BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 3/2000

In the matter of:

Shri D.A.Gadgil **Appellant**

Vs.

SEBI & Others **Respondent No.1**
Shri D.R.Mehta, Chairman, SEBI **Respondent No.2**
Shri R.K.Kakkar, Division Chief, SEBI **Respondent No.3**
Shriram Asset Management Co.Ltd., **Respondent No.4**

APPEARANCE

Mr. Pradeep Sancheti
Counsel

Mr. P. Colabawala
Counsel
(Instructed Bhaishankar
Kanga & Girdharlal Mumbai) **for Appellant**

Shri S.V.Krishnamohan
Division Chief, SEBI

Mr. Vijayakrishnan
Legal officer, SEBI **for Respondents 1 to 3**

ORDER

In the present appeal, the Appellant has challenged a part of the order captioned "Order under section 11 and 11B of SEBI Act, 1992, in the case of Shriram Assets Management Company Limited in respect to transactions in the shares of Videocon International Limited", dated 1st February, 2000, issued by Respondent No.2 as Chairman of the Securities & Exchange Board of India, whereby the Appellant has been rendered ineligible " to hold any public position in any capital market related public institution for a further period of 3 years". The prayer in the appeal is to quash and set aside the impugned order and or in the alternative to direct the Respondents 1 to 3 to withdraw the order so far as it concerns the Appellant.

Before adverting to the validity and sustainability of the order under challenge, it is felt necessary to briefly state the back ground leading to filing of the present appeal.

The Securities and Exchange Board of India, Act, 1992 (the Act) provides for the establishment of a Board, namely the Securities & Exchange Board of India, to protect the interests of investors in securities and to promote the development of and to regulate the securities market. Section 3 of the Act provides for establishment of a multimember Board consisting of a Chairman, three nominee members,

one each from the Ministries of the Central Government dealing with Finance and Law and from the Reserve Bank. Two other members are to be appointed by the Central Government. The Chairman and outside members, according to the Act, shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law, finance, economics, accountancy administration or in any other discipline, which in the opinion of the Central Government, shall be useful to the Board. By virtue of the source of nomination, nominee members are supposed to have requisite expertise in the specific fields. Thus it is evident that the purpose of designing a multimember Board was to have the collective wisdom of experts in deciding the matters entrusted to the Board. In terms of subsection 3 of section 4, in the absence of the Board carving out any powers exclusively to itself, the Chairman of the Board can also exercise all the powers of the Board. The impugned order was issued by Respondent No.2 (R.2) in exercise of the said power. The circumstances under which the said order was issued have been detailed in the order itself as follows:

In the wake of sudden payment crisis in June, 1998 on Bombay Stock Exchange (BSE) and National Stock Exchange (NSE) and allegations of manipulation in trading of shares of BPL Limited, Videocon International Ltd (Videocon) and Sterlite Industries Ltd., etc. Respondent No.1 (R-1) initiated investigations to reach at the truth to take curative measures, if found necessary. Since there were media reports suggesting involvement of certain mutual funds in the bail out operation of brokers of BSE facing payment crisis, investigations were carried out to find out their role as well. Respondent 4 (R-4) being the asset Management Company of Shriram Mutual Fund (SMF) was one of the entities subjected to investigation with reference to certain transactions involving shares of Videocon in June 1998. Investigation revealed that in terms of a buy back arrangement, SMF had purchased 1, 20, 600 shares of Videocon on BSE by way of a cross deal with one Spring Fields Securities Ltd, stated to be an associate concern of Shriram Group, on 24th June, 1998, at a contract price of Rs. 84/- per share as against the then prevailing market rate of Rs. 63/- per share through a broker firm named Jaysukh Jagjivan. Based on the findings of the investigation, R-1 decided to pursue the matter by holding an inquiry to consider action under section 11B against R-4. For the purpose, show cause notice was issued to R-4, being the asset management company responsible for making investment decisions of SMF, asking to explain its conduct with reference to the said transaction. R-4 responded to the show cause notice with a written reply and also availed the opportunity given to make oral submission before R-2 by deputing its Chairman and Managing Director for the purpose. On completion of the inquiry R-2 passed the impugned order, the operative portion of which is reproduced below:

> "In view of the above, I am of the view that decision by SAMC to purchase shares of Videocon @ Rs. 84/- when the market price was Rs. 62. 75 was not in the best interest of the unit holders. Further, simultaneous selling of shares by Mutual Fund of fundamentally sound companies in a falling market to pay for the impugned purchase show that schemes of the Mutual Fund were not handled in a prudent, diligent manner which is expected from a fund manager acting professionally. In fact, the way these transactions were done, it was detrimental to the interest of the investors. In the light of these, I hold that SAMC violated the provisions of SEBI Act, 1992 read with Regulation 25 (1) (2) and (16) of SEBI (Mutual Fund) Regulations and Sub Regulations 1&6 of the Code of Conduct as prescribed in Schedule V of these Regulations. Consequent to initiation of proceedings Shri Gadgil has resigned from the office of Managing Director (with effect from November 1998) Since Shri Gadgil has already resigned as Managing Director and Director of Sriram Group, issuing any directions asking him to resign from the office of Managing Director and Director at this state would be infructuous. He was assisted by Mr. Shenoy and Mr.Prakash in these operations and they are still with SAMC. I, therefore, in the interest of fostering investor confidence and for promoting transparency and the integrity in the capital market, direct that Shri Mr.Shenoy and Mr.Prakash should be asked to resign with immediate effect. It is further directed that Shri Gadgil shall not be eligible to hold any public position in any capital market related public institution for a further period of 3 years with immediate effect. I also find that loss has been caused to the unit holders by the decision of SAMC in purchasing 1,20, 600 shares of Videocon International Ltd. I, D.R.Mehta, therefore, in the exercise of the powers given to me under section 11 and 11B of the SEBI Act, read with section 3(4) in the interest of investors and securities market, hereby direct the sponsors to pay, towards the corpus of the concerned schemes of Shriram Mutual Fund, the sum of Rs. 25, 62, 750/- (i.e. difference between the purchase price of Rs. 84/- and market price on the date of purchase of Rs.62.75) with 15% interest per annum, being the loss caused to the unit holders of the Mutual Fund. The sponsors of Shriram Mutual Fund are further directed to implement the directions asking them to pay the loss caused with interest within a month of receipt of this order"

The Appellant is aggrieved, in as much as the order though directed to R-4 also rendered him ineligible to hold any public position in capital market related public institution, thereby effectively depriving him of his lively hood.

Respondents 1 to 3 (hereinafter referred as the Respondents) have filed a common reply. In the proceedings they were represented by an officer of R-1. R-4 neither filed any detailed reply nor chose to be represented in the proceeding, but sent a letter dated 4th April 2000 to the Tribunal informing that:

> "1. The SAMC had earlier taken the decision not to appeal against the order of Chairman, SEBI under section 11&11B of SEBI Act, 1992 in respect of transactions in the shares of Videocon International Ltd dated 1st February, 2000. We had already complied with the provisions of the said order.
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> In view of para 1 above, it has been now decided by the Board that SAMC has no further interest in the matter and therefore has no comments to make with regard to the appeal filed by Shri D.A.Gadgil".

Shri Pradeep Sancheti, learned Counsel for the Appellant, though made a request to allow him to file a rejoinder to the reply filed by the Respondents, did not press the request, on pointing out by the Tribunal that the Securities Appellate Tribunal (Procedure) Rules 2000, do not provide for filing a rejoinder in an appeal proceedings before the Tribunal.

Main thrust of the learned Counsel's argument was that the impugned order was passed behind the back of the Appellant without following the principles of natural justice. He had also challenged the powers of the Respondents to issue penal order under sections 11 and 11B of the Act as well as the factual accuracy and reliability of the evidence based on which conclusions have been drawn against the Appellant.

Shri Sancheti submitted that the Appellant was the Managing Director of Respondent 4, but resigned from that post even before the inquiry proceedings were initiated against the said R-4. The fact of his resignation has been admitted by the Respondents in the impugned order itself. The Respondents themselves had admitted that only R-4 was served with the show cause notice, that the Show cause notice could not be served on the Appellant as he had resigned from the Managing Director's post with effect from November 1998. R-4 was represented before R-2 by its present Chairman (Shri R.Narayanan) and Managing Director (Shri A.Alagappan). He denied the Respondents' version that the Appellant resigned from the post of Managing Director only after the proceedings were initiated, pointing out that the proceedings commenced with the issuance of SCN on 29.6.1999 to R-4, whereas the Appellant had resigned according to Respondent's own version with effect from November, 1998. According to him the impugned order is directed against R-4 and not against the Appellant. In support of this he cited several paragraphs from the impugned order.

Learned Counsel submitted that SCN was issued to R-4 and not to the Appellant and R-4 had made representations on its behalf. Since the scope and reach of the inquiry was restricted to the conduct of R-4, order also should have been restricted in its application to R-4 and not to the Appellant. He alleged that the impugned order against the Appellant is an offshoot of the prejudice in the mind of the Respondents as could be seen from the observations made by R-2 in the order itself, that the Respondent was bent upon inflicting some penalty on the Appellant and that since he had resigned from the post of Managing Director of R-4 it was not possible to remove him from the post, 'the ineligibility' label was fastened.

According to the learned Counsel an order depriving the means of lively-hood has been slapped on the Appellant ignoring the requirements of Articles 14 and 21 of the Constitution, without even following the principles of a natural justice. The Appellant was not given a reasonable opportunity to defend and the order had been passed arbitrarily depriving him of his lively-hood by rendering him ineligible to do any activity in a field where he works. Learned Counsel submitted that there was no fairness in action and

the fundamental safeguard available to a person to defend himself against any punitive action has been given goodbye by the Respondents by passing the impugned order without notice to him. He submitted that the Respondents had come to certain conclusions based on the statements/submissions given by certain persons, without affording an opportunity to the Appellant to rebut those statements/submissions. He urged that since impugned order is violative articles 14 and 21 of the Constitution the same need be set aside. As the Act itself provides for giving a fair hearing in precedings providing less severe penalties like cancellation or suspension of registration certificate under section 12(3) or imposition of monetary penalty under Chapter VIA, it is unbelievable that a penalty resulting in deprivation of means of lively-hood can be imposed without giving the affected person a reasonable opportunity of being heard. He reiterated his contention that the order was issued in an arbitrary manner discarding the fundamental principles of fairness in action by denying a reasonable opportunity to explain the point of view to the other side. The order is therefore bad ab initio and cannot be made good at the appellate stage. He submitted that principles of natural justice require that a person who is to be directly affected by an administrative action be given prior notice of what is proposed so as to enable him to make a representation on his behalf to meet effectively the charges levelled against him. In support of his contention that a penal action should precede fair action following the principles of natural justice, learned Counsel cited following decisions of the Supreme Court– Manak Lal, Advocate V Dr. Prem Chand Singhvi & Ors. (AIR 1957 SC 425); Khemchand V Union of India (AIR 1958 SC 300); Jagdish Prasad Saxena V The state of Madhya Bharat (AIR 1961 SC 1070); State of Orissa V Dr.(Miss) Binapani Dei (AIR 1967 SC 1269); A.K. Kraipak V Union of India (AIR 1970 SC 150); Maneka Gandhi V Union of India (AIR 1978 SC 597); S.L.Kapoor V Jagmohan (AIR 1981 SC 136); Swadeshi Cotton Mills V Union of India (AIR 1981 SC 818); Olga Tellis V Bombay Municipal Corporation (AIR 1986 SC 180);Institute of Chartered Accountants of India V L.K.Ratna (AIR 1987 SC 71); Baldev Singh V State of Himachal Pradesh (AIR 1987 SC 1239); Gokak Patel V Collector of Central Excise (AIR 1987 SC 1161); State of Haryana V Ramlakhan (AIR 1988 SC 1301); Dipti Prakash Banerjee V SNB National Centre for Basic Sciences (AIR 1999 SC 983); V P Ahuja V State of Punjab (AIR 2000 SC 1080).

On the scope of sections 11 and 11B invoked by the Respondents, learned Counsel submitted that the operational ambit of the sections is limited and by no stretch of imagination these sections can be invoked to impose penalties that too undermining the fundamental rights provided under Article 14 and 21. Explaining the scheme of the Act and the role of the Respondents therein, he submitted that the legislature had provided penal powers, wherever it was considered necessary, in the hands of the Respondents. He, in support, referred to the provisions of section 12(3), Chapter VIA, and section 24 and the safe guards provided therein to protect persons from arbitrariness in the hands of the Respondents. According to him a direction under section 11 B is not of universal reach but of limited audience, specified in the section itself and that the Appellant is not a person falling within its ambit.

Countering the Respondents' stand that since the Appellant had appeared in an inquiry proceeding before an adjudicating officer in a matter arising out of the same set of facts and as such it cannot be said that the Appellant was unaware of the charges, the learned Counsel submitted that an enquiry under section 11B and an adjudication proceeding under section 15I are entirely different in scope and effect. Appearance of the Appellant before an adjudicating officer in a matter relating toR-4 cannot be considered to be a substitute for appearance before the Board in an inquiry order under section 11B to present his own case. Even in the adjudication proceeding, it was R-4 and not the Appellant who was asked to show cause The fact that he had assisted R-4 in the adjudication procedure is not a ground to deny him audience by R-2 in the inquiry under section 11B. Since the consequences of inquiry before two separate authorities, under sections 11B and 15I being substantially different, it was necessary to issue separate SCN specifying the charges and the proposed penalty to the person going to be adversely effected. To drive home the point, Shri Sancheti cited the Supreme Court's decision in S L Kapoor V Jagmohan (AIR 1981 SC 136), in support.

With reference to the facts of the case, the learned Counsel submitted that there was nothing in the order to show that the Appellant had committed any omission or commissions to warrant any penalty. He submitted that the inquiry was against R-4 questioning its wisdom in a matter relating to transaction of securities on BSE. In effect the Respondents are questioning the wisdom of R-4 in deploying the funds at the micro level. According to him SEBI Regulations on Mutual Funds provide broad framework of the investment portfolio of a Mutual Fund and it is for the management to act within that framework. It is not for the Respondents to decide as to which scrip at what price at what point of time should be purchased or sold. Day to day investment decisions are left to the asset management company to make in tune with the broad policy guidelines in vogue. He submitted that fluctuations in prices of quoted securities are common in stock exchanges and gain or loss is attendant to the transaction. Learned Counsel stated that there is hardly any Mutual Fund, which would escape penal action, if the Respondents' proposition that

every transaction should result only in profits were accepted. Investment decisions are taken on the spot relying on several factors. Short term and long term gains are also considered. The fact that the shares of Videocon had crossed Rs. 100/- in September 1999 has been ignored by the Respondent. A prudent investor would buy fundamentally strong scrips in a falling market and the decision of R-4 to purchase shares of Videocon cannot be faulted on that account. In posterity, perhaps a decision may prove wrong. That cannot be helped as price movement in the stock market is not in a structured manner to be predicted precisely in advance.

Learned Counsel reiterated the version that 1, 20, 600 shares of Videocon were purchased on 19.6.1998 and not on 24.6.1998 as alleged by the Respondent. He pointed out that the statement of persons from the seller party and broker firm through which purchase was made was not reliable as they had themselves given conflicting version on different occasions. Citing the oral submission made by Shri Usgaonkar, Director and Chairman of Spring Fields Securities Ltd, from whom SMF had purchased 1,20,600 shares, before the Respondents on 26.12.1998, the learned Counsel pointed out that Shri Usgaonkar himself had said that the letter dated 23.6.1998 authorising the broker to sell 1, 20, 000 shares was not signed by anyone from his organisation. Letter dated 28.8.1999 from the Brokers addressed to R-4 produced at the time of hearing contains a denial from them to the effect that they had informed Respondents that Videocon shares were actually purchased on 24.6.1998 and confirmation that the transaction was concluded on 19.6.1998. But the said broker sang a different song before the Respondents saying that the actual transaction took place on 24.6.1998. Learned Counsel submitted the impugned order is based on assumptions and presumptions and hearsay and not on factually correct information and on that count also the order need be set aside.

Shri Sanchety, invited the Tribunal's attention to the last para of the order and stated that the order is directed to R-4 with an 'ineligibility' label fastened on the Appellant, little realising or bothering as to how R-4 would implement such an order against the Appellant.

He further submitted that not only that the Appellant was served with any SCN before taking the punitive decision, he was not even provided with a copy of the adverse order by the Respondents of their own. The Appellant on seeing the press reports issued by the Respondents had to approach them for a copy of the order and only on making a written request a copy was made available to him by R-3 vide letter dated 2.3.2000. This is how the Respondents viewed a matter of such serious consequence resulting in deprivation of a person's lively-hood. He submitted that irreparable damage has already been done to the Appellant, by issuing such an order by the Respondents.

Learned Counsel urged that the impugned order cannot sustain as it is patently illegal and devoid of any merits, and not to remand the matter to the Respondents that a remand is not possible in view of the fact that there was no valid inquiry against the Appellant, as the inquiry in the instant case was directed against R-4.

Shri Krishna Mohan, learned Representative, appearing for the Respondents admitted that they had not issued any specific show cause notice to the Appellant in the inquiry. But this deficiency by itself had not resulted in any prejudice to the Appellants' case, as he was aware of the ongoing inquiry before R-2 and could have come and defended his case. In support of the submission that the Appellant was aware of the charges under inquiry, he had relied on a communication to them from R-4, therein it has been stated that the SCN addressed to it was forwarded to the Appellant for his comments and that the Appellant had helped in preparing the reply filed by R-4 in the inquiry before the Respondents. It was also stated that the Appellant can not deny knowledge of the transaction since he was the Managing Director of R-4 at the relevant point of time, that his resignation subsequently was only a ploy to escape from the consequences arising out of his action. Yet another aspect was that the Appellant had appeared before the adjudicating officer appointed by R-2, in a separate proceeding, arising out of the same set of facts, in response to a SCN from the adjudicating officer to R-4. The main thrust of his argument was that even though no SCN was issued to the

Appellant, since he knew the charges against R-4 and his role in the impugned transaction as the Managing Director of R-4 at the relevant time, he should have volunteered to defend his cause. It cannot be said that he was unaware of the inquiry proceedings and the matter under inquiry. In the inquiry proceedings all those concerned, such as sponsors, SMF and R-4 were given opportunity to present their version and the statements of the seller of shares, broker through whom the transaction was effected,

etc. were also considered. Based on the evidence, available before the Respondents, it was concluded that the acts of omission and commission on the part of the persons in charge of SMF, including the Appellant, had resulted in loss to the SMF and accordingly the impugned order was made.

He submitted that procedural deficiency due to non service of SCN on the Appellant can be cured even at the appellate stage in the light of the Supreme Court decision in the case of Workman of Fire-stone Tyre and Rubber Co.of India Pvt.Ltd Vs. Management (1973) 1 SCC 813 and Delhi Cloth and General Mills Co.Ltd Vs. Lugh Budh Singh (1972) 1SCC 595.According to him evidence can be produced even in the appeal proceeding also to support the impugned order and the Appellant will also get opportunity to rebut the Respondent's version. By following such a procedure, the procedural deficiency as alleged can be cured. He also submitted, in case the order is set aside on the ground that the impugned order was made without following the principles of natural justice, the matter can be remitted for fresh consideration instead of dismissing the same. In support of this request, reliance was placed on the Supreme Court's decisions in state of Haryana Vs. Jagdishchander (1995) 2 SCC 567 and Managing Director, ECIL Vs. B.Karunakar AIR 1994 SC 1074.

Referring to the Respondents' authority to issue the impugned order, the learned Representative stated that the Respondents were adequately empowered under section 11 and 11B as those sections empower the Respondents to take appropriate measures to protect the interests of investors and the impugned order was issued to protect the interests of investor. The order is well within the scope and reach of section 11B in as much as the purpose for which the power has been invoked and the person to whom it has been directed are covered therein. In support of this submission, reliance was placed on the Gujarat High Court's decision in SEBI Vs.Alka Synthetics Ltd (1999) 19 SCL 460 (Guj.) According to him the impugned order is not penal but remedial in nature. Countering the Appellant's contention that he was not amenable to section 11B, being not a person covered under section 12 as mentioned in section 11B, the learned Representative pointed out that since the Appellant was the Managing Director of R-4, he was to be considered as a person covered under section 11B in the light of the Gujarat High Court's decision in Karnavati Fincap Vs.SEBI (1996) 23 CLA 113(Guj.)

On the facts, he claimed that the Respondents had gone by the records and statements of persons concerned with the transactions. Weighing all aspects of the case, it was concluded that R- 4 and its Managing Director (the Appellant) had risked the funds of the SMF for extraneous reasons necessitating issuance of the impugned order. He narrated the facts as mentioned in the impugned order.

I have carefully considered the rival contentions. Shri Sanchety, had strenuously argued that the impugned order was made without following the well cherished principles of natural justice. It is an admitted fact that the inquiry was directed against R-4 with the issuance of SCN dated 29.6.1999 in the matter relating to purchase of Videocon shares in June 1998. The fact that the Respondents had not given any opportunity to the Appellant at any point of time in the inquiry to defend himself has also been admitted. It is nobody's case that the Respondent's order is of no adverse consequence to the Appellant. The Appellant was the chief executive of an asset management company of a mutual fund. Even though in the order the scope of the expression "Public position in any capital market related public institution" for a period of 3 years has been left open to interpretation, in the ordinary course, to a layman it means that the Appellant cannot take up any assignment with any capital market intermediary for 3 years. Undoubtedly it is an order adversely affecting the Appellant. The consequences of debarring him from holding any position in a capital market public institution for 3 years will have attendant fallout in his career. It is not that after three years he comes clean, the stigma may shadow him ever.

Before dealing with the contentions advanced by both sides on the question of non compliance or the extent of compliance of the principles of natural justice, before inflicting the impugned order, it will be useful to briefly discuss the dominance of that principle in decision making in matters adversely affecting the interests of others. The principles of natural justice are known in the jurisprudence of administrative law as the fundamental rules of justice.

Natural justice demands that a person who is to be directly affected by an administrative action be given prior notice of what is proposed so as to enable him to make proper representation to defend his cause. The aim of the rules of natural justice is to secure justice. Soul of the rule is fair play in action. The message of the doctrine is that no one should be condemned without being heard. The concept has been evolved to uphold the rule of law. The rule was stated in the following words by Lord Denning M R in

Schmidt V Secretary of State for Home Affairs (1969) 2 Ch.D 149 that "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Supreme Court had even gone to the extent of treating principles of natural justice as a part of Article 14 of the Constitution.

Two fundamental maxims of natural justice are (i) audi alteram partem and (ii) nemo judex in re sua. For the purpose of the present appeal we are primarily concerned with the concept of audit alteram partem. This principle is not of recent origin. It was well recognised even in the ancient world. Seneca, the philosopher, is said to have referred in Medea that it is unjust to reach decision without a full hearing In Maneka Gandhi V. Union of India (AIR 1978 SC 597) it was held that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the misuse of power. Hence its reach should not be narrowed and its applicability circumscribed. Earlier it was generally believed that the rules of natural justice apply only to judicial or quasi-judicial proceeding. In State of Orissa V. Dr. (Miss) Bina Pani Die (AIR 1967 SC 1269) the reach of the rule was clarified by the Supreme Court by holding that even an administrative order or decision in matters involving civil consequences has to be made consistently with the rules of natural justice. In A.K. Kraipak V Union of India (AIR 1970 SC 150) the Supreme Court further clarified the position in the following words:

> "If the purpose of these rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative inquiries from quasi-judicial enquiries….. Arriving at a just decision is the aim of both quasi judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi judicial enquiry".

In Swadesi Cotton Mills V. Union of India (AIR 1981 SC) the Supreme Court relying on Bina Pani Dei and Kraipak observed that "irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi judicial, a duty to act fairly, that is in consonance with the fundamental principles of substantive justice is generally implied, because the presumption is that in a democratic polity wedded to the rule of law, the State or the Legislature does not intend that in exercise of their statutory powers its functionaries should act unfairly or unjustly".

Supreme Court in D.K.Yadav V. JMA Industrial Ltd (1993) 3 SCC 259 had observed that "it is fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him /her an opportunity of putting forward his/her case. An order involving consequences must be made consistently with the rules of natural justice. In Mohinder Singh V Chief Election Commissioner, (1978) 1 SCC 405, the Constitution Bench held that 'civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation everything that affects a citizen in his civil life inflicts a civil consequence…… In State of Orissa V Miss Bina Pani Dei (AIR 1967 SC 1269) this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken".

The Apex Court in Yadav's case had further observed that "the law must therefore be now taken to be well settled that procedure prescribed for depriving a person of lively-hood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi judicial inquiry and not to administrative inquiry. It must logically apply to both". Having said so the Court further stated that "fair play in action requires that the procedure

adopted must be just fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of lively-hood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and procedural justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defense. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this court that the principles of natural justice are part of Article 14 and the procedure presented by law must be just fair and reasonable… It is thus well settled that right to life enshrined under Article 21of the Constitution would include right to lively-hood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her lively-hood but also career and lively-hood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to putforth his case is given and domestic inquiry conducted complying with the principles of natural justice".

Issuance of show cause notice to the person concerned is normally the starting point of any inquiry proceeding. Notice envisages communication of charges to the concerned person and calling upon him to show cause why action proposed therein be taken. If no sufficient cause shown the charge will stick and consequences will follow. Otherwise the proposal will be dropped. So instrument of show cause notice is of considerable importance in the process.

There is no scope for presuming that a notice, in the light of the facts in a given case may not be of any practical use even to the person against whom the decision is being taken, and dispensing with the requirement of issuing show cause notice. Following observation by the Supreme Court in Olga Tellis V Bombay Municipal Corporation (AIR 1986 SC 180) explains the position.

> "The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well recognised understanding of the real import of the rule of hearing. That proposition over looks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action, which meets the requirement that justice must also be seen to be done. Procedural safe guards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities".

In the present case, admittedly no show cause notice was given to the Appellant providing him a reasonable opportunity to defend his cause. Not only that any show cause notice was given to the Appellant, but even a copy of the impugned order was not supplied to him till such time he made a request to give him a copy! It is also clear that the impugned order inflicting 'ineligibility' visits with civil consequences. What the Apex Court observed in the case of D K Yadav, in effect is applicable to the Appellant, as the after effect of termination from service and rendering the Appellant ineligible to hold any office in the capital market related institution for 3 years is more or less the same. The circumstances obviating the need for serving a notice on the Appellant as putforth are of no help to the Respondents in the light of the Supreme Court's observation in Olga Telli's case cited above.

An authority is now required to act judicially whenever its actions are likely to result in any disadvantage to a person. "Disadvantage" as the Supreme Court stated in Bhagwan V. Ramchand (AIR 1965 SC 1767) " may result from taking away of a right or a privilege or adverse effect on an interest". If it appears that an authority or a body has been given power to determine questions affecting the right of citizens, the very nature of power would inevitably impose a limitation that the power should be exercised in conformity with the principles of natural justice.

The Respondents' contention that even though SCN was not issued to the Appellant, he was aware of the charges because of his participation in another inquiry proceeding under section 15I of the Act, before an officer of the Respondents and that he being the Managing Director of R-4 at the relevant point of time, could have appeared before R-2 of his own, appear to me only a defense for the sake of defense. It is well-settled law that the person against whom action is being taken need be informed of the

specific charges and also the consequence attendant thereto. No one can be expected to defend his cause unless he is called for to do so. The fundamental rule is that, if a person may be subjected to pains or penalty or be exposed to prosecution or proceedings or deprived of remedies or redress or in some such way adversely affected by investigation and report then he should be told the case against him and be offered fair opportunity of answering it. This mandate is on the authority vested with the authority empowered to proceed against the person and pass orders adversely affecting the other person. No one can be expected, of his own, to find out whether, there are any charges against him, being looked into by any authorities and volunteer to putforth evidence to absolve him! In this context the observation made by the Supreme Court in S.L. Kapoor V Jagmohan (AIR 1981 SC 136) in the context of deciding an SLP challenging the order of the Lt. Governor superseding the New Delhi Municipal Committee, is considered relevant. The Court had held that NDMC was never put on notice of any action proposed to be taken under section 238 of the Punjab Municipal Act and no opportunity was given to the Municipal Committee to explain any fact or circumstance on the basis of which that action was proposed. If there was any correspondence between the New Delhi Municipal Committee and any other authority about the subject matter or any of the allegations, if information was given and gathered it was for entirely different purpose. The Court made it clear that "the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. The person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known, the requirements are met". It is therefore impossible to uphold the Respondents' proposition stated above and endorse their view that the principles of natural justice have been complied with in the instant case.

Yet another argument put forth by the Respondents to salvage the situation was that even assuming that a fair and reasonable opportunity was not given to the Appellant at the inquiry stage, the same can be provided at the appellate stage and thereby the deficiency can be cured. I have gone through the two decisions of the Supreme Court in FireStone Rubber Co. Worker's case and Delhi Cloth and General Mills Company Ltd., cited by the Respondents. Both these cases relate to the references under section 11A of the Industrial Dispute Act, 1947. In fact the Court had discussed the Delhi Cloth Mills case while deciding FireStone Rubber Company Workers appeal. These decisions are of little help to the Respondents. The facts are clearly distinguishable. The scheme of the adjudication under Industrial Disputes Act and under the SEBI Act are not identical to draw parallel inferences. In fact there are several cases and authorities contrary to the Respondent's proposition on this point. I will cite one such case, which on factual matrix is somewhat comparable to the present case as in both the cases the issue at stake was the professional reputation of the parties, affected by the decision. It is the case of the Institute of Chartered Accountants of India Vs. L.K. Ratna & others (1986) 4 SCC 534 decided by the Supreme Court. The Court while examining the relevance of following the principles of natural justice in the disciplinary proceedings under section 21 of the Chartered Accountants Act, 1949, had made the following observations, which I consider is relevant in the context. In the context of the submission by the Appellant's Counsel that provision of an appeal under section 22A of the Chartered Accountants Act is a complete safe guard against any insufficiency in the original proceeding before the Council, the Court observed:

> "Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on "Administrative Law" 5th edn. But as that learned author observes (at p.487), "in principle there ought to be an observance of natural justice equally at both stages", and if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial.

And he makes reference to the observations of Megarry, J.in Leary v. National Union of Vehicle Builders. Treating with another aspect of the point, that learned Judge said;

If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right

to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.

The view taken by Megarry, J. was followed by the Ontario High Court in Canada in Re Cardinal and Board of Commissioners of Police of City of Cornwall. The Supreme Court of New Zealand was similarly inclined in Wisland v. Medical Practitioners Disciplinary Committee, and so was the Court of Appeal of New Zealand in Reid v. Rowley

But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made an injury not capable of being entirely erased when the error is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected and publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. "Not all the King's horses and all the King's men" can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blasé attitude towards the noble values of an earlier generation, a man's professional reputation is still his most sensitive pride. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding".

In the light of the authorities discussed above, the argument that the deficiency of not issuing the SCN in the inquiry stage can be cured at the appellate stage stands defeated.

In view of the legal position explained above, I do not consider it necessary to discuss the ratio in each of the cases cited by the Appellant, as all those decisions converge to the same point that audi alteram partem is the justice of the law.

The impugned order under consideration has been undisputedly made without affording an opportunity of being heard to the Appellant, and that order does affect the Appellant adversely. To me it appears that the impugned order is unreasonable in the sense that it is manifestly arbitrary and as such unsustainable. As the impugned order has failed to muster sufficient strength even to cross the threshold, no further inquiry by the Tribunal in the matter is considered necessary. Therefore it is felt that the other points putforth by the learned Counsel for the Appellant need not be examined at present, except one that the appeal cannot be remanded. The Appellant's contention is that since there was no show cause notice to him, there was no inquiry against him and since there was no inquiry against him the matter cannot be remanded. It is an admitted fact that the Appellant was the Managing Director ofR-4 at the relevant time and that the subject matter of the inquiry against R-4 is a transaction involving the top management of R-4, including the Appellant. The impugned order against the Appellant is an off shoot of that inquiry. I do not find any logic in the argument that the inquiry against R-4 had nothing to do with the conduct of the Appellant and others responsible for making investment decisions. The impugned portion of the order is relatable to the conduct of the Appellant in a matter, which is already subjected to an inquiry, it will be in order to examine the Appellants conduct by the Respondents, if they so desire. Since the Appellant's grievance in the appeal being that the impugned order was passed without following the basic principles of natural justice, why he should resist a fair inquiry wherein he is given an opportunity to defend his case on merits? In the light of the facts and circumstances of the case I do not see any legal hitch in remanding the matter.

In the light of the above discussion, I am of the view that the impugned part of the order need be set aside. Accordingly I do so and remand the matter for de novo consideration by the Respondents after affording the Appellant a fair and reasonable opportunity of being heard.

Thus, the appeal is allowed, by way of remand.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: August 11, 2000