BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.34/2002

In the matter of:

T.J. Stock Broking Services Pvt. Ltd **Appellant**

Vs.

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

Appearance:

Shri Shyam Mehta
Advocate

Ms Madhavi Joshi
Advocate
i/b Udwadia Udeshi & Berjis **for Appellant**

Shri Kumar Desai
Advocate

Shri Daya Gupta
Advocate

Shri Sandeep Deore
Jt. Legal Adviser, SEBI **for Respondent**

(Appeal arising out of the order dated 12.6.2002 made by the Chairman, Securities and Exchange Board of India)

ORDER

Market witnessed abnormal price and volume movement in the shares of Amara Raja Batteries Ltd (ARBL) traded on Bombay Stock exchange (BSE)and National Stock Exchange (NSE), in February – March, 2001. The Respondent received complaints alleging market manipulation/ irregularities in the trading of ARBL's shares. In that context the Respondent ordered investigation to ascertain as to the role played by various persons / intermediaries and violations, if any, of the regulatory provisions by them. The investigation is stated to have revealed that Shri Harinarayan Bajaj and his son Shri Rahul Bajaj were the dominant traders in the ARBL's shares during the period August 2000 to March 2001, that some of the members of BSE and NSE had aided and abetted Shri Harinarayan Bajaj in creating a false market in ARBL's scrips and also that they had failed to exercise due care and skill in their dealings. The Appellant was one of the members whose involvement in the matter was subjected to investigation. In the light of the information collected during the course of investigation, the Respondent decided to conduct a detailed enquiry into the role and conduct of the Appellant in trading in the scrip. Accordingly an enquiry officer was appointed on June 18, 2001 to enquire into the affairs of the Appellant in its dealings in the scrip of ARBL and the possible violations of the rules, bye laws and regulations of BSE, provisions of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities market) Regulations, 1995 (the 1995 Regulations) and the Securities and Exchange Board of India (Stock-brokers and Sub-brokers) Regulations, 1992 (the 1992 Regulations). The enquiry officer on concluding the enquiry came to the conclusion that the Appellant had failed to exercise due care and skill in his dealings with Shri Bajaj as required by clause A (2) of the code of conduct prescribed for the stock-brokers in the 1992 Regulations, and also that the

Appellant had violated SEBI circular dated March 7, 2001 whereby short sales were banned. He recommended one month suspension of the certificate of registration granted to the Appellant. The Respondent communicated the findings of the enquiry officer to the Appellant and asked to show cause as to why penalty as recommended by the enquiry officer should not be imposed against it. The Appellant responded to the same by filing written explanation and oral submissions before the Chairman of the Respondent. The Chairman adjudicated the notice and found the Appellant guilty of non complying with the requirements of clause A(2) of the Code of Conduct prescribed in the 1992 Regulations. In the said context he vide order dated 12.6.2002 suspended the certificate of registration granted to the Appellant for a period of one month from June 27, 2002.

Claiming to be aggrieved by the said order, the Appellant has preferred the present appeal praying to set aside the order and stay the operation of the same pending disposal of the appeal. The prayer for stay of the order pending disposal of the appeal was allowed after hearing counsel for the parties.

Shri Shyam Mehta, learned counsel appearing for the Appellant briefly stated the facts leading to the filing of the present appeal and submitted that the Respondent has not established any charge, warranting imposition of such a severe penalty of suspension of certificate of registration granted to the Appellant. He submitted that the certificate of registration granted to the Appellant has been suspended for a month for the reason that the Appellant had not exercised due care and skill in its dealing with Shri Harinarayan Bajaj in the scrip. In this context learned counsel referred to the abnormal price and volume movement in ARBL's scrip during the period as mentioned in the impugned order and stated that the Respondent has held Shri Harinarayan Bajaj and his son Shri Rahul Bajaj responsible for the creation of false market. He also referred to the findings of the investigation, referred to in the enquiry report in this regard. Shri Mehta submitted that based on the investigation, the Appellant was called upon to show cause in respect of the following charges:

> I (a) By virtue of its dealing in the scrip of ARBL on behalf of Shri Harinarayan Bajaj the Appellant has failed to exercise due skill and care in their dealings.
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> (b) The Appellant sold the shares of ARBL in violation of SEBI circular dated March 7, 2001 which banned any kind of naked short sale.
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> (c) The Appellant has allowed the client to take position which is beyond the client's financial position and, therefore, violated regulation 7, Schedule II of the 1992 Regulations.
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> II The Appellant has aided and abetted Shri Harinarayan Bajaj and his family members in creating a false market in the ARBL's scrip and therefore guilty of violating the provisions of regulation 4 of the 1995 Regulations.

Learned counsel submitted that the enquiry officer has exonerated the Appellant of "aiding and abetting Bajaj" of the charge mentioned at II above viewing that "From the material available it is not possible to draw any inference that TJSBSPL (the Appellant) has the intention to arbitrarily raise or depress the price. There is no proof that TJSBSPL was aware of Mr. Bajaj dealing with other brokers except Mukesh Babu Securities Ltd., nor had the information that Mr. Bajaj is indulging in creating a false market in the scrip of ARBL. What TJSBSPL did was a normal broking transaction as a stock broker." Shri Mehta submitted that, while considering the charges stated a at serial no. I above , the observation made by the enquiry officer holding that the Appellant was not in any way involved in the market manipulation as alleged at II above, has to be taken note of.

Learned counsel referred to the observations in the impugned order that Bajajs were primarily responsible for creating false market in the ARBL's shares and because of their transactions trade volume 'went up to around 8-15 lakhs shares per day in February and first week of March 2001 as against 50, 000 – 60, 000 shares per day in October, 2000. It has been stated in the order that excessive speculative exposure given to the client would, by any standard, lead to serious consequences and repercussions in the process of discovery of fair market price of a security, that in that context, it was viewed that the Appellant had failed to exercise due care and skill in their dealings and this so called failure was considered detrimental to the interest of investors and the safety of securities market. Shri Mehta submitted that another finding in the order is that Appellant short sold 15, 500 shares of ARBL at a time when short sales were banned by the Respondent. According to him these charges against the Appellant are unfounded.

Learned counsel submitted that Bajajs were introduced to the Appellant by one of their long time business associates and as such a few blank columns in the client registration Form was of no relevance, as the whole purpose of the information required to be furnished in the Form is to update the broker

about the client's status. He submitted that the Appellant had acted only in their capacity as a broker for Bajajs in the impugned transactions, that the Appellant had no other relationship or dealings with Bajajs other than as a broker and it had executed the trades under the client's instructions. Learned counsel referred to the transactions relied on by the Respondent and stated that these minor transactions of 30, 000 shares per day had taken place when the total transactions in the ARBL shares in the market were around 8 – 15 lakhs and in that context it can not be viewed that a transaction involving just 30, 000 shares had affected the market. Learned counsel referred to the purchase and sale of ARBL scrips by the Appellant during February – March, 2001 stated in the appeal memorandum and submitted that on any given day, the aggregate outstanding position of Shri Harinarayan Bajaj on both NSE and BSE taken together was not more than 30, 000 shares of ARBL that even this outstanding position was only during Settlement Nos. 48-51 on BSE and on NSE for Sett. Nos. 7 – 10 and no further, that by the Respondent's own version this transaction has not affected the market that the Respondent had on the contrary viewed the Appellant's transactions in ARBL scrips as normal transactions. He submitted that 8-15 lacs shares transacted per day was not the transactions effected by the Appellant. Learned counsel submitted that the Appellant had informed the Respondent that its turn over during 2000-2001 was Rs. 6730 crores and its associate company's turn over was Rs. 3120 crores and as such the average turn over per day was Rs.40 crores, that the outstanding value of transactions for Bajaj was around Rs. 85 - 90 lacs on any day which accounted for just 2% of their daily turn over. It was also submitted that Shri Harinarayan Bajajhad paid a margin amount of Rs. 10 lacs at the time of first transaction, that Shri Bajaj's account was credited by a further amount of about Rs. 10 lacs during 3 settlements of BSE / NSE which were retained by the Appellant as further margin from the point of risk management, that this was sufficient proof of the financial soundness of the client. Learned counsel submitted that the material on record does not show that any "excessive speculative exposure" was given to Bajajs by the Appellant and the transactions effected by the Appellant "led to serious consequences and repercussions in the process of discovery of fair market price of the scrip" As alleged in the order. Learned counsel submitted that it is not the duty of the broker to ensure that the price of every scrip which he deals in for his client reflects fair market value. According to him, a broker's duty is to his clients, otherwise conflict will arise. Learned counsel submitted that the Respondent's said proposition if extended, every person dealing with the broker would be entitled to sue the broker for damages and one could imagine the would be consequences in that event. He submitted that the Appellant can not be held guilty for having purchased 30, 000 shares of ARBL for the client as per the client's instructions. In this context learned counsel submitted that the enquiry officer himself had admitted that "there are no quantitative restrictions laid down with regard to execution of each trade and the same is left to the prudential risk management norms of the stock broker within the frame work of law", that the Appellant had gone by the prudential risk management norms and the Respondent has not shown that it was not so.

Referring to the alleged short sale by the Appellant in the shares of ARBL learned counsel submitted that the Appellant has not violated SEBI circular dated March 7, 2001 banning short sales. He submitted that there was a purchase position of 30, 000 shares in the scrip of ARBL in NSE on 9.3.2001, against this the Appellant entered / purchased sale order for 15, 000 shares each on two terminals at BSE at 9.55.18 a.m. 9.55.22 a.m. respectively on 12.3.2001, that since one of the two terminals was not responding due to technical problems, the Appellant once again entered the order for 15, 000 shares at 9.55.29 a.m., that till 9.55.48 a.m. the computer did not show the executed transaction against these orders, then the Appellant once again punched another order for 15,000 shares at 9.55.48 a.m. Learned counsel submitted that when the two terminals showed a total sale of 45, 500 shares instead of the desired 30, 000 shares, the Appellant immediately bought back 15,500 shares between 9.56.05 a.m. – 9.55.34 a.m. on 12.3.2001. He submitted that the time marked in the trade list is the time when the trade was matched and not the time of punching of the order. In this context he referred to the list of trades forming part of the appeal book, executed from its terminals on 12.3.2001 with respect to the relevant transactions, and submitted that from the said details it could be seen that in spite of the substantial increase in the price of ARBL shares from Rs.245 to Rs.275 during a short period of one minute on 12..3.2001, the Appellant nevertheless bought back 15500 shares with a view to rectify the unintended sale, which establishes that there was no intention at all on its part to effect any naked short sale, that also considering the large volume of transactions in the ARBL scrips during the said period the volume of 15, 500 shares is insignificant to affect the market. He submitted that the excess sale was purely due to a technical problem /a genuine, bonafide error of the computer system, that the Appellant had no intention to short sell and the moment it had the knowledge of the wrong sale, the shares were bought back. Learned counsel referred to the portion in SEBI's circular dated 7.3.2001 that "all sales transactions effective from tomorrow i.e. March 8, 2001 shall be backed by delivery unless a sale transaction is preceded by a purchase position of at least an equivalent amount in the name of the same client in the same or any other exchange" and submitted that Bajajs, in Settlement No. 51 had a net purchase position of 119374 shares on BSE, therefore on a close reading of the circular, sale of 15, 500 shares was not in violation of SEBI circular of 7.3.2001 since the sale of 15, 500 shares was backed by purchase position of the client which far exceeded the sale. He submitted that SEBI circular does not

specifically prescribe the requirement brokerwise, but it is client wise and since the interpretation of the circular having a bearing on the culpability of the Appellant and the nature of penalty that would attract, that the circular which is open to different interpretations, the same should not be interpreted to the disadvantage of the person affected by the circular. In this context he referred to section 80 of the Indian Penal Code, 1860 in support which states "nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution" and submitted that the excess sale inadvertently made by the Appellant can not be considered as an offence to visit any penalty.

Learned counsel referred to the import of the words "diligence, care, skill" etc. used in the regulation. He submitted that negligence is the opposite of diligence and explained the concept of negligence as stated in The Common Law Library (Number 6)

> "A duty of care: what is "duty"? The word "duty" connotes the relationship between one person and another, imposing on the one an obligation, for the benefit of that other, to take reasonable care in all the circumstances.
>
> The need for a duty of care to exist. It is a question of law whether or not there exists a duty of care in the given case, under consideration. Unless the existence of such a duty can be established, an action in negligence must fail.

Perhaps the clearest illustration of this need for a duty of care to exist is to be found in the words of Lord Wright in Grant v. Australian Knitting Mills Ltd., (1936) Ac. 85.103 where he said:

> "All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is deduced. It is however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists."

Put in a compendious form, a man is entitled to be as negligent as he pleases towards the whole world, provided that he does not owe anybody a duty to take care.

(See Lord Esher M. R. at 497 in Le Lievre v. Gould (1893) 1 Q.B1. This decision was not followed but was explained by the H.L. in Hedley Byrne & Co. Ltd., v. Heller & Partners (1964) A. C. 465. "English law does not recognise a duty in the air, so to speak: that is a duty to undertake that no one shall suffer from one's carelessness":)

> Evidence of causation must be given on behalf of plaintiff. Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that, on a balance of probabilities, the more likely cause of the damage was the negligence or breach of statutory duty of the defendant, his servant or agent and not solely the negligence or breach of statutory duty of some other person. If he fails to establish that the defendant caused the harm of which he complaints, or some part of it, then his action will fail. Such a failure will result, whether this happens to be expressed in terms of lack of causation or for reasons of remoteness.
> ……
> Additionally, the plaintiff must also show that the damage was the result of the defendant's negligence, because negligence without proof of damage is not actionable. It is a question of law, whether the evidence adduced allows a reasonable finding of causation, but is a question of fact, whether any particular head of damage is so caused by the defendant's negligence or breach of statutory duty.
>
> THE STANDARD OF CARE
> "The reasonable man as the standard of care. The ordinary standard of care, which is adopted, is what is called "reasonable care" namely that of a reasonable man. In Alderson B.'s classic words,
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> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do: or doing

something which a prudent and reasonable man would not do." (Blyth V Birmingham Waterworks (1856) 11 Ex 781 at 784)

Even so, it is still necessary to inquire somewhat more carefully into the standard of the reasonable man.

In one sense the standard of foresight of the reasonable man is an impersonal test.

The reasonable man knows the standard of care, which the law exacts from him, so complies with it. Thus it is a truism to say that the amount of care required by the law is to be measured by the conduct of a reasonable man.

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The situation is such that in numerous activities of life, of which driving motor cars may be taken as an example, the law has worked out definite rules which must be complied with and these rules represent the legal standard of care in that case. These rules vary from time to time as social conditions and habits of life vary, but they regulate the standard of care at any given time. Just as it would be wrong for a tribunal of fact to apply to a motorist its own view of the conduct of a reasonable man under the circumstances, without regard to such things as the rule of the road and the other rules of conduct, mentioned above, so it is equally wrong to apply the abstract test of reasonableness to other cases, in which definite rules have been laid down.

15. STOCKBROKERS

"General Liability of stockbrokers. With regard to the customer, a stockbroker's duty lies primarily in contract and stockbrokers are liable for failing to use that skill and diligence which a reasonably competent and careful stockbroker would exercise. The stockborker's duty includes that of ascertaining with reasonable accuracy facts relating to any particular transaction, and transmitting them to the customer. If the latter suffers loss by the stockbroker's breach of duty, it matters not whether the stockbroker had acted innocently or fraudulently. On the other hand, a stockbroker was held to owe no duty of care to a customer, who had inquired only about the current market price of shares, to tell him that the shares in question were in primary distribution. A stockbroker was held liable where a customer had instructed him to sell shares at a time when there was a market for them but the latter had failed to do so. This was in spite of the fact that further instructions were given by the customer to sell at a time when he knew of the broker's failure. The Alberta Supreme Court held by a majority that the measure of damages was the named price of the shares, less commission and taxes, the broker keeping the shares, which he had not been able to sell.

There can be no room for doubt that, since the decision in Hedley Byrne & Co. Ltd., v. Heller & Partners Ltd.,(1964)Ac 465) a stockbroker also owes a duty in tort to his customer. Likewise, in regard to a third party, with whom he has no contractual relationship, if a stockbroker gratuitously but negligently gives any advice or material information on request to such a person, then should he have reason to believe that it is going to be acted upon, in the absence of a clear disclaimer of responsibility, he may well be liable should loss or damage be suffered as a result of such negligence. The mere fact of losses having been made on the commodities market could not of themselves provide evidence of negligence on the part of a broker, since the doctrine of res ipsa loquitur did not apply to such matters.
Shri Mehta submitted even if it is established that the Appellant has failed, as alleged by the Respondent, by any standard, the imposition of penalty of suspension of certificate of registration is not justified as it is not in proportion to the gravity of the charge leveled against the Appellant. He cited Hon'ble Supreme Court in (Ex. Naik Sardar Singh V. Union of India (AIR 1992 SC 417)on the doctrine proportionality.

Hon'ble Court had therein cited Lord Diplock's observation in "Council of Civil Service Unions V. Minister for the Civil Service (1984) 3 All ER 935, 950:

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'Illegality', the second 'irrationality' and the third 'procedural impropriety! This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic

community…"

The Hon'ble Court further observed:

> "This principle was followed by Ranjit Thakur v. Union of India (1987) 4 SCC 611: (AIR 1987 SC 2386) where this Court considered the question of doctrine of proportionality in the matter of awarding punishment under the Army Act and it was observed thus (at p.2392 of AIR)
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> "The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

Learned counsel submitted that the order is deficient as it is very cryptic and does not explain the basis on which the findings have been arrived at, that such an order can not be sustained. In support of this he cited this Tribunal's decision in M. J. Patel v. SEBI (2002) (38SCL 889).

Shri Mehta, referring to certain submissions of the Respondent's counsel stated that fresh charges / grounds such as alleged margin deficiency, incomplete details in the client registration Form etc. raised in the argument cannot be accepted at the appellate stage to improve the order that the order has to be adjudged as it is and not as is being supplemented/modified by the Respondent's counsel. He submitted that the Respondent's counsel's version that "excessive speculative exposure" covers short sale also is new ground which neither the enquiry officer nor the Chairman had stated and that the counsel on his own is trying to rewrite the order. He said that one can not look everywhere to support the order, -- the order should speak for itself.

Shri Kumar Desai, learned counsel appearing for the Respondent submitted that out of the 4 charges leveled against the Appellant, 3 charges have been established and the remaining one was dropped after enquiry. He submitted that the surviving charges are serious enough to justify suspension of the certificate of registration granted to the Appellant lasting for a month.

Shri Desai submitted that the charge that the Appellant had allowed Bajajs to take position which was beyond the client's capabilities, has been demonstrated in the order in the light of the undisputed fact that Bajajs were the dominant traders in the ARBL scrip during the period, that their trading accounted for approximately 30% of the trading on BSE and NSE and they had absorbed most of the deliveries in the scrip by purchasing and carrying forward their position on BSE, that Bajaj's were making use of the different trading cycles of BSE & NSE to shift their position from one exchange to another, that it was found that they were shifting positions of approximately 5.5 lakhs shares of ARBL between BSE & NSE in Settlement No.1 of NSE and the same was increased to about 11 lakhs in Settlement No.9 of NSE, that it was found that Shri Bajaj was not having the requisite funds to pay the deliveries and also for margins. According to Shri Desai, when the price of ARBL's scrip dropped, Shri Bajaj could not purchase any further shares due to shortage of funds. He submitted that the Appellant did not bother to find out the financial credibility of their client. He further submitted that the Appellant had taken prescribed client registration Form, but it was incomplete in as much as the information pertaining to the client's annual income and market value of portfolio etc., which indicate the financial position of the client was not stated in the Form. In this context he referred to the Appellant's submission before the enquiry officer that it had collected margin of Rs.10 lacs and also kept the credits in interest settlement period which showed the clients financial capability and because of this it did not enquire about Bajajs' financial position till he failed to meet his mark to market margin. He submitted that the Appellant had clearly admitted before the enquiry officer that it had taken an initial margin of Rs. 10 lacs from Shri Harinarayan Bajaj at NSE and since the client had informed that he would be keeping open position at one exchange only, no margin was collected from him for his trades at BSE. He submitted that the Appellant itself had stated that Shri Bajaj's dealing with it was to the tune of Rs.85-90 lacs, that in spite of such large money involved in the transaction with Bajaj, the Appellant did not bother to make any enquiry to find out his financial position is a clear failure on its part to exercise care and diligence. He also submitted that Bajaj was a new client of the Appellant and as such it was all the more necessary to find out the financial position of Bajaj.

With reference to the charge of short sale, Shri Desai referred to the text of the circular issued by SEBI

on 7.3.2001, as annexed to the Respondent's reply, and stated that the import of the circular is clear therefrom that the circular was issued in the context of the then prevailing market condition. He read out the circular – "The meeting of the Group on Risk Management Systems for Equity Market met on March 7, 2001 to discuss the current market condition and the risk management measures. Pursuant to the discussions in the meeting, it was decided that all sales transactions effective from tomorrow i.e. March 08, 2001 shall be backed by delivery unless a sale transaction is preceded by a purchase position of at least an equivalent amount in the name of the same client in the same or any other exchange. This will also apply to the proprietary trading by members. This will be on a self certification basis and would be subject to Exchange off site inspection up to sub broker and client level. The Exchanges are advised to implement the above with immediate effect."

Shri Desai submitted that the measure banning short sale was a risk management measure directed to the stock brokers. He submitted that the position is not with reference to the overall transaction in an exchange for a client, but broker specific, as it is clear from the circular itself which requires self certification, that a broker can certify only the transaction he effects and not the transactions effected by others for the same client, the broker was required to certify that he has not short sold. The learned counsel submitted that if the Appellant's argument that the purchase position with reference to all brokers is to be taken as whole, then the argument that the Appellant was unaware of the going on in the market, can not sustain. He submitted that Bajaj's overall purchase position is of no relevance for complying with the requirements of the said circular, that the short sale is qua the broker.

For factual position relating to the short sale he referred to the paras in the Memorandum of appeal and stated that the Appellant has admitted that they had short sold 15, 500 shares, but has pleaded that it was as a result of computer failure and unintentional. In this connection Shri Desai referred to the timings of the transactions reflected in the trade list provided by the Appellant and submitted that there was no reason to believe that it was a genuine mistake attributable to the computer. He submitted that the Appellant as a result of the short sale effected made a profit of about Rs.2 lacs in such a short period spanning over few minutes. Shri Desai submitted that there was a ban on short sale put in position as a risk management measure and the Appellant was duty bound to comply with the requirements of such measure, that complacency in this regard only show that the Appellant was careless and negligent and not exercising the diligence which is required of a broker in terms of Clause A(2) of the Code of Conduct. He countered the Appellant's claim that a broker's duty is confined only to his client. He submitted that a broker is bound to ensure market safety as well and ignoring the measures put in position by SEBI for the market safety can not be ignored by any broker for any reason. He stated that in the absence of a safe market, the interest of the investors in securities would be in danger. He submitted that by effecting short sale of 15, 500 shares the Appellant was endangering the system, that the value / volume involved in the transaction is not that small as is being stated by the Appellant, that the transaction price was about Rs.42 lacs.

Justifying penalty of one month suspension Shri Desai submitted that the nature of offence itself, with reference to its effect, warranted such a penalty. Referring to the case law cited (AIR 1992 SC 417) by the counsel for the Appellant, on the doctrine of proportionality to be followed in awarding punishments Shri Desai submitted that the Hon'ble Court had observed in the same Judgement that if the decision as to sentence "is an outrageous defiance of logic, then the sentence would not be immune from correction". He submitted that in the present case the Respondent has awarded just one month's suspension though the Appellant's action endangering the market safety warranted severe penalty.

With reference to Shri Mehta's submission regarding 'negligence' 'duty' etc. cited from the Common Law Library Volume 6, Shri Desai submitted that, the matter involved in the present case is not in the realm of Tort or under the general law of negligence, but under the realm of the SEBI Act and hence the authority cited by the Appellant is of no relevance.

I have carefully considered the pleadings and the submissions made by the counsel for the parties and the material on record and my views are as follows:

The impugned order is in the context of the market behaviour in terms of price and volume, witnessed in trading in the shares of ARBL, particularly in February – March, 2001. It is seen that the price of the scrip which was hovering around Rs.91/- in the 1st week of October 2000, reached Rs. 205/- on January 1, 2001 and further touched a high of Rs. 320/- on March 8, 2001. But the same crashed to Rs.78.50 by March 19, 2001. Further the volumes traded in the scrips around 50, 000 – 60, 000 shares per day went up to the extent of 10 - 15 lacs shares per day in January – March, 2001. The Respondent's investigation prima facie revealed one Shri Harinarayan Bajaj and his son Shri Rahul Bajaj were the predominant traders in the scrip of ARBL during the period August 2000 to March, 2001 and held them responsible for the creation of a false market. The investigation carried out by the Respondent indicated that various members of both NSE and BSE had aided and abetted Shri Harinarayan Bajaj in creating a

false market, in the scrip of ARBL and they were also found to have not exercised due skill and care in their dealings. The Appellant was one among those brokers who were investigated in the said context. Though after the investigation and enquiry, the Appellant was absolved of the charge of aiding and abetting Bajajs, they were found wanting in exercising due skill and care in their dealings, as required in terms of Clause A(2) of the Code of Conduct prescribed in the 1992 Regulations.

According to regulation 7 "the Stockbroker holding a certificate shall at all times abide by the Code of Conduct as specified at Schedule II".

Clause A(2) referred to it in the order is on "Exercise of due skill and care" which requires: "a stockbroker shall act with due skill care and diligence in the conduct of all his business".

On a perusal of the impugned order and the material before me, it appears that the market collapse in the case of ARBL shares was in the context of mega size trading allegedly done for one client – Bajajs - by several brokers. Gigantic size of the transaction effected for the said client has been stated in the order. It appears that there were several players. On a perusal of the order it is seen that the Appellant started dealing in the scrip of ARBL from February 2001, and that during the period it had purchased 90,000 shares and sold 1,20,000 shares from Settlement 48 to 51 of BSE. It is in this context the findings in the impugned order have to be seen. In the following four paragraphs in the order, it has been stated:

> "It is established that Shri Harinarayan Bajal and his son Shri Rahul Bajaj were primarily responsible for creating a false market in the scrip of ARBL and because of their transactions the volumes in the scrip also went up to around 8-15 lakh shares per day in the month of February & first week of March 2001 from 50, 000-60, 000 shares per day in October, 2000. In this regard it is to be noted that excessive speculative exposure given to the client would, by any standards led to serious consequences and repressions in the process of discovery of fair market price of a security.
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> In this regard, I have carefully examined the explanation given by the broker member. However I find that they have not exercised due care and skill in its dealings. The above mentioned conduct of the broker member in its dealings with Shri Harinarayan Bajaj in the scrip of ARBL is detrimental to the interest of investors and the safety of securities market and thereby violated the provisions of SEBI (Stock-brokers and Sub-brokers) Regulations, 1992. Further from the proceedings, I have seen that the broker member has admitted that they had short sold 15, 500 shares of ARBL. In this regard, I find that the short sale was committed in respect of a huge quantity of 15, 500 shares and therefore, the same cannot be simply termed as a technical fault. After pursuing the said factual position, I am of the opinion that the said broker member has also violated SEBI circular dated March 7, 2001 which banned the naked short sale.
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> By considering the enquiry report, submissions made by the broker and after examining the reply given by him, I am in (the) conformity of the recommendations given by the Enquiry officer. Therefore, under the provisions conferred upon me under section 4(3) of SEBI Act, 1992 and under Regulation 29(3), SEBI (Stock-broker and Sub-broker) Regulations, 1992 I hereby suspend the registration granted to T.J. Stock Broking Services P. Ltd, Member, The Stock Exchange, Mumbai (SEBI Regn. No INB 010981730) for a period of one month w.e.f. 27th June 2002."

On a perusal of the finding stated above it could be seen that the observation in para 2 is relatable to para 1 wherein the Appellant has been charged for "having given excessive speculative exposure to Bajajs" which lead to serious consequences and repercussions in the process of discovery of fair market price of the scrip. In this context it may be noted that the total volume of the trade in ARBL's shares transacted in the month of February and first week of March 2001 was around 8-15 lakhs shares per day. It is also to be noted that the Appellant had submitted before the Enquiry Officer that on any given day, the aggregate outstanding position of Bajaj on both NSE and BSE taken together was not more than 30, 000 shares of ARBL, that this outstanding position was only during the Settlement NO.48-51 on BSE and on NSE for Settlement Nos. 7-10 and no further, that a transaction of 30, 000 shares can not be regarded as to have created any impact on the market considering the total volume of turnover in that scrip, much less creating a false and misleading market as alleged. In this context the observation made by the enquiry officer in his report, which the Respondent has accepted, is worth noting. According to the enquiry officer the Appellant had done only few transactions for Bajaj, that they were primarily squared of transactions except one transaction where there was a short sale, that there was no indication of price manipulation at the time the Appellant executed the trade for Bajaj, that the Appellant or its directors did not trade in the scrip of ARBL. He had further stated that "from the material available it is not possible to draw any inference that TJSBSPL was aware of Mr. Bajaj dealing with other brokers except Mukesh

Babu Securities Ltd., nor had the information that Mr. Bajaj is indulging in creating a false market in the scrip of ARBL. What TJSBSPL did was normal broking transaction as a stock broker." The clean chit of the conduct of the Appellant has to be kept in mind while considering the charges levelled against them by the Respondent. It is not the Respondent's case that the Appellant had acted in concert with others dealing in the ARBL's scrip.

The Respondent's argument that the Appellant had not verified the financial position of Bajaj, that it should have asked for the details of the annual income and market value of port folio etc. are not that serious to charge them for failure to exercise due skill and care, in the context that Bajaj was introduced as a client by one of the business associates of the Appellant. The argument that the Bajaj's financial capability was unknown to the Appellant remains unsupported that on the contrary, the Appellant had submitted that they had collected margin of Rs. 10 lacs and also Bajaj's account was credited by a further amount of about Rs.10 lacs during 3 settlements of BSE / NSE which were retained by it as further margin. The Appellant's statement that it was holding 22% margin as against the normal requirement of retaining 10% margin remains undisputed.

The enquiry officer had observed that "during the period from Aug.-2000 to March 2001, the entire volume of trades executed by TJSBSPL was for Shri Harinarayan Bajal and about 2000 shares for other clients. This shows that TJSBSPL had given high exposure to Shri Harinarayan Bajaj by executing a buy order of 30, 000 shares in each of the settlement." But in the same breath the enquiry officer has stated that "it should be noted that there are no quantitative restrictions laid down with regard to execution of each trade and the same is left to the prudential risk management norms of the stock broker within the frame work of law." The Respondent has not explained that what prudential risk management norm, the Appellant had failed to follow or that what was that they did which was not within the framework of law.

In my view in the given set of facts there is nothing to hold that the Appellant had given "excessive speculative exposure" to the Bajaj or that while dealing with Bajajs the Appellant had failed to exercise due skill and exercise.

Now comes the charge of short selling. The Appellant has admitted short selling. But the Appellant's contention is that it was not intentional but due to computer trouble.

The Appellant has given "second wise" transaction which has been stated in the earlier para of this order. In this context it is noticed that short selling was banned with effect from 8.3.2001 to contain the crisis which the stock market was facing at that point of time. It was a risk management measure of extreme urgency and therefore adherence to the same is of utmost importance and any broker transacting business in defiance of the said instruction need be dealt with seriously. Shri Shyam Mehta's argument that the sale position has to be viewed client wise and not broker wise is unfounded. The circular is a direction to the members of Stock Exchanges, that client wise compilation of transaction and self certification requirement can not co-exist. The ban is broker wise is certain.

According to the Appellant's version there was a purchase position of 30, 000 shares in the scrip of ARBL in NSE on 9.3.2001, against this the Appellant entered / punched sale order for 15, 000 shares each on two terminals at BSE at 9.55.18 a.m. and 9.55.22 a.m. respectively on 12.03.2001, since one of the two terminals was not responding due to technical problems, the Appellant once again entered the order of 15, 000 shares at 9.55.29 a.m., till 9.55..48 a.m., the computer did not show the executed transaction against these orders, the Appellant once again punched another order for 15, 000 shares at 9.55.48 a.m., when the two terminals showed a total sale of 45, 500 shares instead of the desired 30, 000 the Appellant immediately bought back the 15, 500 shares between 9.56.05 a.m. – 9.56.34 a.m. on 12.3.2001.

The Appellant has furnished its "second wise action". Though the Appellant has attributed computer failure as the cause of short sale, no evidence to this effect has been put on record. In this context one has to remember that the short sales were banned by the Respondent as a risk containing measure in the context of the alarming situation then prevailing in the market. The need to comply with the said measure meticulously, is clear from the context in which the circular was issued. It was incumbent on the part of every broker concerned to ensure that the requirement of the said circular is strictly complied with. Market safety is their concern as well. On a perusal of the information furnished by the Appellant it appears that the Appellant was in a mighty hurry to sell the shares, without even waiting for a minute as Bajajs did not respond for meeting the pay-in obligation at NSE and, therefore the Appellant had to sell the shares at the earliest to minimise its losses. At times seconds matter in stock exchange transactions. Compliance of risk containing measures are also sometimes time sensitive. Ban imposed by the Respondent on short sale was a time related measure. One cannot ignore the sudden impact of offloading 15, 500 shares at that juncture. The Appellant has stated that it punched sale order at 9.55.18 a.m. and 9.55.22 a.m. and since one of the 2 terminals was not responding again punched sale order at

9.55.29 a.m. i.e. by 7 seconds of the earlier order and again, in the absence of response again punched at 9.55.48 a.m. – in less than 20 seconds. Thus in my view it is a clear indication that the Appellant had not taken the requisite care to ensure enforcement of the risk containing measure. It appears that the Appellant was more concerned in selling the shares to protect its interest, rather than complying with the Respondent's circular banning short sale issued in the larger interest of the market. The fact that the Appellant purchased the shares subsequently does not absolve it of the charge of carelessness. In fact the so called re-purchase had resulted only in gain to the Appellant and not caused any loss. Taking into consideration, an over all view of the situation then prevailing in the market and the need and urgency involved in protecting the market, non compliance of the risk containing measure put in position as a crisis management measure, cannot be considered as a trivial failure of no consequence, not to warrant any punitive action. In the light of the facts and circumstances, the Respondent's finding that the Appellant had failed to exercise due care in this regard is established.

Shri Shyam Mehta's submission that the impugned order is not a reasoned one and therefore following M. J. Patel (supra) the same need be set aside is not correct. The order is not that cryptic as it was in the case of M. J. Patel. Basic facts and reasons leading to the conclusion and imposition of penalty are available in the order.

As Shri Desai pointed out, in this appeal we are not examining a wrongful act in the realm of tort. The 1992 Regulations clearly spell out the requirements to be followed by a stock broker and also the consequences that would visit those who fail to comply with the requirements. Suspension / cancellation of certificate of the registration is a penalty which the Respondent is empowered to award on the errant market intermediaries. The regulation does not stipulate any maximum term of suspension. It should be reasonable. I do not subscribe to Shri Mehta's submission that the one month suspension is not in tune with the ratio in Ex Naik Sradar Singh, as the facts of the said case are not comparable to the facts of the Appellant's case, suspension of certificate of registration for one month, awarded by the Respondent in the light of the facts and circumstances can not be considered unduly harsh. In the said case the court had considered the punishment awarded to Naik Sardar Singh by court martial to three months R. I. and dismissal from service, in the light of the charge that he had carried a few bottles of liquor over and above his entitlement, as disproportionate to the gravity of the offence. It is not a matter of no consequence to which the Appellant is charged by the Respondent in the present case.

For the reasons stated above, the appeal is dismissed.

Sd/-
(C. ACHUTHAN)
PRESIDING OFFICER.

Place: Mumbai,
Date: September 30, 2002.