

In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)

Appeal No. 186 of 2014

Dated: 4th February, 2015.

Present: Hon'ble Justice Surendra Kumar, Judicial Member
Hon'ble Mr.T. Munikrishnaiah, Technical Member

In the matter of:

Financial Technologies (India) Ltd.,
Shakti Tower-1, 7th Floor,
Premises E, 766, Anna Salai,
Thousand Lights,
Chennai-600 002.

Versus

..... Appellant

1. Central Electricity Regulatory Commission,
No. 1 is 3rd & 4th Floor,
Chanderlok Building, 36, Janpath,
New Delhi-110 001.

2. Indian Exchange Limited,
1st Floor, Malkani Chamber,
Off Nehru Road, Vile Parle (E),
Mumbai-400099.

..... Respondents

Counsel for the Appellant(s) : Mr. Amit Kapur
Ms. Apoorva Misra &
Mr. Vishrov Mukerjee

Counsel for the Respondent (s) : Mr. Nikhil Nayyar &
Mr. Dhananjay Baijal for Respondent
No.1

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present appeal has been filed by the Financial Technologies (India) Limited (in short, 'FTIL') challenging the order dated 13th May, 2014 passed by the learned Central Electricity Regulatory Commission (hereinafter referred to as 'Central Commission') in Suo Motu Petition No. SM/341/2013 whereby the learned Central Commission, in the matter of Regulatory Oversight of the Management and

Governance of Indian Energy Exchange Limited (IEX), has disposed of the aforesaid Suo Motu Petition in exercise of its powers under Regulation 22(A) and Regulation 63(i) of the Central Electricity Regulatory Commission (Power Market), Regulations 2010 directing the following for compliance by the Indian Energy Exchange (IEX):-

- (a) IEX shall ensure that FTIL divests its entire shareholding from the IEX by 30.9.2014.
- (b) Pending divestment of shares, the voting rights of FTIL shall stand extinguished and any corporate benefit in lieu of such shareholding shall be kept in abeyance or withheld by the exchange.
- (c) IEX shall ensure that no nominee of FTIL is represented in the Board of IEX.
- (d) IEX is directed to ensure compliance of the above directions with immediate effect and submit monthly report to the Commission.

2. The Financial Technologies (India) Limited is the appellant in this Appeal and is also one of the promoter shareholders of the IEX and has two Directors on the Board of the IEX.

2.1. that the respondent no.1 i.e. Central Electricity Regulatory Commission is a regulator of electricity, authorized under the Electricity Act, 2003 to discharge its functions and exercise its authority according to the provisions of the Electricity Act, rules and regulations.

2.2. Indian Exchange Limited (IEX), which is the respondent no.2 herein, has been established and is being operated in accordance with the provisions of the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 (in short, 'Power Market Regulations').

3. that the Central Commission started suo motu proceedings against the appellant to the effect that the appellant/FTIL has been declared as 'not fit and proper person' by Forward Market Commission (FMC) which is a Regulatory Authority under the Forward Contract Regulations Act, 1952 (FCR Act). FMC in its order dated 17.12.2013 in Reference No. 4/5/2013-MKT-I/B had issued the following directions:-

"15.1.4 Keeping in view the foregoing observations and the facts which reveal misconduct, lack of integrity and unfair practices on the part of FTIL in planning, directing and controlling the activities of its subsidiary company, NSEL, we conclude that FTIL, as the anchor investor in the Multi-Commodity Exchange Ltd., (MCX) does not carry a good reputation and character, record of fairness, integrity or honesty to continue to be a shareholder of the aforesaid regulated exchange. Therefore, in the public interest and in the interest of the Commodities Derivatives Market which is regulated under FCRA, 1952, the Commission holds that Financial Technologies (India) Ltd. (FTIL) is not a 'fit and proper person' to continue to be a shareholder of 2% or more of the paid-up equity capital of MCX as prescribed under the guidelines issued by the Government of India for capital structure of commodity exchanges post 5-years of operation. It is further ordered that neither FTIL, nor any company/entity controlled by it, either directly or indirectly, shall hold any shares in any Association/Exchange recognized by the Government or registered by the FMC in excess of the threshold limit of the total paid-up equity capital of such Association / exchange as prescribed under the commodity exchange guidelines and post 5-year guidelines."

3.1. that the Central Commission, in its order dated 03.01.2014, had directed the Indian Energy Exchange (IEX) to inform the Central Commission about the action being taken by the Board of the Company with regard to Shri Jignesh Shah and the shareholding of appellant/FTIL in IEX in light of the directions issued by Forward Market Commission dated 17.12.2013. In response to the above order, IEX vide its affidavit dated 17.1.2014 stated that the Board of IEX would meet post 07.02.2014 (i.e. date of hearing before the Bombay High Court) to discuss and take any steps on the basis of the outcome of the hearing of the Writ Petition filed by the appellant against the order dated 17.12.2013 of FMC in the Hon'ble High Court of Bombay.

3.2. that subsequently, IEX vide its affidavit dated 31.01.2014 clarified that the Board of IEX through circulation had decided to take further action with regard to the directions of the Central Commission after the outcome of the hearing in the Bombay High Court. IEX vide affidavit dated 13.03.2014 informed the Central Commission that Shri Jignesh Shah has tendered his resignation from the Board of IEX vide letter dated 07.03.2014.

3.3. that the Securities And Exchange Board of India (SEBI) in its order dated 19.03.2014 passed in Reference No. WTM/RKA/MRD-DSA/11/2014 has issued the following directions:-

"18. I, therefore, in exercise of the powers conferred upon me under Section 19 read with sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and section 12A of the Securities Contracts (Regulation) Act, 1956, read with regulations 20 (2)

and 49 of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012, hereby issue the following directions:

(a) FTIL is not a 'fit and proper person' to acquire or hold any equity share or any instrument that provides for entitlement for equity shares or rights over equity shares at any future date, in a recognized stock exchange or clearing corporation, either directly or indirectly;

(b) FTIL shall divest the equity shares and/or any instrument that provides for entitlement for equity shares or rights over equity shares at any future date, held by it, directly or indirectly, in MCX-SX, MCX-SX CCL, DSE, VSE and NSEIL within 90 days from the date of this order through sale of shares and/or instrument, and

(c) FTIL and the entities through whom it indirectly holds equity shares or any instrument entitling voting rights in MCX-SX, MCX-SX CCL, DSE, VSE and NSEIL shall cease to be entitled to exercise voting rights in respect of those shares or instruments, with immediate effect."

3.4. that further, FMC through Reference No.1/1/2014-MD-I/B dated 06.05.2014 has brought out the Revised Norms regarding Shareholding, Ownership, Net worth, Fit and Proper Criteria etc of the Nationwide Multi Commodity Exchanges, Clause of the revised norms provided as under:

"6. Consequences of ceasing to be a "fit and proper person":

In the event of any person ceasing to be a "fit and proper person" or being declared so by the Commission, such person shall forthwith divest his shareholding. Further, pending divestment of shares, the voting rights of such person shall stand extinguished and any corporate benefit in lieu of such holding shall be kept in abeyance/withheld by exchange. The exchange shall take necessary steps as it may deem fit so as to ensure that the shareholding of such person is divested forthwith."

3.5. that further vide the same reference dated 06.05.2014, the FMC issued directions under section 10 of the Forward Contracts (Regulation) Act, 1952 read with Rule 7(2)(II) of the Forward Contract (Regulations) Rules, 1954 for compliance of the revised norms by all National Commodity Exchanges by amending their rules including the memorandum and articles of associations within 45 days.

3.6. that examination of the orders issued by SEBI and FMC shows that FTIL (appellant) which has been declared as "not fit and proper person" shall have to divest all its shares in the Security Exchanges as well as Commodity Exchanges controlled by SEBI and FMC respectively and pending divestment of shares, FTIL/appellant shall have no voting rights. Considering these developments, the

learned Central Commission was of the view that such decisions by SEBI and FMC have direct bearing on the Power Market due to the following reasons:-

(a) IEX is an important market infrastructure institution playing a major and pivotal role in promoting the power market in the country with more than 95% of the market share. There is a need to ensure transparent and professional management of the IEX in order to inspire public trust and confidence in the exchange.

(b) The regulatory objectives of the power exchanges are similar to that of the commodity and stock exchanges in so far as the investor/consumer protection, market integrity, transparency, fairness and governance are concerned.

(c) Systems and processes such as electronic trading platform, clearing and settlement and risk management are similar in these exchanges.

(d) The Power Exchange as well as the Commodity Exchanges and the Stock Exchange are market infrastructure institutions needing the same level of integrity and governance.

3.7. that the appellant should not hold any share in the IEX or have any representation in the Board of the IEX because the appellant cannot be considered as 'fit and proper person' to hold shares in the Power Exchange and such a person poses same risk to the interests of the power market and its participants.

3.8. that the learned Central Commission issued an amendment to the CERC (Power Market Regulations), 2010 on 03.04.2014 after following the due procedure through public consultation and inserted a new Regulation as Regulation 22A after Regulation 22 of the Principal Regulations by way of amending the CERC (Power Market Regulations), 2010 which is as under:

"22A Qualifications and Disqualifications for appointment as Director in the Board of Power Exchange

(1) A person shall be considered as qualified to be appointed as a Director in the Board of Power Exchange if such person has a record of fairness and integrity, good reputation and character, and honesty.

(2) A person shall be considered as disqualified for appointment as Director of the Power Exchange, if:-

(a) he is convicted by a court of any offence involving moral turpitude or fraud or any economic offence or any offence against any law and a period of five years has not elapsed from the date of expiry of the conviction:

Provided that if the person is convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a Director in any Power Exchange; or

(b) he is found guilty in any proceedings for non-compliance of any of the provisions of the Act or the rules or the regulations made thereunder or any order made by the Appropriate Commission or the Appellate Tribunal for Electricity and a period of five years has not elapsed from the date of the order; or

(c) an order restraining, prohibiting or debarring him to hold the post of Director in the Board of a Company has been passed by any other Regulatory Authority constituted under any law in force in India under their respective Acts or regulations; or

(d) an adverse order has been passed against him by a competent court/tribunal in a winding up proceedings; or

(e) he is an un-discharged insolvent; or

*(f) he has applied to be adjudicated as an insolvent and his application is pending;
or*

(g) he is found to be of unsound mind by a court of competent jurisdiction and the finding is in force.

(3) No person who suffers from any of the disqualifications prescribed under Companies Act, 2013 shall be eligible for appointment or continuation as Director of the Power Exchange.

(4) The qualifications and disqualifications specified in this regulation shall also be applicable to the existing Directors of the Power Exchanges.

(5) If any shareholder of the Power Exchange suffers from any of the disqualifications as mentioned in clauses (2) and (3) of this regulations, such shareholder or his nominee shall be debarred from being appointed as Director in the Board of the Power Exchange.

(6) If any question arises as to whether a person is qualified/ disqualified to be a Director in a Board of the Power Exchange, the decision of the Central Commission on such question shall be final."

3.9. that in accordance with Regulation 22A(2)(c) and 22A(5) of the aforesaid Power Market Regulations, 2010 various shareholders of the Power Exchange have been prohibited, restrained or debarred by any Regulatory Authority constituted under any law in force in India from holding the post of Director in the Board of a Company, such shareholder or his nominee shall be debarred from being appointed as Director in the Power Exchange.

3.10. that since in the present case, the appellant, as stated above, has been held to be 'not fit and proper person' by SEBI and FMC which are Regulatory Authorities under the Securities and Exchange Board of India Act, 1992 and Forward Contract (Regulations) Act 1952, the directions of the SEBI and FMC in view of the Central Commission amount to debarment of representation of FTIL/appellant in the Boards of the Commodity Exchanges and the Stock Exchanges and therefore, in view of the provisions of Regulations 22(A)(2)(c) and 22(A)(5) of the Power Market Regulations, 2010 as amended by the Notification dated 03.04.2014 of the Central Commission, the appellant is not entitled to nominate its representative on the Board of IEX.

3.11. that the learned Central Commission has, in the impugned order, however, noted that there is no provision in the Power Market Regulations, 2010 directing a shareholder of the Power Exchange to divest his/or her shares but the Central Commission has the power under Section 63 (i) of Power Market Regulations, 2010 to make such orders as may be considered necessary for meeting the ends of justice. The learned Central Commission, keeping in view the public interest and the interest of the power market participants, has taken the view while passing the impugned order that the appellant/FTIL should divest its entire shares in the IEX as stated above.

3.12. that on 31.08.2007, the learned Central Commission passed an order in Petition No. 38 of 2007 granting permission to IEX to set up a power exchange subject to finalization of the power exchange design as well as rules and bye-laws of the power exchange.

3.13. that on 09.06.2008 IEX was granted approval set up and operate a power exchange.

3.14. that on 20.01.2010 the learned Central Commission in the exercise of its powers under Section 66 read with Section 178(2) (y) of the Electricity Act, 2003 notified the CERC (Power Market Regulations, 2010) and as per Regulation 14 thereof IEX was deemed to have been registered under the Power Market Regulations, 2010.

3.15. that on 25.02.2013, the learned Central Commission granted time till 20.01.2014 to the Indian Energy Exchange Limited (IEX) for reduction of appellant's shareholding in IEX to 25% in compliance with the Power Market Regulations, 2010.

3.16. that on 20.12.2013, the appellant filed a Writ Petition being Writ Petition No. 3330 (L) of 2013 under Articles 226 and 227 of the Constitution of India against the order dated 17.12.2013 of the FMC.

3.17. that on 31.12.2013 the IEX filed a Petition being Petition No. 9/MP/2014 before the learned Central Commission seeking extension of time for compliance of Regulation 19 of the Power Market Regulations, 2010 submitting that the appellant is holding 30.14% of the paid up capital in IEX (on fully diluted).

3.18. that the Central Commission in its order dated order dated 03.01.2014 had directed the IEX to inform the Central Commission of the actions being taken by the Board of IEX with regard to Shri Jignesh P. Shah and the shareholding of the appellant in IEX and to place on record the Audit Committee Report for the last three financial years for perusal of the Central Commission in the light of the directions of the FMC to the appellant and Shri Jignesh P. Shah.

3.19. that the respondent IEX filed an affidavit before the learned Central Commission in compliance of its earlier order dated 03.01.2014. The learned Central Commission on 24.01.2014 wrote to the IEX stating that the affidavit of IEX dated 17.01.2014 does not show that the order of the learned Central Commission dated 03.01.2014 had been placed before the Board of IEX as the meeting was held prior to the receipt of this order dated 03.01.2014. The learned Central Commission further directed the Board of IEX to consider its order dated 03.01.2014 and forward its decision to the Central Commission within one week of the receipt of letter dated 24.01.2014.

3.20. that on 30.01.2014 the IEX passed a Board Resolution through circulation resolving that pursuant to the Central Commission's order dated 03.01.2014, the Central Commission's letter dated 24.01.2014, affidavit of IEX dated 17.01.2014 and FMC order and also considering that the appellant has communicated to the Board of IEX vide letter dated 14.01.2014 that the FMC order has been challenged before the Bombay High Court, the IEX Board shall convene a meeting after 07.02.2014 to take a decision on the basis of the outcome of the Writ Petition hearing before the Hon'ble Bombay High Court.

3.21. that the IEX in its affidavit dated 31.01.2014 filed before the Central Commission further informed that the Board of IEX has been awaiting the outcome of next hearing in the Bombay High Court before taking a decision on disinvestment of the appellant's stake in IEX.

3.22. that the appellant vide its letter dated 12.02.2014 informed the IEX that the Writ Petition has been posted for hearing on 28.02.2014 and the hearing in SEBI matter has been postponed to the first week of March.

3.23. that the learned Central Commission, thereafter passed the aforesaid impugned order dated 13.05.2014 which is under challenge before us in the instant Appeal.

3.24. that the IEX vide its affidavit dated 30.05.2014 filed before the Central Commission submitted that two representative Directors of the appellant, namely, Shri Miten Narendra Mehta and Shri Prasant Desai had resigned from the Board of IEX with immediate effect vide their letters dated 19.05.2014. It was further informed to the Central Commission that IEX shall comply with the order of the Central Commission.

3.25. that the Hon'ble Bombay High Court vide its interim order dated 28.02.2014 has refused to grant the stay, as prayed by the appellant, against the order dated 17.12.2013 of the FMC and by observing as follows:

“After having perused the impugned order, we find that elaborate enquiry has been made by the Commission. Findings of fact of serious nature have been recorded against the Petitioners. The fraud perpetrated is to the tune of Rs. 5,500/- crores. Criminal investigations are in progress. Considering the gravity of the allegations which have been found to be established against the Petitioners, this is not a fit case where prayer for stay can be granted in exercise of writ jurisdiction under Article 226 of the Constitution of India. Accordingly, prayer for interim relief is rejected. Hearing of the Petition is expedited.”

4. that the impugned order dated 13.05.2014 of the learned Central Commission has been challenged on the following grounds:-

(A) that the Central Commission has directed the appellant to divest its stake in IEX without giving the appellant any notice or opportunity to submit its case in violation of the principles of natural justice.

(B) that the learned Central Commission has, without conducting an independent enquiry, erroneously relied upon the order dated 17.12.2013 of the Forward Markets Commission (FMC) declaring the appellant as 'not fit and proper person' to hold more than 2% shares in Multi Commodity Exchange (MCX).

(C) that the order dated 19.03.2014 of Security Exchange Board of India (SEBI) further declared the appellant to be 'not a fit and proper person' to acquire and hold any shares in a recognized stock exchange or clearing corporation either directly or indirectly.

(D). that the orders of the FMC and SEBI had been arbitrarily applied by the learned Central Commission in violation of the legal rights of the appellant without conducting an independent enquiry.

(E). that the impugned order of the learned Central Commission is contrary to the provisions of CERC (Power Market) Regulations, 2010.

(F). that the learned Central Commission has exercised its inherent powers erroneously and contrary to law.

5. We have heard Mr. Amit Kapur, assisted by Mr. Apoorva Misra & Mr. Vishrov Mukerjee, learned counsel appearing for the appellant and Mr. Nikhil Nayyar along with Mr. Dhananjay Baijal, learned counsel appearing for the respondent no.1. We have also gone through the material on record as well as the respective written submissions filed by the rival parties. Mr. Nayyar, learned counsel appearing for the respondent no.1 has submitted that counter affidavit filed on behalf of the respondent no.1 be also treated as his written submissions as the instant appeal involves some legal points.

6. The following issues are involved in the present appeal:

(A) Whether the Central Commission has power under Electricity Act, 2003 or Power Exchange Regulations to impose any restrictions on the shareholding in electricity exchange?

- (B) Whether the Central Commission has erred in passing the impugned order without following the principles of natural justice and without giving an opportunity of hearing to the appellant?
- (C) Whether the Central Commission has erred in relying on the order dated 17.12.2013 of the FMC against which Writ Petition is pending before the Hon'ble High court?
- (D) Whether the Central Commission has erred in relying on the order dated 19.03.2014 of the SEBI against which the Appeal filed before the Securities Appellate Tribunal has been dismissed on 09.07.2014?
- (E) Whether the impugned order is beyond the scope and powers of the CERC (Power Market) Regulations, 2010 as amended on 3rd April, 2014 by adding a new Regulation 22A?
- (F) Whether the learned Central Commission is justified in passing the impugned order without conducting an independent enquiry and without giving any reasonable opportunity to the appellant to present its case before directing the divestment of the shareholding of the appellant?

7. Since all these issues are inter-linked and inter-woven, we are taking up and deciding them together.

Regarding violation of principles of natural justice and fair hearing, the learned counsel for the appellant has made the following submissions:-

7.1. that the learned Central Commission has initiated suo-motu proceedings and passed the impugned order without giving any notice to the appellant which is in violation of the principles of natural justice.

7.2. that per Regulation 25 of the CERC (Conduct of Business) Regulations, notice of initiation of proceedings may be issued by the Commission and the Commission may give such orders and directions as may be deemed necessary, for service of notices to the affected parties, the filing of reply and rejoinder in opposition or in support of the petition in such form as it may direct. The Commission may, if it considers appropriate, issue orders for publication of the petition inviting

comments on the issues involved in the proceedings in such form as the Commission may direct.

7.3. that it is the settled principle of law that any enquiry, regulatory, quasi-judicial or judicial has to be conducted in accordance with the principles of natural justice including the proceeding in which the impugned order has been passed without giving any notice to the appellant. In Canara Bank Vs. A.K. Awasthi reported at (2005) 6 SCC 321 it was held that adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. In the instant case, the learned Central Commission should have apprised the appellant by giving notice to enable the appellant to make any representation, in the absence of such a notice and without fair and reasonable opportunity, the impugned order is wholly vitiated.

7.4. that in S.N. Mukherjee Vs. Union of India reported in (1990) 4 SCC 594, the Hon'ble Supreme Court further held that right to be heard is an elementary principle of fair hearing which is one of the basic features of natural justice. 'Natural Justice' means a fair process. A fair process essentially must exclude arbitrariness and exclusion of arbitrariness would ensure equality and equal treatment before law.

7.5. that further in A.R. Antulay Vs. R.S. Nayak reported in (1988) 2 SCC 602, the Hon'ble Supreme Court further held that no prejudice need to be proved in enforcing the fundamental right. Violation of the fundamental right itself renders the impugned order void. So also the violation of the principles of natural justice renders the act a nullity.

7.6. that this Appellate Tribunal in Sasan Power Limited Vs. Central Electricity Regulatory Commission reported in 2013 ELR (APTEL) 1239 has held that if Commission decides the matter on merits at the admission stage itself without deciding the issue of maintainability at the initial stage raised by the opponent and without hearing the opponent etc. on merits of the case, it amounts to a clear cut violation of principles of natural justice.

7.7. that since the appellant was an affected party in the suo-motu petition before the Central Commission and since the issues involved were continuation of nominee Directors of the appellant on the Board of respondent no. 2/IEX and divestment of shareholding of the appellant in respondent no. 2/IEX, the impugned order directs the appellant to divest its shareholding in IEX without affording an opportunity to the appellant to present its case and without hearing the appellant passed the impugned order which is against the principles of natural justice, hence the impugned order ought to be set aside.

8. Regarding the impugned order being contrary to the provisions of Regulation 63 of Power Market Regulations, 2010 the following contentions have been made on behalf of the appellant:-

8.1. that right to hold shares in a power exchange is a substantive right. This right cannot be taken away except by specific operation of law. The learned Central Commission has erred in exercising its inherent powers to negate the right of appellant by directing divestment of shares.

8.2. that there is a specific provision in Regulation 22A of the Power Market Regulations, 2010 relating to the consequence of a person being disqualified from appointment as a Director in a Power Exchange. The learned Central Commission could not go beyond the scope of Regulation 22A and impose additional consequences upon the appellant on the ground of alleged disqualification in terms of Regulation 22A.

8.3. that the learned Central Commission after noticing that it did not have the power to direct divestment of shareholding under the Power Market Regulations, 2010, it has wrongly and in complete violation of the settled judicial principles exercised its inherent powers to direct the said divestment. The scope and ambit of inherent powers under Regulation 63 of Power Market Regulations, 2010 are limited and cannot be expanded to pass directions mandating divestment of shareholding.

8.4. that the learned counsel for the appellant has placed reliance on K.K. Velusamy Vs. N. Palanisamy reported in (2011) 11 SCC 275 wherein it was held that Section 151 CPC is not a substantive provision which creates or confers any

power or jurisdiction on courts. It merely recognizes the discretionary inherent powers of the court which are necessary to secure the ends of justice and prevent abuse of its process. The court has no power to do which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction. The inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions.

8.5. that in Padam Sen Vs. State of U.P. reported in (1961) 1 SCR 884 (Constitutional Bench) which deals with Section 151 of the CPC, it was observed that the inherent powers of the court are not powers over the substantive right which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the court in the matters of procedure, which powers have their source in the court possessing all the essential powers to regulate its practice and procedure.

8.6. that in Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, (1965) 3 SCR 499 it was held that there is, however, no express provision like that of Section 31(1) or Section 33(4) of the Indian Income Tax Act entitling the assessee to a hearing either in the appeal or revision petition. Thus, this case law relates to the particulars of hearing in cases of assessment under Income Tax Act.

8.7. that there was no complaint or allegation of wrongdoing in the functioning of respondent No. 2/IEX. The learned Central Commission in its order dated 25.02.2013 in Petition No. 241/MP/2012 has held as under :-

"9. We note that the present shareholding pattern of the petitioner is quite diversified. The petitioner has appointed requisite number of independent directors in the Board and the various management committees like risk management committee, market surveillance committee are functioning effectively which ensures that the standards of corporate governance are followed and public interest is safeguarded."

9. Regarding the impugned order being bad in law, the learned counsel for the appellant has contended as under:-

9.1. that the impugned order has been passed based on FMC order dated 17.12.2013 against which Writ Petition is pending in the Bombay High Court.

9.2. that the SEBI order dated 19.03.2014 which was under challenge before the Securities Appellate Tribunal (SAT) through appeal, though that Appeal has been dismissed by the SAT on 09.07.2014, it could not adversely affect the appellant.

9.3. that the revised norms of the FMC have been challenged by the appellant before the Bombay High Court by filing a Writ Petition which is pending without grant of any interim stay.

9.4. that the learned Central Commission has not conducted any independent enquiry to ascertain whether the appellant ought to be directed to divest its shareholding. Instead the learned Central Commission has simply reached to the said conclusion based on the aforesaid orders of FMC and SEBI without any independent application of mind.

9.5. that the FMC order was passed against the appellant in light of the fact that appellant is the 'anchor investor' in MCX holding 26% shareholding. On the other hand, appellant has no role to play in the management or working of IEX and in that view, the impugned order relying upon the FMC order to issue impugned directions against the appellant is illegal.

9.6. that the FMC as well as SEBI orders are based on specific powers under the relevant statutes /regulations which permit SEBI to pass order directing divestment of shareholding. In the present case, the learned Central Commission is not empowered under the Electricity Act, 2003 or the Regulations to pass the impugned order giving directions relating to divestment of shareholding of the appellant.

9.7. that the learned Central Commission while passing the impugned order dated 13.05.2014 has relied upon the revised norms dated 06.05.2014 issued by the FMC under section 10 of the FCR Act read with Rule 7(2)(II) of Forward Contract (Regulation) Rules, 1954 ('FCR Rules') regarding ownership, net worth, fit and

proper criteria etc., of the Nationwide Multi Commodity Exchanges which are under challenge before the High Court.

9.8. that the Power Exchange Regulations do not contain any provision under which divestment of shareholding may be directed by the learned Central Commission. Hence, the directions for divestment of shareholding is without any legal sanction or jurisdiction.

10. The learned Central Commission/respondent no.1 has tried to justify the findings recorded in the impugned order saying that the impugned is perfectly legal and just one requiring no interference at this stage by this Appellate Tribunal. The appeal is liable to be dismissed as there is no force in any of the submissions raised on behalf of the appellant.

OUR DISCUSSION AND CONCLUSIONS ON ALL THE ISSUES

Since all these issues are inter connected, we are taking and deciding them simultaneously.

11. After considering the contentions of the learned counsel for the appellant and respondent/Central Commission, their oral submissions and on perusal of the impugned order dated 13.05.2014 passed by the learned Central Commission, the following facts are established:-

11.1. the learned Central Commission, in the matter of Regulatory Oversight of the Management and Governance of Indian Energy Exchange Limited (IEX)/respondent no.2, initiated suo motu proceedings being Petition No. SM/341/2013 (impugned petition).

11.2. that the IEX has been established and is being operated in accordance with the provisions of Central Electricity Regulatory Commission (Power Market) Regulations, 2010 (Power Market Regulations). The appellant being one of the promoter shareholders of the IEX has two Directors on the Board of the IEX.

11.3. that the appellant had been declared as 'not fit and proper person' by Forward Market Commissions (FMC) which is a Regulatory Authority under the Forward Contract Regulations Act, 1952 and the FMC vide order dated 17.12.2013 concluded that the appellant/FTIL as the 'anchor investor' in the Multi-Commodity Exchange Ltd., (MCX) does not carry a good reputation and character, record of fairness, integrity or honesty to continue to be a shareholder of the aforesaid regulated exchange and therefore observed that the appellant is not a fit and proper person to continue to be a shareholder of 2% or more of the paid-up equity capital of MCX as prescribed under the guidelines issued by the Government of India for capital structure of commodity exchanges post 5-years of operation. In the order dated 17.12.2013, the FMC ordered that neither FTIL nor any Company/entity controlled by it, either directly or indirectly, shall hold any shares in any Association or Exchange recognized by the Government or registered by the FMC in excess of the threshold limit.

11.4. that after having knowledge of the FMC's order dated 17.12.2013, the learned Central Commission vide its order dated 03.01.2014 had directed the respondent no.2/IEX to inform it about the action being taken by the Board of the Company with regard to Shri Jignesh Shah and the shareholding of the appellant in IEX in the light of the order dated 17.12.2013 of the Forward Market Commission.

11.5. that the respondent no.2/IEX vide its affidavit dated 17.01.2014 informed the learned Central Commission that the Board of IEX would meet after 07.02.2014 (i.e. the date of hearing before the Bombay High Court) as the appellant had challenged the FMC's order in the Hon'ble High Court of Bombay by filing a Writ Petition. Subsequently, IEX vide its another affidavit dated 31.01.2014 further clarified to the Central Commission that its Board had decided to take further action with regard to the directions of the Central Commission after the outcome of the hearing in the Bombay High Court.

11.6. The respondent no.2/IEX vide another affidavit dated 13.03.2014 further informed the Central Commission that Shri Jignesh P. Shah (one of the Directors of the appellant) in the Board of the IEX had tendered his resignation vide letter dated 07.03.2014.

11.7. The SEBI in its order dated 19.03.2014 also directed that the appellant is not a 'fit and proper person' to acquire or hold any equity share or any instrument that provides for entitlement for equity shares or rights over equity shares at any future date, in a recognized stock exchange or clearing corporation, either directly or indirectly and the appellant shall divest the equity shares and/or any instrument that provides for entitlement for equity shares or rights over equity shares at any future date held by it directly or indirectly in MCX etc within 90 days from the date of its order dated 19.03.2014 through sale of shares and/or instrument and appellant, its entities through whom it indirectly holds equity shares or any instrument entitling voting rights in MCX etc. shall cease to be entitled to exercise voting rights in respect of those shares or instruments, with immediate effect.

11.8. that against the SEBI's order dated 19.03.2014, the appellant filed appeal before the Securities Appellate Tribunal (SAT) which appeal has been dismissed by the SAT on 09.07.2014. There is no challenge before the Hon'ble Supreme Court by the appellant to the dismissal order of the appeal by SAT. Thus, the SEBI's order dated 19.03.2014 has attained finality.

11.9. that the FMC has specifically through reference dated 06.05.2014 brought out the revised norms regarding shareholding, ownership etc. and the said revised norms have also been challenged by the appellant by filing a Writ Petition before the Hon'ble Bombay High Court which is also pending.

11.10. that the Hon'ble Bombay High Court vide its interim order dated 28.02.2014 after hearing the appellant on the stay application has refused to grant the stay against the order dated 17.12.2013 of the FMC observing that elaborate enquiry has been made by the FMC. Findings of fact of serious nature have been recorded against the appellant. The fraud perpetrated is to the tune of Rs. 5,500/- crores. Criminal investigations are in progress. Considering the gravity of the allegations which have been found to be established against the appellant, this is not a fit case where prayer for stay can be granted in exercise of writ jurisdiction under Article 226 of the Constitution of India.

11.11. Thus, the learned Central Commission after examination of the orders by SEBI and FMC has passed the impugned order giving the aforementioned directions.

11.12. The learned Central Commission, in the impugned order, has further observed that orders of SEBI and FMC have direct bearing on the Power Market and since the appellant which had already been declared as 'not fit and proper person' to hold shares in Commodity Exchange and Stock Exchange cannot be considered as 'fit and proper person' to hold the shares in the Power Exchange because such a person poses same risk to the interests of the Power Market and its participants. The learned Central Commission further took the view that the appellant should not hold any share in the IEX or have any representation in the Board of the IEX.

11.13. The learned Central Commission issued an amendment to the Power Market Regulations, 2010 on 03.04.2014 and after following the due procedure through public consultation inserted a new Regulation 22A prescribing qualifications and disqualifications for appointment as Director in the Board of Power Exchange.

11.14. In accordance with Regulation 22A(2)(c) and 22A(5) of the Power Market Regulations, 2010 where a shareholder of Power Exchange has been prohibited, restrained or debarred by any Regulatory Authority constituted under any law in force in India from holding the post of Director in the Board of a Company, such shareholder or his nominee shall be debarred from being appointed as Director in the Power Exchange. The learned Central Commission, in the impugned order, has further noted that the directions of SEBI and FMC in the view of learned Central Commission amount to debarment of representation of the appellant in the Boards of the Commodity Exchange and the Stock Exchange and, therefore, the appellant is not entitled to nominate its representative on the Board of IEX.

11.15. The learned Central Commission, in the impugned order, has candidly and sincerely noted the situation that since there was no provision in the Power Market Regulations, 2010 directing a shareholder of the Power Exchange to divest its shares, the Central Commission has the power under Regulation 63 of Power Market Regulations, 2010. This Regulation 63 provides for savings of inherent powers of the Central Commission which we are reproducing below:

"63. Saving of inherent powers of the Commission:

- (i) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.

- (ii) Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of these Regulations including summary procedures, if the Commission, in view of the special circumstance of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for so dealing with such a matter or class of matters.

- (iii) Nothing in these Regulations shall bar the Commission to deal with any matter or exercise any power under the Act for which no regulations have been made and the Commission may deal with such matters, powers and functions in a manner it thinks fit."

11.16. Thus, the learned Central Commission has, in our view, the Power under Regulation 63 to make such orders as it considers necessary for meeting the ends of justice or to prevent the abuse of the process of the Central Commission. The learned Central Commission, in the impugned order, has clearly noted that keeping in view the public interest and the interest of the Power Market participants, the appellant/FTIL should divest its entire shares in the IEX and the learned Central Commission in exercise of its powers under Regulation 22(A) and Regulation 63(i) of the Central Commission's Power Market Regulations, 2010 passed the impugned order as detailed above.

12. On consideration of the afore-mentioned facts and circumstances, we do not find any force in the contention of the appellant that the Central Commission has passed the impugned order and directed the appellant to divest its shares/stocks in IEX/respondent no.2 without giving the appellant any notice or opportunity to put its case which is said to be in violation of the principles of natural justice in the case in hand.

13. As stated above, the learned Central Commission took notice of the order dated 17.12.2013 passed by Forward Market Commission (FMC), which held that the appellant is not a fit and proper person to continue to be a shareholder of 2% or more of the paid up equity capital of MCX and further directed that neither the appellant nor any Company or entity controlled by the appellant, either directly or indirectly, shall hold any shares in any Association or Exchange recognized by the Government or registered by the FMC in that regard. Just after having knowledge of the FMC's order dated 17.12.2013, the learned Central Commission started suo motu proceedings in the instant petition. In the suo motu petition, the learned Central Commission vide its order dated 03.01.2014, had directed the IEX/respondent no.2 to

inform the Central Commission about the action being taken by the Board of the IEX with regard to Shri Jignesh Shah and shareholding of the appellant in IEX. The IEX vide its affidavit dated 17.1.2014 informed the Central Commission that since the order dated 17.12.2013 of the FMC had been challenged by the appellant before the Hon'ble Bombay High Court, the IEX shall take steps after waiting for the outcome of the hearing of the Writ Petition filed by the appellant in the Hon'ble High Court of Bombay. On further query by the Central Commission, the IEX vide another affidavit dated 31.01.2014 further informed the Central Commission that its Board through circulation had decided to take further action with regard to the directions given in the FMC's order dated 17.12.2013, after looking into the outcome of hearing in the Bombay High Court. The IEX vide other affidavit dated 13.03.2014, further informed the Central Commission that Shri Jignesh P. Shah tendered his resignation from the Board of IEX vide letter dated 07.03.2014.

13.1. We may further note here that if the appellant was not really aware of the order dated 03.01.2014, passed by the Central Commission and further query made by the Central Commission regarding the implementation or compliance of the FMC's order dated 17.12.2013, the appellant was able to challenge the FMC's order dated 17.12.2013 before the Bombay High Court. Not only this, the respondent no.2/IEX was fully aware of the writ proceedings before the Bombay High Court when the IEX informed the learned Central Commission that it would act on the FMC's order only after seeing the outcome of the hearing before the Bombay High Court. Thus, IEX also knowingly waited and gave time to the appellant to get some interim order from the Bombay High Court and the IEX further assured the appellant not to comply with the FMC's order dated 17.12.2013 till some interim order is passed by the Bombay High Court.

14. Before passing the impugned order dated 13.05.2014 by the learned Central Commission, the Hon'ble Bombay High Court after hearing the stay application of the appellant in the said Writ Petition challenging the FMC's order dated 17.12.2013, vide its interim order dated 28.02.2014 refused to grant the stay, as prayed for by the appellant, against the order dated 17.12.2013 of the FMC observing that elaborate enquiry has been made by the FMC. Findings of fact of serious nature have been recorded against the appellant, the fraud perpetrated is to the tune of Rs. 5,500/- crores and criminal investigations are in progress and after considering the gravity of the allegations

which have been found to be established against the appellant, this is not a fit case where prayer for stay can be granted in exercise of writ jurisdiction under Article 226 of the Constitution of India.

15. Thus, even the Hon'ble Bombay High Court through its interim order dated 28.02.2014 refused to stay the operation of the order dated 17.12.2013 of the FMC.

16. Not only this, the learned Central Commission also took notice of the order dated 19.03.2014 passed by SEBI in which SEBI also observed that the appellant is not a fit and proper person to acquire or hold any equity shares or any instrument and the appellant shall divest the equity shares or any instrument that provides for entitlement for equity shares or rights over equity shares by any future date, held by it, directly or indirectly in the MCX etc. within 90 days from the date of SEBI's order. SEBI further directed that the appellant shall cease to exercise any voting rights in respect of those shares or instruments with immediate effect. The SEBI's order dated 19.03.2014 was challenged by the appellant before the Securities Appellate Tribunal (SAT) by filing an appeal and the said appeal has been dismissed by SAT on 09.07.2014. Since the order of the SAT has not been challenged by the appellant in any higher forum, the same has attained finality.

17. The learned Central Commission taking notice of the orders of FMC and SEBI dated 17.12. 2013 and 19.03.2014 respectively, started the proceedings in the suo motu petition of which the appellant had due intimation through respondent no.2/IEX. The exchange of correspondence between the learned Central Commission on the one hand and the respondent/IEX on the other hand clearly establishes that the appellant had full knowledge or notice of the suo motu proceedings before the learned Central Commission. No benefit of the aforesaid rulings cited by the appellant on the principles of natural justice can be given to the appellant in the facts and circumstances of the case. The appellant has failed to show that the learned Central Commission by not giving any opportunity of hearing to the appellant has caused some prejudice to the appellant. The appellant challenged the orders of FMC and SEBI before the higher forums but he could not succeed. Even the Hon'ble High Court of Bombay has refused to stay the operation of the FMC's order and on the basis of the same FMC's order and also on the same SEBI's order against which Securities Appellate Tribunal (SAT) has subsequently rejected the appeal has proceeded to pass the impugned order.

18. The learned Central Commission while initiating the suo motu proceedings against the appellant passed the first order on 03.01.2014 directing the IEX to inform the Central Commission about the action being taken by the Board of IEX regarding shareholding of the appellant in the light of the order dated 17.12.2013 of the FMC, the appellant became fully aware of the aforesaid suo motu proceedings by the Central Commission. The appellant instead of putting his grievances before the Central Commission preferred to file a Writ Petition against the FMC's order before the Bombay High Court and then the IEX gave sufficient time to the appellant to get some interim order from the Hon'ble High Court and lastly when the Hon'ble High Court refused to stay the operation of the FMC's order, then the IEX assured the Central Commission to comply with the FMC's order. It is clearly evident on record that appellant inspite of having sufficient knowledge and notice of the suo motu proceedings before the learned Central Commission did not like to appear or file any reply or objections before it. Thus, the learned Central Commission has legally and correctly directed the appellant by way of the impugned order to divest its shares in IEX and there was no violation of the principle of natural justice by the Central Commission. The learned Central Commission after making repeated queries from the respondent/IEX passed the impugned order.

19. Since the learned Central Commission legally and correctly relied upon the FMC's order dated 17.12.2013 which declared the appellant as not fit and proper person to hold more than 2% shares in Multiple Commodity Exchange and further relied upon the SEBI's order dated 19.03.2014 which also declared the appellant to be not a fit and proper person to acquire or hold any shares in a recognized stock exchange or clearing corporation, either directly or indirectly and particularly after the refusal to grant stay against the FMC's order dated 17.12.2013 by the Hon'ble High Court of Bombay. There was no legal requirement for the Central Commission to conduct any independent enquiry. Two separate and independent enquiries had already been made by the FMC and SEBI, hence there was no mandatory requirement for the Central Commission to make any further enquiry about the fact as to whether the appellant was not a fit and proper person. Therefore, we are further unable to accept this contention of the appellant that the impugned order has been passed without conducting any independent enquiry by the Central Commission. The learned Central Commission has legally and correctly relied upon the orders of FMC and SEBI while passing the impugned order.

20. We also find no force in the contention of the appellant that the impugned order is contrary to the provisions of CERC (Power Market) Regulations, 2010 as amended vide Notification dated 3rd April, 2014 whereby Regulation 22A to the 2010 Regulations dealing with qualifications and disqualifications for appointment as Director in the Board of Power Exchange was inserted.

21. So far as the contention of the appellant regarding exercise of inherent powers by the Central Commission in passing of impugned order is concerned, after going through the Power Market Regulations, 2010 as amended in April, 2014 particularly Regulations 22A(2)(c) and 22A(5) and 63 of the CERC (Power Market) Regulations, 2010, we find that the learned Central Commission was legally justified in passing the impugned order because the learned Central Commission, in the impugned order, has clearly noted that keeping in view the public interest and the interest of power market participants, the appellant should divest its entire shares in the IEX. This action in passing the impugned order by the Central Commission against the appellant appears to be just, legal and proper step in order to save the public interest and the interest of power market participants because such a person like appellant who had been declared as 'not fit and proper person' to hold more than 2% shares in the MCX and/or to acquire or hold any shares in the recognized Stock Exchange or Clearing Corporation should not be allowed to continue with its shares in the IEX.

22. In view of the above discussions on the aforesaid issues, namely, Issue Nos. A, B, C, D, E & F are decided against the appellant as we do not find any kind of illegality or perversity in the impugned order dated 13.05.2014, passed by the learned Central Commission. We further approve all the findings and reasons recorded by the learned Central Commission in the impugned order. The instant Appeal is without merits and is liable to be dismissed.

SUMMARY OF FINDINGS

23. The learned Central Commission is legally justified in passing the impugned order dated 13.05.2014 which directed the respondent no.2/IEX to ensure that appellant (FTIL) should divest its entire shareholding from the IEX and pending divestment of shares, the voting rights of the appellant shall stand extinguished

and any corporate benefit in lieu of such shareholding shall also be kept in abeyance or withheld by the IEX. The impugned order further directed the IEX to ensure that no nominee of the appellant is represented in the Board of the IEX and IEX was also directed to ensure compliance of the directions given in the impugned order with immediate effect and submit monthly report to the Central Commission. The learned Central Commission was justly and legally justified in initiating the suo motu proceedings through the instant Suo Motu Petition No. SM/341/2013 and legally relied upon the orders of FMC and SEBI dated 17.12.2013 and 19.03.2013 respectively. The learned Central Commission has passed many orders making certain enquiries from the respondent /IEX about the appellant and the exchange of correspondences between the Central Commission and the respondent/IEX clearly fortifies the fact that the appellant was fully aware of the suo motu proceedings before the learned Central Commission but he did not, knowingly, appear before the Central Commission requiring any personal hearing. In the aforesaid situation, it was not mandatory upon the Central Commission to make independent and separate enquiry against the appellant before passing the impugned order, particularly when the Hon'ble High Court of Bombay by making detailed observations refused to stay the operation of the FMC's order dated 17.12.2013. Pendency of the Writ Petition in any Hon'ble High Court or any higher forum was not a ground for the Central Commission to keep the matter pending till the disposal of the above said Writ Petitions. The appellant has miserably failed to show the prejudice caused to him by his deliberate non-participation before the Central Commission in the suo motu proceedings and the impugned order has correctly and legally been passed.

23.1. Consequently, the instant Appeal, being devoid of merits is dismissed and the impugned order dated 13.05.2014 passed by the Central Commission in Suo Motu Petition No. SM/341/2013 is hereby affirmed. No order as to costs.

Pronounced in open Court on this 4th day of February, 2015.

(T. Munikrishnaiah)
Technical Member
rkt

(Justice Surendra Kumar)
Judicial Member