BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

Appeal No.117/2002

In the matter of:

Shri D.A.Gadgil **Appellant**

Vs.

Securities & Exchange Board of India & Others **Respondent**

Present:

Mr. Pradeep Sancheti

Advocate

Shri Tushar Desai

Advocate **For Appellant**

Shri Kumar Desai

Advocate

Ms. Daya Gupta

Advocate

Ms. Anitha Anoop

Legal Officer, SEBI

Shri Amit Daga

Manager, SEBI **For Respondent**

ORDER

Order passed by the Chairman, Securities and Exchange Board of India, the Respondent herein, on 24.10.2002, under section 11B of the Securities and Exchange Board of India Act, 1992 is under challenge in the present appeal. The Respondent by the said order had disqualified the Appellant "from holding any public position in any capital market related institution for a period of one year" with effect from the date of communication of the order. The order was communicated to the Appellant on 26.10.2002.

The background of the order, as revealed in the order is that in the wake of sudden payment crisis in the month of June, 1998 on the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) the Respondent had carried out investigations. Since there were certain allegations about the involvement of Shriram mutual fund (SMF) the role of the said mutual fund was also investigated. The investigation report revealed certain irregularities in the matter of investments committed by SMF. In that context the Respondent issued notice to the Shri Ram Asset Management Company (SAM) which was the Asset Management Company of SMF, seeking explanation as to why investment of funds by SAM was not carried out in the best interest of the unit holders of SMF and why it failed to ensure that its acts did not give any undue or unfair advantage to entities having association with sponsors. SAM was also asked to explain why it acted contrary to the provisions of the trust deed and mutual fund regulations notified by the Respondent. SAM replied to the notice and also made oral submissions before the Respondent. The Respondent adjudicated the notice. SEBI in its adjudication held the Appellant, who was the Managing Director of SAM also responsible to the omissions and commissions of SAM in the matter. In that context SEBI directed inter alia that "Shri Gadgil shall not be eligible to hold any public position in any capital market related public institution for a further period of 3 years from the date of the order. The order was issued on 1.2.2000. Shri Gadgil challenged the said order by filing an appeal in the Tribunal. The main thrust of his attack against the order was that it was passed without giving him sufficient notice/opportunity of being heard. The Tribunal after hearing the Counsel for the parties and

considering all the relevant aspects decided to remand the matter to SEBI. Accordingly vide its order dated 11.8.2000 the Tribunal "remanded the matter for denovo consideration by the Respondent after affording the Appellant a fair and reasonable opportunity of being heard." SEBI, thereafter issued a notice to the Appellant on 6.11.2000 asking to show cause as to why directions should not be issued against him by issuing directions declaring him ineligible for holding any office as trustee/fund manager of the Mutual Fund or of Director/Senior functionary of public financial institution -- ICIC, IDBI, UTI/ Stock Exchange/Depositories like CDSL or NSDL for a sufficient period". The Appellant responded to the notice. During the course of the proceedings the Appellant requested the Respondent to cross examine one Jaysukhlal Jagjivan and Nitin Doshi of a broker firm viz. Jaysukhlal Jagjivan Stock Brokers P. Ltd., (JSBL) on that ground that their cross examination was necessary since SEBI had relied on their statements in its order. Lot of correspondence moved to and fro on this issue. Ultimately SEBI declined permission to cross examine the said two persons and adjudicated the show cause notice on 24.10.2002. SEBI issued the order under section 11B of the SEBI Act directing "that Shri D.A.Gadgil shall not be eligible to hold any public position in any capital market related institution for a period of one year".

Claiming to be aggrieved by the order the Appellant preferred the present appeal. In this context before proceeding further in the matter it is felt that it would be advantageous to know the bases on which SEBI has held the Appellant guilty of the charges. SEBI has stated that :

"In response to the aforesaid show-cause notice, Shri Gadgil sent a reply on December 11, 2000 denying all the charges leveled against him. Shri Gadgil in his reply sent through his lawyer stated that the decision to purchase or sell shares was always taken by an investment committee at SAMC. As regards the allegation that the decision to purchase the shares at a rate higher than the market price, it was stated in the reply that the same was taken by the investment committee at SAMC at a time when the price was around Rs.170-175 in the beginning of June, 1998 and hence the purchase was in the interest of

all unit holders.

Pursuant, to the above, Shri Gadgil was granted opportunity of hearing before ex-chairman vide letter No.IES/ID2/RKK/21821/2001 dated January 18, 2001 to which he replied vide letter dated 24, January, 2001 stating that the date was not convenient for him and also expressed his desire to examine Mr. Jaysukhlal Jagjivan and Mr. Nitin Doshi of JSBL during such hearing. Thereafter another letter dated February 23, 2001 was issued to him affording him an opportunity of personal hearing on March 1, 2001. He had repeated his request for cross-examination through another letter of his dated 27th February, 2001. On March 01, 2001 Shri Gadgil alongwith his lawyer had appeared before the ex-Chairman and argued on the right for cross-examination. In the course of the hearing, Chairman directed Shri Gadgil to submit written submissions. Thereafter, a letter dated 7 March, 2001 was sent by the lawyer for Shri Gadgil wherein he submitted a note in support of his right to cross examine in which he repeatedly insisted for an opportunity to cross examine. In the note submitted, he had cited cases in favour of his right for cross examination. However, no written submissions on merits or other aspects was submitted by him. After having waited till October 17, 2001, SEBI sent a letter to the Advocates for Shri Gadgil, M/s. Bhaishankar Kanga and Girdharlal asking them to file written submissions. In response to the said letter, the Advocate for Shri Gadgil sent another letter dated October 19, 2001 referring to their note attached to the earlier letter of theirs dated March 7, 2001 on cross-examination. They had also attached a copy of their correspondence dated March 7, 2001.

On January 22, 2002 SEBI had issued a letter to the Advocate for Shri Gadgil asking them to clarify how Shri Gadgil would be prejudiced in the absence of an opportunity to cross-examine. A copy of the same was sent to Shri Gadgil also. A letter dated January 22, 2002 was issued to Shri Gadgil stating that a personal hearing was scheduled before the Chairman, SEBI on February 15, 2002, a copy of which was also sent to his Advocate. SEBI received a communication dated 28.01.2002 from the advocate for Shri Gadgil asking for confirmation for the presence of Shri Nitin Doshi and Shri Jaysukhlal Jagjivan during the hearing. Again

another letter dated January 30, 2002 was sent to SEBI in which it was said that if SEBI proceeds by relying on the statements made by Shri Nitin Doshi and Jaysukhlal Jagjivan, it would cause prejudice to the client if they are not afforded an opportunity to cross-examine those witnesses. A letter dated February 11, 2002 was sent to Shri Gadgil stating that the hearing has been adjourned to February 15, 2002. Since the Ex-Chairman, had retired on February 20, 2002 there was a change in the date of hearing and it was kept for May 30, 2002 which was communicated to Shri Gadgil vide letter dated April 24, 2002. In response thereof, another letter dated 17 May 2002 was sent by the Advocate for Shri Gadgil asking for an adjournment of hearing. Thereafter, a communication was sent by SEBI informing about the date of hearing being scheduled for August 24, 2002 which was again rescheduled for August 26, 2002. This was communicated vide letter dated August 16, 2002. By letter dated august 23, 2002 SEBI had informed the Advocate for Shri Gadgil that in the scheduled hearing, they may submit their arguments with reference to cross-examination and also on the merits of the case since there was a change in the hearing authority. The hearing took place on August 28, 2002. Shri Gadgil appeared with his counsel. The counsel argued on their right to cross-examine Shri Nitin Doshi and Shri Jaysukhlal Jagjivan and insisted for a ruling on the issue of cross-examination. I advised the counsel to make submissions on the merits of the case also so that I can take a decision and pass an appropriate order in the matter. However, he insisted on the stand and did not make any submission on the merits of the case. In view of this I advised them to file written submissions, which they agreed. The written submissions were submitted by the counsel vide the letter September 4, 2002 which was received by SEBI by September 6, 2002.

The main contentions of Shri Gadgil as expressed in the written replies and during the hearing were that he was not afforded an opportunity to examine the witnesses. It is a settled principle of law that if the adjudicating authority is of opinion that particular statements are not relied upon, an opportunity for cross-examination need not be given. True that in the procedure for exercising powers under section 11B, SEBI is required to observe the principles

of natural justice. However, it varies from case to case and in the present case the right of cross examination does not exist. Another important aspect to be seen is whether the denial of cross-examination would prejudice the person. In the present case, there is sufficient proof in so far as the date of purchase is concerned. The contract note itself is sufficient to implicate Shri Gadgil. The fact that he had entered into such deal for a price higher than the prevailing market rate endangering the interests of all the unit holders is in itself sufficient to warrant action.

The actual transaction took place on June 24, 1998. therefore the argument that such decision to purchase shares was taken early cannot be believed. In a fluctuating market one cannot make decision and then wait for long to implement the same so far as investments are concerned. The contention of Shri Gadgil that the contract notes are not relevant so far as the dates are concerned also has no basis and hence cannot be accepted. It has again been reiterated by Shri Gadgil in his reply that the transaction took place on June 19, 1998 and not on June 24, 1998 as indicated in the show cause. However, this is also not true since there are sufficient proof to show that the transaction took place on June 24, 1998. The order as passed against SAMC stands and they have undergone their period of punishment and also complied with the directions of SEBI. The charges against Shri Gadgil have been framed in the light of such basic facts that led to the finding against SAMC and there is no doubt about their reliability.

The contentions Shri Gadgil raised against the Regulations being not applicable to him also do not hold good. By making an investment decision prejudicial to the interests of unit holders as the managing director of SMF and the Chairman of the investment committee, he is responsible for the violation of Regulation 25(1), (2) (10) and (16) and Code of Conduct of SEBI (MF) Regulations, 1996. Shri Gadgil was the Managing Director of Shriram Mutual Fund and also the Chairman of the Investment Committee that has taken the decision to purchase the impugned shares and hence cannot evade the responsibility for the huge loss caused to the unit holders. As regards the arguments on the powers under Section 11B of SEBI

Act, the action proposed to be taken is remedial or rather preventive in nature and not as a penalty. The argument of SAT having allowed the appeal by Videocon has no relevance since the facts remain undisputed in the instant case.

Further, it does not make any difference whether Shri Gadgil alone or the investment committee of SAMC took the decision to purchase the shares on June 24, 1998 as a prudent fund manager, the investments made has to be in the interest of unit holders. Whereas the same was not only against the interests of unit holders. It was highly detrimental to the unit holders since the price at which the purchase was done was too high when compared to the prevailing market price. SEBI had mainly relied on the contract note and the date of purchase as entered in the system. The statements of Shri Nitin Doshi or Shri Surin Usgaonkar or Jaysukhalal Jagjivan only corroborates the facts. SEBI's findings, show cause notice and the previous order are all based on these basic facts and there is nothing to disprove the same. At no point has, the show cause notice or SEBI for that matter, treated the date of dealing as 19-06-1998.

Therefore, it is clear that acts of omission and commission of Shri Gadgil, who was at the relevant time the managing director of SAMC were prejudicial to the interest of the Unit holders of the SMF and that such acts amount to breach of trust, since Shri Gadgil's action were in fiduciary capacity. As such Shri Gadgil

a) failed to ensure that the investment of the funds was carried out as a prudent businessman and in the best interest of the unit holders;

b) failed to ensure that investment of the funds did not give any undue or unfair advantage to entities having association with the sponsors and Shri Gadgil managed the portfolio of the scheme of the SMF in the interest of associates of the sponsors and not in the interest of ordinary unit holders;

c) failed to exercise due diligence to ensure that the investment of funds is not contrary to the provisions of trust deed and SEBI (Mutual Fund) Regulations;

d) purchase of the shares was for extraneous consideration of bailing out the brokers facing payment problems for their trading in Videocon shares and in pursuance of clandestine buy back arrangement with Videocon group;

e) Shri Gadgil tried to create false documentary evidence with a view to mislead the Investigations by preparing ante dated correspondence between SMF and the broker to give an impression that the shares were purchased on a date different from the actual date of transaction;"

Shri Pradeep Sancheti learned Counsel appearing for the Appellant made the following submissions:

The Respondent had passed the Impugned Order on 24.10.2002 against the Appellant holding him ineligible to hold any public position in any capital market related institution for a period of one year on certain untenable grounds. In this context he referred to the so called omissions and commissions of the Appellant stated in the order.

Learned Counsel referred to this Tribunals order dated 11.8.2000 remanding the matter to SEBI and SEBI's show cause notice dated 6.11.2000 to the Appellant issued in compliance of the directions given by the Tribunal in its order. He submitted that in response to the said show-cause notice, the Appellant had sent a reply on 13.12. 2000 denying all the charges leveled against him. The Appellant in his reply stated that the decision to purchase or sell shares was always taken by the investment committee at SAMC. As regards the allegation that the decision to purchase the shares at a rate higher than the market price, it was stated in the reply that the same was taken by the investment committee at SAMC at a time when the price was around Rs.170-175 in the beginning of June, 1998 and hence the purchase was in the interest of all unit holders. Thereafter the Appellant was granted an opportunity of hearing before chairman vide letter No.IES/ID2/RKK/21821/2001 dated January 18, 2001 to which he replied vide letter dated 24, January, 2001 stating that the date was not convenient for him and also expressed his desire to examine Mr. Jaysukhlal Jagjivan and Mr. Nitin Doshi of JSBL during

such hearing. Thereafter another letter dated February 23, 2001 was issued to him affording him an opportunity of personal hearing on March 1, 2001. He had repeated his request for cross-examination through another letter of his dated 27th February, 2001. On March 01, 2001 the Appellant along with his lawyer had appeared before the chairman of the Respondent and argued on the right for cross-examination. In the course of the hearing, the Respondent directed the Appellant to submit written submissions. Thereafter, vide letter dated 7 March, 2001 the Appellant submitted a note in support of his right to cross examine and repeatedly insisted for an opportunity to cross examine. In the note submitted, he had cited authorities in favour of his right for cross examination. However, no written submission on merits or other aspects was submitted by him. After having waited till October 17, 2001, the Respondent sent a letter to the Appellant, asking him to file written submissions. In response to the said letter, the Appellant sent another letter dated October 19, 2001 referring to his note attached to the earlier letter of March 7, 2001 on cross-examination. On January 22, 2002 the Respondent had issued a letter to the Appellant asking them to clarify how the Appellant would be prejudiced in the absence of an opportunity to cross-examine. A letter dated January 22, 2002 was also issued to the Appellant stating that a personal hearing was scheduled before the Chairman, SEBI on February 15, 2002. The Appellant issued a letter to the Respondent on 28.10.2002 asking for confirmation for the presence of Shri Nitin Doshi and Shri Jaysukhlal Jagjivan during the hearing. Again another letter dated January 30, 2002 was sent to the Respondent in which it was said that if the Respondent proceeds by relying on the statements made by Shri Nitin Doshi and Jaysukhlal Jagjivan, it would cause prejudice to the Appellant if they are not afforded an opportunity to cross-examine those witnesses. The hearing was finally scheduled for 28th August,2002. The Respondent vide letter dated August 23, 2002 informed the Appellant that in the scheduled hearing, he may submit his arguments with reference to cross-examination and also on the merits of the case since there was a change in the hearing authority. The Appellant had appeared with his counsel. The counsel argued on their right to cross-examine Shri Nitin Doshi and Shri Jaysukhlal Jagjivan and insisted for a ruling on the issue of cross-examination. The counsel for the Appellant was asked to make submissions on

the merits of the case. But no submissions were made. Therefore, the Appellant was asked to file written submissions, to which they had agreed. The written submissions were submitted by the Appellant vide letter dated September 4, 2002. Thereafter the Respondent passed the impugned order.

The Appellant submitted further:

On Applicability of Section 11(B):

The purpose and effect of the Impugned Order is not to punish and penalize the Appellant. Merely because it is made as a 'direction' by way of 'preventive measure' it cannot change the real nature and character of the impugned Order. In fact, during the oral arguments the Counsel for the SEBI has tacitly admitted that the impugned Orders amounts to imposing penalty/punishing of the Appellant. The judgement of this Tribunal in the Sterlite Industries Ltd. matter as also in the Videocon International Ltd. matter have clearly laid down the law in this behalf and therefore there is no justification for any argument to the contrary by SEBI. The Impugned Order is not against the Appellant in his personal capacity but in his capacity as the then Managing Director of SAMC for the alleged contravention at the behest of Shriram Group. Admittedly, it is not even proposed to issue any direction either against the Shriram Group Companies and/or its Directors and/or persons controlling interest therein or against SAMC..

On Contravention of the SEBI (Mutual Fund Regulations) Regulations 25(1), (2), (10) and (16).

Admittedly none of the aforesaid Regulations apply to the Asset Management and not to any individual or even to a Director of Asset Management Company. There is no express provision providing for any penalty or punishment on individual Director who is alleged to have been contributed in the contravention by the Asset Management Company. Assuming without admitting that for the contravention of the Regulations by the Company it is possible in law to

isolate and pin point any person or persons who are responsible for decision making, punishment or penalty upon such persons cannot be any higher or different than the penalty or punishment, which can be imposed on the Asset Management Company itself. It is not even in dispute that SEBI, while disposing of a matter against SAMC has not even proposed to issue any direction for debarring them for any period much less one year. Similarly, SEBI has not even proposed to debar the Shriram Group and/or its Company and/or its Directors/persons controlling interest, at whose behest the Appellant is alleged to have acted and deciding the purchase of Videocon shares. It is not the case of SEBI that the decision to purchase Videocon shares is questionable on the ground of any personal gain or benefit to the Appellant.

On infirmities in the impugned Order.

The Impugned Order proceeds on the basis that since SAMC complied with the direction of paying certain amounts to the subscribers by way of indemnity, that the findings of SEBI against SAMC cannot be disputed and that that by itself is a good ground to hold the Appellant guilty. Further, if these contentions were to be accepted it would virtually amount to negating and/or completely effacing the earlier Order of this Tribunal wherein the Order of SEBI to the extent that applied to the Appellant was set aside. SEBI cannot be permitted to take advantage of its own fault in not issuing a Show Cause Notice to the Appellant and not giving an opportunity of hearing before coming to any conclusion; and even the said Order has been successfully challenged by the Appellant and therefore once again foisted penalty on the Appellant on the basis that the earlier Order has not been challenged by SAMC. The untenability of this contention is also evident from the fact that if after proper enquiry, Show Cause Notice, etc. if a common Order was passed against SAMC and Appellant, then a challenge to the said Order by the Appellant could not be brushed aside on the ground that SAMC has chosen not Appeal there from.

On Date of purchase

Undisputedly in the course of enquiry SEBI had in its possession the SAMC letter dated 15-

06-1998 placing an Order for purchase of Videocon shares and (ii) the letter dated 19-06-1998 issued by the Broker, JSBPL confirming the purchase of shares. These two letters read together leave no doubt as to the date of the purchase of shares, viz; 19-06-1998. In the impugned Order it has been observed that there cannot be any dispute on the aspects that the shares were purchased on 24-06-1998, completely over looking this correspondence as also the statements made by the representatives of the seller Springfield Securities Ltd. In the impugned Order SEBI ahs relied upon the statement of the Broker that the said two letters were received/issued on 22-06-1998, however, in complete contradiction while dealing with the Appellant's requests for cross examination, SEBI has stated that it is not relying upon the statements made by the Broker to prove its case as the same is merely corroborative. Mr.Surin Usagaonkar in his statement categorically confirmed that pursuant to their instructions the Broker had sold 1,20,000 shares @ Rs.84/- and had also confirmed the transaction to the seller on 19-06-1998. The Broker has also confirmed in his statement that on 19-06-1998 they were aware about the sale to Shriram Mutual Fund, however, the names of the scheme(s) on whose behalf the shares were purchased were not disclosed. The statement of the Broker clarifies further that this position was telephonically confirmed in the morning of 22-06-1998 (20-06-1998 and 21-06-1998 being Saturday and Sunday). Thus, there is no divergence of views between the Seller, Broker and the Purchaser of the date i.e. 19-06-1998, as also to the manner in which the transaction had been arrived at that day.

On Denial of cross examination.

In view of the aforesaid, the only conclusion which can be drawn by cogent reading of the documents and statements together is that the transaction took place on 19-06-1998. The impugned Order however proceeds on the basis that the transaction took place on 24-06-1998 and, that there is no evidence to the contrary. This means that SEBI not only sought to discard the statement made by Mr.Surin Usgaonkar on behalf of Springfield Securities Ltd. but have also discarded the letters dated 15-06-1998 and 19-06-1998. The basis and the reason for discarding the said letters is the reliance placed on the statements made by the Broker's

representatives that the said letters were issued/received on 22-06-1998. The Broker has however issued a letter dated 28.08.1999 confirming that the transaction took place on 19-06-1998, though it was reported to the Stock Exchange on 24-06-1998. This position has also been reflected before the Arbitral Tribunal of the BSE by and on behalf of Broker, JSBPL. The Broker apparently is mixing up the dates, since he would be seeking to avoid any adverse remarks of penalty upon himself for delay in not reporting the transaction. In the facts and circumstances it cannot be said that no doubt arises in the present proceedings as to the date of the transaction, or that on reading of the document and evidence only one view is possible or that no prejudice has been caused to the Appellant by denying right of cross examination. In the circumstances, if the observations made and/or extracted in the judgement of the Hon'ble Gujarat High Court (in the case of Hindustan Finstock Ltd. V/s. SEBI) in fact support the case of the Appellant of its right and entitlement to cross examination. In this behalf, reliance is also placed on the judgment of the Hon'ble Supreme Court reported in AIR 1957 SC 882, AIR 1958 SC 300, AIR 1970 SC 2086 as also the written submissions made by the Appellant in this behalf. If SEBI seeks to discard the earlier documentary evidence which supports the view that the transaction took place on 19-06-1998 it cannot be done without first giving an opportunity to the Appellant to cross examine the witnesses, based on whose statements SEBI discarded the documentary evidence.

On Other charges made in the Impugned Order.

The alleged MOU was dated 29-12-1998, i.e. six months after the date of the said transaction. Further, neither the SAMC nor the mutual fund are parties to the said mow. The Appellant has signed the said MoU in his capacity as Managing Director of another company and, that too, after resigning as MD of SAMC. The MoU refers to buy back of 5,00,000 shares of VIL, whereas the instant transaction was for purchase of 1,20,000 shares. There is admittedly no link to connect the said MoU to the said transaction, except conjectures that it may be connected. Further, SEBI has not even dealt with in the impugned Order the objections and the contentions raised by the Appellant in his reply as also in his written submissions The

allegation about the receipt of Rs.1,08,00,000/- by Springfield Securities Ltd. from Joy Holdings Pvt. Ltd. has no relevance to the Appellant. Further, admittedly SSL had paid only a sum of Rs.70,00,000/- to the broker against its liability exceeding Rs.1 crore, towards purchase of the said shares. The broker has admitted that it has part financed the purchase of the said shares from its own funds. The allegation about the sale of certain fundamentally strong scrips to finance the purchase of the Videocon shares is not correct. All the shares were sold in ordinary course of business and not with a view to finance the present deal. Further, in majority of the cases the price of the shares so sold actually fell after the sale by the SAMC. Thus showing how baseless is the allegation of SEBI in this behalf. The sum of Rs.38,00,000/- paid by SMF to SSL was in respect of separate and independent transaction and has no relation to the instant case. SEBI has not even alleged and in any case, there is nothing to show that the payment of Rs.38,00,000/- was by way of part payment or advance towards the transactions in question or that the said payment was in any way adjusted and/or appropriated towards the transaction in question. The decision to invest in the shares whose price was continuously falling was with intent and hope of a turn around in the scrip price. In fact the price of the Videocon shares did show smart recovery in 6 months time, which could have fetched the fund a healthy return of more than 25% on its investment. The findings of the SEBI that the Appellant has indulged in fabrication of documents is clearly a finding amounting to fraud and which required a very strong and satisfactory proof, however, the said finding is inherently misconceived in as much as – (i)on one hand SEBI has sought to reply upon the statement of Broker to justify back dating of the letters, but on the other hand SEBI has stated that it is not relying the said statement for the purpose of the impugned Order; (ii) In any case, even according to the Broker the said letters have been issued/received on 22-06-1998.

SEBI cannot read and decide the said statement to suit its convenience. It is not permissible to SEBI to arrive at a finding of fraud by selectively reading only a part of the statement if such an approach is permitted in every case, SEBI could selectively accept or reject the document as also selectively accept or reject parts or portions of the statements that too without any basis.

It is settled law that a statement has to be read as a whole and if the reliance is placed on a statement as an admission or otherwise it must be read as a whole.

Shri Kumar Desai, learned Counsel appeared for the Respondent. The following submissions were made on behalf of the Respondent.

The reasons why SEBI has come to the conclusion that the transaction of purchase of 1,20,100 shares of Videocon Ltd., was dated 24th June, 1998 and not 19th June 1998 as was sought to be contended by the Appellant. The trade log (which is automatically generated as soon as the trade is matched) of BSE showed that this transaction took place on 24th June 1998. The order for purchase and sale of 1,20,100 shares of Videocon was recorded in the trading system on 24th June, 1998 by JSBPL as a cross deal at 24:15:15 hours. A cross deal is a deal executed between two clients of the same broker. A negotiated deal includes a cross deal and at the relevant time was required to be reported to the stock exchange within 15 minutes of the trade being concluded and if concluded after trading hours, the trade was required to be reported immediately on the next trading day at the start of trading. The fact that the said transaction is a cross deal is now not disputed, though at the stage of recording of statements an attempt was made by both the buyer and the seller to disown knowledge of who respectively was the buyer or the seller. From the contract note and the trade log it is clear that the said deal was admittedly a cross deal. Copies of Contract notes issued to SRMF and SSL by broker JSBPL show that transaction took place on 24th June 2000. The contract notes in Form A are dated 24th June 1998 and disclose that the transaction took place in settlement 14 which started on 24th June, 1998 and not settlement 13 which ended on Friday, 19th June, 1998. Neither purchaser nor seller had at the relevant time raised any grievance relating to the wrongful recording of the said transaction as having been wrongfully recorded as having taken place in settlement 14 as it ought to have been recorded as having taken place in settlement 13. Therefore till investigations and inquiries commenced both purchaser and seller had accepted

that the transactions as recorded in the Contract Note as correct in all respects. If the Appellant's contention that the said transaction was dated 19th June 1998 was correct, payment and delivery would have to be made and effected as per the payment and delivery schedule of settlement 13. Admittedly this was not done. Since the seller i.e. Spring Fields Securities Ltd., had purchased 2,14,100 shares of Videocon on 19th June 1998 i.e. Friday (i.e.) last day of Settlement no.13 of the B.S.E.) after trading hours and which trade was entered into the B.S.E. system, after trading hours, it is not possible for the seller to have sold 1,20,100 shares out of the said purchased shares earlier i.e. during trading hours on the 19th June 1998. If the transaction took place as claimed on 19th after trading hours there is no reason why the same could not have been entered into the system along with the said purchase. But this was not done. It can therefore be safely assumed that the said transaction did not take place on the 19th June 1998. The next 2 days i.e. 20th and 21st June, 1998 being Saturday and Sunday respectively, the said transaction could not and did not take place on these 2 days. If the transaction had taken place on 22nd or 23rd June, 1998 i.e. Monday and Tuesday respectively, there is no reason why the same could not be reported on these 2 dates. The internal bifurcation of the trades amongst the different schemes could be done subsequently. Since the volume of shares transacted on BSE on 22nd and 23rd June 1998 was 900 and 2600 shares respectively the said transaction did not take place on these 2 dates nor was it reported on these 2 dates. It was also seen that a letter dated 23rd June, 1998 was written by SSL to JSBPL, asking the broker to sell 1,20,000 shares of Videocon. Since the letter is dated 23rd June 2000 the sale could have taken place only on or after this date. Statements of the broker were recorded in which Shri Nitin Doshi, director of JSBPL, stated that the transaction for 1,20,100 shares of Videocon between SRMF and SSL was executed on 24th June 1998 and it was a negotiated deal between the buyer and the seller which was routed through the stock exchange through his terminal as a cross deal. A letter was sent by SRMF on 22nd June 1998 to JSBPL though dated 15th June 1998 asking JSBPL to purchase 1,20,000 shares. JSBPL in turn executed the contract and by a letter dated 19th June 1998 informed SRMF that required procurement of 1,20,000 shares of Videocon @ Rs.85/- has been completed. The said letter

was issued and predated at the request of SRMF. The said letter dated 15th June, 1998 is the only letter ever written by SMF to the said broker requesting him to purchase shares. The said letter dated 19th June, 1998 is also the only letter ever written by the broker recording having executed an order placed by SMF. As per the Appellant's statements dated 23rd December, 1998 and 19th January, 1999, the said letter dated 19th June, 1998 is the only proof available with him to prove that the said transaction took place on the 19th and not on the 24th June 1998. Both Mr. Gadgil and Mr. Shenoy have stated that they cannot think of any reason why the said broker would falsely implicate SMF. In light thereof the statement made by the broker that the said letter dated 15th was received on 22nd and the said letter dated 19th was predated is believable.

The Appellant in his statement has sought to distance himself from the said transaction but on reading all the statements together along with the documentary evidence it is clear that the Appellant knew of the said transaction. Mr. Usgaonkar his junior in the Shriram Group had informed him of the same and that he might require funds. The statement of the Appellant that whenever funds were required by the Shriram group he was the person who would be approached it is clear that Springfield did not have adequate resources and that funds have been made available by Joy Holding a Company forming part of the Videocon Companies and SMF. SMF had also made funds of Rs.38 lakhs available. The Appellant has at no time prior to the order denied the fact that SMF had transferred Rs.38 lakhs to SSL which in turn was used by SSL to pay towards purchase obligation of 5 lakhs shares of Videocon. It is therefore further clear that SMF was aware of the bail out and had financed SSL who had effected the said bail out. Non denial of the Appellant during the course of enquiry is a deemed admission by him and is therefore sufficient to implicate the Appellant as charged. While it is true that the Appellant resigned as the Managing Director of the Shriram Asset Management Company in 1998 he did not part company with the Shriram Group and was immediately appointed as the Managing Director of Shriram Investment Services Ltd., which is a Merchant Banker. This clearly shows that the Appellant was an important functionary in the Shriram Group read along

with the fact that the Appellant stated that whenever Shriram Group required funds they approached him etc. While the Appellant pleaded ignorance of the bail out when questioned by SEBI he in a letter to the press had himself referred to the said bail out though denied any participation in the same. The press reports denied by the Appellant in July dealt with an allegation relating buyback. In this respect the fact that an MOU dated 29th December, 1998 was signed by the Appellant as Managing Director SIS is relevant. All these factors taken collectively point directly to the guilt of the Appellant and corroborate SEBI's contention that the transaction did take place on 24th June 1998 as reported to the BSE and not on 19th June 1998 as alleged by the Appellant.

The award on which reliance was sought to be placed by the Appellant is of no avail since as the award records that since there are no disputes between the parties there is nothing to adjudicate and the proceedings are terminated. It may be further noted that even the said broker has reiterated the said contention to SEBI even after his letter dated 28th August, 1999 and the said award. The said arbitration proceedings appear to be collusive. The fact that the said transaction took place and was recorded on 24th is corroborated by several documents and other evidence and that the statements of the said broker were only corroborative and that the said facts could and have been independently proved.

The Appellant had only requested for cross examination of Jaysukhlal and Nitin Doshi – partners of the Broker Firm and not any other person whose statements were recorded and relied upon by SEBI. Therefore denial of cross examination did not and could not have prejudicially affected the Appellant. Cross Examination in all circumstances is not an essential element of the principles of Natural Justice and the requirement of whether denial of right to cross examine is a breach of natural justice should be considered from the facts of each case and there can not be any straight jacket formula. In the facts of the present case denial of right of Cross Examination to the Appellant cannot be prejudicial to the Appellant. The Tribunal has accepted this proposition and it need not be labored any further. (Hindustan Finstock Ltd V/s. SEBI)

It was not and cannot be disputed that SEBI has the power to issue directions of the nature and kind passed in this case i.e. debarring the Appellant from holding any public position in any capital market related institutions.

Under section 11B of the SEBI Act, SEBI's power to pass such an order has been upheld in several matters by various High Courts. Though the said cases were with reference to power to pass such an order at an interim stage, and Interim Order can be passed only if the authority has the power to pass a final order in the same terms. This Tribunal in the case of Anand Rathi has reognised the power of SEBI to pass such order in the interest of investors and the securities market. The Appellant after having resigned as Managing Director of Shriram Asset Management Company in November 1998 had immediately been appointed as Managing Director of Shriram Investment Services Ltd. It is a company also connected with the Securities Market. The charges levied against the Appellant were in his capacity as Managing Director of Shriram Asset Management Company and Chairman of the Investment Committee which charges having been proved and the Appellant having been held guilty as charged, the impugned order passed in terms of the Show Cause Notice debarring the Appellant from holding any public position in any capital market related institution is in the interest of investors and the Securities market and falls within the ratio of the Anand Rathi and can be upheld.

The allegations against the Appellant are restricted in his capacity as a Managing Director and Chairman of the Investment Committee in relation to the allegations made against him. The Appellant is the controlling mind of the Corporate Entity i.e. Shriram Asset Management Company and it is in that capacity that he is held liable. Further the Appellant is the person concerned as he accepted moral responsibility as the person concerned and resigned and therefore he is the person to be looked at for the acts of the corporate entity and it is not a case for piercing/lifting of the corporate veil but a case to see who was the controlling mind of the Corporate entity. SEBI has made to see the human element heading the Company, which is the Appellant in the present case and has been correctly looked at for the acts of the corporate

entity.

Further the impugned order debarring the Appellant from holding any public position in any capital market related institutions is preventive in nature as it prevents the Appellant from committing similar mischief in the future and is passed in the interest of investors and the securities market and can not be termed to be punitive in nature and therefore can be upheld.

I have carefully considered the rival contentions. It is noted that against the Respondent's order dated 1st February, 2000the Appellant had filed an appeal and the matter was remanded to SEBI for de novo consideration following the principles of natural justice. The present order is stated to be issued on following the principles of natural justice. On a perusal of the order it is seen that the important material facts based on which SEBI had come to the conclusion are under dispute. SEBI has relied on certain documents, the authenticity of the contents of the same has been questioned by the Appellant. In this context it is seen that in the show cause notice issued to the Appellant on 6.11.2000 SEBI has stated that "Shri Ram Mutual Fund purchased 1,20,100 shares of Videocon on BSE by way of a cross deal between SRMF as buyers and Spring Fields Securities LTD, (SSL) stated to be an associate concern of Shriram Group as sellers on 24.6.1998." This date of transaction has been disputed by the Appellant. SEBI has also relied on a statement of Shri Nitin Doshi Director of JSBPL in support of its findings as could been seen from the following statement in the show cause notice that:

> "Statements of the broker was recorded in which Shri Nitin Doshi Director of JSBPL stated that the transaction for 1,20,000 shares of Videocon between SRMF and SSL was executed on June 24, 1998 and it was a negotiated deal between the buyer and the seller which was routed through the stock exchange through his terminal as a cross deal." A letter was sent by SRMF on 22.6.1998 to JSBPL though dated 15th June, 1998, asking JSBPL to purchase 1,20,100 shares. JSBPL in turn executed the contract and informed SRMF that required procurement of 1,20,000 shares of Videocon @ Rs.85/- has been

completed."

SEBI has further stated in the notice that:

"it was also seen that false documents were specifically created to give an impression to the investigation team of SEBI that impugned shares were purchased by SRMF on June 19, 1998 and not on June 24, 1998. It was observed that a letter dated June 15, 1998 asking the broker JSBPL to purchase 1,20,000 shares of Videocon was written on behalf of SRMF. Further, consequent to this order, vide letter dated 15.6.1998 broker JSBPL also confirmed the purchase of these shares to SRMF through a letter dated June 19,1998. Investigations revealed that these two letters one by SRMF and the other by the broker were the only written communication between the broker and the Mutual fund during the business relationship spanning one and half year.

Shri Nitin Doshi, Director of JSBPL, admitted to SEBI on oath, that letter of SRMF to the broker on June 15, 1998 placing the order of purchase of Videocon shares, pursuant to which these purchases were made, was received by him actually on June 22, 1998. It was further admitted that letter dated June 19,1998 issued by JSBPL to SRMF was back dated at the request of SRMF i.e. actually this letter confirming purchase was written subsequent to letter 22/6/1998 giving order for purchase of shares. The documents were specifically created to give an impression that impugned transaction (purchase of 1,20,100 shares of Videocon) took place on 19th June 1998 and not on 24th June 1998. This was clear from the perusal of these letters itself. The letter of SRMF giving the order for purchase of 1,20,000 shares to the broker JSBPL, mentioned price range at less than Rs.85/- per share as the limit for purchase of these shares. On 15th June, 1998, which is the date on which this letter was purportedly written the price of Videocon shares was Rs.100.40 per share. Further, the execution of order has taken place as per the letter of the broker to SRMF dated 19th June, 1998 @ Rs.85/- per share. However, the contract was issued by the broker for Rs.84.25 per share, which is inclusive of

brokerage of 25 paise per share i.e. the price of the share is Rs.84/-. This description clearly reveals that the contents of the letter are different from the actual facts. It is common knowledge that nobody will give the order for buying the shares at the rate of less than Rs.85/- when the market price on June 15, 1998 was Rs.100.40 per share. Further, no broker would mention that transaction has taken place at Rs.85/- when the contract note is dated June 24, 1998 and when the market price was Rs.62/- to Rs.63/- per share."

JSBPL has been shifting its version from time to time is evident that they stated something before and took a different stand in their letter dated 28.8.1999 addressed to SAM. The following portion from the said letter is relevant in this context:

"You are well aware that your Mutual Fund had given us the order on 15th June 1998 to purchase 120000 shares of Videocon International Limited within the limit of Rs.85/- per share. You had also requested us to confirm as soon as the quantum is completed. A copy of the said letter dated 15th June 1998 is enclosed herewith for your ready reference.

On 19th June, 1998 we informed your mutual fund that with reference to their letter dated 15th June, 1998 we confirmed that we have purchased 120000 shares of Videocon International Limited at Rs.85/- per share. A copy of the said letter dated 19th June, 1998 duly acknowledged by your mutual fund is enclosed herewith for your ready reference.

On 20th June, 1998 vide our letter we informed your mutual fund confirming therein that we have already informed them vide our letter dated 19th June 1998 that we have purchased 120600 shares of Videocon International Limited and not 12000 shares hence your Mutual Fund was requested to make necessary correction in their record. By the said letter we had requested your Mutual Fund to give us the names of the schemes in whose favours the contracts were required to be issued. It was further

informed to your Mutual Fund that we will report the transaction to the stock Exchange, Mambai only after receipt of the scheme wise break up from them since we have to mark the transaction as financial institution while reporting the transaction to the Exchange. A copy of the said letter dated 20th June 1998 is enclosed herewith for your ready reference.

You are aware that 20th day of June 1998 was Saturday the said letter was received by your Mutual Fund on 20th day of June 1998 and vide its letter dated 23rd June, 1998 your Mutual Fund had given the apportionment of quantity of the shares of Videocon International Limited which were purchased by you. The said apportionment of quantity of shares was for 120600 shares. A copy of the said letter dated 23rd June, 1998 is enclosed herewith for your ready reference. As we had received the said letter dated 23rd June, 1998 we immediately vide our letter dated 23rd June, 1998 informed you that since the transaction could not be reported today, i.e.23rd June, 1998, to the Stock Exchange, we informed you that the transaction will be reported to the Stock Exchange on 24th June, 1998 and we will issue the contracts accordingly.

Accordingly, we have reported the said transaction to the Stock Exchange, Mumbai on 24th June, 1998 and prepared contracts dated 24th June, 1998 according to the schemes given by your Mutual Fund. Please note that the deal was concluded on 19th June, 1998, which was reported to your Mutual Fund and confirmed by your Mutual Fund. The said contract was received, retained and accepted by you along with our covering letter dated 24th June, 1998. We are enclosing herewith a copy of the said letter dated 24th June, 1998 along with the contract are enclosed herewith for your ready reference.

You are well aware that the said transaction was made through us between you and your associate company, viz.the Spring Field Company Limited. As the said transaction was reported in the cross deal we have given the entire consideration to the said the Spring Field Company Limited at the same rate less our brokerage. Thus, we have not taken any advantage of the difference in price.

We deny that we have informed SEBI that we have actually purchased the shares of Videocon International Limited on 24th June,1998. We say that we have reported the said transaction on 24th June, 1998. We repeat and say that the transaction was concluded on 19th June, 1998 which was confirmed by you. We deny that the contract note issued to you clearly amounts to breach of trust committed by us as alleged. We deny that we have actually made a purchase on 24th June, 1998."

The contradictory stand of JSBPL is very evident from the above. SEBI's submission that they have gone by the documents and the statement of Nitin Doshi etc. only corroborates the document is difficult to accept in the light of the dispute on the authenticity of the letters and documents relied on by SEBI. Once a document is disputed, then it has to be proved. I have also perused the oral statements made by Shri Doshi before SEBI's officer in the matter, filed in the appeal. In view of the conflicting views on the authenticity of the document conveying the actual date of transaction, and that the date being crucial to the charge I am of the view that in the light of the circumstances of the case the Appellant's request to cross examine the author of the disputed letter and statements, can not be brushed aside. It is well settled that "no evidence affecting a party is admissible against that party unless the latter has an opportunity of testing its testimony by cross examination". This tribunal in its earlier order in Gadgil's appeal has elaborately discussed the need to scrupulously follow the principles of natural justice in an adjudication resulting in adverse consequences on the rights of the person charged against. For ready reference the observation made therein is extracted.

"I have carefully considered the rival contentions. Shri Sancheti, had strenuously argued that the impugned order was made without following the well cherished principles of natural justice. It is an admitted fact that the inquiry was directed against R-4 with the issuance of SCN dated 29.6.1999 in the matter relating to purchase of Videocon shares in June 1998. The fact that the Respondents had not given any opportunity to the Appellant at any point of time in the inquiry to defend himself has also been admitted. It is nobody's case that the Respondent's order is of no adverse

consequence to the Appellant. The Appellant was the chief executive of an asset management company of a mutual fund. Even though in the order the scope of the expression "Public position in any capital market related public institution" for a period of 3 years has been left open to interpretation, in the ordinary course, to a layman it means that the Appellant cannot take up any assignment with any capital market intermediary for 3 years. Undoubtedly it is an order adversely affecting the Appellant. The consequences of debarring him from holding any position in a capital market public institution for 3 years, will have attendant fall outs in his career. It is not that after three years he comes clean, the stigma may shadow him ever.

Before dealing with the contentions advanced by both sides on the question of non compliance or the extent of compliance of the principles of natural justice, before inflicting the impugned order, it will be useful to briefly discuss the dominance of that principle in decision making in matters adversely affecting the interests of others. The principles of natural justice are known in the jurisprudence of administrative law as the fundamental rules of justice.

Natural justice demands that a person who is to be directly affected by an administrative action be given prior notice of what is proposed so as to enable him to make proper representation to defend his cause. The aim of the rules of natural justice is to secure justice . Soul of the rule is fair play in action. The message of the doctrine is that no one should be condemned without being heard. The concept has been evolved to uphold the rule of law. The rule was stated in the following words by Lord Denning M R in Schmidt V Secretary of State for Home Affairs (1969) 2 Ch.D 149 that "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative

action. Supreme Court had even gone to the extent of treating principles of natural justice as a part of Article 14 of the Constitution.

Two fundamental maxims of natural justice are (i) audi alteram partem and (ii) nemo judex in re sua . For the purpose of the present appeal we are primarily concerned with the concept of audit alteram partem. This principle is not of recent origin. It was well recognised even in the ancient world. Seneca, the philosopher, is said to have referred in Medea that it is unjust to reach decision without a full hearing In Maneka Gandhi V. Union of India (AIR 1978 SC 597) it was held that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the misuse of power. Hence its reach should not be narrowed and its applicability circumscribed. Earlier it was generally believed that the rules of natural justice apply only to judicial or quasi judicial proceeding. In State of Orissa V. Dr.(Miss) Bina Pani Die (AIR 1967 SC 1269) the reach of the rule was clarified by the Supreme Court by holding that even an administrative order or decision in matters involving civil consequences has to be made consistently with the rules of natural justice. In A.K. Kraipak V Union of India (AIR 1970 SC 150) the Supreme Court further clarified the position in the following words:

"If the purpose of these rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative inquiries from quasi judicial enquiries…….

…….. Arriving at a just decision is the aim of both quasi judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi judicial enquiry".

In Swadesi Cotton Mills V. Union of India (AIR 1981 SC) the Supreme Court relying on Bina Pani Dei and Kraipak observed

that “irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi judicial, a duty to act fairly, that is in consonance with the fundamental principles of substantive justice is generally implied, because the presumption is that in a democratic polity wedded to the rule of law, the State or the Legislature does not intend that in exercise of their statutory powers its functionaries should act unfairly or unjustly”.

Supreme Court in D.K.Yadav V. JMA Industrial Ltd (1993) 3 SCC 259 had observed that “it is fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him /her an opportunity of putting forward his/her case. An order involving consequences must be made consistently with the rules of natural justice. In Mohinder Singh V Chief Election Commissioner, (1978) 1 SCC 405, the Constitution Bench held that ‘civil consequences’ covers infraction of not merely property or personal right but of civil liberties, material deprivations and non pecuniary damages. In its comprehensive connotation everything that affects a citizen in his civil life inflicts a civil consequence…… In State of Orissa V Miss Bina Pani Dei (AIR 1967 SC 1269) this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken”.

The Apex Court in Yadav’s case had further observed that “the law must therefore be now taken to be well settled that procedure prescribed for depriving a person of lively-hood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary fanciful or oppressive . There can be no distinction between a quasi judicial function and an administrative function

for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi judicial inquiry and not to administrative inquiry. It must logically apply to both". Having said so the Court further stated that "fair play in action requires that the procedure adopted must be just fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of lively-hood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and procedural justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this court that the principles of natural justice are part of Article 14 and the procedure presented by law must be just fair and reasonable.……It is thus well settled that right to life enshrined under Article 21of the Constitution would include right to lively-hood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her lively-hood but also career and lively-hood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to putforth his case is given and domestic inquiry conducted complying with the principles of natural justice".

Issuance of show cause notice to the person concerned is normally the starting point of any inquiry proceeding. Notice envisages communication of charges to the concerned person and calling upon him to show cause why action proposed therein be

taken. If no sufficient cause shown the charge will stick and consequences will follow. Otherwise the proposal will be dropped. So instrument of show cause notice is of considerable importance in the process.

There is no scope for presuming that a notice, in the light of the facts in a given case may not be of any practical use even to the person against whom the decision is being taken, and dispensing with the requirement of issuing show cause notice. Following observation by the Supreme Court in Olga Tellis V Bombay MunicipalCorporation (AIR 1986 SC 180) explains the position.

" The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well recognised understanding of the real import of the rule of hearing. That proposition over looks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safe guards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities".

In the present case, admittedly no show cause notice was given to the Appellant providing him a reasonable opportunity to defend his cause. Not only that any show cause notice was given to the Appellant, but even a copy of the impugned order was not supplied to him till such time he made a request to give him a copy! It is also clear that the impugned order inflicting 'ineligibility' visits with civil consequences. What the Apex Court observed in the case of D K Yadav, in effect is applicable to the Appellant, as the after effect of termination from service and rendering the Appellant ineligible to hold any office in the capital market related institution for 3 years is more or less the same. The circumstances obviating the need for serving a notice on the Appellant as putforth are of no help to the Respondents in the light of the Supreme Court's observation in Olga Telli's case cited above.

An authority is now required to act judicially whenever its actions are likely to result in any disadvantage to a person. “Disadvantage” as the Supreme Court stated in Bhagwan V. Ramchand (AIR 1965 SC 1767) “ may result from taking away of a right or a privilege or adverse effect on an interest”. If it appears that an authority or a body has been given power to determine questions affecting the right of citizens, the very nature of power would inevitably impose a limitation that the power should be exercised in conformity with the principles of natural justice.

The Respondents’ contention that even though SCN was not issued to the Appellant, he was aware of the charges because of his participation in another inquiry proceeding under section 15I of the Act, before an officer of the Respondents and that he being the Managing Director of R-4 at the relevant point of time, could have appeared before R-2 of his own, appear to me only a defense for the sake of defense. It is well settled law that the person against whom action is being taken need be informed of the specific charges and also the consequences attendant thereto. No one can be expected to defend his cause unless he is called for to do so. The fundamental rule is that, if a person may be subjected to pains or penalty or be exposed to prosecution or proceedings or deprived of remedies or redress or in some such way adversely affected by investigation and report then he should be told the case against him and be offered fair opportunity of answering it. This mandate is on the authority vested with the authority empowered to proceed against the person and pass orders adversely affecting the other person. No one can be expected, of his own, to find out whether, there are any charges against him, being looked into by any authorities and volunteer to putforth evidence to absolve him! In this context the observation made by the Supreme Court in S.L. Kapoor V Jagmohan (AIR 1981 SC 136) in the context of deciding an SLP challenging the order of the Lt. Governor superseding the New Delhi Municipal Committee, is considered relevant. The Court had held that NDMC was never put on notice of any action proposed to be taken under section 238 of the Punjab Municipal Act and no opportunity was given to the Municipal Committee to

explain any fact or circumstance on the basis of which that action was proposed. If there was any correspondence between the New Delhi Municipal Committee and any other authority about the subject matter or any of the allegations, if information was given and gathered it was for entirely different purpose. The Court made it clear that "the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. The person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known, the requirements are met". It is therefore impossible to uphold the Respondents' proposition stated above and endorse their view that the principles of natural justice have been complied with in the instant case.

Yet another argument put forth by the Respondents to salvage the situation was that even assuming that a fair and reasonable opportunity was not given to the Appellant at the inquiry stage, the same can be provided at the appellate stage and thereby the deficiency can be cured. I have gone through the two decision of the Supreme Court in Fire Stone Rubber Co. Workers case and Delhi Cloth and General Mills Company Ltd., cited by the Respondents. Both these cases relate to the references under section 11A of the Industrial Dispute Act, 1947. In fact the Court had discussed the Delhi Cloth Mills case while deciding Fire Stone Rubber Company Workers appeal. These decisions are of little help to the Respondents. The facts are clearly distinguishable. The scheme of the adjudication under Industrial Disputes Act and under the SEBI Act are not identical to draw parallel references. In fact there are several cases and authorities contrary to the Respondent's proposition on this point. I will cite one such case which on factual matrix is some what comparable to the present case as in both the cases the issue at stake was the professional reputation of the parties, affected by the decision. It is the case of the Institute of Chartered Accountants of India Vs.

L.K. Ratna & others (1986) 4 SCC 534 decided by the Supreme Court. The Court while examining the relevance of following the principles of natural justice in the disciplinary proceedings under section 21 of the Chartered Accountants Act, 1949, had made the following observations, which I consider is relevant in the context. In the context of the submission by the Appellant's Counsel that provision of an appeal under section 22A of the Chartered Accountants Act is a complete safe guard against any insufficiency in the original proceeding before the Counsel, the Court observed:

" Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on "Administrative Law" 5th edn. But as that learned author observes (at p.487), "in principle there ought to be an observance of natural justice equally at both stages", and

> If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.

And he makes reference to the observations of Megarry, J.in Leary v. National Union of Vehicle Builders. Treating with another aspect of the point, that learned Judge said;

> If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I

> cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.

The view taken by Megarry, J. was followed by the Ontario HighCourt in Canada in Re Cardinal and Board of Commissioners of Police of City of Cornwall. The Supreme Court of New Zealand was similarly inclined in Wisland v. Medical Practitioners Disciplinary Committee, and so was the Court of Appeal of New Zealand in Reid v. Rowley

But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected and publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. “Not all the King’s horses and all the King’s men” can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blasé attitude towards the noble values of an earlier

generation, a man's professional reputation is still his most sensitive pride. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property , with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding".

In the light of the authorities discussed above, the argument that the deficiency of not issuing the SCN in the inquiry stage can be cured at the appellate stage stands defeated".

I have perused the Hon'ble Gujrat High Court's decision in Hindustan Finstock Ltd., relied on by the Respondent. The Hon'ble Court in the said case had observed that when on the question of facts there was no dispute, that no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross examination per se does not invalidate or vitiate the decision aggrieved at fair play".

The facts in the present case are under dispute and the decision based on the disputed facts has adversely affected the right of the Appellant. So the present case is not comparable to the case of Hidnustan Finstock. The Hon'ble High Court had made it clear by observing in Hindustan Finstock that "ultimate analysis of various case laws comes to conclusion that the court may strike down the action of the authority if taken in breach of principles of natural justice only if the prejudice is shown or proved and the action is in breach of principles of natural justice." In the Appellant's case it is clear that the Appellant was denied of an opportunity to rebut the evidence used against him, by denying cross examination. In my view

this is clear breach of the principles of natural justice.

I agree with the Respondent's submission that through documents the charges can be established. But if the material contents in such documents are contested by the other party, then the party relying on such document has to prove the same. The Respondent, for the purpose of establishing the charge against the Appellant has gone by the oral statement and written communications of the authors of those documents/statements.(Shri Nitin Doshi etc. of JSBPL) It is seen that those persons from JSBPL has been shifting their stand from time to time and as such their statement, as desired by the Appellant, need be tested. In my view, since their evidence is crucial in the matter of proving/disproving the charge, the Appellant's prayer to cross examine them is legitimate and reasonable and therefore denial of cross examination of them is against the principles of natural justice. Therefore SEBI is directed to permit the Appellant to cross examine Shri Nitin Doshi etc. of JSBPL, as prayed for by the Appellant. In case the Appellant fails to make use of the opportunity, SEBI is at liberty to draw appropriate inference in the matter. But the Appellant in all fairness need be provided an opportunity to examine Shri Nitin Doshi and Shri Jaysukhlal Jagjivan with reference to their written / oral statements/communication which have been referred to and relied on by the Respondent in its order.

In view of the legal position explained above I do not consider it necessary to go into the merits of the charges held against the Appellant.

SEBI is at liberty to pass appropriate order after affording the Appellant to cross examine the persons on whose statement/communication SEBI has relied. For the purpose the matter is remanded.

Appeal is allowed by way of remand.

Sd/-

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai

Date: October 30, 2003