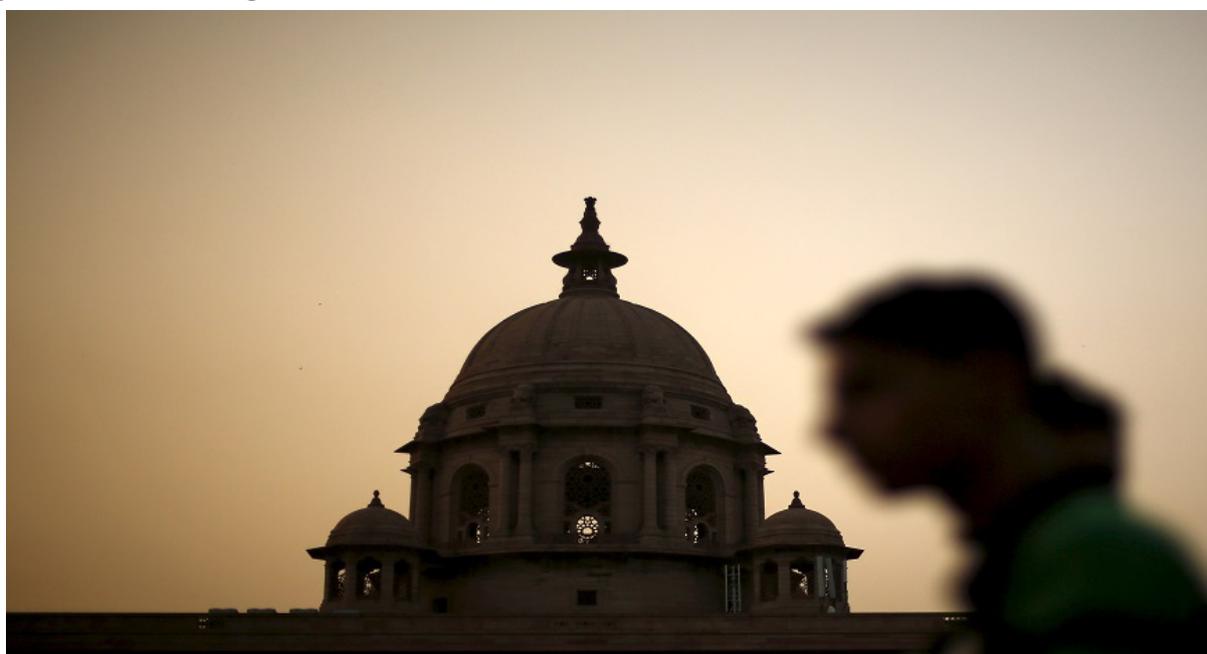


Since Regulators Fail!

Ministry of Finance should take a leaf out of the recommendations of the Law Commission of India over wrongful prosecutions in the country in the context of financial regulators



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by Sumit Agarwal

Wrongful prosecution in our country is not very rare. Often there have been incidences in the past wherein innocent individuals have been wrongfully prosecuted, incarcerated for crimes that they did not commit. In most scenarios, even the government has not been able to help them. Many such matters are languishing in courts.

Law Commission in the backdrop of a Delhi High Court order, in its 277th report recommended enactment of specific legal provisions for redressal of cases of wrongful prosecution – to provide relief to the victims of wrongful prosecution in terms of monetary and non-monetary compensation and recommends amendment to criminal laws.

The Article 14(6) of the International Covenant on Civil and Political Rights which India had ratified, makes it mandatory for countries to have a statutory framework for providing

compensation and rehabilitation to those who have been wrongfully prosecuted. India is yet to enact a law to this effect.

Unfortunately, there is not a whiff anywhere where corporates and individuals are wrongfully prosecuted under myriad regulatory laws.

The mistakes we commit

India has witnessed various cases wherein corporates as well as individuals have been wrongfully tried for regulatory violations they never did. These include cases where the accused and not guilty of the offence, and the regulator engaged in some form of misconduct in investigating and / or passing ex parte orders, and the cases where there has been delay of years, yet persons are put to civil death by freezing their demat and bank accounts based on circumstantial evidence.

In a case a Chairman and Managing Director (CMD) of a software company was accused of dealing in stocks based on unpublished price-sensitive information thereby referred to as 'Insider Trading'. Under SEBI's laws, for the same cause of action, multiple proceedings could happen simultaneously depending upon the measure SEBI wants to adopt. For monetary penalty – Adjudication Proceedings, for debarment from securities market – WTM proceedings, for jail term – Special Court prosecution. In the case, to buy peace, CMD settled the proceedings when he received the Adjudication notice for monetary penalty. Years later, another department started proceedings and restrained him for two years. He had to obtain a stay from a High Court to make the regulator understand the latches in its system.

There is an increasing trend in regulatory laws to rope in a Company, its board of directors and the Compliance Officer - all three - for the same violation on the argument that failure of compliance officer is failure of other two vicariously leading to a joint and several liability. Regulated persons have to consider it cost of doing business. This is a very serious trend requiring a relook if Government of India is serious about ease of doing business.

The Law Commission of India, SEBI and Finance Ministry

There are other such cases. The Law Commission of India in its latest report has recommended that the Indian Government should have a broader view on the protection of citizens and rights. The report has also recommended that the erring government officers if found to have maliciously prosecuted an innocent citizen will be prosecuted.

In the regulatory set up and specifically in the context of securities laws, accountability of the regulatory decisions is tested at Securities Appellate Tribunal (SAT). In a case where a compliance officer who was serving notice period under resignation having no nexus with the allegation was imposed penalty by SEBI. SAT in an appeal held that considering the fact that the appellant had to undergo this litigation and face harassment for almost 1.5 years, coupled with the fact that a substantial portion was spent on litigation, SEBI needs to pay certain costs.

In another case, Tribunal imposed costs on SEBI for passing a confirmatory order without application of mind and in a casual manner. Tribunal held that while the regulator wields wide

powers, it does not mean that in every case, an ex-parte interim order should be passed on the pretext that it was imminent to pass such interim order in order to protect the interest of the investor or the securities market. An interim order, however temporary it may be, restraining an entity/person from pursuing his profession/trade may have substantial and serious consequences which cannot be compensated in terms of money.

In the year 2020, there were at least eight such cases.

History will show that there would not be a single case where SAT has imposed costs or passed remarks against conduct of officials, manner of proceedings, extreme delays and SEBI has not have carried the matter to Supreme Court seeking overturn, leniency or expunging of remarks.

But the problem is...

...regulators taking a leaf out of Law Commission's recommendations is far from consideration. It is worthy of note that for bringing amendments to regulatory laws there is no regulatory law commission and the Law Commission of India has never been tasked with looking at these laws.

G.V. Ramakrishna, the first chairman of SEBI, once had made an interesting remark when regulator was still trying to hold its territory by saying 'Brokers should know that the road from Dalal Street (where the Bombay Stock Exchange is located) to Mittal Court (where Sebi was then based) doesn't run through North Block (where the finance ministry is located)'.

Today, if one were to go by the amendments in past years through Finance Acts (along with budget, without parliamentary debates), it is the reality that the road to amending regulatory laws definitely run through North Block.

In the present context, need of the hour requires attention of Ministry of Finance to have a system which closely oversees these issues. This consideration will help victims, who lack financial resources and legal knowledge to fight the mighty regulators and approach the judiciary, for such wrongful prosecution. It will do two things – while it will enable a rightful compensation, it will prove to be a legal remedy as well as make the regulators institutionally liable for such problems. In addition to a step for ease of doing business, it will be a step to bring accountability of a regulator.

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