

THE RIGHT TO LEGAL REPRESENTATION DURING SEBI INVESTIGATION

-Sumit Agrawal & G S Sreenidhi*

I. INTRODUCTION

The right to legal representation and the importance of due defence is almost universally upheld. In the Indian context, the right to legal representation (albeit in a criminal proceeding) finds place among the Fundamental Rights, being the only ‘profession’ which has a mention under Part III of the Constitution of India. Article 22 of the Constitution of India guarantees a right to be defended by a legal practitioner to every person who is arrested. Moving beyond fundamental rights, legal representation is a *sine qua non* in any judicial proceeding and there is little scope for challenge or ambiguity with regards to legal representation in such proceedings before Courts.

However, in the context of quasi-judicial, civil or administrative proceedings, when one begins to unravel the aspect of legal representation, the question arises— to what extent is such representation a matter of right? Extension of the right to proceedings before tribunals and quasi-judicial bodies seems to be a natural corollary to representation before courts. Going a few steps further, there come inquiries, investigations, disciplinary proceedings, and a host of different proceedings under various specialized legislations where the question of legal representation is not set out in clear terms and has been a subject of varying interpretation.

The focus of this piece is to view this right to legal representation within the architecture of regulatory laws, more particularly, securities laws. Broadly, while regulatory laws have specialized legislations, statutory bodies and specialized tribunals; in most cases, the jurisprudence is studied against the backdrop of administrative laws.

II. REPRESENTATION UNDER ADVOCATES ACT

Section 30 of the Advocates Act, 1961 lays down the right of advocates to practice. The section provides as below:

* Sumit Agrawal is the Founder of Regstreet Law Advisors, author of a book on the SEBI Act and a former SEBI official. G S Sreenidhi is an Associate at Regstreet Law Advisors and a graduate from Maharashtra National Law University, Mumbai. The authors can be reached at info@regsla.com.

“Right of advocates to practise

30. Subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,—

- (i) in all courts including the Supreme Court;
- (ii) before any tribunal or person legally authorised to take evidence; and
- (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.”

While Section 30 of the Advocates Act grants a right to the advocate to practice, as a necessary inference, the provision confers a right upon a party to engage an advocate for appearing before courts, tribunals, persons legally authorised to take evidence, and before any authority or person before whom an advocate is entitled to practice. The Karnataka High Court in *M/s Kothari Industrial Corporation Ltd & Anr v M/s Chamundi Curing Works & Anr*¹ observed in this regard that,

....The right of an Advocate to practice before any Court or Tribunal is closely related to the right of his client to engage him for appearance before any such Court or Tribunal. Stated conversely the right of a litigant to be represented by a Counsel is circumscribed by the right of the Advocate to appear before such Court, Tribunal, Authority or person. If the Advocate has in terms of Section 30 of the Advocate’s Act, 1961, the right to practice before any Court, Tribunal, Authority or person, it would necessarily mean that a litigant before any such Court, Tribunal, Authority or person will have a right to engage and avail of the services of an Advocate²

Section 30 of the Advocates Act is broad in its scope inasmuch as it allows an Advocate to practice before the following bodies:

- All courts including High Courts
- Any Tribunal
- Any person legally authorised to take evidence
- Any authority/person before whom the Advocate is entitled to practice under law

In the context of Applicability of Section 30, the Hon’ble Supreme Court of India has interpreted the Advocates Act to be a general legislation and has adopted the principle of *generalia specialibus non derogant*, i.e., the general words would not derogate from

1 ILR 1999 KAR 2235.

2 *ibid* [4].

special provisions. The Supreme Court in the case of *Paradip Port Trust v Their Workmen*³ observed in the context of Standing Orders and Industrial Disputes Act that:

...the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided with a clear object in view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject-matter of appearance of lawyers before all courts, tribunals and other authorities⁴

Notably, the apex court, in the judgment in *Paradip Port Trust* noted that this interpretation would have held good even if Section 30 of the Advocates Act was in force.⁵ While this interpretation was in a different era and in a specific context, today most financial regulatory laws have a provision that makes those regulatory laws in addition to and not in derogation of other laws,⁶ rarely providing an overriding effect.⁷

III. SECURITIES MARKET:

In the specific context of the securities market, the regulator is the Securities and Exchange Board of India (SEBI), established under the Securities and Exchange Board of India Act, 1992 (SEBI Act). The powers of SEBI are infamously far-reaching and the Supreme Court in *Clariant International Ltd & Anr v SEBI*⁸ held that:

The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, *run counter to the doctrine of separation of powers*. Integration of power by vesting legislative, executive and judicial powers in the same body, in future, *may raise a several public law concerns* as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers....The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise

3 (1977) 2 SCC 339.

4 *ibid* [23].

5 Section 30 of the Advocates Act, 1961 came into force w.e.f June 15, 2011 *vide* Gazette notification no. S.O. 1349(E) dated June 09, 2011.

6 See for instance, Section 32, SEBI Act, 1992 which reads as, 'Application of other laws not barred. 32. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.'

7 See for instance, Section 60 of Competition Act, 2002 which reads as, 'Act to have overriding effect. 60. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.'

8 (2004) 8 SCC 524.

of such wide ranging power is that it must comply with the Constitution and the Act....⁹

The key legislations governing the securities laws are the SEBI Act, the Securities Contract (Regulation) Act, 1956 (SCRA), the Depositories Act, 1996 and certain provisions of Companies Act, 2013 which are administered by SEBI. Each of these legislations allow an appeal against an order by SEBI/Stock Exchanges/Depositories/Clearing Corporations to lie before the Securities Appellate Tribunal. These legislations specifically allow an appellant to authorise *inter alia* a ‘legal practitioner’ to present the case on its behalf.¹⁰

Under Section 15-I of the SEBI Act, SEBI has the power to initiate inquiry proceedings for adjudging under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB of SEBI Act. The Appointment of Adjudicating Officer, if any, and holding of the inquiry is undertaken in accordance with SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (SEBI Inquiry Rules). Under the SEBI Inquiry Rules, the Board or adjudicating officer, while holding an enquiry, *inter alia* has the power to take evidence, issue summons for attendance or producing of documents:

SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995

Holding of inquiry.

4. (1) In holding an inquiry for the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15HA and 15H whether any person has committed contraventions as specified in any of sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15HA and 15HB the Board or the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than fourteen days from the date of service thereof) why an inquiry should not be held against him.

...

(4) On the date fixed, the Board or the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.

⁹ *ibid* [75], [77] (emphasis added).

¹⁰ See section 15V, SEBI Act; section 22C, SCRA and section 23C, Depositories Act, 1996 providing for the Right to Legal Representation, allowing an appellant to authorise one or more legal practitioners to present his case before the Securities Appellate Tribunal.

(5) The Board or the adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary the hearing may be adjourned to a future date and in taking such evidence the Board or the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872 (11 of 1872) :

...

(6) *While holding an inquiry under this rule the Board or the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which, in the opinion of the Board or the adjudicating officer, may be useful for or relevant to, the subject-matter of the inquiry.*

...

(emphasis added)

Under section 23-I of the SCRA, SEBI has the power to initiate inquiry proceedings for adjudging under sections 23A, 23B, 23C, 23D, 23E, 23F, 23G and 23H of the SCRA. Appointment of the Adjudicating Officer, if any, and holding of the inquiry is undertaken in accordance with Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 (SCR Inquiry Rules). Similar to the SEBI Inquiry Rules, under the SCR Inquiry Rules, the Board or adjudicating officer, while holding an enquiry, *inter alia* has the power to take evidence, issue summons for attendance or producing of documents.¹¹

Under section 19H of the Depositories Act, 1996, SEBI has the power to initiate inquiry proceedings for adjudging under sections 19A, 19B, 19C, 19D, 19E, 19F, 19FA and 19G of the Depositories Act, 1996. The Appointment of Adjudicating Officer, if any, and holding of the inquiry is undertaken in accordance with Depositories (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 (Depositories Inquiry Rules). Similar to the SEBI Inquiry Rules and SCR Inquiry Rules, under the Depositories Inquiry Rules, the Board or adjudicating officer, while holding an enquiry, *inter alia* has the power to take evidence, issue summons for attendance or production of documents.¹²

As can be seen from the provisions above, under Rule 4 of each of the above Rules, a notice is issued under the respective Acts to a person to show cause why an inquiry should not be held against her and if it is determined that an inquiry is to be held, the noticee shall be given an opportunity of hearing during which she may appear in person or through her

¹¹ Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005, rule 4.

¹² Depositories (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005, rule 4.

lawyer.

The above provisions which clearly allow legal representation pertain to ‘Inquiry Proceedings’ by SEBI.

Following is a look at legal representation and the ambiguity in case of investigations.

Apart from the above Inquiry proceedings, SEBI has the power to investigate under section 11C of SEBI Act. Section 11C(5) of SEBI Act empowers an Investigating Authority to ‘examine on oath’ ‘any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner’ and in this regard also has the power to require such persons to appear before the Investigating Authority in person. Further section 11C(6) of the SEBI Act prescribes the punishment for failing to respond to the Summon (for personal appearance or production of documents / information / records or for making statements) under section 11C(5) which includes ‘imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.’

There have been hundreds of cases where for non-compliance with summons issued by SEBI’s investigating officer, SEBI has imposed monetary penalty under section 15A(a) or under section 15 HB of SEBI Act. Under section 15A(a) and section 15HB of SEBI Act, the minimum penalty is one lakh rupees and maximum penalty is one crore rupees. It may be noted that these monetary penalties are separate and distinct from criminal prosecution for imprisonment as stated above.

From the scheme of the investigative powers of SEBI, including the power to examine on oath and criminal prosecution for failing to produce information or appear in person as required under section 11C(5), it is clear that the Investigating Authority is ‘authorised to take evidence’. Further, section 11C(7) specifically states that any information provided or statement made under section 11C(5) may be used in evidence against the party providing such information or making such statement. Even though the constitutionality of such a provision is dubious, it has remained unquestioned so far.

Therefore, the nature of SEBI’s investigative powers are wide-ranging and even prior to initiation of inquiry proceedings, have grave civil and criminal consequences. In light of the ruling of Supreme Court in *Paradip Port Trust*¹³ it must be noted that the SEBI Act does not contain any specific provision to exclude the application of the Advocates Act, more particularly Section 30.

Ostensibly, SEBI’s Investigating Authority, while examining on oath and requiring personal appearance of a person, should also permit the presence of a legal representative considering its powers attract section 30(ii) of the Advocates Act. However, SEBI has not

13 *Paradip Port Trust* (n 3).

set a standard/permitted legal representation at the stage of investigation. Interestingly, SEBI manual or guidelines on the process of investigation have remained opaque and discretionary, unlike that of other regulators such as the US Securities and Exchange Commission. In the absence of a specific ruling in the context of securities laws, one turns to the precedents under administrative tribunals and statutes.

IV. LEGAL REPRESENTATION – ADMINISTRATIVE AND REGULATORY LAWS

While ‘Courts’ and ‘Tribunals’ have an unambiguous ‘judicial’ flavour to them and therefore leave little doubt as to the applicability of Section 30 of the Advocates Act, the Regulators, a creation of statutes, often exercise quasi-legislative, quasi-executive and quasi-judicial powers. This makes the circumstances regarding entitlement to legal representation before regulators fall into a grey area.

Highlighting the difference between a ‘Regulator’ and a Court / Tribunal, the Supreme Court in *Lafarge Umiam Mining Pvt Ltd v Union of India*¹⁴ held that:

The difference between a regulator and a court must be kept in mind. The court / tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a pro-active body with the power conferred upon it to frame statutory Rules and Regulations. The Regulatory mechanism warrants open discussion, public participation, circulation of the Draft Paper inviting suggestions.¹⁵

In the context of regulators, administrative bodies and various proceedings under specialised legislations, the stage at which ‘legal representation’ becomes a matter of right has been subject to varying interpretations, largely based upon the person in authority. A key yardstick that maybe adopted in view of section 30 of the Advocates Act is to practice before ‘any person authorised to take evidence’. In case of regulators, several officers at different stages such as investigation, inquiry, disciplinary proceedings, adjudication proceedings etc., are empowered to record statements and examine persons on oath. Whether an entity is entitled to legal representation at the stage of investigation continues to remain unsettled.

The Supreme Court in *Poolpandi & Ors v Superintendent & Ors*¹⁶ dealt with the question of entitlement of presence of lawyers in questioning during investigation under the Customs Act, 1962 or the Foreign Exchange Regulation Act, 1973. It rejected the contention that the appellant in the case was entitled to the company of his choice during questioning and being questioned without the assistance of a lawyer violated his constitutional right. The Court observed that:

¹⁴ (2011) 7 SCC 338.

¹⁵ *ibid* [122].

¹⁶ (1992) 3 SCC 259.

The purpose of enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be “expanded” to favour exploiters engaged in tax evasion at the cost of public exchequer.

In the same year, the Supreme Court in *Crescent Dyes and Chemicals Ltd v Ram Naresh Tripathi*¹⁷, relying on decisions of English Courts, took the view that the right to be represented by counsel of one’s choice is not absolute and can be controlled, restricted or regulated by law, rules or regulations. This view came with a rider that in case of a serious or complex charge against a delinquent, the request for legal representation could be conceded. It was also observed that in India the right to representation is not an element of the principles of natural justice. In the context of Industrial Disputes and connected legislations, the apex court observed in *Crescent Dyes* that, ‘the requirement of the rule of natural justice insofar as the delinquent’s right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent.’¹⁸

In *Kothari Industrial*, the Karnataka High Court dealt with the question of whether the Chief Coffee Marketing Officer before whom proceedings were initiated would constitute a ‘Court, Tribunal or Authority’ and consequently, whether a right to engage an Advocate before such proceedings is available to an individual. In case of a person ‘legally authorised to take evidence’ due to a contract as opposed to a statute, as was the case with the Chief Marketing Officer, the Karnataka High Court held that the proceedings before this officer were not in the character of those before a Court and therefore there existed no entitlement of a litigant to be represented by an Advocate.¹⁹

In 2010 while deciding writ petitions seeking a mandamus for permitting the petitioner to be allowed to be accompanied by an advocate for proceedings under the Foreign Exchange Management Act, 1999, the Madras High Court in *P Giribabu v Prakash R Shah*²⁰ held that:

...Whether, the petitioners will be treated as accused of contravention

17 (1993) 2 SCC 115.

18 *ibid* [16].

19 *Kothari* (n 1) [5].

20 (2010) 326 ITR 575.

of the provisions of FEMA or whether they would be treated as witness would be decided after preliminary enquiry or investigation by the authorities concerned. Even at the initial stage itself, before the adjudicating authorities comes to a conclusion to proceed further or not, there need be no assistance to the petitioners either by an Advocate or by a Chartered Accountant

....Thus, considering the overall aspects of the judgement cited above, I am of the considered view that the petitioners have no right to take their counsels along with them at the time when their statement is recorded by the respondent or his officials²¹

While the above decisions have largely adopted the view that at a ‘preliminary’ stage of an inquiry proceeding, the right to legal representation cannot be availed,²² there is an increasing trend of decisions which have allowed legal representation and the presence of an advocate with some safeguards, during such preliminary stages of proceedings as well.

In securities laws, this in fact may not even be applicable in view of section 11(3) of the SEBI Act which reads thus:

Securities and Exchange Board of India Act, 1992

Functions of Board .

11 ...

(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 (2A), 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 time 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

²¹ *ibid* [7.7], [7.8].

²² It may be noted that none of these judgements are in the context of regulatory laws by institutions such as SEBI, Competition Commission of India, Telecom Regulatory Authority of India, Insurance Regulatory and Development Authority of India, Pension Fund Regulatory and Development Authority etc., which have in-built provisions under their respective statutes providing for serious civil and criminal consequences arising *inter alia* out of investigation/enquiry.

referred to in section 12, at any place;

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

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

On a related note, in an order passed in respect of a broker with the Ahmedabad Stock Exchange, *inter alia* for violations of SCRA, SEBI (Stock Brokers) Regulations, 1992²³ (Broker Regulations) and bye-laws of the exchange, the Gujarat High Court in *Mitesh Manubhai Sheth v. Secretary, Government of India and Others*²⁴ ruled in favour of the broker's right to be defended through a lawyer. The petitioner, being a stock broker facing enquiry following deficiencies observed during the course of inspection, challenged the constitutionality of the proviso to the then Regulation 28 of the Broker Regulations.²⁵ While declaring the proviso as unconstitutional, the court observed thus:

I have failed to persuade myself as to why there should be any objection to the presence of a lawyer in a case which involves complicated questions of law and fact. The presence of a lawyer cannot only be useful to the delinquent but also to the tribunal or enquiry committee to arrive at a just and appropriate decision. It is now well-settled that, in an enquiry affecting the legal rights of a person by a judicial or quasi-judicial or even administrative decision, the party affected should be permitted to be represented through a lawyer, if facts of the case so warrant. While it is true that, before a particular tribunal a lawyer should be allowed or not is a matter of policy, but keeping in view the mandate of article 21 of the Constitution of India, a decision reached by the Tribunal held to be vitiated on the ground that the enquiry was held in violation of the principles of natural justice as the delinquent was not afforded a reasonable opportunity to defend himself in the enquiry. *The cancellation of the registration of a stock-broker has definitely serious civil consequences and if the intricacy of the case so warrants, it will be denial of justice if*

23 Then called the SEBI (Stock Broker and Sub-Brokers) Regulations, 1992.

24 1997 SCC OnLine Guj 253.

25 Regulation 28 of the Broker Regulations (as published in the Gazette of India on October 23, 1992 *vide* No. S.O. 780(E)) read as,

“28. Manner of holding enquiry-

...

(5) Before the enquiry officer, the stock-broker may either appear in person or through any person duly authorised on his behalf;

Provided that no lawyer or advocate shall be permitted to represent the stock broker at the enquiry;

Provided further that where a lawyer or an advocate has been appointed by the Board as a presenting officer under sub-regulation (6), it shall be lawful for the stock broker to present its case through a lawyer or advocate”.

the authority concerned is not even vested with power to consider that in the facts of the case, representation of a stock-broker through lawyer is expedient. The statutory provisions are required to be in consonance with the principles of natural justice inasmuch as the right of a person having serious civil and pecuniary consequences are not jeopardised, except by a fair procedure. The extent of the application of course depends upon the framework of the statute. Bearing in mind the scheme of the SEBI Act and the regulations, as discussed, a complete embargo under the proviso to sub-regulation (5) of regulation 28 on the enquiry officer or the appropriate authority even to consider a request of the delinquent stock- broker to permit him to be defended through lawyer, in my view, is bound to lead to considerable hardships affecting the civil rights of a person arbitrarily and unreasonably which deserves to be struck down being violative of articles 19 and 21 of the Constitution of India. The contention of learned counsel for the SEBI that no request was made by the petitioner that he may be permitted to appear through lawyer, has no force as in view of the proviso to sub-rule (5) of regulation 28, such a prayer could not be made. As the petitioner was deprived during the enquiry to make a request to be defended through a lawyer and so the enquiry being in violation of the principles of natural justice, the entire enquiry proceedings against the petitioner deserved to be quashed and set aside and so also, all the proceedings subsequent thereto.²⁶

Notably, the proviso to Regulation 28, along with certain other provisions of the Broker Regulations, was omitted by the SEBI (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002, which stands repealed with effect from May 26, 2008 by virtue of the SEBI (Intermediaries) Regulations, 2008.

The Supreme Court in *Nandini Satpathy v PL Dani*²⁷ has held that at the stage of police investigation in a criminal proceeding “if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.”²⁸

Senior Intelligence Officer, Directorate of Revenue Intelligence v Jugal Kishore Samra,²⁹ in the context of Narcotic Drugs and Psychotropic Substances Act, 1985, differed from the decision of *Poolpandi*³⁰ and allowed the respondent’s advocate to be present during interrogation. However, the court specifically directed that ‘the advocate or the

²⁶ *Mitesh Manubhai* (n 23) [28] (emphasis added).

²⁷ (1978) 2 SCC 424.

²⁸ *ibid* [63].

²⁹ (2011) 12 SCC 362.

³⁰ *Poolpandi* (n 16).

person authorised by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not have consultations with him in the course of the interrogation.’

The Delhi High Court in a decision involving the rights and privileges during an investigation/enquiry under the Foreign Exchange Regulation Act in *KT Advani v The State*³¹ held that ‘As for the right of counsel to appear in an enquiry or investigation, the question has also to be answered in the affirmative. Section 30 of the Advocates Act entitles an advocate to practise, inter alia, before any Tribunal or “person legally authorised to take evidence”.’³² Further, while considering the provisions which are in the nature of preliminary enquiry and investigation, the Court observed that mere use of the term ‘evidence’ in a marginal heading would not deem the proceedings judicial and held that:

The expression “evidence” used in section 40 must, therefore, be given its ordinary meaning of oral or written statement and documents. There is, therefore, no escape from the conclusion that an advocate would be entitled, as of right, to practise before any person who is legally authorised to take evidence.³³

There are other High Courts which have upheld the right to legal representation in a pending investigation or proceedings before designated committees. The Allahabad High Court in *Chandradev Ram Yadav v Lokayukta UP*³⁴ held that:

The Lokayukta has got right to call for and ensure personal appearance of person against whom the investigation is pending, and to pass appropriate order in compliance of the statutory provisions during the course of investigation. However, the Lokayukta may not restrain the Advocates from appearing before him/her to contest the cause of a person against whom investigation is pending under the Act.³⁵

The Madras High Court has increasingly favoured the presence of legal representatives during administrative proceedings. In a case involving proceedings before the Privilege Committee of the Tamil Nadu Legislative Assembly in *E Edwig v Tamil Nadu Legislative Assembly*³⁶, it interpreted the powers of the committee in light of Section 30 of the Advocates Act to hold that the ‘Privilege Committee, which is undoubtedly empowered to record evidence, cannot deny the assistance of a Counsel in the absence of any Rule legally prohibiting such appearance.’³⁷

31 1985 Cri LJ1325.

32 *ibid* [11].

33 *ibid* [11].

34 2012 SCC OnLine All 485.

35 *ibid* [17].

36 2013 SCC OnLine Mad 253.

37 *ibid* [23] (emphasis added).

The trend of allowing an advocate to be present, but at a distance so as to not disturb the proceeding has begun to emerge as somewhat of a middle-ground while reconciling the right of an accused/entity facing proceedings and the nature of the proceedings. In case of a summons issued under the Customs Act, 1962 in *Vijay Sajani & Anr v Union of India*,³⁸ the Supreme Court allowed the presence of an advocate during the interrogation of the petitioner with the condition that the advocate 'should be made to sit at a distance beyond hearing range, but within visible distance and the lawyer must be prepared to be present whenever the petitioners are called upon to attend such interrogation.'³⁹

Similarly, in *B Narayanaswamy v Deputy Director, Enforcement Directorate*⁴⁰ the Madras High Court, while recognising the right of practice of an Advocate under Section 30 of the Advocates Act, held that:

....When such being the right conferred on the Advocate, the respondents cannot curtail such right, if the petitioner seeks such assistance. But at the same time, it should also be borne in mind that presence of such lawyer should not be a hindrance to the enquiry either by his interference with queries or by his prompting the person, who is being examined, to say this way or that way. If that is permitted then it would defeat the very object and purpose of enquiry. *However, the object of permitting the lawyer to be present at the time of enquiry is to see that such enquiry is conducted without giving any room for complaint as if the statement was obtained from the person so summoned under threat or coercion or harassment or physical torture.*

Therefore, I am of the view that the petitioner must be permitted to have his choice of lawyer to be present along with him at the time of interrogation/enquiry, however, by making it clear that such lawyer should sit within a visible distance but beyond hearing distance.⁴¹

In the context of the Competition Commission of India (CCI), an antitrust regulator similar to the capital markets regulator, the Delhi High Court in *Oriental Rubber Industries Private Limited v Competition Commission of India*⁴² held that the officials of the petitioner summoned by the 'Director General' (DG) of investigation shall be entitled to be accompanied by the advocate(s). The contentions of the CCI included *inter alia* –

- (a) That the Competition Act belongs to the family of legislation which deals with economic offences such as Foreign Exchange Regulation Act etc and Courts have consistently held that a person who is called to give his statement by way of

38 2012 SCC OnLine SC 1094.

39 *ibid* [5].

40 MANU/TN/3086/2019.

41 *ibid* [22], [23] (emphasis added).

42 2016 SCC OnLine Del 2438.

evidence cannot insist as a matter of right that he be accompanied by a lawyer;

- (b) That the person who is called to give his statement is not an accused and the question of his self-incrimination would not arise;
- (c) Larger public interest calls for expeditious investigation;
- (d) That the CCI is not barring advocates from practicing before it but a person being investigated has no right to be represented by an advocate during investigation when there is only a fact finding.

However, the High Court found it difficult to accept the arguments put forth by the CCI/DG and noted that:

- (a) The powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on Police under the Code of Criminal Procedure Code. While the Police has no power to record evidence on oath but the DG has been vested with such a power; and
- (b) It is no answer that no prejudice would be caused to the person/enterprise being investigated. The credibility and competitive position of a public company is affected in the business world even though in the end it may be completely exonerated.
- (c) The High Court took note that the Advocate Act, 1961 confers a right to practice on Advocates and it provides that every advocate shall be entitled to practice throughout India in all Courts and Tribunals or before person legally authorized to take evidence. It further said that right to practice would include accompanying a person who has been summoned before the DG for investigation.

In appeal, the Delhi High Court Division Bench in *Competition Commission of India v Oriental Rubber Industries Private Limited*⁴³ upheld the view of the earlier bench with the modification that the counsel / advocate shall not sit in front of the witness giving a statement before the DG. With a focus on avoiding hindrance to the efficacy of DG's investigation, the court held that:

....Therefore, while the party is allowed his right to be accompanied by an advocate, the DG's investigations are not unnecessarily hindered. The Commission having regard to the appropriate best practices across jurisdictions in antitrust matters may formulate such procedures and incorporate them in regulations; till then, it is open to the DG to make appropriate procedural orders. This court feels additionally that this precautionary note is essential, because often there can be situations where the prominent presence of a counsel might hinder questioning of

43 2018 SCC OnLine Del 9192.

the witness by the investigating officers or the Director General. Apart from non-verbal communication, the counsel might restrict the element of surprise that is essential when collecting such evidence. Therefore, the DG shall ensure that the counsel does not sit in front of the witness; but is some distance away and the witness should be not able to confer, or consult her or him.⁴⁴

Since then CCI has been allowing legal representation during investigation, however, SEBI till date is mired in opaqueness.

V. CONCLUDING REMARKS

The trend of the courts therefore have been leaning towards protecting constitutional rights by permitting the presence of legal representatives at the stage of enquiries, and certainly during investigation. In case of financial regulators, the authorities are empowered to record statements on oath at the time of investigation itself. Such enquiries/investigations, rather, become a basis for recommending Himalayan penalties, debarment from securities market, attachment of bank and demat accounts, cancellation or suspension of certificates of registration and criminal prosecution for imprisonment and fine.

Specifically, in the context of securities laws, considering the far-reaching civil and criminal consequences of statements made at the stage of enquiry and/or investigation, presence of one's legal representative assumes tremendous significance and not allowing proper and fair legal representation to the party being examined/summoned vitiates any fairness leading to annulment of entire proceeding(s) that may follow.

Presence of advocates is in fact in the interest of such an enquiry/investigation itself involving deposition/interrogation/statements on oath as an advocate can also be a witness to a recorded statement and witness to the fact that neither coercion nor undue influence, if any, was exerted on a deponent during the course of the examination/recording of statement(s). This will also avoid allegations of graft against investigating/enquiry/adjudicating officers and ensure credibility to the process as Advocate(s) appearing on behalf of a noticee can be made to sign the statement as a witness, to avoid any possible allegations subsequently.

Therefore, while one will have to wait to have this important issue judicially settled in the context of securities laws, it is the need of the hour for regulators like SEBI to make a policy decision in this regard and set an example by ensuring due process and that its powers are not open to be misused.

44 *ibid* [26].