Dispute Resolution Hotline

September 28, 2022

SUPREMACY OF FAIR TRIAL: SUPREME COURT DIRECTS SEBI TO DISCLOSE LEGAL OPINIONS AND EXPERT REPORT TO RELIANCE

- SEBI, as a quasi-judicial body, has a duty to act fairly and is required to disclose material relied upon it while initiating criminal action against RIL.
- SEBI cannot claim legal privilege over legal opinions of which were investigative in nature and excerpts of which SEBI had already disclosed to RIL.
- Selective disclosure of such reports by SEBI amounts to "*cherry picking*" which "*derogates commitment to a fair trial*".
- SEBI relied on the concept of litigation privilege to prevent the disclosure of the legal opinions. While the Supreme Court analyzed the concept of legal professional privilege in England and how it is classified into legal advice privilege and litigation privilege,[1] it concluded that the Indian position is different from England as Sections 126 to 129 of the Indian Evidence Act, 1872 do not draw any distinction between adversarial and investigative litigation.

In *Reliance Industries Limited ("**RIL**") v. Securities and Exchange Board of India ("**SEBI**")*,[2] the Supreme Court of India ("**Supreme Court**") allowed a petition by RIL seeking certain legal opinions and expert reports from SEBI which SEBI relied on while commencing criminal action against RIL. While allowing RIL's plea, the Supreme Court held that SEBI has a duty to disclose these reports, which are investigative in nature, and cannot claim legal privilege to share some "*cherry picked*" excerpts from them. The Supreme Court held that as a regulator, SEBI has the duty to act fairly and not "*circumvent the rule of law*".[3]

FACTUAL BACKGROUND

In 2002, a complaint was filed against RIL, and its associate companies and directors, with SEBI alleging that RIL fraudulently allotted equity shares worth INR 12 crores (USD 14,72,639.28) to its promoters and other group companies in 1994. In 2005, the investigative officer appointed by SEBI provided a report with their findings ("**2005 Report**"). In a note authored by SEBI in 2006, SEBI allegedly noted that the 2005 Report did not bring out a specific violation of any legal provision by RIL and that an external expert's opinion should be sought on the possibility of initiating criminal proceedings against RIL ("**2006 SEBI Note**"). Accordingly, SEBI approached and procured an expert opinion from Justice (Retd.) B.N. Srikrishna in 2009 ("**First Opinion**"). SEBI divulged some excerpts of the First Opinion to RIL.

In 2010, SEBI sent a letter to RIL alleging that RIL violated Section 77(2) of the Companies Act 1956 ("**Companies Act**"), and Regulations 3, 5, and 6 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 ("**SEBI Regulations**"), by funding purchase of its own shares by 38 related entities. RIL replied to this letter with several letters requesting for copies of relevant documents. RIL also submitted that by an office memorandum dated 18 July 2011, the Ministry of Corporate Affairs ("**MCA**") noted that the transaction was compliant with law and Section 77 of the Companies Act[4] was not attracted.

In 2011, RIL also filed a without prejudice settlement application before SEBI. In 2014, SEBI responded to RIL's request for documents and refused to share the First Opinion by claiming privilege and confidentiality over the same. In 2017-2018, SEBI decided to re-examine this issue and sought another opinion from Justice (Retd.) Srikrishna. Before giving such advice, Justice (Retd.) Srikrishna recommended SEBI to seek the opinion of a chartered accountant, Mr. YH Malegam. Accordingly, SEBI sought a report from Mr. Malegam ("**Malegam Report**") and a second opinion from Justice (Retd.) Srikrishna ("**Second Opinion**").

While the settlement proceedings were pending, RIL requested further material from SEBI including the First Opinion, the Second Opinion and the Malegam Report in 2019. SEBI rejected this request pursuant to Regulation 13(2)(a) of the SEBI (Settlement Proceedings) Regulations, 2018 ("**SEBI Settlement Regulations**") which set out that an applicant does not have the right to seek information from SEBI for "*the purpose of relying upon [such information] in the settlement proceedings*". Aggrieved by the action of SEBI, RIL filed a writ petition before the Bombay High Court. The Bombay High Court dismissed this petition on 4 February 2019.

In 2020, SEBI filed a complaint against RIL in the court of SEBI Special Judge, Mumbai ("**Trial Court**") which was dismissed for being barred by limitation. Subsequently, SEBI challenged such dismissal before the Bombay High Court ("**Revision Petition**"). RIL filed an interim application in the Revision Petition requesting copies of the Malegam

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Report, the Second Opinion and the case brief prepared by SEBI while seeking the Second Opinion (collectively, the "**Reports**"). On 28 March 2022, the Bombay High Court passed the impugned order wherein it held that interim application may only be decided with the Revision petition on the next date. Consequently, RIL filed the present appeal against the impugned order which had essentially adjourned the determination of the interim application along with the merits of the Revision petition.

JUDGMENT

Whether the appeal is maintainable

SEBI challenged the maintainability of the appeal on the ground that: (i) that the impugned order was a mere adjournment order against which the Supreme Court should not exercise its discretionary jurisdiction; and (ii) that no criminal action existed to seek document disclosure considering that the Trial Court had dismissed the complaint on the issue of limitation. RIL argued that the Bombay High Court's conduct in adjourning the decision on the interim application despite having two hearings on it is impermissible.

The Supreme Court held that the appeal is maintainable considering the facts and circumstances of the case. It found that the Bombay High Court did not exercise its discretion under Section 473 of the Code of Criminal Procedure,1973 ("**CrPC**") in a principled manner by delaying the determination of the interim application until the hearing of the Revision Petition.[5] The Supreme Court further held that the appeal is maintainable since: (i) it touches upon important aspects of criminal jurisprudence which requires consideration; and (ii) substantial time had passed without there being any end to the litigation in the matter.[6]

Whether SEBI is required to disclose documents to RIL

Earlier Rejection of Request

SEBI argued that the issue of disclosure of document is *res judicata* since the Bombay High Court had already dismissed RIL's request for disclosure in the petition filed by RIL in 2019. The Supreme Court dismissed this argument by finding that the earlier petition made by RIL was in the context of proceedings under the SEBI Settlement Regulations. It held that the findings of the Bombay High Court in that petition are not relevant to the present appeal which has been made in the context of criminal prosecution initiated by SEBI against RIL.[7]

Constitutional Mandate

RIL argued that SEBI, as a regulator, has a duty to disclose documents in accordance with Article 21 of the Constitution of India. RIL argued that this constitutional mandate has been applied to SEBI by the Supreme Court in the case of *T. Takano v. SEBI* ("**Takano**").[8] SEBI argued that the law laid down in *Takano* is inapplicable in the present case since *Takano* related to an investigation under different regulations.

The Supreme Court held that SEBI, being a quasi-judicial body, has the "*mandate…to act fairly and in accordance with the rules prescribed by the law*".[9] It further held that this duty to act fairly is tied to principles of natural justice where a party should be accorded an adequate opportunity to defend itself. The Supreme Court also held that while *Takano* was rendered in the context of different regulations, the reasoning of the Supreme Court in *Takano* alludes to a general obligation of disclosure on SEBI's part.[10]

On the facts of the case, the Supreme Court noted that SEBI's initiation of criminal proceedings against RIL, despite previous approval of the concerned transactions by the MCA, without providing the necessary Reports to RIL is in gross violation of RIL's right to natural justice.[11] The court reiterated the finding of *S.P. Velumani v. Arappor Iyakkam* ("**SP Velumani**")[12] that principles of natural justice require that an accused is "*afforded an opportunity to defend his case based on material that had exonerated him initially, which was originally accepted by the State*".

Legal Privilege

SEBI argued that the Reports are privileged pursuant to Section 129 of the Indian Evidence Act, 1872 ("**Evidence Act**"). On the other hand, RIL argued that SEBI cannot claim litigation privilege since the proceedings are not adversarial in nature and that, in any case, SEBI's disclosure of the First Opinion's excerpts resulted in a waiver of such privilege. RIL also argued that such selective disclosure of the First Opinion's excerpts amounted to "cherry picking" which is impermissible.

The Supreme Court noted that litigation privilege is available in England when the litigation in question is adversarial, and not investigative or inquisitorial, in nature.[13] However, the court then went on to find that Sections 126 to 129 of the Evidence Act do not "*draw any distinction between adversarial and investigative litigation, as such and privilege is applicable all through*".[14] While analyzing the facts of the case, the Supreme Court held that the Reports are not privileged since they are merely an extension of SEBI's investigations to determine RIL's culpability.[15] Lastly, the court held that SEBI cannot claim privilege over certain parts of the documents while disclosing some excerpts of such documents.[16] The court noted that the such selective disclosure of the First Opinion amounts to cherry picking which "*derogates commitment to a fair trial*".[17]

Pre-mature Request

SEBI alleged that RIL's request for documents has been made at a premature stage. It was SEBI's case that RIL would be entitled to seek such documents under Sections 207 and 208 of the CrPC once the Trial Court took cognizance of the matter. The Supreme Court rejected SEBI's contention and found that RIL's request was not premature. The court relied on the finding in *SP Velumani* that principles of natural justice require that an appellant-accused's request for document disclosure is not denied by strictly construing Section 207 of the CrPC, especially when the State decides to re-examine the issue in contradiction of their prior reports.[18]

Accordingly, the Supreme Court allowed RIL's appeal and directed SEBI to furnish a copy of the First Opinion, the Second Opinion and the Malegam Report to RIL.

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ANALYSIS

The *Takano*[19] and *Reliance* judgments reflect a move towards ensuring greater accountability in actions of SEBI as a regulator. These judgments emphasize the duty of SEBI to maintain transparency in their proceedings to uphold the rule of law and not subvert principles of natural justice. This is a departure from several previous cases which held that all investigative material of SEBI need not be disclosed.[20] The Supreme Court in *Reliance* can, in fact, be said to have widened the scope of disclosure required from SEBI. While *Takano* held that SEBI is obligated to disclose investigation reports relied upon it, *Reliance* takes a step further to find that SEBI is obligated to disclose even legal opinions which are investigative in nature. Moreover, the Supreme Court's finding on impermissible cherry picking in *Reliance* might impose greater checks on SEBI's general discretion to redact information from its reports.

This move towards greater transparency is a welcome development. However, it would be interesting to see how regulators or quasi-judicial bodies respond to these judgments, especially considering SEBI's continued non-disclosure of the Reports leading to RIL's filing of a contempt petition against SEBI.

While the Supreme Court did not express any opinion on the concept of privilege in India, it highlighted its importance by terming it as crucial and something which touches the foundation of the legal profession in India. The Supreme Court's observation that unlike English law, in India, there is no distinction between adversarial and investigative litigation privilege will be applicable across cases. This observation will provide more clarity on this issue, and help practioners keep in mind such difference as English law is the most referred jurisprudence on this topic. As a takeaway, this case highlights that the dominant purpose of a privileged document is always the key and will be important in protecting documents from disclosure in a given case.

– Ritika Bansal, Shweta Sahu & Alipak Banerjee

You can direct your queries or comments to the authors

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[1] *Privilege and Waiver: Attorney – Client Privilege* (January 2021),

https://www.nishithdesai.com/Content/document/pdf/ResearchPapers/Privilege-and-Waiver-Part-I.PDF.

[2] Criminal Appeal No. 1167 of 2022, Special Leave Petition (CRL) No. 3417/2022 ("***Reliance***").

[3] *Also see: Can a Regulator hide its investigation report which has been relied upon as part of its adjudication?* (June 15, 2022), https://www.nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/6170/1.html.

[4] Duty to register charges, etc.—(1) It shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

Provided that the Registrar may, on an application by the company, allow such registration to be made—

a. in case of charges created before the commencement of the Companies (Amendment) Act, 2019, within a period of three hundred days of such creation; or

b. in case of charges created on or after the commencement of the Companies (Amendment) Act, 2019, within a period of sixty days of such creation,

on payment of such additional fees as may be prescribed:

Provided further that if the registration is not made within the period specified—

a. in clause (a) to the first proviso, the registration of the charge shall be made within six months from the date of commencement of the Companies (Amendment) Act, 2019, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies;

b. in clause (b) to the first proviso, the Registrar may, on an application, allow such registration to be made within a further period of sixty days after payment of such ad valorem fees as may be prescribed.

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered:

Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India

(2) Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

(3) Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator 109[appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be,] or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

(4) Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.

[5] *Reliance*, Paragraph 27-28.

[6] *Reliance*, Paragraph 30.

[7] *Reliance*, Paragraph 34.

[8] 2022 SCC Online SC 210.

[9] *Reliance*, Paragraph 42.

[10] *Reliance*, Paragraph 44.

[11] *Reliance*, Paragraph 45.

[12] 2022 SCC Online SC 663.

[13] *Reliance*, Paragraph 50; *Three Rivers District Council & Ors. v. Governor and Company of the Bank of England*, [2004] UKHL 48.

[14] *Reliance*, Paragraph 53.

[15] *Reliance*, Paragraph 55.

[16] *Reliance*, Paragraph 58.

[17] *Reliance*, Paragraph 57.

[18] *Reliance*, Paragraph 56.

[19] *Can a Regulator hide its investigation report which has been relied upon as part of its adjudication?* (June 15, 2022), https://www.nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/6170/1.html.

[20] *Natwar Singh v. Directorate of Enforcement*, (2010) 13 SCC 255; *Shruti Vora v. SEBI*, Order dated February 12, 2020 in Appeal (L) No. 28 of 2020 (Securities Appellate Tribunal, Mumbai); *Anand Sathe v. SEBI*, Order dated July 17, 2020 in Appeal No. 150 of 2020 (Securities Appellate Tribunal, Mumbai); *Pooja Wadhwan v. SEBI*, Order dated September 13, 2020 in Appeal No. 487 of 2021 (Securities Appellate Tribunal, Mumbai).