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No case for judicial overreach

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Allowing free access to courts only leads to business uncertainty and delays.

The courts need not probe matters that are also being examined by the regulator concerned.

In the recent past, the Supreme Court and at times High Courts of different States have entertained petitions seeking investigation into the affairs of listed and unlisted companies, even when the regulators have been seized of the matter.

This is a disturbing trend since it exposes a private entity (company or individual) to litigation from any private citizen in any High Court or the Supreme Court, irrespective of whether the regulator concerned has expressed an opinion or not.

In various cases since the adoption of the Constitution, the Supreme Court has held that courts ought to defer to the executive in matters relating to policy — it made these observations in the context of special bonds for black money (*R. K. Garg vs. Union of India*), privatisation of public sector enterprises (*Balco Employees Union vs. Union of India*), and other economic or socio-economic matters.

Therefore, in technical matters such as non-compliance in relation to shares and securities, foreign exchange, telecom and so on, it would be important to balance the right of a citizen to approach the court with the functions performed by the regulator.

Climate of uncertainty

Another important aspect is that intervention by the courts in matters relating to enforcement of regulatory laws leads to a climate of uncertainty for companies — if a decision relating to investment laws and public procurement made by an authority is open to scrutiny and any person can challenge it, companies and investors will be operating under a perpetual threat of litigation and regulatory non-compliance.

The Supreme Court has held in this regard that certainty is integral to rule of law and has acknowledged the requirement for consistency and uniformity in the application of laws.

In *State of West Bengal and Others. v. Committee for Protection of Democratic Rights* [(2010) 3 SCC 571], the Supreme Court laid down certain principles for referring matters to the CBI and also cautioned that such powers must be used sparingly.

The apex court has also recognised that courts must guard against 'busybodies' who approach the court and public interest litigations (PILs) where the litigant has a vested interest.

Admittedly, every citizen has the right to have the law enforced to ensure that companies do not subvert the law.

However, the right of a citizen to approach the court has to be balanced with the substantive process of the law that

has to be followed.

So, the relevant questions here are: Is there ground for a court to exercise jurisdiction under the Constitution to direct a regulatory authority to investigate the affairs of a company?

If a regulatory authority has been vested with necessary powers under a law, is it justified for a private citizen to approach a writ court asking for examination or re-examination of a matter by the concerned authority? Under the Constitution, every right is subject to restrictions.

Consequently, where personal freedom and liberty are not involved it is imperative that certain rights are balanced in favour of a greater common good or rule of law.

THE BROAD FRAMEWORK

In the field of public law, ever since the US supreme court held in *Marbury v. Madison* that the country was one ruled by laws and not men, the principle of rule of law has been held fundamental to democratic societies.

Although rule of law has not been defined, the Supreme Court has held consistency and uniformity to be part of principles of rule of law.

Consequently, the finality of legal proceedings is also imperative for citizens, including companies, to adequately plan their affairs. It is also important for a person not to have to live perpetually in fear of litigation.

Generally, the trigger for PIL has been the apprehension of failure of the law enforcement agency to enforce the law. Unlike investigation under the Indian Penal Code which tends to be more transparent, investigations under regulatory laws tend to be an internal enforcement mechanism. The enforcement of regulatory laws requires considerable collection of information and since some of the infractions are more technical than offences against the State (such as fraud or cheating), the investigation takes place outside public scrutiny.

In certain cases, companies are also afforded the opportunity to seek closure of the entire process with a payment of fine. But can a court direct a regulatory authority to investigate the affairs of a company?

If a regulatory authority has been vested with necessary powers under a law, is it justified for a private citizen to ask for re-examination of a matter?

DIFFERENT CONTEXTS

In the US and England, there is a growing recognition for courts to intervene in matters relating to regulatory laws while in the past, courts mechanically deferred to statutory authorities.

For instance, in 2008, the high court of England set aside the decision of the government to stop investigations into allegations of corruption in defence contracts.

Similarly in the US, courts have increasingly begun to scrutinise settlement claims by the Securities and Exchange Commission with companies that have committed violations relating to security laws. The problems of regulatory capture and crony capitalism have justified such intervention by the courts.

After all, where the regulator abandons its jurisdiction or its decisions are motivated by irrelevant considerations, it is important for citizens to ensure that the substantive law is complied with and investigations are not closed prematurely.

In India, courts have always recognised this jurisdiction. What is required, therefore, is enforcement of a balance between the rights of private citizens to approach the court and the jurisdiction of regulatory bodies.

Restating the guidelines of the Supreme Court in the *Committee for Protection of Democratic Rights* in the context of regulatory laws would help bolster the credibility of regulators and provide greater clarity for courts to intervene in matters relating to regulatory laws.

This balance would also go a long way in ensuring consistency and predictability in the administration of law — essential for citizens and companies to manage their affairs.

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