BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

Appeal No. 12/2003

In the matter of:

Mithani Investment

(Through its proprietor Milan J. Mithani) **Appellant**

Vs.

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

Appearance:

Shri Mahesh P. Sarda

Chartered Accountant

Shri Milan J. Mithani **for Appellant**

Shri Praveen Trivedi

Asstt. Legal Adviser, SEBI **for Respondent**

ORDER

The present appeal is directed against the Respondent's order dated 12.12.2002. By the said order one Hem Enterprises and its proprietor Shri Hasmukh Shah and the Appellant and its proprietor Shri Milan J. Mithani were debarred from "associating with the capital market related activities, dealing in securities, accessing the capaital market and associating with any of the intermediaries in the capital market for a period of five years" with effect from the date of the order.

The direction, as per the impugned order is issued under section 11B of the Securities and Exchange Board of India Act, 1992 (the 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 (FUTP Regulations) against the parties named in the order with reference to their alleged role relating to the public issue made by one company viz. Bharthari Financial Services Ltd. (now known as BT Technet Ltd) (BFS). As per the information furnished by the Respondent in September 1995 BFS made a public issue of 13,50,000 equity shares of Rs.10 each for cash at par for an aggregate sum of Rs.1.35 crores, which remained open from 29.9.95 to 5.10.95. The issue was reportedly oversubscribed by 17.8 times. The concerned stock exchange accorded approval of the 'Basis of Allotment' on 8.12.1995 and granted listing permission on 14.12.1995. The Respondent reportedly received market reports indicating that the listing of BFS's shares was preceded by speculative grey market operations, and the suspects were the promoters and other persons associated with them. In that context the Respondent vide its order dated 24.7.97 ordered an investigation into the matter.

The investigation reportedly revealed that BFS acting through its Chairman Shri S. K. Gupta in connivance with one Ashok Chawla, made irregular allotments in the public issue against the applications accompanied by stock invests issued after closure of the issue and the shares irregularly allotted were sold prior to obtaining the "approval of basis of allotment" and "permission for listing" of the shares from the stock exchange.

Based on the findings of the investigation, the Respondent issued a show cause notice to the Appellant on 18.3.1999. Though the Appellant did not submit any written submissions, its representative appeared before the Respondent and denied the charges. The Respondent adjudicated the show cause notice holding the Appellant guilty of violating the provisions of section 12 of the Act and rule 3 of the Securities and Exchange Board of India (Stock Brokers and Sub brokers) Rules, 1992 (the Stock Broker Rules) for dealing in securities without obtaining certificate of registration from the Respondent. The Appellant was also found guilty of violating the provisions of FUTP Regulations, as it was found to have indulged in fraudulent and unfair trade practices to manipulate the market price by doing grey market transactions in the shares of BFS. It is in the said background the impugned order was passed by the Respondent.

The Appellant claiming to be aggrieved by the Respondent's order has preferred the present appeal inter alia praying to quash the order. Even though the Appellant had prayed for an interim order staying the operation of the impugned order, the said prayer was not pressed when the matter was taken up for consideration on 25.2.2003, in view of the Respondent's undertaking to file its reply early and the Tribunal's decision in the context to list the appeal itself for early disposal.

Shri Mahesh P. Sarda, learned representative of the Appellant referred to the introductory portions in the impugned order and submitted that in the order it has been observed that the grey market operations in the shares of BFS were done by the promoters and persons associated with the promoters. He submitted that the Appellant is not an associate of the promoters that the Resopondent itself in its reply filed in the appeal proceeding has admitted in para 2 (e)(ii)that the Appellant has no connection with BFS or its promoters. He further submitted that the order is directed to one Hem Enterprises also, that the Appellant has nothing to do with the said Hem Enterprises, that the scope of the present appeal is only confined to that part of the order directed to the Appellant. Shri Sarda submitted that if the said Hem Enterprises have done anything against the provisions of law, they are to be penalised and there is no justification in bracketing the Appellant which has not done anything wrong, with the said entity and penalising it alongwith the said Hem Enterprises. Shri Sarda further submitted that even though in the order the Respondent has referred to "78 days report" "market reports" "order dated 24-7-97 directing investigation" "report of investigation" and other materials, none of these was provided to the Appellant so as to enable it to effectively meet the charges.

Shri Sarda referred to the impugned order and submitted that as per the said order the Appellant has been charged for (1) entering into grey market transactions and (2) issuing contract notes/bills being an unregistered broker. Learned Representative submitted that the Appellant has not indulged in any grey market operations that it purchased shares on spot basis as an investor at the rate of Rs.24/- per share in January 1996 i.e. after the listing of the shares, that the market price of the scrip in January 1996 at Saurashtra Kutch Stock Exchange Ltd., (SKSE), was Rs.24 to Rs.28 per share, that when the sale was at market price the question of the Appellant having induced sale of shares of BFS does not arise. In this context he referred to

a "certificate of price" of the BFS scrip on 4.1.96 at SKSE filed with appeal indicating the scrip's price on that date as Rs.25.75 per share. He also submitted that the Appellant had not purchased any shares on 2.11.1995 as alleged, and the Respondent has not cited any evidence in its order in support of its contention that the shares were purchased on 2.11.1995. In this context Shri Sarda referred to the following observation in the order;

"Enquiries with the above investors (i.e. Hansaben Desai and Navinchandra Desai) revealed that they had along with certain other investors obtained the allotments of BFSL shares by way of applications made to the public issue of BFSL along with stock invests issued by State Bank of India, Ashram Road, Amhedabad on 25.11.95, where as the public issue of BFSL closed on 5..10.1995. All these investors confirmed having submitted the applications after the closure of the public issue. Some of the investors have also stated that the apaplications were made by Mr. Hasmukh N. Shah, proprietor of M/s.Hem Enterprises on their behalf and they had no interest in the applications, any provfit or loss being to the account of Mr. Hasmukh N. Shah."

Shri Sarda submitted that the above finding is directed to Shri Hasmukh Shah and not to the Appellant and the Appellant cannot be penalised for the alleged activities of Shri Hasmukh Shah. He also referred to the observation that:

> "As per the information obtained from these investors it also emerged that sales had been contracted by them prior to the approval of the Basis of Allotment and Listing of BFS shares on 8.12.95, 14.12.95 respectively……."

Shri Sarda submitted that "the information" can not partake evidence and that in any case "these investors" referred to by the Respondent in the order are those persons who had indulged in market manipulation, and strangely enough the Respondent has relied on the information furnished by the persons who were party to the manipulation, that further the details of the information so received were not made available to the Appellant. With reference to the Respondent's contention that the Appellant did not ask for the same, learned Representative submitted that the Appellant was never told of such information and as it was unaware of the same, it could not ask for the same, that it came to know of such information only when it saw the impugned order. He further submitted that in any case it is not for the Appellant to ask for the material based on which the charge is framed, that it is the Respondent's duty to furnish the same along with the show cause notice, that the Respondent did not give the material/evidence in support of the charges.

Learned Representative referred to the copy of the bill No.108 dated 3.1.96 from one Navin chandra Vadilal Desai to the Appellant and submitted that it is a "SPOT BILL" and the sale date shown as 2.11.1995 therein is not the correct date. He submitted that the Appellant was not given an opportunity in the enquiry proceedings to rebut the same by not providing the bill. He submitted that for the first time that the Appellant has been shown the said document by filing along with the Resp ondent's reply in the appeal, though the same has been relied on to hold the Appellant guilty of market manipulation. He questioned the authenticity of the said bill which does not even bear the signature of the Appellant indicating receipt/acknowledgement. He further submitted that the authenticity/credibility of the said evidence has to be gauged in the light of the fact that the said Navinchandra Vadilal Desai is a person involved in the alleged manipulation. He referred to the copy of an identical bill from Hansaben Navinchandra Desai also relied on by the Respondent and submitted that the reasoning adduced by him in the case of the bill from Navinchandra Vadilal Desai is in equal force applicable to the said bill also, and therefore, can not be admitted as evidence. In this

context Shri Sarda referred to two affidavits both dated 28.12.2002 from Smt. Hansaben Navinchandra Desai filed by the Appellant and submitted that the factual position regarding sale of 1700 shares by Smt. H. N. Desai and 4300 shares by her husband Shri N. V. Desai (since died) have been stated as sales on spot basis and she has admitted that consideration for the same was received on 16.1.1996, that it has also been stated therein that the transaction of purchase and sale being spot transaction for delivery between them and the Appellant was direct and not through any broker or through stock exchange, that no brokerage has been paid, that the concerned share certificates were accordingly despatched by them to the Appellant on 4.1.1996. Learned representative submitted that this corroborates the Appellant's version that the transaction was on spot basis in January, 96 and not in November, 1995 as alleged by the Respondent.

With reference to the Respondent's averment that Shri Milan J. Mithani, apart from being the proprietor of the Appellant was also director of M/s. Mithani Securities P Ltd. a member of SKSE and this was not disclosed, the learned representative submitted that in 1995-96, i.e. the relevant period, the said company was not a member of SKSE that only in 1997 it became a member and therefore the Appellant making a disclosure, as suggested by the Respondent did not arise.

Learned representative submitted that the allegation that the Appellant being an unregisterd sub broker or stock broker issued contract notes/bills for purchase of BFS shares is also baseless and there is no evidence on record to support the said allegation, that the Respondent except simply making a vague statement that "Mithani Investment, being an unregistered sub broker/ or stock broker have issued contract notes/bills for purchase of BSFL shares" has not made any serious attempt to substantiate the said charge, that the Respondent has not cited even a single contract note/bill in supprt of the same in its order. He submitted that

however the Respondent has made vain attempt to improve the situation by producing some material, which he said is not acceptable at the stage of the proceeding as it was not available to the Appellant to rebut in the enquiry proceedings. He submitted that even the said material does not support the Respondent's case. In this context he referred to the document relied on by the Respondent which is stated to be a delivery note dated 4.1.96 in respect of 4000 shares of BFS received by the Appellant from Mayurbhai Navinchandra Desai. He submitted that the shares stated therein were received by the Appellant not on behalf of any body, but for the Appellant itself as it was the purchaser and as such there was no need to show the name of the person for whom it was purchased. He further submitted that it is only an acknowledgement of receipt of shares purchased by it, that the description "delivery note" is not the correct description, that in any case the said description was not the one made by the Appellant and the said 'delivery note' was not issued by the Appellant.

Learned representative referred to the reply filed by the Respondent and submitted that in para 2(e) (iii) the Respondent has averred "Ms. Hansaben Desai and Shri Navinchandra Desai in their letters dated 20.5.97 to SEBI admitted of applying for the shares of BFSL after closure of the issue. As shares irregularly allotted to them were purchased by the Appellant before opening of the public issue, it is concluded that the Appellant facilitated disposal of the shares arising out of irregular allotment." (The Respondent's representative in this context pointed out that the correct date is 25.9.97 and not 20.5.97.) He submitted that the Respondent had not made available copies of these letters to the Appellant. He submitted that the Respondent in fact has not only made available to the Appellant any of the documents relied on by it but has also failed to produce the same even before the Tribunal, that it has relied on certain documents now, which have not been referred to in the impugned order. He further submitted that the Appellant had no ways and means to find out the activities of the promoters of BFS, that the Appellant is not an associate of them and as such the conclusion that the Appellant facilitated disposal of shares arising out of irregular allotment is unfounded. He

further submitted in the context that the charges in the show cause notice in the absence of the material supporting the same, could not be rebutted but to deny, and therefore, it was incumbent on the part of the Respondent to establish the charges with facts and figures or accept the denial made by the Appellant. It was also submitted that the Appellant purchased in all 6,000 shares only as against 17,50,000 shares offered in the public issue, which is just 0.34% of the pulic issue and it can not have affected the market price.

Learned representative submitted that the Appellant is only an investor and not doing the business of stock broker or sub broker to attract the provisions of section 12 of the Act or rule 3 of the Stock Broker Rules, that it has not indulged in any market manipulation to attract regulation 12 of the FUTP Regulations.

Learned representative referred to the decision of this Tribunal in Roopram Sharma V SEBI (2002) 51 CLA 224 (SAT) and submitted that in the said case the Tribunal had held that the time factor has to be taken for the purpose of issuing directions, that in this case also, the time factor need be taken into consideration that the allegation is about grey market operation alleged to have been indulged in 1995-96 and that there is no justification to issue at this juncture such a wide reaching penal order debarring the Appellant from "associating with the capital market related activities, dealing in securities, accessing the capital market and associating with any of the intermediaries in the capital market for a period of 5 years". He further submitted that it is not within the powers of the Respondent to issue such penal order as section 11B or regulation 12 does not vest such powers in the Respondent. In this context he referred to the limitation on the Respondent exercising penal powers and cited this Tribunal's decision in Sterlite Industries V SEBI (2001) 34 SCL 485) and stated that this Tribunal in the said case had held that section 11B can not be invoked to impose penalties.

Learned representative submitted that the impugned order can not be sustained as it is not based on any evidence and the direction issued by the Respondent is unwarranted and beyond the powers of the Respondent.

Shri Praveen Trivedi, learned representative of the Respondent referred to the averment in para 2(e) (iii) of the Respondent's reply that Ms. Hansaben Desai and Shri Navinchdra Desai in their letters dated 20/5/97 to the Respondent had admitted of applying for the shares of BFS after closure of the issue, that the shares irregularly allotted to them were purchased by the Appellant before opening of the public issue, the Respondent concluded that the Appellant facilitated disposal of shares arising out of irregular allotments to manipulate the market. He submitted that the correct date of these letters is 25.9.97 and reference to 20.5.97 is a typographical error. He referred to copies of these letters filed with the reply and submitted that share applicants i.e. Ms. Hansaben Desai and Shri Navinchandra Desai, in their letters have stated that they purchased shares of BFS out of the money borrowed from Lloyds Finance Ltd., Ahmedabad, that they submitted application form along with stock invest to the bank after the closure of the issue and they sold the shares to the Appellant. Shri Trivedi submitted that the shares offered in the public issue were listed only on 14.12.95 but the shares were purchased by the Appellant on 2.11.95. He submitted that the two Affidavits from Ms. Hansaben Desai relied on by the Appellant do not indicate the date on which those shares were sold by them, that the said suppression of fact is intentional. He submitted that the Respondent's finding that the shares were purchased by the Appellants on 2.11.1995 is based on the two letters both dated 25.9.97 from the sellers namely Ms. Hansaben Desaia and Shri Navinchandra Desai.

Shri Trivedi referred to the copy of the "Delivery Note" dated 4.1.1996 forming part of the Respondent's reply and submitted that there is no indication therein as to on whose behalf the Appellant received the shares and in what capacity it was received, if it was not received for self. With reference to the certificate from SKSE relied on by the Appellant, Shri Trivedi submitted that the price quoted therein is as on 4.1.96, that in any case the price at which the shares were purchased per se is not important, as the charge is that the Appellant indulged in grey market operations which is prohibited under the FUTP Regulations. He submitted that the Appellant's argument that the shares purchased by it contributed only 0.34% of the shares offered in the public issue is also not that relevant. He further submitted that the Appellant has not stated when it sold the shares, at what price and to whom. Shri Trivedi also submitted that the Respondent has not stated anywhere in the show cause notice or in the order that the Appellant is associated with BFS or in any way related to the directors/promoters of the said company, that the charge against the Appellant is that it indulged in grey market operation, is independent of the Appellant's relationship, if any, with BFS and its promoters.

Learned representative referred to the contention that the Appellant had purchased the shares under reference on 3/1/96 and submitted that during the investigations conducted by the Respondent, information was obtained from Ms. Hansaben Desai and Shri Navinchandra Desai, to whom 1700 shares and 4300 shares respectively were irregularly allotted, that as per the bill no.108 dated 3/1/96, provided by Mr. Navinchandra Desai to M/s. Mithani Investments, 4300 shares were sold on 2/11/95 and that vide bill no. 162 dated 3/1/96 provided by Ms. Hansaben Desai 1700 shares were sold to M/s. Mithani Investment on 2/11/95. He referred to the copies of these bills filed with the Respondent's reply. Shri Trivedi referred to the Affidavits of Ms. Hansaben Desai and Mr. Navinchandra Desai filed by the Appellant along with the appeal, and submitted that while dates like dispatch of share certificates to M/s. Mithani Investments on 3/1/96, receipt of the same by purchasers on 4/1/96, receipt of the the Demand Draft dated 16/1/96 issued in consideration thereof etc. have been referred in the said affidavits, but the

affidavits are silent about the date of sale of shares, that the failure to disclose the said date is intentional as the disclosure, if made would have shown that the shares were sold/ purchased on 2/11/95 and not on 3/1/96 as claimed by the Appellant.

Shri Trivedi referring to the Appellant's contention that the Appellant was not given any opportunity to rebut the evidence relied upon by the Respondent, submitted that the Respondent had issued show cause notice to the Appellant and the Appellant responded to the same by making oral submissions that the Appellant did not ask for copies of any of the documents.

Learned representative submitted that the charge against the Appellant was of indulging in grey market transactions and facilitating the disposal of shares arising out of irregular allotments, that these activities are fraudulent in nature and amount to unfair trade practices intended to manipulate the market price of the scrip so as to induce sale and purchase of the shares by other persons, that the Appellant's conduct is in violation of regulations 3,4, and 6 of the FUTP Regulations.

Shri Trivedi submitted that during the personal hearing given to the representative of the Appellant, the representative simply denied the charges without producing any material in support of such denial. As the Appellant did not submit any material in support of its defence, the impugned order was passed on the basis of

record available with the Respondent . He submitted that the impugned order is just, fair and reasonable, that it is issued to protect the interests of investors and the securities market.

I have carefully considered the rival contentions and also the material placed on record. It is noted that the Respondent issued a show cause notice to the Appellant on 18.3.1999. This show cause notice is stated to be based on the material collected by the Respondent in an investigation stated to have been carried out by it. The information collected in the investigation suggested that certain persons had indulged in grey market transactions in the share of BFS, before the shares got approval of listing from the concerned stock exchange. It has been recorded in the order that "the investigation revealed that BFSL acting through its Chairman Mr. S. K. Gupta in connivance with Ashok Chawla made irregular allotments in the Public issue of BFSL involving irregular subscription for shares by way of applications accompanied by stock invests issued after closure of the issue." However, the oroder is silent about the action , if any, taken against the company, Shri Gupta and Shri Ashok Chawla. The present order covers two other entities of which one is the Appellant. The show cause notice issued by the Respondent is very cryptic and it gives an interesting reading. The full text of the said notice is as follows:

"March 18, 1999

M/s. Mithani Investment,

307, Gayatri Commercial Complex,

Dr. Yagnik Road,

Rajkot – 360 001.

Dear Sir,

Reg: Show Cause Notice u/s. 11B of SEBI Act, 1992 read with Regulation 11 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 in the case of M/s. Bhartari Financial Services Ltd (BFSL)

The Chairman SEBI vide his order dated 24th July 1997 ordered an investigation into the irregularities in the public issue of M/s. Bhartari Financial Services Ltd (BFSL). During the course of investigations your dealings in the shares of BFSL were examined. Investigations revealed that the following purchases of BFSL shares were made by you:-

NAME OF INVESTOR	NO.OF SHARES	DATE OF TRANSACTION	RATE
Hansaben Desai	1700	2.11.95	24.00
Navinchandra Desai	4300	- do -	24.00

Enquiries with the above investors revealed that they had obtained the allotments of BFSL shares by way of applications made to the Public Issue of BFSL along with stockinvests issued by State Bank of India, Ashram Road, Ahmedabad on 25.11.95, whereas the Public Issue of BFSL closed on 5.10.1995. All these investors confirmed having submitted that applications after the closure of the Public Issue. Some of the investors have also stated that the applications were made by Mr. Hasmukh N. Shah proprietor of M/s. Hem Enterprises on their behalf and they had no interest in the applications, any profit or loss being to the account of Mr. Hasmukh N. Shah.

As per information obtained from these investors, it also emerged that the sales had been contracted by them prior to the approval of the Basis of Allotment and Listing of BFSL shares on 8.12.95 on 14.12.95 respectively. These are evidently grey market trading before the approval of Basis of Allotment and Listing of the scrip.

M/s. Hem Enterprises, being an unregistered sub-brokers have issued contract notes/bills for purchase of BFSL shares. You are thus, liable for action order section 12 of SEBI Act, 1992 and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules,1992 for dealing in securities without obtaining certificate of registration.

These transactions were undertaken prior to the approval of the Basis of Allotment or Listing of BFSL shares. You have indulged in grey market transactions and facilitated disposal of shares arising out of irregular allotments. These are fraudulent and unfair trade practices, designed to manipulate the market price of BFSL shares and induce their sale and purchase by other persons, specifically prohibited under Regulation 3,4 and 6 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995.

You are hereby being given a show cause to explain as to why a direction u/s 11B of SEBI Act, 1992 read with Regulation 12 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 should not be issued against you. Your explanation should reach the undersigned by 31.3.1999.

Yours faithfully

Sd/-"

(emphasis supplied)

It is seen from the records that though the Appellant did not file written response to the show cause notice, its representative appeared before the Respondent's Chairman and made oral submission denying the charges.

In this context it is considered pertinent to have a look at the impugned order as a whole. Full text of the order is as follows:

"**Directions under Section 11B of the SEBI Act, 1992 read with Regulation 12 of SEBI (Prohibition of Fraudulent & Unfair Trade Practices relating to Securities Market) Regulations, 1995 against M/s. Hem Enterprises and M/s. Mithani Investment in the case of their role in the Public Issue of M/s. Bharthari Financial Services Ltd.**

M/s. Bharthari Financial Services Ltd. (now known as BT Technet Ltd.) hereinafter referred to as BFSL, came out with a Public Issue of 13,50,000 equity shares of Rs.10/- each for cash at par, aggregating to Rs.1.35 crores. The issue remained open from 29.09.05 to 05.10.95. As per 78 days report the issue was oversubscribed by 17.859 times. As per market reports, the listing of equity shares of BFSL was preceded by speculative grey market operations. It was suspected that the promoters and other persons associated with the promoters had indulged in grey market operations and allotments to the Public Issue were manipulated by using ante-dated stockinvests at higher amounts than issued by the banks. These manipulations were possibly done by

promoters of BFSL and certain investors/financiers with the assistance of RTI and Bankers to the Issue. The stock brokers who traded in these shares had also possibly facilitated this process. In view of this SEBI, vide its order 24.7.97 ordered an investigation into the affairs relating to buying, selling or dealing in the shares of BFSL.

The investigations revealed that BFSL acting through its Chairman Mr. SK Gupta in connivance with Ashok Chawla, made irregular allotments in the Public Issue of BFSL involving irregular subscription for shares by way of applications accompanied by stock invests issued after closure of the Issue. These stockinvests issued for Rs.1 lac, Rs.1.1 lac and Rs.1.2 lac were fraudulently altered to higher amounts of Rs.10 lac, Rs.11 lac and Rs.12 lac respectively. Mr. Ashok Chawla had arranged for the security against which the stock invests were issued and made applications in the name of some persons who were not genuine investors. Certain investors of Ahmedabad also made late applications by way of back dated stockinvests & were allotted shares against their applications. The ante-dated stockinvests were arranged from Sangli Bank Ltd., Karol Bagh, New Delhi & State Bank of India, Ashram Road, Ahmedabad. The share applications which were made for higher amount and which were arranged after the closure of the issue were made to get the issue oversubscribed many times. Consequently, such applications affected the regular allotment process. It was also gathered during the investigations that shares irregularly allotted were sold prior to the approval of basis of allotments and listing of shares.

M/S HEM ENTERPRISES

A show cause notice dated 18.03.1999 was issued to M/s. Hem Enterprises u/s.11B of the SEBI Act, 1992 read with Regulation 12 of SEBI (Prohibition of Fraudulent & Unfair Trade Practices relating to Securities Market) Regulations, 1995. M/s. Hem Enterprises did not furnish reply on the specific allegations contained in the said notice but shown ignorance of the provisions applicable in the case. M/s. Hem Enterprises was given an opportunity of personal hearing before me on 26.09.02 which was also not availed. The issues pertaining to M/s. Hem Enterprises regarding his role are discussed below.

ISSUE

Entering into grey market transactions and issuing contract notes/bills being an unregistered stock broker

Investigations revealed that the following purchases of BFSL shares were made b
y M/s. Hem Enterprises:-

NAME OF INVESTOR	NO.OF SHARES	DATE OF TRANSACTION	RATE
Gulabdevi Kabra	4800	5.12.95	20.00
Maya Devi Kabra	4800	-do-	20.00
Jagan Nath Kabra	4000	-do-	20.00

Enquiries with the above investors revealed that they obtained the allotments of BFSL shares by way of applications made to the Public Issue of BFSL along with stockinvests issued by State Bank of India, Ashram Road, Ahmedabad on 25.11.95, whereas the Public Issue of BFSL closed on 5.10.1995. All these investors confirmed having submitted the applications after the closure of the Public Issue. Some of the investors have also stated that the applications were made by Mr. Hasmukh N. Shah, proprietor of M/s. Hem Enterprises on their behalf and they had no interest in the applications, any profit or loss being to the account of Mr. Hasmukh N. Shah.

As per information obtained from these investors, it also emerged that the sales had been contracted by them prior to the approval of the Basis of Allotment and Listing of BFSL shares on 8.12.95 on 14.12.95 respectively. These are evidently grey market trading before the approval of Basis of Allotment and Listing of the scrip.

M/s. Hem enterprises, being unregistered sub-broker/or stock-broker have also issued contract notes/bills for purchase of BFSL shares.

REPLY

M/s Hem Enterprises has not responded to the findings of the investigations contained in the show cause notice. Its reply only refers to the losses made by them and their ignorance of the rules and Regulations of SEBI.

FINDINGS

By choosing not to respond to the show cause notice, M/s. Hem Enterprises has deemed to have admitted the findings of the investigations. M/s. Hem Enterprises is thus liable for action under section 12 of SEBI Act, 1992 and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules, 1992 for dealing in securities without obtaining certificate of registration. These transactions in BFSL were undertaken prior to the approval of the Basis of Allotment or Listing of BFSL shares. M/s. Hem Enterprises have indulged in grey market transactions and facilitated disposal of shares arising out of irregular

allotments.

M/S. MITHANI INVESTMENTS

A show cause notice dated 18.03.1999 was issued to M/s. Mithani Investments u/s. 11 B of the SEBI Act, 1992 read with Regulation 12 of SEBI (Prohibition of Fraudulent & unfair Trade Practices relating to Securities Market) Regulations, 1995 but they did not furnish reply to the said notice. M/s. Mithani Investments was given an opportunity of personal hearing before me on 26.09.02 which was attended by Mr. Sanjay Singhal, authorised representative of M/s. Mithani investments. It was submitted by Mr. Singhal that M/s. Mithani Investments had merely made purchases in the shares of BFSL. He simply denied the charges under the show cause notice without reference to their specific defence. There was nothing to substantiate the denial from M/s. Mithani Investments. The issues pertaining to M/s. Hem Enterprises(?) regarding his role are discussed below.

ISSUE

Entering into grey market transactions and issuing contract notes/bills being an unre gistered stock broker.

Investigations revealed that the following purchases of BFSL shares were made by M/s. Mithani investments:-

NAME OF INVESTOR	NO. OF SHARES	DATE OF TRANSACTION	RATE
Hansaben Desai	1700	2.11.95	24.00
Navinchandra Desai	4300	-do-	24.00

Enquiries with the above investors revealed that they had along with certain other investors obtained the allotments of BFSL shares by way of applications made to the Public Issue of BFSL along with stockinvests issued by State Bank of India, Ashram Road, Ahemdabad on 25.11.95, whereas the Public Issue of BFSL closed on 5.10.1995. All these investors confirmed having submitted the applications after the closure of the Public Issue. Some of the investors have also stated that the applications were made by Mr. Hasmukh N. Shah, proprietor of M/s. Hem Enterprises on their behalf and they had no interest in the applications, any profit or loss being to the account of Mr. Hasmukh N. Shah.

As per information obtained from these investors, it also emerged that the sales had been contracted by them prior to the approval of the Basis of Allotment and Listing of BFSL shares on 8.12.95 on 14.12.95 respectively. These are evidently grey market transactions before the approval of Basis of Allotment and Listing of the scrip.

M/s. Mithani Investment, being an unregistered sub-broker/ or stock broker have issued contract notes/bills for purchase of BFSL shares.

REPLY

M/s. Mithani Investment has submitted that it had merely made purchase in the shares of BFSL. It further denied the charges made out in the show cause notice.

FINDINGS

M/s. Mithani Investment has failed to substantiate the denial made. M/s. Mithani Investment being unregistered stock broker or sub-broker had issued contract notes/bills for purchase of BFSL shares prior to the approval of the Basis of Allotment or Listing of BFSL shares. M/s. Mithani Investment have thus indulged In grey market transactions and facilitated disposal of shares arising out of irregular alalotments.

M/s. Mithani Investment had tacitly admitted the findings of the investigations. M/s. Mithani Investment is thus liable for action under section 12 of SEBI Act and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules, 1992 for dealing in securities without obtaining certificate of registration from SEBI.

I thus find that both M/s. Hem Enterprises and M/s. Mithani Investments are guilty of violating the provisions of section 12 of SEBI Act, 1992 and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules, 1992. The transactions undertaken by these entities were prior to the

approval of the basis of allotment for listing of BFSL shares. They have thus indulged in grey market transactions and facilitated disposal of shares arising out of irregular allotments. These are fraudulent and unfair trade practices designed to manipulate the market price of BFSL shares and induce their sale and purchase by other persons. Thus they have violated the provisions of Regulation 3 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 which requires that no person shall buy or sell or otherwise deal in securities in a fraudulent manner.

In view of the above, I find it to be a fit case for passing an appropriate direction against M/s. Hem Enterprises and M/s. Mithani Investments. I, therefore, in exercise of the powers conferred u/s. 4(3) of the SEBI Act debar M/s.Hem Enterprises & its proprietor Shri Hasmukh Shah and M/s. Mithani Investments & its proprietor Shri Milan J. Mithani in anay capacity whatsoever from associating with the capital market related activities, dealing in securities, accessing the capaital market and associating with any of the intermediaries in the capital market for a period of 5 years. This order shall come into force with immediate effect."

Since Hem Enterprises is not a party to the appeal, I do not consider it necessary to take cognizance of the finding specifically relating to the said entity, while dealing with the present appeal.

On a perusal of the show cause notice issued to the Appellant it is seen that the notice is deficient in as much as it is silent on the specific material based on which the charges are levelled. In the notice addressed to the Appellant it has been stated that "M/s. Hem

Enterprises, being an unregistered sub-broker have issued contract notes/bills for purchase of BFSL shares. You are thus, liable for action order section 12 of SEBI Act, 1992 and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules,1992 for dealing in securities without obtaining certificate of registration." For the said alleged contravention of section 12 and rule 3, by Hem Enterprises how the Appellant can be held liable is not clear. In this context the conclusion arrived at by the Respondernt as recorded in its order against the Appellant, despite the fact that the Appellant was not called upon to answer such a charge in the show cause notice, need be noted:

"M/s. Mithani Investment has failed to substantiate the denial made. M/s. Mithani Investment being unregistered stock broker or sub broker had issued contract note/bills for purchase of BFSL shares prior to the approval of the Basis of Allotment or Listing of BFSL shares. M/s. Mithani Investment have thus indulged in grey market transactions and facilitated disposal of shares arising out of irregular allotments.

I thus find both M/s. Hem Enterprises and M/s. Mithani Investments are guilty of violating the provisions of section 12 of SEBI Act, 1992 and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules, 1992. M/s. Mithani Investment had tacitly admitted the findings of the investigations. M/s. Mithani Investment is thus liable for action under section 12 of SEBI Act and Rule 3 of SEBI (Stock Brokers and Sub Brokers) Rules, 1992 for dealing in securities without obtaining certificate of registration from SEBI."

There is nothing on record to show that violation of section 12 of the Act and rule 3 of the Stock Broker Regulations was a charge against the Appellant and there is no reference to the material based on which the said finding was arrived at. It has been stated in the order that the authorised representative of the Appellant who appeared in the enquiry proceeding "simply denied the charges under the show cause notice without reference to their specific defence. There was nothing to substantiate the denial from M/s. Mithani Investments." In fact, in response to such a vague notice what response, except a denial, can be expected from the noticee. Under the heading "finding" in the order it has been recorded that "M/s. Mithani Investments has failed to substantiate the denial made". This is rather strange. It was for the Respondent to substantiate the charge with the support of relevant material. It is for the person levelling the charges to prove the charges and not by the person against whom the charges are levelled. There is no reference at all in the order to the material based on which the Respondent has come to the conclusion. In such a situation the Appellant can not effectively counter the charges, but make a blatant denial. In fact it is not a case that the notice did not refer to material, but it is a case of the notice not referring to the specific charge itself. In the order it has been stated that "M/s. Mithani Investment had tacitly

admitted the findings of the investigations". I do not find any material from the Respondent's side in support of this observation. The Appellant has contented that it was not provided with a copy of the investigation report etc. The Respondent has not disputed the said contention. On the contrary the Respondent has impliedly admitted the said version of the Appellant by stating that "as a matter of fact, the Respondent never received any request for copies of the documents from the Appellant." The Respondent's contention that the material supporting the charge was not furnished for want of request from the Appellant, is untenable. Since the finding recorded in the order is stated to be based on the material collected in the course of investigation it was incumbent on the part of the Respondent to make available the relevant material to the Appellant, so as to enable the Appellant to answer the charges. Neither the show cause notice nor the impugned order refers to any document/material in support of the charges/findings. The Respondent has indicted the Appellant. But there is no reference to the material based on which such indictment has been made. This flaw is serious.

The Respondent has made vain attempt to improve the situation by referring to few new documents in its reply. But, it is well settled

that an order can not be improved by supplementary affidavits etc. during the course of the appeal proceedings. This has been made clear by the Hon'ble Supreme Court in Mohinder Singh Gill V Chief Election Commissioner ((1978) 1 SCC 405) in the following words:

> "that when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J in Gordhandas Bhanji (AIR 1952 SC 16) at p. 18:
>
> > 'Public order publicly made, in exercise of a statutory authority cannot be construed in the light of the explanations subsequently given by the officer making the order of what he meant, or what was in his mind or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.'
>
> Orders are not like old wine becoming better as they grow older."

The Respondent has found the Appellant guilty of violating the provisions of section 12 of the Act, rule 3 of the Stock Broker Rules and regulation 3 of the FUTP Regulations.

Section 12 of the Act prohibits stock broker, sub broker etc. from buying, selling or dealing in securities except under and in accordance with the conditions of certificate of registration obtained

from the Respondent. According to rule 3 “no stock broker or sub broker shall buy, sell, deal in securities unless he holds a certificate granted by the Board under the regulation”. The very purpose of the requirement of obtaining certificate of registration from the Respondent is to ensure that the concerned intermediary acts as per the regulatory provisions put in position to protect the interest of the investors and the securities market. Any stock broker/ sub broker engaging in the activities referred to in section 12 without obtaining the certificate of registration is a serious charge and such offenders deserve to be dealt with appropriately. Then, penalty is for the offence. If the offence is not established, imposition of penalty can not be sustaianed.

Regulation 3 of the FUTP Regulations, which the Appellant is stated to have violated is a measure to prohibit fraudulent and unfair practices relating to securities market. According to regulation 3 “no person shall, buy sell or otherwise deal in

securities in a fraudulent manner”.

The scope of the expression "fraudulent" referred to in regulation 3 is available in regulation 2 (c) which is as follows:

"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 sugtgestion, 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 speciaally declares to be fraudulent; and "fraudulent"shall be construed accordingly."

The impugned order has failed to establish violation of regulation 3 by the Appellant. Charge has not been reasonably proved.

The Respondent has invoked section 11B of the Act and regulation 12 of the FUTP Regulations for issuing the directions. Relevant provisions of section 11 and regulation 12 are as under:

Section 11B

"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 secrutities market"

Regulation 12:

"The purpose of which directions under regulation 11 may be issued are the following namely:-

(a) directing the person concerned not to deal in securities in any particular manner;

(a) 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;

(b) prohibiting the person concerned from disposing of any of the securities acquired in contravention of these regulations,

(c) directing the person concerned to dispose of such securities required in conrtravention of these regulations, in such manner as the Board may deem fit, for restoring the status quo ante."

From the legal provision stated above it is clear that the charges levelled against the Appellant are of very serious nature and in the event the violations are established the consequences that would visit the offender are also of serious nature. The direction issued by the Respondent to the Appellant has severe implications as far as the Appellant is concerned. The Respondent has debarred the Appellant "in any capacity whatsoever from associating with the capital market related activities, dealing in securities, accessing the capital market and associating with any of the intermediaries in the capital market for a period of 5 years". The scope and reach of the direction is clear from the wording of the order itself. I am not for a moment saying that the Respondent has no power to issue directions. The Respondent is empowered to issue appropriate directions if the facts and circumstances warrant taking such appropriate measure, to protect the

interest of investors or for ensuring due compliance with the provisions of the Act, rules and regulations made thereunder. The Respondent is empowered to issue diriections under Section 11B, for the purposes mentioned in the section, to those persons listed therein. This Tribunal in Sterlite case (supra) had held that section 11B can not be invoked to impose penalties, but never viewed that section 11B can not be invoked for taking measures to protect the interest of investors and securities market. The measures can be preventive or remedial as well. Whether a direction is preventive or remedial or penal would depend on the nature of the direction vis-à-vis the attendant factors. Regulation 12 also enumerates the purposes for which directions can be issued under the FUTP Regulations. However, the basic question to be considered is that in the facts and circumstances specific to the case the impugned direction debarring the Appellant from the activities specified in the order is justified or not.

I have very carefully considered the order. I find the order wanting in material in support of the findings recorded therein. The Appellant was kept in the dark on the material relied on by the Respondent. Neither the show cause notice nor the impugned order

refers to the specific evidence based on which the charges are levelled/conclusions are arrived at. Learned representative of the Respondent, during the course of the argument had submitted that the Respondent's finding that the Appellant indulged in market manipulation is based mainly on the two letters dated 25.9.97 from Ms. Hansaben Desai, Shri Navinchandra Desai (there is one from one Mayur Desai also.) Copies of these letters as filed in the Tribunal bear the receipt stamp of the Respondent indicating the receipt of the same by its office on 29.9.97. It is noticed that the letters, but for the details of the shares involved, are exactly identical including the address of the persons who wrote the letters. These letters were in the possession of the Respondent on 29.9.97 i.e. well before the show cause notice was issued. But the Respondent did not refer to the same in the notice and provide copies thereof to the Appellant so as to enable the Appellant to meet the version contained therein. But at the same time heavy reliance is placed on these letters to hold the Appellant guilty of violating the provisions of the Act and the Rules and the Regulations.

In my view, the order has failed to establish the charges against the Appellant and as such the impugned direction can not be sustained. Since the Respondent has failed to establish the charge, I do

not consider it necessary to examine the scope of section 11B with reference to the direction issued by the Respondent.

For the reasons stated above, that part of the order directed to the Appellant is set aside.

However, it is made clear that this order does not in any way preclude the Respondent from taking out any fresh proceedings and passing appropriate orders, in the matter by following the requirements of law. Sd/-

(C.ACHUTHAN)

PRESIDING OFFICER

Place: Mumbai

Date:April 22 , 2003.

Copy to:

1. The Appellant as above
2. The Chairman,Securities and Exchange Board of India.. Respondent