
5TH GNLU MOOT ON SECURITIES AND INVESTMENT LAW, 2019

BEFORE THE SUPREME COURT OF INDIA

CASE NO. ___/201X

JURISDICTION UNDER ARTICLES 133, 134 & 136 OF THE CONSTITUTION OF INDIA, 1950

SLP No. ___/201X

THE CENTRAL ELECTRICITY REGULATORY COMMISSION ... APPELLANT

Versus

THE SECURITIES AND EXCHANGE BOARD OF INDIA ... RESPONDENT

Clubbed with

SLP No. ___/201X

THE SECURITIES AND EXCHANGE BOARD OF INDIA ... APPELLANT

Versus

THE CENTRAL ELECTRICITY REGULATORY AUTHORITY ... RESPONDENT

Clubbed with

CIVIL APPEAL No. ___/201X

THE ELECTRICITY EXCHANGE OF INDIA LIMITED ... APPELLANT

Versus

THE SECURITIES AND EXCHANGE BOARD OF INDIA ... RESPONDENT

Clubbed With

CRIMINAL APPEAL No. ___/201X AND CIVIL APPEAL No. ___/201X

THE ASSOCIATION OF COMMODITY BROKERS ... APPELLANT

Versus

THE SECURITIES AND EXCHANGE BOARD OF INDIA ... RESPONDENT

WRITTEN SUBMISSION *for* THE RESPONDENT

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LIST OF ABBREVIATIONS

| Serial No. | Abbreviations | Full form |
|-------------------|----------------------|----------------------------------------------|
| 1. | AC | Appeal Cases |
| 2. | ACB | Association of Commodity Broker |
| 3. | AIR | All India Reporter |
| 4. | Anr. | Another |
| 5. | AO | Adjudicating Officer |
| 6. | Art. | Article |
| 7. | BCX | Bharat Commodity Exchange |
| 8. | Bom. | Bombay |
| 9. | CERC | Central Electricity Regulatory Commission |
| 10. | Ch. | Chapter |
| 11. | CLB | Company Law Board |
| 12. | Co. | Company |
| 13. | Corp. | Corporation |
| 14. | Del. | Delhi |
| 15. | Ed. | Edition |
| 16. | EOW | Economic Office Wing |
| 17. | EXIL | Electricity Exchange India Ltd |
| 18. | FCRA | Forward Contract (Regulation) Act, 1952 |
| 19. | FMC | Forward Market Commission |
| 20. | H.C. | High Court |
| 21. | HL | House of Lords |
| 22. | IA | Interlocutory Application |
| 23. | IIA | Indian Investors Association |
| 24. | I.L.R. | Indian Law Reporter |
| 25. | Inc. | Incorporation |
| 26. | IPC | Indian Penal Code, 1860 |
| 27. | Ltd. | Limited |

| | | |
|-----|----------|-------------------------------------------------------------------------------------------|
| 28. | MhLj | Madras Law Journal |
| 29. | Mh. L.R | Madras Law Review |
| 30. | MoF | Ministry of Finance |
| 31. | MPID Act | Maharashtra Protection of Interests of Depositors (in Financial Establishments) Act, 1999 |
| 32. | NBFC | Non-Banking Finance Company |
| 33. | No. | Number |
| 34. | NTSD | Non-Transferable Specific Delivery |
| 35. | PC | Professional Corporation |
| 36. | Pt. | Part |
| 37. | RIL | Roths India LLP |
| 38. | SAT | Securities Appellate Tribunal |
| 39. | SC | Supreme Court |
| 40. | SCC | Supreme Court Cases |
| 41. | SCL | SEBI and Corporate Laws Reporter |
| 42. | SCN | Show Cause Notice |
| 43. | SCR | Supreme Court Weekly Reporter |
| 44. | SCRA | Securities Contract (Regulation) Act, 1956 |
| 45. | SEBI | Securities and Exchange Board of India |
| 46. | Sec. | Section |
| 47. | SFIO | Serious Fraud Investigation Office |
| 48. | SLP | Special Leave Petition |
| 49. | WTM | Whole Time Member |

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STATEMENT OF FACTS

INTRODUCTION OF FORWARD CONTRACTS IN ELECTRICITY- In 2009, FMC granted BCX the approval for providing a platform to trade forward contracts in goods notified under Section 15 of FCRA. As a result, EXIL petitioned to CERC to halt the launch of trading in forward contracts in electricity by BCX for such contracts are within the exclusive jurisdiction of CERC by virtue of the Electricity Act, 2003. FMC objected to the same stating that FMC alone has jurisdiction to regulate forward contracts in electricity

ADJUDICATION BY CERC AND BOMBAY HIGH COURT- On August 13, 2009 CERC pronounced its order stating that FMC's jurisdiction is not inconsistent with that of CERC but since CERC is vested with the authority to promote development of the market in power, BCX will be governed by the orders and regulations of CERC. Thus, FMC filed a Writ Petition before the Bombay High Court wherein it was observed that neither FMC nor CERC has exclusive jurisdiction to deal with the futures contract in electricity independently and the Central Government may decide the issue related to jurisdiction by amending appropriate legislation. Aggrieved by the order of the Hon'ble High Court of Bombay, both FMC and CERC filed separate Special Leave Petitions before the Hon'ble Supreme Court of India.

INTRODUCTION OF NTSD CONTRACTS IN ELECTRICITY BY CERC- While the Writ Petition was pending before the Bombay High Court, CERC gave EXIL the permission to organize month-ahead contracts in electricity which are essentially forward contracts in the nature of NTSD contracts. FMC brought this to the attention of Bombay High Court that EXIL is neither registered with FMC nor any recognition to it granted by the Central Government in order to launch month-ahead forward contracts.

DISCLOSURE OF PAIRED CONTRACTS- In 2013, FMC received a letter from IIA stating that a huge payment default had occurred on the platform of EXIL to the tune of Rs. 2100 crore. FMC appointed RIL to carry out a forensic audit of EXIL. It was founded that registered brokers of EXIL were trading on EXIL without actual delivery of electricity and instead paired contracts were being entered into. FMC forwarded the complaint to EOW. As per the EOW Report, there were 200 entities operating as a member/ broker at EXIL who were bringing in investors to invest in paired contracts by making false and misleading representations. Simultaneously, SFIO also initiated investigation into the EXIL scam upon receiving instructions from MoF.

MERGER OF FMC WITH SEBI- On September 29, 2015, FMC got merged with SEBI. Accordingly, FCRA was repealed by the Finance Act, 2015, and certain provisions of SEBI Act, SCRA and regulations made thereunder were amended. Pursuant to the merger, the brokers operating in the commodity space were given time of 3 months to seek registration from SEBI. All the 200 brokers also applied to SEBI for registration out of which 190 were granted registration. During the pendency of these applications, SEBI received a letter from IIA demanding SEBI to take action against the brokers whose names have appeared in the EOW Report and RIL Report.

INITIATION OF ENQUIRY PROCEEDINGS- In 2016, SEBI appointed a Designated Authority to initiate enquiry proceedings against the 10 brokers. SCN was issued to them for ascertaining their fit and proper criteria under SEBI (Intermediaries) Regulations, 2008 and SEBI (Brokers and Stock Brokers Regulations), 1992. Later, SEBI received the SFIO Report wherein all the 200 brokers were found to be involved in the EXIL scam. SEBI issued SCNs to the remaining 190 entities. Further, in 2018, SEBI filed a criminal complaint under erstwhile FCRA to the EOW against all the entities involved in the EXIL scam.

OBJECTIONS BY ACB AND EXIL- ACB sent a letter to SEBI stating that the action initiated by SEBI against 200 members/ brokers is unjust. SEBI responded to the aforesaid letter stating that the action initiated by SEBI is in accordance with the provisions of FCRA, SEBI Act, and the regulations made thereunder. Therefore, ACB filed a Writ Petition before the Bombay High Court contending that all proceedings initiated by SEBI are ultra vires as they do not have jurisdiction over the spot market and spot exchanges such as EXIL. EXIL also filed a Writ Petition against SEBI before the Bombay High Court submitting that the action initiated by SEBI by invoking FCRA and filing criminal complaint against EXIL and its promoters is ultra vires, since SEBI has no jurisdiction over spot transactions in electricity. Bombay High Court passed an order in favour of SEBI finding that the actions initiated by SEBI are within the regulatory purview of SEBI.

APPEAL TO SUPREME COURT- Aggrieved by the order of the Bombay High Court, ACB and EXIL separately approached the Hon'ble Supreme Court of India which decided to hear them together. Further, the case relating to the jurisdiction of CERC and/or SEBI on derivative contracts in electricity, was also clubbed with the aforesaid appeals.

STATEMENT OF JURISDICTION

The Respondents have invoked the jurisdiction of the Hon'ble Supreme Court to hear the instant appeals by virtue of:

Article 133 of the Constitution of India, 1949 –

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under article 134A — (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Article 134 of the Constitution of India, 1949 –

Appellate jurisdiction of Supreme Court in regard to criminal matters

134. (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court— (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or (c) certifies under article 134A that the case is a fit one for appeal to the Supreme Court: Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

Article 136 of the Constitution of India, 1949 –

Special leave to appeal by the Supreme Court

136. *(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

RESPONDENTS HUMBLY SUBMIT THEMSELVES TO THE JURISDICTION OF THE HON'BLE COURT

ISSUES RAISED

ISSUE I: WHETHER FORWARD CONTRACTS IN ELECTRICITY ARE WITHIN THE EXCLUSIVE JURISDICTION OF CERC.

ISSUE II: WHETHER THE ACTION INITIATED BY SEBI BY INVOKING FCRA AND FILING CRIMINAL COMPLAINT AGAINST ALL THE ENTITIES INVOLVED IN THE EXIL SCAM IS ULTRA VIRES.

ISSUE III: WHETHER THE ENQUIRY PROCEEDINGS INITIATED BY SEBI AGAINST THE 200 MEMBERS/ BROKERS OF EXIL IS ULTRA VIRES.

SUMMARY OF ARGUMENTS

ISSUE I: WHETHER FORWARD CONTRACTS IN ELECTRICITY ARE WITHIN THE EXCLUSIVE JURISDICTION OF CERC.

The Appellants do not have jurisdiction to decide a matter relating to forward contracts in electricity. Firstly, Forward contracts in electricity fall within the ambit of SEBI/ FMC under FCRA. CERC as regulatory authority while discharging its functions cannot exercise jurisdiction over the functions assigned to FMC. Further, FMC has the authority to regulate forward contracts in electricity as it is a notified good under Section 15 of FCRA. CERC's jurisdiction over forward contracts also defeats the spirit of Business Rules. Language and intent of the legislature is to be seen to determine the powers of FMC and CERC. Secondly, FCRA which was enacted pursuant to Entry 48 in List I and FMC while Electricity falls under Entry 38 of list III. Therefore, predominance must be given to FCRA, and FMC should have sole jurisdiction over forward contracts including forward contracts in electricity.

ISSUE II: WHETHER THE ACTION INITIATED BY SEBI BY INVOKING FCRA AND FILING CRIMINAL COMPLAINT AGAINST ALL THE ENTITIES INVOLVED IN THE EXIL SCAM IS ULTRA VIRES.

The action initiated by the Respondent by invoking FCRA and filing criminal complaint against all the entities involved in the EXIL scam is legally valid. Firstly, vide Section 29 (2)(e) of FCRA, SEBI has the requisite jurisdiction to initiate fresh proceedings against these entities. Secondly, the entities have acted in vehement breach of the proviso to Section 18(1) of FCRA as they were entering into paired contracts and subsequently, avoiding the delivery of electricity. Thirdly, these entities engaged into paired contracts which was beyond its permitted scope.

ISSUE III: WHETHER THE ENQUIRY PROCEEDINGS INITIATED BY SEBI AGAINST THE 200 MEMBERS/ BROKERS OF EXIL IS ULTRA VIRES.

The enquiry proceedings initiated by the Respondent against the 200 members/ brokers of EXIL is legally valid. Firstly, regulation 5(e) of Brokers Regulations read with Schedule II of the Intermediaries Regulations empower SEBI to determine whether the applicant is a fit and

proper person to be granted a certificate of registration. Secondly, pursuant to the merger of SEBI with FMC, the definition of '*Securities*' includes commodity derivatives also. Therefore, regulations regulating the securities market and its members are applicable to commodity derivatives and its members as well. Further, before the merger brokers operating in the commodity derivatives market were not required to be registered but after the merger it is a necessary requisite. As a result, they are under the supervision of SEBI even when their registration applications are not disposed. In such a circumstance rule of purposive construction must be applied to the provision of registration of commodity brokers by SEBI as a commodity broker as they cannot operate in a regulatory vacuum for the period when they operate as a commodity derivative broker till the disposal of their application of registration.

ARGUMENTS ADVANCED

ISSUE I: WHETHER FORWARD CONTRACTS IN ELECTRICITY ARE WITHIN THE EXCLUSIVE JURISDICTION OF CERC.

1. It is humbly contended that forward contracts in electricity are not within the exclusive jurisdiction of Central Electricity Regulatory Commission (*for brevity* ‘CERC’) as [I.A.] Forward contracts in electricity fall within the ambit of SEBI or the erstwhile Forward Market Commission (*for brevity* ‘FMC’) created under the Forward Contracts (Regulation) Act, 1952 (*for brevity* ‘FCRA’) and [I.B.] FCRA being enacted under List I to the Seventh Schedule of the Constitution of India, 1950 (*for brevity* ‘the Constitution’) must be widely interpreted.

[I.A.] FORWARD CONTRACTS IN ELECTRICITY FALL WITHIN THE AMBIT OF FMC/SEBI CREATED UNDER FCRA

2. It is contended that forward contracts in electricity fall within the ambit of FMC/SEBI created under FCRA. The present argument is in four folds. *First*, CERC as a regulatory body while discharging its functions cannot exercise jurisdiction over FMC [I.A.1.]; *secondly*, FMC has the authority to regulate forward contracts in electricity as it is a notified good under Section 15 of FCRA [I.A.2.]; *thirdly*, CERC’s jurisdiction over forward contracts defeats the spirit of the Government of India (Allocation of Business Rules), 1961 (*for brevity* ‘Business Rules’) [I.A.3.]; and *lastly*, Language and intent of the legislature is to be seen to determine the powers of FMC and CERC [I.A.4.].

[I.A.1.] CERC as regulatory body while discharging its functions cannot exercise jurisdiction over FMC

3. One regulatory authority created under one statute cannot exercise jurisdiction over another regulatory authority created under a different statute having a different purpose and objective.¹ The creation of a specific authority to deal with a specialized subject matter is clear indication of that authority’s supremacy over the said subject matter and thus, another authority cannot overstep its boundaries and exercise control over the specific authority

¹ Competition Commission of India v. Bharti Airtel Limited and Ors., (2019) 2 SCC 521 (India) [hereinafter ‘Bharti’].

merely because it feels that the proper jurisdiction rests with it.² Allowing one such body to exercise control over another defeat the purpose of having a special legislation in place.³

4. FMC is an authority established under FCRA by the Central Government,⁴ for the purpose of keeping forward markets under observation and to take appropriate action in relation to the same.⁵ On the other hand, CERC is established under the Electricity Act, 2003.⁶ Therefore, since both the regulatory authorities are functioning under different statutes, neither of them can be said to be subject to the jurisdiction of the other. Additionally, FCRA was enacted providing for regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith.⁷ Thus, as long as the statutory enactment prevails, the subject-matter of forward contract is regulated under the provisions of FCRA.
5. It is, therefore, submitted that CERC as a regulatory body while discharging its functions cannot exercise jurisdiction over FMC and thus, forward contracts in electricity fall within the ambit of FMC/SEBI. Therefore, forward contracts in electricity are not within the exclusive jurisdiction of CERC.

[I.A.2.] FMC has the authority to regulate forward contracts in electricity as it is a notified good under Section 15 of FCRA

6. According to Section 15 of FCRA, once certain goods or class of goods are specified by the Central Government in its notification, provisions of FCRA are applicable to them.⁸ Unless FMC is invested with the power to impose the conditions with respect to the commodities in which the business of forward contract can be carried on, the object of constituting the Commission would be frustrated.⁹ The Commission alone is invested with the power to impose conditions or prohibitions with regard to the commodities in respect of which forward contracts can be entered into by a particular association.¹⁰ Therefore, the role and functions of FMC are of paramount importance to facilitate the forward markets.
7. In exercise of the powers conferred by Sub-section (1) of Section 15 of FCRA, the Central Government declared, vide notification dated January 9, 2006, that provisions of FCRA are

² *Id.*

³ Bharti, *supra* note 1.

⁴ Forward Contracts (Regulation) Act, 1952, § 3(1), No. 74, Acts of Parliament, 1952 (India).

⁵ Forward Contracts (Regulation) Act, 1952, § 4(b), No. 74, Acts of Parliament, 1952 (India).

⁶ The Electricity Act, 2003, § 76(1), No. 36, Acts of Parliament, 2003 (India).

⁷ Forward Contracts (Regulation) Amendment Act, 1971, Preamble, No. 53, Acts of Parliament, 1971 (India).

⁸ Forward Contracts (Regulation) Act, 1952, § 15(1), No. 74, Acts of Parliament, 1952 (India).

⁹ Union of India and Ors. v. Rajdhani Grains and Jaggery Exchange Ltd. and Ors., (1975) 1 SCC 676 (India).

¹⁰ *Id.*

applicable to forward contracts in electricity which are entered into on or before the date of the notification.¹¹ Thus, once a notification has been issued to declare electricity as a notified commodity under Section 15(1), only authorities registered with the FMC under Section 14A can legally trade in its forward contracts within the ambit and regulation of FMC.

8. It is, therefore, submitted that FMC has the authority to regulate forward contracts in electricity as it is a notified good under Section 15 of FCRA and thus, forward contracts in electricity fall within the ambit of FMC/SEBI. Therefore, forward contracts in electricity are not within the exclusive jurisdiction of CERC.

[I.A.3.] CERC's jurisdiction over forward contracts defeats the spirit of Business

Rules

9. By virtue of the Business Rules, the Ministry of Finance, more specifically, the Department of Economic Affairs was allocated all the matters relating to regulation and control of forward trading under FCRA¹² and FMC.¹³ On the other hand, all matters relating to the Electricity Act, 2003 and CERC are under the control of the Ministry of Power.¹⁴
10. These Business Rules are formulated under Article 77(3) of the Constitution which provides that the President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.¹⁵ Further, the rules formulated under Article 77(3) are mandatory in nature as opposed to those made under Article 77(1) and (2).¹⁶
11. This shows that there was no intention of the legislature to allow one statutory authority to have jurisdiction over the other. Therefore, exercise of jurisdiction by CERC over forward contracts in electricity would not be in consonance with the object and spirit behind the Business Rules. This will not only go against the spirit of the Business Rules but also against the mandate of the Constitution.
12. It is, therefore, submitted that CERC's jurisdiction over forward contracts defeats the spirit of Business Rules and thus, forward contracts in electricity fall within the ambit of

¹¹ Ministry of Consumer Affairs, Food and Public Distribution (Department of Consumer Affairs) Notification, 2006, Gazette of India, pt. II sec. 3 sub-section (ii) (Jan. 9, 2006).

¹² Government of India (Allocation of Business) Rules, 1961, Rule 106 of Ministry of Finance, (Jan. 14, 1961), file:///C:/Users/HP/Downloads/GoI%20(Allocation%20of%20Business)%20Rules,%201961.pdf.

¹³ Government of India (Allocation of Business) Rules, 1961, Rule 23(c) of Ministry of Finance, (Jan. 14, 1961), file:///C:/Users/HP/Downloads/GoI%20(Allocation%20of%20Business)%20Rules,%201961.pdf.

¹⁴ Government of India (Allocation of Business) Rules, 1961, Rule 5 of Ministry of Power, (Jan. 14, 1961), file:///C:/Users/HP/Downloads/GoI%20(Allocation%20of%20Business)%20Rules,%201961.pdf.

¹⁵ INDIA CONST. art. 77, cl. (3).

¹⁶ MRF Ltd. v. Manohar Parrikar, (2010) 11 SCC 374 (India).

FMC/SEBI. Therefore, forward contracts in electricity are not within the exclusive jurisdiction of CERC.

[I.A.4.] Language and intent of the legislature is to be seen to determine the powers of FMC and CERC

13. The main purpose of construction of a statute is to find the intention of the legislature.¹⁷ It is a well settled principle of interpretation that the legislature speaks its mind by the use of clear and precise words.¹⁸ While applying the canons of interpretations of statutes, the wordings used by the legislature need to be looked at and if they adequately point towards the intention of the legislature, then the Court must read that statute to give effect to that intent and not otherwise.¹⁹ It is the duty of Judicature to act upon the true intention of the legislature.²⁰
14. While interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences.²¹ Those words must be expounded in their natural and ordinary sense.²² When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself.²³ In considering the expression used by the legislature, the Court should have regard to the aim, object and scope of the statute to be read in its entirety.²⁴
15. It is pertinent to note that when two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise.²⁵ Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration.²⁶
16. FCRA is an Act that has been enacted to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith.²⁷ On the other hand, the Electricity Act, 2003 has been enacted to consolidate the

¹⁷ Lt. Col. Prithi Pal Singh Bedi Etc v. Union of India and Ors., AIR 1982 SC 1413 (India).

¹⁸ Rao Shive Bahadur Singh v. State, AIR 1953 SC 394 (India).

¹⁹ Narendra H. Khzurana v. Commissioner of Police, 2004 (2) Mh. L.R. 72 (India).

²⁰ Hari Prasad Shivashanker Shukla v. A. D. Divelkar, AIR 1957 SC 121 (India).

²¹ Nathi Devi v. Radha Devi Gupta, (2005) 2 SCC 271 (India).

²² Ram Rattan v. Parma Nand, AIR 1946 PC 51 (India).

²³ Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907 (India).

²⁴ State of W.B. v. Union of India, AIR 1963 SC 1241 (India).

²⁵ Sarwan Singh v. Kasturi Lal, AIR 1977 SC 265 (India).

²⁶ *Id.*

²⁷ Forward Contracts (Regulation) Amendment Act, 1971, Preamble, No. 53, Acts of Parliament, 1971 (India).

laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry.²⁸

17. This is suggestive of the fact that FCRA and the Electricity Act were enacted for the regulation of the forward and future market and electricity respectively which are highly specific fields. This makes both of them special statutes enacted by the Union Parliament. It stands to reason that the Parliament had a clear intention while enacting both these legislations. Therefore, CERC being a statutory authority constituted under the Electricity Act, 2003, cannot be provided with the powers which are beyond the parent statute which includes regulation of futures, forward and derivative contracts, which are admittedly a domain of authorities under FCRA.
18. It is, therefore, submitted that language and intent of the legislature is to be seen to determine the powers of FMC and CERC and thus, forward contracts in electricity fall within the ambit of FMC/SEBI. Therefore, forward contracts in electricity are not within the exclusive jurisdiction of CERC.

**[I.B.] FCRA BEING ENACTED UNDER LIST I TO THE SEVENTH SCHEDULE OF THE
CONSTITUTION MUST BE WIDELY INTERPRETED**

19. According to Article 246(1) of the Constitution, Parliament has an exclusive power to make laws with respect to any of the matters enumerated in List I or the Union List in the Seventh Schedule of the Constitution.²⁹ The supremacy of Parliament has been provided for by the non obstante clause in Article 246(1).³⁰ Therefore, under Article 246 (1) if any of the entries in the three lists overlap, the entry in List I prevails.³¹
20. When there are two entries in the in legislative lists, one general in its character and the other specific, the former must be construed as excluding the latter.³² It is a settled principle that while reading entries in legislative lists the widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them.³³ The words employed in the entry are to be interpreted so as to include all ancillary and subsidiary matters.³⁴
21. Entry 48 of list I to the Seventh Schedule deals with stock exchanges and futures markets and thus, FCRA was enacted under it. Electricity on the other hand falls under Entry 38 of

²⁸ The Electricity Act, 2003, Preamble, No. 36, Acts of Parliament, 2003 (India).

²⁹ INDIA CONST. art. 246, § 1.

³⁰ I.T.C. Limited. v. Agricultural Produce Market Committee, AIR 2002 SC 852 (India).

³¹ Greater Bombay Co-op. Bank Ltd. v. United Yarn Tex. Pvt. Ltd. and Ors., AIR 2007 SC 1584 (India).

³² Bhuwarka Brothers Ltd. v. Dunichand Rateria, AIR 1952 Cal 740 (India).

³³ Duni Chand Rateria v. Bhuwarka Brothers Ltd., AIR 1955 SC 182 (India).

³⁴ Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) Private Ltd., AIR 1963 SC 90 (India).

list III i.e. the Concurrent List and thus, the Electricity Act, 2003 was enacted under it.³⁵ Since, the former is a wider subject and of specific nature as compared to the latter, it must be widely construed to include all the matters within it. Therefore, predominance must be given to FCRA which was enacted pursuant to Entry 48 in List I and FMC, which is a regulatory body created under the FCRA, should have sole jurisdiction over forward contracts including forward contracts in electricity.

22. It is, therefore, submitted that FCRA being enacted under List I to the Seventh Schedule of the Constitution must be widely interpreted and thus, forward contracts in electricity fall within the ambit of FMC/SEBI. Therefore, forward contracts in electricity are not within the exclusive jurisdiction of CERC.

³⁵ M.P. Vidyut Karmachari Sangh v. M.P. Electricity Board, AIR 2004 SC 2974 (India).

ISSUE II: WHETHER THE ACTION INITIATED BY SEBI BY INVOKING FCRA AND FILING CRIMINAL COMPLAINT AGAINST ALL THE ENTITIES INVOLVED IN THE EXIL SCAM IS ULTRA VIRES.

23. It is humbly contended that the action initiated by SEBI by invoking FCRA and filing criminal complaint against all the entities involved in the EXIL scam is legally valid as [II.A.] SEBI can initiate a fresh proceeding under FCRA; [II.B.] EXIL and its brokers breached proviso to Section 18(1) of FCRA by not delivering electricity and [II.C.] EXIL and its brokers violated provisions of FCRA by engaging into paired contracts.

[II.A.] SEBI CAN INITIATE A FRESH PROCEEDING UNDER FCRA

24. According to Section 29A(2)(e), inserted vide Section 132 of Finance Act, 2015,³⁶ SEBI is empowered to initiate a fresh proceeding related to an offence under the FCRA, within a period of three years from the date on which it has been repealed.³⁷ This is suggestive of the fact that even after FCRA got repealed, SEBI can initiate proceedings against any offender under FCRA and proceeded with it as if FCRA had not been repealed.³⁸
25. On September 29, 2015, FMC got merged with SEBI and subsequently, FCRA was repealed by the Finance Act, 2015.³⁹ Furthermore, EXIL is alleged to have acted in collusion with the members/brokers of EXIL to dupe investors.⁴⁰ Thus, after receiving the SFIO report SEBI filed a criminal complaint under repealed FCRA to EOW, Mumbai for taking appropriate action under relevant laws against all the entities involved in the EXIL scam.⁴¹ The complaint was filed on June 26, 2017 which is well within the prescribed period of 3 years from the date on which FCRA was repealed.
26. It is, therefore, submitted that SEBI can initiate a fresh proceeding under FCRA and thus, the action initiated by SEBI by invoking FCRA and filing criminal complaint against all the entities involved in the EXIL scam is legally valid.

³⁶ The Finance Act, 2015, § 132, No. 20, Acts of Parliament, 2015 (India).

³⁷ Forward Contracts (Regulation) Act, 1952, § 29(2)(e), No. 74, Acts of Parliament, 1952 (India).

³⁸ *Id.*

³⁹ Moot Problem, ¶ 15.

⁴⁰ Moot Problem, ¶ 13.

⁴¹ Moot Problem, ¶ 18.

**[II.B.] EXIL AND ITS BROKERS BREACHED PROVISO TO SECTION 18(1) OF FCRA BY
NOT DELIVERING ELECTRICITY**

27. Non-transferable specific delivery contracts (*for brevity 'NTSD Contracts'*) are specific delivery contracts, the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable.⁴² Section 18(1) of FCRA deals with NTSD Contracts stating that Chapter III and Chapter IV of FCRA are not applicable to NTSD Contracts for the sale or purchase of any goods.⁴³ But the proviso to the section prohibits an unrecognized association or any member of such association to provide facilities for the performance of any NTSD Contract without making or receiving the actual delivery.⁴⁴ Therefore, Section 18(1) of FCRA deals with true NTSD Contracts but the proviso to the section makes it illegal for an unrecognised association to so arrange matters that NTSD Contracts will be worked out without actual delivery.⁴⁵
28. Proviso to Section 18 makes a clear distinction between recognized and unrecognized associations. There is a clear prohibition against persons arranging for avoidance of delivery through an unrecognized association.⁴⁶ Such acts are rendered illegal thereby, making these NTSD Contracts by members of unrecognised associations also illegal.⁴⁷ Such contracts are forward contracts and on account of being entered into other than between members of a recognised association or through or with any such member are rendered illegal by FCRA itself.⁴⁸
29. On October 21, 2009 EXIL was permitted for organising month-ahead contracts in electricity which are essentially forward contracts in the nature of NTSD Contracts.⁴⁹ EXIL was neither registered with FMC as required under Section 14A of FCRA nor was granted any recognition by the Central Government under Section 6 of FCRA.⁵⁰ Further, the brokers of EXIL were trading on the EXIL platform by entering into paired contracts without actual delivery of electricity.⁵¹ They were found to bring in investors to invest in paired contracts

⁴² Forward Contracts (Regulation) Act, 1952, § 2(f), No. 74, Acts of Parliament, 1952 (India).

⁴³ Forward Contracts (Regulation) Act, 1952, § 18(1), No. 74, Acts of Parliament, 1952 (India).

⁴⁴ *Id.*

⁴⁵ M.R. Pillai v. Motilal Vrijbhukhandas and Ors., AIR 1970 Bom 324 (India).

⁴⁶ State of Gujarat v. Manilal Joitaram, AIR 1968 SC 653 (India).

⁴⁷ *Id.*

⁴⁸ Forward Contracts (Regulation) Act, 1952, §15, No. 74, Acts of Parliament, 1952 (India).

⁴⁹ Moot Problem, ¶ 6.

⁵⁰ *Id.*

⁵¹ Moot Problem, ¶ 12.

by making false and misleading representations,⁵² and promising them fixed return on investments while declaring that actual delivery of electricity is not necessary.⁵³

30. Therefore, under the guise of offering NTSD Contracts, EXIL and the brokers of EXIL were indulged not just in forward trading but also in financial businesses. Despite being an unrecognized association and members of such association, EXIL and its brokers were providing facilities for the performance of NTSD Contract in electricity without making actual delivery of the electricity. This, conduct of EXIL and the brokers of EXIL, of arranging and entering into paired contracts and subsequently, avoiding the delivery of electricity is a breach of the proviso to Section 18(1) of FCRA and thus, is directly punishable under Section 20(1)(b), 20(1)(c) read with Section 15; Section 21(b) and 21(c) of FCRA.
31. It is, therefore, submitted that EXIL and its brokers breached proviso to Section 18(1) of FCRA by not delivering electricity and thus, action initiated by SEBI by invoking FCRA and filing criminal complaint against all the entities involved in the EXIL scam is legally valid.

[II.C.] EXIL AND ITS BROKERS VIOLATED PROVISIONS OF FCRA BY ENGAGING INTO PAIRED CONTRACTS

32. According to Section 2 (c) of the FCRA, forward contract means a contract for delivery of goods, and which is not a ready delivery contract.⁵⁴ A ready delivery contract means a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the official gazette, specify.⁵⁵ Therefore, it is clear that any contract that has a delivery period of more than eleven days is not a ready delivery contract, and therefore a forward contract.
33. Moreover, no association concerned with regulation and control of business relating to forward contracts can carry on such business without a certificate of registration granted under FCRA.⁵⁶ Additionally, every forward contract for the sale or purchase of any goods, notified by the Central Government, between members of a unrecognised association or through or with any such member is illegal.⁵⁷

⁵² Moot Problem, ¶ 14.

⁵³ *Supra* note 51.

⁵⁴ Forward Contracts (Regulation) Act, 1952, § 2(c), No. 74, Acts of Parliament, 1952 (India).

⁵⁵ Forward Contracts (Regulation) Act, 1952, § 2(i), No. 74, Acts of Parliament, 1952 (India).

⁵⁶ Forward Contracts (Regulation) Act, 1952, § 14(A), No. 74, Acts of Parliament, 1952 (India).

⁵⁷ Forward Contracts (Regulation) Act, 1952, § 15, No. 74, Acts of Parliament, 1952 (India).

34. EXIL is an electronic system-based spot exchange providing spot trading in electricity and regulated by CERC,⁵⁸ and is neither registered with FMC nor recognised by the Central Government.⁵⁹ Therefore, EXIL or any member/ broker of EXIL cannot be engaged in forward contracts unless registered under FCRA or recognized by the Central Government. However, EXIL, with the help of its brokers, in the name of NTSD Contracts in electricity, organized and entered into paired contracts.⁶⁰ The two components of the paired contracts traded on EXIL were T+2 (buying short duration contracts) and T+21 (selling long duration contracts),⁶¹ where, “T” represents the trade day and the numbers 2 and 21 represent the period within which the deliveries of commodities will be completed and the transactions squared off.
35. This is suggestive of the fact that in permitting contracts with delivery periods of more than eleven days, EXIL permitted execution of forward contracts, an act which required it to be registered or recognised under FCRA. By not getting registered or recognised under FCRA, and yet carrying out contracts with delivery periods of more than eleven days, EXIL intentionally and wilfully violated the provisions of FCRA.
36. It is pertinent to note that by virtue of Amendment Act 53 of 1971, the definitions of the expressions ‘forward contract’⁶² and ‘ready delivery contract’⁶³ in Sections 2(c) and 2(i) respectively of FCRA were amended. The Statement of Objects and Reasons to the Amendment Act of 1971 provides that this legislative measure was prompted because it was observed that the speculative elements were taking resort to the ready market itself and were conducting their business in forward contracts in banned or regulated commodities under the guise of ready delivery contracts.⁶⁴
37. It was founded that the method employed by the parties was to enter into an apparently ready delivery contract for a week or ten days thus keeping themselves strictly within the law and then to square it up by entering into an opposite contract.⁶⁵ The next day or a day thereafter a seemingly new contract for the same quantity and variety of goods and with the same party was being entered into afresh and at the end of the next period of seven or ten days by an

⁵⁸ Moot Problem, ¶ 2.

⁵⁹ Moot Problem, ¶ 6.

⁶⁰ Moot Problem, ¶ 12.

⁶¹ Clarifications, ¶ 28.

⁶² Forward Contracts (Regulation) Amendment Act, 1971, § 2(a), No. 53, Acts of Parliament, 1971 (India).

⁶³ Forward Contracts (Regulation) Amendment Act, 1971, § 2(b), No. 53, Acts of Parliament, 1971 (India).

⁶⁴ Forward Contracts (Regulation) Amendment Act, 1971, Statement of Objects and Reasons, No. 53, Acts of Parliament, 1971 (India).

⁶⁵ *Id.*

opposite contract and so on.⁶⁶ Thus, a contract was carried on with the same party for the same quantity and quality of goods for as long as both the parties desire. If the business at a commodities spot exchange is in the form of paired contracts, it is nothing but financing transactions which is distinct from genuine sale and purchase transactions in commodities.⁶⁷

38. EXIL, in collusion with the members/ brokers of EXIL duped its investors as 99% of all the transactions being entered on EXIL platform in the year 2012-2013 and 2013-2014 were paired contracts.⁶⁸ The members/ brokers of EXIL received brokerage from the clients/ investors on the EXIL platform, and those brokers who had their NBFCs arms, got additional revenue by financing investors for investing in EXIL.⁶⁹ The members/ brokers had also made false and misleading representations, offered inducement, financing, and deliberately made wrongful assertions purely to get brokerage and facilitate EXIL in generating higher volumes.⁷⁰
39. This mechanism of paired contracts adopted at the EXIL exchange was very similar to the abuse referred to in Statement of Objects and Reasons to the Amendment Act of 1971. By resort to such a modus operandi, the transactions at EXIL no longer remained any genuine spot delivery transactions or even ready delivery transactions. Rather, the transactions assumed the character of pure and simple financing transactions. These paired contracts converted the operation at EXIL from a commodities exchange, which it was meant to be, to a platform for engaging in financing transactions unconnected with sale and purchase of commodities, which it was never meant to be. Thus, the act of engaging into paired contracts, by EXIL, its promoters and brokers, was beyond its permitted scope and in breach of provisions of FCRA.
40. It is, therefore, submitted that EXIL and its brokers violated provisions of FCRA by engaging into paired contracts and thus, action initiated by SEBI by invoking FCRA and filing criminal complaint against all the entities involved in the EXIL scam is legally valid.

⁶⁶ *Supra* note 64.

⁶⁷ 63, *Moons Technologies Limited and Ors. v. The Union of India and Ors.*, MANU/MH/3090/2017 (India).

⁶⁸ Moot Problem, ¶ 13.

⁶⁹ Moot Problem, ¶ 14.

⁷⁰ *Id.*

**ISSUE III: WHETHER THE ENQUIRY PROCEEDINGS INITIATED BY SEBI
AGAINST THE 200 MEMBERS/ BROKERS OF EXIL IS ULTRA VIRES.**

41. It is humbly contended that the enquiry proceedings initiated by SEBI against the 200 members/ brokers of EXIL is legally valid as **[III.A.]** SEBI can determine if the brokers of EXIL are fit and proper to be registered under the SEBI (Stock Broker and Sub Brokers Regulations), 1992 (*for brevity* ‘**Brokers Regulations**’) and **[III.B.]** SEBI can determine if the brokers of EXIL are fit and proper based on the criteria specified in Schedule II of the SEBI (Intermediaries) Regulations, 2008 (*for brevity* ‘**Intermediaries Regulations**’).

**[III.A.] SEBI CAN DETERMINE IF THE BROKERS OF EXIL ARE FIT AND PROPER TO BE
REGISTERED UNDER THE BROKERS REGULATIONS**

42. According to regulation 5(e) of Brokers Regulations, SEBI, while considering the application for grant of registration to a broker, is required to take into account whether the applicant is a fit and proper person.⁷¹ Furthermore, according to the second proviso to Section 28A(1) a person engaged in buying or selling or otherwise dealing in commodity derivatives as a commodity derivatives broker or as an intermediary, before the merger of FMC with SEBI, may continue to do so for a period of three months from the date of merger even without a registration certificate.⁷² It further provides that such a commodity derivatives broker or intermediary needs to make an application for registration within the said period of three months as he would be entitled to continue with his activities till the said period only.⁷³

43. The existence or absence of jurisdiction is determined by statute as the statute can vest or oust the jurisdiction and any representations or statements made by any party are not material to the arguments on jurisdiction.⁷⁴ This is suggestive of the fact that by virtue of the second proviso of Section 28A(1), such intermediaries who are dealing with commodity derivatives and who have made an application within a period of three months have been

⁷¹ Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations, 1992, Gazette of India, pt. II sec. 3 sub-section (ii) (Oct. 23, 1992), § 5(e).

⁷² Forward Contracts (Regulation) Act, 1952, § 28A (1), No. 74, Acts of Parliament, 1952 (India).

⁷³ *Id.*

⁷⁴ SEBI Order In the Matter of Anand Rathi Commodities Limited, WTM/MPB/EFD-1-DRA-IV/22/2019, https://www.sebi.gov.in/sebi_data/attachdocs/feb-2019/1551141494733.pdf, ¶38 [hereinafter ‘Rathi’].

- brought under the control of SEBI. Therefore, once an application of registration is received by SEBI, SEBI obtains the jurisdiction to determine whether the applicant is fit and proper.
44. On September 29, 2015, FMC got merged with SEBI and it was entrusted with regulatory supervision and control of commodity derivatives brokers.⁷⁵ As a transitory measure, three months period was given to the brokers operating in the commodity space, so as to enable them to get themselves registered with SEBI and pursuant to the same, all the 200 brokers who were involved in the EXIL scam, applied to SEBI for registration in order to be allowed to operate in the market.⁷⁶ Therefore, all the 200 brokers, who were functioning as commodity derivatives brokers, after having made their application to SEBI were under the supervision and control of SEBI like any other intermediary holding a certificate of registration.
45. It is, therefore, submitted that SEBI can determine if brokers of EXIL are fit and proper to be registered under Brokers Regulations and thus, the enquiry proceedings initiated by SEBI against the 200 members/ brokers of EXIL is legally valid.

[III.B.] SEBI CAN DETERMINE IF THE BROKERS OF EXIL ARE FIT AND PROPER BASED ON THE CRITERIA SPECIFIED IN SCHEDULE II OF THE INTERMEDIARIES REGULATIONS

46. It is contended that SEBI can determine if all the brokers of EXIL are fit and proper to operate in the commodity derivatives market on the basis of the criteria provided Schedule II of the Intermediaries Regulations. The present argument is in two folds. *First*, Commodity derivatives falls squarely under the definition of Securities [III.B.1.]; and *secondly*, Rule of purposive construction must be applied to the provision of registration of commodity brokers by SEBI [III.B.2.].

[III.B.1.] Commodity derivatives falls squarely under the definition of Securities

47. By virtue of Section 133B of Finance Act, 2015, SCRA was amended and the term “*commodity derivatives*” was included within the definition of ‘*Derivative*’ under SCRA.⁷⁷ Also, under SCRA the definition of ‘*Security*’ also includes “*derivate*”.⁷⁸ Thus, post the amendment to SCRA, commodity derivatives falls under the definition of Securities. As a result, Section 12(1) of the SEBI Act read with regulation 3(1) of the Stock Broker Regulations became applicable to the commodity derivatives market as well and SEBI

⁷⁵ Moot Problem, ¶ 15.

⁷⁶ Moot Problem, ¶ 16.

⁷⁷ Securities Contracts (Regulation) Act, 1956, § 2(ac)(C), No. 42, Acts of Parliament, 1956 (India).

⁷⁸ Securities Contracts (Regulation) Act, 1956, § 2(h)(ia), No. 42, Acts of Parliament, 1956 (India).

became empowered to exercise its jurisdiction to decide the application of registration of commodity derivatives brokers.⁷⁹

48. Furthermore, the criteria of determining a fit and proper person,⁸⁰ forms the part of Securities Laws.⁸¹ The regulations apply across to all sets of regulations and all intermediaries of the securities market including those who associate themselves with the market and they all have to satisfy the criteria of fit and proper person before they could be registered under any of the relevant regulations and this criteria they must continue to satisfy throughout the period of validity of their registration and throughout the period they associate with the market.⁸²
49. An applicant seeking registration is required to be a fit and proper person.⁸³ Similarly, an entity who has received a certificate of registration or is acting as a commodity derivative broker is required to continue to be a fit and proper person.⁸⁴ SEBI can take into account any consideration as it deems fit for the purpose of determining the fit and proper status of the above said persons.⁸⁵ SEBI as a regulator has been assigned a statutory duty to protect the integrity of the securities market and also the interest of investors in the securities market apart from promoting the development of and regulating the market by such measures as it may think fit.⁸⁶ The purpose of the regulations is to achieve the said objectives and make the securities market a safe place to invest.⁸⁷ Thus, SEBI may be justified in keeping a person of doubtful reputation out from the market rather than running the risk of allowing the market to be affected.⁸⁸
50. Therefore, when all the brokers of EXIL applied to SEBI for their registration, they were operating and functioning in the market without technically holding a certificate of registration but within the regulatory supervision and control of SEBI from the date of the merger, and at the same time, they are applicants for registration as commodity derivatives

⁷⁹ Securities and Exchange Board of India Act, 1992, § 12(1), No. 15, Acts of Parliament, 1992 (India).

⁸⁰ Securities and Exchange Board of India (Intermediaries) Regulations, 2008, Gazette of India, pt. III sec. 4 (May 26, 2008), Schedule II.

⁸¹ Securities and Exchange Board of India (Intermediaries) Regulations, 2008, Gazette of India, pt. III sec. 4 (May 26, 2008), § 2(k).

⁸² *Jermyn Capital LLC v. Securities and Exchange Board of India*, (2006) SAT 243 (India) [hereinafter 'Jermyn'].

⁸³ Securities and Exchange Board of India (Intermediaries) Regulations, 2008, Gazette of India, pt. III sec. 4 (May 26, 2008), § 7(1)(e).

⁸⁴ SEBI Order In the Matter of Motilal Oswal Commodities Broker Private Limited, WTM/MPB/EFD-1-DRA-IV/21/2019, https://www.sebi.gov.in/sebi_data/attachdocs/feb-2019/1551087705719.pdf, ¶60.1.

⁸⁵ *Mukesh Babu Securities Limited v. Securities and Exchange Board of India and Ors.*, SAT Appeal No. 53 of 2007 (Oct. 12, 2007), <https://www.sebi.gov.in/satorders/mukesh53.pdf>, ¶ 52.

⁸⁶ *Jermyn*, *supra* note 82.

⁸⁷ *Id.*

⁸⁸ SEBI Order In the Matter of Phillip Commodities India Pvt. Ltd., WTM/MPB/EFD-1-DRA-IV/ 25 /2019, https://www.sebi.gov.in/sebi_data/attachdocs/feb-2019/1551281570009.pdf, ¶63.2.

brokers under Brokers Regulations.⁸⁹ This brought them under the supervision and control of SEBI and thus, SEBI could look into the status of fit and proper criteria of all the brokers who had made an application for registration. Hence, at the time of submitting the application for registration, all the brokers were required to comply with the provisions of regulation 5(e) of Brokers Regulations read with fit and proper criteria specified in the Intermediaries Regulations.

51. It is, therefore, submitted that SEBI must exercise its supervision over all the brokers who had applied to it for the registration and determine if they are fit and proper to continue operating in the commodity derivatives market on the basis of the criteria provided in the Intermediaries Regulations. Thus, the enquiry proceedings initiated by SEBI against the 200 members/ brokers of EXIL is legally valid.

[III.B.2.] Rule of purposive construction must be applied to the provision of registration of commodity brokers by SEBI

52. It is an established principle of law that in order to construe the true meaning of a statute in question, it is not only legitimate but highly convenient to refer to the former Act, to the ascertained evils to which the former Act had given rise and to the later Act which provided the remedy.⁹⁰ These three are compared to ascertain the true reason of the remedy.⁹¹ It is then the duty of the judges to make such construction which suppresses the mischiefs and evils of the former Act and advance the remedy to stop the continuance of the mischief.⁹²
53. Under normal circumstances, Intermediaries Regulations are applicable when an intermediary is registered with SEBI and any action against him by SEBI, can be taken only if a certificate of registration has been granted to him under SEBI Act and rules and regulations made thereunder, thereby operating and functioning in securities market as per the rules and regulations made under SEBI Act.⁹³ However, prior to the coming into effect of the Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under any of the provisions of law but this mischief was noticed by the Parliament and intermediaries dealing with commodity derivatives were brought under the control of SEBI.⁹⁴ It was done with the belief that the activities of intermediaries

⁸⁹ Moot Problem, ¶ 16.

⁹⁰ Bengal Immunity Co. Ltd. v. State of Bihar and Ors., AIR 1995 SC 661 (India).

⁹¹ K.P. Varghese v. Income Tax Officer, AIR 1981 SC 1922 (India), Eastman Photographic Material Co. v. Comptroller General of Patents, Designs and Trade Marks, [1898] AC 571 (HL) (appeal from SCA) (576).

⁹² Goodyear India Ltd. v. State of Haryana and Anr., AIR 1990 SC 781 (India).

⁹³ Securities and Exchange Board of India (Intermediaries) Regulations, 2008, Gazette of India, pt. III sec. 4 (May 26, 2008), § 23.

⁹⁴ Rathi, *supra* note 74.

dealing in commodity derivatives should not remain uncontrolled and they should be brought under the control of competent authority.⁹⁵

54. Pursuant to the merger of FMC with SEBI, relevant statutes were amended to enable the functioning of the commodities derivatives exchanges and its brokers under SEBI norms.⁹⁶ Thus, all the brokers were given three months to get themselves registered from SEBI, which was not required earlier, in order to continue to be operating the market.⁹⁷ Further, all the brokers who had made an application of registration within a period of three months from the date of merger, were permitted to continue their activities and operate in the market till the disposal of their application. An entity cannot operate in a regulatory vacuum for the period when they operate as a commodity derivative broker till the disposal of their application of registration by SEBI. Thus, they were brought under the supervision and control of SEBI even as their application for registration was pending.
55. It is, therefore, submitted that SEBI must exercise its supervision over all the brokers who had applied to it for the registration and determine if they are fit and proper to continue operating in the commodity derivatives market on the basis of the criteria provided in the Intermediaries Regulations. Thus, the enquiry proceedings initiated by SEBI against the 200 members/ brokers of EXIL is legally valid.

⁹⁵ *Id.*

⁹⁶ Moot Problem, ¶ 15.

⁹⁷ Moot Problem, ¶ 16.

P R A Y E R

IN LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED IT IS HUMBLY PRAYED THAT THE HON'BLE COURT MAY BE PLEASED TO

- **QUASH** the order of the order of Hon'ble High Court of Bombay issued on December 31, 2010.
- **DECLARE** that forward contracts in electricity are within the exclusive jurisdiction of SEBI.
- **UPHOLD** the order of Hon'ble High Court of Bombay issued on December 31, 2018.
- **HOLD** that the action initiated by SEBI by invoking FCRA and filing criminal complaint against all the entities in the scam is legally valid.
- **HOLD** that the enquiry proceedings initiated by SEBI against the 200 members/ brokers of EXIL is legally valid.

AND/OR

PASS ANY OTHER ORDER, DIRECTION, OR RELIEF THAT THIS HON'BLE COURT MAY DEEM FIT IN THE INTERESTS OF JUSTICE, EQUITY AND GOOD CONSCIENCE.

All of which is humbly prayed

Date: --/--/201X

Sd/-

On behalf of
The Securities and Exchange Board of India
Counsel for the Respondent