BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 29/2001

In the matter of:

1. Mr. Shankar Sharma
2. Ms Devina Mehra
3. M/s.First Global Stockbroking Pvt.Ltd
4. M/s. Vruddhi Confinvest India Pvt.Ltd
5. M/s.First Global Finance Pvt.Ltd **Appellants**

Vs.

Securities & Exchange Board of India **Respondent**

APPEARANCE

Mr.Aspi Chinoy
Sr.Counsel
I/b. D.H.Law associates

Mr. Sunip Sen
Advocate

Mr.Nusrat Huassan
Advocate

Mr.Prasad Dhande
Advocate **for Appellants**

Mr. Rohit Kapadia
Sr.Counsel

Mr.Kumar Desai
Advocate
I/b. Maneksha & Sethna

Mr.K.R.C.V.Seshachalam
Asstt. Legal Adviser, SEBI **for Respondent**

(In the matter of appeal arising out of the order dated 25.5.2001 made by the Chairman, Securities and Exchange Board of India)

ORDER

The present appeal is directed against the order dated 25.5.2001 made by the Chairman, Securities & Exchange Board of India (Respondent herein). The order is made under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (the Act). By the said order the Appellants (First Global Group) have been debarred from undertaking any fresh business as stock broker, merchant banker, or portfolio manager, pending enquiry. An enquiry has been ordered into certain alleged violations of the Act, Rules and Regulations by the Appellants. The order provides for appointment of an enquiry officer for the purpose in a week's time, and requires the enquiry officer to complete the enquiry expeditiously by following the prescribed procedure and taking into consideration the existing material and material which may be further supplemented. It has also been stated in the order that on receipt of the inquiry report a view will be taken by the Respondent as to whether the Appellants should be permitted or debarred from carrying on their business activities.

The sequence of events leading to the filing of the present appeal, briefly are as follows. In the wake of the unexpected price fall in the securities market and apprehending possible attempts by certain entities to manipulate the market, investigations were undertaken by the Respondent with a view to take preventive / corrective steps to protect the interests of the investors and the market. Several entities were subjected to preliminary investigations. The Appellants were one among them. As per the Respondent's version preliminary investigation revealed that Appellant Nos 3 and 4 indulged in large trading transactions in the scrips of Global Telesystems, HFCL, DSQ Software, Zee Telefilms, Wipro, Satyam Computers, MTNL, SBI, Infosys Technologies and Sterlite Opticals (the select scrips). According to the Respondent, these transactions prima facie appeared to have carried out to artificially depress the prices of the said scrips. Based on its assessment, the Respondent passed an interim order on 18.4.2001 debarring the Appellants from undertaking any fresh business as stock broker or merchant banker or portfolio manager until further orders. Since the order dated 18.4.2001 was made without hearing the Appellants, they were given a post decisional hearing on 30.4.2001. Meanwhile the Appellants filed a Writ Petition No.1129/2001 before the Honourable Bombay High Court challenging the said order of 18.4.2001. The Writ Petition was disposed of by the Honourable High Court vide order dated 4.5.2001, inter alia directing the Respondent to pass a reasoned order within the time frame specified therein. The Appellants on their own agreed not to undertake any fresh business as stock broker or merchant banker or portfolio manager until the Respondent passed the order. While disposing the Writ Petition it was also stated in the order that in view of the self restraint made by the Writ Petitioners, the directions contained in the SEBI's order dated 18.4.2001 do not survive and for the purpose of enquiry the said order and the SEBI's affidavit will be treated as a Show Cause Notice. The Appellants made written and oral submissions before the Respondent, denying all the allegations. However, after inquiry the Respondent concluded that the Appellants' business activities during the relevant period resulted in market manipulation and artificially depressing the prices of certain scrips, impacting the market as a whole during mid February to mid March 2001 and these activities were not in consonance with the right standards of integrity and professionalism of a stock broker and a portfolio manager, that this was also detrimental to the interests of investors and securities market. Based on the conclusion so arrived at, the Respondent made the impugned order on 25.5.2001.

Being aggrieved by the said order, the Appellants filed the present appeal on 6.6.2001, inter alia praying to set aside the order debarring them from undertaking any fresh business as stock broker, merchant banker or portfolio manager.

The charges against the Appellants and the findings thereon have been grouped and stated under three heads in the impugned order. For ready reference the relevant portion from the order is extracted below.

"Issue No.1

Whether the activities of First Global Group led to artificial depression of prices and market manipulation and that the conduct of Mr.Shankar Sharma and Mrs. Devina Mehra are in consonance with the highest standards of integrity, fairness and professionalism expected from a stock broker and portfolio manager.

Trading by FGSB was examined during investigations in certain scrips such as Global Telesystems, HFCL, DSQ Software, Zee Telefilms, Wipro, Satyam Computers, MTNL, SBI, Infosys and Sterlite Opticals. These were for the specific settlement periods forming part of the period mid February to mid March 2001, (dates on which the market exhibited a decline) and also during specific time slots. The records of First Global Group indicate substantial short selling and unwinding of previously built long position in these scrips. It is observed that FGSB made heavy net sales in the aforementioned scrips as compared to the total net sales at BSE/NSE during the above period. For instance, the net sales by FGSB were 14% of the net sales in Wipro and 10% of the net sales in HFCL during settlement No.48 at BSE, 14.5% of the net sales in Wipro on March 1 and 10% of net sales in DSQ on March 2, at NSE. Even the cumulative trading by the FGSB in all scrips at BSE showed a pattern of significant net selling during this period and the aggregate trading at BSE and NSE also showed substantial net sales on certain dates. For instance there were net sales of approximately Rs.30 crores on 13.2.2001, Rs.15 crores on 16.2.2001, Rs.20 crores each on 19.2.2001, 23.2.2001 and 7.3.2001 at BSE and NSE taken together.

It has been contended that to draw inferences based on "net sales" metric is flawed. However, the examination of trading by the FGSB was not restricted to end-settlement or end-day net positions alone, but also included trading during specific time slots on a given day to preclude possibilities of any distorted

analysis.

It was also found that the FGSB made significant net sales in certain scrips during specific time slots, which show that its trading contributed to the fall in scrip prices during these time slots. Instances of significant net sale by the FGSB during specific time slots include almost 45% of net scales in Wipro at BSE during 10.40 – 10.58 hours on February 23 and almost 20% of net sales in Satyam at BSE during 10.44 – 10.52 hours on February 23, etc. when the scrip price fell by Rs. 50/- and Rs. 6/- respectively. The First Global Group has contended that the selection of specific time slots is arbitrary. I find that the time slots have been selected in a systematic manner for scrips, which either form part of the stock index and contributed substantially to the fall in the index or for those momentum scrip which could have impacted the trading sentiment on those days. The time slots pertain to specific periods of substantial fall in prices of the scrips and therefore cannot be construed as arbitrary or selective as contended.

It has been contended by First Global Group that the data relied upon by SEBI has certain purchases having been considered as sales. After examining the details available with SEBI, an opportunity to clarify/explain these issues was given to First Global Group on 23.5.01. SEBI received a reply on behalf of First Global Group on 23.5.2001 and 24.5.2001 stating that they would not appear before SEBI as part of the hearing, but they were prepared to clarify the issues dehors the hearing. This hearing was in pursuance to the orders of the Hon'ble High Court and therefore, there can be no question of arriving at an "understanding" whereby the clarifications can be discussed without they being a part of the hearing. This order is therefore being passed in the absence of further clarifications. For instance, I find that in SEBI's data there are mistakes regarding four cases of purchases being construed as sales, and one transaction relating to sale of 9411 shares of Wipro on March 1, 2001 actually pertaining to NSE, having been erroneously shown at BSE. These could possibly have occurred due to typographical errors. In any view of the matter, this does not in any way change the present finding.

An examination of the records of the FGSB shows that it also made naked short sales. For instance, a peak naked short sales of 50,000 shares (valued at Rs. 13 crores approximately) of Wipro was carried forward from settlement No. 47 to 50 and another 55, 000 shares of Software Solutions (valued at Rs.6 crores approximately) was carried forward from settlement 47 to 49. Assuming that these trades were within the SEBI prescribed limit and even if naked short sales were not prohibited, the fact remains that such a quantum of naked short sales would contribute to a depression in the scrip prices. Even the pattern of order placement and particularly cancellation of large sell orders shows an attempt to influence the scrip prices.

The manipulative intent of these trades becomes serious as it is observed that most of these trades were executed on behalf of VCIP. An analysis of the trading data of VCIP furnished by First Global Group shows that it had major mandi Badla/sales deferral positions in various scrips at both BSE and NSE during the settlements forming part of the period January-March, 2001. The average aggregate value of carry forward sale in the scrips of Wipro, SSI, Sterlite Optical, during Settlement No. 45 - 49 was approximately Rs. 13 crores. Further, it is also built naked short sales in several scrips as its Demat Statement furnished by First Global Group does not show any holding in such scrips. The value of naked short sales on certain dates by VCIP ranged between Rs. 2 to 15 crores in the scrips of Satyam, Infosys, DSQ, Wipro, HFCL, etc., during this period.

It has been contended by First Global Group that the data relied upon by SEBI regarding proprietary trading by VCIP is factually inaccurate, I find that the trading data was submitted to SEBI by FGSB itself and therefore it does not lie with them to say that SEBI's data is inaccurate. Also, to respond to the submissions relating to inaccurate data, an opportunity to explain/clarify was given to them on 23. 5. 2000, as discussed earlier, which they chose not to avail. Since the data was given by First Global Group and they chose not to come for a hearing, it is now not open to them to dispute the authenticity of the data.

First Global Group has admitted that they cancelled some orders. They have submitted that this was done in the normal course of business. I find that the FGSB entered orders at prices much beyond the prevailing traded prices. Placing orders on the exchange at different prices than the prevailing price and thereafter canceling the orders affects the Order Book and can be a factor which could result in creation of artificial market.

Shankar Sharma and VCIP of First Global group routed some of their proprietary trades through Palombe Securities. FGSB is holding membership of both NSE and BSE. Shankar Sharma, a Director of FGSB traded heavily through third party broking concern, M/s. Bang Equity Broking Ltd (Bang Equity) Shankar Sharma was ostensibly introduced to the broker by M/s.Palombe Securities and one CSL Securities, entailing payment of brokerage of approximately Rs.60 lakhs to the said Bang Equity during 2000 - 2001 (on a volume of approx. Rs. 600 crores), of which 50% was passed on to the said Palombe. As per information from First Global Group itself, there are financial dealings between FGSB and Palombe securities also. For instance, an amount of Rs. 20 lakhs was received by FGSB from Palombe Securities in January 2001. FGSB has impliedly denied any relationship with Palombe and sought to justify the relation ship between Palombe and Bang Equity stating that Bang Equity have paid remissier charges to Palombe.

Remissier charges can be paid only to a Registered Remissier. It may be mentioned that the issue of payment of remissier charges has been raised by First Global Group for the first time. If they had responded to the request to appear on the 24th instant the contrary contention made by Palombe (describing these payments as introductory fees) and Bang Equity (describing these payment and finder's fees) could have been shown to First Global Group.

FGSB is a registered Merchant Banker and deemed FII and has established offices in UK and obtained membership of London Stock Exchange. It has 70 institutional clients including some of the largest investors in India and global markets. First Global Group also claims to be a Global analyst and has published more than 450 reports. It has been represented to SEBI that First Global Group is the Sachin Tendulkar of the Securities market. Shri Shankar Sharma hardly needs any introduction for trading through another fellow FGSB and that too on the introduction of a non descript entity like Palome Securities, who was the recipient of 50% of the brokerage paid by Shankar Sharma for no role or responsibility in the execution of such huge trades.

First Global Group contended that it conducted trading through Bang Equity when its carry forward limits based on capital adequacy deposit with the exchange got exhausted. An issue has been raised regarding the correctness of the data relied upon by SEBI in framing its findings. I find that the entire findings of SEBI are based on data either submitted by First Global Group or obtained from the exchanges. Even on the basis of the data now furnished by First Global Group, I find that trading had been done by FGSB through Bang Equity even on dates when adequate exposure limits were available with First Global Group. First Global Group has submitted that SEBI has arrived at a conclusion of negative exposure limits, which is unheard of. It is true that there cannot be negative exposures as BSE and NSE have an in built system of deactivation of trading terminals in the event of trading exposures reaching limits based on available capital deposits. I find that the reference to the exposure limits in the SEBI affidavit was only to the effect that trading had been conducted through Bang Equity on dates when exposure limits were available with FGSB. No other adverse inference was drawn.

First Global Group has justified the opposite trades at FGSB and Bang Equity as being due to shifting of positions so as to free exposure limits in their broking concern or create new positions or shift positions at Bang Equity to First Global. They have tacitly admitted having synchronised the order timing for specific scrips, quantity and rate, which is contrary to the accepted principles of screen based trading where anonymity of the counter party is sought to be maintained. These orders are necessarily in the nature of structured transactions, which vitiates the transparency and fairness of the working of the market. Further, I also do not agree with the contention of First Global that circular trading can never take place in liquid scrips.

It is observed that the FGSB collected about 25 crores from its various constituents including RNA group, Anil Chanana and others for the avowed purpose of conducting arbitrage trading. Investigations showed that the FGSB conducted portfolio operations in the garb of arbitrage trading. The decision about the security, quantity and timing of purchase/sale was left to the discretion of the broker and more significantly losses arising out of arbitrage were absorbed by FGSB who used to give average return of upto 27% to 33% on an annualised basis. Under the SEBI Portfolio Managers Regulations, the Portfolio Manager cannot use the funds of its clients for arbitrage trading or for its own operation and can charge only fixed fee and cannot give such returns. The above activity shows that there is a prima facie violation of SEBI (Stockbroker and Sub Broker) Regulations, Portfolio Manager's Regulations and SEBI guidelines on Broker and Client Relationship.

While considering the above activities of First Global Group, the market scenario of considerable volatility during mid February – mid March 2001 has to be kept in mind. The pattern inter alia of significant sales, unwinding of previously built long positions, order placement particularly in the time slots when the scrip prices registered substantial fall, portfolio operations disguised as structured arrangement in the garb of arbitrage trades, routing of the proprietary orders through non-descript unregistered sub-broker, all indicate a concerted attempt to manipulate the prices of the scrips and artificially depress the prices.

From the above, it is clear that there is enough material on record to conclude that activities of First Global Group resulted in market manipulation and artificially depressing the prices of certain scrips which could have impacted the market as a whole during mid February to mid March, 2001 and these activities were not in consonance with the high standards of integrity and professionalism of a stock broker and a portfolio manager. This was also detrimental to the interests of investors and securities market.

Issue No. 2

Whether any orders are required to be passed?

Considering the above facts and circumstances of the case in their entirety, I am of the view that First Global Stock Broking Pvt.Ltd, Vrudhi Confirment India Pvt.Ltd and First Global Finance Pvt.Ltd, Mr.Shankar Sharma and Mrs. Devina Mehra should be debarred from undertaking any fresh business as stock brokers, merchant banker or portfolio manager.

Issue No. 3

Whether SEBI has powers to pass such orders?

Under section 11 of the SEBI Act, to protect the interests of investors in securities and to promote the development of and to regulate the securities market SEBI can take such measures, as it thinks fit. Under section 11B of the said Act, SEBI has the power to issue directions in the interest of investors or orderly development of securities market or to prevent the affairs of any intermediary or other persons connected with the securities market being conducted in a manner detrimental to the interest of investors or securities market. SEBI has invoked the powers under 11B in the past on several occasions in order to safeguard the interest of the investors. It has been held by various High Courts that SEBI has the powers to pass appropriate orders under section 11B.

With regard to the contention of First Global that the order is punitive in nature and that SEBI has no powers to pass such orders, it has to be noted that there is well-settled distinction in law between suspensions which are made pending enquiry and suspension by way of punishment. In an urgent situation the regulators are empowered to issue orders of suspension, such orders are not by way of punishment or penalty. Having been faced with serious situation of erosion of investors confidence in the market, SEBI passed the said order. Creation of market manipulation erodes confidence of investor in the securities market. As capital markets are dynamic and fast changing, the regulatory agency must have the capacity to move quickly to protect the capital market and the interest of the investors.

The order is in the nature of a direction debarring the First Global Group from undertaking any fresh business as stock brokers. The same has been passed pending further investigation into manipulations. It has also been passed in the interest of investors and in the interest of the securities market. Such action does not amount to punishment or penalty particularly as this action is of interim nature.

The market expertise available with some of the players may enable them to erase the footprints and destroy the tracks so as to disable the investigators of the regulator to find out the truth unless emergent steps are taken".

The Appellants had prayed for an interim order staying the operation of the impugned order, pending disposal of the appeal. The request for interim stay was rejected by the Tribunal vide its order dated

25.6.2001.

Shri Aspi Chinoy, learned Senior Counsel, appearing for the Appellants explained the background in which the Respondent made the impugned order. In this context he refered to the order dated 4.5.2001 of the Hon'ble Bombay High Court in the Writ Petition (Lodg No. 1129 of 2001) filed by the Appellants and stated that the Court had directed the Respondent to make full disclosure of the material relied upon by it to the Appellants, grant personal hearing to them and pass a reasoned order within 7 days after conclusion of the hearing. Shri Chinoy submitted that none of these requirements has been complied with by the Respondent.

Shri Chinoy referred to the provisions of Section 15T and 15Z of the Act and submitted that the jurisdiction of the Tribunal in deciding an appeal is wider than the supervisory jurisdiction under articles 226 and 227 of the Constitution. He stated that the Act provides for a two-tier appeal system - first to the Tribunal and against the Tribunal's order to the High Court. He pointed out that even the 2nd appeal can be on any question of fact or law arising out of the order. The learned Senior Counsel submitted that the legislature has consciously provided for such two tier plenary appellate provision to protect the persons aggrieved by an order made by SEBI. According to him appellate review by the Tribunal is a plenary review that the Appellate Tribunal sits like trial Court, it should look at the material, consider the law and decide these facts based on which such an order can be passed. He submitted that the Wednesbury test, referred to by the Respondent has no application to an appeal before the Tribunal. In support of the proposition that the scope of appellate powers and judicial review are not identical, Shri Chinoy referred to the following decisions of the Hon'ble Supreme Court.

Nagendra Nath Bora & Anr. V.Commissioner of Hills Division and Appeal, Assam & Ors (AIR 1958 SC 398)
State of Kerala & Anr. V. ACK Rajah & Anr. (1994) Sapp (3) SCC 250)
Lachman Dass v. Santokh Singh (1995) 4 SCC 201)
State of Tamil Nadu v. V.S.Subramaniam ((1996) 7 SCC 509)
Appropriate Authority & Anr. V. Sudha Patil & Anr. (1998) 8 SCC 237)
Bank of India & Anr. V. Degala Suryanarayana (AIR 1999 SC 240)
Apparel Export Promotion Council v. A.K.Chopra ((1999) 1 SCC 759)

In this context Shri Chinoy specifically referred to the Hon'ble Bombay High Court's decision in Anand Rathi v. SEBI ((2001) 43 CLA 312) and stated that the Hon'ble Court was deciding Writ Petition filed by Rathi under article 226 and not dealing with an appeal under section 15Z of the Act. Therefore the Wednesbury test followed by the Hon'ble Court should not be extended to the present appeal as the Tribunal is exercising the power of a plenary appellate forum. He submitted that the appellate remedy provided in the statute under section 15T to be meaningful, the Appellate Tribunal should consider the entire matter on merits by re-appraising the facts and the applicable law.

Shri Chinoy describing the profile of the Appellants stated that the First Global Group is one of the largest securities groups in the country with 17 branches in India, in addition to offices in London and New York with business spread all over the world. He stated that they have 70 substantial institutional accounts/constituents and more than 1200 clients; there are about 250 qualified people in the direct employment of the Group; the turn over of the Group during the year 1999-2000 was to the tune of Rs. 7432 crores, the Group is the only non Japanese Asian Group holding membership in London Stock Exchange, that their application for membership in NASDAQ is pending. Further, Appellant No.3 is one of the very few Indian firms to whom the Respondent granted the coveted deemed foreign institutional investor status. Shri Chinoy stated that the research done by the Group commands the highest credibility among major F11s and as a result the Appellants have been garnering a significant share of F11 flows into the Indian market. Learned Senior Counsel submitted that such a well recognised, well established group has been all of a sudden branded a villain and without any tangible reason debarred from carrying on its legitimate business. As a result of the impugned order the Appellants' standing and reputation have been considerably affected.

Shri Chinoy submitted that the impugned order has been made malafide and for extraneous reasons. In support of the said allegation he referred to the chronology of events narrated in para 5A10 of the appeal, that on the 2nd of March, 2001 there was a substantial fall in the prices of shares on the Bombay

Stock Exchange (BSE), resulting in the down fall of the sensitive Index, that on 2nd March, 2001 itself BSE and the National Stock Exchange (NSE) commenced an investigation into the reason of the downfall and issued notices to about seventeen entities covering a number of large brokers including the Appellants, the Appellants furnished every information sought for, and the particulars so furnished established that the Appellants had not done anything illegal or improper to warrant any further investigation in the matter. According to the learned Senior Counsel, with the 'Tehelka expose' on 13.3.2001 the attitude of Respondent changed. Shri Chinoy stated that First Global Group holds 14.5% stocks in Buffalo Network P. Ltd., the owner of Tehelka.com On 27.3.2001 Respondent's officers visited the Appellants office and served a summons to produce records etc. The Appellants fully co - operated with the officers. The learned Senior Counsel stated that on 27.3.2001 and there after the significant focus of the investigation was shifted to find out the association of Appellant No.1 with Buffalo Net Work, its balance sheets, financial statements etc., though it had nothing to do with the so called market crash.

He also referred to income tax raid on the Appellants, arrest of Appellant No.1, etc., to support the submission that Government had turned hostile towards the Appellants. Shri Chinoy submitted that even though the particulars called for were unrelated to the inquiry, the Appellants unhesitatingly furnished every bit of information called for by the officers. However, on 19th April the Respondent served a copy of its order dated18.4.2001 debarring the Appellants from undertaking any fresh business as a stock broker or merchant banker or portfolio manager, that this order was passed even without giving the Appellants an opportunity of being heard. The Appellants in that context filed a Writ Petition in the Hon'ble Bombay High Court. The said Writ Petition was disposed of by the Hon'ble Court on 4.5.2001 by an order, interalia directing that the order dated 18.4.2001 and the Respondent's affidavit before the Hon'ble High Court be treated as show cause notice to the Appellants, and disclose to the Appellants all the materials relied on by the Respondent and pass a reasoned order after providing the Appellants an opportunity to present their case. The entire exercise was required to be completed in a time frame provided in the said order. The Respondent passed the impugned order on 25.5.2001 which the learned Senior Counsel stated is ex-facie without and/or in excess of jurisdiction, bad in law, perverse and discloses non application of mind. Shri Chinoy submitted that even factual inaccuracies in the material relied on by the Respondent, as pointed out by the Appellants were ignored and a tailor made order in tune with its pre conceived notion was made.

Shri Chinoy submitted that the impugned order is ultra vires the section 11 read with SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations 1995 (the 1995 Regulations). According to him in view of the express statutory restriction stipulated in the opening words of section 11B, "save as other wise provided in section 11" the power to issue executive /administrative directions under section 11B is excluded in respect of matters covered by section 11(1) and the Regulations framed thereunder including prohibiting fraudulent and unfair trade practices relating to securities market. Shri Chinoy submitted that the 1995 Regulations were notified after the addition of section 11B in the Act. He stated that in regulation 4 read with regulations 7 & 8 contain detailed provisions as to the manner and circumstances in which investigation may be carried out, regulations 11 & 12 provide for the procedure and circumstances in which "directions" may be issued by the Respondent in cases of "market manipulation" and these regulations also defines and limits the purposes for which such directions can be issued. Shri Chinoy submitted that section 11 (1) read with the 1995 Regulations necessarily excludes the powers of the Respondent to pass directions in cases of alleged market manipulation except in the manner/procedure stipulated in the said 1995 Regulations and only for the purposes stipulated in the said Regulations. He submitted that the impugned order which has been made for alleged "market manipulation" without complying with the requirements of the 1995 Regulations is therefore not in order.

Shri Chinouy further submitted that the impugned order is ultra vires sections 11 & 12 read with the SEBI (Stock Brokers & Sub Brokers) Regulations, 1992 (1992 Regulations) for the same reasons stated with reference to section 11 and 1995 Regulations. Sections 11 & 12 of the SEBI Act read with the 1992 Regulations and in particular regulation 26(1)(v) and regulation 26(1)(ii) read with Clause (A)(3) and A (4) of the Code of Conduct stipulated in Schedule II to the said 1992 Regulations, provide that a penalty of suspension of registration of a stock broker can be imposed if he "indulges in manipulating or price rigging" in the market or indulges in "deceptive transactions" with a view to "creating a false market" and Regulation 30 provides that on such suspension the stock broker "shall cease to buy, sell or deal in securities as a stock broker", that no such order of penalty of suspension can be imposed except after holding an enquiry in accordance with Regulation 28. Shri Chinoy submitted that the impugned order which in effect is a penalty has been imposed without following the procedure set out in the 1992 Regulations.

Learned Senior Counsel submitted that having regard to the scheme of the Act and Regulations' "directions" to a stock broker to stop trading can be issued under section 11(B) only by way of immediate preventive/remedial action in emergent circumstances and not by way of penalty, that having regard to the admitted facts of the present case, the order debarring the Appellants from undertaking fresh business as Stock Brokers, Merchant Bankers, Portfolio Manager, is ex facie punitive and not preventive and is consequently ultra vires section 11B. He stated that the order has been made more than 80 days after the investigation/inquiry commenced on 2nd March, 2001, that the order while stating that " in an urgent situation regulators are empowered to issue orders of suspension"- i.e preventive/ remedial orders, does not state what urgent situation allegedly existed on 25th May, 2001 which required such drastic action as a preventive/remedial measure, that by the time the impugned order was made in May, the Respondent had banned all short sales and by April itself the market had stabilized and had even moved upwards on a number of occasions. Shri Chinoy stated that the Appellants' case is not comparable to Anand Rathi's case (Anand Rathi v. SEBI ((2001) 43 CLA 312) relied on by the Respondent as in the said case action was taken immediately and not after 80 days of the so called market fall.

Shri Chinoy referring to the Respondent's attempt to justify the impugned order by differentiating between suspensions by way of penalty/ punishment and suspensions which are made in urgent situations pending enquiry and which are not by way of punishment or penalty, that such non punitive suspensions are imposed pending enquiry to ensure that the person being investigated does not frustrate/obstruct the enquiry, in the absence of such circumstances an order debarring the Appellants from carrying on their lawful and established trade and business are clearly punitive in nature, even though made pending enquiry. Shri Chinoy submitted that in the impugned order itself the Respondent has stated that "the activities of First Global Group resulted in market manipulation and artificially depressing the prices of certain scrips which could have impacted the market as a whole during mid February to mid March, 2001 and these directions were not in consonance with the high standard of integrity and professionalism of a stock broker and a portfolio manager. The direction debarring the Appellants from doing business is based on such a finding of fault and in that context the Respondents argument that the order is not penal' cannot hold good. Shir Chinoy pointed out that such a finding and decision thereon by the market regulator has been given wide publicity through its press releases and as a result the Appellants have suffered immensely. Such a stigmatic order of serious adverse consequences cannot be considered in any way as a preventive or remedial order as is being claimed by the Respondent. In this context he referred to the following observation of the Hon'ble Supreme Court in the Institute of Chartered Accountants of India v. L.K. Ratna (1986) 4 SCC 537):

> "There are cases where an order may cause a 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 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 Kings 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 effects his standing and dignity amongst 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 proceedings and to avoid treating an appeal as an overall substitute for the original proceeding".

In this context Shri Chinoy cited another case: Board of Trustees of the Port Trust of India v. Dilip Kumar Raghavendranath Nadkarni & Ors. (1983) 1 SCC 124, wherein the Hon'ble Supreme Court had observed that "the expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning, where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelyhood of a person, some of the finer graces of human civilization, which make life worth living would be jeoparadised and the same can be put in jeoparady only law which inheres fair procedure".

Shri Chinoy submitted that the impugned direction has been issued in total disregard to the procedure required to be followed, and as a result the painfully built reputation of the Appellants during the last 6 years have been destroyed.

Learned Senior Counsel referred to the Respondent's stand as stated in para 42 of its reply that "SEBI cannot and ought not at this stage deal with the facts alleged by the Appellants in paragraph 5B 9(i) to 5 (B)(ix) of the said Appeal since the inquiry officer would be the proper person to deal with this aspect of the matter. Shri Chinoy submitted that in para 5B.9, of the appeal the Appellants have provided factual details to knock off the allegation that Appellants' undertaken "substantial short selling and unwinding of previously built up long position" in the select scrips resulting in market manipulation and artificially depressing prices of the said scrips. He pointed out that the Respondent has taken similar evasive stand with reference to paragraphs 5(B) 10 to 5(B) 15 and from 5(B) 17 to 5(B) 22 of the appeal stating that since the Respondent has only arrived at a prima facie conclusion it cannot and ought not at this stage deal with the facts alleged by the Appellants in paragraph 5B 10(1) to 5(B) 15 of the said appeal. Shri Chinoy submitted that in para 5B 10 in the appeal the Appellants have contested the facts, figures and analysis based on which the Respondents stated that the Appellants had indulged in substantial short selling, that the Appellants have demolished the core charge against them in these paras with evidence and the Respondent is skirting the issue, for the obvious reason that it has no material to counter the Appellant's submission. The learned Senior Counsel pointed out that having passed a penal order, the Respondent is duty bound to defend its order. He stated that the inference in the context is that the Respondent has no material in its possession to prove its case and accordingly the findings need be set aside. Shri Chinoy submitted, if the Respondent's views are accepted, it would be in effect a negation of the appeal remedy available to the Appellants under the Act. Learned Senior Counsel submitted that the Respondent cannot pass such a drastic order debarring the Appellants from carrying on their business or stigmatize them as market manipulators, without holding any proper enquiry and at the same time decline to justify/defend its action on the ground that it has subsequently appointed an inquiry officer. According to Shri Chinoy if the Respondent chooses to pass orders debarring the Appellants, without holding an inquiry and without waiting for the report of the enquiry officer, it must be liable to defend such action independent of any such enquiry that it may subsequently order. He submitted that the Respondent cannot on the one hand take action against the Appellants which has the effect of totally stopping their business and stigmatizing and damaging the Appellants' hitherto unblemished reputation without holding an enquiry as required under the rules and regulations and at the same time refuse to deal with facts which establish that the order is vitiated by non application of mind and total absence of relevant material, that to permit such conduct would be totally destructive of the Appellant's statutory right to impugn the Respondent's order before the Tribunal, that if the Respondent is not in a position to defend and sustain its order within the settled legal parameters, the same must be set aside. Shri Chinoy submitted that since the Respondent has opted not to putforth any material in defense, the Tribunal has to go by what is before it and decide the appeal.

Shri Chinoy submitted that the order proceeds on the patently incorrect and unsustainable basis that selling of previously acquired shares (unwinding of long positions and short selling), which is a perfectly legitimate and normal part of trading in securities market, constitutes market manipulation and that if prices of a scrip fall pursuant to such trading, the depression in the price of the scrip would be 'artificial'. Undertaking genuine trade transactions is part of normal business activity in the stock market and can never constitute market manipulation or be said to artificially raise or depress prices of shares. According to him the charge of market manipulation or artificially raising or depressing prices can only be established if it is shown that the trader has sought to create a false or misleading appearance of trading or has indulged in non genuine trade transactions which are intended to operate only as a device to inflate or depress the prices of securities. According to the learned Senior Counsel, short selling essentially involves selling without actual delivery of the shares, that the Respondent itself has set limits on the value of scrips that can be "carried forward on a card either in the form of carry forward sales or purchase". Shri Chinoy submitted that short selling is a normal trading activity in the securities market, that short selling was permitted by the Respondent and the various exchanges, that the Respondent had infact imposed a temporary ban on short selling on 8.3.2001. Referring to the "Unwinding of previously built up long positions" Shri Chinoy submitted that selling shares which had been previously purchased, is a normal trading activity that nobody could be expected to hold long positions in falling market at loss to itself. He further stated that even if it is assumed that the Appellants transactions had been large enough, that could not result in their trading activity being termed as market manipulation or be said to have artificially depressed the prices of the shares. Shri Chinoy pointed out that sales and purchases by Institutional Investors are always Netsales/Purchases and these are almost always large trades and specifically on 1.3.2001, FIIS had gross sales of over Rs.950 crores, that by applying the logic of the Respondent, even these sales/purchases by institutional investors would constitute market maipulation.

In this context the Learned Senior Counsel cited U.S. Supreme Court decision in Ernest & Ernest Vs. Hochfeldev(http://caselaw.lp.findlaw.com/scripts/g…y=search &Court: US case =us/425/185.html) to explain the scope of the expression manipulation. The Court was examining the scope of rule 10b-5 of the Securities Exchange Commission Rules, which referred to "employment of manipulative and deceptive devices". The Court had observed that " the argument simply ignores the use of the words 'manipulative', 'device', ' contrivance' - terms that make unmistakable a congressional intent to prescribe a type of conduct quite different from negligence. Use of the word 'manipulative' is specially significant. It is and was virtually a terms of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities". Websters International Dictionary defines 'manipulate' as ' to manage or treat artfully or fraudulently ; as to manipulate accounts. To force (prices) up or down, as by matched orders, wash sales, fictitious reports …… , to rig" . Learned Senior Counsel submitted that thus the genuine commercial trading cannot be considered manipulative.

Referring to the Respondent's statement in its reply that it is possible to manipulate the market by various acts put together which otherwise may be within the regulatory frame work and possibly these acts if seen isolated may be legally permissible but when put together with connected circumstances may show an intention to create artificial market and such manipulation is done under the garb of normal trading, the learned Senior Counsel submitted that this statement is a conjuncture, and not based on real facts. He pointed out that there is no reference to any "connected circumstances" anywhere in the order that in any case charge of fraudulent trading was not leveled against the Appellants in the show cause notice issued by the Respondent.

With reference to the allegation that the Appellants had undertaken substantial short selling in the selected 10 scrips Shri Chinoy referred to the factual position explained in para 5B .10 of the Memorandum of Appeal and stated that the Respondent's version is contrary to the factual position. Shri Chinoy quoted the observation of the US Court of Appeal in Sullivan & LongInce v. Scattered Corporation (Kentlaw.edu/7 circuit/1995/94-20/5.html) that " A short sale is a sale at a price fixed now for delivery later. A trader sells stock short when he thinks the price of the stock is going to fall, so that when the time for delivery arrives he can buy it at a lower price and pocket the difference". The learned Counsel submitted that the charge that the Appellants had undertaken substantial short selling it is baseless as is evident from the fact that they had undertaken no proprietary short sales at least in two of the scrips i.e. Global Telesystems & HFCL and had in fact held long purchase delivery position in the said scrip, that even in Zee Telefilms the Appellants held no short proprietary position, except for a small position for 2-3 days created by a dealer error, that infact in HFCL the Appellants held proprietary purchase delivery position that the Appellants had also held as to a delivery purchase position of 72,000 shares from mid February and they ultimately suffered a loss of Rs.5.5 crore, that in Global Telesystem the Appellants held proprietary Purchase Delivery Position, the Appellants also had a long position of 12,000 shares in the said company during the period. Shri Chinoy submitted that it would be totally irrational to suggest that a person who is holding long position in a share would try to depress the price thereof as such an action will increase ones own losses. He further submitted that the sales carried out by the Appellants in the said scrips constituted a very small proportion, say far less than 1% of the total sales/volumes of transactions in the said scrips. According to him the Appellants transactions in the remaining seven scrips never exceed 1-2% of the total volume of trading in such shares during this period that in fact on a number of days during this period the Appellants (on their proprietary account) were net buyers that their pattern of transactions during this period did not depart from their pattern of trading in the past few months.

Referring to the allegation that Appellants made heavy net sales in the said scrips as compared to the total net sales at BSE/NSE during the period, learned Senior Counsel stated that the criterion of net sales as sought to be defined by the Respondent is flawed as the relevant criterion for determining the impact of the Appellants trading volumes on the price of a stock is to compute these trading volume as a percentage of the stocks daily traded volume at BSE/NSE, that the Respondent had deliberately chosen not to even explain or justify its concept of net sales and total net sales as a relevant touch stone/analysis method.

Shri Chinoy also rebutted the Appellants version that even the cumulative trading by the Appellants in all scrips of BSE showed a pattern of significant net selling during this period and the aggregate trading at BSE and NSE also showed substantial net sales on certain dates, citing factual position stated in para 5B.12 and 5B.13 of the appeal. Shri Chinoy referring to the Respondent's finding that the Appellants' aggregate trading at BSE/NSE also showed substantial net sales on certain dates, stated that the

Respondent has failed to consider the fact that the Appellant was a net buyer on other days in the same period. According to him out of the total 22 trading days in the period, the Appellant was a net buyer in 11 days; that the Respondent has deliberately and selectively relied on certain data to support a pattern, which it is fully aware does not exist. The observation that the cumulative trading by Appellant No. 3 showed a pattern of significant selling during this period, according to the learned Senior Counsel, is false as the Appellant had net sales and purchases on an equal number of days in this period of 11 days of net purchase and 11 days of net sales from 13.2.01 to 15.3.01, that even the size of the net purchases are high on certain days. He cited figures in support of this. He also submitted that there is no co-relation between the days when Appellant No.3 had the alleged significant net selling and the market movement on those days, that for example, 19.2.01 and 7.3.01 are mentioned in the impugned order as days on which the Appellants had substantial net sales but actually the market went up on those days. In this context the learned Senior Counsel referred to the statement on p.48 of the Memorandum of Appeal and pointed out the stock index movement to substantiate his point of view.

Shri Chinoy referred the statement of "daily combined BSE and NSE Turnover Position of the Appellants and the changes in the BSE sensex" furnished in the appeal and pointed out that there was no correlation in the index movement vis-à-vis the Appellants' trading.

Learned Senior Counsel submitted that reference/reliance by the Respondent of significant net sales made by the Appellants during arbitrarily selected time slots ranging from 8 to 18 minutes to show that the Appellants trading contributed to the fall in scrip prices is contrary to the factual position. He submitted that the Respondent had arbitrarily chosen the time slots in which it could fit its hypothesis , that the contention that the selection of time slots pertains to specific periods of substantial price fall in scrips is incorrect. By way of example he stated that the sale trade of Wipro in the time slot 10.09-10.13 on February 23 of 1699 shares (as against 5000 shares contented by the Respondent) saw the price of Wipro go up by Rs.6.35 during the period. Learned Counsel referred to the data relied on by the Respondent that the sale of 5000 shares of Wipro by the Appellants constituted 41.6% of the net sales in Wipro during the period 10:09-10:13 on February 23.

However, the same quantity of 5000 shares of Wipro only constituted 7.79% of the net sales in Wipro on the same date for the time period 15:07-15:23. Shri Chinoy stated that the very figure of 5000 shares sale by Appellant 3 in the time period of 10:09-10:13 is itself incorrect as the Appellants had actually sold only 1699 shares of Wipro during the period. According to the learned Senior Counsel in the material provided to the Appellants by the Respondent pursuant to the High Court's order there was no mention of the net sales of Satyam in the time slot of 10:44-10:52 on February 23, that on 8th May the Respondent had only referred to net sales of Satyam during the time slot 10:35-10:57, that, as there was no significant fall in Satyam's price during that time slot, the Respondent has in the impugned order sought to rely upon another time slot in which it could fit its hypothesis.

With reference to the charge that the Appellants created an artificial market by placing orders at prices beyond the prevalent traded prices and thereafter canceling the same, the learned Senior Counsel stated that orders were put in at prices different from the prevailing market prices, that limit orders always have to be put in a price different from the prevailing market price as that is the very definition of a limit order. A sell limit order is always placed at a price higher than the prevailing market price and a buy limit order at a price lower than the prevailing market price, that is what exactly the Appellants have done. He further stated that the fact that 90% of all the orders above 1000 shares transferred by the Appellants were through disclosed offers negates the charge of attempting to influence/depress the market prices by making large sale offers.

Learned Senior Counsel stated that to substantiate its claim of a large number of cancellation of large sell orders, the Respondent had provided a list of 7 order cancellations as material relied upon by it. According to Shri Chinoy, to say that the cancellation of 100 shares sale order of Wipro and a 1000 shares sale order of Global Tele systems and a 6000 shares order of Satyam Computer had impact on the stock price movement is untenable. These stocks are traded in lakhs and crores in the market every day. He further stated that the list of cancellations provided by the Respondent show that each of the offered prices is higher than the price at the time of cancellation. He further stated that an equal number of buy orders were placed by the Appellants at below market prices on a disclosed basis and should the price move up, they are cancelled. According to him, the Respondent has ignored such buy orders as it would have inherently incompatible with its finding.

The learned Senior Counsel submitted that the Respondent's data on Appellants' exposure limit is wrong as is evident from the fact that on many dates the limit is shown to be negative, that infact the Respondent has admitted that these exposure figures relied on by it is incorrect as there cannot be any such negative exposure, that the Respondent still asserts on the basis of such incorrect data regarding exposure limits that trading was undertaken through Bang when limits were available with the Appellants. Though the Appellants had furnished to the Respondent a day by day explanation for all transactions done with Bang, it has been ignored by the Respondent.

Shri Chinoy submitted that shifting positions between the Appellants and Bang are not structured transactions as alleged. He stated that even though the trades are undertaken simultaneously with a view to minimising/eliminating losses, it does not in any way detract from the fact that they are genuine transactions undertaken through the stock exchange and both orders/transactions are matched off against the total limit order book of the market. All such shift transactions are at identical prices and therefore do not affect prices and are not intended to affect prices, and that such shift transactions are undertaken at prevalent market prices and cannot be said to be structured transactions.

Learned Senior Counsel submitted that the finding that the Appellants carried out portfolio operation in the garb of arbitrage trading and thereby prima-facie violated the stock broker regulations is unfounded. He submitted that even though the Appellants have been granted registration as portfolio managers, they never acted as portfolio managers. He submitted that arbitrage is the judicious use of price differences in different stock exchanges, that arbitrage is officially permitted and arbitrage opportunities are quoted in leading financial publications, and it is done by literally hundred of brokers; that such arbitrage transactions have no effect on prices except eliminating inter exchange short term mispricing and do not have any connection with the market crash. In this context Shri Chinoy referred to the observation by United States Court of Appeals in Sullivan and Long Inc. v. Scattered Corporation (http://www.kentlaw.edu/7circuit/1995/94-2015html) that "The plaintiffs call what Scattered did "market manipulation", a term that refers to tactics by which traders, like monopolists, create artificially high or low prices, prices that do not reflect the underlying conditions of supply and demand (Ernst & Ernst v. Hochfelder, supra, 425 U.S. at 199). The only artificial prices, however, were the price at which LTV stock sold between the confirmation of the plan and the expiration of the old stock. They were artificially high because they so greatly exceeded the stock's true value, which was only 3 to 4 cents. Far from launching a balloon, Scattered's short sales punctured a balloon, bringing prices down to earth where they belonged.

The name for what Scattered did is not market manipulation, but arbitrage. Arbitrageurs are traders who identify and eliminate disparities between prices and value, or as in this case between today's price and tomorrow's price where the difference cannot be attributed to any prospective change in value. See Falco v. Donner Foundation, Inc., 208 F.2d 600 (2d Cir. 1953) . By doing this, arbitrageurs promote the convergence of market and economic values that we suggested was the central objective of securities regulation. Consider a case in which the identical stock is selling for different prices on two exchanges at the same time. Since the value is the same, the prices should be the same. By buying stock on the exchange where the price is lower and reselling it on the other exchange, the arbitrageur brings about a convergence of price with value".

Shri Chinoy denied the allegation that Appellants have routed some of its transactions through Palombe Securities, an unregistered broking entity. He stated that the Appellants did not route any of their trade through Palombe Securities or any other unregistered broker entity, that the Respondent has not disclosed any material in support of its allegation in this regard. He stated that some proprietary trades were undertaken by Appellant No.1 , a regular constituent's agreement was executed between him and Bang, that contract notes were duly received and brokerage for such transactions was paid by him to Bang . Shri Chinoy submitted that the Appellants have specific limits on their exposure, that when such limits were exhausted, or when it appeared that limits should be made available for expected constituents transactions, proprietary positions were temporarily shifted to Bang, that these positions were either squared off, or shifted back to Appellant No.3 as and when limits became available with the Appellant. The amount of such trade Rs.600 crores is less than 2% of the Appellants total trades in F.Y. 2000-01. About the payment made by Bang to Palombe Securities, the learned Senior Counsel submitted that the Appellants are in no way concerned with or even aware of the same. With reference to Rs.20 lakhs received from Palombe Securities referred to in the order, the learned Senior Counsel stated that it was a short term loan, which had been duly reflected in the books of accounts of the Appellants and had duly returned the amount within 12 days.

Referring to the allegation that the shifting of positions between the Appellant No.3 and Bang are in the nature of structured transactions and that they vitiate the transparency and working of the market, Shri Chinoy referred to the reply filed by the Respondent wherein it has been stated that the Appellants knew the counter party even before executing the trade that the so called shifting of positions is nothing but deals negotiated in advance which frustrated the transparency trading and stated that the trades at Bang were primarily undertaken to shift positions from Appellant No.3 , so as to free exposure limits on the Appellants' cards or to create new position or to shift positions at Bang back to the Appellants. He submitted that all such shift transactions are at identical prices and therefore do not effect prices and are not intended to affect prices, further that all such shifts are undertaken at prevalent market prices and cannot be said to be structured transactions.

Referring to the Respondent's allegation of the Appellants having indulged in negotiated deal made in its reply, Shri Chinoy submitted that the issue is raised for the first time and that was not covered by the Show Cause Notice or the impugned order and cannot be taken cognizance of at this stage. He denied that shifting trades as stated by him constituted deals negotiated in advance.

Shri Chinoy stated that the observation in the impugned order that the Respondent do not agree with the contention of FGSB that circular trading can never take place in liquid scrips is only an opinion and not a charge, that such a general observation regarding circular trading in the order is totally irrelevant as the shifting position from Appellant No.3 to Bang does not constitute circular trading and the Respondent has not so held in its impugned order. He stated that the two are totally dissimilar as in circular trading an illiquid stock is traded between different persons at different prices in a circular manner so that there are generally no outstanding delivery obligations, but shift transactions are undertaken to shift/create positions in liquid heavily traded scrips, that in the case of a shift, both opposite transactions are undertaken for/by the same party at the same price and result in outstanding delivery obligations.

Shri Chinoy submitted that the finding in the order that the material disclosed/on record justified a conclusion that the Appellants had manipulated the price of the scrips and artificially depressed prices and that the Appellants' activities were not in consonance with the high standards of integrity and professionalism of a stock broker and portfolio manager and they were detrimental to the interests of investors on the securities market is not supported by any material, contrary to the record and vitiated by patent non application of mind. He submitted that the Respondent has failed to demolish the factual position put in support of the Appellants' case and on a flimsy alibi of pending inquiry it has chosen to keep quite. The fact that the Respondent has not come forward with the facts to defend its order, itself should be a ground to set aside the order. Shri Chinoy submitted that the impugned order is a final order and not an interim order and is being made out by the Respondent to buy time to harm the Appellants. Shri Chinoy in this context cited Hon'ble Supreme Court's decision in Re- An Advocate(AIR 1989 SC 245)that an 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 of doubt 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" and submitted that the Respondent, has not followed the said principle while arriving at the conclusions and inflicting the penalty on the Appellants that according to him it is not the intent of the authority, but the effect of the action on the persons concerned is important.

Shri Rohit Kapadia, learned Senior Counsel appearing for the Respondent explained the background of the case and submitted that the impugned order is nothing but an interim order passed by the Respondent in exercise of the powers vested in it and that a full fledged enquiry is going on and that at this stage it may not be proper to disclose each and every material available with the Respondent as that may impair or jeopardize the main inquiry itself.

Shri Kapadia submitted that almost all the legal issues raised by the Appellants have been answered by the Hon'ble Bombay High Court in Anand Rathi's case (supra), there is nothing left undecided on the issues raised by the Appellants, to be decided by the Tribunal. He extensively quoted from the said case to meet Shri Chinoy's argument and to show that the Respondent has adequate powers to issue such an order. In this context on the relevance of SEBI's role he draw the attention to para 15 of the order as under:

"15:The main issue raised in this petition is concerning the limits of powers of the SEBI Board which regulates capital market of the country. The capital market had acquired a status of the system as a part and parcel of the national economy where companies seek to raise funds for different types of transactions in the course of their business and individuals invest their savings. Previously there was Securities Contracts (Regulation) Act 1956 to prevent undesirable transactions in securities by regulating business or dealings therein and providing for certain other matters connected therewith. This Act provided for recognised stock exchanges and the control of the Central Government on such recognised stock exchanges. With the passage of time the Government felt more concerned with the healthy growth of the securities market and taking into consideration the relevant factors influencing the growth of the capital market it realised the necessity to pass a comprehensive legislation for setting up a statutory apex board to promote orderly and healthy growth of the securities market. SEBI was constituted vide Resolution dated 12.4.1998 of the Ministry of Finance, Department of Economic Affairs (Investment Division). On 30.1.1992 the Securities and Exchange Board of India Ordinance 1992 was promulgate by the President and ultimately the securities and Exchange Board of India Act 1992 was enacted and notified on 12.4.1992. It was deemed to have come into force on 30.1.1992 in terms of section 1(3) of the said Act. The statement of Objects and Reasons appended to the Bill when the enactment was made stated that

> "The capital market has witnessed tremendous growth in recent times, characterised particularly by the increasing participation of the public. Investers confidence in the capital market can be sustained largly by investors protection. With this end in view, the Government decided to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market".

On the powers of the Respondent under section 11 and 11B which has been questioned by the Appellants, Shri Kapadia cited the following observations by the Hon'ble High Court:

"17: The plain reading of section 11 itself shows that SEBI has to protect interest of investors in securities and 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-sec.(2) of section 11 and in due discharge of its duty cast upon SEBI as part of its statutory functions, it has been invested with the powers to issue directions under sec.11B. Section 12 deals with registration of stock Brokers, sub-brokers, share transfer agents etc. Sub-sec.(3) empowers the Board by passing an order to suspend or cancel a certificate of registration in such manner as may be determined by regulations. Proviso to sub-sec.(3) of section 12 reads as under:

"Provided that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard".

The aforesaid proviso in sec.12 is in regard to the penalty of suspension or cancellation of a certificate of registration. This, under the proviso, no doubt can be done only after affording a reasonable opportunity of being heard. In the present case we are not concerned with section 12(3). If an order suspending or cancelling a registration certificate had been passed in proceedings under section 12(3) the same would have been void as being not only contrary to the rules of natural justice but contrary to the rules of natural justice as expressly mandated by a statutory provision. The impugned order of 12.3.2001 passed under section 11B was an interim order pending inquiry and does not mandate a pre decisional hearing by the very nature of the situation and circumstances in which it was required to be invoked. SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992 have been framed in exercise of powers conferred by section 30 of the said Act. Regulations 26 to 29 lay down the procedure in the matter of suspension or cancellation of the certificate. However, the impugned order cannot be termed as either punishment or penalty. It is only an interim measure to prevent further possible mischief of tampering with the securities market. A preliminary enquiry into the conduct of the petitioners has been conducted. A preliminary report is also submitted and it is found prima facie that the petitioners have been indulging in manipulations of securities market. Hence, in order to safe guard the interests of the investors and to maintain the integrity of the market, the petitioners have been directed not to undertake any fresh business as brokers till the enquiry proceedings are completed and further proceedings in the matter are taken. In our opinion, the impugned order as passed by SEBI is only an interim measure which the SEBI is fully empowered in taking.

While considering the question as to whether the SEBI has authority of law under sections 11 and 11B to order interim suspension, we have to bear in mind that SEBI is invested with statutory powers to regulate securities market with the object of ensuring investors protection, orderly and healthy growth of securities market so as to make SEBI 's control over the capital market to be effective and meaningful. It cannot be gain said that SEBI has to regulate speculative market and in case of speculative market varied situations may arise and looking into the exigencies and requirements, it has been entrusted with the duty and functions to take such measures as it thinks fit. Section 11B is an enabling provision enacted to empower the SEBI Board to regulate securities market in order to protect the interests of the investors. Such an enabling provision must be so construed as to subserve the purpose for which it has been enacted. It is well settled principle of statutory construction that it is the duty of the Court to further Parliament's aim of providing of a remedy for the mischief against which enactment is directed and the Court should prefer construction which will supress the mischief and advance remedy and avoid evasions for the continuance of the mischief. We may quote the words of Denning, L.J. in Seaford Court Estates, Ltd. V. Asher (1949) 2 All E.R.155, at page 164, namely:- "..... when a defect appears, a Judge cannot simply fold his hands and blame the draftsmen. He must set to work on the constructive tasks of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which give rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give force and life to the intention of the Legislature." We have, therefore, to adopt the construction that gives force and life to the legislative intention rather than the one which would defeat the same and render the protection illusory. In the matter of construction of enabling statute, the principle applicable is that if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view. We thus find that the SEBI has ample authority in law to take the action under sec. 11B as has been taken by it.

We may also mention that the issue as to the power of the SEBI, to order interim suspension in pending investigation is no more res integra. In Ramrakh Bohra's case (supra) the Division Bench has considered this issue and categorically held that SEBI has power under sec.11 read with sec.11B to issue order of suspension by way of interim measure. Speaking for the Bench, Agarwal J. (as he then was) observed thus:

> "20. Having regard to the aforesaid provisions, it is straneously contended on behalf of the petitioners that the impugned order has virtually put a death-knell on the business of the petitioners. The same has undoubtedly stopped their entire business. It is, therefore, virtually an order passed under section 12 and this can be done only after affording the petitioners a reasonable opportunity of being heard. In our, prima facie, view the impugned order cannot be said to have been passed under section 12 as contended but the same has been passed under section 11B. It is in the nature of a direction restraining the petitioners from carrying on their business of dealing in shares. The same has been passed pending the inquiry into the manipulations. The same has been passed in the interests of investors and in the interest of the securities market.

Section 11B is an enabling provision enacted to empower SEBI to protect 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 subserve the purpose for which it is enacted. It would be the duty of the court to further the legislative object of providing a remedy for the mischief. A construction which advances this object should be preferred rather than one which attempts to find a way to circumvent it. In the case of Reserve Bank of India V. Peerless General Finance & Investment Co. Ltd. AIR 1996 SC 646 the Supreme Court has observed as under:

> "22 It would thus appear that Section 45-K (3) is an enabling provision enacted to empower the Bank to regulate the conditions on which deposits may be accepted by non-banking companies or institutions and (the) to prevent malpractices in the matter of acceptance of such deposits. Such an enabling provision must be construed as to subserve the purpose for which it has been enacted. It is a well accepted canon of statutory construction that "it is duty of the Court to further Parliament's aim of providing a remedy for the mischief against which the enactment is directed and the Court should prefer a construction which advances this object rather than one which attempts to find some way of circumventing it...."
>
> "27. Section 45-K is in the nature of an enabling provision. In the matter of construction of

enabling statues the principles applicable is that if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensible for the purpose of carrying out the purpose in view (see:Craies on Statutes, 7th Edn.p.258). It has been held that the power to make a law with respect of any subject carries with it all the ancillary and incidental powers to make the law effective and workable and to prevent evasion. (See Sodhi Transport Company Vs. State of U.P. 1986 (1) SCR 939 at pp. 947-48: (AIR 1986 SC 1099)"

23. In the case of ITO V.M.K. Mohammed Kunhi AIR 1969 SC 430 it has been observed, as under:

> "4..... It is firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective....."

If one has regard to the aforesaid principles, it would follow that the power which has been conferred by section 11B to issue direction are of a widest possible amplitude and are exercisable in the interests of investors and in order to prevent inter alia a broker from conducting his business in a manner detrimental to the interest of the investors or the securities market. The said power to issue directions under section 11B must carry with it., by necessary implication, all powers and duties incidental and necessary to make the exercise of these powers fully effective including the power to pass interim orders in aid of the final orders. The provision of section 11B it is to be noted has been introduced by an amendment brought about in 1995 and the same seeks to confer additional power on the board by way of interim measures, pending inquiry. The same is intended for the protection of the interests of the investors and the securities markets.

In the light of the above decisions and also in the light of the fact that the SEBI as regulator of securities market is empowered to take all necessary measures to protect the interest of the investors and the capital market, we have no hesitation in holding that the SEBI is fully competent and is empowered by sections 11 and 11B to pass interim order in aid of the final orders

…….

SEBI is charged with duty to protect the public and the integrity of the capital markets and as a Regulator, it is certainly empowered to order suspension as an interim measure pending investigation into serious allegations of manipulations and insider trading. We, therefore, over rule the submission that the SEBI had no power to pass the impugned order.

Shri Kapadia submitted that the legal position regarding the Respondent's power to issue directions under section 11B is now well settled in the light of the view held by the Hon'ble Court in Anand Rathi's case. Shri Kapadia explained the similarity in the sequence of events in Anand Rathi's case and the Appellants' case preceding filing of the appeal. He submitted that the Respondent has started a full fledged inquiry based on the prima-facie findings arrived on the basis of the material available before it and at this interim stage the Tribunal's interference would adversely affect the very inquiry itself, that it may even become redundant. He submitted that in Anand Rathi's case, the Hon'ble High Court had held that the interim order passed by the Respondent should be allowed to operate pending inquiry and the inquiry be allowed to be concluded smoothly to reach at a final conclusion, that the Respondent is ready to complete the inquiry as expeditiously as possible and within a time frame if so fixed by the Tribunal. Shri Kapadia reiterated that the impugned order is by way of interim measure and not a penal order. In this context he cited the following observations of the Hon'ble Court in Anand Rathi's case and submitted that the present case is in no way different as far as this aspect is concerned.

> "28: In the instant case the impugned order has been passed not by way of punishment or penalty but only by way of an interim measure, pending enquiry into the manipulations. There is a well settled distinction in law between the suspensions which are made as holding operation pending enquiry and suspensions by way of punishment. As observed by Lord Denning in Lewis Vs. Heffer (supra), (cited with approval by the Supreme Court in Liberty Oil Mills) there is a distinction between the suspensions which are inflicted by way of punishment, as for instance, when a member of the Bar is suspended for six months or when a solicitor is suspended from practice. He said (All E.R.page 364 para 13)
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> > "But they do not apply to suspensions which are made, as a holding operation,

pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has every questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply, see Furnell v. Whangarei High Schools Board".

Shri Kapadia submitted that in the Anand Rathi's case also Shri Rathi's Counsel had contended before the Hon'ble High Court that there was absolutely no valid grounds for passing the restraint order. In that context observation made by the Hon'ble Court was cited by Shri Kapadia as under:

"34: Dr. Singhvi then contended that there was absolutely no valid ground for passing the restraint order. It was urged that the SEBI's order is based on no material. It was emphasised that the information sought was not price sensitive and in any event the petitioners have not used the information nor passed the same to any other person. It was contended that the Circulars relied upon by SEBI do not in any manner preclude the President of the Exchange from making bona fide enquiries into the causes of the downfall of the market. And, the fact that such inquiries were made is not sufficient to infer any possible role of the President in the alleged manipulations. Dr. Singhvi took us through the transcripts sentence by sentence analysing each word with a view to show that the information sought by the President was of a general nature in discharge of his duty. The learned Advocate General on the other hand placed an entirely different interpretation on the two transcripts. SEBI by its impugned orders has also analysed parts of the transcripts. Regarding these portions of the transcripts discussing specific scrips and brokers Dr.Singhvi submitted that the same were volunteered by Arun Dhanawade and were not solicited by the 1st petitioners. He also submitted that the information collected by him on 2.3.2001 could not be used in future and therefore there was no purpose in issuing the impugned order. Dr. Singhvi submitted that the information obtained by him was available to anyone at any time. The learned Advocate General on the other hand submitted that this price sensitive information would not have been available to anyone at anytime. We decline the invitation to assess the material including an analysis of the transcripts. It is not for the Courts, especially while exercising powers under Art 226, to analyse the evidence in detail and come to conclusion on the merits of the case. The operation of Stock markets and the functioning of brokers is not only highly technical but very complex. The exercise to be carried out will invoke not merely the interpretation of the above circulars and the parameters of the authority of the President of the BSE but also the collection of the material relating to innumerable transactions, the corelation of the same various factors such as the time, and rate at which they were entered into and also the relationship between the conflicting entries thereto. It is the SEBI and not the Court that must carry out this analysis.

SEBI has recorded a prima facie finding that the information sought was price sensitive and further investigations is required in order to find out the role of the petitioners in the manipulations. The reason why the index fell, whether there was any bear cartel in operation, the role played by the petitioners or any of them in such manipulations are the subject matter of the investigation and inquiry. The reason why the President was anxious to get this information is also the subject matter of the investigation and inquiry. The extent to which the President used the information is precisely what is being probed by the SEBI. SEBI as a regulatory agency has been constituted with avowed object of protecting the interest of the investors. The decision taken by the regulatory agency in exercise of its powers is entitled to the greatest weight and the Courts will be slow to interfere with such decisions or orders."

On the question of debarring the Appellants taking up any fresh broking business etc. also, Shri Kapadia referred to the following observations of the Hon'ble High Court and stated that these observations are relevant to the present case:

"37: The question is not whether the petitioners should be permitted to trade in any particular scrip but whether in public interest they should be permitted to trade at all pending investigation into the allegations. Secondly, this very question would involve weighing the nature of the allegations the extent of the petitioners involvement and, most importantly the element of public interest. But there are all matters for the consideration of the authority making the order which in this case is SEBI. In the facts of this case it cannot be said that SEBI's orders are unwarranted in law or without any justification. The SEBI is charged with the duty to protect the public. What will protect the public must involve an exercise of discretionary powers. And so the question of the appropriate remedy is necessarily a matter of administrative competence."

Shri Kapadia refuted the allegation that the action is in the context of the 'Tehelka expose' and that the order is malafide. He narrated the sequence of events and stated that BSE/NSE had started enquiries on 2.3.2001 itself and on the basis of the material collected further investigations were required and which the Respondent, as market regulator had taken up. The fact that during the course of the investigation 'tehelka expose' happened has in no way affected the course of the inquiry. He further pointed out that the Respondent has initiated investigations in the case of several market intermediaries after the market fall on 2.3.2001 and the Appellants are not the only persons singled out. He strongly denied the allegation and submitted that the inquiry is a fact finding one to find out the role of the persons responsible for manipulating the market and depressing the prices. He submitted that not taking such step would be against the mandate given to the Respondent.

Shri Kapadia submitted that there is no dispute about the scope of judicial inquiry in an appeal and judicial review. He submitted that when an authority is already examining the matter, during the pendency of such examination, the Tribunal or the Court is not expected to interfere and create problem for the authority exercising its statutory powers in the normal manner. He said that the Respondent has now embarked on an elaborate enquiry following the procedure laid down by the law and as such the Tribunal should restrain from making any order on the basis of the preliminary finding arrived at by the Respondent preceding the inquiry. In this context he again referred to the observation made by the Hon'ble Bombay High Court and urged to follow the same principle by the Tribunal in this case. He stated that a detailed Show Cause Notice has already been served on the Appellants on 18.7.2001 giving them one month time to reply thereto, that it is for the Appellants to co-operate in the inquiry and get the matter decided early, and that in any case the Tribunal should not interfere and unsettle an order which is in effect in force from April, 2001.

The learned Senior Counsel referred to this Tribunals interim order dated 25.6.2001 in the appeal and stated that even if there is a prima facie case in favour of the Appellants, the Tribunal cannot go further ahead with the adjudication, as such a step would mean preempting the full fledged on going fact finding inquiry by the Respondent. He also pointed out that in the said order the Tribunal had held that the balance of convenience was not in favour of the Appellants, that having come to such conclusion, it is not proper or possible for the tribunal to ignore the said finding and proceed further in the matter as there are no two stages for the balance of convenience, that the balance of convenience has not shifted after issuance of the said order by the Tribunal on 25.6.2001. In this context Shri Kapadia cited the decision of the Hon'be Supreme Court in The Printers Mysore P.Ltd v. Pothen Joseph (AIR 1960 SC 1156), therein the Court had held that the power of the appeal Court to grant stay is discretionary and the discretion vested in the Court must be properly and judicially exercised. He also cited the Supreme Court decision in U.P Co.operative Federation Ltd v. Sunder Bros (AIR 1967 SC 249) in this regard. He also cited the decision of the Hon'ble Calcutta High Court in Haridas Mondal v. Sahadeb Mondal (AIR 1980 Cal. 140) following the above cases.

Referring to the Appellants version that short selling was permitted under law and that the market transaction undertaken in accordance with the legal provisions cannot be said to be in violation of the law to attract the penal consequences, Shri Kapadia stated that even if they had traded in accordance with the law, the action still can result in market manipulation resulting in artificial share price movement . In support of the said contention he cited Hon'ble Supreme Court decision in Needle Industries India Ltd v. Needle Industries Newly (Indias)Holding Ltd (1981) 51 co.cases 743, where the Hon'ble Court while dealing with the case of oppression and mismanagement had observed that "every action in contravention of law may not per se be oppressive for the purpose of section 397 of the Companies Act; a resolution passed by the directors may be perfectly legal and yet oppressive and conversely a resolution which is in

contravention of the law may be in the interest of the shareholders and the company. An isolated act, which is contrary to law may not necessarily and by itself support the inference that the law was violated with a malafide intention or that such violation was burdensome, harsh and wrongful. . But a series of legal acts following upon one another can, in the context lead justifiably to the conclusion that they are part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed." Learned Senior Counsel submitted that even if the action is legal if the intention is bad, it can be considered as manipulation. Shri Kapadia submitted that the market transactions alone by the Appellants had the manipulative effect. He submitted that the Respondent has come to a primafacie conclusion that the Appellants action had resulted in market manipulation, and this finding cannot be overturned at this stage. He said that it is not necessary at this stage to rebut the Appellants version on every aspect specifically, as the inquiry is still in progress. But there are broad indications that they had indulged in market manipulation by resorting to practices like 'limit sale', 'shifting','matching transactions', etc. He said matching transaction is one of the methods of market manipulation which requires detailed investigation, that the share market transactions and the activities of the market players are complicated and deeper investigation alone will bring tangible evidence, and that process is already on. The interim order is based on prima facie evidence which cannot be considered to have hundred percent evidence, that if the entire material had been available at the time of making the impugned order, there was no need for ordering a further detailed inquiry.

Shri Kapadia also relied on the U.S. Supreme Court decision in Ernest & Ernest (supra) and referred to the following paragraphs:

> "The legislative reports do not address the scope of 10(b) or its catchall function directly. In considering specific manipulative practices left to Commission regulation, however, the reports indicate that liability would not attach absent scienter, supporting the conclusion that Congress intended no lesser standard under 10(b). The Senate Report of S.3420 discusses generally the various abuses that precipitated the need for the legislation and the inadequacy of self regulation by the stock exchanges. The Report then analyses the component provisions of the statute, but does not parse 10. The only specific reference to 10 is the following:
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> > "In addition to the discretionary and elastic powers conferred on the administrative authority, effective regulation must include several clear statutory provisions reinforced by penal and civil sanctions, aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful {425 U.S.185, 205} functions . These sanctioned are found in sections 9,10 and 16." S.Rep. 792, 73d Cong. 2d Sess., 6 (1934)"

In the portion of the general analysis section of the Report entitled Manipulative Practices, however, there is a discussion of specific practices that were considered so inimical to the public interest as to require express prohibition, such as " wash" sales and " matched" orders, 25 and of other practices that might in some cases serve legitimate purposes such as stabilization of security prices and grants of options. Id., at 7-9. These latter practices were left to regulation by the Commission. 1934 Act 9 (a)(6), (c) 48 Stat. 890, 15 USC 78I (a)(6)(c). Significantly, we think, in the discussion of the need to regulate the latter category of practices when they are manipulative, there is no indication that any type of criminal or civil liability is to attach in the absence of scienter . Further more, in commenting on the express civil liabilities provided in the 1934 Act, the report explains:

> "If an investor has suffered loss by reason of illicit practices, it is equitable that he should be allowed to recover damages from the guilty party…… [T]he bill provides that any person who unlawfully [425 U.S 185, 206] manipulates the price of a security, or who induces transactions in a security by means of false or misleading statements, or who makes a false of misleading statement in the report of a corporation, shall be liable to in damages to those who have bought or sold the security at prices affected by such violation or statement. In such case the burden is on the plaintiff to show the violation or the fact that the statement was false or misleading, and that he relied thereon his damage. The defendant may escape liability by showing that the statement was made in good faith. " S.Rep. No.792 supra, at 12-13 (emphasis supplied)

The report therefore reveals with respect to the specified practices, an overall congressional indent to

prevent "manipulative and deceptive practices, which ….. fulfill no useful function" and to create private actions for damages stemming from " illicit practices", where the defendant has not acted in good faith. The views expressed in the House Report are consistent with this interpretation. H.R. Ref. No.. 1383, 73d Cong,2d Sess., 10-11, 20-21 (1934) (H.R. 9323). There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith., The catchall provision of 10(b) should be interpreted no more broadly".

> "Footnote 20: Webstors International Dictionary (2d).ed.1934) defines "device" as " [t]hat which is devised, or formed by design; a contrivance ; an invention; project; scheme; often, scheme to deceive; a stratagem; an artifice", and " contrivance" in pertinent part as "[a] thing contrived or used in contriving ; a scheme, plan, or artifice". In turn, "contrive" in pertinent part is defined as "[t]o devise; to plan; to plot……. [t]o fabricate….. design; invent…… to scheme……" The commission also ignores the use of the terms [t]o use or employ", language that is supportive of the view that Congress did not intend 10(b) to embrace negligent conduct."
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> Foot note 21: webster's International Dictionary, supra, defines "manipulate" as "to manage to treat artfully or fraudulently; as to manipulate accounts….. 4. Exchanges. To force (prices) up or down, as by matched orders, wash sales, fictitious reports ….. to rig".

Shri Kapadia referred to the statement of the Appellants in their letter dated 13.4.2001 to the Respondent wherein it has been stated that " as regards the trades done between us and Bang Equity, these trades get done only when we, at First Global, run into constraints in terms of base capital turn over limits, gross exposure limits, as well as per scrip exposure limits. In such cases we square up some of our positions at our end and create the same as similar position at a counter party's end". This is, ofcourse, subject to availability of capacity as the various parameters at their end. In this context the learned Senior Counsel referred to Annexure I of the Respondent's reply therein available exposure limit as per exchanges DS files and Appellants' trades at Bang has been given on certain days during the period 14.2. 2001 to 16.3.2001. Citing the figures stated therein, Shri Kapadia stated that even when the exposure limit had not reached the Appellants had shifted trade to Bang on certain days and as such the argument that 'shift' was made due to commercial expediency is not tenable. He said that the details are being collected on this issue in the inquiry.

The learned Senior Counsel referred to the trading figures furnished by the Appellants in compilation I to the appeal at p 41 to 51 and stated that the Appellants' carry forward sale position in total carry forward position is significant and not trivial as is being made by the Appellants and the Respondent is further inquiring into the matter. He pointed out that even on the basis of the data furnished by the Appellants a prima facie view can be drawn against the Appellants.

The learned Senior Counsel submitted that the practice regarding shifting, transactions with Bang and payment of remessier fee/ finding charge and the transactions with Palombe etc. are now under detailed enquiry.

Shri Kapadia submitted that it is totally incorrect to say that there is no primafacie evidence to support the charges, such as substantial short selling, unwinding of long purchase position, heavy /significant sales in certain scrips, naked short sales, pattern of placement and cancellations of large carry forward sale, Mandi Badla, routine trade effected through Palombe etc., that one has to go by the totality of the circumstances and come to the conclusion as to whether the Appellants had any role in manipulating the market and anyone or all of the activities of the Appellants over a period of time had resulted in bringing grief to the ordinary investors. He submitted that he is not making any item by item rebuttal of the submissions made by the Appellants at this stage as it is not considered necessary also at this interim stage of the proceeding. Shri Kapadia submitted that the Appellants are facing serious charges and their action had a telling impact on the Indian economy as a whole, and as such it is necessary that the impugned order be left undisturbed till the ongoing inquiry is completed.

Shri Chinoy's submission that this Tribunal being the plenary appellate forum is empowered to go into the question of fact and law is of no dispute. In support of the said submission the learned Senior Counsel had cited a number of authorities. In view of the settled legal position in this regard, I do not propose to discuss those decisions again here, except to cite a recent decision of the Hon'ble Supreme Court on the

subject, in Madhukar and Others v. Sangram and Ors. (2001) 4 SCC 756. In the said case the Hon.ble Court was considering an appeal against the dismissal of a suit in a first appeal by the High Court. While deciding the matter the Hon'ble Court observed:

> "We have carefully perused the judgement and decree of the High Court in the first appeal. We find that substantial documentary evidence had been placed before the trial court including certified copies of certain public records besides copy of the judgement and decree of the earlier suit (OS No. 93 of 1971). Oral evidence had also been led by the parties before the trial court which was noticed and appreciated by the trial court. However, the impugned judgement in the first appeal is singularly silent of any discussion either of documentary evidence or oral evidence. Not only that, we find that though the trial court had dismissed the suit on the ground of limitation as also on the ground that the decision in the earlier suit (OS No.93 of 1971) operated as res judicata against Defendant 1 only, the High Court has not even considered, much less discussed the correctness of either of the two grounds on which the trial court had dismissed the suit. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligation placed on a first appellate court. The judgement under appeal is so cryptic that none of the relevant aspects have even been noticed, The appeal has been decided in a very unsatisfactory manner. First appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgement in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (emphasis supplied)

In Santosh Hazari v. Purushottam Tiwari this Court opined: (SCC pp.188-89, para 15)

> "The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgement of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising alongwith the contentions put forth, and pressed by the parties for decision of the appellate court….. while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it"

Though there is no doubt about the powers of the Tribunal to examine the facts of the case afresh, evaluate the evidence and test the impugned decision with reference to the applicable law, the question is as to at what appropriate stage such power is exercisable. In all the cases cited by the learned Senior Counsel, the appeal was against final order passed by the authority down below. In the instant case that is not the case. The present appeal is against an interim order passed by the Respondent pending a full fledged enquiry. Ofcourse, Shri Chinoy had argued forcefully to establish that the impugned order is nothing but a final order. However, I am not prepared to accept the said argument for the simple reason that from the tenor of the order itself it is clear that it is an interim order. This is evident from the following extract from the order that " In view of the above, it is stated Mr. Shankar Sharma, Ms. Devina Mehta, First Global Stock Broking Pvt.Ltd., Virudhi Confirment India Pvt.Ltd and First Global Finance P.Ltd be debarred from undertaking any fresh business as stock broker, Merchant banker or Portfolio Manager pending inquiry. It is further directed that an order appointing an enquiry officer to enquire into the violations by First Global group of the provisions of the SEBI Act, Rules and Regulations be passed within a week. The enquiry officer after considering the material available on the basis of investigations conducted so far and the material, which may be further supplemented, will expeditiously complete the proceedings, after following the procedures as laid down in the regulations. On receipt of the enquiry officers' findings a view will be taken as to whether the entities above named should be permitted or debarred from carrying on activities as stated above" (emphasis supplied). If the order is a final order as stated by the learned Senior Counsel, there was no need to restrain the Appellants from undertaking business pending inquiry and to appoint an inquiry officer. In this context it is relevant to note that the Hon'ble Bombay High Court in Anand Rathi's case, had considered a similar order passed by the Respondent and treated it as an interim order. I do not see any reason to treat the impugned order differently for the purpose. A look at the background in which SEBI had passed the order under section 11/11B of the Act in Anand Rathi's case would show the striking comparison of both the cases. Background of the order in Anand Rathi's case briefly is as follows:

On 28.2.2001 Union Budget was presented. The Budget was widely seen as " an investor friendly budget" and the general expectation was that the stock markets in the country would respond positively, that in fact between 28.2.2001 and 1.3.2001 sensex rose by 201 points. But on 2.3.2001 strangely, the sensex dropped by 176 points. In the wake of such a drastic and unexpected fall in the market and apprehending possible attempts to manipulate the market, investigations were undertaken by the Respondent. Several stories were out attributing the cause to several factors and characters. Some news papers carried reports alleging that Shri Anand Rathi, who was the President of the Bombay Stock Exchange, had illegally obtained some price/market sensitive information from the surveillance department of the exchange in the presence of certain other brokers. Investigation by SEBI revealed that Shri Rathi had obtained information in respect of certain specific scrips and brokers from the exchange's surveillance department. In the aftermath, Shri Rathi resigned from the post of President (on 7.3.2001). Chairman, SEBI in exercise of powers under section 11 read with section 11B of the Act passed an order inter alia directing that Shri Rathi and his concerns not to undertake any fresh business as a broker until further orders .Though the order was passed without hearing Shri Rathi subsequently on 21.3.2001 he was given a post decisional hearing. The said order was challenged by Shri Rathi in a writ petition in the Hon'ble Bombay High Court. However, Shri Rathi was heard by SEBI during the pendency of the Writ Petition and thereafter on 30.3.2001, the Board passed an order confirming the earlier order dated 12.3.2001. In the said writ petition the Hon'ble High Court had examined in detail, the nature of the order, its sustainability, the Respondent's powers to issue such an order, etc. in detail. The writ petition was dismissed inter alia directing SEBI to complete the inquiry ordered by it, within the time frame stipulated by the Court. But the order debarring Shri Rathi and others undertaking fresh business was left untouched pending the inquiry.

From the sequence of events it could be seen that in the present case also an order was passed by the Respondent on 18.4.2001, the Appellants challenged the order in a writ petition. Subsequently the Respondent heard the Appellants and passed an order debarring them from undertaking fresh business, pending enquiry; ordered an enquiry and decided to appoint an inquiry officer for the purpose. Since the portion from the Hon'ble High Court's order in Anand Rathi's case relevant to the issues before us have already been extracted elsewhere in this order, I am not repeating the same here. The extracts are available at pages 32 to 43 of this order. As already stated above the impugned order is only an interim order and not a final order as claimed by the Appellants. Since it is an interim order and that an enquiry is in progress I do not consider it proper for the Tribunal to embark on an inquiry by itself into the facts of the case at this stage, but leave it to the enquiry officer concerned.

The Appellants' contention that the order has been made malafide and for extraneous reasons, remains unsubstantiated. I do not find any force in linking the inquiry with "tehelka expose" as alleged. By the Appellants' own version the enquiry started on 2.3.2001 with NSE/BSE asking for various information relating to the transactions. It was a preliminary data collection exercise at that point of time. The Respondent entered the scene only subsequently on examining those materials and realising the need to pursue the matter further. In the meantime "tehelka expose" happened. The enquiry was already on, even before the tehelka expose. Therefore, it is not correct to link the enquiry with the tehelka expose. The Respondent's alleged request to provide the details of the shareholding pattern of Buffalo Networks P.Ltd, the owner of Tehelka.com, its financial statements, etc. does not establish any nexus between the inquiry and the expose. The Appellants had admitted that they held 14.5% stake in the said Buffalo Net work and in that context there is nothing unusual, if in an inquiry the details of the ownership, management and financial position of the said investee company are sought. Further, no reason or any motive on the part of the Respondent to act in any vindictive manner against the Appellants has been even suggested. The Respondent, which is an independent statutory authority is not a person directly or indirectly mentioned in the expose. Further it is also to be noted that the Appellants are not the only persons subjected to investigations by the Respondent. Activities of several market intermediaries, not in any way connected with tehelka.com were also taken up for investigation. In the absence of sufficient material before me substantiating that the impugned order is malafide, the Appellants' allegation fails.

Now coming to the Respondent's power to issue such an order restraining the Appellants from undertaking business, there is nothing much left to be decided by the Tribunal, for the time being in view of the legal position set out by the Hon'ble High Court in Anand Rathi's case referred to above. In the said case Shri Rathi was also governed by the 1992 Regulations, like the Appellants herein and still the Hon'ble Court had held that an order under section 11/11B would be sustained . Following the said view I hold that the Respondent is competent to issue the impugned order, in terms of section 11/11B of the Act.

Shri Chinoy's submission that since the Respondent is not ready to explain the factual position relating to the Appellants' case stated in paras 5B.9 to 5B.22 in the appeal the Tribunal should go by the information available before it, is difficult to accept in the facts and circumstances of this case. If the impugned order had been a final order and not an interim one, I would have unhesitatingly accepted the said submission. Here that is not the case. The impugned order as already held, is an interim order pending enquiry and the inquiry is in full swing. I find enough force in the Respondent's unwillingness to disclose certain materials at this juncture fearing that disclosure of the same would hamper the inquiry in progress. In any case, sustainability of the final order would depend on the material facts that would be produced by the Respondent in support of its findings. At that point of time the Respondent will have to clearly state in its order the facts in support of each charge. I do not think that it is proper for the Tribunal at this stage to ask the Respondent to disclose the full material in view of the fact that inquiry is still going on . It is not that there is no material at all in the impugned order to hold that the order is totally baseless. The interim order is based on the primafacie findings arrived at by the Respondent.

As stated above since an inquiry is already in progress, it is felt that it will not be in order for the Tribunal to finally adjudicate the matter in the appeal now, as a finding of fact by the Tribunal on the charges leveled against the Appellants would in effect preempt the inquiry itself. Even though the factual position putforth by the parties have been stated in this order in detail I restrain from drawing any conclusion based on these facts, so as to enable the inquiry officer to hold a purposeful inquiry and the Respondent to pass an appropriate order.

In the light of the facts and circumstances of the case and also the legal position set out by the Hon'ble Bombay High Court in Anand Rathi's case, I do not consider it proper to interfere with the impugned order at present . Therefore the order is left undisturbed. It is upheld.

It is seen from the order that since April, 2001, the Appellants have been deprived of carrying on their business activities., The impugned order passed on 25.5.2001 states that the ban on the Appellants undertaking fresh business would continue pending inquiry, meaning thereby that if the inquiry is prolonged the ban on the Appellants taking fresh business also would continue. It may not be fair and proper to allow the inquiry to continue indefinitely and thereby subject the Appellants to undue hardship. But at the same time, it will be also unfair to deny reasonable time to the Respondent to complete such a complicated inquiry. According to the information furnished by the Respondent an enquiry officer has been appointed on 31.5.2001. A Show Cause Notice has been served on the Appellants on 18.7.2001. It is felt that in all fairness the inquiry be completed as expeditiously as possible. Shri Kapadia on a query from the Tribunal had stated the Respondent's readiness to conclude the inquiry early. Taking into consideration all the relevant aspects involved, it is felt that the inquiry and final order therein, need be expedited. In this context the Respondent is directed to complete the inquiry and pass final orders with detailed reasons within 10 weeks from today. It should not be a problem as the enquiry officer was appointed as far back as on 31.5.2001. In case the Respondent fails to complete the inquiry and pass final orders within the stipulated time, the order restraining the Appellants undertaking fresh business as Stock Brokers or Merchant Bankers or Portfolio Managers would cease to operate from the date of expiry of the said time limit, enabling the Appellants to undertake fresh business as Stock Brokers, Merchant Bankers and Portfolio Managers. The Appellants are directed to extend full co-operation in the inquiry, so as to enable the Respondent to complete the process within the time stipulated above. All contentions of the parties are expressly kept open. Respondent shall decide the matter without being influenced in any manner by the observations made in this order.

The appeal is disposed of in the above lines.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: 25th June 2001