BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.20/2002

In the matter of:

Roopram Sharma **Appellant**
Vs.
The Securities and Exchange Board of India **Respondent**

Appearance:

Ms. Sanober P. Nanavati
Advocate **For Appellant**

Shri A. Barua
Jt. Legal Adviser, SEBI **For Respondent**

(In the matter of appeal arising out of the order dated 19.2.2002 made by the Chairman, Securities and Exchange Board of India)

ORDER

M/s. Incap Financial Services Ltd., (the company) had made a public issue of 25, 40, 000 equity shares of Rs.10/- each for cash at par. The issue opened on 9.5.1995 and closed on 20.5.1995. There were allegations of manipulation relating to promoters contribution, late subscription etc in the public issue. The Respondent vide its order dated 2.4.1998/30.9.1998 initiated investigation into the alleged manipulation. Following the findings of the investigation, show cause notice was issued on 19.3.2001 to S/Shri Kantibhai Patel, Urmilesh Gandhi, Nimesh Patel, Kirti S. Kotaria and the Appellant, who were allegedly associated with the company's public issue, for violation of the terms of issue of the prospectus, circulars and SEBI Guidelines on Disclosure and Investor Protection. The Chairman of the Respondent adjudicated the show cause notice. Holding the Appellant guilty of violating the terms of issue of the prospectus, circulars and SEBI Guidelines on Disclosure and Investor Protection, the Chairman of the Respondent, invoking section 11B of the Securities and Exchange Board of India Act, 1992 (the Act) directed that the Appellant be prohibited from accessing capital market and dealing in securities market in any capacity for a period of 3 years from the date of the order. The Appellant claiming to be aggrieved by the said order filed the present appeal praying to set aside the order. Even though the Appellant had prayed, pending final hearing and disposal of the appeal, to restrain the Respondent from implementing the order, this prayer was not pressed when the matter was taken up on 2.5.2002 for consideration.

Ms. Sanober P. Nanavati, learned counsel for the Appellant narrated the background of the appeal. The Appellant's version as submitted by the learned counsel, and as stated in the appeal / rejoinder, having a bearing on the issue under consideration, briefly is under:

The impugned order is misdirected to the Appellant as he had resigned from the Board of the company with effect from 7.5.1995 whereas the public issue was opened on 9.5.1995, that he had dissociated himself from the said public issue, that the alleged violations have taken place on and after the opening of the public issue after he vacated the office. A person not associated with particular decision making can not be proceeded against, as has been held by the Hon'ble Bombay High Court in H. Nanjundiah V V. Govindan (1986) 59 Co. Cases 356 (Bom), that the Department of Company Affairs in their circular dated 24.6.94 had advised Registrar of Companies not to prosecute ordinary directors when there are managing directors or whole time directors, that the company had a managing director at the relevant period.

Letter dated 6.10.94 addressed to the Appellant by the company's managing director Shri Gandhi, refers to the Board resolution dated 5.10.94 appointing him as the Company Law Consultant on retainership basis that he was to guide the company on all company law matters except public issue. The Appellant was appointed as a non executive director of the company with effect from 30.12.1994 and he resigned from the Board vide his letter addressed to the company on 7.5.95, that his resignation from the Board was acknowledged by the company vide letter dated 8.5.95, that it is the date of submission of resignation to the company and not the date of acceptance of the same by the Board of Directors of the company that matters in the light of the provisions in the company's Articles of Association that the director will cease to hold his office upon giving the notice of resignation in writing, that this view has the support of two decisions of the Hon'ble Madras High Court in T. Murari V State (1976) 46 Co. Cases 613 and S.S. Lakshmana Pillai V. Registrar of Companies (1977) 47 Co. Cases 652. The Appellant resigned from the Board as he was not satisfied with the manner in which its affairs were conducted, that during his tenure as director between 31.12.1994 and 7.5.95, he was neither given any notice of Board Meetings nor he attended any Board meeting or participated in the transaction of the company's business in any manner except that he gave a limited power of attorney to late Shri U. N. Gandhi, for and on his behalf. The Respondent has wrongly viewed that the Appellant being a qualified person should have taken care to inform the Merchant Banker, the Respondent and other appropriate agencies and also published a notice about his disassociation with the company when there was no such requirement for an ordinary director to comply with either in the Companies Act or in the Act or Guidelines; that in any case the Appellant could do nothing much as he was under threat from Shri Gandhi.

The learned counsel reiterated the following submissions made by the Appellant in his written submission before the Respondent in the enquiry proceedings that:

> "I may further state that Late Shri U. N. Gandhi introduced himself to me as MBA (Finance), and in the prospectus also he was shown as MBA (Finance). When it came to my knowledge that Late Shri Gandhi was not MBA I, without disclosing my name brought this fact to the notice of SEBI to stall the Public Issue of Incap Financial Services Ltd. Unfortunately the complaints so made were not viewed seriously by SEBI. When I could not succeed in stalling the public issue I tendered my resignation on 7/5/1995.
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> The investigation carried out by SEBI has not found anything about my involvement in the irregularities in the public issue of the company. It appears that relying on allegation made by Shri Kantibhai Patel that I was the mastermind behind the entire operation and was involved with Shri U. N. Gandhi from beginning, I am being implicated in the alleged irregularities in the public issue of the company.
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> It may please be noted that the allegations made by Shri Kantibhai Patel against me are motivated and are false. The investigation has not found my involvement in the alleged irregularities and except the general allegations, Mr. Kantibhai Patel has also not pointed out precisely my participation in the activities of public issue after 7/5/1995 or my involvement in the irregularities.As explained that I was retained by the company on 4/10/1994 as Consultant I, accompanied Mr. U. N. Gandhi to PNB office once or twice during pre issue period in my professional capacity and acting in my professional capacity does not imply involvement in the acts of alleged irregularities which have taken place after I resigned on 7/5/1995.
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> The statement that the public issue was not handled in proper manner made by me at the time my deposition does not imply my involvement in the irregularities in the public issue. SEBI has chosen to interpret the same as my involvement in the alleged irregularities without assessing my intention to commit such irregularities.
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> Presumption made by SEBI that I failed to bring in promoters contributions as per the terms of prospects, procured application after closure of the issue, had entered into tacit arrangement with the 28 applicants, had paid back the amount of their subscriptions in violation of Section 73 and 77 of the Companies Act, 1956 and failed to meet the minimum subscription of 90% do not therefore survive."

According to the Appellant the public issue was planned by Shri U.N. Gandhi that the Appellant was threatened by Shri Gandhi of dire consequences and due to fear of danger to his life he could not expose the designs of Shri Gandhi. The statement of Shri Kantibhai Patel and Kirti S. Kotaria recorded during the course of investigation, copy annexed to the appeal, was relied on to show the conduct of Shri Gandhi. According to him Shri Kotaria to a question as to why he did not complain to any authorities on knowing that the issue was being mishandled, had responded by stating that Shri Gandhi silenced him under coersion with the help of anti social elements that the Appellant was placed in the same situation.

According to the Appellant, the Respondent is empowered to issue directions in the interest of investors or orderly development of securities market, to any person or class of persons referred to in section 12 or associated with the securities market. In other words, the section indentifies the persons to whom and the purpose for which directions can be issues. The Appellant had neither subscribed nor held nor dealt in any share in the company and, therefore, he can not be equated with a person associated with the securities market with in the meaning of section 11B that the Hon'ble Gujrat High Court in Karnavati Fincap Ltd., V SEBI (1996 (10) SCL.5 (Guj) had interpreted the words 'person associated with the securities market' appearing in section 11(2) of the Act as a person having connection or having intercourse with the others dealing in securities market. A direction having penal effect can not be issued in the absence of mensrea and further that such a direction can not in any case be issued on the basis of surmise, conjucture or suspicion, as has been held by the Hon'ble Supreme Court on L D Jaishivphani V Naraindas N. Punjabi (AIR 1976 SC 374). The directions issued against the Appellant prohibiting him from accessing the capital market and directing him not to deal in securities market in any capacity for a period of three years is beyond the scope and purview of section 11B, that this Tribunal in Sterlite Industries (India) Ltd. V. SEBI (2001) 34 SCL 485 (SAT) had held that SEBI has no authority under section 11B to issue directions debarring a person from accessing the securities market.

The Respondent has placed reliance on the statement of Shri Kantibhai Patel, the Chairman of the company that the alleged malpractices were committed by the management of the company comprising of the promoters, shareholders and managing personal, that Shri Patel being one of them, his statement against the Appellant deserves to be discarded as it is untested.

It is correct that Appellant was named as a director in the Prospectus dated 10/4/1995 issued by the company and that Appellant was to assist the company in the field of management, law, accounts, etc. It is, however, incorrect to hold that this would have given an impression to the investors that the Appellant would be taking care to ensure that all legal requirements including those relating to the public issue would be duly complied by the company. The investors are not so gullible enough so as to fall a prey to such a statement but they have their own calculations while making investment in shares. The day to day affairs of the company were entrusted to the Chairman and Managing Director, that the Appellant was an ordinary director to assist the company and, therefore, he can not be held responsible and liable for violation of sections 56, 59, 60, 62 63, 68, 69, and 73 in view of Section 5 of the Companies Act. It is further submitted that SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 dealing with the manipulation in the Securities came into force only in October 1995 and therefore it is not justified to resort to those regulations at this stage.

The Appellant was not involved with the public issue at any stage. The Appellant was retained to guide the company on all company law matters except Public Issue as is evident from the company's letter dated 6/10/1994. The Appellant had accompanied late Shri U.N. Gandhi to BSE on 28th July 1995 but the Appellant did not represent the company. The Respondent has also not placed any tangible evidence to show that the Appellant had represented the company before BSE. A single, stray, lone instance does not and can not amount to an involvement in the alleged irregularities for the purpose of invoking the provisions of Section 11B of the Act,. An association with the securities market is essential. It was further submitted that except the journey to Mumbai on 27th/28th July, 1995 the Appellant had not visited alone or accompanied late Mr. U.N. Gandhi to Chennai or any other place after 7/5/1995 for any purpose much less to generate subscription for Public Issue. It is also contrary to the findings of the investigation by the Respondent because according to the findings, the Stock Invests in favour of the company were already obtained in the month of May/June 1995. The statement of Mr.Kantibhai Patel heavily relied by the Respondent is not only contrary to the Appellant's statement recorded by the Respondent on 18/1/1999 wherein he had catagorily stated that Shri Dilip Gajjar accompanied Gandhi to Chennai.

The Respondent has countered the contentions of the Appellant, in its reply and in the oral submissions made by its Representative as follows:

In 1994-95 many companies without any financial credibility had come out with public issues and after tapping the funds from the public simply disappeared, that the company is one among them. The Appellant was a part of the management of the company.

It is a requirement that the promoters should bring in their contribution before the opening of the public issue, that in the case of the company the auditors had given a certificate that promoters contribution had come in, that infact only cheques were deposited by the promoters towards the amount which were subsequently dishonoured. The promoters contribution was not actually received. In the company's public issue minimum subscription was not received, that five share applications for the amount of Rs.156 lacs were deposited with the Registrar to the issue with instructions to have them deposited with the

Bankers to the issue in case there was a short fall, that this was done with a view to ensure that in 7 days report it could be declared that the minimum subscription was received, that these cheques also subsequently bounced. Anticipating that these cheques would bounce, the managing director of the company approached Vishwapriya Financial Services and Securities Ltd (VFS) and worked out an arrangement whereby the said VFS, after the closure of the issue, applied for shares worth Rs. 180 lacs in the name of 27 non existent applicants in the form of stock invests, that this amount was refunded with interest to the entities immediately thereafter on 24.7.1995 out of the public issue account. Further subscription for shares worth Rs. 60 lacs was made by one Darshan Investment P. Ltd (DIP) by cheques which was also actually deposited after the closure of the issue, that this amount was also refunded by the company to DIP subsequently. Minimum subscription was not received in the public issue but only an impression was created that the amount was received. The Respondent has issued directions to the company and its other directors viz. Shri Kirti S.Kotaria, Kanitbhai Patel and Nimesh Patel prohibiting them from accessing the capital market and directing them not to deal in securities in any capacity for specific periods.

The Appellant has signed the prospectus dated 10.4.95, that in the prospectus his name appears as a director of the company. He has been described in the prospectus as a practicing company secretary with experience of company and corporate laws for about 33 years, that he will assist the company in the field of management, law, accounts, etc. He was appointed as director by his own version in December 1994. Prior to that in October 1994 he was appointed as Company Law Consultant on retainership basis. He was involved with the public issue of the company right from the planning stage till the listing is evident not only from the fact that he was a functional director of the company during the relevant period but also from his conduct, that he had accompanied Shri Gandhi, managing director of the company to Bombay Stock Exchange on 28.7.1995, a few days before listing permission was granted by the exchange, that he accompanied the managing director on his trips in order to generate subscription to the public issue etc. The fact that the Appellant was not designated as executive director is of no relevance to absolve him of the charges in view of the fact that his field of responsibility in respect to the company was clearly demarcated that according to his own as statement he was company law consultant to the Company.

It is incorrect to hold that the Appellant resigned on 7.5.95 as claimed by him, for the reason that he himself had written to the Respondent on 10.1.99 that due to personal reasons he resigned on and from 1.8.1995 and that his resignation was duly notified to the Registrar of Companies and to support this he had forwarded a certified copy of Form No.32 filed with the Registrar, there in the date of resignation is shown as 1.8.95 that further in his statement on oath made on 18.1.1999 before the Respondent's officers, the Appellant volunteered the information that he resigned from the directorship and retainer ship only in August 1995. While the Appellant stated that he severed all links with the company by resigning his directorship on coming to know of the irregularities, has stated that he accompanied Mr. Gandhi, to the Merchant Bankers office as well as to the Stock Exchange in his capacity as company law consultant. It is clear that his claim of resignation on an earlier date is intended solely to escape the consequence of having continued as a director of the company during the relevant time.

Making allotment of shares without receiving minimum subscription in a public issue is a serious matter that it is a requirement of law to refund the entire application money if the minimum subscription is not received within the stipulated period, that if the company fails to make such refund with in the time prescribed for the purpose the directors are jointly and severally liable to pay the amounts with interest, that only those directors who prove that the failure to refund was not due to their negligence or default, can escape the liability. It is also a violation of para D of the Guidelines on Disclosure and Investors Protection issued by the Respondent, that non compliance of the provisions relating to promoter's contribution is also a violation of the requirement in para L of the said Guidelines.

With reference to the Appellant's contention that the Respondent is not empowered to issue direction debarring the Appellant accessing the market since it is penal in nature, in view of the Tribunal's decision in Sterlite (Supra) it was submitted that facts of the said case are entirely different to the present case that whether the direction is penal or preventive depends on the facts and circumstances specific to each case, that the ratio of the said decision has no application to the present case. In support of the said view Respondent's Representative cited this Tribunal's decisions in Status Management Services Ltd V. SEBI [(2000)26 SCL 491], Integrated Amusements Ltd V. SEBI [(2000 27 SCL 458] and Phenomenal Plantations Ltd V. SEBI [(2002) 36 SCL 780].

I have carefully considered the material on record and the submissions of the parties and my views are as follows:

It is an admitted fact that the company's public issue was not a fair one, that the issue was manipulated. The Appellant has not disputed the Respondent's version in this regard. In any case in the light of the

factual position as put forth by the Respondent, in the absence of any evidence to the contrary, the position as stated by the Respondent is accepted. In this context it is also noticed that the company and its three other directors have been proceeded against and action has been taken against them, by the Respondent for their role in manipulating the said public issue.

The Appellant's main thrust of the argument is that he was not associated with the company's public issue, that he had resigned from the Board of the company before the public issue opened, that though he knew of the mishandling of the public issue he could not expose the same as he was under threat from Shri Gandhi the then managing director of the company, and that the Respondent is not empowered to issue the impugned direction under section 11B of the Act.

The company came out with a public issue which was opened on 9.5.1995 and closed on 20.5.95. Though the issue was undersubscribed, it was made to believe to have saved by receiving the minimum subscription by adopting manipulative tactics. From the facts on record before me it is clear that it was a fraud on the public.

The Appellant was advising the company in his capacity as a company law consultant since October, 1994 and subsequently with effect from 30.12.1994 he was appointed as a director of the company. He claims to have resigned from the company on 7.5.1995 by sending his resignation to the company on 8.5.1995. But there is evidence on record to show that he had actually resigned only on 1.8.1995. Apart from the entry in the From No.32 notifying his resignation showing the date of resignation as 1.8.1995, the Appellant himself had stated in his letter dated 11.1.99 addressed to the Respondent that he "was a non executive professional director, for a period of about 7 months and had resigned from 1.8.1995." This position is further corroborated in the Appellant's statement before the Respondent's investigating Officer, a copy of the statement is found filed along with the appeal, that he became a director of the company in December 1994 and resigned from directorship and retainership in August 1995. In these circumstances, the Appellant's version that he resigned on 7.5.1995 before the public issue opened is difficult to accept. In the light of the authentic documentary proof as produced by the Respondent – certified copy of the From No-32 made available to it by the Appellant himself and his written / oral statement - the version now raised by the Appellant appears to be of after thought to get himself extricated out of the trouble in which has landed up. In view of the clear factual, position that he resigned on 1.8.1995, the case laws cited by him have no relevance. The credibility of the Appellant's version is suspect as one could see from his own statement. To a question from the investigating officer as to how the Appellant knew Shri U.N. Gandhi, his answer was "we were appointed as the company law consultants to guide the company on company law matters. That is how I know him". But there is something more. It is noticed from the copy of the prospectus filed in the proceedings that the Appellant was a director of Wizma Securities Ltd, of which Chairman was Shri Gandhi. Further Shri Gandhi has been described as a financial consultant and not as a company law consultant. In this context it is also to be noted that the said Wizma Securities Ltd was one of the applicants (out of the 27 applicants put in position) who had paid 31 lakhs for the shares to save the public issue.

There is no difficulty in accepting the factual position, that the Appellant was associated with the company in official capacity as consultant/director from October 1994 to 1.8.1995. In this context it is noticed that the prospectus was dated 10.4.1995 and the public issue was opened on 9.5.1995 during the period when the Appellant was holding office in the company. Further, even if it is assumed that he had resigned on 7.5.95 (which is not so) he allowed his name to be put in the prospectus, and he did not make any announcement that he was not director of the company as disclosed in the prospectus. The submission that he was under threat and that is why he did not disclose resignation from the company before the opening of the public issued is difficult to swallow with out a pinch of salt.

The Appellant's version that he was a non executive director and therefore not responsible for the company's activities is contrary to the facts. He was technically not designated as an executive director, but functionally he was. It is seen from the prospectus that he was functional director with assigned task in as much as he was to "assist the company in the field of management law, accounts etc." It is unbelievable that a man of the Appellant's experience who was company law consultant and who as director of the company assigned with the duty of assisting the company in the field of management, law and accountancy was not involved in the company's public issue. The fact that he was involved in the public issue is evidenced from his own statement before the investigating officer. To a question – "Did you introduce Shri U.N. Gandhi to the Merchant Bankers, Registrars to the issue" his answer was –"No, I did not introduce him, but I had accompanied him when he went to the office of the Merchant Bankers. The Registrar's to the issue came to my office to collect details of public issue in the offing". The fact that he had accompanied Shri Gandhi to the Merchant Bankers, cannot be viewed that the visit was unconnected with the public issue. It cannot be that a man of the Appellant's status in the profession and assigned with the task of assisting the company in company law matters would go with Shri Gandhi to the Merchant Banker simply to give him company or to help him with his luggage. The second part of his

statement is also relevant to the Respondent's charge that he was associated with the public issue. He says "the Registrars to the issue came to may office to collect details of public issue in the offing". If he was not associated with the public issue as he now claims, the details of the public issue would not have been available in his office. He has not explained as to why the details of the public issue were kept in his office, if he was not associated with it. In the context of the Appellant's version that he did not associate with the public issue operation he was asked by the investigating officer to state as to why he accompanied Shri Gandhi in his meetings with the Merchant Bankers/Registrar and Stock Exchanges? His answer –"Once or twice I Went to PNB office along with Shri U.N. Gandhi and once I attended Bombay Stock Exchange on 28.7.1995. It is now difficult to tell why I accompanied him." Though he cannot deny the factual position, he preferred to be evasive in explaining the visit. The Appellant, to another question from the investigating officer had stated that "I did not associate with the public issue operation", "I guided the company only on company law matters." The Appellant's version gives an impression that a public issue has no requirement of any guidance from the company law angle. This statement is coming from a practicing company secretary claiming to have 31 years of experience in the filed of company law. The Appellant in his deposition has admitted that he "knew that the issue was not fully subscribed and that it was managed." In that context when he was asked as to why he did not complain about it to any of the authorities, his answer was "I was threatened of dire consequences". It was stated that the threat was form Shri Gandhi - a person who was a co-director in another company and whom he had accompanied to different office / authorities for the purpose of public issue. The fact that he had accompanied Shri Gandhi when he went to Madras to mobilize funds from VFS has been reasonably established by the Respondent. During the course of the arguments, the Tribunal had asked the Appellant's Counsel as to how the courage which the Appellant was stated to be lacking earlier to resign, got subsequently Learned Counsel could not give any convincing explanation.

The Appellant's submission that Kanti Bhai's statement is not accep as it is untested is also not tenable. A copy of the Kanti Bhai's statement was available to the Appellant, a copy of which is found annexed to the appeal. There is nothing on record to show that the Appellant had sought cross examination of Shri Kanti Bhai to test his evidence. He virtually accepted it. He cannot now turn around and say that the statement is untested and not accep. In fact he himself had relied on Shri Kanti Bhai's statement with reference to his submission that he was also under threat from Shri Gandhi as Shri Kanti Bhai was. Shri Kanti Bhai is the Chairman of the company. He was on the Board of the company along with the Appellant at the relevant period. His statement is revealing. He in answer to the question as to "how the public issue was organized and planned" had stated that "They did not ask me anything. I used to sit outside and they (VNG, Dilip Gajjar, and R.S. Sharma) decided everything. They made me sign blank stamp papers and resignation letter at gun point by Shri S.N. Gandhi." Shri S.N. Gandhi is the brother of Shri U.N. Gandhi. Shri R.S. Sharma, referred to by Shri Kanti Bhai is none other than the Appellant herein. The manner in which the issue was made to believe that it received the minimum subscription is clear form his own words that:

> "from the public we received only Rs.5.5 lakhs and the rest of the money Rs. 1. 80 crores was brought through stock invest from Vishwapriya of Madras. Rs. 60 lakhs was brought from Darshan Investments as promoters contribution. The Stock invest was encashed for subscription purpose and then returned back. The share certificates were not sent to the person and sold in the market and the money was not deposited in the account."
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> "From July 1995 to February 1996 the shares were with them. He started selling the shares in February 1996. The listing was done in Madras, Ahmedabad and Bombay. The price opened around 12 and went up to 22". The gravity of the manipulation is thus evident. To another question as to 'who appointed lead manager, registrar and auditors" the answer was candid -"Everything was done by Shri R.S. Sharma and Team".

To another question as to "what is the extent of involvement of other directors namely, Shri Kotaria and Shri Roopram Sharma in the entire operations? the answer was – Shri Roopram Sharma was the mastermind behind the entire operations and was involved with Shri U.N.Gandhi from the beginning and afterwards with Shri S.N. Gandhi. Shri Kotaria was also a member of Gandhi's group. At present he is the Managing Director." This statement gains credibility in the light of the admission of the Appellant that he had accompanied Shri Gandhi to the Merchant Banker, Registrar etc., and that Registrar to the issue had collected details of the public issue from his office.

From the material on record it is evident that he was not a director simplicitor. He was actually involved in the public issue, which was designed to defraud the public. Therefore the ratio in the Nanjudih's case (Supra) and the DCA circular referred to by the Appellant are of no help to him. He is liable for the role he played in the public issue made by the company.

In his written submission before the Respondent he has stated that "when it came to my knowledge that

late Shri Gandhi was not MBA, I without disclosing my name brought this fact to the notice of SEBI to stall the public issue of Incap Financial Services Ltd. Unfortunately the complaints so made were not viewed seriously by SEBI. When I could not succeed in stalling the public issue, I tendered my resignation on 7/5/95". Though the Tribunal asked the Appellant's Counsel to produce a copy of the said letter she could not provide. In any case it is a pity that a professional like the Appellant had to resort to write an anonymous letter to the Respondent, if at all he had written, on a matter which he considered very relevant to the public issue.

The Respondent has established beyond doubt that the company's public issue was designed to defraud the investing public and the issue was manipulated and the Appellant was involved. However it is noticed that in such proven misconduct on the part of the Appellant, the Respondent has opted to issue a direction under section 11B "prohibiting the Appellant from accessing capital market and directing him not to deal in securities market in any capacity for a period of three years."

The direction in the present case is a prohibition on the Appellant accessing the capital market and dealing in securities in the capital market in any manner. Accessing the capital market in the normal course means raising funds from the market, which is a remote possibility in the Appellant's case as he is only a company secretary in whole time practice. Therefore, this direction in effect is of no consequence to the Appellant. Similarly he is not a person (broker/sub- broker) dealing in securities in the capital market. Therefore the said direction is also of no consequence to the Appellant as on date. It has to be noted that the charge against the Appellant is on his involvement as a director of the company in manipulating the public issue. The impugned order does not in any way prevent him indulging in manipulation of the market as was done in the instant case. In fact in effect the order serves no purpose. However since the Appellant has questioned the legality of the order, the same has to be considered.

This Tribunal in Sterlite (Supra) and in several cases had taken the view that section 11B does not even remotely empower the Respondent to impose penalties.

In Sterlite, this Tribunal had observed:

> "But it is to be noted that the power under section 11B is restricted to issue appropriate direction for the purpose of protecting the interest of the investors etc. mentioned in the section. The scope of the expression 'direction' has not been defined in the Act. But the word has been judicially interpreted by Courts. Hon'ble Bombay High Court had viewed that "in law direction means guidance or command" (AIR 1988 Bombay 416 at p. 421). According to the Hon'ble Supreme Court in Rajendranath v.CIT (1979) 4 SCC 282, "a direction by a statutory authority is in the nature of an order requiring positive compliance". According to Blacks Law Dictionary direction means "a guiding or authoritative instruction, order, command".

It has to be noted that section 11B does not even remotely empower the Respondent to impose penalties. Hon'ble Calcutta High Court had held that prescribing an offence and its punishment is an essential plenary function of the legislature (D.N.Ghosh v. Addl. Sessions Judge (AIR 1959 Cal.208.) Hon'ble Gujarat High Court also held the same view in Delux Land Organisers v. State of Gujarat (AIR 1992 Guj. 75) holding that

> "any power to impose penalty must be statutorily warranted and executive Government cannot create penal provisions by issuing circular when there is no authority to impose such penalty flowing from any provision of law".

Hon'ble Supreme Court in Khemka and Co.(Agencies) Pvt.Ltd v. State of Maharashtra (AIR 1975 SC 1549), while considering the question as to whether the assessee under the Central Sales Tax Act, 1956 could be made liable for penalty under the provisions of the State Sales Tax Act, had considered the power to impose penalty. It had held:

> "It is well settled canon of construction of statutes that neither a pecuniary liability can be imposed nor an offence created by mere implication. It may be deba whether a particular procedural provision creates a substantive right or liability. But I do not think that the imposition of pecuniary liability which takes the form of a penalty or fine for a breach of a legal right can be relegated to the region of mere procedure and machinery for the realization of tax. It is more than that. Such liabilities must be created by clear, unambiguous and express enactment. The language used should leave no serious doubts about its effect so that the persons who are to be subjected to such a liability for the infringement of law are not left in a state of uncertainty as to what their duties or liabilities

are. This is an essential requirement of a good government of laws". (emphasis supplied)

The legislature has clearly spelt out the penal provisions in the Act at 3 places – section 12(3) provides for suspension or cancellation of the certificate of registration granted to the market intermediaries in the event of their proven misconduct, provision under Chapter VIA, provides for imposition of monetary penalty for certain offences specified therein; section 24 empowers Courts to award punishment for violation of offences under the Act etc. Since legislature has deliberately chosen to create specific offences and penalties thereto, it is not possible to view that under section 11B the Respondent is competent to issue a direction which tantamounts to imposition of penalties. While widening the scope of 'such measures' used in section 11, to include penalties, and thereby stretching the scope of issuing directions under section 11B to cover imposition of penalties, the limitation stated above need be kept in mind. However, it is understood that the Respondent has also been taking the view that section 11B is not a penal provision, but preventive and remedial in its application. If that is so, it has to be seen whether the impugned direction prohibiting the Appellant from accessing the capital market for a period of 2 years from the date of the order is preventive or remedial. In the absence of any explanation from the Respondent as to what exactly is meant by "accessing the capital market", it has to be understood as is understood in the common parlance – i.e., entry to the capital market for issuing / offering securities. In this context, it is to be noted that the charge against the Appellant is of market manipulation. The shares of the Appellant are listed / traded in the stock exchanges even today. That being the case preventing the Appellant raising further capital/offering shares to the public in the next two years cannot serve as a preventive measure to debilitate the Appellant indulging in market manipulation.

Similarly, by no stretch of imagination the said direction can be considered even remedial as prospective barring of a public issue cannot remedy an act of market manipulation allegedly indulged for a specific purpose, 3 years ago. A remedial action is normally seen as one intended to correct, remove or lessen a wrong, fault or defect. Purport of preventive or remedial directions which can be issued in a proven case of fraudulent and unfair trade practice is discernible from the provisions of regulation 12 of the 1995 Regulations, already cited in this order. In my view the impugned order is neither remedial nor preventive but punitive in effect as it takes away the Appellant's right to mobilise funds from the public to carry on its business. According to Webster's Encyclopedic Unabridged Dictionary "penalty means a punishment imposed or incurred for a violation of law or rule". In the instant case it is seen that the order is made in the light of the finding by the authority, that the Appellant has violated the regulations. This nexus also strengthens the view that the order debarring the Appellant from accessing the capital market is a penalty. In this view of the matter the order has no legal backing and therefore cannot sustain."

This Tribunals decisions in Status Management, Integrated Amusement and Phenomenal Plantations relied on by the Respondent do not support the Respondent as no where therein it has been viewed that directions tantamounting to penalty can be issued under section 11B.

The Appellant's argument that he is beyond the reach of section 11B as he is not a person associated with the capital market is not tenable. In this context it is considered necessary to have look at the following provisions of section 11B:

> "11.B 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,-
>
> (a) in the interest of investors, or orderly development of the securities market; or
>
> (b) to prevent the affairs of any intermediaries or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or
>
> (c) to secure the proper management of any such intermediary or person
>
> it may issue such directions-
>
> (i) to any person or class of persons referred to in section 12 or associated with the securities market; or
>
> (ii) to any company in respect of matters specified in section 11A, as may be appropriate in the interest of investors in securities and the securities market.

The scope and reach of the section is clear. First part of the section refers the purpose for which

directions can be issued. Second part refers to the persons to whom the directions can be addressed. The expression "associated" appearing in clause (a) above also means "connected with." So the question to be considered in the Appellant's case is as to whether he can be said to be associated / connected with the securities market. In this context it has to be noted that the section is restricted not only to persons who are associated directly with the securities market. It is applicable to persons associated with the securities market directly or indirectly. The company's shares are listed on the stock exchange. It has entered into listing agreement with the stock exchanges at Mumbai, Ahmedabad etc., and its shares are traded on the stock exchanges. The stock exchanges are integral part of the securities market. Therefore the company has to be considered as a person associated with the securities market. Once it is held that a company is a person associated with the securities market, logically it has to be accepted that its directors are also associated with the securities market by virtue of their position vis a vis the company. In that view of the matter the Appellant being a director of the company, could be considered as a person associated with the securities market and thereby amenable to directions under section 11B.

In the instant case, I do not find any nexus between the Appellant's action and the direction issued to consider the same as a measure to prevent the Appellant indulging in such action in future or remedying the mischief arisen as a result of the Appellants action. A remedial action is normally seen as one intended to correct, remove or lessen a wrong, fault or defect. The impugned direction is found extraneous to the charge established against the Appellant. In my view the direction tantamounts to imposition of penalty which section 11B does not provide for, as explained in Sterlite (Supra). In this view of the matter I am of the view that the direction has no legal backing and therefore cannot sustain. Therefore the Respondent's direction prohibiting the Appellant from accessing the capital market and dealing in securities market is set aside. But it is made clear, that this order does not in anyway inhibit the Respondent taking any action against the Appellant in accordance with law.

Appeal disposed of accordingly.

Sd/-
(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: September 19, 2002