

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

PIL NO. 29 OF 2013

Indian Council of Investors

V/s.

Union of India & Ors.

.. Petitioner

.. Respondents

Mr. Dariaus Shroff with Mr. Ashish Kamat, Mr. Deepak Sanchety and Mr. Durgesh Khanapurkar i/b India Law Alliance for the petitioner.

Mr. Darius Khambata, Senior Advocate with Ms. Naira Jeejeebhoy, Mr. Yogesh Chande, Mr. Faraz Sagar & Mr. Tomu Francis i/b Economic Laws Practice for respondent no.2.

Mr. Parag Vyas for respondent no.1.

**CORAM: MOHIT S. SHAH, C.J. &
M.S.SANKLECHA, J.**

DATE : 22 APRIL 2014.

ORAL JUDGMENT: (Per Chief Justice)

This public interest litigation has been filed by the Indian Council of Investors essentially seeking the following directions to respondent no.2 – Securities and Exchange Board of India (SEBI):-

- (a) to cease, desist and refrain from calling for Call Data Records (CDRs) and details of tower location from Telecom Service Providers (TSP);

- (b) to disclose the names of its officials who had called for such information from TSP and to take necessary action against such officials; and
- (c) to disclose on oath all investigation, adjudication, prosecution and other action that may have been taken and is being taken on the basis of CDRs collected.

The petitioner Council has also alleged that the action of calling for CDRs from TSP by SEBI violates and infringes the fundamental right of privacy available to citizens of India.

2. The petitioner is a company incorporated under section 25 of the Companies Act, 1956 and claims to be promoting, protecting and safeguarding the interest of investors of primary and secondary markets with various authorities including SEBI.

3. SEBI is a Board constituted and established by the Central Government under Section 3 of the Securities and Exchange Board of India Act, 1992 (SEBI Act). It has primarily been constituted to protect the interest of the investors in securities, to promote and regulate the security market.

4. The grievance in the petition as filed is not only in respect of CDRs and details of tower location from such TSP but also the action of SEBI of seeking to intercept and monitor the calls. This is specifically pleaded in ground (i) of the petition as under:

“ Respondent No.2 being a Government body, ought to have realized that such sensitive information of citizens of the country by seeking to intercept, call monitor as well as calling for Call Data Records of its telephones/cellphones cannot be just randomly sought for as per the whims and fancies of the junior officers of Respondent No.2. A proper reasoned order is required to be passed by an appropriate authority designated for this purpose before any such activity such as call interception and monitoring is done or call records are sought for of the citizens of the country, even if the agency/ organization / body is empowered by law to call for such CDR details. An appropriate authority designated of the agency empowered by law for this purpose is required to apply its mind and after considering the merits of the case and justification for seeking to intercept and monitor calls of ordinary citizens ought to pass orders interception, call monitoring as well as call Data Records of various citizens.”
(emphasis supplied)

However, the allegation in respect of intercepting and monitoring calls has been denied by SEBI. In the affidavit in reply dated 3 May 2013 filed on behalf of SEBI, it has been specifically stated as under:

“ It is further submitted that SEBI who has been mandated by the parliament to protect the interest of investors and regulate the securities market, has been continuously conducting surveillance and undertaking investigations to trace the facts associated with anomalies noticed in the functioning of the capital market. While conducting investigations, SEBI calls for information from several entities including telephone call records of suspected persons from telecom service providers. It is further submitted that SEBI has not tapped or intercepted calls during the process of its investigation. SEBI has only called for data that was already available in the records of the telecom providers. The data received has been utilized for the purpose of investigations only and for any malafide intentions.

In reply to Ground (B), (C) and (E), it is admitted that interception and monitoring of telephone conversation can be done only by the agencies that have been empowered by the government in this regard. However, SEBI has not tapped or sought interception of telephone communications and has only sought call data records from telecom service providers. The telecom service providers have provided these call data records willingly / voluntarily and where and when SEBI's request for data was refused by the telecom service providers, SEBI has taken no legal action to either seek / attain the data or file any legal proceedings against these operators.

(emphasis supplied)

5. At the hearing, learned counsel for the petitioner concedes that the petitioner Council is not making and/or pressing its allegation about interception and/or monitoring of calls by or at the instance of SEBI. The above allegation in the petition is attributed by the Counsel to loose drafting. The grievance of the petitioner is only confined to SEBI calling for CDRs and details of tower location from the TSP. We also find that the prayer clauses in the petition are also confined only to CDRs. Accordingly, the only issue being agitated before us and being considered by us is the power of SEBI to call for CDRs from Telecom Service Providers (TSP).

6. Mr. Darius Shroff, learned counsel for the petitioner has raised the following contentions:

(a) SEBI, being a creature of SEBI Act, has no powers to call for any CDRs from TSP conferred upon it. The calling of such information would amount to violation of fundamental right

of citizens to privacy. Thus, in violation of Article 21 of the Constitution of India;

- (b) In any view of the matter, SEBI is prevented/prohibited from calling for any records such as CDRs from any TSP in view of Section 5(2) of the Indian Telegraph Act, 1885. Thus, seeking and receiving CDRs from the TSP is in breach of the law and the Officers responsible for the same be proceeded with in accordance with law; and
- (c) The Officers of the SEBI and the Government of India are also of the view that SEBI does not have powers to call for CDRs. In fact, the correspondence between SEBI and Government of India and inter se between various Ministries of Government of India and notings on the files obtained under the Right to Information Act all clearly indicate that they were all conscious of the absence of power of SEBI to call for such information from service providers. It is only in the above light that suggestions were made to specifically confer that power on SEBI by proposing to amend section 5(2) of the Indian Telegraph Act, 1885 by empowering SEBI to exercise powers referred to in the said provision and have access to CDRs. However, no such amendment has been made nor has SEBI been included in the list of authorities upon whom such powers are conferred under section 5(2) of the Telegraph Act. It is therefore vehemently submitted that SEBI is acting illegally in calling for CDRs from such service providers.

7. Mr. Darius Khambata, learned Senior Counsel appearing for SEBI and Mr. Parag Vyas, learned Counsel appearing for UOI have in reply made the following submissions:

- (a) The SEBI has been constituted under the SEBI Act for protection of Investors in the Security Market, the regulation and promotion of Securities Market. In the above view, the SEBI Act has conferred power upon SEBI to call for information from any person including TSP. The powers of SEBI to call for information is traceable to Section 11 sub-section (1), sub-section (2) (i) & (ia) and sub-section (3) of the SEBI Act. Besides, such power is part of power to investigate under Section 11C(3) of the SEBI Act. Thus, SEBI is entitled to call for CDRs from TSP;
- (b) Without prejudice to the above, it is submitted that it has incidental to its functions of protecting investors, power to call for information from TSP in respect of pending investigation. Therefore, de hors the specific powers under the SEBI Act SEBI has inherent power to call for information such as CDRs. At times, the TSPs have given and at others declined to provide information about CDRs. SEBI has acted wherever information is furnished but not taken any action against TSP not providing the CDRs.

- (c) Section 5(2) of the Indian Telegraph Act, 1885 has no application in respect of calling for CDRs from TSP. The above provision only applies to intercepting calls and/ or prohibiting calls/ messages. It has no application in respect of calling for CDRs from TSP. The action of calling for CDRs from TSP in no manner violates any fundamental rights of the citizens as it is only a static record of calls having already been made to a particular telephone/ mobile number from a particular number. The record of CDRs is called for only in a pending investigation;
- (d) Power is only delegated to high ranking officers or investigating officers.
- (e) The correspondence between SEBI, the Government and various Ministries was with regard to specifically empowering SEBI to call for CDRs from TS, this was for the reason that in the absence of a specific provision, some of the TSPs did not provide the CDRs. Therefore, out of abundant caution, a specific provision would enable SEBI in obtaining the CDRs from the TSP ;
- (f) Without prejudice, in any case, the understanding of the SEBI Officials or of the Government of the legal provision will not decide the issue whether SEBI has the necessary powers or not; and

(g) Reliance is also placed on the provisions of the Ordinances issued by Government of India issued on 16 July 2013, 16 September 2013 and 28 March 2014 in support of the contention that the power to call for information has been expanded by introducing the words “any person” which would also include TSP. It is submitted that since such information is called for only for the purposes of investigation, there is no question of any misuse or abuse of the power or infringement of any fundamental right to privacy. In the first place, SEBI does not intercept or monitor any call on-line. All that SEBI calls for is static information about the CDRs and, therefore, there is no attempt to infringe the right to privacy of any person or investor.

In view of the above, it is submitted that the petition be dismissed.

8. Before dealing with the rival submissions, it would be convenient to refer to a few provisions of the SEBI Act relevant to the issue as under:-

“11. Functions of Board.— (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for—

(a) to (h)

(i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries and self-regulatory organisations in the securities market;

(ia) calling for information and record from any bank or any other authority or board or corporation established or constituted by or under any Central, State or Provincial Act in respect of any transaction in securities which is under investigation or inquiry by the Board;

(j) to (l)

(la) calling from or furnishing to any such agencies, as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions.

(m)

(3) Notwithstanding anything contained in any other law for the time being in force while exercising the powers under clause (i) or clause (ia) of sub-section (2) or sub-section (2-A), the Board shall have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:-

(i) the discovery and production of books of account and other documents, at such place and such times as may be specified by the Board;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) inspection of any books, registers and other documents of any person referred to in section 12, at any place;

(iv) inspection of any book, or register or other document or record of the company referred ton in sub-section (2-A);

(v) issuing commissions for the examination of witnesses or documents.

11-C- Investigation.

11C. (1) & (2)

(3) *The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before it or any person authorized by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.*

(4) to (7)

(8) *Where in the course of investigation, the Investigating Authority has reasonable ground to believe that the books, registers, other documents and record of, or relating to, any intermediary or any person associated with securities market in any manner, may be destroyed, mutilated, altered, falsified or secreted, the Investigating Authority may make an application to the Judicial Magistrate of the first class having jurisdiction for an order for the seizure of such books, registers, other documents and record.”*

(emphasis supplied by petitioner)

9. The President of India promulgated an Ordinance on 18 July 2013, continued by Ordinance of 16 September 2013 (which lapsed on 16 January 2014 and 16 March 2014) and fresh Ordinance was promulgated on 28 March 2014 which inter alia substituted **Section 11(2)(ia)** as under:-

“(ia) calling for information and records from any person including any bank or any other authority or board or corporation established or constituted by or under any Central or State Act which, in the opinion of the Board, shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities.”

(emphasis supplied)

Section 11C (8) was also substituted to read as under:-

“Where in the course of an investigation, the Investigating Authority has reason to believe that any person or enterprise, as the case may be, to whom a notice under sub-section (3) has been issued or might be issued, -

(a) has omitted or failed to provide the information or produce documents as required in the notice; or

(b) may not provide the information or produce documents which shall be useful for, or relevant to, the investigation; or

(c) may destroy, mutilate, alter, falsify or secrete the information or documents useful for, or relevant to, the investigation,

then, the Chairman may, after being satisfied that it is necessary so to do, after recording the reasons thereof in writing, authorise the Investigating Authority or any other officer of the Board (the officer so authorized being hereinafter referred to as the authorized officer), to:

(i) enter and search, with such assistance, as may be required, the building, place, vessel, vehicle or aircraft where such information or documents are expected or believed to be kept...”

(emphasis supplied)

10.

Section 5 of Indian Telegraph Act, 1885 reads as under:-

“5. Power for Government to take possession of licensed telegraphs and to order interception of messages.—

(1)

(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or

public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.”

(emphasis supplied)

11. We have considered the rival submissions. SEBI was constituted under the SEBI Act, 1992 with the objective of protecting the interest of investor in securities, development and regulation of Security market. Thus, the purpose and object of the SEBI is to ensure that the markets are well-regulated and investors are not cheated because of manipulation of the security market by a few unscrupulous investors who for personal gain seek to destroy the sanctity of the security market. Section 11(1) of the SEBI Act, states that the function of SEBI is to protect investors in securities, promote and regulate the Security Market. Section 11(2) of the SEBI Act, sets out without prejudice to the generality of Section 11(1) of the SEBI Act the measures which can be undertaken by SEBI for the purpose of achieving its objective/ mandate of protecting the investor and regulating the market. It is well settled that whenever the expression “without prejudice to the generality of the provisions of sub-section (1)” is used, it only means that the provisions following this

expression are not interpreted to curtail the generality of the power found in the earlier sub-section. Thus, the powers of the SEBI under Section 11(1) of the SEBI Act is sufficiently broad for the protection of investors in securities.

12. Moreover, Section 11-2(i) and (ia) of SEBI Act even before the amendment by the Ordinances did empower SEBI to call for information from persons associated with the securities market or under Section 11(2)(ia) of the SEBI Act from the agencies specified by SEBI with the objective to ensure clear and transparent transactions in the securities market. Further, under Section 11 (3) of the SEBI Act, SEBI has the powers of a Civil Court while exercising its power for calling information from any person under Section 11(2) (i) or (ia) of the SEBI Act and direct the authority concerned to produce documents, if so required, by the SEBI in the course of its investigation. Moreover, Section 11C (3) of the SEBI Act which was introduced into the SEBI Act in 2002 also empowered SEBI during the course of investigation to require any person associated with the securities market to produce documents, books etc. which is considered necessary for the purpose of investigation.

13. However, the objection of the petitioner is that the aforesaid provisions do not empower SEBI for calling for CDRs from TSP either under Section 11(2)(i) or (ia) of the SEBI Act. This is for the reason that the TSP is not associated with Security Market nor

are all the TSPs constituted under a Central, State or Provincial Act. This according to the petitioner is further supported by (information obtained through Right to Information Act) letter dated 24 June 2009 of Chairman of SEBI to the Department of Economic Affairs seeking to make them eligible to access e-mails and CDRs from TSP. Further, correspondence also seems to indicate the view of the officers that SEBI is not empowered to call for CDRs from the TSP.

14. So far as powers of SEBI as existing prior to the amendments made by the Ordinances is concerned, we find that the Supreme Court in ***Sahara India Real Estate Corporation Limited and others v/s. Securities and Exchange Board of India and another 2013(1) SCC 1*** while considering the powers of SEBI has made the following significant observations:-

“303.1 Sub-section (1) of Section 11 of the SEBI Act casts an obligation on SEBI to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, 'by such measures as it thinks fit'. It is therefore apparent that the measures to be adopted by SEBI in carrying out its obligations are couched in open-ended terms having no prearranged limits. In other words, the extent of the nature and the manner of measures which can be adopted by SEBI for giving effect to the functions assigned to SEBI have been left to the discretion and wisdom of SEBI. It is necessary to record here that the aforesaid power to adopt 'such measures as it thinks fit' to promote investors' interest, to promote the development of the securities market and to regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been given overriding effect over sub-section (1) of Section 11 of the SEBI Act.

303.2 Coupled with the clear vesting of the power with SEBI referred to above, sub-section (2) of Section 11 of the SEBI Act illustratively records the measures which can be adopted by SEBI. For the present controversy, reference may be made to clauses (i) and (i-a) of sub-section (2) which ordain that SEBI would be at liberty to call for information from or undertake inspections of, or conduct inquiries, or audits into 'stock exchanges', 'mutual funds', and 'other persons associated with the securities market', 'intermediators', and 'self-regulatory organization in the securities market. The power to call for information was expressly extended to 'banks' any other authority or board or corporation', in respect of any transaction in securities which is under investigation or inquiry (at the hands of SEBI) by adding clause (i-a) to sub-section (2), Sub-section (2-A) of Section 11 of the SEBI Act extends to SEBI the power to inspect (in addition to power already delineated in sub-section (2) of Section 11 referred to above) books, registers or other documents or records of any listed public company or a public company' which intends to get its securities listed on any recognized stock exchange.

303. Sub-section (3) of Section 11 of the SEBI Act vests with SEBI the same powers as are conferred on a civil Court, in the manner of discovery and production of books of account and other documents, summoning and enforcing the attendance of persons and examining them on oath, inspection of any books, registers or other documents. The power aforementioned specifically governs matters relating to calling for information already referred to hereinabove (under clauses (i) and (i-a) of sub-section (2), and sub-section (2-A) of Section 11.

303.4 to 308....

309. From a collective perusal of Sections 11, 11-A, 11-B and 11-C of the SEBI Act, the conclusions drawn by SAT that on the subject of regulating the securities market and protecting interest of investors in securities, the SEBI Act is a stand alone enactment and SEBI's powers thereunder are not fettered by any other law including the Companies Act, is fully justified.

(emphasis supplied)

Thus, the power of SEBI is very wide even de hors the amendments by the ordinances and is entitled to take such measures as it deems fit to protect the investors.

15. The President of India issued Ordinances on 16 July 2013 (lapsed), 16 September 2013 (lapsed) and 28 March 2014 wherein Section 11(2) (ia) of the SEBI Act was substituted to enable SEBI to call for information/ record from “any person” as opposed to the earlier provisions, empowering SEBI to call for information only from an Authority or board or Corporation established under an Act. Further, the Ordinance dated 28 March 2014 has also substituted Section 11C(8) of the SEBI Act by giving powers to SEBI to enforce its requests for the documents/ records from any person when not made available during the course of Investigation. Thus, the power in SEBI to call for the CDRs from TSP was always available and in case there was any doubt or ambiguity, the same is removed by the Securities Law (Amendment) Ordinances issued in 2013 and 2014.

16. So far as the understanding of the officers of SEBI and the officers of the Government of India is concerned, we find that in case of recent Acts, their understanding/ interpretation is of no avail. The principle of contemporaneous exposito is only applicable to old statutes and can have no application to the SEBI Act which is as recent as 1992. It is well settled that the interpretation/ understanding of legal provisions by officers of the Government cannot be the basis for construing/ interpreting the legislation. The

function of interpreting legislative measures is vested in Court and this obligation on its part cannot be outsourced to the construction put on the provisions by the executive. This view is fully supported by the decision of the Supreme Court in ***B. K. Garad and Others v/s. Nasik Merchants Co-op. Bank Ltd. AIR 1994 SCC 192.*** In the above case, the Supreme Court observed as under :-

“It is the function of the Court to construe legislative measures and in reaching the correct meaning of a statutory provisions, opinion of executive branch is hardly relevant. Nor can a Court abdicate in favour of such opinion.”

We also take note of the submission on behalf of SEBI that the correspondence was being exchanged only so as to specifically authorize SEBI to call for CDRs from TSP and also for providing the consequence of not furnishing the CDRs. This became necessary for the reason that at times, the TSP did not furnish information of CDRs when asked for on the ground that there was no specific provision in the SEBI Act for calling for CDRs.

17. The next objection of the petitioner is that SEBI is prevented/prohibited from calling CDR from any TSP by virtue of Section 5(2) of the Indian Telegraph Act 1885. We have reproduced Section 5(2) of the Indian Telegraph Act, 1885 herein above and do not find any prohibition to calling of CDRs from any TSP. It only prohibits an authority not authorized by Central Government from intercepting and/or prohibiting the sending of calls/messages. The calling of static information like CDRs from a TSP does not in

any manner violate Section 5(2) of the Indian Telegraph Act, 1885. Thus, on the face of it, we do not find the above objection sustainable.

18. Thus, there can be no dispute that the SEBI is authorized under the SEBI Act to call for CDRs from the TSP. However, this power is capable of misuse and can violate a citizen's right to privacy guaranteed by Article 21 of the Constitution. Therefore, it is made clear that such a power cannot be exercised by SEBI for conducting a fishing enquiry. It cannot be a blanket power to hunt out information without any pending inquiry or investigation. This power can only be exercised by SEBI in respect of any person against whom any investigation or enquiry is being conducted. Further, such information can be called for only by an officer duly authorized by SEBI to call for information with regard to CDRs from the TSP. SEBI had issued delegation order dated 3 May 2010 which, inter alia, delegates power to the following officers:

S.No.	Officer	Nature of delegation
1.	ED/Investigating Authority	Calling for information and record from any bank, any other authority or Board or corporation under Section 11(2)(ia)
2.	DGM with the approval of ED	Exercising powers under Section 11(3)
3.	Investigating Authority (original power)	Conduct/undertake investigation under Section 11C

Further, as a safeguard, it would be necessary that before calling for such information, an opinion be recorded on the file by the authorized officer, calling for the records indicating the reason why he considers it necessary to call for the CDRs. We are inclined to read this safeguard into the provisions of Section 11 and 11C(3) because Section 11C(8), while authorizing the Chairman of SEBI to take coercive measure for obtaining the relevant information not supplied, though called for, requires the Chairman to record reasons for authorizing such coercive measures. It would, therefore, stand to reason that before calling for CDRs from TSPs also, the authorized officer must be satisfied that it is necessary to call for such information. All the above safeguards are necessary to ensure that the privacy of an individual cannot be invaded by calling for the CDRs save and except in accordance with law.

19. Having heard the learned counsel for the parties, we are of the view that the provisions of Section 11(1), 11(2)(i) & (ia) (as amended by Ordinances promulgated by President of India on 16 July 2013, 16 September 2013 and 28 March 2014), Sections 11(3), 11C(3) and 11C(8) of the SEBI Act confer powers on SEBI to call for information and record of CDR of Tower Location from Telecom Service Providers, whether in public sector or in private sector. However, such power is to be exercised after complying with the following safeguards:-

- (i) such CDRs or information regarding tower location can be called for only in respect of the person against whom any investigation or enquiry is being conducted by SEBI,
- (ii) the information may be called for only by an officer who is duly authorized by SEBI as per the delegation order,
- (iii) before calling for such information, the opinion of such authorized officer should be recorded in the file indicating application of mind to the effect that CDRs and/or information regarding tower location would be relevant for any investigation or enquiry by SEBI in respect of any transaction in securities, and
- (iv) the CDRs of any such subscriber and information regarding tower location is a matter of confidentiality and privacy and therefore such privacy cannot be invaded except in accordance with law.

20. In our opinion, therefore, the safeguards indicated above are very important and mandatory and SEBI shall henceforth scrupulously observe the same before calling for any CDRs and/or information regarding tower location.

21. We also make it clear that we are rendering this decision in light of the provisions of the SEBI Act as amended by Ordinances issued by President of India on 16 July 2013, 16 September 2013 and 28 March 2014.

22. If any CDRs or information regarding tower location have been called for any period not covered by above Ordinances, we do not express any opinion as in this public interest litigation, the petitioner Council cannot espouse the cause of persons whose CDRs have been called for by SEBI for the purposes of investigation or enquiry in respect of any transaction in securities.

23. The **PIL** is accordingly **disposed** of in the above terms.

CHIEF JUSTICE

(M.S. SANKLECHA, J.)