**BEFORE THE SECURITIES APPELLATE TRIBUNAL**

MUMBAI

## Appeal No.115/2002

**In the matter of:**

1. **Gold Multifab Limited**
2. **Alok Kalawat**
3. **Priti Bhatia**
4. **Vivek Bhatia** **Appellants**

**Vs.**

1. **Chairman,**

   **Securities and Exchange Board of India**
2. **C. M. Mehra**
3. **R. K. Kakkar** **Respondents**

**Appearance:**

**Shri Vipin Kamadi,**

**Advocate** **For Appellants**

**Shri Kumar Desai,**

**Advocate,**

**Ms. Rita Shivalkar**

**Advocate**

**Shri Pravin Trivedi,**

**Asstt. Legal Adviser, SEBI** **For Respondents**

# ORDER

The present appeal is directed against the order passed by the Respondent No.1 (SEBI) on 11.10.2002. The operative portion of the order under challenge in the present appeal is as follows:

> "In view of the above, I, in the exercise of the powers conferred upon me by Sec.4(3) and 11B of SEBI Act, 1992, direct that M/s. Gold multifab Ltd., be prohibited from accessing the capital markets for a period of three years. It is also directed that Mr. Pradip Dingra, Mr. Alok Kalawat, Mr. Murli Manohar Modani, Priti Bhatia and Mr. Vivek Bhatia, directors of the company are debarred from dealing in securities for a period of three years. This aspect of the order shall come into force with effect from October 11th 2002. It is further directed that promoters of M/s. Gold Multifab Ltd., shall write to all allottees/existing shareholders asking them whether they would like to remain invested (?) with the company and if allottees/existing shareholders choose to exit; they should be given an option to sell the shares to the promoters. If the shares

offered are fully paid up, then the promoters should give the face value to the allottees/existing shareholders and if the shares are partly paid up, then the promoters should give the amount subscribed to the allottees/existing shareholders. It is directed that the company shall send its compliance report (giving evidence as to writing to all the allottees/existing shareholders by the promoters and purchase of shares from such allottees/existing shareholders by the promoters who choose the option) within 45 days of receipt of this order."

The Respondent No.1 passed the said order based on the following findings arrived at by him, as recorded in the order that:

"I have carefully examined the findings of investigation, submissions made from time to time and material and evidence available on record. I find that the charges levelled against the company and its directors are fully substantiated. I find that GML allotted shares to applicants who had applied much after the closure of the issue. I also notice that shares were allotted to applicants, who got stock invests cancelled and did not give/ bring any consideration. These acts of the company were in violation of SEBI Guidelines dated 2/1/92 and section 69 of the Companies Act. It was also noticed by me that share certificates refund orders were not dispatched but company /its agents provided false/misleading information to SEBI in respect to subscription received and despatch of shares. I also notice that promoters of GML /its promoters/directors arranged finance for circumventing requirement of minimum subscription. The applications were arranged with the understanding that shares once allotted and listed would be purchased back by the promoters from the issue proceeds and the financier would be paid the amount subscribed with interest. I find that GML /its promoters were involved in purchase of its own shares, in contravention of Section 77 of Companies Act, 1956. In view of above I find that there is no merit in the argument that there was no direct or indirect benefit to the company in allotting shares to these alleged 19 persons who had applied with ante-dated stock invests; and that a fraud has been

perpetrated on the company and its directors by Registrars and Bankers."

(emphasis applied)

Shri Vipin Kamadi, learned Counsel appearing for the Appellants referring to the charge that the Appellant Company allotted shares without receiving minimum subscription submitted that the Respondent's said contention is erroneous in as much as the Respondent has not taken into consideration the correct facts in this regard. He submitted that facts on record in fact contradicts the very basis of the said charge.

He submitted that though the net offer to the public was 26,50,000 shares, subscriptions were received for 78,27,500 shares; that as per the Respondent's order 9,04,000 shares were involved in irregular allotment, that even if the said number of shares are excluded for the purpose of calculating the subscription received, still the subscription received was more than the prescribed 90% and therefore, the charge that public issue did not receive the minimum subscription of 90% is baseless. He submitted that in fact the public issue was over subscribed by 2.95 times.

Learned Counsel submitted that the impugned public issue relates to February-March 1996 and the impugned order against the Appellant company and its directors was brought into effect on 11 October 2002 i.e. after 5½ years of the public issue and 3½ years after initiating investigation. He submitted that the subject matter of the impugned order really relates to the conduct of the intermediaries associated with the public issue, that despite the fact that it was the intermediaries i.e. Registrar to the Issue, Lead Manager to the Issue and Bankers to the Issue, who betrayed, deceived and committed fraud on the Appellants, the Respondent vide its order has penalized the Appellants. Learned Counsel submitted that the Respondent (SEBI) restrains companies from making public offer without appointing the registered Intermediaries, who are empowered and duty bound to undertake the roles, duties and functions laid down by SEBI, and the issuer company

and promoters have limited knowledge of cumbersome SEBI guidelines and procedure of public issue and they have to rely on the SEBI registered Intermediaries. He submitted that the Intermediaries appointed for the purpose acted negligently and committed breach of their duty, committed wrongs relating to rights of the Appellant and dispossessed the Appellant of the proceeds of the Public Issue, still the penalty has been imposed on the Appellants.

Learned Counsel submitted that the Respondent SEBI did not hold a combined inquiry covering the intermediaries as well, and has failed to give reasons for holding separate proceedings against the intermediaries, that due to such separate proceedings, material evidence to prove the innocence of the Appellants failed to come on record and as a result the proceedings have been vitiated.

Learned Counsel submitted that SEBI failed to consider the fact that the Appellant company is a sick industrial company registered with Board for Industrial and Financial Reconstruction (BIFR) under the provisions of the Sick Industrial Companies(Special Provisions)Act, 1985 (SICA) that the impugned order is bound to vitiate the rehabilitation of the Appellant Company, which is contrary to the SICA. He submitted that the reference was registered on 5th May 2001 by BIFR and in the written submissions made by the Appellants on 18th July, 2002, filed with the Respondent this fact was clearly stated. But the Respondent ignored the same.

According to the learned Counsel the Respondent SEBI has no jurisdiction to proceed against a company which is under inquiry under SICA and in support of the said submission he referred to the observation made by the Hon'ble Supreme Court in Real Value Appliances Ltd.,

V Canara Bank (JT 1988 (3) SC 715) that:

"It is to be noticed that according to section 22, in case "an inquiry under section 16" is pending, then, notwithstanding anything in the Companies Act or any other instrument etc. no proceedings for the winding up of the company or for execution or distress or the like against the property of the company or for the appointment of a receiver and no suit for recovery of money or any enforcement of any security or of any guarantee – shall lie or be proceeded with further, except with the consent of the Board or, as the case may be by the appellate authority."

Learned Counsel submitted that the impugned order has been passed under section 11B of the SEBI Act, that a direction under the said section can be issued only to the persons referred in section 12 of the SEBI Act. The Appellants are not persons covered under section 12 and, therefore, the Respondent cannot issue direction against the Appellants, and enforce the same. He further submitted that direction against a company can be issued only under section 11A and section 11A is available only for the limited purpose specified in the section and it has no application to the Appellant in the instant case.

Shri Kumar Desai, learned Counsel appearing for the Respondents submitted that the first Respondent in his order has clearly stated the charge against the Appellants and the clear findings thereon has also been stated. Shri Desai submitted that the Appellant company's claim that it had procured subscription much more than the specified minimum subscription, is not correct. Shri Desai referred to the impugned order and submitted that the Respondent has clearly established that the Appellants had manipulated the issue and minimum subscription was not received, that the subscription money was misused and they even indulged in buying back the shares in the process and violated the provisions of the Companies Act. He referred extensively to the factual position stated in the impugned order to drive home the charge of violation of the provisions of the Companies Act by the Appellants.

Shri Desai refuted the Appellant's contention that the intermediaries were left out. He submitted that it is not true that the action has only been taken against the Appellants, that the Registrar to the Issue, M/s. SPS International Ltd, and its Director, Shri S K Jain, have been prohibited from accessing the capital market for a period of 2 years w.e.f. 20.9.2002 by an order dated 18.9.2002. Further, the lead manager to the issue M/s. S B & T International Ltd was warned vide letter dated 4.1.2000. The New Delhi branch of Corporation Bank, the bankers to the issue, had also been suspended for 6 months w.e.f. 27.1.2000 for their omissions and commissions in the public issue of the Appellant company. Shri Desai submitted that in any case it is not for the Appellants to decide as to how the investigations and inquiries are to be carried out by the Respondent. It was for the Respondent to decide as to whether it was to conduct combined investigation/inquiry covering the intermediaries also or that separate investigations/inquiries were necessary..

With reference to the Appellant's contention that direction under section 11B of the SEBI Act can not reach the issuer company, Shri Desai submitted that the reach of the section is not limited to intermediaries registered under section 12 of the SEBI Act but also to any person associated with the securities market as stated in the section and that the Appellant having issued shares to the public through prospectus and having sought permission to get its shares listed on the stock exchanges can not claim that it is not a person associated with the securities market, that being a person associated with the securities market the issuer company and its directors are amenable to the directions issued under section 11B.

Learned Counsel referred to the provisions of section 11B of the SEBI Act and submitted that the Respondent is empowered to issue the impugned directions thereunder, that

section 11A does not curtail the powers otherwise available under section 11B, that the power under section 11A is an additional power. Shri Desai further submitted that in terms of section 55A of the Companies Act, SEBI has been empowered to administer the provisions of section 55 to 58, 59 to 84, 108, 109, 110, 112, 113, 117, 118, 119, 120, 121, 122, 206, 206A and 207 so far as they relate to issue and transfer of securities and non payment of dividend, in the case of listed public companies, and in case of those public companies which intend to get their securities listed on any recognised stock exchange in India, that it is not in dispute that the Appellant Company had issued the prospectus and it had sought permission from Stock Exchanges for listing the shares; that therefore, the Respondent is empowered to take action against the persons concerned for violation of the provisions of the Companies Act, referred to in the show cause notice..

Shri Kumar Desai submitted that the Appellant Company is not entitled to the benefit under section 22 of the SICA and the view held by the Hon'ble Supreme Court in Real Value Appliances (supra) has no application to the Appellant's case. In this context he submitted that the proceeding initiated by SEBI in which the impugned order was passed is not a proceedings falling within the scope of section 22(1) of SICA. He referred to the said section 22(1) that:

"Where in respect of an industrial company, an inquiry section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceeding for the proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or of

any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate authority."

Shri Desai submitted that the proceedings before the Respondent No.1 was for none of the purposes covered in section 22(1) and therefore the Appellant's claim that the impugned order has been passed in violation of the provisions of the said Section 22(1), is not tenable.

Learned Counsel submitted that the Appellant Company can not disown its role in the public issue made by it on the ground that the public issue was managed by the Merchant Banker and the Registrar to the Issue. He submitted that the Merchant Banker and the Registrar to the Issue being the agents of the issuer company, the issuer company can not absolve itself of their omissions. Shri Desai submitted that the impugned order 'debarring' the Appellants has nexus with omissions and commissions by the Appellants and the direction is intended to protect the interest of the investors and as such need to be sustained.

I do not consider it necessary, to go into the details of the facts of the case, in depth, as the Respondent's order in my view fails at the threshhold itself for want of jurisdiction, for the reasons stated hereinafter.

The charges against the Appellants relate to their conduct with reference to the public issue of 27,50,000 equity shares of Rs.10/- each for cash at par made by the Appellant Company in February/March 1996. The Respondent SEBI is stated to have carried out an investigation in to the matter and collected material. Based on the material so collected the

Respondent SEBI decided to conduct an inquiry and for the purpose a show cause notice was issued. In this context the show cause notice dated 29.2.2000 issued by Respondent No.3 need be noticed. The notice after narrating the facts has stated as follows:

> "On the basis of the above evidences gathered in the course of investigation the following conclusions have been arrived at:
>
> - GML made allotments to applicants without receiving the consideration for the shares allotted and went ahead with allotting shares to applicants without receiving the minimum subscription. Thus, GML appears to have contravened the provisions of section 69 of the Companies Act, 1956. SEBI Guidelines on Disclosure and Investor Protection (June 18 1992) and also the terms and conditions of the Prospectus for the Issue.
>
> - Section 73 (3A) of the Companies Act specifies that the public issue proceeds standing to the credit of a separate bank account shall not be utilised for any purpose other than adjustment against allotment of shares or repayment of moneys received where shares are not permitted to be traded. GML accounted for transfer of the proceeds of Public Issue as Advances made to associate concerns of SPS and thus appears to have violated the provisions of section 73(3A) of the Companies Act.
>
> - Payments made by GML to Mani Investments who had made applications in the issue of GML on behalf of the applicants shows that GML purchased its own shares in violation of section 77 of the Companies Act.
>
> (emphasis supplied)

In the light of the aforesaid facts, you are required to show cause why suitable directions under section 11B of SEBI Act, 1992 including directions for refund of the public issue of GML and prohibiting GML from accessing the capital market for a

suitable period should not be issued."

The scope of the adjudication is thus confined to the alleged violation of section 69, 73(3A) and section 77 of the companies Act and violation of the provisions of the SEBI Guidelines on Disclosure and Investor Protection and also the terms and conditions of the Prospectus issued by the Appellant Company. In the show cause notice, the conclusion arrived at by the Respondent after investigations has been clearly stated and these conclusions relate to contravention of the provisions of the companies Act, SEBI Guidelines and the terms and conditions of the Prospectus. The Respondent No.1 has accepted the conclusions recorded in the show cause notice as could be seen in the order. The Respondent No.1 in his order after adjudicating the show cause notice has recorded that:

"I find the charges leveled against the company and its directors are fully substantiated"

Having come to the said conclusion he, in exercise of the powers conferred on him by section 4(3) and 11B of the SEBI Act issued the impugned directions.

It is well settled that the adjudicating authority can not go beyond the scope of the show cause notice. No charge other than the one specified in the show cause notice can be adjudicated. There may be enough material to pin down the noticee on other grounds. But the material itself is not a charge. The material only supports the charges. Notice to show cause is with reference to charges and not with reference to anything else.

The scope of adjudication is thus confined to the charges leveled in the notice. The charges in the show cause notice, as stated earlier is based on the conclusion arrived at by the person who

issued the show cause notice, based on the facts stated therein. Even though the Respondent No.3 has referred to violation by the Appellants of the SEBI Guidelines and also the terms and conditions of the Prospectus, it is not clear as to which specific guideline/terms and conditions were violated. These sort of vague allegations are not to be sustained as the same does not provide an opportunity to the noticee to counter the charges. Therefore adjudication of the said two charges i.e. violation of the SEBI Guidelines on Disclosure and Investor Protection and violation of the terms and conditions of the Prospectus, and the decision based thereon can not be sustained, as the same is contrary to the rules of natural justice. Therefore, the charges against the Appellants, which need be taken cognizance are that of violation of section 69, 73 (3A) and 77 of the Companies Act, 1956, in the light of the facts stated in the show cause notice. In this context it is pertinent to have a look at the said three sections of the Companies Act:

## Section 69

69.(1) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the amount stated in the prospectus, as the minimum amount which, in the opinion of the Board of directors, must be raised by the issue of share capital in order to provide for the matters specified in clause 5 of Schedule II has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company, whether in cash or by a cheque or other instrument which has been paid.

(2) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in money, and is in this Act referred to as "the minimum subscription".

(3) The amount payable on application on each share shall not be less than five per cent of the nominal amount of the share.

(4) All moneys received from applicants for shares shall be deposited and kept deposited in a Scheduled Bank—

(a) until the certificate to commence business is obtained under section 149, or

(b) where such certificate has already been obtained, until the entire amount payable on applications for shares in respect of the minimum subscription has been received by the company, and where such amount has not been received by the company within the time on the expiry of which the moneys received from the applicants for shares are required to be repaid without interest under sub-section (5), all moneys received from applicants for shares shall be returned in accordance with the provisions of that sub section.

In the event of any contravention of the provisions of this sub-section, every promoter, director or other person who is knowingly responsible for such contravention shall be punishable with fine which may extent to fifty thousand rupees.

(5) If the conditions aforesaid have not been complied with on the expiry of one hundred and twenty days after the first issue of the prospectus, all moneys received from applicants for shares shall be forthwith repaid to them without interest; and if any such money is not so repaid within one hundred and thirty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of six per cent per annum from the expiry of the one hundred and thirtieth day:

**Provided** that a director shall not be so liable if he proves that the default in the repayment of money was not due to any misconduct or negligence on his part.

(6) Any condition purporting to require or bind any applicant for shares to waive compliance with any requirement of this section shall be void.

(7) This section, except sub-section (3) thereof, shall not apply in relation to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

Section 73(3) and (3A)

73(3) "All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section 2 and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees.

73(3A) Moneys standing to the credit of the separate bank account referred to in sub-section (3) shall not be utilised for any purpose other than the following purposes, namely:-

(a) adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus; or

(b) repayment of moneys received from applicants in pursuance of the prospectus, where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share.

## Section 77

77.(1) No company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 100 to 104 or of section 402.

(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company:

**Provided** that nothing in this sub-section shall be taken to prohibit—

(a) the lending of money by a banking company in the ordinary course of its business; or

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried office or employment in the company, or

(c) the making by a company of loans, within the limit laid down in sub-section (3), to persons (other than directors or managers) *bona fide* in the employment of the company with a view to enabling those persons to purchase of subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) No loan made to any person in pursuance of clause ( c) of the foregoing

proviso shall exceed in amount his salary or wages at that time for a period of six months.

(4) If a company acts in contravention of sub-sections (1) to (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to {ten} thousand rupees.

(5) Nothing in this section shall affect the right of a company to redeem any shares issued under section 80 or under any corresponding provision in any previous companies law.

On a perusal of the above sections it is noticed that consequences for non compliance of the requirements of the said sections have been provided in the section itself. It is to be noted that section 69 requires the issuer company in the event of failure to procure minimum subscription to repay the entire subscription money to the applicants. Similarly section 73 requires the issuer company to return the money collected by way of subscription to the applicants, in case it fails to get the listing approval from the stocks exchanges in terms of the disclosure made in this regard in the Prospectus. In both the eventualities the issuer company is left with little option to retain the subscription money. In that context the SEBI's direction to the issuer company's promoters to give an option to the allottees/existing shareholders to continue to be a member of the company or to exit from the company in any case is not in tune with the provisions of the Companies Act. For the enforcement of the provisions of the Companies Act, there are provisions in the Companies Act itself and no external assistance for the purpose is required or is permissible. The Act has also identified the authorities for the purpose of enforcement of the provisions of the Act. Respondent SEBI is one of such identified authorities, for the purpose of administering certain provisions of the Companies Act. We will come to that later.

Section 3 of the SEBI Act provides for establishment of a Board consisting of a Chairman with such number of members as prescribed therein. In terms of sub section (2) section 4 the general superintendence, direction and management of the affairs of the Board is vested in the Board. In terms of sub section (3) of section 4, save as otherwise determined by regulations, the Chairman of the Board shall also have powers of general superintendence and direction of the affairs of the Board and may also exercise all powers and do all acts and things which may be exercised or done by the Board. Whatever be the logic of section 4(3) in the context of a multi member board provided for administering the SEBI Act, the fact is that as per the law, the Chairman himself is empowered to exercise all the powers of the Board barring those reserved exclusively to the Board by the Regulations. It is not the Appellant's case that the power to issue directions under section 11B is not available to the Chairman. The 1s$^{t}$ Respondent's power to exercise the powers under section 11B of the Act is not in question. The question is whether the impugned order made by the 1$^{st}$ Respondent in exercise of the powers under section 11B is in the ambit of the said section. For this the scope of section 11B has to be examained. The said section 11B is on the Respondent SEBI's power to issue directions. According to the said section

"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."

The scope and reach of section 11B is clear. Directions can be issued for the purposes stated in clauses (i)to (iii). The persons to whom such directions can be issued have also been stated in clauses (a) and (b). The Appellant's contention that they are not persons covered under section 12 and as such they are not amenable to section 11B is not correct. As Shri Kumar Desai rightly pointed out they are persons associated with the securities market and as such coming within the scope of section 11B. Thus there is no doubt as to the Chairman's power to issue directions under section 11B and the reach of the said section to the Appellants. Since the charges levelled against the Appellants are violation of certain provisions of the Companies Act it is necessary to examine as to whether section 11B has jurisdiction to meet the contraventions of the provisions of other statutes like the Companies Act.

As stated earlier, the surviving charge against the Appellants are that they have contravened the provisions of section 69, 73 (3A) and 77 of the Companies Act. It is clear from the show cause notice that the authorities on the basis of the facts stated therein had come to the conclusion that the Appellants had contravened the provisions of the said sections of the Companies Act, and it was in that context the Appellants were asked to show cause as to why suitable directions under section 11B of the SEBI Act should not be issued to them. Thus it is clear that section 11B was proposed to be invoked to issue directions for the contraventions of the said sections of the companies Act and not for any other purpose. As stated earlier one should not forget that what is required to be answered in the show cause notice is the charges and nothing else. Those charges have been stated in the show cause notice and they are

contraventions of the provisions of section 69, 73(3A) and 77 of the Companies Act. Neither the Respondent No.1 in his order nor the Counsel appearing for the Respondents by his submissions can expand the scope of the show cause notice and make out fresh charges out of the material furnished in the show cause notice. As per the show cause notice, on the basis of the facts in the possession of the Respondent, it came to the conclusion that the Appellants violated the provisions of the Companies Act, SEBI Guidelines and the terms and conditions of the Prospectus and in that context the Appellants were asked to show cause as to why directions under section 11B should not be issued against them. The Appellants were not asked to show cause with reference to any other charge. As stated earlier since the show cause notice is silent as to which of the provisions of SEBI Guidelines on Disclosure and Investor Protection were not compiled, the charge on this count can not in any case be sustained. Similarly the vague charge that the Appellants did not comply with the terms and conditions of the Prospectus also in the absence of specifics can not be sustained.

Shri Desai, learned Counsel, in support of his contention that the Respondent SEBI has power to administer the provisions of sections 69, 73(3A) and 77 of the Companies Act had cited the provisions of section 55A of the Companies Act. Section 55A was included in the Companies Act in the year 2000, vide Companies (Amendment)Act, 2000. The section is as follows:

> "55A. The provisions contained in sections 55 to 58, 59 to 81 (including sections 68A, 77A and 80A), 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall,--
>
> (a) in case of listed public companies;
>
> (b) in case of those public companies which intend to get their securities listed

on any recognized stock exchange in India,

be administered by the Securities and Exchange Board of India; and

(c) in any other case, be administered by the Central Government.

Explanation.—For the removal of doubts, it is hereby declared that all powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, the Company Law Board or the Registrar of companies, as the case may be."

Authority to prosecute the persons violating the provisions of the Companies Act flows from section 621 of the Act. As per section 621(1) of the Companies Act:

" No court shall take cognizance of any offence against this Act (other than an offence with respect to which proceedings are instituted under section 545) which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing to the Registrar or of a shareholder of the company or of a person authorised by the Central Government in that behalf:

Provided that nothing in this sub section shall apply to a prosecution by a company of any of its officers:

Provided further that the court may take cognizance of offence relating to issue and transfer of securities and non payment of dividend on a complaint in writing by a person authorised by the Securities and Exchange Board of India"

(emphasis supplied)

It is clear that the power to administer provisions contained in those sections stated in section 55A so far as they relate to issue and transfer of securities and dividend in respect of listed companies and those companies which intend to get their securities listed on any recognized stock exchange in India, is vested with the Respondent SEBI. In this context it is to be noted that the said section 55A only vests authority of administering the section stated therein, with SEBI. Section 621 empowers SEBI to prosecute those who contravene the provisions of those sections. Section 55A does not empower SEBI to invoke the provisions of SEBI Act to administer those provisions of the Companies Act. As stated earlier in this order the Companies Act recognises SEBI as an enforcement authority for administering certain specific sections. SEBI has to enforce those sections under the Companies Act. It can't resort to the provisions of SEBI Act for the purpose of enforcing the provisions of the Companies Act in the absence of an enabling provision for the purpose in the SEBI Act. Section 11B has no over riding effect on the provisions of the Companies Act, as has been made clear in section 32 of the SEBI Act that the provisions of the SEBI Act "shall be in addition to and not in derogation of, the provisions of any other law for the time being in force."

In my view section 11B can not be invoked to take action against those who contravene the provisions of section 69, 73 and 77 of the Companies Act and in that view of the matter the impugned order made under section 11B in the light of the Respondent's finding that the Appellant had contravened sections viz. 69, 73(3A) and 77 of the Companies Act, is without jurisdiction and as such the order can not be sustained.

However, it is made clear that SEBI is in no way precluded from issuing appropriate directions against the Appellants under Section 11B in case it is established that such directions are called for, for any one or all of the purposes stated in section 11B. SEBI, if it so desires, is at liberty to initiate proceedings against the Appellants for violation of the SEBI Guidelines on

Disclosure and Investor Protection and for violation of the terms and conditions of the Prospectus, or for any other charge that could be made out on the basis of the material in its possession, in accordance with provisions of the SEBI Act, rules and regulations made thereunder and take appropriate action including issuance of directions under section 11B of the SEBI Act.

For the reasons stated, the appeal is allowed and the impugned order is set aside. Sd/-

**(C.ACHUTHAN)**

**PRESIDING OFFICER**

**Place: Mumbai**

**Date: September 19 , 2003**