BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

Appeal No.9/2003

KSL & Industries Ltd. **Appellant**

Vs.

1. The Chairman,

The Securities & Exchange Board of India

2. Gopal Khadaria **Respondents**

Present

Shri D. J. Khambatta,

Advocate

Ms. Rashida Sauliwala,

Advocate

I/b Paras Kuhad & Associates **For Appellant**

Shri Kumar Desai,

Advocate

Ms. Rita Shivalkar,

Advocate

Shri Praveen Trivedi,

Asstt. Legal Adviser, SEBI **For Respondent No.1**

ORDER

Order made by the Respondent No.1 (SEBI) on 29.11.2002 under section 11B of the Securities and Exchange Board of India Act, 1992 (the SEBI Act) read with regulation 12 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 (the FUTP Regulations) debarring Shri S. K. Gupta, Shri Ashok Chawla, Shri J. B. Gupta, Shri Gopal Khadaria and KSL & Industries Ltd., (the Appellant herein – formerly known as Krishna Texport and Capital Market Ltd.,) "from accessing and being associated with the capital market for a period of five years" from 29.11.2002, is under challenge in the present appeal. Though the order is directed not only to the Appellant but to 4 individuals also, none other than the Appellant has so far filed any

appeal against the said order.

The facts based on which SEBI passed the order have been stated in the order itself. Briefly those facts are as follows:

Manu Finlease Ltd., (MFL) a public limited company issued a Prospectus on 5.9.1995 whereby 21,00,000 equity shares of Rs.10/- each were offered for public subscription. Out of the same 9,20,000 shares were reserved for preferential allotment – i.e. 4,20,000 shares to Indian Mutual Funds and 5,00,000 shares to Non Resident Indians. In that context net offer to the resident Indian public was only 11,80,000 shares. The issue was found oversubscribed by 50.54 times, though the said company had no sound financial track records. In that context, on 2.8.1996 SEBI ordered an investigation. Investigation revealed manipulation of the public issue made by MFL and also grey market operations and secondary market manipulations in the shares of the company. Pursuant to the investigation report, show cause notices were issued on 6.8.98 to the persons found involved including the Appellant. They responded to the notice by sending replies and making oral submissions. Thereafter SEBI passed the impugned order. The order deals with charges against each one of the noticees separately. Since the present appeal is confined to the findings and the decision relating to the Appellant it is not considered necessary to go into the charges against others in this order. However, since Shri Gopal Khadaria's role has a bearing on the charges levelled against the Appellant it is felt that it would be advantageous to know the charges against him and also the findings thereon as per the impugned order. The relevant portion from the order is extracted below:

> "1. As per the investigation report, Shri Gopal Khadaria having an address of 1-A, Hillview Apartment, JP Road, Andheri (W), Mumbai entered into an arrangement with M/s. Nathji Enterprises Pvt. Ltd., an associate concern of MFL operating from the

same premises and having common directors for providing finance through six multiple applications of 10 lac shares of Rs.1.00 crore each in the Public Issue of MFL. Shri Gopal Khadaria in turn entered into an agreement dated 7.10.95 with M/s. Krishna Texport and Capital Market Ltd., also for receiving financial accommodation to enable him to apply for 60 lac shares in the Public Issue of MFL by way of six multiple applications of 10 lac shares each.

Shri Gopal Khadaria was allotted 97,800 shares of MFL (i.e. 16,300 shares against each of the six applications). The delivery of these allotments was not received by him but was taken directly by M/s. Nathji Enterprises P Ltd., an associate of MFL. The promoters of MFL thus obtained allotment of 97,800 shares of MFL through this arrangement.

Since all the applications were made on behalf of Shri Gopal Khadaria, a single application for 60 lac shares should have been made instead of six multiple applications of 10 lac shares each. As the net offer to the public in this case was for 11,80,000 shares, Shri Gopal Khadaria who was acting on behalf of M/s. Nathji Enterprises P. Ltd.,an associate concern of MFL, could not have applied for more than 11,80,000 shares being the size of the Public Issue. Since the application was for 60,00,000 shares, this was conveniently sub-divided in six multiple applications of 10,00,000 shares each. This act resulted in irregular allotment of MFL shares to its promoters.

Shri Gopal Khadaria resorted to financing of irregular subscription to the Public Issue of MFL, resulting in irregular allotments.

In his reply to the Show Cause Notice, Shri Gopal Khadaria stated that he had entered into a purely financial arrangement with M/s. Nathji Enterprises Pvt. Ltd., and M/s. Krishna Texport and Capital Market Ltd., to arrange finance for the Public Issue of MFL which was done by him at a spread of 2% as financing charges. He

stated that an agreement dated 30.9.95 was entered into with M/s. Nathji Enterprises Pvt. Ltd., who was introduced to him by Shri S. N. Daga of D.B.India Securities Ltd., for financing 60,00,000 equity shares in the Public Issue of MFL at interest of 26% p.a. He denied knowledge of the fact that M/s. Nathji Enterprises Pvt. Ltd., was an associate concern of MFL having common directors and operating from the same premises. Shri Gopal Khadaria entered into another agreement on 7.10.95 with KTCML for financial arrangement of 6 applications of 10,00,000 equity shares of Rs.10/- each at interest of 24% p.a. He stated that the applications were by 6 different parties and denied that these applications were multiple. It was for MFL to accept or reject the application. He stated that the shares were allotted to the applicants and not to him. He denied knowledge of the ulterior motive of M/s. Nathji Enterprises Pvt. Ltd. and management of MFL and stated that he was not a party to the irregular subscription and irregular allotment of MFL shares.

He denied the charges made out against him and contented that no directions u/s.11B of SEBI Act, 1992 read with Regulation 12 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 could be issued against him. He further stated that the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 were applicable w.e.f. 25.10.95 as notified by SEBI, whereas he had entered into an agreement with M/s. Nathji Enterprises Pvt. Ltd., and M/s. Krishna Texport and Capital Market Ltd. prior to this date.

Findings.

The purported agreement entered into by Shri Gopal Khadaria with M/s. Nathji Enterprises Pvt. Ltd., was neither dated nor signed and, therefore, has limited credibility. Shri Gopal Khadaria has not responded to the allegation that the delivery of 97,800 shares was not received by him but was taken directly by M/s.

Nathji Enterprises Pvt. Ltd. from MFL. This arrangement certainly could not have been possible without the knowledge and consent of Shri Gopal Khadaria.

Shri Gopal Khadaria has not denied his involvement in arranging finance for 6 applications for 60,00,000 shares in the Public Issue of MFL. The beneficial interest of Shri Gopal Khadaria or of M/s. Nathji Enterprises Pvt. Ltd., was not disclosed in these applications. Shri Gopal Khadaria provided finance for irregular subscription to the Public Issue of MFL leading to irregular allotments which facilitated artificially rise in the prices of MFL shares on the secondary market and thereby inducing the sale or purchase of shares by the investing public.

Even if the purported agreement were entered into by Shri Gopal Khadaria with M/s. Nathji Enterprises Pvt. Ltd., and M/s. Krishna Texport and Capital Market Ltd., prior to 25.10.95, the implementation the terms of agreements i.e. delivery of shares and payments/receipts of funds were effected subsequent to the notification of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 which would therefore be applicable.

I thus hold Shri Gopal Khadaria guilty of the charges levelled against him".

What the SEBI has stated about the Appellant in the order is also extracted below:

"I As per the investigation report, M/s. Krishna Texport & Capital Market Ltd., (KTCML) provided finance to Shri Gopal Khadaria for six multiple applications of 10 Lac shares of Rs.1.00 crore each to the Public Issue of MFL made in the names of its nominees. For this purpose, stockinvests of Rs.1 crore each were obtained from State Bank of Indore, Dadar (W) Mumbai, in the names of these

nominees against deposits of KTCML with the bank. The share applications were made in the names of KTCML nominees and allotments obtained. The beneficial ownership of these applications was not disclosed. The realisation proceeds of stockinvests against allotment of MFL shares were adjusted in the Current Account of KTCML and not in the bank accounts of the allottees.

By indulging in falsification of its books, accounts and records, KTCML resorted to financing of irregular and late subscriptions to the Public Issue of MFL, resulting in irregular allotments.

II In its reply, KTCML contended that it provided financial accommodation on interest to Shri Gopal Khadaria. All the stockinvests were taken against deposits of M/s. Krishna Texport and Capital Market Ltd., from State Bank of Indore, Dadar and after allotment the shares were handed over to Shri Gopal Khadaria. It was also stated that no shares were sold to any associate concerned of MFL directly by KTCML and that they had no knowledge of Shri Gopal Khadaria acting of behalf of any other person.

FINDINGS

KTCML has not responded to the query that the 6 applications financed by it in the names of its nominees were in fact multiple applications. During the personal hearing the representative of KTCML had acknowledged that the beneficial interest of Shri Gopal Khadaria was not disclosed in the applications. KTCML thus financed irregular subscriptions to the Public Issue of MFL, resulting in irregular allotments and their subsequent sale to the associate concerns of MFL. These irregular allotments thus facilitated an artificial rise in prices of MFL shares on the secondary market, thereby inducing the sale or purchase of shares by the investing public.

I thus hold Krishna Texport & Capital Market Ltd., guilty of charges levelled against them."

When the appeal was taken up for disposal, Shri D. J. Khabatta, learned Counsel appearing for the Appellant explained the background in which the Respondent SEBI had passed the order and stated that SEBI has ignored vital facts, that would show non involvement of the Appellant in the pre public issue and post public issue developments. He submitted that the Appellant's involvement in the matter is only as a professional financier, that it had advanced money in the normal course of its business to Shri Gopal Khadaria to earn interest after providing adequate safeguards, and it was in no way connected or associated with the promoters of MFL and not a party to the alleged manipulation in any manner. In this context he referred to the copy of the Agreement dated 7.10.1995 (the Agreement) entered into between the Appellant and Gopal Khadaria (Respondent No.2) and submitted that from the Scheme of the agreement it is clear that it is essentially a funding agreement and such agreements are normally entered into by financiers while advancing money to persons who seek funds for subscribing the shares offered in public issues, that it has been made clear in the Agreement that the BORROWER (i.e. Gopal Khadaria) was desirous of applying for 60 lakhs equity shares of Rs.10/- each for an amount of Rs.6 crores out of the public issue of MFL, that since he did not have liquidity to pay the application money he requested the INVESTOR (i.e. the Appellant) to provide him financial accommodation to the extent of Rs.6 crores to enable him to apply for the said shares and for the said financial accommodation, he agreed to pay interest at the rate of 24% per annum from the date of stockinvest to the date of allotment and also agreed to pay interest @ 30% p.a. from the date the stockinvest gets debited into the bank to the date of final payment made by him, that in the event of funds not refunded to the Appellant within seven days after intimation to take delivery of the shares, he was required to pay interest @ 36% p.a. In this context learned Counsel referred to clause (f) of the Agreement which stipulated that "To ensure repayment of Financial Accommodation BORROWER has offered to

pledge in favour of the INVESTOR the shares to be allotted by Manu Finlease Ltd. , and for this purpose has suggested that the INVESTOR apply for the said shares in own name or in the name of its nominees" Learned Counsel in support of his contention that the financial arrangement with Gopal Khadaria was a purely financial arrangement and nothing more than that, referred to the following terms and conditions of the Agreement dated 7.10.1995.

"1. The INVESTOR shall provide Financial Accommodation of Rs.6,00,00,000/- to BORROWER from the date of the Stock Invest till the receipt of Share Certificates on allotment.

2. In consideration of the INVESTOR providing the said Financial Accommodation to BORROWER, BORROWER shall pay to the INVESTOR interest at the rate mentioned in para (d) & para (e) on page no.2 (exclusive of the return on stock invest) for the said period.

3. On or before the earliest closing date the INVESTOR shall submit application for the said Equity Shares at the instance of BRROWER together with the application amounts agreed to be provided to BORROWER as Financial Public Issue of Manu Finlease Ltd.

4. In the event allotment of the Shares is not made or partly made by Manu Finlease Ltd. such moneys are refunded by Manu Finlease Ltd. to the INVESTOR shall be treated as repayment/part repayment of the Financial accommodation.

5. The Shares allotted by Manu Finlease Ltd. shall pledge to the INVESTOR by BORROWER to secure repayment of the above Financial accommodation.

6. BORROWER has agreed to repay to the INVESTOR the entire amount if for any reason, the allotment of Shares and/or refund of application money, as the case may be, is not effected by Manu Finlease Ltd. and / or the Registrar above,

BORROWER agrees that the entire amount of the financial assistance of Rs.6,00,00,000 (Rupees Six Crores Only) or such part thereof, as may be shall be repaid by them alongwith interest refund in clause '2' above to the INVESTOR.

7. BORROWER repaying the amount of Rs.6,00,00,000/- to the INVESTOR within the prescribed time set out in the preceding Clauses, the INVESTOR shall transfer/allow the Shares allotted to the INVESTOR be transferred to BORROWER pays the amount of Rs.6,00,00,000/- (Rupees Six Crores Only) to the INVESTOR there fore the allotment of shares and/or refund of application money is effected by the Registrars to the Issue, the INVESTOR agrees that the Allotment Letter /Share Certificates and / or Refund Warrant that may be received by them. Manu Finlease Ltd./ Registrar to the issue, will forthwith transferred by them to BORROWER, in the case of allotment of shares and in the case of refund, an amount equal to the amount refunded to the INVESTOR by Manu Finlease Ltd. / Registrar to the Issue will be paid over to BORROWER by way of cheque that will be issued in their favour. Stamp Duty payable on transfer of the shares to Manu Finlease Ltd. shall be borned in full by BORROWER.

8. In the event BORROWER fails to repay the amount due to the INVESTOR within 30 days after receiving intimation to collect the delivery, the investor shall be entitled to sell the shares that may be allotted to them by Manu Finlease Ltd./ Registrar to the Issue by private sale or Public auction after giving one week's notice in writing to appropriate the amount due to them (net of the refund received from Manu Finlease Ltd./ Registrars to the issue) inclusive of interest till that date and in case of any shortfall; the same shall be made good by BORROWER. Any surplus balance still remaining after the appropriation to the INVESTOR, shall be transferred back to BORROWER.

9. In the event that for any reason whatsoever, the amount of financial

accommodation is not refunded to the INVESTOR within seven days after intimation to take/ lift the delivery. BORROWER shall be liable to INVESTOR interest at the rate of 36% per annum.

10. BORROWER agrees and undertakes that until the loan and any other amount payable hereunder is repaid in full to the INVESTOR, BORROWER shall not apply for duplicate certificate of shares allotted by Manu Finlease Ltd pursuant to the Application made by the INVESTOR as contemplated therein.

11. All the dividends or profits accruing on bonus or right shares issued by Manu Finlease Ltd. on the shares allotted shall be appropriated to BORROWER under this agreement and the same shall be transferred to the BORROWER immediately.

12. Capital Gains, if any, accruing on sale of shares by the INVESTOR will be to the account of the BORROWER, being the beneficial owner."

Learned Counsel refuting the Respondent's contention that the Appellant knew of the arrangement between Gopal Khadaria and others, submitted that the Appellant was not at all aware of any such arrangements or intention of Shri Gopal Khadaria, and in fact that being not even a charge levelled against the Appellant in the show cause notice, the Respondent is now precluded from charging the Appellant on that ground. In this context learned Counsel referred to the show cause notice dated 6.2.1998 issued to the Appellant and submitted that, it was not a charge that the Appellant knowingly financed Gopal Khadaria to manipulate the market in concert with Nathaji Enterprises, that it is too late for SEBI to level such a charge in its reply affidavit. He referred to the following portion in the show cause notice dated 6.2.1998 in this regard:

"In terms of your agreement dated 7.10.95, you provided finance to Shri Gopal Khadaria for six multiple applications of Rs.1 crore each to the public issue of MFL made in the name of your nominees. For this purpose stockinvests of Rs.1 crore each were obtained from State Bank of Indore, Dadar (W), Mumbai in the name of your nominees against your deposits with the bank. The share applications were made in the names of your nominees and allotments obtained. The beneficial ownership of these applications was not disclosed. The realisation proceeds of stockinvests against allotment of MFL shares were adjusted in your current Account and not in the bank accounts of the allottees.

Since the applications were made on behalf of Shri Gopal Khadaria, a single application for 60 lakh shares should have been made instead of six multiple applications of 10 lakh shares each. As the net offer to the public in this ca se was for 11,80,000 shares, Shri Gopal Khadaria who was acting on behalf of Nathji Enterprises P. Ltd., an associate concern of MFL, could not have applied for more than 11,80,000 shares being the size of the public issue. Since the application was for 60,00,000 shares, this was conveniently sub divided in six multiple applications of 10,00,000 shares each. This act resulted in irregular allotment of MFL shares to its promoters.

It appears that you have thus indulged in 'fraudulent' act, as defined in regulation 2(1) (c) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995, specifically prohibited under regulation 3. You resorted to financing of irregular subscriptions to the public issue of MGL. These irregular allotments thus facilitated an artificial rise in the price of MFL shares on the secondary market, thereby inducing the sale or purchase of shares by the investing public. These acts are "market manipulation" and "unfair trade practices" specifically prohibited under regulation 4 and 6 of SEBI(Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 respectively."

It is in the said background the Appellant was asked to show cause as to why a direction under section 11B of the SEBI Act read with regulation 12 of the FUTP Regulations should not be issued against it.

Shri Khambatta submitted that from the sequence of events also it is clear that the Appellant had only provided financial accommodation in return for interest, that the funding Agreement was executed on 7.10.1995, that the MFL's Public Issue remained open during the period 14.10.1995 to 18.10.1995, that the Appellant made applications on 18.10.1995, that the applications were made in the name of six persons (nominees) as instructed by the Borrower, that even though 10,00,000 shares were applied for by each nominee applicant, only 16,300 shares were allotted to each one totaling 97,800 shares, and the purchase consideration for the same was only Rs.9,78,000/-, that this amount was debited to the current account of the Appellant for the reason that the Appellant had instructed the State Bank of Indore to debit the aforesaid amount to the current account as otherwise the State Bank of Indore, as per its practice would have broken up the fixed deposit of Rs.6 crores against which the stockinvests were issued, and that would have resulted in loss of interest on the said fixed deposit to the Appellant. He submitted that as soon as the shares were allotted the same were handed over to Gopal Khadaria with blank transfer forms on 27.12.1995 and in the transaction the Appellant received Rs.25,64,383 by way of interest. In this context he referred to the copy of the accounts statements of the Appellant furnished to SEBI vide letter dated 23.10.1996 filed along with the appeal, which clearly indicated that stockinvests for Rs.9,78,000 were debited to the Appellant's account on 27.12.1995, that in the said letter the names of the nominee Applicants and the details of the stockinvests furnished to MFL were also stated.

Learned Counsel submitted that the adjudicating authority has passed the impugned order going beyond the scope of the show cause notice and therefore the order is bad and deserves to be set aside. In this context he referred to the show cause notice dated 6.2.1998 and submitted that the only charge against the Appellant is that it made 6 multiple applications and the same resulted in irregular allotment. He submitted that it is not a charge against the Appellant that it acted in connivance with any other person, or that it acted with an intention to defraud anybody or that it indulged in falsification of the records. He submitted that the Respondent has referred to only one document in the show cause notice based on which the charges were levelled and that document is the Agreement dated 7.10.1995 entered into between the Appellant and Shri Gopal Khadaria and no other material or document has been referred to and provided to the Appellant. Therefore the Respondent is precluded from relying on any other document/material while adjudicating the show cause notice or defending its order under challenge in the appeal proceedings. He submitted that the Respondent in its reply has referred to an unsigned draft agreement dated 30.9.95 between Gopal Khadaria and M/s. Nathji Enterprises, stated to have been given by Gopal Khadaria vide his letter dated 18.11.1996 allegedly showing that both the parties had reached an understanding that Shri Gopal Khadaria would arrange finance/share applications for 60 lakh shares on behalf of Nathji Enterprises in the public issue, that the said letter and the agreement though were in the possession of the Respondent in the year 1996 no reference to the same was made in the show cause notice and a copy of the same was never made available to the Appellant. Learned Counsel submitted that in the context of the limited charge levelled against the Appellant it had answered only the said charge in its reply dated 18.2.1998 and referred to the same filed with the appeal that:

> "we reiterate that this was purely a financial accommodation given on interest to Shri Gopal Khadaria. All the Stock Invests were taken against the deposits of the company from the State Bank of Indore, Dadar. On allotment all the shares were handed over to Mr. Gopal Khadaria on whose behalf we applied in the public issue of MFL and not a

single share was sold to any associate concern of MFL directly by us. We have earned only interest income of Rs.25,64,383 which is duly accounted in the book.

We wish to particularly emphasise that we were neither a party to nor even aware of Shri Gopal Khadaria acting on behalf of any one else and we therefore pray that the proposal for issue of any direction U/S.11B of SEBI Act, 1992 read with regulation 12 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 may kindly be dropped."

Shri Khambatta referred to the Respondent's observation in the order based on its investigation that the Prospectus had banned making multiple applications and the consequence of multiple applications was also mentioned therein that "the multiple applications are liable to be rejected." According to the Respondent:

"State Bank of Indore Dadar(W) Mumbai issued 6 stock invests 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 Market Ltd., (hereinafter referred to as KTCML) In terms of an agreement dated 7.10.1995, KTCML provided these stock invests with each application for 10 lakh 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 should have been made instead of 6 multiple application of 10 lac each, which were liable for rejection being multiple applications.

As per the prospectus of MFL, 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 rejection. Thus multiple share applications made by KTCM L 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 an associate concern of MFL. Shri Gopal Khadaria was introduced by M/s. DB India Securities to the MFL for the purpose of financing the public issue of MFL"

Learned Counsel submitted that the Respondent itself has admitted that the multiple applications though should have been rejected, were entertained and irregular allotments were made. The Respondent has ignored the fact that the allotments were made by MFL and not the Appellant and for making irregular allotment MFL is to be held liable and not the Appellant.

Learned Counsel submitted that the Appellant was not aware of the transactions effected by Gopal Khadaria after the Appellant delivered the shares to him and that Shri Khadaria was not an agent or associate of the Appellant, that the relationship between the Appellant and Shri Khadaria was purely commercial and on compliance of the terms and conditions of the Agreement there was nothing left for the Appellant to follow up and the Agreement ceased to operate.

Learned Counsel submitted that SEBI in its order having come to the conclusion that the Appellant made multiple applications and having admitted that the share applications were made in the names of the Appellant's nominees has gone to the extent of accusing the Appellant "for the realisation of proceeds of stocks invests against allotment of MFL shares adjusted in the current account of the Appellant and not in the bank accounts of the allottees" ignoring the fact that those allottees were the nominees of the Appellant itself and that shares would be in the possession of the Appellant till such time Shri Gopal Khadaria returned the

money paid against those shares. He submitted that the transaction was done by debiting in the Appellant's current account itself, for the simple reason to avoid unnecessary loss to the Appellant as otherwise the fixed deposit of Rupees six crores against which stock invests were issued would have been broken for the purpose of realisation of such small amount, causing heavy loss by way of interest.

Learned Counsel reiterated that only charge made against it is making multiple applications and for making the multiple applications the consequence stated in the prospectus was to visit the person. In this connection he referred to the following paragraph in the Prospectus on multiple application, under the para with the heading"Multiple Applications liable for rejection" that "An applicant should submit only one application form (and not more than one) under any of the categories of the total number of Equity shares required. Two or more applications in single or joint names will be deemed to be multiple applications, if the sole and/or the first applicant is one and the same. The Board reserves the right to reject in its absolute discretion all or any of the multiple applications." He submitted that thus it was for the Board of the company to decide as to whether the multiple applications should be rejected or not and certainly not a matter attracting the provisions of FUTP Regulations.

Learned Counsel submitted that the charge against the Appellant is that it indulged in market manipulation attracting action under the FUTP Regulations, that this charge can not stick as the FUTP Regulations came into force only on 25.10.1995 whereas the cause of the alleged action relates to a period before the notification of the FUTP Regulations in as much as the Agreement between the Appellant and Gopal Khadaria was executed on 7.10.1995, that the MFL's public issue was opened on 14.10.1995 and closed on 18.10.1995 and the Appellant had made applications through nominees on 18.10.1995 and thereafter there was no action from the Appellant's side. Learned Counsel submitted that since show cause notice itself refers

to violation of FUTP Regulations, the Respondent can not invoke the provisions of section 11 for the violation of a non existent Regulation at the point of time. He further submitted that even if it is assumed for argument sake that the FUTP Regulations attracted to the facts of the case, still the alleged action is not one prohibited under regulations 3,4,5 or 6 of the FUTP Regulations. He submitted that according to regulation 3, no person shall buy, sell or otherwise deal in securities in a fraudulent manner. It is not the Respondent's case that the Appellant had indulged in buying or selling or otherwise dealing in securities in a fraudulent manner, that the charge is making multiple applications. He referred to the ingredients of regulation 4 and submitted that making multiple applications in a public issue does not fit in any of the sub clauses of the regulation to consider that the Appellant indulged in market manipulation attracting the said regulation. Since the Appellant had not made any misleading statement to induce sale or purchase of securities regulation 5 has also no application. He also referred to the provisions of clauses 6(a) to (e) of the FUTP Regulations and submitted that none of the provisions attracted. However, in the light of the allegation of "fraud" levelled in the order, learned Counsel referred to regulation 6(a) and submitted that as per the said clause (a) "no person shall in the course of his business, knowingly engage in any act or practice which would operate as a fraud upon any person in connection with the purchase or sale or any other dealing in securities." Learned Counsel submitted that regulation 6(a) attracts only if a person in the course of his business knowingly engage in any act or practice which would operate as fraud, that the intention of the party in this regard is thus an important factor for the purpose of regulation 6(a). He submitted that in this context the definition of the expression "fraud" in the regulation need also be looked into, that the ingredients of 'fraud' includes 'intent to deceive another' and the show cause notice does not attribute any such 'intention to deceive' on the part of the Appellant. He further submitted that even if it is assumed that there is allegation of fraud against the Appellant, the Respondent cannot simply make the allegations and get away with it without producing adequate evidence in support of the charge. In this context he referred to the observation made by the Hon'ble Supreme Court in Barium Chemicals Ltd. V Company Law Board (AIR 1967 SC 295) that mere repetition of the provision of the law is not adequate when

the charge is alleged, that the material based on which such charge is levelled need be disclosed in the notice. He submitted that when fraud is alleged test of evidence is strict and surmises and conjunctures are not adequate. In support of the contention that sufficient proof is required when fraud is alleged, learned Counsel referred to the observation made by Privy Council in Hansraj Gupta V Dehra Dun Mussoorie Electric Tramway Ltd. (AIR 1940 Privy Council 98) that "the party alleging fraud is bound to establish it by cogent evidence and suspicion can not be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they can not be accepted as affording sufficient proof of fraud." He submitted that SEBI except making wild allegation has not put forward any convincing evidence to establish the charge of fraud. Learned Counsel submitted that if making multiple application is fraud, then every person making such application would be considered as fraudster, and that would really be a mockery, that the Respondent has not stated as to how making multiple application would amount to fraud in terms of regulation 2 (1) (c) of the FUTP Regulations and in the absence of any explanation in this regard the Appellant is not in a position to meet the said charge. In this context he referred to the observation made by the Hon'ble Supreme Court in B.D. Gupta V State of Haryana (1973) 3 SCC 149) that a show cause notice not giving the noticee the real opportunity to defend himself against the charge is not an adequate show cause notice and based on such a show cause if any action is taken the order taking such action is bad and liable to be struck down. He submitted that the said ratio is in equal force applicable to the Appellant's case and the order passed by the Respondent deserves to be set aside because of the inadequate show cause notice. Learned Counsel also cited Hon'ble Supreme Court's decision in Tarlochan Dev Sharma V State of Punjab (2001) 6 SCC 260) to buttress his argument that an order passed at variance from the show cause notice of which noticee was not even made aware of, is untenable.

Shri Khambatta referred to the reply filed by the Respondent and submitted that through

the said reply the Respondent is making an attempt to bring in new charges and material which is not permissible, that the purpose of filing reply in an appeal proceeding is not to supplant the order which is under challenge and as such the additional charges or material being smuggled in now by SEBI through its reply be discarded.

Learned Counsel submitted that the Respondent has issued the directions under section 11B of the SEBI Act and regulation 12 of the FUTP Regulations. He submitted that the scope of the directions which can be issued under regulation 12 is circumscribed by the Regulation itself in clause (a) to (d) under the said regulation that: (a) directing the person concerned not to deal in securities in any 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 from disposing of any of the securities acquired in contravention of the FUTP Regulations and (d) directing the person concerned to dispose of any such securities acquired in contravention of the FUTP Regulations in such manner as the Board may deem fit for restoring the status quo. Learned Counsel submitted that the direction debarring the Appellant "from accessing and being associated with the capital market" for a period of five years is not a direction contemplated under regulation 12. Learned Counsel further submitted that section 11B is also not available to issue such a direction as the impugned order is out and out punitive and section 11B is not available to issue such punitive directions has been made clear by this Tribunal in its order in Sterlite Industries Ltd. V SEBI ((2001) 34 SCL 485) that 'Section 11B does not even remotely empower the Respondent to impose penalties' that the Tribunal has been consistently following the said view in other cases also, and he also cited BPL Ltd., V SEBI ((2002) 38 SCL 310) in support thereof.

Learned Counsel submitted that penalty is not imposable in a case where the offence was not committed in willful disobedience of law and that the Appellant had not committed any

offence willfully in disobedience of the law and as such did not deserve any penalty. In support of the same, learned Counsel cited the decision of the Hon'ble Supreme Court in Hindustan Steel Ltd. V State of Orissa 1969 (2) SCC 627) that "an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation." Learned Counsel submitted that this Tribunal had followed the principles laid down by the Hon'ble Supreme Court in Hindustan Steel case in several cases including Kensington Investment Ltd., V SEBI ((2002) 40 SCL 170 (Sat)).

Shri Khambatta submitted that the impugned order having been issued after an undue delay of 7 years is bad and deserves to be set aside. In this context he cited the observation made by the Hon'ble Bombay High Court in Universal Agencies P. Ltd. V Union of India (1993 (68) ELT 27 (Bom)) holding that imposition of penalty, if at all, after a lapse of ten years is not just and fair and on that ground the belated adjudication order was set aside. He also referred to the observation made by the Hon'ble Supreme Court in Collector of Central Excise V Raghuvir (India) Ltd. (2000)5 SCC 299 that "Any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of the period stipulated has the consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed therefor. It is not for the courts to import any specific period of limitation by implication, where there is really none, though courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period." Learned Counsel submitted that the impugned order dated 29.11.2002 relates to an action allegedly taken in October, 1995, i.e. after a delay of more than 7 years, and the Respondent has not explained the delay. He submitted that in any case the delay was not on account of the Appellant.

Learned Counsel submitted that the impugned order is not to be sustained on any count.

Shri Kumar Desai appearing for the Respondent submitted that there is a procedural defect in the appeal. Shri Gopal Khadaria has been arrayed as a Respondent in the present appeal for no reason and his name be deleted.

Shri Desai countering the Appellant's contention that FUTP Regulation has no application to the case, submitted that there is a chain of action from the signing of the Agreement on 7.10.1995 to the handing over of the share certificates on receipt of allotment to Shri Gopal Khadaria on 27.12.1995 and the chain of action did not stop with the submission of application for shares on 18.10.95 but reached atleast upto 27.12.95, if not thereafter. He submitted that the Appellant's contention that since the FUTP Regulation was notified on 25.10.95, the alleged charges are beyond the jurisdiction of the said Regulation is therefore untenable.

Shri Desai submitted that the Appellant's version that it was unaware of the design of Shri Gopal Khadaria to manipulate the market in concert with others is baseless as could be seen from the fact that the Appellant had agreed to advance Rs.6 crores to Shri Khadaria, having even stated by him that at that time he had no liquidity to pay the application money and further that by way of security for such huge amount the Appellant agreed to take only the shares which were expected to be allotted to Shri Khadaria. He further submitted that the Appellant was not unaware of the fact that the number of shares offered to the public was only 11,80,000 and still it decided to make six applications, each seeking 10 lakh shares i.e. 60 lakh

shares against the total number of 11,80,000 shares offered to the public. He submitted that obviously the intention of the Appellant was to give an impression to the gullible investors that the Public Issue of the company was oversubscribed by several times so as to lure the investors to buy the shares from the promoters in the secondary market. The Appellant being an experienced financier can not be unaware of the game plan Shri Khadaria and others had designed and it can not now claim that it was unaware of the same. He submitted that the Appellant has not explained as to why 6 applications were made instead of one, if it was that ignorant of the design of Shri Gopal Khadaria. Learned Counsel submitted that 6 applications were made only to show that the applicants were independent and that the fact as to who is the beneficial owner was deliberately suppressed in the application, so that each application would be treated separately and allotment is made to each one of them, that those multiple applications resulted in irregular allotment adversely affecting the interest of the genuine investors. Shri Desai further submitted that according to the Appellant applications were given for shares on 18.10.1995 along with stockinvests and the funding agreement was executed on 7.10.1995 i.e. 10 days before the agreement. In this context he submitted that the details of the applicants and stockinvests are found in the Agreement which raises doubt as to the authenticity of the execution of the agreement itself on 7.10.95, and that in any case this also raises doubt on the bonafide of the transaction. In this context he referred to the letter dated 23.10.1996 of the Appellant forming part of the appeal papers.

Shri Desai submitted that from the Appellant's letter dated 23.10.1996 to SEBI it is also clear that the Appellant received its interest money even before the share allotment was made.

Shri Desai submitted that the impugned order is well within the scope of the show cause notice and not outside the purview of the notice as has been alleged. In this connection he referred to the show cause notice and submitted that the charge against the Appellant is that it indulged in 'fraudulent act' specifically provided under regulation 3 of the FUTP Regulations

and that reference to the fact that the Appellant made multiple applications in the nominees' names without disclosing the name of the beneficiary owner and the realisation proceeds of the stock invests were adjusted in the current account of the Appellant and not in the bank accounts of the allottees etc. are made in support of the charge. Shri Desai submitted that the very fact of making 6 applications on behalf of Shri Gopal Khadaria, instead of making one application itself is indicative of the fact that the Appellant was fully aware of the game plan to manipulate the market and that it was an active party to the fraudulent action designed to manipulate the market. He submitted that the 6 applications were made to pre empt allotment of shares to that extent to the public, so as to enable the promoters to grab the shares, that but for such multiple application, those shares would have gone to the other genuine applicants. In the said context the Appellant who made such applications can not claim ignorance and innocence stating that its role was only that of financier. Shri Desai submitted that fraud is implicit when the charge is that the Appellant was a party to the irregular allotment. Shri Desai submitted that the evidence has not been brought on record to show that the Appellant directly knew Nathji Enterprises. But in the totality of the facts and circumstances and the manner in which payment was made and received and by making multiple applications etc. it is evident that the Appellant was also a party to the fraudulent activities indulged in by Shri Gopal Khadaria with the promoters and associates of MFL.

Learned Counsel submitted that in the impugned order the Respondent has clearly stated the role of the Appellant along with few others in arranging irregular subscription toward the Public Issue of MFL resulting in irregular allotment, that the irregular allotment facilitated in artificial rise in price of MFL shares on the secondary market, thereby inducing sale or purchase of shares by the investing public and the action of the Appellant accordingly is fraud in terms of regulation 2(1) (c) of the FUTP Regulations. He submitted that financing an irregular issue is a fraudulent action.

Shri Desai submitted that the charges having been proved categorically, logically the consequences should follow. It is in the said context the impugned directions were issued and the Respondent is competent in terms of section 11B read with regulation 12 of the FUTP Regulations to issue corrective and remedial measure. He submitted that the impugned direction is not a punitive order but an order to prevent such activities by the persons involved, that the objective behind the direction is to disable the Appellant from repeating such unfair activities for some time atleast. Learned Counsel submitted that the Tribunal in Sterlite case (supra) has not held that the Respondent is not empowered to take remedial or preventive measures, that in fact the Tribunal has accepted that under section 11B preventive and remedial measures can be taken. Shri Desai submitted that the Tribunal in Anand Rathi V SEBI ((2002) 35 SCL 1) has held that direction which is relatable to the conduct of the accused, can be issued under section 11B of the Act, that in the instant case such nexus has been established. With reference to the Appellant's reliance on Hindustan Steel case (supra) learned Counsel submitted that the Appellant's case is different from the facts in the said Hindustan Steel's case, that it has been demonstrated in the present case that the Appellant had willfully and intentionally acted to defraud the investors. According to Shri Desai the Appellant's contention that since the impugned order was issued after a delay of 7 years and therefore in the light of the Hon'ble Bombay High Court's observation in Universal Agencies (supra) and the Hon'ble Supreme Court in Collector of Central Excise (supra) no action is called for now, is baseless for the reason that investigation of market manipulation is a time taking process requiring collection of evidence and the Respondent had not delayed the investigation intentionally and as a result of the delay, even if there is such delay, the Appellant has not in any way suffered.

Shri Desai submitted that Barium Chemical's case cited by the Appellant is not relevant to the present case, as it was in the case of an investigation ordered by Company Law Board

under section 237 of the Companies Act, and the said section requires, the competent authority before ordering an investigation to satisfy that there were circumstances, as stated in the section, warranting such an investigation, that there is no such pre requisite under the SEBI Act. He further submitted that the observation made by the Privy Council in Hansraj Gupta on the test of evidence in cases alleging fraud has been fully satisfied in the present case. He further submitted that the Hon'ble Supreme Court's decision in B D Gupta's case relied on by the Appellant in support of the contention that the show cause notice is inadequate, Shri Desai submitted that it was a case relating to the notice sent to a labourer, a lay man, but that is not the case of the Appellant which is a professional with adequate expertise available at its command and it was in a position to understand the charges clearly. He submitted that the show cause notice issued to the Appellant is self explanatory and the impugned order has not strayed away from the said notice and therefore Trilochan Dev Sharma's case relied on by the Appellant has also no application to the case. He submitted that the Appellant's contention that SEBI is attempting to improve its case through its reply is baseless as in the reply SEBI has only evaluated the material information already known to the Appellant.

According to the learned Counsel the findings in the impugned order are based on facts and the directions issued being preventive, well within the powers of the Respondent the order deserves to be sustained.

I have carefully considered the rival contentions and the material on record. The core charge against the Appellant as per the show cause notice dated 6.2.1998 is that it "indulged in fraudulent act" as defined in regulation 2 (1) (c) of the FUTP Regulations. This charge is based on the Respondent's finding that the Appellant "resorted to financing of irregular subscriptions to the public issue of MFL, resulting in irregular allotments and their subsequent sale to the associate concerns of MFL." According to the Respondent these irregular

allotments "facilitated an artificial rise in the prices of MFL shares on the secondary market, thereby inducing the sale or purchase of shares by investing public" and "these acts are market manipulations" and "unfair trade practices" specifically prohibited under regulation 4 and 6 of the FUTP Regulations respectively. The root cause of the irregular allotment according to the Respondent is the Appellant making six separate applications -- multiple applications - each seeking 10 lakh shares, totaling 60 lakh shares, as against 11,80,000 shares offered to the public by MFL. According to the Respondent , "on listing MFL share opened at Rs.48/- (as against the issue price of Rs.10/-) on 2.1.1996 and moved to Rs.70 on 26.3.1996 at Delhi Stock Exchange (DSE) and receded to Rs.54/- on 3.6.1996. The major buying in the scrip at DSE was by DBISL (i.e. DB (India) Securities Ltd.,) on behalf of M/s. Glory Securities Ltd., an associate concern of MFL and 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." (emphasis supplied). Thus the Respondent has clearly identified the persons responsible for causing artificial price movement in the scrip of MFL.

The order deals with the role of several players. Appellant is one among them. The Appellant has not been identified as having bought shares causing unusual price movement in the scrip. The charge against the Appellant is confined to financing irregular applications resulting in irregular allotment which resulted in market manipulation. What the Respondent has stated about the Appellant's role in the process need be examined in this context . This is what the Respondent has stated in the impugned order:

I As per the investigation report, M/s. Krishna Texport & Capital Market Ltd., (KTCML) provided finance to Shri Gopal Khadaria for six multiple applications of 10 lac shares of Rs.1.00 crore each to the Public Issue of MFL made in the names of its nominees. For this purpose, stockinvests of Rs.1 crore each were

obtained from State Bank of Indore, Dadar (W) Mumbai in the names of these nominees against deposits of KTCML with the bank. The share applications were made in the names of KTCML nominees and allotments obtained. The beneficial ownership of these applications was not disclosed. The realisation proceeds of stockinvests against allotment of MFL shares were adjusted in the Current Account of KTCML and not in the bank accounts of the allottees.

By indulging in falsification of its books, accounts and records, KTCML resorted to financing of irregular and late subscriptions to the Public Issue of MFL, resulting in irregular allotments.

II In its reply, KTCML contended that it provided financial accommodation on interest to Shri Gopal Khadaria. All the stockinvests were taken against deposits of M/s. Krishna Texport and Capital Market Ltd., from State Bank of Indore, Dadar and after allotment the shares were handed over to Shri Gopal Khadaria. It was also stated that no shares were sold to any associate concern of MFL directly by KTCML and that they had no knowledge of Shri Gopal Khadaria acting on behalf of any other person". (emphasis supplied)

In the said context the Respondent has stated that:

"KTCML has not responded to the query that the 6 applications financed by it in the names of its nominees were in fact multiple applications. During the personal hearing the representative of KTCML had acknowledged that the beneficial interest of Shri Gopal Khadaria was not disclosed in the applications. KTCML thus financed irregular subscriptions to the Public Issue of MFL, resulting in irregular allotments and their subsequent sale to the associate concerns of MFL. These irregular allotments thus facilitated an artificial rise in prices of MFL shares on the secondary market, thereby inducing the sale or purchase of shares by the investing public." (emphasis supplied)

It is on the basis stated above, the Respondent found the Appellant guilty of violating the provisions of regulations 4 and 6 of the FUTP Regulations. It is not in dispute that the Appellant had made 6 applications through its nominees for a total of 60 lac shares of MFL. There is no charge against the Appellant about any manipulation in obtaining the stock invest etc. as has been alleged in the order against some others. Stock Invests were obtained from State Bank of Indore, Dadar (Mumbai) against the fixed deposit of Rs.6 crores remaining with the said bank in the name of the Appellant.

It is to be noted that as per the order it was the irregular allotment which facilitated artificial rise in price of MFL shares. Thus the artificial rise in the price of the scrip is now attributed to the irregular allotment of shares. In this context it is to be noted that the Respondent in the same order has attributed the cause for unusual price movement to large buying in the scrip at DSE for Glory Securities. It is to be noted that the shares are actually allotted by the issuer companies following certain procedures as per the advice of the allotment committee representing various interests. The share applications received in response to the public issue are processed by the Registrar to Issue and the Registrar is also supposed to act diligently while processing the applications. It is not that the issuer company has no responsibility in the matter. It is also equally responsible to ensure that the allotments are made in the proper manner.

It is to be noted that making multiple applications is not an offence. In fact the consequences of making fictitious applications have been indicated in the Prospectus itself by clearly stating that the multiple applications are liable to be rejected. In this context it is to be noted that submitting multiple applications are different from submitting applications in fictitious names for subscription. Section 68A of the Companies Act 1956 provides penalty by way of imprisonment upto 5 years to those persons who make applications in fictitious names. No penalty has been provided in the Companies Act for making multiple applications, as it is not an offence under the said Act.

It is an admitted fact that one of the business activities of the Appellant is that of financing. The Appellant has claimed that it is a professional financier. It advances money against high rate of interest. In the instant case also it had done the same thing. It agreed to provide financial accommodation to the tune of Rs.6 crores to Gopal Khadaria against 24% interest per annum. In this context the Agreement dated 7.10.1995 entered into between the Appellant and the said Gopal Khadaria assumes relevance. It is to be noted that whether the terms and conditions of the agreement was adequate or not or that security offered by the borrower was adequate to cover the risk involved etc. are not matters of concern to others. Risk coverage is the concern of the lender. It is for the lender to protect his interest. If he fails to exercise requisite diligence, then he is the person to face the consequences. On a perusal of the Agreement dated 7.10.1995 I find that Shri Gopal Khadaria had stated the reason for seeeking financial accommodation from the Appellant. He had no choice but to state the reason that the rest of the structure of the agreement from the angle of security against the loan provided therein is linked to the shares which he was planning to purchase. It is true that the Appellant has advanced application money to the extent of Rs.6 crores through stock invests to subscribe for 60 lakh shares, though the net public offer was only for 11,80,000 shares. The Respondent has taken this as a major point to establish the role of the Appellant in the alleged market manipulation. In this context it is to be noted that the Appellant is a financier. It's goal is to maximise its profit. By giving large sum for short duration by way of advances, its gain through interest collection increases. The financier as such is not normally expected to exercise any control on the number of shares one proposes to purchase in a public issue for which financial accommodation is availed from the financier. The Appellant, in my view, undoubtedly knew the total number of shares offered to the public by MFL and also that Shri Gopal Khadaria was applying for more shares than the total quantity of shares offered to the public. It is to be noted that the Appellant was acting as financier for maximising his profit and not as a counsellor to the borrower. The Appellant had agreed to give financial accommodation

upto a sum of Rs.6 crores and it had put safe guards considered necessary to protect its interests. In that context how the said Rs.6 crores was to be utilised was a matter for the borrower to decide. Borrower desired to make 6 applications., The Appellant made six applications in the name of the nominees of the Appellant. It was necessary to apply in the name of nominees of the Appellant to protect its interest as the shares to be allotted was to be kept with the Appellant as security. On receipt of shares and receiving the interest on the entire Rs.6 crores from Shri Gopal Khadaria, the Appellant handed over the shares to Shri Gopal Khadaria and with that the Agreement ceased to be operative. In this context it is to be noted that the Appellant handed over the shares to Shri Gopal Khadaria. It did not trade in those shares. It acted as per the terms of the agreement. It is also to be noted that against 60 lakh shares applied for, the Appellant's nominees received only 97,800 shares which accounted only for 8.28% of the net shares issued to the public. The percentage is still less at 4.65% if the total public issue of 21,00,000 shares is taken as the base. There is nothing on record to show the Appellant's involvement after the closure of the transactions covered in the Agreement dated 7.10.1995.

The Respondent has not brought any evidence on record to show that the Appellant was aware of the design of Shri Khadaria and Nathji Enterprises as alleged. There is nothing on record to show that the Appellant was aware of what transpired between Shri Khadaria and Nathji Enterprises. In fact the Respondent had gone on record by saying that "the purported agreement entered into by Shri Gopal Khadaria with M/s. Nathji Enterprises P. Ltd. was neither dated nor signed and therefore has limited credibility." As the said document is not acceptable even to nail Shri Gopal Khadaria, certainly it can't be used to book the Appellant. In this case it is also to be noted that existence of such an unsigned agreement was never brought to the notice of the Appellant, during the enquiry proceedings. It is not known as to whether the statement of Shri Gopal Khadaria was ever recorded. In any case no such statement is on record.

In the absence of any evidence to show that the Appellant also knew the alleged designs of Shri Khadaria and the promoters of MFL and intentionally participated in the market manipulation and further in the context of the Respondent's failure to establish the Appellant's nexus, if any, with the post allotment market manipulation allegedly indulged in by others, the Appellant can not be held guilty of violating regulations 4 and 6 of the FUTP Regulations. The evidence on record shows that the Appellant provided financial accommodation to Shri Khadaria to subscribe for the shares offered in the public issue made by MFL and Rs2564383 by way of interest. It is a legitimate business activity per se. It appears, in the absence of any other evidence to show the contrary, that the Appellant's interest was limited to the extent of making gain out of the transaction and it succeeded in achieving the said goal on receiving the promised interest.

The Respondent has alleged that the Appellant had violated the provisions of regulations 4 and 6 of the FUTP Regulations. These regulations are as under:

Regulation - 4

No person shall –

(a) effect, take part in, or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities, and thereby inducing the sale or purchase of securities by any person;

(b) indulge in any act, which is calculated to create a false or misleading

appearance of trading on the securities market;

(c) indulge in any act, which results in reflection of prices of securities based on transactions that are not genuine trade transactions;

(d) enter into a purchase or sale of any securities, not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the market price of securities;

(e) pay, offer or agree to pay or offer, directly or indirectly, to any person any money or money's worth for inducing another person to purchase or sell any security with the sole object of inflating, depressing, or causing fluctuation in the market price of securities." (emphasis supplied).

Regulation - 6

No person shall –

(a) in the course of his business, knowingly engaged in any act, or practice which would operate as a fraud upon any person in connection with the purchase or sale of, or any other dealing in, any securities;

(b) on his own behalf or on behalf of any person, knowingly buy, sell or otherwise deal in securities, pending the execution of any order of his client relating to the same security for purchase, sale or other dealings in respect of securities.

Nothing contained in this clause shall apply where according to the clients instruction, the transaction for the client is to be effected only under specified conditions or in specified circumstances;

(c) intentionally and in contravention of any law for the time being in force

delays the transfer of securities in the name of the transferee or the despatch of securities or connected documents to any transferee;

(d) (d) indulge in falsification of the books, accounts and records (whether maintained manually or in computer or in any other form);

(e) when acting as an agent, execute a transaction with a client at a price other than the price at which the transaction was executed by him, whether on a stock exchange or otherwise, or at a price other than the price at which it was set off against the transaction of another client. (emphasis supplied)

The expression "fraud" has been defined in regulation 2(1)(c) as under:

(c) "fraud" includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

(1) the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent; and "fraudulent" shall be construed accordingly.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that regard being had to them , it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech;

I have carefully considered the Respondent's submissions on the charge that the Appellant had violated the provisions of regulation 4 and 6 in the light of the provisions of FUTP Regulations. But I do not find any material on record in support of the said charge. A wild allegation of market manipulation, in particular the charge of fraudulent action unsupported with convincing evidence is not to be sustained. I fully agree with Shri Khambatta's submission in this regard that allegation of 'fraud' can not survive on mere conjectures and surmises. "Financing irregular subscriptions resulting in irregular allotment" by itself can not be considered as fraud and in violation of regulation 4 or 6 of the FUTP Regulations. If somebody unconnected with the financier, who had only borrowed money from the financier to subscribe for the shares in a public issue, subsequently makes use of the shares received in an irregular allotment, to manipulate the market, on that ground alone in the absence of any positive evidence against the financier that he had intentionally made available finances so as to enable the other person to manipulate the market, the financier can not be held guilty of market manipulation. Real nexus of the financier – directly or indirectly - with the market manipulation has to be established to hold the financier guilty. In my view the Respondent has failed to establish violation of the provisions of FUTP Regulations as stated in the show cause notice against the Appellant. Therefore the impugned order can not be sustained.

"By indulging in falsification of its books, accounts and records KTCML resorted to financing of irregular and late subscriptions to the Public Issue of MFL" is not a charge the

Appellant was asked to answer in the show cause notice and the Respondent therefore cannot adjudicate such a charge and pass an order thereon. In any case the said charge is also found unsupported with any convincing evidence. The Appellant has explained the reason for debiting the payment consideration of the shares into its account. Since the application was made by its nominees and the shares were allotted to the nominee applicants, I do not consider that taking debit of the purchase consideration in the Appellant's current account as falsification of account.

The Appellant's argument that since they had executed the agreement on 7.10.1995 and application for shares was made on 18.10.1995 and that since the FUTP Regulations came thereafter on 25.10.1995, FUTP Regulations has no application is baseless. As Shri Kumar Desai rightly pointed out, though the Appellant executed the agreemnt on 7.10.1995 to provide financial accommodation to Shri Khadaria, it was not over by 18.10.1995 by applying for shares. The activities did not come to an end on 18.10.1995. The transaction was over only on 27.12.1995 i.e. the date on which the Appellant received the allotment and handed over the shares to Shri Khadaria. Since it was an ongoing matter partly covered in the post FUTP notification period, in my view the Appellant's version that the said Regulations has no application to the case is not tenable. The Appellant's submission that the alleged action relates to the year 1995 and as such an order relating to the same issued in the year 2002 is not tenable, is baseless as the investigations involving market manipulations may in certain cases take considerable time.

Since the Respondent has failed to substantiate the charge against the Appellant, the question of issuing any direction by the Respondent to the Appellant based on the finding that the Appellant has violated the FUTP Regulations does not arise. Therefore, I do not consider it necessary to go into the sustainability of the impugned directions.

For the reasons stated above, the impugned order, to the extent it applies to the Appellant, is set aside and the appeal is allowed to the said extent.

Sd/-

(C. ACHUTHAN)

PRESIDING OFFICER

Place: Mumbai

Date: September 30, 2003.