BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

In the matter of:

Appeal No.15/2003

Manu Finlease Ltd.
Appellant

Vs.

Securities & Exchange Board of India
Respondent

Appeal No.16/2003

Anil Kumar Jindal
Appellant

Vs.

Securities & Exchange Board of India
Respondent

Appeal No.17/2003

J.K. Garg
Appellant

Vs.

Securities & Exchange Board of India
Respondent

Appeal No.18/2003

P.K. Kapoor
Appellant

Vs.

Securities & Exchange Board of India
Respondent

Appeal No.19/2003

Ritu Garg
Appellant

Vs.

Securities & Exchange Board of India
Respondent

Appearance

Shri Sunil Narula

Advocate **for Appellants**

Shri Kumar Desai

Advocate

Ms. Rita Shivalkar

Advocate

Shri Achal Singh

AGM, SEBI

Shri Praveen Trivedi

ALA, SEBI **for Respondent**

ORDER

These appeals are directed against the order passed by SEBI on

29.11.2002. The Respondent held the Appellants guilty of violating certain provisions of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade

Practices relating to Securities Market) Regulations, 1995 (the FUTP Regulations) and debarred them from "accessing and being associated with the capital market for a period of five years" with effect from the date of the impugned order.

SEBI has stated the background leading to the adjudication and issuance of the impugned order as follows:

"Investigations were conducted by SEBI into the affairs relating to buying, selling, and dealing in the shares of M/s. Manu Finlease Ltd. (MFL) which entered the capital market with a public issue of 21,00,000 shares of Rs.10/- each for cash at par. The issue remained open from 14.10.95 to 18.10.95. As per the prospectus dated 5.9.95 the directors of MFL were Shri AK Jindal, Shri PK Kapoor, Shri RK Aggarwal, Shri JK Garg & Smt. Ritu Garg.

The Lead Manager to Public Issue was M/s. Doogar & Associates and the Registrar to the Issue was M/s. SPS Data Products Ltd.

As per 3 day report filed on 21.10.95, the number/s of shares subscribed to were 51.959 lacs i.e. the issue was oversubscribed by 2.81 times. However, as per 78 days report filed on 5.1.96, the number of shares subscribed were 595.059 lakhs i.e. the issue was oversubscribed by 50.43 times. It was observed from the basis of allotment that the issue was subscribed mainly by way of stock invests accompanying big applications. The shares were listed at Delhi, Ahmedabad & Jaipur Stock Exchanges. As per the prospectus of MFL, Earning Per Share had reduced from Rs.1.36 for the financial year 31.3.1994 to Rs.1.07 for 31.3.1995. Thus, MFL did not appear to have any sound track record or profitability, which could justify oversubscription by 50.43 times. Further, scrip opened at Rs.48/- in January 96 at DSE and showed unusually high fluctuations touching Rs.72/- in March 96.

In view of the above, an investigation was ordered into the

affairs relating to

buying, selling or dealing in the shares of MFL in terms of order dated 2.8.96. Investigations interalia showed various irregularities which are detailed below:-

A) Public Issue manipulation

1. Forgery in amount of stockinvests

There were 12 applications accompanied by stockinvests issued by Sangli Bank, Karol Bagh, New Delhi at Rs.1 lac each. These stockinvests were fraudulently increased to Rs.1 crore each. This implies that stockinvests of Rs.12 lacs were used for making applications of Rs.12 Crores. All these stockinvests were issued to Shri Prem Gupta, a director of Glory Securities Ltd. (an associate concern of MFL).

Similarly, there were 23 applications accompanied by stockinvests also issued by Sangli bank, wherein the amounts of stockinvests were increased by a multiple of 10. This implies that

stockinvests worth Rs.27.6 lacs were utilized for making applications worth Rs.276 lacs. These include stockinvests issued to Shri Ashok Chawla, who had admittedly obtained these stockinvests on the asking of Shri SK Gupta. Shri SK Gupta arranged finance on behalf of Shri J.K.Garg and Shri A.K. Jindal, both Directors of MFL at the request of D.B. (India) Securities Ltd., member DSE (hereinafter referred to as DBISL). As admitted by Shri SK Gupta during the investigations, these stockinvests with blank application forms were delivered at the office of DBISL. Subsequently these blank application forms were filled up, matching the altered value of stock invests as application money.

2. Back dating of stockinvests and acceptance of late applications.

As mentioned earlier, 12 stockinvests were issued by Sangli Bank for Rs.1 lac each to Shri Prem Gupta, which were increased to Rs.1 crore. All these

stockinvests were issued on 19.11.95 i.e. much after the close of

the issue on 18.10.95. These applications were accepted by Dena Bank, Rajendra Place, New Delhi after the closure of issue.

Dena Bank, Rajendra Place, New Delhi had also received late applications worth Rs.15 lacs along with stockinvests issued by Sangli Bank to Shri Ashok Chawla & Shri JB Gupta. Similarly, applications worth Rs.249 lacs were accepted late by Oriental Bank of Commerce, Ballabgarh. These applications were made with backdated stockinvests issued by Sangli Bank (which includes all applications except for one of Rs.50 lacs, with altered amount as mentioned in 1 above) to Shri Ashok Chawla & Shri Prem Gupta. However, it was revealed during investigations that the application money against these applications was collected by MFL by way of Demand Drafts and not through presentations of the related stockinvests.

As already mentioned that impugned stockinvests were issued to Shri Ashok Chawla, Shri Prem Gupta and Shri JB Gupta. Shri Ashok Chawla had obtained them at the request of Shri SK Gupta,

who in turn arranged for them after being introduced by DBISL to MFL/directors. Shri Prem Gupta, director of Glory Securities Ltd. was an associate of MFL. Shri Prem Gupta was earlier an employee of Shri JB Gupta.

3. Multiple applications.

State Bank of Indore, Dadar (W), Mumbai issued 6 stockinvests of Rs.1 crore each used in the Public Issue of MFL which were issued to various individuals against the deposit of M/s. Krishna Texport and Capital Markets Ltd. (hereinafter referred to as KTCML). In terms of an agreement dated 7.10.1995, KTCML provided these stockinvests with each application for 10 lacs shares in the name of its nominees to another financier namely Shri Gopal Khadaria. Since all the applications were made on behalf of Shri

Gopal Khadaria, a single application for 60 lacs should have been made instead of 6 multiple applications of 10 lac shares each, which were liable for rejection, being multiple applications.

As per the provisions of the prospectus of MFL at page 6 which provides that an applicant should submit only one application form (and not more than one) for the total number of equity shares required. It was also mentioned that multiple applications are liable for rejections. Thus, multiple share applications made by KTCML in the name of its nominees on behalf of Shri Gopal Khadaria should have been rejected. However, these multiple applications were accepted, which resulted in irregular allotment of 97,800 shares.

These shares were later delivered by Shri Gopal Khadaria to M/s. Nathji Enterprises P. Ltd., an associate concern of MFL. Shri Gopal Khadaria was introduced by M/s. DB India Securities Ltd. to the directors of MFL for the purpose of financing the Public Issue of MFL.

Multiple and late applications in the Public Issue of MFL were also made by

way of 60 applications of 1000 shares each, aggregating to Rs.6 lacs issued by way of cheque from the current account of M/s. Swamy Foods P. Ltd ., another associate concern of MFL.

4. Same stockinvest being used for various applications

Multiple applications were received accompanied by photocopies of the same stockinvests resulting in the subscription of Rs.264 lacs.

5. Stockinvests issued without proper security.

State Bank of India, Ashram Road, Ahmedabad issued 18 stock invests

aggregating Rs.5.51 crores on various dates in November 1995 i.e. after the closure of Public Issue of MFL and that too without obtaining proper security.

The irregularities mentioned at serial no.1 to 5 above, resulted in acceptance of irregular applications for 2,93,50,000 shares out of 5,95,05,900 shares received during the Public Issue. This resulted in irregular allotment of 4,94,200 shares of MFL. (i.e. approx.42% of net offer to public). Had these irregular applications were not accepted, general public would have been allotted the shares. Thus, general investors were wronged by the decision to accept irregular applications.

Bulk of these application forms against which irregular allotments were made in the Public Issue of MFL bear the broker & sub-broker stamp of DBISL. The sub-brokerage paid by DBISL to itself is for applications worth Rs.16.34 crores i.e. 27.5% of the total subscription to the issue. The close association between the promoters of MFL and DBISL was also evidenced by the fact that during the public issue of M/s. DB Merchant Banking Services Ltd. (promoter group concern of DBISL) subscription was made from the bank accounts of MFL and its associates concerns.

6. Allotment of shares without waiting for realisation.

Registrar to Issue made allotment of shares and despatch of Share Certificate/Allotment Advices without waiting for realisation/cancellation of stockinvests. These stockinvests were obtained by MFL from the RTI in all cases, including those of irregular applications and were not sent to the issuing banks for realisation/cancellation. The application-cum-allotment money was subsequently received by way of Demand Drafts purchased against cash. This resulted in allotment of shares in MFL prior to receipt of application money.

7. False and misleading basis of allotment

During the finalisation of the Basis of Allotment, MFL colluded with Registrar to the Issue and Lead Manager and made allotment on the basis of irregular applications, which shouldn't have been considered. This in turn amounted to painting a rosier picture of the company and misleading investors, thus inducing them to invest in the securities of MFL.

B) Grey market transactions

M/s. Hem Enterprises & M/s. D.M. Investment, who are unregistered stock brokers/share dealers indulged in grey market transactions in MFL shares at Ahmedabad and facilitated disposal of shares arising out of irregular allotments.

C) Secondary Market Manipulations

On listing, MFL share opened at Rs.48/- on 2.1.96 and moved to Rs.70/- on 26.3.96 at Delhi Stock exchange (hereinafter referred to as DSE) and receded to Rs.54/- on 3.6.96. The major buying in the scrip at DSE was by DBISL on behalf of M/s. Glory Securities Ltd., an associate concern of MFL & its directors. An associate concern of M/s. Glory Securities Ltd. namely M/s Goodwill Investment also made large buying in the scrip at DSE. Their buying at DSE was responsible for causing an unusual price movement in the scrip.

As apparent from the above, all the aforementioned

irregularities were committed with active connivance of MFL & its directors."

Pursuant to the Investigation report, show Cause Notices for issue of direction u/s 11B of SEBI Act, 1992 read with Regulation 12 of FUTP Regulations were issued by SEBI to MFL & its directors (namely Shri Anil Kr. Jindal, Shri JK Garg, Shri PK Kapoor, Smt. Ritu Garg, Shri RK Agarwal on 6.2.1998.

Shri Sunil Narula, learned Advocate appearing for the Appellants referred to the averments in the Memorandum of appeal field by the Appellants and submitted that the Respondent had issued a notice on11.7.1997 asking the Appellants to show cause as to why action should not be taken against them by way of penalty in accordance with section 15G of the SEBI Act for the violations enumerated in the statement attached to the said notice. He submitted that the Adjudicating Officer on completion of the inquiry passed an order holding that the Appellants had not violated the provisions of section 15G and therefore imposition of penalty was not warranted.

Learned Counsel submitted that the Appellants received another show cause notice dated 6.2.98 from yet another officer of the Respondent seeking explanation alleging violation of FUTP Regulations. He submitted that show cause notice was silent about the earlier notice and the acquittal of the Appellants thereunder. He submitted that there is no provision in the SEBI Act or in the applicable regulations to issue a second notice and proceed denovo when already an enquiry on the same charges had been concluded and an adjudication order was to be issued. He submitted that apart from the fact that the second parallel notice dated 6.2.1998 was against all the settled norms, that the Respondent was required to confine the inquiry to the areas referred to in the said notice, but there also the Respondent overstepped the terms of reference and passed impugned order beyond the terms of reference. Learned Counsel submitted that the Appellants had submitted detailed reply rebutting the submissions but the Respondent rejected the whole submissions and held the Appellants guilty of charges as alleged in the notice dated 6.2.1998.

Learned Counsel referred to the grounds in the Appeal Memorandum adduced by the Appellants to challenge the order and reiterated the same. He submitted that:

That the impugned order dated 29.11.2002 is bad in law and on facts as the same was issued without appreciating the correct law and facts of the

case.

Respondent can not pass directions under sec.11B of the SEBI Act in the nature of penalty prohibiting the Appellants from "accessing and being associated with the capital market for a period of 5 years."

The impugned direction prohibiting the Appellant from accessing the capital market for a period of 5 years is not an investor protection measure in the interest of investors.

The Appellant Company being a separate legal entity, it can not be penalized for violations of any provisions of the SEBI Act committed by the Director/s in their personal capacity.

FUTP Regulations notified on 25.10.1995 can not have any application to the pre-notification period of public issue of MFL.

Respondent has not followed the correct law as laid down by the Tribunal in Tirupati Finlease Ltd. vs SEBI (2001) 6 Comp. LJ 260 (SAT) that a company and its promoters being separate legal entities, company can not be substituted for promoters for the purpose of imposing penalties.

Respondent has not followed the correct law as laid down by the Tribunal in Sterlite Industries (India) Ltd. vs. SEBI (2001) 6 Comp.LJ 268 (SAT) and Videocon International v. SEBI (2002) 4 Comp. LJ (Sat) that Section 11B is not a penal provision but preventive and remedial in its application that preventing the Appellants from accessing and being associated with the capital market for a period of 5 years is a punitive order. The remedial action is to correct, remove or lessen a wrong and not to impose penalty.

Mere conjectures and surmises are not adequate to hold a person guilty of serious offences, that the extent of proof required to hold the delinquent guilty has been explained by

the Hon'ble Supreme Court in Bank of India vs. Degala Surya Narayana AIR 1999 SC 2407. There was not enough evidence to hold the charges against the Appellants that in the absence of reasonably strong evidence, even in a civil proceeding, a

person can not be held guilty and awarded punishment.

Respondent failed to appreciate that the enquiry and adjudication orders passed by Sh.Sai Ram had held that no charge was proved against the Appellant, that the Respondent could not have initiated another parallel enquiry while an enquiry was already being conducted on the same charges against the Appellants vide show cause notice dated 11.7.1997, that the inquiry officer has no power to overstep the terms of reference of enquiry required to be conducted by him in terms of show cause notice dated 6.2.1998.

Learned Counsel submitted that it is only bankers to the issue

who are subject to control of the Respondent through the SEBI (Bankers to an Issue) Rules, 1994 and SEBI (Bankers to an Issue) Regulations 1994, that Bankers to an Issue has a prominent role in the process of raising capital from public through public issue and also has to monitor compliance of the statutory Rules and Regulations, that same are the duties of the Registrar to an Issue. It was submitted that Public Issue of shares was a team action involving not only the issuer company but several agencies including Bankers to an Issue, Registrar to Issue, Lead Manager etc as well. In this context he referred to the decision of this Tribunal in SEBI vs. Bank of Baroda (2001) 6 CompLJ 717(Sat). Learned Counsel submitted that the Respondent has not taken any action against the Bankers to the issue and Registrar to the issue, but singled out the Appellants and decided to punish them, though they had not violated any of the SEBI regulations.

Shri Kumar Desai, learned counsel appearing for the Respondent submitted that the Appellants has not disputed the facts and the findings reached at by the Respondent in the order, that the order is attacked only on the ground that SEBI has no power to issue the direction debarring the Appellants from accessing and associating with

the capital market.

Shri Desai referred to the allegations against the Appellants and the material based on which such findings were arrived at, as stated in the order and submitted that the charges have been conclusively established and the Appellants have no material to challenge the findings and they therefore decided not to challenge the same in the appeal and decided only to attack the scope of section 11B under which the impugned direction was issued.

Learned Counsel submitted that the directions given by the Respondent vide order dated 29.11.02 under section 11B of the SEBI Act, 1992 in respect of the Appellants are remedial and not penal in nature. The directions were passed as a preventive and remedial measure and to curb the activities, which were considered to be detrimental to the interest of the investors in securities market. He submitted that a duty has been cast upon SEBI to prohibit fraudulent and unfair trade practices relating to securities market in terms of the provisions of section 11(1) and section 11(2) (e) of SEBI Act, 1992,

that section 11 of the SEBI Act empowers SEBI to protect the interests of investors in securities, to promote the development of and to regulate the securities market by such measures, as it thinks fit, that section 11B, empowers SEBI to issue directions as may be appropriate in the interests of investors or securities market.

Learned Counsel submitted that during the investigation various irregularities in the allotment made by the company, to the detriment of the investors were noticed. The active connivance and involvement of Appellant company and its directors was established. Further the violations in the present case are violations committed by the company and therefore, the persons who were-in-charge of and were responsible to the company for the conduct of the business of the company, as well as the company, are liable to be proceeded against and dealt with accordingly, that the conduct of the directors in the instant case was not in their personal capacity but was in capacity of the directors of the company and therefore can not be dealt with differently from the Appellant company.

Learned Counsel submitted that the Appellants' Counsel has mixed up two different proceedings, which were initiated under different provisions of law. The Adjudication Officer vide his order dated 28.1.1998 had dropped the proceedings against MFL and its directors on technical ground. The show cause notice dated 6.2.1998 was issued not on the same charges for which an enquiry (Adjudication) completed and order passed. While, the proceedings by Adjudication Officer were on suspected violations of the provisions of SEBI (Substantial Acquisition of shares and Takeover) Regulations 1994 and SEBI (Insider Trading) Regulations 1992, the show cause notice dated 6.2.1998 was issued by SEBI under section 11B of SEBI Act, 1992 read with Regulation 12 of the FUTP Regulations. Section 15I of SEBI Act, 1992 deals with the appointment of Adjudication Officer for the purpose of adjudging under sections 15A to 15H of the said Act. The charges mentioned in Respondent's show cause notice dated 6.2.1998, do not relate to issue for which penalty can be levied in terms of section 15A to 15H. Shri Gupta was appointed as investigating Officer for the purpose of investigation. The show cause notice dated 6.2.98 was not issued against the settled norms as alleged. The order passed by SEBI is not beyond the terms of reference of show cause notice. It was submitted that while passing the

order, no fresh charge in addition to those referred to in the Respondent's show cause notice dated 6.2.1998 was incorporated.

Since the irregularities were committed subsequent to the notification of the FUTP Regulations on 25.10.1995 the said Regulation is applicable. It could be seen that 12 stockinvests that were issued for Rs.1 lac each was fraudulently altered to Rs.1 crore each. These were issued on 19.11.1995 i.e. the date subsequent to the notification of FUTP Regulations. During the investigations it was observed that these stockinvests with blank applications were delivered to the directors of Appellant Company at the office of DB (India) Securities Ltd. These stockinvests with backdated applications by the Appellant were accepted for the allotment. The application money for these applications were not collected through the presentation of related stockinvests, but by issue of demand drafts. Similarly, 18 stockinvests

were issued aggregating to Rs.5.51 crores on various dated in November 1995 i.e. again the period being subsequent to the notification of aforesaid regulations, and that too without proper security. All these stockinvests with respective applications were

considered for allotment of shares by the Appellant. The false and misleading basis of allotment was also finalised after the notification of the said Regulations. The secondary market violations were also committed after the notification of the said Regulations. It is also to be noted that SEBI is empowered to prohibit fraudulent and unfair trade practices relating to securities markets in terms of section 11(2)(e) of the SEBI Act, brought into force since 1992.

The law laid down by the Tribunal in Tirupati Finlease Ltd case has no application to this matter. In the present appeal the Appellant company is not charged with anything done by its directors in their personal capacity as was in Tirupati Finlease. As stated in the Respondent's order, these directors have connived with various entities to indulge in fraudulent and unfair trade practices to ensure the success of the public issue of the Appellant company. Moreover, the Appellant company is an artificial person, which acts through its directors. In the circumstances the Appellant company can not said to have been substituted for promoters/directors for the purpose of imposing the penalities.

Learned Counsel referred to the Tribunal's decision in Sterlite and Videocon cited by Shri Narula and submitted that the charges against those companies were not relating to any manipulation of market relating to any public issue made by them. In

the instant case the manipulation is with reference to the public issue made by Manu Finlease (Appellant in appeal no.85/2002). The facts of both the cases are totally different and as such ratio in the case of Sterlite and Videocon has no application to the present case. He submitted that the direction issued under 11B in the present case is a preventive one and not a punitive one and the Tribunal had held in Sterlite and Videocon that section 11B is available to take preventive/remedial measures, that in the Appellants' case nexus between manipulations indulged in by the

Appellants and the direction issued under section 11B is there.

With reference to the Doogar & Associates' case relied on by

the Appellant's Counsel, Shri Desai submitted that in the said case Tribunal had found the said firm which was acting as a lead manager, as guilty and in appeal only the quantum of monetary penalty imposed on it was reduced. He submitted that the Bankers to the Issue and Registrar to issue are the issuer company's agents and the issuer company can not absolve itself for the omissions and commissions of its agents.

With reference to the view held by the Tribunal in Bank of Baroda that several agencies including bankers to an issue have well defined roles assigned to them in a public issue, Shri Desai submitted, that the fact that each one associated with a public issue has an assigned role does not mean that as a team player, collective responsibility of the issuer company and the intermediaries involved be ignored.

I have considered the rival contentions of the parties in these appeals. Shri

Narula, has not disputed the facts based on which the Respondent has

drawn the conclusions. He did not question the findings arrived at by the Respondent. His challenge is focussed on the legality of the impugned order.

It is seen that the Respondent had appointed an Adjudicating Officer in terms of section 15I of the SEBI Act for the purpose of inquiry and adjudging the contravention of section 15G of the SEBI Act. The charges which the Appellants were required to answer in terms of the show cause notice dated 11.7.1997 issued by the Adjudicating Officer are as under:

"Allegations:-

The promoters/directors of MFL through GSL and GI have made heavy purchases and sales of MFL shares at DSE, the deliveries of which effected

are for 4,70,100 and 1,900 shares respectively, resulting in a net purchase of 4,68,200 shares, which represents approx.20% of the floating stock. These persons who are "insiders" as defined in

Regulation 2(e) of SEBI Insider Trading Regulations, 1992 had access to "unpublished price sensitive information" as defined in clause 2(k) of SEBI (Insider Trading) Regulations, 1992 that the allotment of 4,94,200 shares (42% of net offer to public) in the public issue of MFL had been mainly cornered by themselves by manipulating the process of allotment. This information was available only to these "insiders" and enabled them to rig the prices of MFL shares on the secondary market."

The Adjudicating Officer after inquiry passed an order on 28.1.1998 absolving the Appellants of the charge of violation of the provisions of SEBI (Insider Trading) Regulations, 1992.

Respondent SEBI on 2.8.1996 ordered an investigation vide order dated 2.8.1996 "into affairs of buying or selling in the shares of M/s. Manu Finlease Ltd"

and on receipt of the investigating officers report SEBI issued a show cause notice to the Appellants on 6.2.1998 requiring them to explain as

to why action should not be taken against them in terms of section 11B of the SEBI Act read with regulation 11 of the FUTP Regulations in respect of their involvement in the transactions involved in the shares of Manu Finlease Ltd. This show cause notice was adjudicated by the Chairman of the Respondent and the impugned order was passed. The Appellants' argument that having adjudicated the matter once, the Respondent was not entitled to initiate the inquiry again, in my view, in the light of the facts of the case is untenable. The adjudication in terms of the show cause notice dated 11.7.1997 was in respect of the alleged violations of the provisions of the SEBI (Insider Trading) Regulations, where as the present inquiry under section 11B was with reference to contravention of FUTP Regulations. These are two different proceedings. The argument that since

the Adjudicating officer had absolved the Appellants of the charge of insider trading,

on the same set of facts the Respondent can't hold the Appellants guilty of violating FUTP Regulations, in my view is misplaced. The facts are appreciated with reference to the charges, that it is not a sound argument that the Respondent should have accepted the finding of the Adjudicating Officer for the purpose of the second inquiry. I have

perused the earlier order also. The Adjudicating Officer has not gone into the details of the market transactions based on which the charges of insider trading was leveled. His conclusion therein was based on the finding that to attract the Insider Trading Regulations the persons involved should be insiders. In that context he held that "the Appellants can not be considered as persons deemed to be connected persons or as insiders within the meaning of SEBI (Insider Trading) Regulations, 1992." Adjudication under Chapter VI A of the SEBI Act, does not in any way preclude SEBI holding inquiry for the purpose of issuing direction under section11B of the Act. This is clear from the provision of section 15I and section 11B of the SEBI as extracted below:

"Section 15-I

(1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, [15H, 15HA and 15HB], the Board shall appoint any

officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving the person concerned a reasonable

opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections."

Section 11B reads as under:

Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary, --

(i) in the interest of investors, or orderly development of securities market, or

(ii) to prevent the affairs of any intermediary or other persons referred to in Section 12 being conducted in a manner detrimental to the interest of investors or securities market, or

(iii) to secure the proper management of any such intermediary or person,

it may issue such directions, --

(a) to any person or class of persons referred to in section 12, or associated with the securities market, or

(b) to any company in respect of matters specified in Section 11A as may be appropriate in the interests of investors in securities and the securities market."

It is abundantly clear that the scope and reach of both the sections are different. In my view the Appellants' argument that since an adjudication was ordered under section 15G and the adjudicating

office had absolved the Appellant of the charges in the said adjudication proceedings, no inquiry under regulation 11B is permissible and no direction under section 11B can be issued, is untenable.

The argument that since FUTP Regulations were notified on 25.10.1995, the same cannot be applied to the public issue which was opened on 14.10.95 and closed on 18.10.95, in my view is not tenable, as the manipulations were indulged in the post public issue period also, as has been stated in the impugned order.

The next limb of Shri Narula's argument is that under section 11B, SEBI is not empowered to issue the impugned directions. In this context it is to be noted that

the charges against the Appellants relate to the transactions carried out in the shares

of the Appellant company, offered in a public issue made in October, 1995. The whole allegation is related to the said public issue – pre

issue and post issue - and the involvement of the Appellants therein. The Appellants have not disputed the findings recorded about their involvement. They have thereby admitted the charges. But they preferred only to challenge the authority of SEBI under section 11B to issue the ban order on the ground that the said ban order is a penalty and that in view of this Tribunals decision in Sterlite and Videocon, section 11B is not available to take punitive action.

Since section 11B has been already extracted earlier I do not want to burden this order again repeating the text of the said section. Since the order also refers to regulation 12 of the FUTP Regulations it is felt necessary to have a look at the said

regulation also.

Regulation 12. Purpose of direction: The purpose for which directions under regulations 11 may be issued are the following namely-

(a) Directing the person concerned not to deal in securities in any particular manner.

(b) Requiring the person concerned to call upon any of its officers, other employees or representatives to refrain from dealing in securities in any particular manner.

(c) Prohibiting the person concerned to dispose of any such securities acquired in contravention of these regulations.

(d) Directing the persons concerned to dispose of any such securities acquired in contravention of these regulations in such manner as the Board may deem fit for restoring the status-quo-ante."

Regulation 11 referred to in regulation 12 is as follows:

Regulation 11: The Board may after consideration of the report referred to in

regulation 10, and after giving a reasonable opportunity of hearing to the person concerned, issue directions for ensuring compliance with the

provision of the Act, rules and regulations made thereunder for the purpose specified in regulation 12.

It is, to be noted that the power to issue directions under FUTP Regulations flows from regulation 11. The purpose for which the directions under regulation 11 can be issued is limited vide regulation 12. The regulation 11 is not an open ended one. It's scope is circumscribed by regulation 12.

Section 11B of the Act clearly defines its scope and reach that if after making or causing to be made an enquiry, the Board is satisfied that it is necessary (i) in the interest of investors or orderly development of securities market, or (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market, or (iii) to secure the proper management of any such intermediary or person, it may issue such directions. The persons to whom such directions can be issued are (i) any person or class of persons referred to in section 12, or associated with the securities market; or (ii) to any

company in respect of matters specified in section 11 A.

It is in this context that we have to see the nature of the directions issued by the Respondent. The order reads as follows:

"Taking into consideration the facts and circumstances of the case and in exercise of the powers conferred upon me under section 4 (3) of the SEBI Act, 1992 and 11B of SEBI Act, 1992 red with regulation 12 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulation 1995, I hereby debar M/s. Manu Finlease Ltd, Shi AK Jindal, Shri JK Garg, Shri PK Kapoor, Smt. Ritu Garg, from accessing and being associated with the capital market for a period of 5 years." The order has come into force with effect from 29.11.2002.

On a perusal of the order it is clear the direction is not covered in terms of regulation 12. So the applicability of section 11B has to be considered.

This Tribunal in Sterlite and Videocon had held that section 11B is not available for issuing directions which tantamount to imposition of penalty. In the Videocon's case the direction interalia was "not to raise money from the public in the capital market for a period of 3 years in the interest of investors." In the case of Sterlite Industries Ltd the prohibition on the company was on "accessing the capital market for a period of 2 years". In both the cases the charges were that the said companies with others had violated regulation 4(a) and 4(d) of the FUTP Regulations. But, as Shri Desai pointed out the violation was not linked to the public issue of shares made by them at the relevant point of time. In the light of the facts and circumstances specific to the said cases it was held that the direction was punitive and not a preventive or remedial measure to protect the interests of the investors. It was found that measures taken in the said cases under 11B had no nexus with the charge leveled against those companies. Whether the direction is preventive/remedial would depend on the facts and circumstances of each case.

This Tribunal had examined the scope of section 11B in several cases. In Anand Rathi vs. SEBI ((2002) 36 SCL 182 (SAT-MUM) the Tribunal had observed that:

"In the light of the above it is clear that the SEBI in terms of section 11 and 11B is entitled to take measures/directions for protecting the interest of the investors and to promote the development of, and to regulate the securities market and for matters connected. It is totally incorrect to say that the Respondent has no power under section 11B to protect the interest of investors in the light of this Tribunal's decision in Sterlite. There is not even a suggestion to the said effect in the Sterlite case. The Tribunal had only held that 11B can not be invoked for imposing penalty as the section is not intended for the said purpose"

In Anand Rathi's case, the Respondent had passed an order where by Shri Rathi "was restrained from holding any position of director or trustee of any capital market related institution/entities for a period of two years." The Tribunal had up held the said direction issued under section 11B.

In RK Agarwal v SEBI ((2001) 31 SCL 279 (SAT-MUM) this Tribunal had held that the Respondent is empowered to disqualify a person from occupying any office in the exchange, if it is satisfied that involvement of such a person in the management of the exchange would not be in the interest of the exchange. This observation was made by the Tribunal while deciding an appeal filed by Shi RK Agarwal, President of Uttar Pradesh Stock Exchange, challenging SEBI's order debarring him to be a member of the Governing Board or capital market related institution for a period of 2 years.

It is to be noted that in the Appellants' case the undisputed charge is that they had manipulated a public issue and it is in the context of the said proven charge the Respondent decided to prevent them from repeating such manipulations. SEBI felt that prevention is possible by debarring the Appellants from accessing and associating with the capital market. The Appellants feel that the order is punitive. But viewed from the investor protection angle - that is the objective for which directions under each 11B can be issued - it certainly is a preventive measure and therefore such a direction can be issued under section 11B. The direction is relatable to the violation of the FUTP

Regulations in relation to the public issue made by the Appellant company. It was not so in the case of Sterlite and Videocon. In view of the facts and circumstances of the case, I am of the view that the impugned order is not contrary to ratio in the Sterlite and Videocon case.

The Appellants argument that for the omissions and commissions of the directors, the company cannot be subjected to such a direction is baseless as there is

evidence to show that the directors/promoters of Manu Finlease had acted in their capacity as directors/promoters of the company and not in their individual capacity independent of the company with which they were associated.

The Appellant No.1 has stated that its shares are listed on the stock exchanges at Delhi, Ahmedabad, & Jaipur. The scope of the order debarring the Appellant company from being associated with the

capital market is likely to adversally affect the listing arrangement the Appellant company has with the stock exchanges and the trading facility available to the shareholders. In case SEBI is satisfied that as a result of its order, the genuine investors are trapped without any exit route, SEBI is at liberty to suitably modify the order so as to protect the interest of those shareholders.

For the reasons stated about the Appeals are dismissed.

Sd/-

(C. ACHUTHAN)

Place: Mumbai **PRESIDING OFFICER**

Date: October 27, 2003