REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WRIT PETITION (CIVIL) NO. 4748 OF 2007

Reserved on : 26th November, 2009.
% Date of Decision 15th April, 2010.

NATIONAL STOCK EXCHANGE OF INDIA LIMITED .... Petitioner
Through Mr. Ashok Desai, Sr. Advocate with Mr. Sanjay Bhatt, Advocate.

VERSUS

CENTRAL INFORMATION COMMISSION & OTHERS…..Respondents.
Through Mr. B.V. Niren, CGSC & Ms. Akriti Gandotra, Advocate for UOI.
Mr. K. Lall, respondent No. 2 in person.
Mr. Rajan Narain and Mr. Rajat Bhardwaj, Advocates for CERS in CM No. 3359/2008.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

1. The petitioner, National Stock Exchange of India Limited, claims that they are not a 'public authority' as defined by Section 2(h) of the Right to Information Act, 2005 (hereinafter referred to as the Act, for short). The aforesaid definition clause is significant as a citizen is entitled to enforce his right to ask for information only from

a ‘public authority’ as defined in Section 2(h) and not from bodies, which are not public authorities.

2. Section 2(h) of the Act reads as under:-

> “2(*h*) "public authority" means any authority or body or institution of self- government established or constituted—
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> *(a)* by or under the Constitution;
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> *(b)* by any other law made by Parliament;
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> *(c)* by any other law made by State Legislature;
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> *(d)* by notification issued or order made by the
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> appropriate Government, and includes any—
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> *(i)* body owned, controlled or substantially financed;
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> *(ii)* non-Government organisation substantially financed,
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> directly or indirectly by funds provided by the appropriate Government;”

3. Section 2(h) of the Act consists of two parts. The first part states that public authority means any authority or body or institution of self-government established or constituted by or under the Constitution, by any enactment made by the Parliament or the State Legislature or by a notification issued or order made by the appropriate Government. The second part starts from the word ‘includes’ and states the term ‘public authority’ includes bodies which are owned, controlled or substantially financed directly or indirectly by funds provided by the appropriate Government and non-Government organizations substantially financed directly or indirectly by the funds provided by the appropriate Government. Interpreting

the second part of the definition and whether conditions (a) to (d) apply, S. Ravindra Bhat, J. in his judgment dated 7th January, 2010 in W.P. (C) No. 876/2007 titled ***Indian Olympic Association versus Veeresh Malik and Others*** and other cases has observed as under:-

> "**45.** Now, if the Parliamentary intention was to expand the scope of the definition "public authority" and not restrict it to the four categories mentioned in the first part, but to comprehend other bodies or institutions, the next question is whether that intention is coloured by the use of the specific terms, to be read along with the controlling clause "authority…of self government" and "established or constituted by or under" a notification. A facial interpretation would indicate that even the bodies brought in by the extended definition:
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> *(i) "….Body owned, controlled or substantially financed;*
> *(ii) Non- Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government."*
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> are to be constituted under, or established by a notification, issued by the appropriate government. If indeed such were the intention, sub-clause (i) is a surplusage, since the body would have to be one of self government, substantially financed, and constituted by a notification, issued by the appropriate government. Secondly – perhaps more importantly, it would be highly anomalous to expect a "non-government organization" to be constituted or established by or under a notification issued by the government. These two internal indications actually have the effect of extending the scope of the definition "public authority"; it is thus not necessary that the institutions falling under the inclusive part have

to be constituted, or established under a notification issued in that regard. Another significant aspect here is that even in the inclusive part, Parliament has nuanced the term; sub-clause (i) talks of a "body, owned, controlled or substantially financed" by the appropriate government (the subject object relationship ending with sub-clause (ii)). In the case of control, or ownership, the intention here was that the irrespective of the constitution (i.e it might not be under or by a notification), if there was substantial financing, by the appropriate government, and ownership or control, the body is deemed to be a public authority. This definition would comprehend societies, co-operative societies, trusts, and other institutions where there is control, ownership, (of the appropriate government) or substantial financing. The second class, i.e non-government organization, by its description, is such as cannot be "constituted" or "established" by or under a statute, or notification.

46. The term "non-government organization" has not been used in the Act. It is a commonly accepted expression. Apparently, the expression was used the first time, in the definition of "international NGO" (INGO) in Resolution 288 (X) of ECOSOC on February 27, 1950 as *"any international organization that is not founded by an international treaty".* According to Wikipedia http://en.wikipedia.org/wiki/Nongovernmental_organization..accessed on 28-12-2009 @19:52 hrs)

> *"…Non-Government organization (NGO) is a term that has become widely accepted as referring to a legally constituted, non-Government organization created by natural or legal persons with no participation or representation of any government. In the cases in which NGOs are funded totally or partially by*

> *governments, the NGO maintains its non-Government status and excludes government representatives from membership in the organization. Unlike the term intergovernmental organization, "non-Government organization" is a term in general use but is not a legal definition. In many jurisdictions these types of organization are defined as "civil society organizations" or referred to by other names…"*
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> Therefore, inherent in the context of a "non-government" organization is that it is independent of government control in its affairs, and is not connected with it. Naturally, its existence being as a non-state actor, the question of its establishment or constitution through a government or official notification would not arise. The only issue in its case would be whether it fulfills the "substantial financing" criteria, spelt out in Section 2(h). Non-government organizations could be of any kind; registered societies, co-operative societies, trusts, companies limited by guarantee or other juristic or legal entities, but not established or controlled in their management, or administration by state or public agencies."

4. The term "substantially financed" has also been interpreted in the same judgment and it has been held that majority test is not appropriate to decide whether or not a non-Government organization is substantially financed directly or indirectly by the appropriate Government. It has been explained that financing in percentage terms in relation to the total budget of a body is not important. While deciding the question whether an organization has been infused or has taken benefit of substantial financing, directly or indirectly from the Government in paragraphs 58 to 60 of the said judgment, learned

single Judge had examined the scope and ambit of the second part and its relationship with the first part and observed in paragraph 60 as under:-

> "**60.** This court therefore, concludes that what amounts to "substantial" financing cannot be straight-jacketed into rigid formulae, of universal application. Of necessity, each case would have to be examined on its own facts. That the percentage of funding is not "majority" financing, or that the body is an impermanent one, are not material. *Equally, that the institution or organization is not controlled, and is autonomous is irrelevant; indeed, the concept of non-government organization means that it is independent of any manner of government control in its establishment, or management. That the organization does not perform – or pre-dominantly perform – "public" duties too, may not be material, as long as the object for funding is achieving a felt need of a section of the public, or to secure larger societal goals.* To the extent of such funding, indeed, the organization may be a tool, or vehicle for the executive government's policy fulfillment plan. This view, about coverage of the enactment, without any limitation, so long as there is public financing, ……"
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> (emphasis supplied)

5. I have referred the second part of Section 2(h) of the Act and the aforesaid judgment, as these are relevant to the present case and give an indication of the legislative intent while defining the term 'public authority'. It is obvious that the term 'public authority' has been given a broad and wide meaning not only to include bodies which are owned, controlled or substantially financed directly or indirectly by the Government but even non-Government organizations, which are substantially financed directly or indirectly

by the Government. The idea, purpose and objective behind the beneficial legislation is to make information available to citizens in respect of organizations, which take benefit and advantage by utilizing substantial public funds. This ensures that the citizens can ask for and get information and know on how public funds are being used and there is accountability, transparency and openness. Even private organizations, which are enjoying benefit of substantial funding directly or indirectly from the Governments, fall within the definition of 'public authorities' under the Act.

6. The first part of Section 2(h) of the Act states that public authorities means authorities, institutions of self-government or bodies which have been established or constituted in the manner specified in (a) to (d). Each of the said words has been interpreted below. Effect of conditions (a) to (d) mentioned in the first part has been examined.

7. Webster's Comprehensive Dictionary (International Edition) defines the term 'authority' as "the person or persons in whom government or command is vested; often in the plural". Meaning to the word "authority" in Webster's Third New International Dictionary is "a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise". Meaning of 'authority' given in The Law Lexicon P. Ramanatha Aiyar, Second Edition-1997 is "a person or persons, or a body, exercising power of command; generally in plural: as the civil and military authorities". In ***Rajasthan State Electricity Board v. Mohan Lal,(1967) 3 SCR 377, 385*** the Supreme Court referred to the dictionary mean of the term 'authority' and observed;

"5. The meaning of the word "authority" given in *Webster's Third New International Dictionary*, which can be applicable, is a public administrative agency or corporation having quasi-governmental powers and authorised to administer a revenue-producing public enterprise. This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution.

6. In *Smt Ujjam Bai* v. *State of Uttar Pradesh*, Ayyangar, J., interpreting the words "other authorities" in Article 12, held: "Again, Article 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot obviously be read as ejusdem generis with either the Government and the Legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India or under the control of the Government of India. There is no characterisation of the nature of the 'authority' in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws." In *K.S. Ramamurthi Reddiar* v. *Chief Commissioner, Pondicherry*, this Court, dealing with Article 12, held: "Further, all local or other authorities within the territory of India include all authorities within the territory of India whether under the control of the Government of India or the Governments of various States and even autonomous authorities which may not be under the control of the Government at all." These decisions of the Court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19(1)(*g*). In Part IV, the State has been given the same meaning as in Article 12 and one of the Directive Principles laid down in Article 46 is that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The State, as defined in Article 12, is thus comprehended to include bodies

> created for the purpose of promoting the educational and economic interests of the people. The State, as constituted by our Constitution, is further specifically empowered under Article 298 to carry on any trade or business."

8. The term 'authority' has been a subject matter of judicial decisions of the Supreme Court while examining Articles 12 and 226 of the Constitution of India and has been given wider meaning. The Supreme Court in ***Praga Tools Corporation versus Shri C.A. Imanual and Others***, (1969) 3 SCR 773 had observed:

> "**6.** In our view the High Court was correct in holding that the writ petition filed under Article 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not be, but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus *etc*. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (See *Sohan Lal* v. *Union of India*), In *Regina* v. *Industrial court* mandamus was refused against

the Industrial court though set up under the Industrial courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. “This Court has never exercised a general power” said Bruce, J. in *R.* v. *Lawisham Union* “to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties”. Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. [Cf. *Halsbury’s Laws of England*, (3rd ed.), Vol. II, p. 52 and onwards].

7. The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ

> petition for a mandamus or an order in the nature of mandamus could lie against the company."

9. In ***Ramana Dayaram Shetty versus The International Airport Authority of India & Others***, (1979) 3 SCR 1014, the Supreme Court noticed that the power of the executive Government to affect the lives of the people is growing and there has been a tremendous expansion of welfare and social service functions by the State. It was also noticed that this has resulted in greater frequency with which ordinary citizens come into association or encounter with the State policy holders. In ***Ajay Hasia and Others versus Khalid Mujib Sehravardi and Others,*** (1981) 1 SCC 722 it was observed that there would be considerable erosion of the efficiency of the fundamental rights in case the term 'authority' is interpreted narrowly by allowing the State to adopt stratagem of carrying out their functions through instrumentality of agency of a corporation and excluding the same. It was accordingly observed in paragraph 11 of the judgment as under:-

> **"**11**.** We may point out that it is immaterial for this purpose whether the corporation is created *by* a statute or *under* a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a government Company or a Company formed under the Companies Act, 1956 or it may be a society registered under the Societies. Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of

> instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a Company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the Company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12."

10. Section 2(h) of the Act does refer to the manner of establishment or constitution in conditions (a) to (d) but condition (d) expands the term to include establishment or constitution by a notification or order by an appropriate government. Legislative enactment is not necessary and 'authority' under condition (d) of the section 2(h) can be established or constituted by an executive action. 'Authority' may be statutory or non statutory. Effect and relevance of conditions (a) to (d) has been examined later on.

11. In ***Ajay Hasia's case*** (supra), the Supreme Court quoted with approval the test laid down in ***International Airport Authority's case*** to decide whether an organization/body is an authority against whom a writ could be issued under Article 226 of the Constitution of India and it was observed:-

> **"**9. The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the *International Airport Authority case*. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise

limitation. We may summarise the relevant tests gathered from the decision in the *International Airport Authority case* as follows:

"(*1*) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p. 507, para 14)

(*2*) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character. (SCC p. 508, para 15)

(*3*) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508, para 15)

(*4*) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)

(*5*) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para 16)

(*6*) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government." (SCC p. 510, para 18)

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the *International Airport Authority case*, be an "authority" and, therefore, 'State' within the meaning of the expression in Article 12."

12. Conflict between ***Sukhdev Singh versus Bhagatram Sardar Singh Raghuvanshi***, (1975) 1 SCC 421 and ***Sabhajit Tewary v***

UOI (1975) 1 SCC 485 was examined by seven Judges of the Supreme Court in the case of ***Pradeep Kumar Biswas versus Indian Institute of Chemical Biology***, (2002) 5 SCC 111. The majority judgment approved of the tests specified in the case of ***Ajay Hasia*** and has observed as under:

> "31. The tests to determine whether a body falls within the definition of "State" in Article 12 laid down in *Ramana* with the Constitution Bench imprimatur in *Ajay Hasia* form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited.
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> 40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

13. More recently in ***Binny Limited and Another versus V.V. Sadasivan***, (2005) 6 SCC 657, the Supreme Court has reiterated that Article 226 of the Constitution is couched in a way that even a Writ can be issued against a body which is discharging public function and the decision sought to be corrected or enforced must be in discharge of a public function. A body is performing a public function when it seeks to achieve some collective benefit for the

public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies, therefore, exercise public functions when they intervene or participate in social or economic affairs of public interest. In the said judgment, the Supreme Court quoted the following passage on what are regarded as public functions from De Smith, Woolf and Jowell in the book Judicial Review of Administrative Action, Fifth Edition in Chapter 3, paras 0.24 and 0.25, which reads as under:-

> "A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.
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> Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognise the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies such as

> these are just as capable of abusing their powers as is Government."

14. The aforesaid passage quoted above specifically holds that stock exchanges perform public functions. Power of judicial review under Article 226 is designed to prevent cases of abuse of power and neglect of duty by a public authority. The Act ensures transparency, openness and accountability of the authorities by giving rights to citizens to ask for and get information. The Act effectuates and provides statutory and enforceable legal right to enforce the Right to Information ingrained and part of Article 19(1) (a) of the Constitution. The term 'authority' used in Section 2(h) of the Act has to be read in the light of the aforesaid tests and paragraph 40 of the judgement in the case of ***Pradeep Biswas*** (supra.). Whether and when an 'authority' is a 'public authority' in view of conditions (a) to (d) in Section 2(h) of the Act has been examined later on.

15. Black's Law Dictionary 6th Edition defines "institution" as an establishment, especially one of eleemosynary or public character or one affecting a community. In Law Lexicon, P. Ramanatha Aiyar, 2nd ed. 1997 it has been defined as "an establishment of a public character, a place where the business of a society is carried on; the organization itself." "The word 'institution' properly means an organization organized or established for some specific purpose, though it is sometimes used in statutes and in common parlance in the sense of the building or establishment in which the business of such society is carried on." In section 2(h) the word 'institution' is qualified by the words 'self government'. The words 'self government' refers to the nature of activities that are performed. The activities should be in nature of governmental or public functions but the institution may be independent and free from governmental control.

'Self government' will cover and encompass independent, autonomous self managed or governed organizations which have been permitted, allowed and are performing what are regarded as governmental or public functions. Pervasive and deep control of the government is not necessary. What are public functions has been examined above with reference to De Smith, Woolf and Jowell in the book Judicial Review of Administrative Action, Fifth Edition. An institution which performs public functions and has been created for discharging public or statutory duties as distinguished from private functions can be an 'institution of self government'.

16. Law Lexicon, P. Ramanatha Aiyar,2nd ed. 1997 defines 'body' as "a number of individuals spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie or occupation, as, legislative body, the body of clergy; a body corporate." 'Authority' or 'institution of self-government' are sub-species and can be included in the term 'body'. The terms 'authority' or 'institution of self-government' are restrictive/narrower than the term 'body'. Nature and type of the activity undertaken by a 'body' is not of primary concern or importance. The term 'body' is extremely wide and unless a purposive interpretation is given, keeping in mind the legislative intention, the said term will include within its scope every and all kind of organization or concerns of two or more persons performing purely private functions. The petitioner is correct in their contention that all private bodies are not 'public authorities'. The petitioner is also correct that the words "establish or constituted" and (a) to (d) of Section 2(h) do not curtail and restrict the definition of 'public authority' to exclude all private bodies like private companies or societies of private nature. These, it was rightly stated, can be established by an order or notification issued by an appropriate

government. Section 2(h) of the Act would have been differently worded if all bodies were 'public authorities', once conditions mentioned in (a) to (d) are satisfied. The term 'public authority' would not have been used, if the Act was to apply to all bodies including private bodies. While retaining extensive and comprehensive nature of the word 'body', the same has to read down keeping in mind the legislative intention and language of section 2(h) of the Act including the second part thereof.

17. The word 'body' will take its colour; is susceptible of analogous meaning and is to complement the two terms 'authority' and 'institution of self government' but has to be read alongwith the second part of section 2 (h) of the Act. Doctrine of Noscitur A Sociis, may not be fully applicable. The second part of section 2(h) of the Act, specifically deals with 'body' and is to be kept in mind. It consists of two parts. Clause (i) states that 'body' owned, controlled or substantially financed directly or indirectly by government are included and regarded as a 'public authority'. Bodies owned or controlled by government will normally qualify to be and are regarded as 'authorities'. Further, 'authorities' or 'institutions of self government' are generally beneficiaries of substantial government finance, though other bodies may be beneficiaries of substantial government finance. Thus, as held in paragraph 60 in the case of ***Indian Olympic Association***(supra), clause (i) applies to all bodies, whether or not they are 'authorities' or 'institutions of self government', that are owned or controlled or substantially financed by the appropriate government. Under Clause(i), requirements of conditions (a) to (d) need not be satisfied and are not required to be examined. In ***Indian Olympic Association*** and other cases (supra), Clause(ii) has been interpreted to include private non

government organisations that are substantially financed, directly or indirectly from government funds. Again for Clause(ii) requirements of conditions (a) to (d) are not required to be satisfied. Read in this manner the term 'body' means an organisation which is owned or controlled or substantially financed directly or indirectly by the government. The three conditions, i.e., owned, controlled, substantially financed are distinct in alternative and not cumulative. The nature and type of activity and functions undertaken by the organisation are inconsequential and immaterial. If a body satisfies requirements of Clause(i) or (ii), conditions (a) to (d) need not be satisfied. Thus, when second part of Section 2(h) applies, satisfaction of conditions mentioned in (a) to (d) need not be examined.

18. Learned counsel for the petitioner laid considerable emphasis on the words "established" and "constituted" and the requirements specified in (a) to (d) of part one of the Section 2(h). It was stated that the term "established" means initial establishment or creation of authority, body or institution of self-government by or under the Constitution, by an enactment made by the Parliament or State Legislature or by a notification or order issued by the appropriate Government. The word "constituted" it was submitted refers to constitution of a body with appointment of members as in the Central Coordination Committee by a notification under Section 3(1) Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

19. The words 'established and constituted' used in Section 2(h) of the Act have to be interpreted in the context in which the said words have been used. In Webster's Third New International Dictionary, it

has been held that the word 'establish' has been given a number of meanings, namely, to found or base squarely, to make firm or stable, to bring into existence, create, make start, originate. In Shorter Oxford English Dictionary, Third Edition, the word 'establish' has been given in number of meanings, i.e., to ratify, confirm, settle to found, to create. Founding is not the only meaning of the word 'establish' and it includes creation also. In Bouvier's Law Dictionary (Third Edition), Vol. I, it has been said that the word 'establish' occurs frequently in the Constitution of the United States and it is there used in different meanings; and five such meanings have been given, namely -(1)"to settle firmly to fix unalterably, to establish justice; (2) to make or form: as to establish a uniform rule of naturalization; (3) to found, to create, to regulate: as, Congress shall have power to establish post officers; (4) to found, recognize, confirm or admit: as, Congress shall make no law respecting an establishment of religion; (5) to create, to ratify, or confirm, as We, the people, etc., do ordain and establish the Constitution".

20. Thus, it cannot be said that the only meaning of the word 'establish' is to be found in the sense in which an eleemosynary or another institution is founded. The word 'established' need not mean the initial foundation and it includes creation, confirmation or recognition.

21. The word 'constituted' is wider than the word 'established'. The word 'constituted' in section 2(h) of the Act not only refers to the first act/acts by which a body or organization is set up but a subsequent act or acts which will have the effect of conferring on an organization or a body, a special status and constitute a 'body' with status of an 'authority' or 'institution of a self-government' for the

purpose of Section 2(h) of the Act. A private institution or a body may be incorporated or formed by acts of private persons but subsequent statutory enactment or an order or notification issued by the appropriate Government can result in constitution and conferring upon the said body, status of an 'authority' or an 'institution of self-government'. For example, a private or a public company upon incorporation may be a body but not an 'authority' or institution of self government' but subsequently a enactment, order or notification can result in its constitution as an 'authority' or 'institution of self government' which was not in existence till the enactment, notification or order was made. An organisation in existence can be 'constituted' or 'established' as an 'authority' or 'institution of self government' by a subsequent enactment or order/notification. A private company upon its incorporation or registration does not become an 'authority or institution of self government' as defined above under section 2(h) of the Act, but by a subsequent enactment or order/notification issued can become an 'authority or institution of self government'. Thus, subsequent enactment, order or notification may have the effect of establishing or constituting an 'authority or institution of self government'. The word "constituted", has to be liberally interpreted to include cases where an organization or a body is already set up but by virtue of a notification or order passed by appropriate Government or statutory enactment is conferred and given status of an 'authority' or an 'institution of self-government'. The words 'established' or 'constituted' have to be read in a manner so as to effectuate the legislative intent in Section 2(h) of the Act.

22. Conditions (a) to (c) are clear, expressive and lucid. Condition (a) refers to establishment or constitution 'by or under' the Constitution, while conditions (b) to (d) refer to establishment or

constitution 'by' an enactment, notification or order. Word 'by' an enactment or notification or order is narrower than 'by or under' an enactment or notification or order. 'Under' an enactment or notification or order is wider than 'by'. The word 'by' refers to direct establishment and constitution of authority, body or institution of self government as a result of legislation, notification or order. The word 'under' will include establishment or constitution under power or authority conferred on an authority/body by an enactment, notification/ order. However, notification or order can be issued in exercise of Executive power and can be a result of power conferred by legislation or even by subordinate legislation on an authority/body. Condition (d) of Section 2(h) of the Act does not envisage or require any specific type or nature of an order or notification. The requirement is only a notification or an order which has the effect of establishing or constituting 'authority, institution of self-government or a body'. There is no further requirement or condition which is required to be complied with or fulfilled.

23. It is difficult to conceive of an 'authority' or an 'institution of self-government' which has been established or constituted by any mode or manner other than the mode and manner specified in conditions (a) to (d) of Section 2(h). There can be 'bodies' which are established or constituted by or under the Constitution or by statutory enactment or by a notification or order issued by appropriate Government. These 'bodies' will be 'public authorities' if they are like 'authorities' or 'institutions of self government'. Further, the second part of the definition clause which starts with the words "includes" and expands the term "bodies" is not with reference to the establishment or constitution or conditions (a) to (d) but with reference to 'body' owned, controlled or substantially financed directly or indirectly by funds of appropriate

Government or even private bodies or non-government organizations which are substantially financed directly or indirectly by funds of appropriate Government.

24. The term 'appropriate Government' has been defined in Section 2 (a) of the Act to mean:-

> "2 (*a*) "appropriate Government" means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly—
>
> (*i*) by the Central Government or the Union Territory administration, the Central Government;
>
> (*ii*) by the State Government, the State Government;"

25. The said definition clause has been enacted in view of two separate apex appellate bodies under the enactment, viz, the Central Information Commission and the State Information Commission. Appropriate government can mean Central Government or State Government as the case may be. These two terms have been defined in Section 3(8) and (60) of the General Clauses Act, 1897 in relation to anything done or to be done after the commencement of the Constitution to mean the President or the Governor, etc. as the case may be. The terms 'Central Government' and 'State Government' have to understood in light to Article 77 or 166 of the Constitution. It refers to the Executive power of the State vested in the Central Government or the State government.

26. National Stock Exchange of India Limited, the petitioner herein, is a company limited, which were incorporated in Mumbai on 27th November, 1992. It is, therefore, established and created by as a company on the said date under the provisions of the Companies Act, 1956. Incorporation of a company under the Companies Act, 1956 may or may not result in establishment or constitution of a 'body', 'authority' or 'institution of self government' by a notification or order passed by the appropriate Government. It depends upon whether as a result of the order or notification by which a company was incorporated had the effect of constituting or establishing an 'authority', 'institution of self government' or 'body'- as defined above. In the absence of complete details regarding incorporation and findings of the Central Information Commission in this regard the question is left open and not decided. However, as per the Memorandum and Articles of Association of the petitioner the promoters and subscribers were public sector corporations or their representatives.

27. Memorandum and Articles of Association of the petitioner has been produced before me and placed on record. The petitioner, as per the Memorandum of Association, was incorporated with the main object to facilitate, promote, assess, regulate and manage in the public interest, dealings in securities of all kinds as defined under the Securities Contracts (Regulations) Act, 1956 (hereinafter referred to as Securities Act, for short) and all other instruments of any kind including money market instruments and to provide advanced and modern facilities for trading, clearing and settlement of securities in a transparent, fair and open manner. It was also incorporated to initiate, facilitate and undertake all such activities in relation to stock exchange, money markets, financial markets, securities markets,

capital markets, etc. The third principal object is to support, develop, promote and maintain healthy market in the best interest of the investor and the general public and economy. The objects incidental and ancillary to attain the main objects read as under:-

> "4. To apply for and obtain from the Government of India, recognition of the Exchange as a recognize stock exchange for the purpose of managing the business of purchase, sale, dealings and transactions in the securities within the meaning of the Securities Contracts (Regulation) Act, 1956 and the Rules made thereunder.
>
> 5. To frame and enforce Rules, Bye-laws, and Regulations regulating the mode and manner, the conditions subject to which the business on the Stock Exchange shall be transacted and the rules of conduct of the members of the Exchange, including all aspects relating to membership, trading, settlement, constitution of committees, delegation of authority and general diverse matters pertaining to the Exchange and also including code of conduct and business ethics for the members and from time to time, to amend or alter such rules, bye-laws and regulations or any of them and to make any new amended or additional rules, bye-laws or regulations for the purpose aforesaid.
>
> 6. To settle disputes and to decide all questions of trading methods, practices, usage, custom or courtesy in the conduct of trade and business at the National Stock Exchange.
>
> 7. To fix, charge, recover, receive security deposits, admission fee, fund subscriptions, subscription form members of the exchange or the company in terms of the Articles of Association and rules and bye-laws of the Exchange and also to fix, charge and recover deposits, margins, penalties, ad hoc levies and other charges.

> 8. To regulate and fix the scale of commission and brokerage and other charges to be charged by the members of the Exchange."

28. It is clear from the reading of the aforesaid objects that the petitioner was incorporated for the purpose of establishing a stock exchange for which it was necessary and required that they should be registered and/or recognized under the Securities Act. It is only after the registration or recognition under the Securities Act that the petitioner could carry out any of the functions or objects for which it was incorporated. Section 4 of the Securities Act deals with recognition and registration of the stock exchange and reads as under:-

> **"4. Grant of recognition to stock exchanges**.—(1) If the Central Government is satisfied, after making such inquiry as may be necessary in this behalf and after obtaining such further information, if any, as it may require,—
>
> (*a*) that the rules and bye-laws of a stock exchange applying for registration are in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors;
>
> (*b*) that the stock exchange is willing to comply with any other conditions (including conditions as to the number of members) which the Central Government, after consultation with the governing body of the stock exchange and having regard to the area served by the stock exchange and its standing and the nature of the securities dealt with by it, may impose for the purpose of carrying out the objects of this Act; and
>
> (*c*) that it would be in the interest of the trade and also in the public interest to grant recognition to the stock exchange;
>
> it may grant recognition to the stock exchange subject to the conditions imposed upon it as aforesaid and in such form as may be prescribed.
>
> (2) The conditions which the Central Government may prescribe under clause (*a*) of sub-section (1) for the grant of recognition to the stock

> exchanges may include, among other matters, conditions relating to,—
>
> (*i*) the qualifications for membership of stock exchanges;
>
> (*ii*) the manner in which contracts shall be entered into and enforced as between members;
>
> (*iii*) the representation of the Central Government on each of the stock exchanges by such number of persons not exceeding three as the Central Government may nominate in this behalf; and
>
> (*iv*) the maintenance of accounts of members and their audit by chartered accountants whenever such audit is required by the Central Government.
>
> (3) Every grant of recognition to a stock exchange under this section shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the stock exchange is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India.
>
> (4) No application for the grant of recognition shall be refused except after giving an opportunity to the stock exchange concerned to be heard in the matter; and the reasons for such refusal shall be communicated to the stock exchange in writing.
>
> (5) No rules of a recognised stock exchange relating to any of the matters specified in sub-section (2) of Section 3 shall be amended except with the approval of the Central Government."

29. Once a body or an institution has got its recognition/registration under the Securities Act, it can operate and function as a stock exchange and perform the said public functions. Registration or recognition under Section 4(3) of the Securities Act by the Central Government has the effect of constituting or establishing an 'authority' or an 'institution of self-government' as defined above. Admittedly, in the present case, notification or an order under Section 4(3) of the Securities Act has been issued for recognition of the petitioner as a stock exchange. The notification or an order under

Section 4(3) of the Securities Act has the effect of creating an 'authority' or an 'institution of self-government'. Incorporation of the petitioner as a Company may not establish or constitute an 'authority' or an 'institute of self government' but the notification/order under section 4(3) of the Securities Act had the said effect. Thus, first part of Section 2(h) of the Act is satisfied as the petitioner was 'established' or 'constituted' as an 'authority' or 'institution of self government' as a result of the notification/order under Section 4(3) of the Securities Act.

30. It is not possible to accept the contention of the petitioner that a notification or an order under Section 4(3) of the Securities Act is similar and same as an order passed by Registrar of Companies incorporating a company under the Companies Act, 1956 or an order under Section 11 of the Industries (Regulation and Development) Act 1951. An order allowing incorporation of a company or permitting setting up of an industry under Section 11 of the Industries (Regulation and Development) Act 1951, may not result in establishment or constitution of an 'authority' or an 'institution of self-government' or a 'body, which is owned, controlled or substantially financed directly or indirectly by Government funds'. Incorporation of a company or establishment of industry, a society or even a cooperative society by itself may not establish or create a 'public authority' as by recognition or registration, it does not become an 'authority or institution of self-government or a body of the nature which is owned, controlled or substantially financed directly or indirectly by the appropriate Government'.

31. The contention of the petitioner that in the present case there is no order or notification by appropriate Government but only an order passed by the Securities Exchange Board of India (SEBI, for short) under Section 4(3) and, therefore, requirements of condition (d) to Section

2(h) of the Act are not satisfied, is not correct. The term “appropriate Government” has been defined in Section 2(a) and the reason for incorporating the said term in Section 2(h) has been explained above. The object and purpose of using the term “appropriate Government” is to clarify the appellate avenue before whom appeals will lie. It cannot be read to water down and read down the scope of the expression “public authority” as defined in Section 2(h) of the Act. Central Government or the State Government refers to the Executive power of the State and will include their manifestations in various forms. The term “Central Government” and “State Government” have to be read and interpreted broadly and not in a restrictive manner.

32. Under Section 4(3) of the Securities Act, an order of registration/recognition is to be passed by the Central Government. Under Section 29 A of the Securities Act, Central Government has been authorized to delegate their powers to SEBI. In the present case, SEBI has granted recognition/ registration to the petitioner as a delegate and as authorised to act on behalf of the Central Government. The recognition granted is, therefore, treated as granted by the Central Government itself under Section 4(3). SEBI has exercised powers of the Central Government to grant recognition in terms of Section 29 A of the Securities Act.

33. Thus, the petitioner is an ‘authority or an institution of the self-Government’ established by a notification or an order passed by the Central Government and, therefore, is a “public authority”.

34. The petitioner also satisfies requirements of the second part of the Section 2(h) of the Act. It is a ‘body’ which is controlled by Central Government. It is not possible to accept that the control exercised is merely regulatory and is not a pervasive and deep

control. This question is no longer res integra and is squarely settled by a Division Bench decision of this Court in the case of ***Delhi Stock Exchange versus K.C. Sharma*** in LPA No. 331/1999 reported in 2002 Volume XCIII DLT 233. In the said judgment, the Division Bench of this Court had examined the provisions of the Securities Act and the effect thereof and whether it can be regarded as mere regulatory control or a pervasive and a deeper control. It has been observed that control of the Central Government under the Securities Act is not merely regulatory control but much wider and a pervasive control. It was held:-

> "17. Let us consider as to whether the control of the Central Government in terms of the provisions of the 1956 Act, is so deep and pervasive so as to bring within the authority contained in Article 12 of the Constitution of India.
>
> 18. The 1956 Act was enacted to prevent undesirable transactions in securities by regulating the business of dealing therein by providing for certain other matters connected therewith. Stock exchange has been defined in Section 2 (j) to mean "any body of individuals, whether incorporated or not, constituted for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities." Section 3 provides for an application for recognition to stock exchanges. Section 4 empowers the Central Government to grant recognition to stock exchanges subject to the conditions imposed upon it upon satisfying itself that it fulfills the criteria thereof. Sub-section (2) of Section 4 lays down the conditions "for the grant of recognition to the Stock exchange may include, among other matters, conditions relating to-
> (i) the qualifications for membership of Stock Exchanges;

(ii) the manner in which contracts shall be entered into and enforced as between members;

(iii) the representation of the Central Government on each of the Stock Exchanges by such number of persons not exceeding three as the Central Government may nominate in this behalf; and

(iv) the maintenance of accounts of members and their audit by chartered accountants whenever such audit is required by the Central Government.

19. Recognition of the Stock Exchange under the section is required to be published in the Gazette of India. The rules of the recognized stock exchanges can be amended only upon approval of the Central Government. Section 5 provides for withdrawal of recognition. Section 6 empowers the Central Government to call for periodical returns or direct enquiries to be made. Section 7 provides for annual reports to be furnished to the Central Government. Section 10, however, also empowers the Central Government to make or amend bye-laws of recognized stock exchange. Section 11empowers the Central Government to supersede governing body of a recognized Stock Exchange. Section 12 empowers the Central Government to suspend business of recognized Stock Exchanges. Section 13 empowers the Central Government to declare contracts in notified areas illegal by notification in the Official Gazette. Section 19 prohibits any person to organize or assist in organizing or be a member of any Stock Exchange other than a recognized Stock Exchange for the purpose of assisting in, entering into or performing any contracts in securities. Section 21 provides that where securities are listed on the application of any person in any recognized Stock Exchange, such person shall comply with the conditions of the listing agreement with that Stock Exchange. Under Section 22, an appeal is maintainable

against an order passed by the Stock Exchange to list securities of public companies. Section 23 provides for penalties in relation to the matters specified therein. Section 29 of the Act is in the following terms:

"Production of action taken in good faith- No suit, prosecution or other legal proceeding whatsoever shall lie in any Court against the governing body or any member, office-bearer or servant of any recognized stock exchange or against any person or persons appointed under Sub-section (1) of Section 11 for anything which is in good faith done or intended to be done on pursuance of this Act or of any rules or bye-laws made thereunder."

20. The provisions above-mentioned clearly go to show that not only Stock Exchanges perform an important function, its control by the Central Government/SEBI are deep and invasive. So invasive is control of the SEBI that even the writ petitioner against the impugned order preferred an appeal before SEBI and filed a representation before SEBI which was entertained. The appellant herein submitted, itself to the jurisdiction of SEBI without any demur whatsoever. The SEBI constituted an independent Committee and despite pendency of the writ petition before this Court arrived at its own finding. This also goes to show that not only the Central Government but also a statutory authority exercises deep and pervasive control of the Stock Exchange. It may be that it does not receive any financial assistance. But receiving the financial assistance is not the only criteria for holding that an instrumentality of the State would come within the purview of the definition of "other authorities".

21. Although, it may not be of much relevance, but we may notice that in Delhi Stock Exchange Association Ltd. v. Commissioner of Income Tax, New Delhi, 1997(3)Scale 353, the Delhi Stock Exchange itself has given out that it is being

considered to be "other authorities" within the meaning of Article 12 of the Constitution of India.
22. Admittedly, its main source of revenue is from listing fees received from the listed companies. Its power to list companies flows from a statute. In doing so, it exercises a quasi judicial function and appeal lies against its order refusing to list companies."

35. The Delhi High Court also made reference to the Securities and Exchange Board of India Act, 1992 (SEBI Act, for short) and has held that the said enactment support assertion that Central Government has deep and all pervasive control on the functioning of the stock exchanges. Referring to the said enactment, it has been observed:-

"28. Following are some of the important sections of SEBI Act which support the assertion that Central Government has deep and all pervasive close control on the functioning of all RSEs (Recognised Stock Exchanges):

(1) Preamble of the SEBI Act which inter alia reads, "An Act to provide for the establishment of a Board to protect the interest of investors in securities and to promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto."

(2) Section 11(1), which casts a duty upon SEBI to protect the interest of the investors and promote the development of and regulate the securities market.

(3) Section 11(2)(a), specifically casts a duty upon SEBI to regulate, even the business (means regulation of even day-to-day business) and that is why it is under this section SEBI from time to time issues directions to RSEs about the nature, type, extent and percentage of margin money to be taken from the members of RSEs; nature,

organization structure and duties of Market Surveillance department etc.

(4) Section 11(2)(j) requires SEBI to perform such functions and exercise such powers under SCRA, 1956, which may be delegated to it by the Central Government.

29. The Apex Court, again in Unni Krishnan J.P. v State of Andhra Pradesh, (supra), held that when a private body carries on public duty, as in the case of an institution whereby recognitions and affiliations are to be granted with conditions, Stock Exchanges are also recognized subject to various conditions. Unlike the companies registered under the Indian Companies Act, the bye-laws of a Stock Exchange can be amended. Even for amendment in bye-laws, the Stock Exchange requires approval of the Central Government. The Central Government, having regard to the provisions of the 1956 Act, as noticed hereinbefore, can interfere in the functions of the Stock Exchanges at every stage.

30. Section 29 of the 1956 Act is a pointer to show that it is an instrumentality of the State inasmuch as the protection of action taken in good faith has been extended to Stock Exchanges which are granted only to public servants. The Central Government even can delegate its power in favour of SEBI.

31. As would be noticed hereinafter, the history shows that various legislations had been enacted for safeguarding the interests of the investors and particularly small investors. Economy of the country, one way or the other, to a large extent would depend upon the dealings of the Stock Exchange.

32. The concept that all public sector undertakings incorporated under the Indian Companies Act or Societies Registration Act for being State must be financed by the Central

> Government and under the deep and pervasive control thereof has undergone a sea change. The thrust, in our opinion, should be not upon the composition of the company but the duties and functions performed by it. Thus, whether the appellant is a body which exercises public function, is the primary question which should be raised and answered."

36. The aforesaid judgment of the Delhi High Court has been upheld by the Supreme Court in ***K.C. Sharma versus Delhi Stock Exchange***, (2005) 4 SCC 4 observing interalia that the control of the Central Government over the Delhi Stock Exchange in view of the provisions of the Securities Act and the SEBI Act is all pervasive and deep. Thus the petitioner is a 'public authority' as per second part of section 2(h) of the Act.

37. Some arguments were addressed on the question whether the Central Government owns National Stock Exchange in view of the shareholding pattern. SEBI in their counter affidavit has stated that more than 50% of the shares of the petitioner stock exchanges are owned by Government of India or Government companies. The petitioner has disputed the said contention and factual statement. I am not going into this aspect as this factual dispute has not been dealt with and examined by the Central Information Commission and my findings recorded above. This question is left open and undecided.

38. In view of the aforesaid findings, it is held that the petitioner is a "public authority" as it is an 'authority or institution of self-government' constituted or established by notification or order issued by the appropriate Government. It is also held that the petitioner is controlled by the appropriate Government. The writ petition

accordingly has no merit and is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

APRIL 15, 2010.
VKR/P