



JUDICIAL PLUG TO LEGISLATIVE VOID: UNDEFINED BUT INCLUSION OF 'GLOBAL DEPOSITORY RECEIPT' AS 'SECURITIES' IN INDIAN LAW

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KEYWORDS :

Justice V.R. Krishna Iyer exposition is highly instructive when he elucidated, “Definitions in statutes are not mere formalities; they are legislative commands that control the understanding and application of statutory provisions. Where the legislature has spoken, the judiciary must listen.” In interpreting a statutory provision, the first and foremost rule of construction is the literal construction. All that the court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from that provision the legislative intent is clear, the court need not call into aid the other rules of construction. The other rules of construction are called in aid only when the legislative intent is not clear. Where the legislature has defined a term, the definition must prevail.

The Courtroom of Definition, “Security”:

Statutory definitions play a critical role in the enforcement of securities laws and the protection of investors. The importance of precise statutory definitions cannot be overstated and is crucial in every subfield of law, including securities law and regulation. The securities markets continually see the introduction of new financial instruments, recent being cryptocurrency, securities token offerings, and initial coin offerings, raising concerns about regulations in many jurisdictions. The definition of “Securities” in any jurisdiction serves as a foundational element in the regulation of financial instruments, subject to appropriate oversight, thereby safeguarding investor interests and maintaining market integrity. The judicial analysis for the construction and interpretation of what constitutes securities is an inevitable undertaking that every jurisdiction will encounter.

In *SEC v. W.J. Howey Co.*, US Supreme Court noted that “The term ‘security’ was defined... in terms which plainly are meant to include a wide range of investment contracts. The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae.” The UK Court of Appeal in *Financial Conduct Authority v. Capital Alternatives Ltd* observed, “It is the wording of the statute – not commercial labels – which determine whether a product is a collective investment scheme or another regulated form of security.” The Supreme Court of Canada in *Pacific Coast Coin Exchange v. Ontario Securities Commission*, highlighted that, “The determination whether an instrument is a ‘security’ must be made in light of the purpose of the Securities Act—protection of the public—and therefore the statutory definition must be interpreted broadly and purposively.” The Federal Court of Australia in *ASIC v. Narain* reasoned that, “Where Parliament has provided a definition, it is not for the courts to rewrite it or limit its operation beyond what the statute permits. Clarity in financial markets depends on respecting the scope of defined terms.” The Singapore Court of Appeal in *Quoine Pte Ltd v. B2C2 Ltd* held that, “Legal definitions in statutes serve to provide clarity, certainty, and foreseeability—values especially vital in areas like digital assets and securities.” There is a strong affirmation of legislative supremacy in scoping the regulatory perimeter through the definition of Securities in the law.

Defining ‘Securities’ in Indian Securities Law³

In India, Section 2(h) of the Securities Contracts (Regulation) Act, 1956 (SCRA) defines ‘Securities’ for the Securities regulation in the market. This definition is inclusive and encompasses a variety of financial instruments. The Securities include shares, scrips stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or a pooled investment vehicle or other body corporate; derivative; units or any other instrument issued by any collective investment scheme to the investors in such schemes; security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002; units or any other such instrument issued to the investors under any mutual fund scheme; units or any other instrument issued by any pooled investment vehicle; any certificate or instrument issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable including mortgage debt; Government securities; and rights or interests in securities.

Notably, in Indian law, ‘Derivatives’ became Securities by amendment in 1999, w.e.f. 2000. Collective investment schemes were added as securities w.e.f. 2002 and Security Receipts were inserted as Securities in 2002 via the SARFAESI Act. Further amendments included Mutual Fund w.e.f. 2005, Securitised Instruments from Special Purpose Distinct Entities (SPDEs) w.e.f. 2007, Pooled Investment Vehicles (such as Alternative Investment Funds (AIFs), Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvITs) w.e.f. 2021 within the scope of ‘Securities’ definition.

Section 2h (iia), SCRA provides, that “such other instruments as may be declared by the Central Government to be securities.” In exercise of these powers, at present, Zero coupon zero principal instruments” have been declared as ‘securities’ vide Gazette Notification No. S.O.3210 (E) F. No. 1/16/SM/2021 in 2022 and ‘Electronic Gold Receipt’ has been declared as ‘securities’ vide Gazette Notification No. S.O. 5401(E) F. No. 1/16/SM/2021, in 2021.

In 1992, the Securities and Exchange Board of India Act, was enacted to provide for the establishment of a Board (SEBI), as a statutory regulator to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith. SEBI is the regulator of the securities market in India. The SEBI Act provides for definition of ‘Securities’ in Section 2 (1) (i), which provides that “securities” has the meaning assigned to it in section 2 of the Securities Contracts (Regulation) Act, 1956.

From Statute To Bench: Judicial Exposition, Redefinition Of Securities And GDRs

The definition of “securities” under Section 2(h) of the SCRA may not be merely essential for the immediate application of its provisions; however, it serves a broader purpose. It assumes significance for two key reasons. First, the definitional scope expands the regulatory oversight of financial instruments *per se*, including the intermediaries associated with it. From a legal standpoint, this pertains to the jurisdiction of the regulator, SEBI. Second, from the perspective of investor protection, an inclusive and purposive interpretation of the term is crucial for identifying and curbing fraudulent activities, particularly those disguised under innovative or altered nomenclatures of financial instruments, and this is significant for market integrity, a major objective of the securities law and regulation. Hence, the U.S. jurisprudence for its “substance over form” approach in defining what constitutes a ‘security’ may have merit in legal argumentation. The Indian legal framework, which relies on a form-based typological definition as provided in Section 2(h) of the SCRA may present challenges and necessitate judicial interpretation of the financial instruments not included in the definition.

A classic illustration of this definitional conundrum can be found in the Supreme Court’s decision in *SEBI v. Pan Asia Advisors Ltd.*, when it was posed with the question of whether Global Depository Receipts (GDRs) fall within the ambit of “securities” under Section 2(h) of the

SCRA. The Act does not explicitly include GDRs within its definitional fold, and the central issue in the case revolved around this void. The core legal issue concerned whether, in the absence of explicit inclusion, Global Depository Receipts (GDRs) could still be considered "securities." Furthermore, if GDRs are not classified as securities, whether SEBI possesses the jurisdiction to regulate associated transactions. The argument advanced in this case was that "both as a matter of law and fact, the GDR operates outside India andand therefore, GDR is not a security covered by the SEBI Act, 1992 as well as the SCR Act, 1956. Consequently, SEBI had no jurisdiction or role to protect the interest of GDR investors or to regulate the GDR market." The case underscored the limitations of a strictly formalist approach to statutory definitions and highlighted the need for a more adaptive and substantive interpretive methodology in line with evolving financial innovations.

When such a legal question arises, it is imperative to examine the functional characteristics of a financial instrument to determine its legal classification within the framework of regulatory statutes and, hence the court undertakes the inquiry, as in para 43 of the judgment with multiple questions addressing the foundational aspects and functioning of GDRs—how they operate, their role in capital markets, and the objectives they are intended to serve. Furthermore, the Supreme court undertakes legal inquiry to establish if, GDRs are within definitional scope or not, by noting that, "in order to further appreciate the status of a GDR of an issuing company, it will be necessary to consider the definition of "securities" as defined under Section 2(1)(i) of the SEBI Act, 1992 read along with Section 2(h) of the SCR Act, 1956."

The Court answers as follows:

"66. The above definition is exhaustive and includes not only shares, scrips, stocks, bonds, debentures, debenture stocks or other marketable securities of a like nature in or of any incorporated company. The further definition under sub-clause (ii-a) covers such other instruments as may be declared by the Central Government as securities and under sub-clause (iii) rights or interest in securities are also to be construed as securities.

67. Going by the definition under Section 2(h)(i) "security" would include other marketable securities of a like nature of any incorporated company. Therefore reading Sections 2(h)(i) and 2(h)(iii) together and apply the same to GDRs, having regard to the fact that the issuance of GDRs are always based on the underlying Indian shares deposited with the domestic custodian bank and thereby GDRs possess in it right, as well as, interest in the shares, scrips, etc. it will have to be straightaway held that all GDRs would fall within the definition of "securities" as defined under Section 2(h) of the 1956 Act."

Rather than relying solely on the literal text, the combined reading of clause (i) and (iii) within the realm of Section 2(h) served as persuasive references, enabling the court to conclude that GDRs fall within the meaning of "securities" under Section 2(h) of the Act which was not expressly mentioned as instrument.

And further, the Court concludes,

"69. The above definition makes it clear that a "stock exchange" as formed under Sections 2(j)(a) and (b) of the SCR Act are for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities. It is true that GDRs have no time-limit and can be possessed as GDRs for any number of years. However, when the holder of the GDR apart from trading with the same as GDR in the global market at any point of time wishes to redeem the same or go in for fungibility of the redeemed shares back into GDRs, necessarily the holder of a GDR will have to fall back upon the stock exchanges as per the definition under Section 2(j) of the SCR Act, 1956, who alone can assist, regulate or control the business of buying, selling or dealing with securities.

70. Having examined the above statutory provisions, we find that a GDR is one form of "security" as defined under Section 2(h) of the SCR Act, 1956, which is created by the issuing company of Indian origin based on underlying shares deposited with the domestic custodian bank and created by the overseas depository bank. Such creation is at the instance of the issuing company in India with a desire to earn foreign investments. Such investments made by the investors in GDRs is facilitated by the Lead Manager at the time of its creation as well as its investment. Thereafter, the investors hold GDRs either for

further trading on it in the global market through the stock exchanges at global level and in the event of such investors interested in liquidating the GDR are entitled to liquidate the same through the overseas depository bank, in which event the extent of underlying shares of GDRs get transferred in the name of the investors themselves and thereby enabling such investors to trade on underlying shares in the Indian stock market or if so wish under the fungibility scheme once again get it redeemed in the form of GDR themselves"

Notably, this conclusion did not occur in a vacuum. The court remained cognizant of the overarching goals of investor protection and market integrity, particularly in light of the potential misuse of complex financial instruments to perpetrate fraudulent or questionable transactions.

CONCLUSION:

The Supreme Court's decision in SEBI v. Pan Asia Advisors Ltd., reflects a thematic undercurrent that pervades judicial reasoning in financial regulation: the need to strike a careful balance between statutory interpretation and the broader economic realities of the market. This balance reinforces a judicial commitment to maintaining the efficacy of regulatory oversight while ensuring that legal definitions do not become tools for regulatory arbitrage or evasion.

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