. It may be

noticed that denying relief on the principle of unlawful or unjust enrichment has been enunciated with respect to cases where a person has other

collected taxes from persons which were not leviable or prices in excess of regulatory prices fixed under statutory orders, which lawfully otherwise

did not belong to him, or was an illegal exaction in the hands of the person himself. Where such amounts had already reached public offers and a

claim to such amount was laid on the ground that levy having been held to be unauthorised, the State has no power to retain it and the same may

be returned to the person who has paid it into the State exchequer, irrespective of the fact whether he himself is entitled to it or not. A distinct line

of authorities have come in existence to deal with two situations. One where such proceeds are in the hands of the recipient, there in the absence of

specific provision of law, the claim of the authority to recover the same has been repelled. On enacting such law, the same has been upheld only in

case it is falling in the category of ancillary or incidental to the main purpose, but not as a substitute for the main purpose itself. On the other hand

where such receipts have been handed over to the exchequer whether by mistake or under protest, the refund in such cases has been refused on

the ground that it belongs to the beneficiaries and not to the claimant, and allowing the claimant to retain such amount would result in his unjust

enrichment, because the same does not belong to him either. A clear illustration is provided under the Excise Act, where specific provision has

been made for recovery of sums collected by a manufacturer from his customers as excise duty to be handed over to the exchequer for the benefit

of the consumer, and to deny refund of such amount to a manufacturer, if paid, unless he proves that he has not recovered the amount from his

customers. The like provisions have also been made in various State sales tax laws. These provisions are a pointer to the fact that unless the claim

to the money can be said to be not belonging to the claimant, the principle of unjust enrichment cannot apply, nor exaction of alleged windfall

profits can be made, as distinguished from retention, without authority of law. The present cases are neither of the nature where the proceeds

belong to somebody other than the petitioner, nor is a case of retention, but is a clear case of exaction. Hence relief cannot be denied on the anvil

of the doctrine of unjust enrichment.

294. CONCLUSION :

As a result of the aforesaid discussion it is held that the Board has no authority of law under the existing statute to impound or forfeit the monies

received by the stock exchange as concluded transactions for squaring up the outstanding transactions under its procedure and to use for any other

purposes and that the orders also suffer from breach of principles of natural justice which results in making them void ab initio. Consequently, the

orders cannot be sustained. Relief in the present circumstances cannot be denied on principles of unjust enrichment.

295. In view of the aforesaid conclusions, the merits of the other contentions about the validity of the impugned orders need not be examined.

296. As a result, the petitions are allowed. The impugned order dated July 4, 1996, in Special Civil Application No. 2224 of 1996 and orders

dated January 25, 1996, in Special Civil Application No. 5483 of 1996 made by the Board as affirmed by the Central Government by its order

dated May 22, 1996, are quashed, to the extent they direct impounding of the monies recovered by the respective stock exchanges on the closing

transactions.

297. Rule made absolute accordingly in each case.

298. No costs.