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Court : Mumbai

Decided On : Aug-16-2016

Judge : G.S. Patel

Appeal No. : Notice of Motion (L) No. 2145 of 2015 in Suit (L) No. 810 No. 2015

Appellant : VSM Diamonds Pvt. Ltd. and Others

Respondent : Bharat Diamond Bourse

Judgement :

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A. BACKGROUND

1. The four Plaintiffs impeach the Defendant s notice dated 1st August 2015 communicating to its members its decision to suspend the Plaintiffs from entering the Defendant s complex; and barring them permanently from applying for or obtaining trade or property membership of the Defendant or its complex. Also impugned are several communications dated 12th June 2015, (Plaint, Exhibit O , pp. 148 149)29th July 2015, (Plaint, Exhibit Q , pp. 151 153)1st August 2015, (Plaint, Exhibit R , pp. 154 155; this is the notice mentioned earlier)and some electronic messages (email and WhatsApp). (Plaint, Exhibit S , pp. 156 159).

2. Given the nature of the arguments before me, I think it is best to set out first the reliefs sought in the Notice of Motion:

(a) Pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to issue an order of temporary injunction staying the operation of the impugned decision taken by the Defendant and the communications dated 12th June 2015 (Exhibit 'O'), 29th July 2015 (Exhibit 'Q'), 1st August 2015 (Exhibit 'R') and e-mail and WhatsApp messages (Exhibit 'S') be stayed;

(b) pending the hearing and final disposal of the above Suit, the defendant, by itself, its servants, agents x restrained by an order and injunction of this Hon'ble Court from in any manner barring or preventing the entry, ingress, egress and access of the Plaintiffs or either of them, or any employee or officer or representative or servant or agent of Plaintiff No. 1 in and to the BDB Complex;

(c) Pending the hearing and final disposal of the Suit, the Defendant, by itself, its servants, agents or otherwise howsoever be restrained by an order and injunction of this Hon ble Court from in any manner publishing, acting upon, in implementation or in furtherance of or in pursuance of the Defendants said

decision impugned herein and the communications dated 12th June 2015 (Exhibit 'O'), 29th July 2015 (Exhibit 'Q'), 1st August 2015 (Exhibit 'R') and email and WhatsApp messages (Exhibit 'S');

(d) that pending the hearing and final disposal of the above Suit, the Defendant be directed by a mandatory order and injunction of this Hon'ble Court to issue and publish communications in the same manner with the same prominence and mode and to all the persons to whom Exhibits 'R' and 'S' were addressed, intimating the orders of stay or injunction, if any, that may be passed by this Hon'ble Court, including publishing the same in the newspapers/websites in which the earlier news item had appeared;

3. Mr. Chinoy s case, as I understand it, is that the Defendant s impugned decision is a usurping of a judicial function, one that is the sole preserve of a court. It has the effect of shutting the Plaintiffs out of business altogether. There is, he says, a violation of fundamental canons of natural justice: the order was without a proper hearing or notice. The Defendant is a dominant body that exercises substantial control over the entirety of the trade. It is, therefore, a trade regulatory body that purported to exercise an adjudicatory function. The ban imposed is permanent, and therefore unfair and unjust. It is not a mere suspension. The Defendant is, he submits, a trade regulatory body that purported to exercise an adjudicatory function and took direct action that, in turn, had a direct adverse impact. This coupled with the Defendant s dominance over the trade makes its action susceptible to a form of intervention and redress by a civil court, even if this falls short of a judicial review standard. It is not merely a matter of affecting reputation, as might be the case if the Defendant was a private individual that took precisely the same action. There, the remedy might lie in tort. It is also not a question of damages for breach of contract. Even outside these two spheres of judicial interference, a civil court can afford relief. The test must be (a) of dominance by the association or trade body; and (b) whether it is shown that the Defendant is a dominant trade regulatory authority that exercises adjudicatory functions. If these tests are satisfied, then the Defendant s action is vulnerable as violating the principles of the natural justice and this allows a court to interfere and set aside the impugned action. If not, then of course the Plaintiffs must fail.

4. I confess to having had the greatest difficulty in deciding this matter. The issues seem narrow and within the limited confines of a civil suit; but appearances are deceptive, and so it is in this case. The questions it raises are of far wider reach and impact. Mr. Chinoy speaks of the facts related to this particular case, and which I will set out shortly, but it seems to me that, of necessity, he anchors his arguments in an issue of public law the relationship between a private body or individual and the judiciary (as a limb of the State), administrative law, and procedural law. He seeks to expand the limits of what a private body, association or entity can do vis- -vis an individual s civil rights: transgressing those limits puts that body or entity firmly within the exclusive preserve of a court; thus the public law dimension. Not every entity of body is included in this sweep: Mr. Chinoy does say that the body must be one that is shown to exercise substantial dominance over the trade or industry in question; not necessarily entire control, but very substantial control.

5. The implications of this construct are, I think, extremely grave and I have not, after a very great deal of thought, been able to find a way to accept those arguments as presented. Mr. Khambata for the Defendant points precisely to the perils of such an enlargement of the discourse, one that is implicit in an acceptance of Mr. Chinoy s arguments. He says that if so expansive a principle is accepted, then no private body will ever be able to act in his own interests without risking such a challenge. All adjudication is not, Mr. Khambata says, purely the realm of courts. All of us adjudicate on a daily basis in matters of supply, contract, employment and more. Not all these are the sole preserves of courts. Many are entirely legitimate and permissible. State functionaries, or instrumentalities of the State, might receive different considerations, but that is because they are subject to Constitutionally-mandated restraints, checks and balances on their functioning. A permanent blacklisting is not permissible at the instance of an organ of the State, for instance, but an entirely private body may decide, with complete legitimacy, for itself or for its constituent members that it will not ever truck in any fashion or form with a particular individual. That decision is never subject to judicial review per se. An action may lie in defamation or some other permissible or recognised tortious claim, but the action is not vulnerable for violating a principle of natural justice. There is no reason why, if judicial review does not lie, a broader

jurisdiction should be assumed for a civil court. Then there is the question of the extent of dominance. Merely saying a body is dominant surely cannot be enough how much would be enough to invoke the paradigm Mr. Chinoy commends? The construct is made more problematic when Mr. Chinoy argues that the dominance of which he speaks merely needs to be substantial. In a given sector, a mere 5% or 15% of a market share or control might be substantial . In another case, 95% might not, because the volumes, vis- -vis the individual s business, are not so very high. This is, of course, independent of his argument that there is no dominance of the kind Mr. Chinoy describes; and if there is, it is irrelevant. In fact, he submits, the kind of interference Mr. Chinoy invites is a possible violation of the Defendant s members constitutionally saved rights under Article 19(1)(c), to form associations.

6. Both sets of arguments are compelling. My task has not been easy, given the public law dimension. There seems to me to be a very fine line that separates a court s adjudicatory role from that of a private body. Some previous cases involving the Advertising Standards Council of India including one of my own orders were cited, and I have had to consider these very closely. I have, finally, been unable to find for the Plaintiffs. My reasons follow, and while I will set these out in detail presently, my overall conclusion is that in the present case the Plaintiffs have not been able to meet that very high bar or standard that must be met to invite a court s interference in such matters.

B. FACTS

7. The Defendant is the Bharat Diamond Bourse (BDB). This is a company incorporated and registered under Section 25 of the Companies Act, 1956. It has a large complex, spread over some 20 acres, at the Bandra-Kurla Complex. The Plaintiffs say this is said to be the only diamond bourse in India; Mr. Khambata refutes this, saying that it is not a bourse properly so called, and that this is just the name given to the Defendant. The BDB Complex, as its campus is known, has some eight towers with over two million square feet of constructed area. There are 2,500 offices here, and the BDB has 4000 constituent members all engaged in different aspects of the diamond trade. In the Complex are trading halls, major banks, diamond testing laboratories, diamond equipment suppliers, customs

house and import-export agencies, and several other facilities (couriers, restaurants, travel agencies and so on).

8. Till 2010, Mumbai s diamond trade was centred at the Opera House area. The concept of a centralized facility is, however, of much older vintage, dating back to the 1980s. The BDB began in 2010, and, in time, the diamond trade shifted out of the Opera House area. For the financial year 2013 2014, exports of various types of diamonds through the BDB Complex were about Rs.1,37,241 crores. Imports for that period stood at above Rs.64,648 crores.

9. In October 2010, the Customs Commissionerate of the CSI Airport set up a Precious Cargo Customs Clearance Centre or PCCCC within the complex. This is a customs notified area under Section 8 of the Customs Act, 1962. With effect from October 2010, the BDB is appointed or notified as the custodian of diamond cargo under Section 45 of the Customs Act, 1962. The Plaintiffs say that as a result, all export and import of diamonds must necessarily be routed through the PCCCC at the BDB Complex. I must straight away note Mr. Khambata s statement that his client s decision is limited to the BDB Complex and does not extend to the attached PCCCC; the Plaintiffs are, and always have been, at liberty to use that facility it just happens to be attached to the BDB Complex, but is not under BDB control.

10. The 1st Plaintiff (VSM), a company incorporated under the Companies Act, 1956, deals, trades and exports and imports natural diamonds. Plaintiffs Nos. 2 and 3 (Viral and Puja) are VSM s directors. Viral and Plaintiff No. 4 (Shreyas) are its shareholders. The Plaintiffs say that in January 2015, Viral and his father-in-law, one Rajiv Modi, owned office premises in the BDB. The Plaintiffs say they were thus property members of the BDB. The Plaint itself gives no further details, and this assertion is squarely denied in the Affidavit in Reply to the Notice of Motion: the BDB says that the premises in question were first allotted to one M. Shashikant Exports Ltd in November 2010; that Viral and Rajiv Modi bought this office from Shashikant Exports in April 2014. Neither Viral nor Rajiv Modi ever sought property membership of the BDB. It is not in dispute that Viral and Rajiv Modi sold these premises in May 2015 to one S. Jogani Exports Pvt Ltd (Notice of

Motion, Reply, paragraphs 15(d) and (e), pp. 15 16, and paragraph 42(b), p. 26).It is, however, admitted that since January 2015, none of the Plaintiffs have had any kind of membership of the BDB.

11. In 1966, the Central Government s Ministry of Commerce established the Gem and Jewellery Export Promotion Council (GJEPC). This is an apex body in the gems and jewellery sector, and represents over 6000 exporters. It is headquartered in Mumbai, with regional offices in New Delhi, Kolkata, Chennai, Surat and Jaipur, all major centres. The GJEPC s charter is to promote the domestic gems and jewellery industry. It also monitors trade in undisclosed or illicit synthetics and detects and prevents malpractices or unethical conduct by its affiliated members. To monitor the undisclosed mixing of synthetic diamonds, the BDB together with the Mumbai Diamond Merchants Association, the Gems and Jewellery Trade Federation (GJF) and the GJEPC jointly constituted the National Diamond Monitoring Committee (NDMC). It is also known as the Grievance Redressal Committee. The NDMC routinely collects laboratory data when synthetic diamonds are detected or are sought to be passed off as natural diamonds without the necessary disclosures. Laboratories reports monthly to the NDMC.

12. It seems that on 15th February 2015, the NDMC received information from the Gemmological Institute of India (GII) laboratory in Mumbai and it had tested a large quantity of diamonds forwarded to it by one Malkish Jewels Pvt Ltd (Malkish), and that these had turned out to be synthetic and not natural diamonds. Acting on this information, the GJEPC wrote to Malkish on 4 March 2015 and asked it to come in for a discussion about the issue (Notice of Motion, Reply, Ex. C , p. 118).The NDMC s working group met on 17th March 2015. One Kishin Balani was present, representing Malkish. He said that Malkish had been sold these diamonds by VSM. Doubting the quality, Malkish sent the diamonds to the GII laboratory for testing; and had been informed that the diamonds were synthetic, not natural. Balani said he had contacted VSM and raised the issue; VSM took back the diamonds immediately. Malkish also wrote to the GJEPC on 30 March 2015 saying that it had some issues with VSM and asked the GJEPC to look into this (Notice of Motion, Reply, Ex. D , p. 119).

13. VSM says it knew nothing of this background or Malkish s correspondence with the GJEPC. It received a letter dated 2nd April 2015 from the GJEPC (addressed to Viral) saying, after introducing itself and its charter in brief, that it had received data from a lab that stones given by VSM to an entity were found to be synthetic. VSM was called to a meeting on 8th April 2015 (Plaint, Ex. B , p. 128. Notice of Motion, Reply, Ex. E , p. 120).This letter does not mention Malkish. On 6th April 2015, BDB wrote to Viral and Rajiv Modi (who had till then not delivered possession of the office they had bought in the BDB Complex) and, referring to the GJEPC

letter, asked them to remain present on 8th April 2015 (Plaint, Ex. C , pp. 129 130).VSM responded to GJEPC on 7th April 2015, saying that it dealt only in natural diamonds and had no involvement in synthetic diamonds. It assured the GJEPC of cooperation and voiced concern about possible damage to reputation. It asked for information about the entity involved, the goods, etc., so that it could verify the details and carry out an internal check (Plaint, Ex. D , p. 131).The meeting for 8th April 2015 seems to have been rescheduled to 15th April 2015; GJEPC wrote to Rajiv Modi on 8th April 2015 about this, but that letter has no further details of any case against VSM (Plaint, Ex. E , p. 132).Modi responded on 13th April 2015, (Plaint, Ex. F , p. 133)saying that he had nothing to do with VSM, and also complaining that he and others had received threatening calls from someone on behalf of the GJEPC s legal department. On that very day, VSM separately wrote to the GJEPC (Plaint, Ex. G , p. 134.).In this letter, VSM pointed out that it had received no details of the case sought to be made out against it, and repeated its request for this. VSM also asked that the GJEPC s legal department should stop making threatening calls.

14. The meeting of 15th April 2015 also does not seem to have taken place. On 18th April 2015, (Plaint, Ex. H , pp. 135 136)GJEPC wrote to VSM, Viral and Shreyas, Plaintiffs Nos. 1, 2 and 4, saying that since the matter was sensitive, the GJEPC did not think it appropriate to place all the facts on record, but felt it better for all concerned to have an informal discussion. It said that during the discussion the relevant material would be made available. It also denied that there were repeated calls or that the solitary call made on 7th April 2015 was in any way

intimidating; it was, GJEPC said, only for confirmation of the VSM s attendance on 8th April. GJEPC pointed out that this was its third letter on the subject and now asked VSM to come to a meeting on 22nd April 2015.

15. The meeting of 22nd April 2015 did not take place either. GJEPC sent a fourth letter to VSM, Viral and Shreyas, reiterating what it had said in the previous communication, but adding that the previous letter of 18th April 2015 could not be delivered because VSM s office was found closed. The meeting was adjourned again to 27th April 2015, and this time the GJEPC said that if VSM did not appear, the Council would proceed to take suitable action (Plaint, Ex. I-1 , pp. 137 138).A copy of this was also sent by email (Plaint, Ex. I-1 , pp. 139 140).

16. On 23rd April 2015, the GJEPC wrote to the Bye-Laws and Legal Committee of the BDB. It said that internal investigations had revealed that VSM, apparently still operating from its BDB Complex offices, had not attended a meeting despite several requests. It asked the BDB to issue a letter to VSM asking it to come to the meeting on 27th April 2015 (Plaint, Ex. J , pp. 141 142).The BDB sent such a request ion 24th April 2015 (Plaint, Ex. K , p. 143).In this, the BDB clearly said that in default of VSM s appearance, the committee might take action, including restricting VSM s entry into the BDB premises.

17. BDB insists that VSM had sufficient notice: it knew the frame of the enquiry, that the case was that VSM had supplied synthetics, and that this and nothing else was the subject of the scheduled meeting (Notice of Motion, Reply, paragraph 20, p. 18).

18. Ultimately, Viral attended the 27th April 2015 meeting with representatives of the NDMC. The BDB says that at this meeting, Viral was told that there was direct evidence of the sale by VSM of synthetic diamonds to Malkish and that the GJEPC had a written complaint in its hands from Malkish to this effect. The BDB says that Viral was told of the laboratory results. He was asked for an explanation. According to the BDB, after saying that he had panicked at receiving the notices, went on to say that VSM did not cut stones but bought them directly from New York suppliers. It then shipped the orders directly to the third party purchasers (such as Malkish). VSM and Malkish had a long-standing business relationship,

Viral said; and, besides, he himself was a friend of Mr. Ash Balani, from the Balani family that held Malkish. Viral admitted that VSM had sold some diamonds to Malkish, which then sent them on to GII for testing. But Malkish also sought other diamonds from Viral to check if these stones were also synthetic. These were also sent to GII for testing. The test reports showed that the majority of the stones were synthetic; and Malkish had therefore contacted Viral and returned the stones. In turn, Viral had checked with his suppliers data and had narrowed the list of 30 to 40 down to three or four who might have been responsible. He could, however, pinpoint the possible supplier of synthetics only by buying more stones and checking them. This is the BDB s version of what transpired at the meeting. The Plaintiffs say otherwise. They insist, in paragraph 27 of the Plaint, that Viral had no knowledge or notice and that it was only at this meeting that Viral was told that the complaint emanated from Malkish. The Plaintiffs do say that Viral acknowledged that if there was truth in this, then VSM itself was as much a victim; it had no knowledge of any fraud and it had not wittingly purchased or delivered synthetic stones. Even the Plaintiffs accept that in February 2015, Malkish had raised certain issues about the diamonds provided by VSM; but VSM took back the stones, and believed that the matter was amicably resolved , and therefore, there was no pending dispute between Malkish and VSM. Viral claims that he had also checked with another purchaser, but no issues had been reported.

19. The Plaintiffs then received an email (addressed to Viral) from the BDB s Secretary Administration, asking VSM to send certain parcels (of 66 carat stones and 56 carats melee stones) to a BDB committee member s office, and some documents to another BDB committee member (Plaint, Ex. L , p. 144).The BDB says VSM did not comply. It did send the stones as requested, but did not send the complete documentation that was sought (Notice of Motion, Reply, paragraph 27, p. 21; Ex. F , p. 121).GJEPC forwarded these two parcels under cover of its letter dated 28th April 2015 to GIA India Laboratory Pvt Ltd with a request to check if the stones were synthetic or natural; if the former, if they were CVD or HPHT; and whether they were from the same or different sources (Notice of Motion, Reply, paragraph 28, p. 21; Ex. G , p. 122).The samples were in two lots. GIA India Laboratory Pvt Ltd returned an email on 6th May 2015 saying that all the stones sent for testing were synthetic (Notice of Motion, Reply, paragraph 29, p.

21; Ex. H , pp. 123 125).The BDB says that in view of this, the NDMC made its own enquiry to see if VSM had sent out any stones for testing to the GII and whether VSM had ever informed or contacted any buyers to whom they had supplied synthetics without disclosure. GII reported that it had received no stones from VSM for testing. As regards the second aspect, although Viral had said that VSM had contacted Shamji Fancy Creations, this turned out to be untrue.

20. There followed, according to the BDB, an internal meeting of the BDB, the GJEPC, the NDMC, the GII and GIA laboratories, and the GJF. Those present unanimously decided to take action against VSM for supplying synthetics without disclosure; and to give VSM an opportunity to clarify its position before taking any action. The BDB says that Viral was telephonically asked to appear before the NDMC on 12th May 2015. Viral, the BDB says, refused.

21. It is common ground that on 26th May 2015, the BDB issued a letter dated 26th May 2015 to Viral demanding his presence on 1st June 2015 (Plaint, Ex. M , p. 145).The Plaintiffs say this was out of the blue; the BDB says this was necessitated by Viral s refusal to come to a meeting on 12th May 2015 (Notice of Motion, Reply, paragraph 32, p. 22).

22. There followed a letter dated 28th May 2015 from VSM in response (Plaint, Ex. N , pp. 145 147. I need only note in passing that VSM responded to the BDB s letter of 26th May 2015; its grievance in the Plaint that the letter of 26th May 2015 was sent only to Viral is, thus, irrelevant). Here, VSM once again said it had not received the information it had previously sought. It asked for this again, and sought I find this most surprising all rules, regulations, articles, bye-laws, etc., empowering the BDB to take action. It also said that the meeting were not informal discussions but were randomly fishing for information and were intimidatory, accusatory and threatening in nature . That VSM had already consulted its lawyers cannot be in doubt. The point, however, is that VSM flatly refused to attend any meeting unless it was supplied all this information and material.

23. The BDB replied on 12th June 2015 (Plaint, Ex. O , pp. 148 149).It said clearly that VSM was aware that the BDB had received a complaint from a member about passing off synthetic diamonds as natural ones without the required disclosures.

The BDB briefly set out what, according to it, happened at the meeting of 27th April 2015. It set out, in paragraph 5, the representations made by Viral on behalf of VSM at that meeting; and, in paragraph 6, that those representations had been found to be untrue. The BDB gave VSM one further opportunity and called it to submit a satisfactory explanation. In the interim, the BDB said, it had decided to restrict VSM s entry into the BDB Complex. By this time, of course, VSM had divested itself of its office in that complex.

24. On 16th July 2015 (over a month later), Viral wrote to the Managing Committee of the BDB saying that he had just returned from overseas and seen its letter of 12th June 2015. He said he would revert shortly (Plaint, Ex. P , p. 150).

25. The BDB waiting for about two weeks. It wrote to VSM on 29th July 2015 in hard copy and by email (Plaint, Ex. Q , pp. 151 153)saying that it had, on the principles of natural justice, given VSM a final opportunity. VSM had not attended a meeting. It had not taken any steps to provide a satisfactory explanation. The BDB therefore said that the entry of VSM s directors, past and present, its employees and agents into the BDB including any functions, events, trade fairs, etc., were permanently restricted with immediate effect. Plaintiffs Nos. 2 to 4 were restricted by name. VSM was informed that the BDB would take steps to intimate its members, including by posting notices; and that BDB s members would also be told that they in turn would not be entitled to allow VSM s directors and staff entry as guests or to recommend their names for membership of the BDB.

26. The BDB then issued its notice of 1st August 2015 (Plaint, Ex. R , pp. 154 155; Ex. S , pp. 156 159)by various modes saying that the Plaintiffs, their representatives, agents, etc., had been suspended from entering the BDB, and debarred from applying for and obtaining trade or property membership in the BDB. The members of the BDB were told not to permit the Plaintiffs into the BDB as guests or to propose them for membership during the validity of the notice. That notice was said to be effective immediately and gave no end date.

C. THE PLAINTIFFS CASE ON FACTS

27. On facts, this is how Mr. Chinoy places his case for the Plaintiffs. There was nothing about a complaint against VSM till 12th June 2015. It was only said that a laboratory report had found synthetics; there was no mention of Malkish at all, only ever of an entity . Even from Malkish there was never any complaint , strictly speaking, only a statement that the laboratory had reported the samples it submitted as being synthetic and that Malkish had issues with VSM. For its part, VSM candidly acknowledged this, and said the issue had been settled; it had taken back the diamonds and there was, therefore, nothing pending as between Malkish and VSM. There is no explanation, Mr. Chinoy says, why the BDB found the Plaintiffs guilty only on the basis of the 6th May 2015 laboratory report; decided, unanimously with the other agencies, that the Plaintiffs were guilty, but did not inform the Plaintiffs till 12th June 2015. This last submission may not be entirely accurate, because there are, as I have noted, the events of late-May 2015 that intervened. The point that Mr. Chinoy makes is that there was no complaint; there is nothing to show that the laboratory tests of May 2015 were of the samples sent by VSM; and there was no reference to the laboratory reports till the Affidavit in Reply; this finds no mention in the notice or the final order. The so-called informal meeting was, he says, a sham. It provided the Plaintiffs no opportunity and no disclosure was ever made to the Plaintiffs of the essentials of the case against them. There is no basis and no causality to the BDB s case that the Plaintiffs acted to make unlawful gains and with ulterior motives.

28. The effect of the ban order and it is that, and not a mere suspension, Mr. Chinoy says is to shut the Plaintiffs out of all business altogether. The only persons with whom they can transact are all within the BDB Complex. To ban them permanently is to close down the Plaintiffs business. The BDB is, Mr. Chinoy says, a virtual monopoly; and by acting as it has, it has affected the Plaintiffs legitimate business interests, and it has done so in a manner not supported by law. Over 80% of the country s diamond trade moves through the BDB (their own annual report puts the figure much higher, at around 97%). The BDB thus has substantial control and dominance over the sector and the trade. It is a dominant trade body.

29. The entire exercise has been, Mr. Chinoy submits, vitiated by a wanton non-adherence to fundamental norms of fair play. Till 27th April 2015, the only exchange was for an informal discussion, entirely without context. After the meeting on 27th April 2015, VSM submitted samples; these were later returned in two weeks without comment. VSM s demand for a copy of the complaint against it went unanswered. On the one hand the BDB says in its letter of 12th June 2015 that it acted on a complaint, which it does not disclose; on the other, in the Affidavit in Reply, it says it acted on the May 2015 laboratory reports and the internal meeting of 8th May 2015 following those reports.

D. THE PUBLIC/PRIVATE DIVIDE

The ASCI Cases

30. Mr. Chinoy s first reference point on the question of law, i.e., the legality of the BDB s ban order is the decision of Nijjar J in Century Plyboards (India) Ltd v The Advertising Standards Council of India (2000 (1) Bom. C.R. 136).The Advertising Standards Council of India (ASCI) is a Section 25 company, very like the BDB. It examines and investigates complaints from consumers and the general public in regard to its self-proclaimed code of conduct . The ASCI received a complaint regarding an advertisement by Century Plyboards in the Times of India s 27th September 1988 edition. The ASCI wrote to Century Plyboards saying it had received a complaint; that the ASCI had adopted a code of self-regulation in advertising; that all complaints were judged by a 14-member committee of persons from diverse fields. It set out the substance or essence of the complaint, though not the identity of the complainant, nor a copy of the complaint. The complaint was upheld and Century Plyboards was direct to suspend its ad campaign. Century Plyboards was not itself a member of the ASCI. Failing compliance, Century Plyboards was told that the advertising agency concerned and media would be requested not to carry its advertisements in the current form. Century Plyboards sought a review and a personal hearing. None was ever given, and the review application was dismissed.

31. Mr. Chinoy lays emphasis on paragraph 7 of this decision:

7. I have considered the arguments put forward by the learned Counsel for the parties. Undoubtedly defendant is a Company which is governed by the provisions of the Companies Act. Therefore, the members of the Company would be bound by all the directions which are issued by the Board of Directors of the Company. Any directions issued by this Company are not binding on the plaintiff. Restrictive order can only be passed by the State in exercise of its powers under Article 19 of the Constitution. This Article permits the State to impose reasonable restrictions on the Rights to Freedom, guaranteed in this Article. No individual or company can arrogate to themselves the powers of the State, Statutory Authorities or Instrumentalities of the State. I am prima facie of the view that this Company cannot be elevated to the status of State, Statutory Corporation or Instrumentality of the State. That being so, any action taken by the Company which would infringe the rights of a citizen of India guaranteed under Articles 14 and 19 would be without jurisdiction. No directions issued by the Company to the members can be held to be binding on a non-member. Therefore, if the directions issued by the Company to the members have the effect of adversely affecting the trade or profession of a non-member, the directions would be without jurisdiction. Interestingly in the Memorandum and Articles of Association it is provided that the Code is not in competition with law. Its rules, and the machinery, through which they are enforced are designed to complement legal controls, not to usurp or replace them. But the directions contained in the two impugned orders clearly have the effect of a mandatory injunction. This kind of order can be granted only by courts duly constituted under law. A voluntary association of persons, even a Company such as the defendant, cannot usurp the jurisdiction of the courts, Tribunals and For a duly constituted by Parliament.

(Emphasis added)

32. Mr. Chinoy submits that the present case is on all fours with the decision in Century Plyboards. There is, in fact, nothing to distinguish the two. He points that this decision was followed by Kathawalla J in his 7th May 2014 order in Teleshop Teleshopping v Advertising Standards Council of India (Notice of Motion (L) No. 1153 of 2014 in Suit No. 497 of 2014)and my own order of exactly a year later, on 8th May 2014, in another suit between those very parties (Teleshop Teleshopping

v Advertising Standards Council of India, Notice of Motion (L) No. 1393 of 2015 in Suit (L) No. 492 of 2015).

Nagle v Feilden

33. Mr. Chinoy then refers to the decision of Lord Denning MR for the Court of Appeal in Nagle v Feilden and Ors., ([1966] 2 WLR 1027; (1966) 2 QB 633)to the effect that just as courts will intervene to protect a man s right to property, they will also intervene to protect his right to work. There, the plaintiff was aggrieved by the refusal of a horse trainer s license to her. She brought an action for a declaration that the race stewards policy of refusing licenses to women trainers was void as being against public policy. The Court of Appeal drew a distinction between a body that governed the right to work and a private social club. In the case of the latter, no recourse to a court could be had against a black balling from membership, because the members had made no contract with him. They can do as they like; they can admit him or refuse him as they please. Where, however, the case is of an association that exercises a virtual monopoly in an important field of human activity, by refusing or banning a person, the body or association might well put a man out of business. This is a great power; if abused, can the courts give redress? That, the Appeal Court said, was the question before it. The Appeal Court held that:

[W]hen an association, who have the governance of a trade, take it upon themselves to license persons to take part in it, then it is at least arguable that they are not at liberty to withdraw a man s license and thus put him out of business without hearing him. Nor can they refuse a man a license and thus prevent him from carrying on his business in their uncontrolled discretion. If they reject him arbitrarily and capriciously, there is ground for thinking that the courts can intervene. I know that there are statements to the contrary in some of the cases. We were referred to one by myself in Russell v Duke of Norfolk. But that was 17 years ago. The right to work has become far better recognised since that time. So has the jurisdiction of the courts to control licensing authorities. When those authorities exercise a predominant power over the exercise of a trade or profession, the courts may have jurisdiction to see that this power is not abused. If

this practice this unwritten rule [of forbidding women trainers] is invalid as being contrary to public policy, there is ground for thinking that the court has jurisdiction to say so. It can make a declaration of right whenever the interest of the plaintiffs is sufficient to justify it see Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606; [1963] 2 W.L.R. 529; [1963] 1 All E.R. 716 C.A.

34. Danckwerts LJ and Salmon LJ both concurred with Lord Denning in separate judgments. Salmon LJ spoke of monopolistic associations such as trade unions, the Stock Exchange and the Inns of Court that control certain trades or spheres of human activity in which none can work without admission to membership. He said:

In such cases the question arises as to a man s right to work or, more precisely, his right not to be capriciously and unreasonably prevented from earning his living as he wills.

If, however, it can be shown from the reasons which they may give, or from other sources, that candidate has been capriciously and unreasonably denied admission, it is certainly arguable that the law will intervene to protect him.

He then spoke of the stewards body being a monopolistic self-elected body which controlled a nation-wide industry in which it could effectively prevent anyone from earning a living.

35. Nagle v Feilden has long been considered a watershed in the development of private and public law. But its invocation in the present context demands care and caution. What is it that Lord Denning said in Nagle v Feilden? The Appeal Court did not have before it a case of a contract through which public law principles of natural justice and reasonableness could be invoked. If the claim is for damages for a contractual breach, it is axiomatic that a contract must exist. But absent any such contract, given an association s overweening power, though self-appointed, where a declaration of a decision s or order s wrongness is sought, principles of natural justice, unreasonableness and so on can always be invoked.

36. Dr. Philip Murray of St. John s College, Cambridge, has a trenchant analysis of the impact of Nagle v Feilden (P. Murray, Natural Justice at the Boundaries of Public Law, UK Const. L. Blog (21st November 2013) (available at http://ukconstitutionallaw.org); short link: http://wp.me/p1cVqo-AO).He writes:

Lord Denning MR affirmed his approach five years later in Enderby Town FC Ltd v Football Association Ltd [1971] 1 Ch 591. That case, and Nagle v Feilden, were accepted by Megarry V-C in McInnes v Onslow-Fane [1978] 1 WLR 1520 an ordinary private law claim for an injunction as establishing that courts are entitled to intervene in order to enforce the appropriate requirements of natural justice and fairness (1528), even where, as in McInnes itself, there was no contract between the parties.

Nagle v Feilden and McInnes v Onslow-Fane thus recognised the continued possibility of invoking natural justice arguments in private law proceedings even where no express or implied contractual term bound the parties to respect those principles. While Hoffmann LJ, obiter, doubted the correctness of Nagle v Feilden in R v Jockey Club, ex parte Aga-Khan [1993] 1 WLR 909 (at 933), the non-contractual basis of natural justice principles outside the judicial review process has nonetheless continued to be recognised in the subsequent case law. In Modahl v British Athletic Federation Ltd (No 2) [2002] 1 WLR 1192, Latham LJ expressly recognised the continued applicability of the Nagle v Feilden approach. This was re-affirmed at first instance in Bradley v Jockey Club [2004] EWHC 2164 (QB) (per Richards J at [35]). As Jonathan Morgan has recognized in his excellent survey of the modern case law and its application to sports governing bodies, the approach in Nagle v Feilden is still to be regarded as good law (Morgan, A mare s nest? The Jockey Club and judicial review of sports governing bodies [2012] LIM 102, at 106).

All of this is a useful reminder to both public and private lawyers that public law principles have life outside the strict confines of the judicial review process. Yet given the importance of the possibility of natural justice arguments being raised outside judicial review, it is unfortunate that the circumstances in which they might be introduced are still so ambiguous.

A number of important question marks still hang over this area of the law. In particular, a question remains as to the scope of the principle in Nagle v Feilden. In Bradley v Jockey Club, for example, a question was raised as to whether the Nagle v Feilden approach should be considered as one instance of the common law doctrine against unreasonable restraints of trade, or whether it had a broader application in line with the approach taken in equity, as typified by Dawkins v Antrobus. At first instance, Richards J noted that a number of cases decided after ex parte Aga Khan had rationalised Nagle v Feilden on a restraint of trade basis (see Stevenage Borough FC Ltd v Football League (1996) 9 Admin LR 109, Newport Association FC Ltd v Football Association of Wales Ltd [1995] 2 All ER 87, and Mondahl (No. 2)). Indeed, such an analysis would be at one with Denning LJ s emphasis of a common law right to work in that case, though we might see this right as simply one of the many common law principles that engage and shape the broader application of the rules of natural justice. Richards J refused to settle this point exactly in Bradley: he said that it was unnecessary to get caught up in the subtleties (para [35]) and that it was sufficient to note that even in the absence of contract the court has a settled jurisdiction to grant declarations and injunctions in respect of decisions of domestic tribunals that affect a person s right to work . If we can see Nagle v Feilden as a natural successor to the line of cases exemplified by Dawkins v Antrobus, then the case allows for a ready reliance on natural justice principles outside judicial review. If, however, it is to be conceptualised simply as an aspect of the restraint of trade doctrine, its scope is much more limited.

(Emphasis added)

37. Professor Dawn Oliver36 examines the impact and scope of Nagle v Feilden in Lord Denning and the Public/Private Divide (14 Denning L.J. 71 (1999).She writes:

According to Lord Denning, the court s jurisdiction to grant a remedy of declaration or injunction in Nagle v. Feilden was based on public policy. The plaintiffs case was pleaded on the basis that the practice of the defendants was in restraint of trade and contrary to public policy. Lord Denning did not use the phrase restraint of trade in his reasoning, and dealt with the case on public policy grounds. In particular he held that:

a man s right to work at his trade or profession is just as important to him as, perhaps more important than, his right to property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work.

36. Professor of Constitutional Law, University College, London. This is an important point, as it opens up wider grounds for the courts to control decision making in private law than restraint of trade, which is of fairly narrow application. Other case law supports the view that there is jurisdiction to control decision making of private bodies outside restraint of trade, or contract, or for the protection of property rights or to protect a right to work. In effect the courts will rest their jurisdiction on a range of public policy considerations. Although Nagle v. Feilden is the leading case on the imposition of rationality in private decision making, Lord Denning discussed the basis for obligations of fairness and rationality in private decision making in a number of other cases.

In Enderby Town Football Club v. Football Association [1971] 1 All E.R. 215, Lord Denning developed the concept that rules of associations are a legislative code, giving rise to control by the courts:

Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the Courts. If they are unreasonable restraint of trade they are invalid: see Dickson v. Pharmaceutical Society., If they unreasonably shut out a man from his right to work, they are invalid ... see Nagle v. Feilden ...

Here Lord Denning was clearly distinguishing two grounds for intervention, restraint of trade and public policy, and maintaining a separate basis from restraint of trade or contract for the court s jurisdiction to intervene. Thus in these cases the courts have been claiming a power to impose duties on private bodies, not on the basis that they are in contractual relationships with their members nor infringing property rights but because they are private legislators under a duty, as exercisers of power, to exercise their powers with due regard for the impact of their decisions

on those affected by them. That this is still an important issue is illustrated by the difficulties experienced in finding a legal basis for the control of private regulatory power in the light of the decision in Law v. National Greyhound Racing Club [1983] 1 W.L.R. 1302 to the effect that regulatory bodies in sport are not subject to judicial review. This raises the question whether they are subject to duties of fairness and rationality in private law. Nagle v. Feilden and the other cases referred to above would suggest that they are.

(Emphasis added)

Public Law v Private Law: Blurring Boundaries?

38. What principles might we deduce from these two cases?

Century Plyboards binds me; that much is certain. Nagle v Feilden and the decisions that followed with some notable departures constitute now a substantial body of precedent. The legal foundation for judicial control of private regulatory power is, however, still unclear. Can a court interfere on (a) grounds of public policy; (b) because the famed judicial conscience finds itself distressed by the decision; (c) because the private regulatory body is dominant or monopolistic and hence conceivably discharges a public function , which, in turn, is susceptible to interference even though judicial review (in the sense of being amenable to the issue of a high prerogative remedy such as a writ of mandamus) might not lie, that body not being an instrumentality of the state; or some combination of all of these? Century Plyboards and Nagle v Feilden both suggest that an overarching concern is natural justice and fairness; and that where these are shown to be lacking, a civil court s interference is justified. This is so even where there is no explicit or implicit contractual relationship between the parties sufficient to invoke the principles of natural justice and fair play. Both decisions thus acknowledge that there is a non-contractual basis of natural justice principles outside the judicial review process. Where private law decision making results in a restraint of trade, Nagle v Feilden suggests that courts do have jurisdictional control; their jurisdiction stems from broad public policy considerations. When courts do interfere in such cases, they seek to impose fairness, reasonableness and rationality in private law decision making processes. Duties are imposed on entirely private bodies, and

these duties are independent of any contractual relationship, or of property infringement considerations. Later cases, particularly Enderby, suggest that such associations act as private legislators .

39. This is, I think, a critical concept. It has several elements. The body must be shown to be monopolistic, or very nearly so; no person in that field can practice, trade or do business without that private association s or body s license or permission. That monopolistic association then adopts a code of conduct or a set of regulations, frequently self-imposed. These include powers for the determination of rights and the procedures to be followed in that determination substantive and procedural due process of a certain stripe. Where courts find either that these processes are faulty one-sided, unfair, unreasonable, irrational, violative of natural justice principles or where the conduct of that body under the self-mandated code is wanting (for those reasons), a civil court can, should and will interfere. It will provide redress. This jurisdictional authority is rooted not in contract, for the affected party might not be a member of the association at all (as in Nagle v Feilden, might be applying for a license), but because the code or regulations are a type of private legislation : omnibus in sweep, general in application within the trade, and sufficiently dominant to enforce an exclusion that could shut a person out of business or work altogether. In exercising their powers, these private associations or bodies are thus supposed to be charged with a duty, and that is to have due regard to the impact of their decisions on those affected or subjected to them. National Greyhound Racing Club, mentioned by Prof Oliver, suggests that private law decisions are immune from judicial review; but Nagle v Feilden, and, closer home, Century Plyboards, suggest that such bodies, though private, and dealing only in private law, are nonetheless subject to duties of fairness and rationality.

E. THE PUBLIC/PRIVATE DIVIDE AND THE LIMITS OF JUDICIAL INTERFERENCE

40. The task before me in this case is to see whether these principles can be applied to the BDB and its decision against the Plaintiffs. If so, to what extent is that decision vulnerable? Is every decision of the BDB subject to judicial

interference and scrutiny? Mr. Khambata urges me not to tread this path: that way, he says, lies only jurisprudential perdition, and possibly legal chaos. Entirely private matters will be subjected to fine-grained judicial scrutiny. Private persons and bodies often take a broad brush approach that is perfectly rational and reasonable. That approach often results in an impact of some degree on someone. If every one of these processes is to be subjected to this kind of scrutiny, he says, the realm of private law will stand devastated, the sanctity of private decision making eviscerated. He says Mr. Chinoy s case does not lend itself to neatly defined exceptions. The postulate is overbroad and without sufficient boundaries. Even accepting the Century Plyboards and Nagle v Feilden principles, to allow for judicial interference calls for a determination of, first, the degree of control or dominance, which must be shown to be nothing short of a stranglehold, and, second, a demonstration that the nature of the decision making process is inherently irrational, unreasonable and violative of natural justice principles. Mere dominance is an unacceptably wide basis for such a principle to be invoked. After all, these private regulatory bodies are not entirely uncontrolled or immune from all forms of legal redress. They have liabilities in contract, in tort, in corporate law and in criminal law. What the Plaintiffs seek is nothing but an unacceptable expansion of public administrative law to the domain of private law.

41. Mr. Chinoy puts his case slightly differently. If he can, he says, show that the BDB exercise substantial dominance in its field; and if he can further show that its decision-making process is not merely ministerial but adjudicatory, and that process is flawed; and, further that the effect of the resultant decision or order is such as would drive the Plaintiffs out of business, then it is within the remit of a civil court to interfere. Two of these factors are exclusively the province of courts: adjudication, and the power to affect a person s trade, business or occupation. The latter is a constitutionally guaranteed freedom and a private corporation may not act to take it away altogether. Where, in addition, the association is so very dominant that its action has a complete shut-down impact, then what that body is doing is nothing short of acting as a private court. That is prohibited, and a properly constituted court of competent jurisdiction will always step in to right that wrong. It will do so even if the action brought to it is not in tort or contract, but simpliciter for a declaration of wrongfulness of the decision and the decision-

making process.

42. To show dominance, Mr. Chinoy points out that almost the entirety of the diamond trade in India, or a very great part of it, moves through the BDB. This, he submits, is enough. It is the only diamond bourse in India, and it is certainly the only and the largest single enterprise of its kind in the trade in this country. It is much more than a housing complex or a conglomeration of offices and shops. Every diamond dealer has a presence here. It is impossible, he says, to effectively deal in diamonds outside the BDB. As to the adjudicatory element, he refers me to BDB s memorandum. Its primary object is to establish a bourse, a single trading centre for the diamond trade (Plaint, Ex. A , pp. 53 127 at p. 66).Articles 12A and 12B of the BDB s amended

articles deal with the necessary disclosures of man-made diamonds

and suspension and other penalties for default (Notice of Motion, Reply, Ex. A , pp. 41 116 at p. 71).The latter, Article

12B, which sets out the penalties for non-disclosure, is directly

relatable to Article 12A, and these are, Mr. Chinoy says, therefore

pivotal:

#12A. DISCLOSURE OF MAN-MADE DIAMONDS

Each person/member shall ensure that as and when a man-made diamond or parcel of diamonds which includes man-made diamonds is offered for sale, such sale shall be made only with a prior disclosure in writing that such a diamond is a man-made diamonds or that the parcel offered for sale includes man-made diamonds. Non-disclosure of a diamond or parcel as man-made shall mean that the seller is assuring the buyer that the diamond is not a man-made diamond or that the parcel does not contain any man-made diamonds.

The term man-made diamonds used in these Articles shall include all diamonds that are partly or fully manmade, synthetic, laboratory-grown or laboratory-created, by whatever name called. This includes diamonds that are treated with HPHT

(High Pressure/High Temperature), irradiation or any other artificial process that alters any aspect of the diamond apart from its shape and facets.

#12B. SUSPENSION AND OTHER PENALTIES FOR NON-COMPLIANCE OF ARTICLE 12A.

Any person who knowingly or unknowingly violates any provisions of Article 12A or indulges in any fraudulent practice, trade or activity, including but not limited to misrepresentation of quality or type of a diamond, non-disclosure of a partly or fully man-made diamonds as man-made, etc., such person may be liable for disciplinary action including suspension, debarment from the Bourse, expulsion, fine or such other appropriate disciplinary measure as decided by the Joint Panel of the institutes, organizations working for Diamond, Gem and Jewellery industry. In the event the person, being the seller of a diamond falls to abide by any provisions of Article 12A, the person, being purchaser of such diamond may also be entitled to cancel the sale and return the diamond, and/or to a refund of the purchase price, and/or to any direct damage as the buyer may have suffered, and/or to such other appropriate remedy, as may be decided by such joint Panel.

43. This, Mr. Chinoy says, is precisely the assumption even arrogation of an adjudicatory function by a dominant private regulatory body, and a form of private legislation that brings this case into the Nagle v Feilden jurisprudential envelope; and, too, squarely within the Century Plyboards formulation. Here is a private association that virtually controls the entire industry in which it is engaged; it has framed a set of regulations for itself and its members; and it has the power, as it says itself (Notice of Motion, Reply, paragraph 15(g), pp. 16 17)to monitor, investigate, issue charges, call for explanations and pass orders. When its orders violate natural justice principles, or operate as a restraint on trade or the right to work of third parties, these orders are susceptible to interference from a civil court on grounds of justice, equity, public policy and good conscience. The BDB s reply in paragraph 31 makes it clear that the action was the result of a disciplinary proceeding, with a finding against the Plaintiffs of malpractice. That is a determination that could never have been made by the BDB, but only by a Court.

44. Mr. Khambata s response is this: for the Plaintiffs to succeed, it is not enough for Mr. Chinoy to show some dominance by the BDB, however extensive. He must necessarily show complete dominance; or else he fails. The reason is, first, in logic: if that dominance is not complete, then there is no justiciable impact on the complainant. He can simply truck elsewhere, take his business off-site , as it were. The Nagle v Feilden postulate requires a demonstration of so complete and utter a stranglehold that a suspension order of the kind with which we are here concerned would inevitably result in the complainant being unable to do any business at all. Anything short of that leaves the complainant with a remedy in tort for defamation, perhaps, but nothing further.

45. The second flaw to Mr. Chinoy s construct, Mr. Khambata says, is that to accept the substantial dominance theory immediately removes all necessary objectivity in determining what constitutes substantial dominance. In a fractured market with multiple players, a dominance of 15% or 5% may be substantial . How is this to be tested, and by whom? What material must be shown? Surely, Mr. Khambata s argument goes, if there is even the smallest sliver of escape it is shown that the aggrieved party may do business elsewhere, though perhaps not as well or as thoroughly then the Nagle v Feilden principle has no application. That was clearly a case of total dominance; without that license, the applicant could not work as a horse trainer at all, anywhere and under any circumstances. She had no alternative. If Nagle v Feilden is to be applied, then its concomitants must apply too, and it must be shown that there is such a level of dominance that without the body s approval or permission, the aggrieved party is effectively run out of business and denied the right to work.

46. As a corollary to this, Mr. Khambata speaks of a third flaw in the Plaintiffs argument. Is this dominance to be expressed in percentages or volumes? he asks. I will accept that dominance is a perspective from the body or association, and the fact that a person choose to do the whole of his business with one entity is irrelevant. A small percentage may represent a very large volume. Is this dominance sufficient to warrant a court s interference? A wholesale fruit vendor or florist may do business worth double-digit lakhs with one five-star deluxe hotel in a chain of such hotels. Does the fact that the chain has a prominent presence make

it dominant, even if it does not occupy the entirety of the market space? In Mr. Chinoy s formulation, should that particular hotel (or the chain) decide to blacklist the florist or fruit vendor, he would be able to demand judicial interference. This would be so even if the action was taken by a voluntary association of some or even many hotels. This is why Mr. Khambata describes Mr. Chinoy s argument as unacceptably overbroad and without sufficient and sufficiently precisely defined outer limits on its invocation. For this reason, he attempts to distance himself from Nagle v Feilden.

47. I am not convinced that I can go as far as Mr. Khambata would have me do. Nagle v Feilden does draw a distinction. To one side is the instance of, say, a purely private social club that blackballs a member, against which there is no legal recourse. There is no justiciable wrong; such a body may simply refuse to admit a person to membership for no reason at all. Lord Denning said:

I quite agree that if we were here considering a social club, it would be necessary for the plaintiff to show a contract. If man applies to join a social club and is blackballed, he has no cause of action: because the members have made no contract with him. They can do as they like. They can admit or refuse him, as they please. But we are not considering a social club. We are considering an association which exercises a virtual monopoly in an important field of human activity. By refusing or withdrawing a license, the stewards can put a man out of business. This is great power. If it is abused, can the courts give redress? That is the question.

(Emphasis added)

48. In a black-balling case, therefore, there is no contractual breach and therefore no remedy; and there is also no actionable wrong or tort either.41 The social body or group is within its rights, without accountability beyond its membership, to decide who it wishes to admit to membership, and on what terms. We interfere (sometimes) with the decisions of disciplinary bodies in private clubs, on a very restricted basis, because there is a form of contract between the club and its members, and that contract requires fair dealing, though not license to a court to function as an appellate body. A court will examine the decision-making process,

perhaps, in a case of a disciplinary proceeding between a member and the club. But a court simply cannot interfere in a matter of admission or refusal of membership.

49. Dominance changes this. Where there is a virtual monopoly, even that refusal of admission or black-balling might lend itself to redress in a court this is on the ground of public policy, for that denial is not merely social; it drives a man out of business. If there is a guild, for instance, that, though voluntarily, requires all to do 41. The concept of what constitutes a tort remains uncertain: Rohtas Industries Ltd and Anr. v Rohtas Industries Staff Union and Anr., (1976) 2 SCC 82. The right to form an association is a constitutional guarantee; refusal of admission to membership is not invariably a tort. business only by acquiring a membership of it, then that guild s action in refusing a person membership would undoubtedly satisfy the Nagle v Feilden test.

50. Let me attempt an illustration. Let us say we have a vegetable vendor who supplies all his produce to the residents of a housing society. The society decides one day that he is undesirable. It forbids him entry. It forbids its members from granting him entry. Is this decision reviewable by a Court? I think not; the impact the assured offtake of produce might be severe, but the vendor can move his supply to the adjacent building. What if all the buildings in that lane also prohibited that vendor? Would their decision be

vulnerable? Again, I think the answer must be no. But if some overarching body said that the vendor could not supply to any society across the city, and it did so without hearing the vendor or in violation of some other natural justice principle, then a very different set of considerations might come into play; and we might then find ourselves within the Nagle v Feilden fold. To emphasize: in the first scenario, the ban by an individual society, the order would not be to stop the vendor s business, but only to restrict his entry and his doing business in those premises. This is qualitatively a very different thing from denying a person a right to do business altogether. I do not think it can ever be said that a man has a right , much less a legally enforceable right, to do business in or, for that purpose, to enter on another man s property.

51. The matter of dominance is thus a question of degree; and each case must receive its own measure of the extent of that dominance. It is not necessary, I think, and perhaps even unreasonable to limit these cases to ones of complete dominance. We should be hard put to find many of these, perhaps even a single one. Our stock exchanges, for instances, do not fall within the realm of this discussion, as their actions are amenable to the writ jurisdiction of our courts and hence to judicial review (For this reason, too, I do not think it necessary to consider in any great deal Mr. Khambata s submissions based on Zoroastrian Co-operative Housing Society Ltd and Anr. v District Registrar, (2005) 5 SCC 632. It is accepted that there is no fundamental right to membership of a society).It is difficult to conceive of an entirely private body with complete dominance. The test must be one of the degree of the impact. If the affected party is effectively shut out from doing any business, and not just diminished business, then he should be able to invoke a court s jurisdiction.

52. The BDB s right to deny membership is hardly liable to be called into question. The denial of membership is neither a tort nor a violation of Article 19(1)(g) of the Constitution of India. In Sejal Rikeen Dalal v Stock Exchange, ([1990] Mh. L. J. 860)this Court held:

14. This right to deny membership and the exercise of this right cannot be considered as in violation of Art. 19(1)(g) of the Constitution. A professional or trade body is entitled to regulate its membership. It is entitled to ensure that an unsuitable person is not admitted to membership. The test of suitability is not always explicit. Often it may be difficult to articulate. The question of judging suitability may be left by members to the mature and experienced judgment of respected members of the profession such as those constituting its Governing Board or Managing Committee. The members may consider these persons as the best and most qualified to decide on the suitability of a new candidate for membership. If a Governing Board in exercise of its discretion, decides that the person is unsuitable, its decision cannot be labelled as arbitrary or unreasonable simply because it is in the exercise of its discretion. It would also be incorrect to call such discretion as unguided. Such discretion is required to be exercised bearing in mind the aims and objects of the organisation. Of course, if the decision

is not bona fide, or is based on ill-informed prejudice, it can be challenged as a mala fide exercise of discretion. In the absence of any material which points to a mala fide exercise of discretion, the exercise of discretion is not per se bad in law. A decision of the Governing Board arrived at bona fide not to grant membership to a candidate is not violative of Art. 19(1)(g). The right to regulate admission to a professional body including a right to reject unsuitable persons, is a reasonable restriction on the right to carry on a profession or trade. Such restriction may be necessary in the interest of professional standards, for ensuring probity of conduct and in public interest.

15. In the present case, the aims and objects of the Stock Exchange are, inter alia, to support and to protect in public interest the character and status of brokers and dealers; in furtherance of its objects it has ensured a high standard of commercial honour and integrity. One of its aims is to promote and inculcate honourable practices and just and equitable principles of trade and business. The Stock Exchange is also required to discourage and suppress malpractices. In the present case, the Governing Board had, before it, the past conduct of a firm which had as its partners, close relatives of the deceased member as also of the 1st petitioner who was seeking nomination in his place. The firm of Harkisondas Laxmidas has large undischarged liabilities which are admitted by the Stock Exchange. The brother and uncle of the deceased were partners of this firm. The 1st respondents have stated in their affidavit that the deceased also held himself out as a partner of this firm and that there are claims which are referred to arbitration in which the heirs and legal representatives of the deceased member have also been joined as respondents because of this facts. The Stock Exchange also had before it a letter from Mukul Harkisondas stating that he had filed a suit to recover from the deceased member some dues which, according to him, were payable to the firm of Harkisondas Laxmidas. The Stock Exchange has also pointed out that M/s Harakshah was a firm which was floated by close relatives of Pradip Harkisondas. These included the wife of Pradip Harkisondas. It was through this firm that substantial speculative business of the firm of M/ s Harkisondas Laxmidas was conducted. In these circumstances, if the Governing Board, by a substantial majority, decides against granting membership to the daughter-in-law of the deceased member, they cannot be said to have exercised

their discretion mala fide. The Governing Board is required to enjoin fair dealings and high standards of commercial honour. The fact that the son of the deceased or his wife did not apply for membership but nominated a 23 years old daughter-in-law itself is somewhat significant. In these circumstances, the denial of membership to the 1st petitioner is a valid exercise of a right which the Governing Board has, granting membership or not granting membership to a candidate. Rule 28 does not violate article 19. Under Rule 28 all new members, whether they are nominated or not, have to be elected by ballot. Each candidate has to secure a majority of not less than 2/3rds of the votes cast. The 1st petitioner failed to secure even a simple majority. Only 2 votes were cast in her favour and 15 were against her. When the election is by ballot there is no question of giving any reason for rejection.

(Emphasis added)

53. I find this decision, one that binds me, to be an important point of distinction to the commended universality of the Nagle v Feilden principle. Here, the stock exchange was amenable to the High Court s writ jurisdiction. Conceivably, a higher standard of fairness and reasonableness was demanded of it than of a purely private body. Moreover, the stock exchange is clearly monopolistic. Yet the power to refuse membership was held not to be unguided, and the exercise of that power to be not unreasonable. This can only mean that the Nagle v Feilden test requires an even stronger demonstration of, first, a complete shutting out not merely barring from entry into premises, for example and, second, that this shutting out violates some larger public policy.

F. THE BDB S DEFENCE

54. Mr. Khambata points out that even the Plaintiffs do not claim that the BDB has a complete monopoly over the diamond trade. In its Reply, the BDB specifically says that there are other markets and places in Mumbai and elsewhere where diamond merchants ply their trade (Notice of Motion, Reply, paragraph 42(h), p. 28);the Plaintiffs are free to go to these places. The BDB also points out that even these other places require traders and merchants to take membership. No restriction has been placed on the Plaintiffs in that regard. The traverse is only a

general denial (Notice of Motion, Rejoinder, paragraph 43, p. 170).

55. Very late in the hearing, Mr. Khambata sought leave to file a further Affidavit dated 26th October 2015. Although Mr. Chinoy opposed this, saying it attempted to take away important admissions, I took that Affidavit on file (Notice of Motion paper book, pp. 174 180).The Plaintiffs filed a response dated 27th October 2015 (Notice of Motion paper book, pp. 181 189).In its further affidavit, the BDB takes a stand that it is not a bourse at all that is merely a name or a label. As an organisation, it does no trading. It may have high volumes, but other organisations such as GJEPC, the Mumbai Diamond Merchants Association, the Gujarat Hira Bourse, the Diamond Export Association Ltd, etc., have larger membership than the BDB. The Mumbai Diamond Merchants Association has over 13,500 members, followed by the GJEPC with 6500 members. The BDB s volumes may be high, but they are by no means a monopoly or even monopolistic, i.e., tending to a monopoly. In fact, Mr. Khambata says, the BDB is little more than a condominium. It does not trading, but only provides facilities.

56. He makes two telling points. The first is that the ban or suspension does not extend to the Plaintiffs right to do business, or their license or permission to do it. The BDB is in no position to take away those rights. The second is that the BDB order under challenge is very site-specific. It is limited to the BDB Complex. It does not even extend to the attached PCCC, the customs centre, which the Plaintiffs are free to use, as they are attendant government centres such as the trade zone. The order does not even prevent the BDB s members from transacting with the Plaintiffs, provided they do so off-site, i.e., anywhere else except the BDB Complex proper. Third, there is an restraint in respect of membership and entering the premises, not on doing business. Here, Mr. Khambata points out that the Plaintiffs did have an office here, but never sought membership. They sold that office. That sale did not affect their business. The Plaintiffs are, therefore, no worse off than they were

when they sold their office. I think Mr. Khambata is right. The

Plaintiffs demand is not the right to do business. It is a claim to do business within the BDB Complex. That is a very different thing. I do not think it is a legally

enforceable right. I do not think there is sufficient material to indicate that without entering the BDB Complex the Plaintiffs are prevented from trading. They may use the PCCC. They may truck with BDB s members off-site, just not here. They may trade freely at other centres and venues. They may go through other associations. All these rights are left entirely unimpaired. BDB s writ runs short, unlike that of the stewards in Nagle v Feilden.

57. I will now return to Century Plyboards. Here, too, the present case is at a far remove from that one. The ASCI body set itself up as a court. It invited plaints from the general public, not just its members. It arrogated to itself an entirely judicial function, and it tried to mimic a court. It even entertained, and finally dismissed, a review petition . It afforded no opportunity of being heard. It allowed another advertisement of exactly the same kind to continue, only saying that it was not bound to act on false advertisements brought to its notice by some other interested parties . Of course this invited and merited censure. What the ASCI did was to order the Plaintiffs to suspend their advertising campaign altogether and, in default, threatened to order and enforce a boycott through media and advertising agencies. There was, thus, a privately-ordered ban on a particular advertisement of a particular individual, not a member of the ASCI, and which prevented him from promoting his business altogether; and all this was done without so much as a wink or a nod in the direction of fairness, fair dealing or reasonableness. The two subsequent orders show that the ASCI continued to conduct itself in exactly this fashion yet again. This is why Nijjar J found that cardinal constitutional freedoms were trespassed by ASCI.

58. I am unable to see how the BDB decision can possibly be made to fit the Century Plyboards mould. All decision-making is not the exclusive province of courts. Many bodies, entirely private, are required to engage in some sort of decision-making or adjudicatory process. In doing so, they do not usurp, ipso facto, the powers of a court. They only do so when they hold themselves out as tribunals or arbiters of some norm for the general public s redress inviting plaints from the public and dealing with those. That is nothing but a kangaroo court and it is always illegal. Only a court of law can deal with everyman s plaint. The fact that the plaint is limited in subject-matter is irrelevant. From whom does the body

receive plaints? If the general public, then that is a judicial function. Against whom does the body act? If against a non-member directly by issuing an order to him or her then that may or may not be an entirely judicial function. For instance, telling a party not to enter a society s premises is not purely the province of courts. What does the body order? If it stops at restricting entry or membership, then that, too, is not purely the realm of a court. If it restrains that person from doing business (affecting his right to carry on a trade, or to speak freely), then that is something only a court can do. Century Plyboards fit all the necessary parameters. This case does not. It starts with an intimation from one of BDB s members of something having gone very wrong. It ends, after a long-drawn process, in restricting entry and membership, but does not extend to prohibiting, forbidding or interdicting trade. The BDB s order is limited to its own premises and does not extend anywhere else; it does not, in fact, extend even to its own members at any other location dealing with the Plaintiffs. Mr. Chinoy s case is one of almost total dominance both in the extent and nature of a business affected and in acting as a court . I am unable to agree that either of these is demonstrated.

59. Mr. Khambata points out, and I think correctly, that the entirety of the Plaintiffs case is about their right to enter the BDB Complex. This is set out in paragraph 11 of the Plaint:

11. As a result of the above, it is extremely important for any person or entity involved in diamond business to have access to the offices/shops and amenities within the BDB Complex of the Defendant. The BDB Complex is in the nature of a public market where anyone involved in the business of diamonds should have access. Any curtailment of access to the BDB Complex will severely prejudice and adversely affect the business of the person whose access is curtailed.

(Emphasis added)

60. Extremely important ; public market ; should have access ; severely prejudice and adversely affect ; access this is not sufficient to establish being driven out of business. It is not established that the BDB is a public market. The averment speaks of that which is desirable, not that which is necessary; an all-important distinction. I read this with, again, the fact that the Plaintiffs once held and then

voluntarily sold their office in the BDB Complex. It is difficult, therefore, to see how the Plaintiffs can claim a right to enter the BDB Complex, and this is what the Plaintiffs claim in paragraph 9 of the plaint (I exclude the PCCCC from the expression BDB Complex as this is clarified by Mr. Khambata).

61. I must confess to being considerably underwhelmed by the Plaintiffs constant refrain that they have been hard done by and that they were denied a fair opportunity. There is an inherent conflict in their version. They accepted that their supply to Malkish was wrongful, and that there was an issue . They also say that they took back the synthetic diamonds from Malkish and assumed that the chapter was closed. But their argument overlooks the next limb. When asked, Viral said he had checked with another purchaser, one Shamji Fancy Creations, and found no complaint. It turned out that he had not. I will assume that he had, and that there was no grievance from Shamji. This leaves a single possibility, viz., that there was one reported incident of supply of synthetics to Malkish, and that VSM knew of this. The alternative too, does not help VSM; for if it did not in fact check with Shamji, it leaves open the possibility that VSM routinely supplied synthetics without the necessary disclosures, and one of these came to light. In either eventuality, VSM knew the identity or source of the complaint (if it did not, and there were multiple possible sources, that makes matters worse). VSM knew, therefore, why it was summoned on 8th April 2015 and 15th April 2015. It claims to have been surprised on 27th April 2015; that cannot be correct. VSM again did not return for a follow up meeting on 12th May 2015. When the BDB gave it one more chance, VSM s Viral wrote back a month later saying he would revert; he never did. Important in this is the admission in the plaint that VSM s statement to the BDB that it had sent the diamonds it supplied to Malkish for testing to the GII laboratories was a false representation. In paragraph 35, the Plaintiffs agree that no such lab testing was ever done by them. It is also not out of place to note that the Plaintiffs and their family own and control one Exemplary Trading and Agencies Ltd, which deals in synthetic diamonds.

62. Admission to membership, and the permission to use the benefits of membership (such as access), is purely discretionary. The right to carry on business does not include an unfettered right to gain admission to every

association or professional body. Even where, as in Nagle v Feilden, membership or a license is denied, the mere denial is not actionable: it must in addition be shown that the denial was against public policy. That same public policy and the public interest might well demand the refusal to admission to membership of undesirable persons, in order to ensure probity of conduct and also in the public interest.

63. Assuming that the principles of natural justice have any application Mr. Khambata insists that they do not I find that the Plaintiffs were afforded multiple opportunities. It is settled law that if, despite notice, chooses not to appear, he cannot later claim that he was denied a fair opportunity of hearing (N. K. Prasada v Government of India and Ors., (2004) 6 SCC 299).As I have noted, VSM could have been in no manner of doubt as to the provenance of the complaint against it. There was only one possible source, Malkish. VSM knew it had supplied synthetics. It knew it had not made the necessary disclosures. Its principal officers control a company that deals in synthetic diamonds; they can hardly have been innocents abroad in the matter of disclosure or the regulations or restrictions on the supply of synthetic diamonds. There is no explanation at all about the incorrect statements made about contacting Shamji Fancy Creations and about having their supply tested at a laboratory themselves. There is not, in my view, any substance to the claim of violation of principles of natural justice (It is therefore not necessary to consider the application of Dharampal Satyapal Ltd v Deputy Commissioner of Central Excise, Gauhati, (2015) 8 SCC 519, cited by Mr. Khambata in support of his proposition that a post-decisional hearing is not always necessary; and that the rules of natural justice, being flexible, do not invariably result in an order being void where these rules are not strictly followed).

G. CONCLUSION AND ORDER

64. To invoke Century Plyboards, a plaintiff must be able to show, first and foremost, that the regulatory body purported to set itself up and to act as a court; and, second, that in doing so, it violated a fundamental right available to the plaintiff. For the Nagle v Feilden principle to apply, there must be a convincing demonstration of such dominance by the regulatory body that a ban or a refusal of

permission by it would have the effect of impairing a public policy principle depriving the plaintiff of the ability to work and of means of livelihood. A diminution of trade volumes or income is not enough. Absent a demonstration of mala fides, and absent a public policy violation, a court will not interfere with a decision of a professional or trade body refusing or declining membership. A suspension that is circumscribed and limited to, say, entry into premises or operating out of a defined area is not justiciable in a civil court. There is no inherent legal, vested or constitutional right to membership of any association, or to enter into and use a private association s premises.

65. I do not find a prima facie case in favour of the Plaintiffs, and I also do not find the balance of convenience in their favour. The Plaintiffs are largely unaffected. They have sold their own office in the BDB Complex. I note and accept Mr. Khambata s statement that the Plaintiffs may use the PCCCC unit freely as also the special trade zone. I will extend this to any other government-controlled or established unit attached to the BDB, but no further. The BDB will issue a clarification to this effect within two weeks from the date this order is uploaded. I also note and accept Mr. Khambata s statement that the Plaintiffs are at liberty to trade with BDB members at any other location or site outside the BDB Complex.

66. Subject to this, the Notice of Motion is dismissed. There will be no order as to costs.

67. I must, in conclusion, record my appreciation of the assistance rendered by Mr. Chinoy and Mr. Khambata, and apologize to them and to the parties for the delay in delivering this judgment. As I said at the beginning, the questions raised were of very far-reaching consequence.

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