BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI
APPEAL NO.20/2001

In the matter of:

Sterlite Industries (India) Ltd Appellant

Vs.

Securities and Exchange Board of India Respondent

APPEARANCE

Mr.C.A.Sundaram
Sr.Counsel

Mr. Madhavi Joshi
Advocate
I/b. Udwadia, Udeshi & Berjis

Mr.Tarun Jain
Director (Finance)
Sterlite Industries (India) Ltd for Appellant

Mr.R.A.Dada
Sr. Counsel

Ms Uma Dalal
Advocate
I/b. Maneksha & Sethna

Mr. Praveen Trivedi
Asstt.Legal Adviser,
SEBI for Respondent

(In the matter of appeal arising out of the order dated 19th April 2001, made by the Chairman, Securities & Exchange Board of India).

ORDER

The present appeal is directed against the order dated 19th April 2001, made by the Chairman, Securities & Exchange Board of India. The order prohibits the Appellant from accessing the capital market for a period of two years and orders to initiate prosecution proceedings under section 24 read with section 27 of the Securities and Exchange Board of India Act, 1992 (the Act) for violation of regulation 4(a) and 4(d) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to securities Market) Regulations 1995 (1995 the Regulations), against the Appellant, through its directors namely Shri Anil Aggarwal, Shri Tarun Jain and Shri Shashikant.

The Appellant is a large public limited company engaged in copper and aluminum manufacturing business. The Appellant's shares are listed on Stock Exchanges at Mumbai (BSE), Calcutta, Delhi, Ahmedabad and also traded at the National Stock Exchange (NSE).

The Respondent is a statutory regulatory body established under section 3 of the Act. It is mandated to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

The Respondent carried out an investigation into the alleged price manipulation in the scrips of certain companies including the Appellant, especially during April and May 1998. Investigation revealed that a set of persons had cornered large chunk of shares of the Appellant, at BSE and NSE resulting in distortion of market equilibrium. Based on the findings of the said investigation, the Respondent, on 20.12.1999 issued show cause notice to the Appellant and its directors/officers, viz. Shri Anil Aggarwal, Shri Shashikant and Shri Tarun Jain. In the said show cause notice it was inter alia alleged that :

i. There were large volumes coupled with fluctuations in prices at the bourse in respect of the Appellant's shares specially during April-May, 1998. Share price of the Appellant was hovering in the range of Rs. 175/- to 200/- since September 1997 but rose to above Rs. 350/- in this period. As compared to other scrips in the industry, the rise was abnormal.

ii. Investigations revealed that a set of brokers and sub brokers acting on behalf of a common set of clients cornered large chunk of shares of the Appellant at both BSE and NSE. These clients called the Damayanti Group,built up unusually large positions in the Appellant's shares resulting in distortion of the market equilibrium and creation of artificial market in this scrip. Investigations further revealed that Damayanti Group merely acted as a front for Mr. Harshad Mehta ("Mr. Mehta"). In the documents obtained from Mr.Mehta, a page was found with the following in his handwriting "Dil Vikas, Ster – 195,000". Dil Vikas Finance Limited is an associate of a company called Eldorado, known in market circles as "a jobber" for the Appellant.

iii. In April,1998, El Dorado bought 3 lakh shares for the following 2 accounts:-

(a) 1, 50, 000 shares for Crimson securities, an associate company of El Dorado;

(b) 1, 50, 000 shares for Ashwini Khurana, a client of Eldorado.

iv. In case of Mr. Khurana the shares were never transferred to him and were always lying with Eldorado. In addition no payment was received from him and the purchase consideration was adjusted against some amounts due to him. Mr. Murthy of the Appellant had indicated to Eldorado about the availability of 3 lakh shares. Investigations revealed that the brokers from whom the 3 lakh shares were bought belonged to the Damayanti Group. In addition, it was revealed that the Appellant through Madras Aluminium Company Limited ("MALCO") lent Rs.5 crores for the purchase of these 3 lakh shares in the garb of a loan to Dil Vikas. Hence, the entire transaction of 3 lakh shares was a conduit for parking of shares.

v. In addition, MALCO lent Rs. 11.75 crores to Eldorado for acquisition of shares by Dil Vikas Finance. These shares were bought at the instance of the BSE authorities to avert a payment crisis on the stock exchange due to failure of some brokers to meet their obligations. These transactions were entered into the stock exchange system at midnight on June 12, 1998. The brokers bailed out by these trades, were brokers who had dealings / linkage with Damayanti Group.

vi. If the building up of the positions is seen in the perspective of developments at the corporate level, it would bring to light the probable reasons for connivance of the Appellant with Mr. Mehta in manipulating the prices of the shares of the Appellant. The share price of the Appellant was hovering in the range of Rs.175/- to Rs.200/- since September 1997. A resolution was passed by the Appellant on February 16, 1998 whereby it was decided to issue on preferential basis 90 lakh warrants to Shri Anil Agarwal, the promoter of the Appellant and his associates. The warrant holder was entitled to apply for one Equity Share against each warrant held by him, after the expiry of 18 months. The warrant was priced @ Rs. 181/- per share as per SEBI guidelines. This offer was accepted by the promoters and by June end 1998 they applied for these 90 lacs warrants by paying 10% of the face value which came to around Rs. 16.20 crores.

vii. A public offer was made on 17.2.1998 by the Appellant for acquisition of 10% equity of Indian Aluminium Company Limited ("INDAL") @ Rs.90/- per share. Later, Alcan, a majority shareholder of INDAL made a competitive bid on 22nd March 1998 to shareholders of INDAL to acquire 20% further equity @ Rs. 105/- per share. On 25.5.1998 Alcan revised its offer price to Rs. 175/- payable in cash for each share of INDAL. The Appellant on 25.6.1998 hiked its offer size (to acquire 52. 03% of the equity of INDAL) and increased the offer price to Rs. 221/- each payable by Rs. 131/- in cash and balance by allotment of Optionally Convertible Preference Shares ("OCPS") of the Appellant with minimum conversion price of Rs. 350/-. The Appellant did not succeed in acquiring majority stake in INDAL as majority of the shareholders of INDAL preferred the Alcan bid. From the price movement around this period it would be clear that price touched a high of Rs. 385 on 27th May 1998. Prices started falling off after 2nd June, when the attempt of the Appellant to acquire INDAL failed, it touched a low of Rs. 175/-

within a month.

viii. In the light of the above, it appears that the Appellant connived with Mr. Mehta to build up large positions in the shares of the Appellant, which facilitated market manipulation. Later, the Appellant provided an exit route when the artificial increase in price was not sustained and some of the brokers dealing for Damayanti Group got trapped in the manner mentioned above.

In the context of the above allegations the Respondent viewed that the Appellant has violated regulation 4(a) and (d) of the 1995 Regulations read with section 11(1) and 11(2)(e) of the Act. Accordingly the Appellant was requested to show cause why directions including directions prohibiting the Appellant from dealing in securities and accessing the capital market and any other suitable direction in the interest of investors and securities market under section 11 read with section 11B of the Act and regulation 11 of the 1995 Regulations, should not be issued. The Appellant was also requested to show cause why prosecution proceedings under section 24 of the Act should not be initiated for the above mentioned variations.

The Appellant answered the show cause notice vide its letter dated 10.1.2000.

Show cause notice was adjudicated by the Chairman, SEBI. Based on the conclusion arrived at in the adjudication, he passed the impugned order inter alia stating that: -

- "I find that there were large volumes coupled with fluctuation in prices at the stock exchange in respect of Sterlite Industries Ltd. especially during April and May 1998. In the scrip of Sterlite the price moved from Rs. 162/- on 17th February 1998 to Rs. 385/- on 27thMay 1998. Sterlite has not disputed the above price movement which is a fact borne out of actual trading details and price at the stock exchange. I find that the price movement in the scrip of Sterlite was not in conformity with the Sensex / Nifty movements. During the period from 1/4/98 to 4/6/98, while the BSE Sensex showed a decline of 11% i.e. from 3969 to 3546 and Nifty showed a decline of 5% from 1081 to 1027, the price of Sterlite share rose by 71%. I find that this rise in price was accompanied by abnormal volumes in these shares both at the BSE and NSE during this period. At the same time, I find that the price movement in the scrips of Sterlite vis a vis the price movements of the shares of other companies in the same industry segment was highly abnormal. I do not find any merit in the submissions of Sterlite that rise in the price of scrip of Sterlite was due to open offer for Indal, recommencement of commercial production of Copper Smelter, preferential allotment or declaration of half-yearly result. The findings show the price was due to price manipulation and there was similar to abnormal price rise in two other scrips namely; BPL and Videocon.

- I find that despite the falling trend in stock indices since May 98, the price of Sterlite shares continued to rise. However, the scrip could not sustain the rise any longer and fell sharply after 04.06.98 and declined to a low of Rs. 176/- in the month of June 1998. I do not find any merit in the submission that the said fall in price of the scrip is attributed to nuclear blast.

- The findings show that a set of brokers and sub-brokers acting on behalf of a common set of clients cornered a large chunk of shares of Sterlite both at BSE and NSE. These common clients i.e. Damayanti Group built up unusually large positions in these scrips i.e. in the scrip of Sterlite, BPL and Videocon resulting in distortion of the market equilibrium and creation of artificial market in these scrips. Damayanti group comprised mainly of the following entities: -

  Damayanti Finvest Pvt Ltd
  CDP Fincap and Leasing Pvt Ltd
  KRN Finvest and Leasing Pvt Ltd
  Rijuta Finvest Pvt Ltd
  Ikshu Finvest Pvt Ltd
  Money Television Industries Ltd

- All the above entities have shown their office at 1208, Maker Chambers V, Nariman Point, Mumbai-21. This is adjacent to the office of Shri Harshad Mehta at 1205-1207, Maker Chambers V.
- These entities had neither the financial worth nor the professional expertise to undertake the kind of dealings, which they have supposedly done through a large number of brokers and merely acted as front for Shri Harshad Mehta. The entire decision making for Damayanti Group entities was with Shri Harshad Mehta only though routine day to day affairs of these entities were being looked after by Shri Anil Doshi, brother in law of Shri Harshad Mehta i.e. his wife's brother. Shri Pankaj Shah, Shri Atul Parikh and Sunil Samtani also dealt for Damayanti Group entities, though they are neither employees nor directors of Damayanti Group companies but are close confidante of Shri Harshad Mehta. Since Shri Harshad Mehta is a notified person under the Special Courts Act, 1992 and

subject to several restrictions imposed by the Courts in the matter of dealing in securities, he operated through Damayanti Group as front for him in the securities market.

- The findings show that Damayanti Group acting through a set of brokers built up large purchase positions in the carry forward segments in the scrip of Sterlite Industries Ltd. at the BSE, which increased from settlement to settlement. The outstanding purchase positions were abnormally high in the scrips of Sterlite and it went to the extent of 3.8% of total equity of Sterlite Industries Ltd. This increase in carry forward positions was accompanied by a corresponding increase in the scrip prices. In Sterlite Industries Ltd., the hawala rate (closing rate on the date of end of settlement) moved consistently from Rs.260/- to Rs.350/- in only five settlements. The settlement wise details of outstanding position along with Hawala Rate in Sterlite are as under:-

Sett. No.	Carry forward Purchases	Carry forward Sales	Purchase V/s Sales (No.of times)	Hawala Rate (Rs.)
1.	624200	169300	3.69	260
2.	782800	307300	2.55	305
3.	326600	218200	1.50	320
4.	350300	204300	1.71	325
5.	575200	222000	2.59	350
6.	666900	197800	3.37	330
7.	734700	169400	4.34	305
8.	768500	170400	4.51	305
9.	788900	147300	5.36	315
10.	1217600	139800	8.71	345
11.	1797400	299900	5.99	270
12.	1416300	475900	2.98	195

- The profits earned by Damyanti Group as a result of increase in hawala prices over successive settlements were utilised for making further purchases both at BSE and NSE in cash segment, payment of margins, building up further positions in carry forward etc. The delivery of shares received was also utilised for raising finances by doing share badla. It was found that Damayanti Group/Shri Harshad Mehta acting through a set of brokers built up large concentrated positions in the scrip. This positions was around 40% of the total positions in Sterlite. Thus, through this modus operandi, substantial position of traded stock of Sterlite was cornered by Damayanti Group/Shri Harshad Mehta and this cornering caused creation of artificial market and price manipulations in the scrip.
- Damayanti Group built up concentrated positions in Sterlite Industries Ltd. Damayanti Group built up large positions in carry forward segment. For example, in Settlement No.48 their position was 62.97% of the total position at the exchange. Likewise in Settlement No.2, this position was 65.57% of the total carry forward position. In Settlement No.6 it was 61.27% of the total position at the Exchange and in Settlement No.8 it was 53.57% of the total position at the Exchange. The carry forward position in this scrip at the BSE increased from 8.2 lacs shares in Settlement No.9 to 12.5 lacs shares in settlement No.10 and to 18.8 lacs shares in Settlement No.11. Thus, the increase in the carry forward position between Settlement No.9 to Settlement No.11 was approximately 10.6 lacs shares. Out of the increased carry forward positions, substantial number of shares were on an account of Damayanti Group. This abnormal increase in carry forward position resulted in cornering of the shares. Damayanti Group took delivery of 6, 68, 000 shares, out of 16,85,700 shares delivered in settlement No.12, which constituted 39.63% of the total delivery in the settlement. Similarly, a set of brokers of NSE dealing essentially for Damayanti Group took large positions at the NSE in this scrip. The approximate number of shares acquired by Damayanti group through these brokers in Settlement No. 20 was 1, 00, 200 which is 38. 94% of the total delivery of 2, 57, 300 shares at the

exchange.

- Sterlite has admitted that Malco has purchased about 3 lacs (6lakhs) shares at the cost of Rs. 11.75 crores. It was stated that when Malco purchased these shares the sole intention was to help the BSE to avert a major payment crisis on the premium exchange of the country and not to manipulate the price of Sterlite or bail out any particular group of brokers. Sterlite in its reply has stated that Malco is mainly an affiliate by reason of only two directors on the respective Board of Directors being common. It was further stated that two companies are distinct corporate entities. It is pertinent to note that Sterlite in its Letter of Offer for acquisition of shares of Indal has stated Malco as one of its Group Companies. Sterlite has further stated that in June 1998 any such payment crisis would have without any fault of Sterlite further tarnished the corporate reputation of Sterlite. At the same time this was perceived as an opportunity by the promoters to acquire some further shares at an attractive price. It is further stated that purchase of shares by promoters is permissible under the regulations upto 5% of the capital of the company. It is pertinent to note that the creeping limit for acquisition of shares by a promoter under the Takeover Regulations was increased to 5% only w.e.f. 20th October 1998 the creep limit was 2% and therefore, the above reply is clearly after-though and cannot be accepted.
- The share price of Sterlite was hovering in the range of Rs. 200/- since September 1997. A resolution was passed on February 16, 1998 whereby it was decided to issue 90 Lacs warrants to Shri Anil Agarwal, the promoter of Sterlite and his associates on a preferential basis. The details of offer to various entities and the holding of such entities after the offer are as under:

Name of the Entities	No.of warrants	Post issue holding
Sterlite Copper Rolling Mills Pvt. Ltd.	24,00,000	6.76%
Dwarkaprasad Anilkumar Investment Pvt. Ltd.	15,00,000	10.36%
Twin Star Holdings Ltd.	36,00,000	9.86%
Pravin Navin Investment & Trading Co.Pvt.Ltd.	15,00,000	10.63%

- The holders of one warrant were entitled to apply for one Equity Share after the expiry of 18 months. The price of this was worked out @ Rs.181/- per share on 31st March 1998. This offer was accepted by the promoters and by June end 1998 they applied for these 90 Lacs warrants by paying 10% of the face value which came to around 16.20 Crores.
- An offer was made on 17.2.98 by Sterlite Industries Ltd., for acquisition of 10% equity of INDAL @ Rs.90/- per share. However, SEBI directed Sterlite Industries Ltd., to make minimum offer for 20% equity of INDAL. Later, Alcan, a majority shareholder in INDAL made a competitive offer. At the same time, trading volumes rose in the scrip of Sterlite Industries Ltd. The volumes increased suddenly from 4 to 5 lakhs per settlements to 25 to 30 lakhs per settlements at NSE and around 30 to 40 lakhs at BSE.

- To beat Alcan in its competitive bid, Sterlite Industries Ltd. came with an ingenious scheme. The very next day i.e. 26.5.98, Sterlite announced its decision to hike the offer size to acquire 52.03% of the equity of INDAL at a price of Rs. 221/- each. The total fund required for acquisition of 52. 03% equity of INDAL, which amounted to 3.70 Crore shares, was Rs. 817. 70 Crores. This offer was partly in cash i.e. @ Rs. 131 per share and partly in the form of Optionally Convertible Redeemable Preference shares (OCPs). The OCPs were convertible at the end of 18 months from the date of allotment at a price which would have been at a discount of 10% of the average of the weekly high and low of the closing market price of Sterlite Industries Ltd. during the 10 weeks immediately preceding the conversion date. However, this price was subject to minimum conversion price of Rs. 350/- per share. In case the OCP s (OCPs having face value of Rs. 10/- each) were not converted, the same were redeemable in two equal instalments at the end of 3rd and 4th year from the date of allotment. For generating funds to the tune of Rs.817.70 Crores, it was proposed to issue OCPs worth 333 crores, arrange loans from ICICI to the extent of Rs.200 Crores, procure Bank Guarantees from Bank of Nova Scotia, Banque Nationale De Paris and ABN Amro Bank to the tune of Rs.110 Crores, etc. If one see the price movement since 25th of May 1998, as tabulated below, it would be clear that price immediately touched a high Rs. 385 (?) on 27th May, 1998. Prices started falling off after that.

Date	No. of shares	Price
25/5/98	1071000	350.10

26/5/98	1204300	368.90
27/5/98	1337600	360.90
28/5/98	1180500	350.20
29/5/98	803000	346.85
01/6/98	1500100	335.75
02/6/98	1074200	302.25

- 6.4 If one tries to analyse rationale behind "minimum conversion price of OCPs at Rs.350/-", this offer would not have been attractive to any prudent shareholders of INDAL unless the share price of Sterlite Industries Ltd. was higher than this price on the day of offer and during the currency of the offer. This price i.e. Rs. 350/- per share is in stark contrast with the price at which preferential offer was made to the promoter i.e. Rs. 181/-. By all logic on increase of equity the prices should have come down but the prices started increasing. Apparently, commercial production in the Copper Smelter project at Tuticorin, started in April 1998 but this by itself was not very significant which would have warranted such substantial increase in prices of the shares of Sterlite. This price was artificially raised and it went down to Rs. 195/- when the artificial support was withdrawn. At that point of time, the copper smelter plant was working and the production was higher in June and July as compared to production in the month of April.
- Damayanti group was working in concert with promoters of the company. During the visit of the SEBI investigation team to the office of Damayanti Group at 1208, Maker Chambers V, Nariman Point, copies of certain documents were furnished by employee of Damayanti Group in response to summons. One of the papers had details of investment by Shri Harshad Mehta. On this paper under the heading ‘excess lying as under’ there is noting "Dil Vikas, ster – 1,95,000". The break up of this figure has also been given as 1, 50, 000 + 45, 000 margins. Dil Vikas referred to Dil Vikas Finance Ltd., which is an associate company of Eldorado Guarantee Ltd., which is known in market circles as ‘jobber’ of Sterlite Industries Ltd. It was found that Eldorado had purchased 1.5 lakh share in the name of Crimson Securities, another associate concern of Eldorado, in settlement No.3 of BSE. This was part of the total purchase of 3 lakh shares by Eldorado in that Settlement. Eldorado purchased 1.5 lakh shares in the name of M/s. Crimson Securities, their family concern and advised their clients, Mr Ashwini Khurana of Delhi to purchase another 1.5 lakh shares, which they purchased in the names of their group concerns.

- The fact that paper (referred above) was available in the office of Damayanti Group, which is a front for Shri Harshad Mehta indicated that there was a nexus between El Dorado and Damayanti Group in this regard. The providing of list of the brokers who would like to sell these shares by management of the Sterlite Industries Ltd. coupled with transfer of funds from MALCO to Dil Vikas under the garb of clean loan proves a nexus between Damayanti Group on one hand and Sterlite Industries Ltd., on the other hand. The sellers who sold these shares to El Dorado were having dealings with Damayanti group. This can be found from the table below:

Clearing No.	Name of selling broker	Quantity
553	P.R. Shah	40000
566	S.N. Nangalia	39900
200	GNH Global Securities	118200
581	R.R. Mohta	30000
519	N.C. Jain	15000
645	S.N. Tara	25000

- It was also found that the transaction with Shri Ashwin Khurana were in the nature of financing transactions and have been given colour of purchase and sale of shares as (i) no payments were received from the client and purchase consideration was adjusted against amounts borrowed from Shri Khurana earlier (ii) no deliveries were given to the client and they were kept with the broker

who utilised it for his personal transactions.

- Though, Shri Gandhi denied that any assurance was given by Mr Murthy as regards the funds for the purchase of these shares or any commitment as regards the buy back of these shares or sharing of gains / losses on the purchase of these shares, yet the transaction have been found to be done by them for Sterlite Industries Ltd. It can be inferred from the following facts (a) funds being given by MALCO ostensibly as loan, (b) transaction being entered at the instance of Mr. Murthy of Sterlite who gave details of counter party broker with whom this negotiated deals was entered, (c) departure from normal practice of entering in inward and outward register of shares received in the office in respect of 45, 000 shares, (d) non-furnishing of details regarding the financier and owner of this 45,000 shares, (e) loan has been given by Malco for six months though the need for Eldorado was only for two days, (f) availability of details of 1,95,000 shares in the office of Damayanti Group,that this transaction was for Damayanti Group and Sterlite Industries Ltd.
- In view of the above, it is concluded that Eldorado was used as a conduit for parking of shares.
- The promoter and Damayanti Group nexus became further clear from the fact that some of the brokers at BSE and NSE who were dealing for Damayanti Group and who could not carry forward their outstanding positions in Sterlite Industries Ltd. sold these shares to Dil Vikas Finance Ltd., and associate concern of Eldorado. This was done by entering the trade as "All or none" deals by synchronising the timing of logging in of the trades by the buyer and the seller at predetermined prices. This deals was entered in the trading system at midnight of June 12, 1998 by opening the system much beyond the trading hours and without informing the market and investors in general. This deal was actually for MALCO an associate company of Sterlite Industries Ltd., which was approached by the Stock Exchange to bail out brokers having payment difficulties. MALCO forwarded Rs. 11.75 Crores to Eldorado for this deal. Ostensibly, the deal was in the name of Dil Vikas Finance Ltd. and which was asked by MALCO to place the shares with Financial Institutions and in case Dil Vikas Finance Ltd failed to place these shares, it would be picked up by MALCO. Later these shares were picked up by MALCO only. The persons who were bailed out or whose positions was taken up by Eldorado are as under:

Clearing No.	Name of selling broker	Quantity
739	Lalkar Securities	58, 800
200	GNH Global secs. Ltd.	2, 32, 000
747	SVS Secs. Pvt. Ltd.	21, 300
141	Sanghvi Bros.Brokerage Ltd.	40, 000
553	P. Regulation 3(I) shah	70, 600
566	S. N. Nangalia	1, 35, 000
394	KNC Shares & Securities	22, 500
482	M N Agrawal	20, 000
581	R.R. Mohta	53, 500
295	J.H. Patel	40, 000
785	T.C.P Stock Brokers	5, 000
	Total	6, 99, 500

- The actual shares were around 6, 06, 000 shares as some of the transactions entered as bulk deals were cancelled. However, the trade log of BSE showed the above figure of 6, 99, 500.
- Sterlite has admitted that Malco has forwarded Rs. 11.75 crores to E'l Dorado in view of the payment problems. Sterlite had admitted that BSE's Governing Board members had approached Sterlite with a view to avoid market having a payment crisis and for avoiding any draw down from trade guarantee funds in order to fulfill commitments. Sterlite has admitted that any such payment crisis would have further tarnished the corporate reputation of Sterlite and at the same time this was perceived as an opportunity by the promoters to acquire some further shares at an attractive price. It further stated that when Malco purchased these shares the sole intention was to help BSE to avert a major payment crisis on the premier exchange of the country and not to manipulate the share

prices of Sterlite or bail out any particular group of brokers.

- Only brokers who had dealings / linkages with Damanyanti Group were selected for bailing out. Why would any limited company who is responsible to its shareholders would like to pick up shares of Sterlite when there were no genuine buyers and only sellers in the market and that too from those brokers who were dealing for Shri Harshad Mehta unless they were in league with him. The rate at which the transactions were to be entered and the name of the brokers with whom it was to be entered was given by Damayanti Group. Apart from this, in the light of the above, it is concluded that promoters / company first abetted Shri Harshad Mehta to build up large positions in the shares of Sterlite Industries Ltd., which facilitated market manipulation and later provided an exit route when the artificial increase in price not sustained and some of the brokers dealing for Damaynati Group got trapped.

- The Sterlite in its reply has denied that the seller of this 6 lakhs shares were Damayanti Group / Harshad Mehta. It is stated that when Malco made such payment to E'l Dorado it did not even know who were the selling brokers and only realised their identities from the documents now available. It further stated that all these brokers did not belong to Damayanti Group alone cited example of Mantri Group, which has sold 50, 000 shares of Sterlite to them. It is pertinent to note that Shri C.R. Murthy who in his statement before investigation officer of SEBI has stated that he is an employee of Sterlite. However, Sterlite in its reply claims that Shri Murthy is Manager-Finance of Malco. Shri Gandhi, the director in E'l Dorado Guarantee Limited in his statement has categorically stated that around the month of April, 1998 he received a telephone call from Shri C.R. Murthy informing that there were a lot of 3 lakhs shares of Sterlite Industries available with few brokers of BSE and whether E'l Dorado were interested to purchase these shares. These shares were accordingly purchased by E'l Dorado in the name if their family concerns M/s. Crimson Securities and advised their clients Mr. Ashwin Khurana of Delhi to purchase another 1.5 lakh shares. Even if the statement of these above persons are not taken into consideration, I find that such large chunk of shares of Sterlite shares were purchased through 'all or no deals' in BSE terminals by synchronising the timings of the logging of trades after the official hours at the pre-determined price. It is very difficult to conclude that in such a large deal, which was in the form of negotiated deal, the buyers and sellers were not knowing each other.

- From the above circumstantial evidence, it is very difficult to conclude that Sterlite was not involved in the price or market manipulation in the scrip of Sterlite or that the same was a normal transaction. At this juncture, I would like to refer to the Supreme Court judgement which is stated as under:

- Shivajirao Nilangekar Patil vs. Mahesh Madhav Gosavi (AIR 1987 SC 294)- "There is no question in this case of giving any clean chit to the appellant in the first appeal before us. It leaves a great deal of suspicion that tampering was done to please Shri Patil or at his behest. It is true that there is no direct evidence. It is also true that there is no evidence to link him up with tampering. Tampering is established. The relationship is established."

- After taking into consideration all that has been stated above and the circumstantial evidence, I am convinced that Sterlite Industries Ltd. has indulged in price manipulation of the scrip of Sterlite during the period April & May, 1998 and violated regulation 4 (a) and (d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 read with Section 11(1) and 11(2) (e) of SEBI Act, 1992.
- Creation of false market and price manipulation is a very serious offence and is in violation of regulation 4(a) and 4(d) of SEBI (Prohibition of Fraudulent and Unfair trade practices relating to the securities market) Regulations, 1995. Such manipulations shake confidence of investors in securities market. The sub-regulations (a) and (d) of regulation 4 which provides for prohibition against market manipulation run as under:
- "4. No person shall –
- effect, take part in or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities and thereby inducing the sale or purchase of securities by any person enter into a purchase or sale of any securities, not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress, or cause fluctuations in the market price of securities.
- From the findings as shown in Paras 5.2 to 9.1, it is clear that the Sterlite has indulged in purchase of 6 lakhs securities of Sterlite through Malco, its associated company through E'l Dorado who had purchased the same from Damayanti group/ Harshad Mehta "through all & none deal " with the purpose of inflating the price of the Sterlite. The price of the scrip of Sterlite, which was languishing at Rs. 181/- touched a high of Rs. 385/- on 27th May, 1998. The findings show that the said purchase was not for financial ownership but for inflating the price of Sterlite.
- Section 11 of the SEBI Act empowers SEBI to regulate securities market by such measures as thinks fit. Section 11B of the Act empowers SEBI to issue directions in the interest of the investors

or orderly development of securities market. The Hon'ble Division Bench of the Bombay High Court in the matter of R.R. Bohra vs. SEBI (SCL 1998) has held that Section 11B of the SEBI Act is an enabling provision enacted to empower SEBI to protect the interest of investors and to promote the development of and to regulate the securities market and to prevent malpractices and manipulations inter alia by brokers. Such an enabling provision must be construed so as to sub-serve the purpose for which it is enacted. I, therefore, do not agree with the submission that SEBI has no power to prohibit Sterlite from accessing the capital market.

- After taking into consideration the material and evidence gathered during the investigations in the price manipulations of Sterlite the calculated manner in which manipulations has been caused the gravity and seriousness of the offences which could cause great harm to the fairness and integrity of the securities market. I am of the view that integrity of the securities market has been effected. In order to ensure that the confidence of investors in securities market remains unimpaired, it would be necessary to issue suitable direction.

- In view of the above, I in exercise of powers u/s 4(3) read with Section 11 and 11B of SEBI Act hereby direct that Sterlite Industries is prohibited from accessing the capital market for a period of 2 years from passing of this order. It is further ordered that prosecution proceedings under section 24 read with section 27 of the SEBI Act for violation of regulation 4(a) and (d) of SEBI (Prohibition of Fraudulent and Unfair trade practices relating to the securities market) Regulations, 1995 shall be initiated against Sterlite Industries through their directors namely Shri Anil Aggarwal, Shri Tarun Jain and Shri Shanshikant."

Shri C.A. Sundaram, learned Senior Counsel appearing for the Appellant submitted that the impugned order is contrary to the rules of natural justice, as the Respondent did not give personal hearing to the Appellant nor allowed it to cross examine the witnesses upon whose statements the Respondent has so heavily relied on. In this context he particularly mentioned the statements of Shri Bimal Gandhi of El Dorado and stated that Shri Gandhi died recently and as a result the Appellant has lost for ever an opportunity to controvert his evidence. Shri Sundaram, though contested the viewpoint put forth by the Respondent justifying its decision to disallow cross-examination of the witnesses, did not press the matter further.

Shri Sundaram refuting the Respondent's version that the Appellant was keen to delay the inquiry proceedings stated that by the Respondent's own version the inquiry is relatable to the market behaviour witnessed in April-May, 1998. But, a show cause notice was issued to the Appellant on 20.12.1999, that is after a lapse of about 18 months, that the Appellant submitted its reply on 10.01.2000 i.e., within just 3 weeks of the receipt of the notice, that the Respondent vide letter dated 08.02.2000 fixed the matter for hearing on 24.02.2000, that on 16.02.2000 the Appellant requested either to "pre-pone or postpone" the date of hearing because of unavoidable reasons. Learned Senior Counsel stated that it was not a request for postponing the hearing to cause delay, that it was left to the Respondent to even pre-pone the hearing if they so wanted. Learned Senior Counsel also stated that as far back on 8.3.2000 the Appellant had sought cross examination of the witnesses on whose statements the Respondent had relied on, the request was repeated on 4.10.2000. There was no response. On 20.3.2001 the Respondent wrote to the Appellant advising to attend the hearing on 3.4.2000 at 3.30 p.m. and present its case and all the issues and objections in respect of the show cause notice, which obviously included the request for cross examination of the witnesses. Shri Sundaram stated that on 3.4.2001 before the scheduled time of the hearing, the Appellant filed a letter requesting the Respondent to fix the hearing any time within a week, so as to enable it to have the benefit of the presence of its Senior Counsel. He pointed out the endorsement on the office copy of the letter filed with the appeal to show that the letter marked "urgent" was delivered at the Respondent's office at 1.30 p.m. on 3.4.2001 i.e. before the scheduled timing of the hearing. Shri Sundaram stated that the Respondent did not respond to the request and without giving any opportunity to the Appellant to putforth its version, on 19.4.2001 the Respondent passed the order. He stated that the sequence of events narrated above, as also disclosed in the impugned order would show that the delay in investigation was not caused by the Appellant, that though the Respondent was moving at snails pace since 1998, picked up super speed all on a sudden in the light of the heat turned on it after the share market crash in March, 2001 and decided the matter in a hurry even ignoring the rules of natural justice.

Shri Sundaram submitted that the impugned order can not sustain legally and factually. He submitted that the Respondent has chosen two transactions involving the Appellant's shares i.e. 3 lakh shares purchased by El Dorado Guarantee Ltd (El Dorado) for their clients on 8/10 April, 1998 and 6 lakhs shares purchased by MALCO on 12.6.1998 and come to the conclusion. In this context the learned Senior Counsel submitted that these two transactions when compared with total transaction of the Appellant's shares in BSE/NSE during the relevant period, are insignificant to have any impact on the market or the share price so as to accuse the Appellant of having indulged in manipulation.

Shri Sundaram referring to the finding recorded in the impugned order that the Appellant has violated the provisions of regulation 4(a) and 4(d) of the 1995 Regulations stated that the charge is totally baseless. He submitted that unless it is established that these two specific transactions squarely fall within the ambit of the said

regulations the charge cannot stick that the Respondent has failed remarkably in this regard. He submitted that the onus is on the Respondent to establish the charge with supporting evidence, that since the charge is of a serious nature and the attendant consequences being very severe, the standard of proof required is very strict and rigid and no casual approach would suffice. He further submitted that it is incumbent on the Respondent to establish the charge by clearly bringing out all the transactions involved, that a general statement that the two transactions referred to in the order are only illustrative is not sufficient, that the Respondent has not referred to any other transaction indicates that there was no other transaction to support its findings.

With reference to the alleged contravention of the provisions of regulation 4, Shri Sundaram read out the provisions of the regulation and in particular clauses (a) and (d) and stated that the scope of the regulation need be clearly understood, which the Respondent did not, before applying to the facts of the case and drawing hasty conclusions. He stated that Chapter II of the 1995 Regulations, under which regulations 4 on 'Prohibition against market manipulation', regulation 5 on 'Prohibition of misleading statements to induce sale or purchases of securities' and regulation 6 on 'Prohibition on unfair trade practice relating to securities' are put, is titled "Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market". According to him the object of the regulation, is thus clear that in the absence of any fraud or deceit the provisions of the regulation would not apply, that in the absence of any finding that the transaction was intended to defraud or deceit someone, there is no further scope for any investigation as to who did it and why did it. Shri Sundaram stated that deceit through market manipulation is what the regulation prohibits. In this context he stated that there is not even a whisper of such a charge against the Appellant anywhere in the order. Learned Senior Counsel stated that according to clause (a) of regulation 4, no person shall, effect, take part in or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities and thereby inducing the sale or purchase of securities by any person. He stated that self-profit is the motivation that attracts clause (a) of the regulation. Shri Sundaram submitted that any price change in the scrips, as a result of genuine purchase or sale would not attract the provision, that if there is no artificiality in a transaction, regulation 4(a) cannot reach. He stated that the words "intention of artificially raising or depressing the price" are the crux and that an artificial price is not the genuine price. Whether the price is genuine or artificial would depend on the attendant facts in each case.

Referring to the allegation involving purchase of 3 lakh shares by the Appellant, Shri Sundaram stated that shares were not purchased by the Appellant or at its behest, that it was a transaction effected by a broker for his clients. He submitted that as per El Dorado, they purchased 1, 50, 000 shares of the Appellant for their client, Shri Khurana on 8.4.1998 at the rate of Rs. 291. 50 per share and another 1, 50, 000 shares for their client M/s. Crimson on 10.4.1998 at the rate of Rs. 308. 50 per share, that prior to such purchases the share price had already touched Rs. 320 (on 2.4.1998) and the volume of the shares traded on both BSE and NSE during the period 1.4.1998 to 17.4.1998 was about 13 million shares and the price range was between Rs. 295 to Rs.325, that the weighted average price aggregated Rs. 308 per share on the NSE and Rs. 306 per share on BSE during the period. Shri Sundaram further submitted that as a matter of fact, during the period April to June, 1998 the total volume of the Appellant's shares traded on both these exchanges was to the tune of 69 million shares and as such even if it is assumed for argument sake that MALCO had purchased these shares, it is impossible to believe that just 3 lakh shares traded would in any way manipulate such a big market. He submitted that it is evident that purchase of these 3 lakhs shares on delivery basis had not artificially raised the price or induced any person to sell or purchase the share or it was a device to inflate the price. He reiterated that the purchase was made by El Dorado from the open market at the prevailing rate, that the quantum of shares purchased with reference to the total volume of transaction was trivial to artificially raise or depress the prices and that there was not even a trace of deceit in the transactions. Shri Sundaram submitted that there is nothing on record to show that the transaction involving 3 lakh shares referred to by the Respondent in the order attracted the provisions of regulation 4(a).

Shri Sundaram further stated that regulation 4(d) which prohibits any person entering into a purchase or sale of any securities, not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the market price of securities, is also not attracted to the case. He submitted that only those transactions in securities not intended to effect transfer of beneficial ownership but intended only to distort the market prices of securities, alone would attract regulation 4(d). In this context he stated that from the factual position it is clear that the shares were purchased at the prevailing market price on delivery basis and it was intended to register in the name of the clients, and not to distort the price mechanism, and therefore it cannot be said that the transaction attracted regulation 4(d).

Referring to the purchase of 6 lakh shares of the Appellant by MALCO in June, 1998, Shri Sundaram submitted that provisions of regulation 4(a) and (d) are not attracted to the said purchase also as could be seen from the factual position being referred to later. The shares were purchased as requested by the BSE, to avert a payment crisis and save the market.

Shri Sundaram submitted that the Respondent has wrongly concluded that the Appellant and MALCO are one and the same entity. MALCO is a public limited company, run by its Board of Directors in management and that it is not even a subsidiary of the Appellant, the fact that MALCO is an associate company of the Appellant should

not be construed to hold that MALCO is an agent of the Appellant, that the relation is not that of principal and agent but that of business associates, that this aspect has been totally over looked by the Respondent in its order. The Appellant and MALCO are two distinct and separate legal entities and as such purchase of shares by MALCO cannot in any case be considered as purchase of shares by the Appellant.

Learned Senior Counsel submitted that MALCO purchased 6,00,000 shares of the Appellant at the specific request of some senior members of the BSE Governing Board to avert a payment crisis in the exchange. He submitted that the sole intention of MALCO in buying the scrips was to help BSE to avert a major payment crisis, which if allowed to happen would have affected innocent investors. Learned Counsel stated that the material on record and the impugned order acknowledges that these transactions were put through at mid night on 12.6.1998 which would never have been possible without the BSE Governing Board being involved, that this favour by MALCO has been twisted and classified as bail out of the Damayanti Group; He submitted neither MALCO nor the Appellant knew the brokers of the Damayanti Group nor was there any means of knowing as to which brokers were selling those shares. Shri Sundaram stated that the impugned order has disregarded the fact that MALCO instructed EL Dorado to first find a buyer (financial institution) for these 6 lakh shares and only if they could not find such a buyer, MALCO would purchase the shares, which MALCO did after one month of the original purchase by El Dorado. He further stated that it is an admitted fact that the shares were purchased to avoid a market crisis at the instance of BSE, and therefore the question of distorting the market did not arise at all; further the beneficial ownership of six lakh shares purchased was transferred to MALCO. He further stated that the fact that MALCO had instructed El Dorado to place the shares with financial institutions and in case it did not fructify, the shares would be purchased by MALCO, indicates the genuineness of the transaction, that if the intention was to manipulate the market, MALCO would have directed El Dorado to place the shares with the brokers. He further stated hat the impugned order itself clearly states that the shares were purchased by MALCO and the purchase was also funded by MALCO and as such the Appellant cannot be said to have violated regulation 4(d). He also pointed out that nowhere it has been stated in the order that there was any fund flow from the Appellant for the purchase of the said 6 lakh shares. MALCO used its own funds. Shri Sundaram submitted that the factual position completely belies the contention that the Appellant had any intention to manipulate the share price. He further submitted that the scope of the provisions of regulation 4(a) and (d) discussed in the context of the transaction relating to purchase of 3 lakh shares is in equal force applicable to the purchase of 6 lakh shares by MALCO and this transaction is also out of the scope of the said regulation.

Learned Senior Counsel submitted that in the context of market manipulation charge leveled against the Appellant, it is necessary to clearly understand what is actually meant by ‘market manipulation’. According to him the Respondent has made the allegation without fully appreciating the scope of the said expression. He stated that the expression ‘manipulation’ for the purpose of the regulation has not been defined, but its meaning is well understood in the market and by the regulators all over the world. He stated that the scope of the expression has been subjected to scrutiny by judicial authorities in the context of security market operations. In this context he cited the following extract from the Administrative Law Judges’ decision in the matter of CAROLE. HYNES (decided on 24.11.1995) in the context of administration of the Securities Exchange Act, 1934 that " market manipulation refers generally to practices such as wash sales, matched orders or rigged prices – that are intended to mislead investors by artificially effecting market activity (SDchreiber v. Burlington Northerm Inc 472 US.1, 6 (1985).

> "Section 9(a) (1) prohibits certain manipulative practices, including wash trades, and matched orders, when such transactions are done for the purpose of creating the false or misleading appearance of active trading in a security listed on a national securities exchange, or a false or misleading appearance with respect to the market for any such security. To establish a violation of section 9a(1), it must be shown, as it has been in this case, that one or more individuals effected a transaction in a "security registered on a national securities exchange … which involve(d) no change in the beneficial ownership thereof or … with the knowledge that an order of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties"

To establish that an individual has engaged in manipulative practices in violation of section 10(b) of the Exchange Act and Rule 10b-5 thereunder, the Division must prove, as it has done here, that one or more individuals engaged in any act, practice, or course of business which operated as a fraud or deceit upon any person in connection with the purchase or sale of the security (SEC V Kimmes, 799 F.Supp. 852, 858 (ND III. 1992)". In establishing a violation of section 10(b) and Rule 10b-5 the commission must show that the individual acted with scientier (Aaron v SEC 446 US. 680, 701-02 (1980).

> "Scienter is an element of violation of section 17(a)(1) of the Securities Act and sections 10(b) and 15(c) of the Exchange Act - the Supreme Court has defined scienter as " a mental state embracing intent to deceive manipulate or defraud" (Ernst & Ernst v. Hochfelder 425 US 185, 193.n. 12 (1976). "Recklessness is sufficient to satisfy the scienter requirement" "(Sand Strand Corp v. Sunchemical Corp 553 F.2d 1033 1044 (7th cir.)

Shri Sundaram stated that the law in this regard is materially identical in India and in USA and therefore the decision of the US Courts could be followed for guidance.

Learned Senior Counsel submitted that there is no allegation or finding of deceit either in the show cause notice issued to the Appellant or in the impugned order. In this context Shri Sundaram further cited the observations made by the Administrative Judge on 'manipulation'.

> Manipulation
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> "The court in Resch-Cassin listed various factors which characterize attempts by manipulators to raise the price of a security. Among them are price leadership by the manipulator, domination and control of the market, and restricting the "floating supply of stock" 362 F. Supp. At 976-77. However, an infinite variety of manipulative devices are encompassed within Section 10(b) and Rule 10b-5. See Herpich v. Wallace, 430 F.2d 792, 802 (5th Cir. 1970). A finding of manipulation is not dependent upon the presence of any particular device usually associated with a manipulative scheme. Swartwood, Hesse, Inc., 50 S.E.C.1301, 1307 (1992). The proof in a manipulation case "almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behaviour, from apparent irregularities, and from trading data". Pagel, Inc., 48 S.C.E.C 223, 223(1985), aff'd, 803 F.2d 942 (8th Cir 1986) (footnote omitted).

A series of transactions in a manipulative scheme may consist of actual purchases or sales of securities or bid quotations entered for securities. Resch-Cassin, 362 F.Supp. at 975. "Rapidly rising prices in the absence of any demand" for securities are "well-known symptoms" of manipulative transactions. Dlugash v. SEC, 373 F.2d 107, 109 (2d Cir. 1967); see Resch-Cassin, 362 F.Supp. at 970-971. In Todd & Co., the Commission, in determining that a market had been manipulated, emphasized that there was little retail demand for the securities in question. Todd & Co., Inc., 46 S.E.C. 314, 319 (1976), vacated and remanded on other grounds sub.nom., Todd & Co., Inc. v. SEC, 557 F.2d 1008 (3cd Cir. 1977). A lack of public information which could justify a price increase for a security is also evidence that a series of manipulative transactions caused the price of the securities to rise. See Mawod & Co. v. SEC, 591 F.2d 588, 591-92 (10th Cir. 1979)

Wolf & Co., entered into a series of transactions in Of Counsel units, stock and warrants by purchasing units, common stock and warrants. Wolf & Co's bids for Of Counsel securities also constitute a series of transactions. The series of transactions in Of Counsel securities caused an in crease in the price for Of Counsel units. Two factors in particular indicate that Wolf & Co., Hibbard, and Wegard artificially inflated the price of Of Counsel securities. First, there was virtually no retail demand for Of Counsel securities during the rapid price rise. During the entire period from November 16, 1993 through December 8, 1993 only 1.9% of the Of Counsel units volume involved retail customers. And second, there was no publicly disseminated information regarding Of Counsel to account for the price increase from the $3.25 IPO price to the high price of $8. -[18]-

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> It is settled Commission law that "one who accumulates at rising prices and sells out at prices created by his buying efforts will be presumed to have raised prices for the purpose of inducing other to buy. Only the strongest countervailing evidence will be sufficient to outweigh this presumption". Halsey, Stuart & Co., 30 S.E.C. at 124 n.28, citing Opinion of General Counsel, Sec. Ex. Act Rel. No. 3056 (1941); see also VIII L.Loss & J.Seligman, Securities Regulation, 3974-75 (3d.ed. 1991).
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> Scienter
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> "Rapidly rising prices in the absence of any demand are well-known symptoms of…. Unlawful market operations". Dlugash v. SEC, 373 F.2d at 109. In this case, the price of Of Counsel units rose dramatically despite an almost total absence of demand. Between November 23 and December 8, over only 11 trading days, the price of Of Counsel units almost doubled, from $4-1/8 to $8. This rapid increase occurred in the absence of any significant retail demand for the securities, and in the absence of any news about the company. This price increase, which cannot be attributable to any normal market forces, is a clear basis for me to infer the necessary scienter in connection with a finding that Wolf & Co., Hibbard and Wegard illegally manipulated the market for Of Counsel securities."

Learned Senior Counsel further submitted that the Respondent has referred to irrelevant data to show that the Appellant's scrips had risen abnormally compared to other scrips in the referral period, that while BSE sensex

declined by 11%, the Appellant's share price rose by 71%. In this context he referred to the share price movement data furnished at Ex.-D to the appeal and stated that on 1.4.1998 the Appellant's share price was Rs.299.10 and on 4.6.1998 Rs.302.70 thereby showing an increase of just 1.2% as against the sensex of 3969 and 3546 on the relevant dates which indicated a decrease of just –10.7%. Shri Sundaram stated that the relevant period is 1.4.1998 to 4.6.1998 and not from 1.1.1998. He further stated that comparison of the Appellant's share with BSE or NSE index is meaningless, as it is not a component of BSE or NSE index scrips.

According to Shri Sundaram apart from applying wrongly the regulations, the factual position relied on by the Respondent is also incorrect. He submitted that the Respondent has heavily relied on certain portions of the statement made by Shri Bimal Gandhi of El Dorado. He submitted that since Shri Gandhi has not been made available to the Appellant to cross-examine and that since he died recently his oral evidence cannot be used. Shri Sundaram stated that Shri Bimal Gandhi was a director of El Dorado Guarantee Ltd, that he was also a director of Dil Vikas Finance Ltd, that the transactions attributed to the Appellant were done by the said firms, that in fact the entire finding of the Respondent that the 3 lakh shares were purchased by the Appellant is based on the untested evidence of Shri Gandhi. Shri Sundaram stated that Shri Gandhi's statement that Shri Murthy had informed him about the availability of 3 lakh shares of the Appellant with certain brokers has been adopted by the Respondent to hold that Shri Gandhi purchased those shares as instructed by Shri Murthy though Shri Murthy had denied the version. Shri Gandhi had also stated that it was Shri Murthy of MALCO who agreed to provide funds for buying approximately 6 lakh shares of the Appellant in June, 1998. Shri Sundaram submitted that in any case Shri Murthy, as could be seen from his evidence had denied of having given any instructions to Shri Gandhi to buy three lakh shares and as far as funding to purchase 6 lakh shares by MALCO is concerned, the factual position remains undisputed.

Learned Senior Counsel submitted that MALCO did not finance 3 lakh shares on delivery basis purchased by El Dorado, that the loan of Rs.5 crores given by MALCO to Dil Vikas, a registered RBI satellite dealer for Government securities was deposited by Dil Vikas in their separate earmarked satellite account with RBI from which funds could only be utilised for RBI transactions and for no other purpose. He said that the said loan had nothing to do with the purchase of these 3 lakh shares, as the loan amount itself was only Rs.5 crores, while the purchase consideration for 3 lakh shares was over Rs.9 crores. Shri Sundaram submitted that both the parties for whom the shares were purchased by El Dorado, namely Crimson and Shri Khurana, had admitted that they were beneficially entitled to these shares, that the Respondent has blacked out this factual position to suit its convenience.

Shri Sundaram referred to Shri Murthy's statement dated 30.9.1999 (at A.10) to the effect that he had not given any instructions to anyone in El Dorado Guarantee Ltd or to any other associate concern to buy the Appellant's shares According to Shri Sundaram in the light of the said denial, Shri Bimal Gandhi's statement has no evidentiary value especially since it has not been put to test in cross examination or for that matter not corroborated by any other evidence. In this context he also referred to the evidence of Shri Tarun Jain dated 6.10.1999 that "We (MALCO or Sterlite Industries Ltd) have not given any loan to Mr. Bimal Gandhi or any of the directors or any directors of the associate concerns (Q.13)". He had also stated that "I have checked up with Mr.Murthy and he says that no instructions as claimed by Mr.Bimal Gandhi were given". Shri Sundaram said there is no evidence to support the finding in the order that 3 lakh shares were purchased at the behest of the Appellant, that the finding in this regard is nothing but an offshoot of imagination. Shri Sundaram stated that in fact the available evidence establishes that these 3 lakh shares were purchased for El Dorado's clients and the Appellant or MALCO had no involvement at all therein, that no funding for the purpose was done by them as has been alleged.

Shri Sundaram stated that MALCO had funds, gave Rs. 5 crores loan to Dil Vikas Finance for 6 months at 15% interest. Dil Vikas in their request to MALCO had stated the purpose of obtaining the loan that it was with reference to purchase of Govt. Securities but the Respondent with pre set mind ignored the real purpose for which the loan was sought and chose to view the said transaction differently to support its story. Shri Sundaram submitted that from Bimal Gandhi's evidence it is clear that MALCO was not informed by Dil Vikas that the advance was to buy the Appellant's shares. Further from Shri Gandhi's deposition (question 18) it is clear that "he did not remember about the contact person for the purchase of these shares that it is to be noted that Shri Murthy has also stated that he also did not say". In answer to Question 21, Shri Gandhi had admitted that "the firm regularly do corporate finance with Sterlite Group which include MALCO". Shri Sundaram submitted that in the light of the factual position stated above the advance given by MALCO can not be considered as an advance to buy the Appellant's shares as has been alleged by the Respondent.

Shri Sundaram further submitted that the Respondent has not fully appreciated the factual position while drawing conclusions. In this context he referred to Annexure "A" to the appeal, therein the market price and volume traded on BSE and NSE have been shown and stated that as per the said Annexure the price of the scrip was opened on 8.4.1998 at 296 and closed at 291 and the traded volume was 241 153. On 10.4.1998 the corresponding figure was 299 and 319.80 and volume was 447 539. Shri Sundaram stated that 8.4.98 and 10.4.98 are relevant as the shares for Khurana and Crimson were purchased on the said dates. Shri Sundaram submitted that the volume

traded in NSE during the period 1.4.1998 to 17.4.1998 was 6, 370, 900 and in BSE it was 6582991, making a total of 12,953,891, that the weighted average price of the scrip in NSE was Rs. 308 and in BSE Rs.306.16 and therefore in the light of the said factual position, it is not possible for any reasonable man to conclude that purchase of 3 lakhs shares @ Rs.291 (on 8.4.) and @ Rs. 308 (on 10/4) by anybody had resulted in manipulation of the market. He stated that a perusal of the said annexure would also reveal that there was no erratic movement of price or volume as a result of the said purchase, as alleged. He further pointed out that the purchase of shares was made on 8/10 April 1998 and therefore Respondent's reference to price movement from 2.1.1998 is only to misguide the Tribunal. Learned Senior Counsel submitted that no reasonable person would have reached at the conclusion, which the Respondent has drawn, in the light of the facts and circumstances of the case.

Shri Sundaram referred to the finding in para 6.6 of the order that "Damayanti Group was working in concert with promoters of the company" and stated that such blatant observations have been made without any substance. He stated that the said observation is based on the innocuous scribbling found on a sheet of paper stated to have been retrieved from the office premises of Damayanti Group. Shri Sundaram submitted that even if it is admitted that the scribbling relates to the Appellant's shares, it does not in any way show that the Appellant was involved in the transaction. El Dorado/Dil Vikas etc. are not exclusively working for the Appellant, and they transact dealings for others also, that in the instant case also they have admitted of purchasing 1.5 lakh shares of the Appellant for Shri Khurana and another purchase involving 1.5 lakh for Crimson. Shri Sundaram submitted that if all those persons who purchase shares of the Appellant are to be treated as persons acting in concert with the Appellant, the result would be rather absurd.

Learned Senior Counsel stated that the inference drawn in para 6.8 and 6.9 of the order is not based on any reasonable information/evidence, that on the contrary the findings are contrary to the facts on record. Referring to para 7.1 of the order, Shri Sundaram submitted that the Respondent itself has admitted that "this deal (6 lakh shares) was actually for MALCO an associate company of Sterlite Industries Ltd which was approached by the BSE to bail out brokers having payment difficulties, MALCO forwarded 11.75 crores to El Dorado for this deal. In fact the position that MALCO purchased shares has been re-iterated in para 7.2 also. By this statement the Respondent itself has admitted that the purchase was made for MALCO and not for the Appellant and the reason for such purchase was BSE's request to help to avoid a payment crisis. BSE is a public authority which has representatives of the Respondent on its Governing Board and that MALCO purchased shares at the price fixed by the Governing Board officials of BSE and the quantum was also decided by them, MALCO had no choice, that the whole purpose was to go by BSE to avoid market crash and thereby protect the interests of all concerned, including the investors. Shri Sundaram submitted that such an action taken at the behest of BSE, to protect the interests of the capital market cannot be considered by any standard a market manipulation to attract the provisions of regulation 4(a) and (d).

Learned Senior Counsel submitted that 6 lakh shares were purchased by MALCO on the specific request of the authorities from Bombay Stock Exchange, neither MALCO nor the Appellant knew the brokers of Damayanti Group allegedly involved in the transactions. He stated that the Respondent had ignored the fact that MALCO had instructed El Dorado to find a buyer for the said 6 lakh shares and only if they could not find a buyer, MALCO would purchase such shares, which MALCO did after one month of the purchase by El Dorado. Shri Sundaram pointed out that the Respondent has failed to recognise the fact that MALCO is a separate and independent legal entity and that it felt no need to issue any show cause notice to MALCO, to ascertain the actual position in this regard. According to the learned Senior Counsel this is a serious omission having a direct bearing on the conclusion drawn by the adjudicating authority.

Referring to the observation in para 7.3 of the order, that only those brokers who had dealings/ linkages with Damayanti Group were selected for bail out. Shri Sundaram stated that this is factually incorrect. He stated that the factual position in this regard has been stated by Bimal Gandhi himself that even he was not aware of the brokers involved and the purchase was done as per the list prepared by BSE. Shri Sundaram strongly rebutted the Respondent's version that promoters/company first abetted Shri Harshad Mehta to build up large positions in the shares of the Appellant, which facilitated market manipulation and later provided exit route when the artificial increase in price was not sustained and some of the brokers dealing for Damayanti Group got trapped. He submitted that the Respondent's observation is not based on any evidence. According to Shri Sundaram, the Appellant and MALCO have nothing to do with Damayanti Group or Shri Harshad Mehta. He stated that the observations of the Respondent are nothing but a figment of imagination, that on the contrary, the Respondent itself has stated that MALCO purchased shares, at the instance of BSE to overcome an impending disaster affecting the credibility of the market. Though the order (in para 9.1) speaks of 'circumstantial evidence' there is no evidence of any kind to charge the Appellant that it was involved in market manipulation. Shri Sundaram, stated that the Appellant's reliance on the decision in Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi (AIR 1987 SC 294) is misplaced for the simple reason that facts of the Appellant's case are entirely different and distinguishable from the facts of the said case. He pointed out that the legal position referred to in para 10.2 of the order if read with the observation in para 7.2 of the order would clearly show that the Respondent had drawn its conclusion erroneously holding the Appellant guilty of market manipulation. He also pointed out that price of Rs. 181 referred to in para 10.2 of the order is relating to January, 1998 and this referral date has been deliberately

left out to misguide the Tribunal to show that the time gap between the rate of Rs. 181 prevailed and Rs. 385 on 27.5.1996 was very narrow. He submitted that purchase of 3 lakh shares by El Dorado was on 8/10 of April, 1998 and purchase of 6 lakh shares by MALCO on 12th June, 1998 and these purchases were made at the market price and the market data furnished by the Appellant indicate that these transactions had no impact on the market as has been alleged in the order.

Referring to the Respondent's finding that the motive for the alleged price manipulation was relatable to the Appellant's plan to acquire shares of INDAL in the context of competition from ALCAN, the learned Senior Counsel submitted that the said finding is baseless and contrary to the facts. Shri Sundaram submitted that the Respondent had ignored the fundamental difference in valuing the shares allotted to the promoters and the minimum conversion price for Optionally Convertible Preference Shares (OCPs), that the allegation that the price was rigged to sustain the minimum conversion price of OCPS of Rs. 350/- is with out any substance in as much as OCPs were to be converted into equity shares eighteen months after the date of allotment, that such conversion was not mandatory but optional and, therefore, the Appellant could have had no intention in rigging the price to Rs. 350/- in April, 1998 more so when the entire concept of offer of the said OCPs was mooted, even as per the show cause notice, only at the end of May 1999 in response to ALCAN's counter offer, that the alleged rigging of price in April 1998 would in no way be connected with the issue of OCPs which was not even contemplated at that time.

Shri Sundaram referred to para 6.4 of the order and stated that the Respondent has stated therein that it was acquisition of the shares of INDAL by the Appellant that increased trading volumes. Shri Sundaram submitted that since the Respondent itself has stated in the order the reason for increasing the share price is the acquisition of INDAL by the Appellant, it can not now say that the share price was manipulated. He also refuted the allegation that issuance of OCP at a conversion price of Rs.350/- on 26.5.1998 could have resulted in any market distortion, as the transaction involving 3 lakh shares were effected on 8/10 of April 1998 and the transaction involving 6 lakh Shares were effected on 12.6.1998. Shri Sundaram submitted that infact when a company like INDAL is being taken over by the Appellant naturally the price should move up, that if it had not moved up that would have been a cause of worry requiring investigation. The fact that price movement was linked to the Appellant's acquisition of INDAL shares is evident from the fact that the prices started slipping down considerably from 2.6.1998, in the wake of the press note issued by the Respondent on 1.6.1998 by virtually stopping the Appellant from bidding for INDAL shares.

Shri Sundaram referred to the Appellant's take over bid of INDAL and stated that, it is but natural that scrip price of acquirer going up in the event of such a take over, that when the Appellant purchases a company it is own growth, its assets improve and naturally the share price should also increase, that it is the optimism that drives the prices up. The Appellant had made an open offer for the acquisition of a substantial stake in INDAL, a company promoted by the Canada based multinational Alcan Aluminium Corpn. Ltd., that this was the first time in India that a local Indian company made a non negotiated bid to take over an under performing unit of a multinational corporation, that it was but natural that the Appellant was expected to make higher profits and benefit immensely from the potential acquisition of INDAL. He stated that other major factors for price rise could be attributed to re-commencement of commercial production at copper smelter which was closed twice during June-December, 1997, declaration and commencement of commercial production at copper after operations stabilised declaration of excellent half yearly results for July-December, 1997 on 27.2.1998, preferential allotment to promoters at a price above market price. He further submitted that the price did fall in June, but the reasons for that are not far to seek, that the nuclear blasts in Pokharan had led the entire market taking down, followed by the Union budget which the stock market interpreted as 'unfriendly' for several weeks and unloading of large quantities of the Appellants scrips by certain institutional investors. Shri Sundaram stated that the price movement was spontaneous and not manipulated.

Learned Senior Counsel submitted that the impugned order is heavily based on the conduct of Damayanti Group. He submitted that even though there is no material or evidence to show that Damayanti Group had any connections with the Appellant, the Appellant has been bracketed with the said Damayanti Group. Shri Sundaram, citing extensively from the impugned order stated that there are patent errors in the order and it is full of infirmities and inconsistencies. He submitted that the Respondent has tailored the order to meet with certain preconceived notions, that it makes one believe that the order preceded adjudication. As an illustrative example of reliance on factually incorrect information, he referred to the statement in para 5.5 of the impugned order that during the period from 1.4.98 to 4.6.98 while the BSE sensex showed a decline of 11%, the price of the Appellant's shares rose by 71%; Quoting the published figures, the learned Senior Counsel stated that in fact during the period the Appellant's share price rose only by 1.2% and not 71%. He also stated that, at the relevant time, the earning per share of the Appellant was Rs. 371/- giving a price to earning multiple ratio of around 8, which was much lower than the prevailing P/E's of other industry majors.

Shri Sundaram, referred to the Respondent's averment in para 25 of the reply that the two purchases of 3 lakh shares or 6 lakh shares are merely illustrative and that the Appellant had connived with Shri Harshad Mehta to artificially raise the price of the Appellant's shares, and stated that such attitude from the Regulator deserve all

out condemnation, that on the basis of two trivial transactions that too not involving the Appellant, the Respondent has generalised the conduct of the Appellant and invoked penal action. He pointed out, that the statement of the Respondent, though unsustainable, is an after thought as nowhere in the order the Respondent has stated that those two cases are only illustrative. In fact the truth is that there are no other cases and that is why the Respondent could not bring in any other case. Shri Sundaram stated that an elaborate investigation spanning over three year period would not have missed any transaction, if actually there had been such transactions. Shri Sundaran submitted that the Respondent at this appellate stage cannot improve the impugned order and the Respondent's attempt to stretch the order at this stage, beyond what it is, need be disregarded. In this context he referred to the observation made by the Hon'ble Supreme Court in Mohinder Singh Gill v. The Chief Election Commissioner AIR 1978 SC 851 that when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise.

Shri Sundaram stated that even in the order the main charge is that the Damayanti Group built up unusually large position in the scrips of the Appellant and of BPL and Videocon resulting in distortion of the market equilibrium and creation of artificial market in their scrips, Thus according to the Respondent it is the Damayanti group which cornered the large chunk of shares resulting in distortion of market equilibrium. He said the transactions involving 3 lakh and 6 lakh shares are not the key issues, but the Respondent is linking the Appellant with the said Damayanti Group and treating it as a part of the said group, holding liable for the actions of the said group. For this purpose the Respondent has not adduced any evidence except stating that the bail out was meant to protect the Damayanti group brokers, ignoring the Appellant's version that the bail out was made at the instance of BSE to avoid a payment crisis. The Learned Counsel submitted that unless it is established that the Appellant is a part of the Damayanti Group or that the Damayanti Group had cornered shares at the behest of the Appellant, the charge of manipulation against the Appellant cannot be sustained, that the Respondent has failed to establish the said two requirements. He further stated that para 5.5 of the order reiterates that Damayanti Group acting through a set of brokers built up large positions in the carry forward segments in the Appellant's scrip at the BSE. According to Shri Sundaram, even if it is by Damayanti Group, carry forward segment is not the entire market. He also submitted that the Respondent is deliberately misguiding the authorities by comparing the quantum with carry forward figures, instead of comparing with the total volume traded on the exchange, with a view to play up the percentages. He submitted that the Appellant can not be held responsible for Damayanti Group's transactions as it has no connection with them. In this context he also referred to the BSE data provided in Annexure 'R' and stated that price at which the impugned share transactions were made and its percentage share in the total Turnover also need be looked into. He submitted that the data reveals that these two transactions had no impact on the market that the transactions were uneventful as far as the market was concerned.

Shri Sundaram submitted that the Respondent has no power to issue such an order under 11B of the Act debarring the company from accessing the capital market. In this context he cited the decision of this Tribunal in Tirupati Finlease's case (2000) 27 SCC 179: (2000) 38 CLA 423 wherein the Tribunal had held that for the omissions and commissions personal to the promoters, a company promoted by them cannot be in the normal course held responsible.

Learned Senior Counsel submitted that regulation 11 or any other provisions of the Act or the Regulations do not confer any power on the Respondent to direct a ban on the Appellant accessing the capital market. Shri Sundaram also submitted that the order is wrong in directing to launch prosecution of the Appellant and its officers as none of the ingredients of any offence has been established by any material on record warranting such prosecution.

Shri Rafiq Dada, learned Senior Counsel appearing for the Respondent submitted that the Appellant's argument that MALCO and the Appellant are distinct and separate and therefore MALCO's action should not be treated as Appellant's action is untenable. He submitted that technically the two companies are different, but their management is common and the action of MALCO has to be seen in the context of their close relationship. Shri Dada submitted that practically both the companies are under the same management and MALCO did what the Appellant wanted. In this context the learned Senior Counsel referred to the reply of the Appellant to the show cause notice that "Sterlite bailed out the broker of the Damayanti Group through MALCO purchasing about 6 lakhs shares at a cost of about Rs.11.75 crores". He further read out the following portion from the reply in this context- "It is true that in the first week of June 1998, we were informed by some senior members of the BSE Governing Board of an impending problem in settlement of dues in Sterlite shares on the BSE which would adversely affect the Group's corporate reputation and investor friendly image. They requested us to take suitable action to prevent a major crisis on the BSE. It may be noted that in June 1998, the otherwise excellent reputation and image of the Group had suffered a setback due to the failure of INDAL's Open Offer as well as the closure of its plant in late 1997, and any such payment crisis would have without any fault of Sterlite, further tarnished the corporate reputation and investor friendly image of the Group. At the same time, this was indeed perceived as an opportunity by the promoters to acquire some further shares at an attractive price. Purchase of shares by promoters is also permissible under the Regulations up to 5% of the capital of the company. When Malco purchased these shares, the sole intention was to help the BSE to avert a major payment crisis on the premier

exchange of the country and not to manipulate the share price of Sterlite or bail out any particular group of brokers".

Shri Dada submitted that the cited reply by the Appellant indicates the close association of the Appellant and MALCO and that MALCO was only an intermediary acting for the Appellant in the transaction. In support of his version he also cited the evidence of Shri Murthy, C.G.M. Finance and Taxation in the Appellant, that on a request to mention the name of Sterlite group of companies, Shri Murthy had stated that MALCO is one of the leading companies in the Sterlite group, that to another question he had stated that El Dorado Guarantee Ltd., is 'our brokers', that reference to 'our brokers' is significant. Learned Senior Counsel stated that Shri Murthy is not a small fry as he had boasted that "he handled all high value transactions of all finance, related whether for LCs, bank guarantees, funds, commercial papers, NCDs and that he had a portfolio of more than 1000 crores".

Shri Dada submitted that reference to 'our management' by Shri Murthy is to the common management of the Appellant and MALCO. To show that MALCO had acted at the behest of the Appellant the learned Senior Counsel cited letter dated 19.5.1999 of MALCO to the Respondent wherein it has been stated that "during the first week of June, 1998 we were approached by the Bombay Stock Exchange authorities that there is an impending problem in settlement of dues in the Bombay Stock Exchange and requested us to take suitable action in order to prevent a major crisis in the Bombay Stock Exchange. On their request we had placed a sum of Rs.11.75 crores on the disposal of El Dorado Guarantee Ltd on a clear understanding that the said sum will be utilized for purchase of securities and MALCO would take up 6, 06, 000 shares of Sterlite Industries (India) Ltd, only if no other buyer available. As they were not able to place the shares with any other investor we had bought 606000 shares of Sterlite Industries for which the necessary contract copies are enclosed. The purchase of shares has been entirely financed through the internal resources of the company and we had not borrowed from any entities for financing this transaction". Shri Dada submitted that from this letter it is clear that the bail out was done to avoid payment crisis relating to Sterlite shares and not MALCO's shares, that the bail out was mainly to protect the brokers dealing in Sterlite shares, who had cornered shares, and MALCO was interested for the reason that both the companies are under the same management.

Shri Dada referred to the finding in para 5.5 of the order and stated that it could be seen from the data furnished therein that from settlement to settlement these brokers built up large purchase position in the carry forward segment in the scrip of the Appellant, that the outstanding purchase position was abnormally high in the Appellant's scrips and it went to the extent of 3.8% of total of its equity accompanied by a corresponding increase in the price of the scrips that those brokers who had cornered shares were to be bailed out. Shri Dada stated that these brokers are not genuine investors, but speculators not warranting any protection by way of bail out, but the Appellant had to bail them out as they were acting for the Appellant by keeping the scrip price high. Shri Dada submitted that there was evidence to show that Damayanti Group, a front for Shri Harshad Mehta, had nexus with El Dorado, that providing of list of the brokers willing to sell these shares by the management of the Appellant, coupled with transfer of funds from MALCO to Dil Vikas under the garb of clean loan proves the said nexus between Damayanti Group on one hand and the Appellant on the other hand. The sellers who sold these shares to El Dorado were having dealings with Damayanti Group as revealed in the impugned order. He further stated that the persons who were bailed out or whose positions were taken up by El Dorado had high outstanding positions in the Appellant's scrips as could be seen from the particulars furnished in para 7.1 of the order. He also stated that in the carry forward segment 3 lakh shares is a substantial quantity to affect the market equilibrium.

Shri Dada submitted that the Appellant had to keep its share price high and that is why it indulged in manipulating the price. He stated that since the minimum conversion price was stated to be Rs. 350/- in respect of the OCPS, the share price of the Appellant had to be above Rs. 350/- in order to induce any person to subscribe to the OCPS floated by the Appellant as the prevailing price of the share would have an impact on the decision of any person to subscribe to the OCPS. He refuted the Appellant's contention that the Appellant could have had no interest in rigging the price to Rs. 350/- in April 1998, as the conversion of the said OCPS was to be given effect to in May 1999. Shri Dada stated that in order to induce the investors to exercise their option in favour of Sterlite in preference to Alcan's offer, the share prices of Sterlite were rigged to Rs. 350/-. He further submitted that on the basis of the public offer made by the Appellant for the acquisition of INDAL's shares, the total fund required was Rs. 817. 70 crores, that to generate this fund it was proposed to issue OCPs worth Rs. 333 crores and arrange loans/bank guarantees from different banks. Learned Senior Counsel submitted that the Appellant had vested interest to push up its share prices to Rs. 350/- so as to make its open offer to the shareholders of INDAL attractive.

Shri Dada submitted that it is incorrect to say that there is no material or evidence on record of artificially raising the share price. He submitted that the two purchases of 3, 00, 000 shares or 6, 00, 000 share are merely illustrative. According to the learned Senior Counsel the Appellant connived with Shri Harshad Mehta to artificially raise the price of its shares, that Shri Harshad Mehta built up large positions in the carry forward segment at BSE where positions can be leveraged upto 8-10 times of the base minimum capital plus additional capital (i.e. by paying 10% margin one can build positions upto 10 times of the same), that the funding from Sterlite has enabled Shri Harshad Mehta to build up large positions.

Shri Dada submitted that the Appellant has been subjected only to adjudication, that the standard of proof required in an adjudication is not that high as required in a criminal proceeding. He submitted that while in a criminal proceeding evidential standard of proof is beyond reasonable doubt, whereas the requirement in an inquiry like the instant one is preponderance of probabilities, which is much less than the strict proof requirement in a criminal proceeding.

In this context he referred to the following observations of the Hon'ble Supreme Court in State of UP v. Krishna Gopal (AIR 1988 SC 2154) that:

> "What degree of probability amounts to "proof" is an exercise particular to each case – Doubts would be called reasonable if they are free from zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to guilt of the accused person arising from the evidence or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or merely possible doubt; but a fair doubt based upon reason and common sense.
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> ……..
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> ……..
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> The concepts of probability and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained institutions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time uninformed legitimization of trivialities would make a mockery of administration of criminal justice"

Shri Dada stated that, thus even in criminal cases strict test of evidence is not insisted, the evidential requirement in adjudication proceedings could be much less.

Shri Dada cited yet another decision of the Hon'ble Supreme Court in Directorate of Enforcement v. MCTM Corporation Ltd (1996) 2 SCC 471 in support:

> "Therefore, unlike in a criminal case, where it is essential for the prosecution to establish that the accused had the necessary guilty intention or in other words the requisite 'mensrea' to commit the offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement in cases of contravention of the provisions of section 10 of FERA, would be discharged where it is show that the "blame worthy conduct" of the delinquent had been established by willful contravention by him of the provisions of section 10, FERA 1947. It is the delinquency of the defaulter itself, which establishes his blameworthy conduct… "

Shri Dada submitted that the above observation was with reference to an adjudication under FERA and the principle stated therein is in equal force applicable to the instant case. Shri Dada also referred to the argument put forward by the Respondent before this Tribunal and accepted, in the appeal filed by Canbank Investment Management Services Ltd v. Shri P. Sri Sairam ((2001) 31 SCL 142: (2001) 42 CLA 241: (2001) CLC 799) that blame worthy conduct of a party, irrespective of the resultant gain or loss is sufficient to warrant penalty as observed by the apex court in Disciplinary Authority etc. v. N.B. Patnaik (1996) 9 SCC 69.

Shri Dada submitted that to establish the charge of manipulation and hold a person responsible for the same circumstantial evidence is sufficient and from the material furnished in the order it is evident that the Appellant had indulged in market manipulation attracting the provisions of regulation 4(a) and 4(d).

Learned Senior Counsel referred to the Annexure R in the Appellant's compilation and stated that on 26/27th May, 1998 the Appellant's scrip price had to be around 350, because of the Appellant's acquisition plan of INDAL. The price started falling from Rs. 385 on 27.5.1998 to Rs.204 on 12.6.1998 a fall of Rs. 181 per share. Referring to the scrip price position on 27.5.1998, Shri Dada stated that the price was pushed up and pushers had to be saved and that commitment had to be honoured and hence the bail out was necessary to save those trapped. He stated that in the INDAL acquisition Rs. 817. 70 crores were going out from the company and as the investors knew about such huge outflow the share price had to fall, but it was going up because of the manipulation. According to Shri Dada there was no reason for the brokers to be a party to the unnatural price propping up for the benefit of the Appellant in the Alcan war", that the price pep up was done obviously at the

behest of the Appellant, that the only beneficiary of such manipulation was the Appellant and that was the reason for the Appellant to go out of way to protect the brokers as their saviour. In this context learned Senior Counsel cited the decision of the Hon'ble Supreme Court in Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi (AIR 1987 SC 294) that:

> "There is no question in this case of giving any clean chit to the appellant in the first appeal before us. It leaves a great deal of suspicion that tampering was done to please Shri Patil or at his behest. It is true that there is no direct evidence. It is also true that there is no evidence to link him up with tampering. Tampering is established. The relationship is established".

He submitted that 'INDAL' take over gives sufficient circumstantial evidence to show that the Appellant was the beneficiary in the transactions propping the prices up. Shri Dada referred to the show cause notice wherein it has been stated that investigation revealed that the entity 'Dil Vikas' referred to in the records of Shri Harshad Mehta, is Dil Vikas Finance Ltd, an associate company of El Dorado Guarantee Ltd., which is known in market circles as 'jobber' of the Appellant, a finding which the Appellant has not denied in its reply. The Appellant's nexus with the Damayanti Group thus stands established.

Referring to the funds for transaction involving 3 lakh shares Shri Dada stated that Bimal Gandhi of Dil Vikas Finance Ltd had vide letter dated 8.4.1998 sought a loan of Rs. 5 crores and MALCO made available the loan vide cheque dated 16.4.1998 @ 15% interest for a period of 6 months. Interest never paid. Rs.11.75 crores was also paid to El Dorado through whom the bail out was made.

Learned Senior Counsel stated that to MALCO it was clear that the brokers should be bailed out at any cost. The company had in any case provided the funds and incidentally requested the broker to find out a purchaser for the shares purchased in the bail out, and expressed its own readiness to purchase the shares in case no such purchaser could be found. Shri Dada submitted that thus it was an insurance.

According to the learned Senior Counsel from the facts and events stated in the order, it is clear that the aforesaid 3, 00, 000 shares are purported to have been purchased in the names of Shri Ashwani Khurana and Crimson Securities (admittedly a firm controlled by El Dorado), and that Shri C.B.R. Murthy, an employee of the Appellant had himself organized the entire transaction including furnishing information to the said Bimal Gandhi regarding the brokers through whom the aforesaid 3, 00, 000 shares were to be purchased. Shri Dada submitted that in the light of these facts it can be safely concluded that purchase of 3, 00, 000 shares of the Appellant was organized by the Appellant itself and the same was financed indirectly through its group company i.e. MALCO.

About the funding of the transaction Shri Dada submitted that the sum of Rs.5 Crores was provided to Dil Vikas, an associate of El Dorado under the guise of a loan, that from the statement of Shri Bimal Gandhi, it is clear that the money deposited with the Reserve Bank of India account could have been used for other transactions also and it was transferred from the said RBI A/c to El Dorado's account, that Shri Bimal Gandhi had in his statement mentioned that the money in case of devolvement of Government securities would be required only for a period of about two days, but the loan was obtained for 6 months.

Shri Dada further submitted that the Appellant has failed to offer any rationale for the purchase of its 6, 06, 000 shares by MALCO, that the intention of MALCO was not to help BSE to avert payment crisis but to protect selected brokers. Shri Dada further submitted that the question of investors being affected would not arise in the context because the shares of the Appellant were held by brokers known to be operating on behalf of the Damayanti Gorup, that in any event, investors would never have been affected as brokers who had purchased the shares of the Appellant were trapped. Referring to the Appellant's version that neither MALCO nor the Appellant knew the brokers of the Damayanti Group nor had they ever spoke to them about this transaction nor was there any means of knowing as to which brokers were selling those shares, the learned Senior Counsel submitted that these sort of particulars are not that secret in the market as has been claimed by the Appellant, that the fact that transactions were entered in the exchange system on 12.6.1998 as "all or none" deals synchronizing the timing of logging in of the trades by the buyers and the sellers at the pre-determined price itself shows the name of the brokers were known to the Appellant.

Shri Dada rebutted the Appellant's version that the Respondent has not adduced any material or evidence to establish the nexus or connection of the Appellant with Damayanti Group brokers or Shri. Mehta, save and except the piece of paper found in Shri Mehta's office with the scribbling "Dil Vikas Ster-1, 95, 000". Shri Dada submitted that the aforesaid paper suggest that the Damayanti Group was working in concert with the promoters of the Appellant. The learned Senior Counsel submitted that it is clear that Shri Murthy had furnished the names of the brokers to El Dorado from whom the said 3, 00, 000 shares were to be purchased, that the said 3, 00, 000 shares were purchased to reduce the floating stock of the Appellant's shares in the market and to artificially inflate prices thereof.

He submitted that regarding the purchase of 5 lakh shares the Appellant has not produced any evidence to show

that the shares were registered in the name of Crimson and Khurana as has been claimed, that on the contrary the evidence shows that these shares were lying with the broker, that it is also on record that the said parties had also not made any payment. Countering Shri Sundaram's interpretation of regulation 4 Shri Dada submitted that the scope of the regulation is wide enough to bring in, the conduct of the Appellant thereunder. In this context Shri Dada referred to the definition of the expression 'fraud' in regulation 2 (e) in the 1995 Regulations and stated that it is not an ingredient of regulation 4(a) or 4(d) as is being made out by Shri Sundaram, that wherever fraud/fraudulent transactions are covered, it has been specifically included in the regulation as in regulation 3 and 6.

Shri Dada submitted that Chapter II of the 1995 Regulations talks about fraudulent and unfair trade practices relating to securities. He explained the ingredients of regulation 4(a) and (d) and stated that deceit need not necessarily be there to attract the regulation. He also emphasised the expression 'directly or indirectly' in regulation 4(a) and stated that in the instant case it was the Appellant who indirectly transacted in shares and indulged in manipulation. He referred to para 5.5 in the order and reiterated the contention that as a result of the carry forward position built up by Damayanti Group of brokers, and at a time when they were to face the music, MALCO appeared on the horizon as their saviour to bail them out, that MALCO was not simply interested in the brokers but for the cause that they had acted at the behest of the Appellant. He also referred to para 6.5 of the order and stated that the motive or intend for manipulating the market was relatable to the acquisition of the shares of INDAL. Shri Dada stated that self-benefit was the motive behind the transaction and the transaction was designed accordingly, therefore regulation 4(a) and 4(d) attracted.

Learned Senior Counsel submitted that in the light of the finding that the Appellant had manipulated the market to its benefit, the impugned order under section 11B is perfectly justified and need be upheld. He also submitted that while Shri Aggarwal and Tarun Jain being the officers of the Appellant in terms of section 27 and Shri Sashikant being an abettor are liable to be prosecuted.

I have carefully considered the submissions, both written and oral, made by the learned Senior Counsel for the parties, and my views are stated below:

The Respondent has in a nutshell put the background of the case and its finding in the first two paragraphs of the impugned order as under:

> "Investigations were conducted by SEBI into the alleged price manipulations in the scrips of BPL, Videocon and Sterlite. Investigations revealed that there were large volumes coupled with fluctuation in prices at the exchanges in respect of BPL Limited, Videocon International Ltd and Sterlite Industries Ltd, (hereinafter referred to as BPL, Videocon and Stewrlite respectively) especially during April and May, 1998."
>
> "The Investigation revealed that a set of brokers and sub brokers acting on behalf of a common set of clients were acting as front for Shri Harshad Mehta cornered a large chunk of shares of Sterlite both at BSE and NSE. These common clients hereinafter called Damayanti Group, built up unusually large positions in these scrips resulting in distortion of the market equilibrium and creation of artificial market in these scrips".
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> However, in the next para, it has been stated that "it was alleged that the Sterlite Industries Ltd indulged in the price manipulation of the scrip of Sterlite Industries. Accordingly, a show cause notice dated 20.12.1999 was issued to the Sterlite Industries Ltd, Shri Anil Aggarwal, Managing Director, Sterlite Industries Ltd, Shri Tarun Jain, Sterlite Industries Ltd, Shri Shashikant, Director Sterlite Industries Ltd".

The order though refers to cornering of shares by Damayanti Group is silent about the action, if any, taken against the said Group. However, learned Senior Counsel appearing for the Appellant stated that they have been proceeded against separately.

The Appellant was subjected to inquiry in the context referred to above. There is an affirmative finding by the Chairman in the order (para 10.1) that "after taking into consideration all that has been stated above and the circumstantial evidence I am convinced that Sterlite Industries Ltd has indulged in price manipulation of the scrip of Sterlite Industries during the period April and May, 1998 and violated Regulation 4(a) and (d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 read with section 11(1) and 11(2) (e) of SEBI Act." Chairman had also concluded that "promoters/company first abetted Shri Harshad Mehta to build up large positions in the shares of Sterlite Industries Ltd, which facilitated market manipulation and later provided an exit route when the artificial increase in price was not sustained and some of the brokers dealing for Damayanti Group got trapped". (para 7.3). The gravity of the offence attributed to the Appellant has been stated in the following words that "creation of false market and price manipulation is a very serious offence"(para 10.2). Obviously taking into consideration "the calculated manner in which manipulation has

been caused, the gravity and seriousness of the offences which could cause great harm to the fairness and integrity of the market" and "in order to ensure that the confidence of investors in securities market remains unimpaired (para 10.4)" invoking the powers available under section 11 and 11B of the Act, the Chairman directed that "Sterlite Industries is prohibited from accessing the capital market for a period of 2 years from passing this order". And also "ordered that prosecution proceedings under section 24 read with section 27 of the SEBI Act for violation of regulation 4(a) and (d)….. shall be initiated against Sterlite Industries through their directors namely Shri Anil Aggarwal, Shri Tarun Jain and Shri Shashikant".

In the background that the impugned order relates to the market crisis erupted in April-May, 1998, there were allegations from both sides holding the opposite party responsible for the delay. In any case, I do not consider it necessary to look into those charges and counter charges in this regard, as this Tribunal is now only required to consider the sustainability of the end product i.e. the order.

Shri Sundaram's submission that the order was made without giving adequate opportunity of being heard and that witnesses were not given to be cross examined, lost the vigour as he himself ultimately stated that he was not pressing the issue, so as to avoid further delay in the matter. However, he had urged that the evidence of Shri Bimal Gandhi, Director of El Dorado, on which the Respondent has placed heavy reliance be discarded as the evidence is untested and that it is not possible now to cross examine him as he is no more. But this argument does not hold good as the Appellant itself has relied on Shri Gandhi's evidence to meet its case.

It is to be noted that the object of the Act is broadly stated in its preamble in the following words, that it is an Act "to provide for the establishment of a Board to protect the interests of the investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto". Section 3 of the Act empowers the Central Government to establish a Board by name of the Securities and Exchange Board of India, with a Chairman and five members. The Board is in position since 1992, In terms of sub section 3 of section 4 of the Act, in the areas otherwise determined by regulations the Chairman also enjoys all powers of the Board. The impugned order is made by the Chairman exercising the concurrent power of the Board vested in him.

Chapter IV of the Act deals with the functions of the Board. This chapter comprises 4 sections – i.e. Section 11, on functions of Board, section 11A on matters to be disclosed by the companies, section 11AA on Collective investment scheme and section 11B on power to issue directions. Since the powers under section 11 and 11B have been invoked in the matter, it is felt necessary to have a look at these two sections. According to sub section (1) of section 11:

> "Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it think fit"

Sub section (2) refers to measures to provide for certain matters enumerated therein, with a caveat that it is without prejudice to the generality of the provisions of sub section (1) "Prohibiting fraudulent and unfair trade practices relating to securities" is one of the measures, SEBI is expressly empowered to take. In exercise of the said power SEBI has made the 1995 Regulations. These Regulations came into force with effect from 25.10.1995, that is the date on which it was published in the official gazette. We will discuss the provisions of the said regulations a little later. Before that let us also have a look at section 11B invoked by the Respondent to issue the directions. Text of section 11B is extracted below:

> "Power to issue directions
>
> 11B. Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary; -
>
> (i) in the interest of investors, or orderly development of securities market; or
>
> (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or
>
> (iii) to secure the proper management of any such intermediary or person.
>
> it may issue such directions,-
>
> (a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market"

Now back to the 1995 Regulations:

Regulation 2(b) defines dealing in securities as under:

> "dealing in securities" means an act of buying, selling or otherwise dealing in any security or agreeing to buy, sell or otherwise deal in any security by any person either as principal, or as agent".
>
> The expression "fraud has been defined in clause (c) of regulation 2 as under:
>
> (c) "Fraud includes any of the following acts committed by a party to a contract or with his connivance, or by his agent with intent to deceive another party thereto or his agent or to induce him to enter into the contract:
>
> (1) the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact
>
> (3) a promise made without any intention of performing it
>
> (4) any other act fitted to deceive
>
> (5) any such act or omission as the law specially declares to be fraudulent; and
>
> 'fraudulent' shall be construed accordingly,
>
> Explanation: Mere silence as to facts likely to effect the willingness of a person to enter into a contract is not a fraud, unless the circumstances of the case are such that regard being had to them it is the duty of the person keeping silence to speak or unless his silence is in itself equivalent to speech."

Chapter II is the core chapter in the Regulation titled 'Prohibition of Fraudulent and Unfair Trade Practices relating to securities market. Regulation 3 thereunder prohibits any person from buying, selling or otherwise, dealing in securities in a fraudulent manner. Prohibition against market manipulation' is covered by regulation 4. Regulation 5 is "Prohibition of misleading statements to induce sale or purchase of securities and regulation 6 prohibits unfair trade practices relating to securities. In the present case the charge is that the Appellant has violated regulation 4(a) and (d). Full text of the said regulation 4 is extracted below:

"4. Prohibition against market manipulation: No person shall –

> (a) effect, take part in, or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities, and thereby inducing the sale or purchase of securities by any person;
>
> (b) indulge in any act, which is calculated to create a false or misleading appearance of trading on the securities market;
>
> (c) indulge in any act which results in reflection of prices of securities based on transactions that are not genuine trade transactions;
>
> (d) enter into a purchase or sale of any securities, not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress, or cause fluctuations in the market price of securities;
>
> (e) pay, offer or agree to pay or offer, directly or indirectly, to any person any money or money's worth for inducing another person to purchase or sell any security with the sole object of inflating, depressing, or causing fluctuations in the market price of securities;

Chapter III provides for investigation into alleged contravention of the regulations and consequential action thereafter. In terms of regulation 10 the concerned investigating officer is required to submit the investigation report to the Board. Regulation 11,12 and 13 deal with the follow up action.

"11. Power of the Board to issue directions: - The Board may, after consideration of the report referred to in regulation 10, and after giving a reasonable opportunity of hearing to the person concerned, issue directions for ensuring due compliance with the provisions of the Act, rules and regulations made thereunder, for the purposes specified in regulation 12.

12. Purpose of directions: - The purpose for which directions under regulation 11 may be issued are the following namely:

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

(b) requiring the person concerned to call upon any of its officers, other employees or representatives to refrain dealing in securities in any particular manner;

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

(d) directing the person concerned to dispose of any such securities acquired in contravention of these regulations, in such manner as the Board may deem fit, for restoring the status-quo ante.

13. Suspension or cancellation of registration: - The Board may, in the circumstances specified in regulation 11, and without prejudice to its power under regulation 12, initiate action for suspension or cancellation of registration of an intermediary holding g a certificate of registrations under section 12 of the Act;

Provided that no such certificate of registration shall be suspended or cancelled unless the procedure specified in the regulation applicable to such intermediary is complied with"

Scope of regulation 4(a) and (d) was elaborately argued by learned Senior Counsel appearing for the parties. While Shri Sundaram vehemently argued that the said regulations are not attracted Shri Dada in equal force emphasised these regulations are attracted. In this context it is considered necessary to examine the scope and reach of the said regulation 4(a) and (d), to begin with.

On a perusal of regulation 4 it is clear that prohibition put therein is against market manipulations stated in five clauses therein at clauses (a) to (e). According to the impugned order the market manipulation referred to at clause (a) and (d) are applicable to the Appellant's conduct. On a perusal of the regulation it is clear that reach of clause (a) is wider than the reach of clause (d). Regulation 4(a) attracts not only the purchaser and seller but even third parties to its ambit, if they are found in any way involved in effecting or taking part in the transactions directly or indirectly. Those transactions must be with the intention of distorting the prices of securities. It should induce the sale or purchase of securities by any person. As Shri Sundaram pointed out element of deceit is an underlying factor in the transaction. A genuine transaction by itself cannot attract the regulation though such a transaction had resulted in market price variation. The regulation attracts if the transaction is made with an intention of artificially raising or depressing the prices of securities so as to induce any other person to sell or purchase the securities. The participation need not necessarily be direct, it can be indirect as well. In this context the observation made by the US Court in Hynes case (supra) relied by Shri Sundaram gives strength to the belief that deceit or fraud are components of market manipulation. The Court had observed:

"It is sufficient for the person to engage in a course of business which operates as a fraud or deceit as to the nature of the market for the security" to face the charge of manipulation.

The Court had also observed that:

"proof of manipulation is generally not based on single activity, but rather on a course of conduct showing an intentional interference with the normal functioning of the market for a security. Indeed manipulation is usually the result of acts, practices and course of conduct that deceive the market place…."

The above observations were made by the Administrative Judge while considering whether a transaction could be considered as a manipulative practice in violation of section 10(b) of the Securities Commission Act of USA. I think that on a perusal of the provisions of regulation 4(a), the observations made by the Judge are in equal force applicable to the said regulation.

Prohibition in regulation 4(d) is on entering into transactions for a purchase or sale of any securities not intended to effect transfer of beneficial ownership but intended only as a device to distort the market price of securities. In other words the regulation covers speculative trading. Under regulation 4(d) it is not necessary that the action should result in inducing others to purchase or sell the securities as in the case of regulation 4(a). It has to be

noted that in both the clauses, the intention of the party is relevant. Therefore an element of mens rea is also involved.

The factual matrix based on which charge of market manipulation has been levelled against the Appellant is as under:

A. Purchase of 3 lakh shares of the Appellant by El Dorado in the 2nd week of April, 1998 for the following 2 accounts;

i. 1, 50, 000 shares for Crimson Securities, an associate company of El Dorado

ii. 1, 50, 000 shares for Shri Ashwani Khurana, a client of El Dorado.

B. Advance of Rs.11.75 crores to El Dorado by MALCO for acquisition of shares by Dil Vikas Finance to bail out certain brokers to avoid payment crisis in the scrips of the Appellant.

With reference to the acquisition of the three-lakh shares, the basic question to be considered is as to whether these shares were purchased at the instance of the Appellant. In this context the following observation made in para 6.9 of the order is very relevant. Even though this para has been already extracted above, at the cost of repetition it is again extracted for ready reference. It reads:

"Though, Shri Gandhi denied that any assurance was given by Mr.Murthy as regards the funds for the purchase of these shares or any commitment as regards the buy back of these shares or sharing of gains/losses on the purchase of these shares, yet the transactions have been found to be done by them for Sterlite Industries. It can be inferred from the following facts:

(a) funds being given by MALCO ostensibly as loan transaction being entered at the instance of Murthy of Sterlite who gave details of counter party broker with whom this negotiated deal was entered departure from normal practice of entering inward and outward register of shares in the office in respect of 45, 000 shares

(b) non-furnishing of detail regarding the financier and owner of 45, 000 shares

(c) loan has been given by MALCO for six months though the need for El Dorado was only for two days.

availability of details of 1, 95, 000 shares in the office of Damayanti Group.

Based on the above, it was concluded that "this transaction was for Damayanti Group and Sterlite Industries Ltd" and "El Dorado was used as a conduit for parking of shares". It has also been stated that "the transactions with Ashwani Khurana were in the nature of financing transactions and have been given colour of purchase and sale of shares as:-

i. no payments were received from the client and purcahse consideration was adjusted against amounts borrowed from Shri Khurana earlier

ii. no deliveries were given to the client and they were kept with the broker who utilised it for his personal transactions.

The Appellant has denied that it provided necessary funds for purchase of these three lakh shares. The Appellant had admitted that MALCO had provided a loan of Rs 5 crore to Dil Vikas Finance Ltd, an associate company of El Dorado, a Reserve Bank of India dealer for Government securities, to meet the requirement of funds for their obligation as satellite dealer, but not for purchase of the three lakh shares, that the observations at (c) and (d) are vague and in any way not concerning the Appellant.

It is seen from the letter available at p.49 of the compilation filed by the Appellant that Dil Vikas Finance Ltd in its letter dated 8.4.1998 to MALCO had requested for "a loan/advance/intercorporate deposit of Rs.5 crores for a period of 6 months for their short term needs for investing in Government securities and also for their working capital requirements to carry out large Institutional business". In the said letter they had also stated that they are one of the nine RBI approved satellite dealers. It is also seen from the letter dated 15.4.1998 from MALCO to Dil Vikas, available at p.50 of the compilation, that MALCO had provided a sum of Rs.5 crores to Dil Vikas by way of Inter Corporate Deposit vide cheque dated 16.4.1998 for a period of 6 months with interest at the rate of 15%. This factual position has been confirmed by Shri Bimal Gandhi of Dil Vikas also in his evidence before the

Respondent. Shri Bimal Gandhi in his deposition dated 8.9.1998 before the Investigating Officer had admitted the receipt of Rs.5 crores from MALCO "towards advance for purchase of Government of India securities". There is also evidence on record to show that the cheque for Rs.5 crore from MALCO was deposited by the said party in their current account maintained with the Reserve Bank of India as a satellite dealer for Government securities. Shri Gandhi had also admitted that "Dil Vikas Finance Ltd had purchased Government securities on 16.4.1998".

In fact Shri Gandhi in his deposition referred to above had stated in the context of obtaining Rs.5 crores as Inter Corporate Deposit from MALCO that "neither were they specifically informed that the advance given by MALCO to Dil Vikas Finance would be used to buy the shares of Sterlite Industries Ltd nor where there any instructions from them in this connection". The Respondent had examined Shri Tarun Jain, the Appellant's Director, Finance on 6.10.1998. In answer to a question that whether he or Murthy had given any instructions to buy 3 lakh shares of Sterlite Industries Ltd, Shri Jain had stated "we had not given any instructions as stated by Shri Bimal Gandhi in his statement shown to me". He had further stated that he had checked up with Shri Murthy and Shri Murthy also said that no instructions as claimed by Shri Bimal Gandhi were given.

In this context it is also to be noted that 1, 50, 000 shares were purchased by Dil Vikas for Shri Ashwani Khurana on 8.4.1998 @ Rs.291.50 and 1,50,000 shares were purchased for Crimson Associates on 10.4.1998 @ Rs.308.50. In fact in the order itself it has been stated that "El Dorado purchased 1.5 lakh share in the name of Crimson securities, their family concern and advised their clients Mr. Ashwani Khurana of Delhi to purchase another 1.5 lakh shares which they purchased in the name of their group companies". Shri Ashwani Khurana in his deposition has stated as to how the purchase consideration was paid. Regarding the purchase of shares by Crimson also, Shri Gandhi has stated the source of funds. It is nowhere mentioned that the Rs.5 crores provided by MALCO was used in these transactions. The argument that the fund requirement for purchasing securities was only for two days and for the reason that Dil Vikas was given loan for 6 months does not in any way support that MALCO funded 5 crores to purchase 3 lakh shares. It may not be forgotten that the total purchase price value of these 3 lakh shares at the rate stated above was about Rs. 9 crores and not rupees five crores. The allegation that the shares were not delivered to the parties also stands demolished, for the reasons stated in the ensuing paragraphs.

Shri Bimal Gandhi in his statement had unequivocally stated that 1, 50, 000 shares were purchased for Mr. Ashwani Khurana and 1, 50, 000 shares for Crimson Securities. Shri Gandhi in reply to a question from the Investigating Officer had also stated that "the said clients have regular transactions from time to time hence there was no payment on this date from the said client. In the case of Shri Ashwani Khurana we have been regular borrowers from them and we have adjusted the purchase consideration against their loan… Though no payments have been made specifically for the purchases, the accounts of the said parties have been adjusted against the obligations from time to time. As per our understanding with these clients it is incumbent upon us to arrange for funds to meet the pay in liabilities… Since most of their share dealings are through us the said shares were not delivered to them and were in our possession". In this context the corroborating evidence from Ashwani Khurana in his deposition before the Investigating Officer available in the compilation is also relevant. Shri Khurana in his deposition dated 10.9.1998 had admitted that he had purchased 50, 000 shares each of Sterlite in the name of his family concerns, viz. (1) Kanchenjunga Advt. PLtd (2)Khurana & Co. and (3) Iqbal Chand Khurana in the month of April, 1998. Regarding delivery of the shares purchased on his behalf by Dil Vikas, Shri Khurana had stated that "the physical delivery of shares is lying with El Dorado. We normally seek the physical delivery in case of book closure". To a query as to whether he paid consideration of all 1. 50 lakhs shares of Sterlite to M/s. El Dorado, Shri Khurana had stated that "there was a credit balance of Rs. 1.81 crore in Khurana & Co., out of which purchase consideration of Rs. 1.46 crore was met. Similarly M/s.Iqbal Chand Khurana was having a credit balance of Rs.1.54 cr., out of which purchase consideration of Rs.1.46 crore was met. In the case of Kanchenjunga Advt. P.Ltd the purchase consideration of Rs.1.46 crore was met from the opening balance of .45 cr. and the balance was adjusted through the running account which currently shows a Cr. balance of Rs. 35 lakhs as on 10.9.1998. Shri Tarun Jain, Director Finance for Sterlite Industries Ltd, in his deposition dated 6.10.1998 had confirmed the position that MALCO or Sterlite Industries Ltd had not given any loan to El Dorado Guarantee Ltd., Shri Bimal Gandhi or any of the directors or any directors of the associate concerns. The statements of the persons referred to above remain unrebutted.

The finding that El Dorado had purchased shares as instructed by Shri CBR Murthy has also not been established. On the contrary the evidence shows that there was no such instruction to El Dorado to purchase 5 lakh shares. Shri Murthy in his deposition before the Investigating Officer on 30.9.1999 to a question as to whether he had given any instruction to the director of El Dorado Guarantee Ltd or any of their associate concerns to buy shares of Sterlite Industries Ltd in the last 2 years, had stated categorically "No, I have not given any instructions to anyone in El Dorado Guarantee Ltd or any of their associate concerns to buy shares of Sterlite Industries Ltd". Shri Murthy did not even confirm that he had suggested the names of counter party selling brokers to Shri Bimal Gandhi. In this context it is to be remembered that Shri Gandhi also did not say that Shri Murthy had instructed him to buy the shares. All that he stated was that Murthy had mentioned about the availability of 3, 00, 000 shares of the Appellant with few brokers of BSE if they were interested to conclude the transaction. This statement is not even suggestive of any instruction to purchase shares. To another question Shri Gandhi had stated that "Shri

Murthy had given the names of a few brokers who had ready stock of 3 lakh shares of Sterlite Industries… The price was not indicated by Shri Murthy but was negotiated by us with the selling brokers. There was no arrangement of funds, commitment of buy back or sharing of gains or losses on these purchases with Shri Murthy…."

In this context it is to be noted that the statements extracted above are from the statements made by S/Shri Gandhi, Khurana, Murthy and Jain before the Respondent's Investigating Officer and their statements have also been relied on by the Respondent. Depositions of these persons have been filed in the appeal by the Appellant in a compilation. The Respondent has not questioned the authenticity or admissibility of any of the statements. Therefore in the light of the evidence discussed above it is difficult to agree to the Respondent's view that 3 lakh shares were purchased by the Appellant or at its behest and that MALCO had provided funds to meet the purchase consideration.

The finding in the context of purchase of 3 lakh shares in para 8.1 of the order that such large chunk of shares were purchased through "all or no deals" in BSE terminals by synchronizing the timings of the logging of trades after the official hours at pre determined price is contrary to what is stated in para 6.9 of the order wherein it has been stated that these were negotiated deals. In fact the view that it was negotiated deals has been confirmed by Shri Gandhi in his statement.

The Respondent's argument that even though technically MALCO and Sterlite are two separate entities, the action of MALCO should be considered as the action by Sterlite cannot be altogether discarded while examining the applicability of regulation 4(a) as the regulation 4(a) refers to transactions indirectly effected also. The proximity factor no doubt is relevant. But in the instant case there is no evidence to show that even MALCO had purchased the shares. In the said context there is nothing much that would emerge even by treating both the companies as closely associated.

Another ground adduced in support of the manipulation of market by the Appellant is that MALCO lent Rs.11.75 crore to El Dorado for acquiring 6 lakh shares of the Appellant in the 2nd week of June, 1998 to bail out brokers associated with the Damayanti Group of Shri Harshad Mehta.

It is an admitted fact that MALCO had provided funds to the tune of Rs.11.75 crore to Dil Vikas to purchase shares of the Appellant. It is also an admitted fact that the said amount was made available by MALCO on a request made by some of the members of the Governing Board of BSE to avoid a payment crisis and save the market as well. The involvement of BSE higher ups is evident from the fact that the trading system was opened at mid night to put through the transactions. But for the involvement of the stock exchange officials it would not have been possible to put through the transactions after the trading hours. But the charge against the Appellant does not stop there. It has been alleged that by funding the Appellant had bailed out the brokers associated with Damayanti Group as they had taken long positions in the carry forward segment to maintain the Appellant's scrip price high, in the context of its bid to acquire the shares of INDAL, that it was at the instance of the Appellant the market was manipulated by the brokers and when the manipulators got trapped the Appellant had stepped in to protect them. To support the contention that the scrip price was artificially kept high for the limited purpose, Shri Dada had referred to the abnormal upward price movement from 1.4.1998 to 4.6.1998 and sudden fall thereafter, as the price could not sustain any longer, after the Appellant failed in its attempt to acquire INDAL. Shri Dada had stated that even the issue of optionally convertible shares (OCPS) subject to minimum conversion price of Rs.350/- at the end of 18 months from the date of issue, to meet the fund requirements of acquisition also required the Appellant's scrip price to be kept high to attract subscription.

It is true that the price of the Appellant's scrip had steadily increased during the period and fell when the acquisition failed. Upward price movement in the shares of an acquirer company is not uncommon, as the market would respond positively in case the takeover is likely to result in value addition. In the absence of any evidence to show that the price was pushed up to meet the situation at the instance of Appellant, it is difficult to hold the Appellant responsible for the abnormal price movement. The Respondent has failed to reasonably prove its case that the Appellant had manipulated the market to keep the scrip price high. It has gone by inference that the Damayanti Group had manipulated the price and that it was done at the behest of the Appellant, as otherwise MALCO would not have stepped in to bail them out. The fact that MALCO had advanced Rs.11.75 crores to Dil Vikas to purchase the Appellant's shares remain undisputed. There is reason to believe that the money was made available as requested by certain members of the BSE's Governing Board. The Respondent in its order has also endorsed this fact. Now the question is whether the Appellant had any role in choosing the brokers to be bailed out. In this context the unrebutted evidence of the Respondent's witness Shri V.D.Kinkhabwala, a Director of Dil Vikas, dated 15.9.1998 is revealing. He had stated that "the name of the client, number of shares and the price were all given by BSE". The following reply given by the Appellant in response to the show cause notice is also to be noted in the context. It was stated therein that "when MALCO purchased these shares the sole intention was to help the BSE to avert a major payment crisis on the premier exchange of the country and not to manipulate the share price of Sterlite or bail out any particular group of brokers. In fact when MALCO made such payment to El Dorado, it did not even know who were the selling brokers and only realised their identities from the documents

now available". The statement of Shri Gandhi of El Dorado confirmed that even they did not know the identity of the selling brokers. To a question that " were you told that the clients of the counter party brokers for these transactions were Damayanti Group who were believed to be front entities of Shri Harshad Mehta, Shri Gandhi's answer was "No I am not aware of anything". It has also been stated that in any event all these brokers did not belong to the Damayanti Group alone (for example the Mantri Group which sold 50, 000 shares).

Paras 5. 3 to 5.5 of the order in detail deal with the Damayanti Group and its transactions in the scrip of the Appellant. It is clear that the outstanding purchase positions were abnormally high in the scrip of Sterlite. Shri Dada had demonstrated with the aid of data, that in the Appellant's scrip the hawala rate moved consistently from Rs. 260/- to Rs. 350/- in just 5 settlements. His submission that the profits earned by Damayanti Group as a result of increase in hawala prices over successive settlements were utilised for raising finances by doing share badla is convincing. But it is to be noted in this context that in this appeal we are not examining the conduct of the Damayanti Group but the conduct of the Appellant. In the absence of any reasonably acceptable evidence to show a nexus between the Appellant and the Damayanti Group or that the Damayanti Group had acted at the behest of the Appellants it is not possible to view the alleged market manipulation by the said Damayanti Group as the one by the Appellant. Therefore, I do not consider it necessary to go into the details of the index movement etc. in this context as the Respondent has failed to establish the Appellant's involvement in any transaction linking such price movement. This failure is fatal in proving its case.

In the order in para 6.6 it has been stated that "Dayamanti Group was working in concert with the promoters of the company". It appears that this view is formed mainly on the basis of a paper retrieved from the office of the Damayanti group which is stated to be one of the papers having details of investment by Shri Harshad Mehta", wherein under the heading" excess lying as under" it was found written "Dil Vikas – Ster. 1,95, 000 giving the break up of this figure as 1, 50, 000 - 45, 000 margins". It has been further stated in the order that "the Dil Vikas referred to in the said paper is Dil Vikas Finance Ltd, which is an associate company of El Dorado Guarantee Ltd, which is known in market circles as a "jobber" of Sterlite Industries". The order further states that "it was found that El Dorado had purchased 1.5 lakh shares in the name of Crimson Securities, another associate concern of El Dorado in settlement No.3 of BSE. This was the part of the total purchase of 3 lakh shares by El Dorado in that settlement, El Dorado purchased 1.5 lakh shares in the name of M/s.Crimson Securities, their family concern and advised their clients Mr.Ahwani Khurana of Delhi to purchase another 1.5 lakh shares, which they purchased in the name of their group companies". The order also states "the fact that paper (referred to in para 6.6.) was available in the office of Damayanti Group which is a front for Harshad Mehta indicates that there was nexus between El Dorado and Damayanti Group in this regard., The providing of list of the brokers who would like to sell these shares, by the management of the Sterlite Industries Ltd, coupled with transfer of funds from MALCO to Dil Vikas under the garb of clean loan proves a nexus between Damayanti Group on one hand and Sterlite Industries Ltd on the other hand. The sellers who sold these shares to El Dorado were having dealings with Damayanti Group". To my mind this statement by itself does not establish any linkage between the Appellant and the Damayanti Group. The name of a company appearing in the list of investments made by a broker by itself cannot be considered as an evidence proving conclusively that the investment was made by the broker at the company's behest. The Respondent seems to have not examined in this context any of the Damayanti Group companies to ascertain the factual position. In any case there is no reference to any statement from them, in the order.

In this context linking the said investment of Shri Harshad Mehta with the purchase made by Dil Vikas, does not in any way help to establish any nexus between the Appellant and Damayanti Group/Shri Harshad Mehta, as Dil Vikas had purchased the shares in its capacity as a broker from the market. The trade relationship, of Dil Vikas with the Appellant could be independent of the transactions it undertakes for its other clients. As a broker it serves other clients as well. It has been demonstrated with evidence that the three lakh shares were purchased by Dil Vikas for others and not for the Appellant or at its behest. In the light of the views already expressed with reference to Shri Murthy's mentioning of the names of the brokers holding scrips of Sterlite in the market and the nature of Rs.5 crore advanced as Inter Corporate Deposit by MALCO, it is difficult to subscribe to the Respondent's view in this regard. In this context it is to be noted that the Appellant in its reply has stated that it has no connection with Damayanti Group and therefore it was for the Respondent to establish the nexus, if any existed. It is also to be noted that the Respondent's witnesses positioned in the Appellant's employment had also denied of any association with the Damayanti Group. Shri Murthy in his statement had emphatically stated that he had not heard about any of the companies of Damayanti Group mentioned by the Investigating Officer. He had also denied of any knowledge about S/Shri Anil Doshi, Dinesh Doshi and Dilip Shah of Damayanti Group. Shri Tarun Jain had also stated that he had not heard about any of the so-called Damayanti Group companies or the persons referred to by the Investigating Officer. In the absence of adequate evidence from the Respondent's side to establish any nexus between the Appellant and the Damayanti Group, if not directly, at least indirectly, the Appellant cannot be considered as part of the Damayanti Group or associated with the Damayanti Group and it cannot be held liable for the actions of the said Damayanti Group.

It has been stated in the order (para 7.3) that the promoters/company first "abetted Shri Harshad Mehta to build up large positions in the Appellant's shares which facilitated market manipulation…" But no evidence has been

adduced in support of this allegation except posing a question on the wisdom of the Appellant.

Shri Dada's argument that the Appellant was the beneficiary, in as much as the price manipulation was in the context of its bid to take over INDAL and by applying the principle laid down by the Hon'ble Supreme Court in Shivajirao Nilangekar Patil's case, the Appellant's role in the manipulation can be safely inferred, is not convincing. Facts and circumstances of Nilangekar Patil's case are very different. In that case the tampering was done by one of the officials of a Medical College coming under the administrative control of Government of Maharashtra and Shri Patil was at that time the Chief Minister of Maharashtra. The nexus is thus evident. But in the instant case there is no evidence to establish any nexus between Damayanti Group with the Appellant.

Shri Dada had submitted that the two transactions are only illustrative and there are other instances as well to show manipulation by the Appellant. I am afraid this is a new finding, not found in the order. In this connection I fully agree with Shri Sundaram that a statutory order issued by an authority cannot be supplemented by fresh reasons. This position is clear from the following observation made by the Hon'ble Supreme Court in M S Gill's case (Supra)

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

Shri Dada had argued about the degree evidence required in an adjudication like the one, in contradistinction to the nature of evidence required in criminal proceedings in a court of law, that in an inquiry like the instant one it is the "preponderance of probability" that is to be taken into consideration and not to go by "proof beyond doubt" as required in criminal proceeding.

In this context it is to be noted that Chairman holding the Appellant guilty of indulging in price manipulation has stated that "creation of false market and price manipulation is a very serious offence". Evidence merely probabalising and endeavouring to prove the fact on the basis of preponderance of probability is not sufficient to establish such a serious offence of market manipulation. When such a serious offence is investigated and the charge is established, the fall out of the same is multifarious. The impact of such an adverse finding is wide especially in the case of a large public company having large number of investors. The stigma sticks and it also hurts, not the company alone, but its shareholders as well. "Not all the King's horses and all the King's men" can ever salvage the situation. Mere conjunctures and surmises are not adequate to hold a person guilty of such a serious offence. The extent of proof required to hold the delinquent guilty has been explained by the Hon'ble Supreme Court in Bank of India v. Degala Surya Narayana (AIR 1999 SC 2407). The Court held:

> "strict rules of evidence are not applicable to departmental enquiry proceedings. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and objectively may arrive at a finding upholding the gravamen of the charges against the delinquent officer. Mere conjuncture or surmise cannot sustain the finding of guilt even in departmental enquiry proceeding. (emphasis supplied)

In M.S.Bindra V VoI (1998) 7 SCC 310 the Court had while deciding an appeal against the removal of an officer from service on doubtful integrity held that "mere possibility is hardly sufficient to assume that it would have happened". In Nandakishore Prasad v. State of Bihar (1978) 3 SCC 366, the Court while considering the appeal against the removal of an employee from service based on the findings of a departmental enquiry viewed that "Before dealing with the contentions canvassed, we may remind ourselves of the principles in point crystalised by judicial decisions. The first of these principles is that disciplinary proceedings before a domestic tribunal are of a quasi judicial character; therefore, the minimum requirement of the rules of natural justice is that tribunal should arrive at its conclusion on the basis of some evidence, i.e. evidential material which with some degree of definiteness points to the guilt of the delinquent in respect of the charges against him. Suspicion cannot be allowed to take the place of proof even in domestic inquiries. As pointed out by this Court in Union of India v. H.C.Geol (AIR 1964 SC 364) 'the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as toe disciplinary inquiries held under the statutory rules'. (emphasis supplied).

In the context of a disciplinary action against an advocate, the Hon'ble Court had held that "disciplinary authority empowered to conduct the inquiry and to inflict the punishment on behalf of the body, in forming an opinion must be guided by the doctrine of benefit and is under an obligation to record a finding of guilt only upon being satisfied beyond reasonable doubt. It would be impermissible to reach a conclusion on the basis of preponderance of evidence or on the basis of surmise, conjuncture or suspicion. It will also be essential to consider the dimension regarding mens rea. This proposition is hardly open to doubt or debate particularly having regard to the view taken by this Court in L.D.Jaisinghani v. Naraindas N Punjabi (1976) 1 SCC 354: AIR 1976 SC 373 at P. 376 – wherein Ray, CJ speaking for the Court has observed:

> "In any case we are left in doubt whether the complainants version with which he had come forward with considerable delay was really truthful. We think that in a case of this nature, involving possible debarring of the advocate concerned the evidence should be of a character which should leave no reasonable doubt about guilt. The Disciplinary Committee had not only found the Appellant guilty but had disbarred him permanently. (In Re An advocate AIR 1989 SC 245)" (emphasis supplied).

About the test of evidence in a civil proceeding, the following observations made by the Hon'ble Court (Razikram v. J.S.Chauhan - AIR 1975 SC 667: (1975) 4 SCC 769) is to be noted:

> "It is true that there is no difference between the general rules of evidence in civil and criminal cases and the definition proved in section 3 of the Evidence Act does not draw a distinction between civil and criminal cases. Nor does this definition insist on perfect proof because absolute certainty amounting to demonstration is rarely to be had in the affairs of life. Nevertheless, the standard of measuring proof prescribed by the definition is that of a person of prudence and practical good sense… The same is equally true about proof a charge of corrupt practice which cannot be established by a mere balance of probabilities". (emphasis supplied)

The Hon'ble Supreme Court in yet another case with reference to adjudication under the Sea Customs Act and Land Customs Act relating to imposition of penalty on the person concerned had held:

> "To such a situation though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply, except in so far as they are statutorily made applicable, the fundamental principles of criminal jurisprudence and of natural justice must necessarily apply. If so, the burden of proof is on the customs authorities and they have to bring home the guilt to the person alleged to have committed a particular offence under the said Acts by adducing evidence" (Ambalal v. Union of India AIR 1961 SC 264).

On application of the standard of evidence required to hold a person guilty of an offence, as set out by the Hon'ble Supreme Court cited above, it is seen that the evidence produced by the Respondent is not sufficient to hold the charge against the Appellant. From the case law referred to above it is clear that in the absence of reasonably strong evidence, even in a civil proceeding, a person cannot be held guilty and awarded punishment. Mere surmise, conjuncture, or suspicion cannot sustain the finding of guilt. I have very carefully examined the impugned order and find that the conclusion drawn by the Respondent holding the Appellant guilty of indulging in market manipulation in contravention of regulation 4(a) and 4(d) of the 1995 Regulations is not substantiated by sufficient evidence.

Even though in the order it has been stated that it was MALCO which had provided Rs. 5 crores for purchase of 3 lakh shares and Rs. 11.75 crores for bailing out brokers, it is understood that no show cause notice was issued to MALCO and subjected it to any inquiry. For excluding MALCO from the scope of investigation and inquiry the Respondent has not given any valid explanation. It is felt that an inquiry into the conduct of MALCO in the episode would have helped the Respondent to gather more material information and such information would have helped the Respondent to examine the charge more seriously and purposefully.

Now on the direction issued by the Respondent. It is seen from the order that the direction debarring the Appellant accessing the capital market was issued invoking the powers vested in the Respondent under section 11 and 11B of the Act. Since I have already reproduced the text of these two sections in the earlier part of this order, the same is not reproduced again. The Tribunal had occasion to examine the scope and reach of these sections in Bank of Baroda v. Securities Exchange Board of India ((2000) 26 SCL 532: (2000) 38 CLA 226: (2001) CLC 714): and had expressed the following view:

> "Section 11 and section 11B are interconnected and coextensive as both these sections are mainly focussed on investor protection. On a careful perusal of the said section 11 referred to in the earlier paragraphs, it could be seen that the Respondent has been in no uncertain terms mandated to protect the interests of investors in securities by such measures as it thinks fit. Of course those measures are subject to the provisions of the Act. The expression 'measure' has not been defined in the Act. So we have to go by its generally understood meaning. According to Corpus Juris Secundum measure means "anything desired or done with a view to the accomplishment of a purpose, a plan or course of action intended to obtain some

object, any course of action proposed or adopted by a Government". However, I am not inclined to agree with the Respondent's view that the power under section 11 is unlimited. I am of the view that the legislature has circumscribed the power, by putting the caveat that these measures are subject to the provisions of the Act. The ambit of power is contained within the framework of the Act. But within the statutory frame work such power reigns.

While section 11 deals with the functions of the Board, section 11B is on the powers of the Board. Section 11B is more action oriented, in a sense it is a functional tool in the hands of the Board. In effect section 11B is one of the executive measures available to the Respondent to enforce its prime duty of investor protection. As could be seen from the text of the section reproduced above, the Respondent is empowered to issue directions in the interests of investors to any person or class of persons referred to in section 12 of the Act or associated with the securities market. In other words the section identifies the persons to whom and the purposes for which, directions can be issued.

Gujarat High Court had examined the scope of section 11 and section 11B vis-a-vis the Respondent's position, while deciding an appeal against the Single Judge's order in Alka Synthetics Case (supra). The basic issue for consideration before the Division Bench in the said appeal was as to whether the Respondent had the authority to issue an order under section 11B of the Act for impounding or forfeiting the money received by stock exchanges, as per the concluded transactions under its procedure, until final decision is made. While negating the views of the Single Judge, and upholding the Respondent's power to issue such a direction under section 11B the Court observed: -

"The SEBI Act is an Act of remedial nature and, therefore, the preset cases could not be compared with the cases relating to the fiscal or taxing statutes or other penal Statutes for the purposes of collection of levy, taxes etc. As and when new problems arise, they call for new solutions and the whole context in which the SEBI had to take a decision, on the basis of which impugned orders were passed, cannot be said to be without authority of law in face of the provisions contained in section 11 and section 11B. As the language of section 11(1) itself shows and as the matters for which the measures can be taken are provided in sub-section(2) of section 11. It is clearly made out by the plain reading of the language of the section itself that the SEBI has to protect the interests of the investors in Securities and has to regulate the securities market by such measures as it thinks fit and such measures may be for any or all of the matters provided in sub-section (2) of section 11 and in due discharge of this duty cast upon the SEBI as a part of its statutory function, it has been invested with the powers to issue directions under section 11B. ……. Thus, so far as the authority of law in the SEBI to issue such directions is concerned, such authority to take measures as it thinks fit is clearly discernible on the basis of the provisions contained in section 11 read with section 11B of the SEBI Act. … We have to therefore consider and interpret the power of SEBI under the provisions so as to see that the objects sought to be achieved by Act is fully served, rather than being defeated on the basis of any technicality… The duty and function had been entrusted to take such measures as it think fit and in order to discharge this duty, the power is vested under section 11B. … The authority has been given under the law to take appropriate measures as it thinks fit and that by itself is sufficient to cloth the SEBI with the authority of law".

One has to view the powers of the Respondent under the provisions of the Act in the context of the objects sought to be achieved by the Act and the duty cast on them in achieving the same. Section 11 and section 11B give enormous authority to the Respondent in this regard. As long as the power exercised under section 11B is subject to the provisions of the Act and well within the legal and constitutional frame work, intended to achieve the purposes of the Act and subjecting the persons specified in the section, the power will sustain. Since the exercise of power is subject to the provisions of the Act and the purposes for which it can be exercised and the persons to whom it can reach has been specified in the section, it can not be said that the power is unguided or unlimited. It is a wholesome provision designed to achieve the objectives of the Act."

But it is to be noted that the power under section11B 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 debatable 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 not 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.

As already stated above, in the absence of sufficient material evidence to establish that the Appellant had directly or indirectly indulged in market manipulation, the impugned order holding the Appellant guilty of violating regulation 4(a) and 4(d) of the 1995 Regulations cannot sustain.

In the result the appeal is allowed and the impugned order is set aside.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: October 22, 2001