BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Misc. Application No. 25 of 2012
And
Appeal No. 198 of 2011

Date of decision: 12.11.2012

Dipak J. Panchal
403, Shashvat,
Opp Gujarat College,
Ellisbridge,
Ahmedabad – 380 006. ……Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Deepak R. Shah, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mobin Shaikh, Advocate for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg.*)
S. S. N. Moorthy, Member

Per : P. K. Malhotra

These two appeals, no. 198 and 200 of 2011, arise out of a common order dated May 31, 2011 passed by the adjudicating officer of the Securities and Exchange Board of India (for short the Board) holding the appellants guilty of violating provisions of Section 12A(a), (b) and (c) of the Securities and Exchange Board of India Act, 1992 (the Act) and Regulations 3(a), (b), (c), (d) and 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1997 (for short the regulations) and imposing a penalty of ₹ 20 crores on the appellant in Appeal no. 198 of 2011 and ₹ 25 crores on the appellant in Appeal no. 200 of 2011.

2. Learned counsel for the appellants submitted that separate orders may be passed in these two appeals as the transactions of the two appellants in the securities market are separate and distinct. However, we are of the view that facts relating to the appellants in these appeals are same or similar and evidence against each of the appellants, to a large extent, is common. The appellants are husband and wife and investigations against both of them relate to Initial Public Offerings (IPO) scam that took place during the period 2003 to 2005. It is for these reasons that the Board has also passed a common order. We are of the view that no prejudice will be caused to the appellants by passing a common order in these appeals. Wherever necessary, we will deal with their case individually.

3. These cases arise out of the IPO scam that was unearthed by the Board in the year 2005-2006. Before we deal with the facts of the present case, let us briefly state how this scam was perpetrated. On receipt of information regarding alleged abuse and misuse of the IPO allotment process, the Board initiated a probe. During preliminary analysis of buying, selling and dealing in the shares allotted through IPOs of as many as 21 companies in the years 2003, 2004 and 2005, it transpired that certain entities opened a large number of demat accounts in fictitious/benami names. These entities acquired shares of those companies allotted in the IPOs by making large number of applications of small value so as to make them eligible for allotment under the retail individual investor category. The strategy adopted was that subsequent to the receipt of the IPO allotment, these fictitious/benami allottees transferred the shares to their principals called the 'key operators' who controlled their accounts and who, in turn, transferred most of the shares to the 'financiers' who had made available funds for executing the game plan. In view of the then booming market, the financiers then sold most of these shares on the first day of listing or soon thereafter thereby making profit out of the price difference between the issue price and the listing/sale price.

4. The appellants before us are members of the Panchal family including Ms. Roopalben N. Panchal, Mr. Bhargav Ranchodlal Panchal, Ms. Hina Bhargav Panchal, Mr. Arjav Nareshbhai Panchal. They have been collectively referred to

as ‘Panchal group’ by the Board. It is the case of the Board that the members of the Panchal group, along with Karvy Stockbroking Ltd., a depository participant and stockbroker, and certain other entities were involved as key operators in the scheme/arrangement of cornering shares under the category reserved for retail individual investors in the IPO of IL&FS Ltd., IDFC Ltd., Shoppers Stop Ltd., Datamatics Technologies Ltd., Nandan Exim Ltd., Yes Bank Ltd., SPL Industries Ltd., National Thermal Power Corporation Ltd., Disman Pharmaceuticals Ltd., Tata Consultancy Services Ltd., Nectar Lifesciences Ltd., Sasken Communication Technologies Ltd., Amar Remedies Ltd., Suzlon Energy Ltd., FCS Software Solutions Ltd., Gateway Distripark Ltd., Patni Computers Ltd. and TV Today Networks Ltd. It was alleged that the appellants are closely related with other members of the Panchal group. They held joint demat and bank accounts with them and shared the same address. The Panchal group opened bank accounts in their own names with Bharat Overseas Bank, Ahmedabad Branch and Indian Overseas Bank, Thaltej Branch, Ahmedabad. A large number of fictitious names were then added to these bank accounts which were subsequently used for opening thousands of demat accounts. One such bank account was opened in the name of Devangi Panchal (No. 50795 with Bharat Overseas Bank) though it is disputed by appellants and based on this bank account, 297 demat accounts were opened. Another bank account no. 54199 was opened in the name of Dipak Panchal, appellant in Appeal no. 200 of 2011, and this account was used for opening 3450 demat accounts. The demat accounts were opened in various devious combinations of names and surnames. The group is alleged to have created bank introduction letters for thousands of fictitious names and based on such introduction letters as proof of identity and address, the afferent demat accounts were opened. It is further alleged that the appellants, alongwith other members of the Panchal group and the depository participant, opened thousands of afferent accounts with the same address as that of the appellants. It is also alleged that the two appellants were having several joint accounts with other members of the Panchal group which were used for opening 37,240 afferent accounts and in making applications in various IPOs. The particulars mentioned in almost all

these accounts were alleged to be either of the appellants or other members of the Panchal group and all these accounts were in some way or the other related/connected to the bank account of atleast one member of the Panchal group. These bank accounts were also used to avail of finance for IPOs from the banks and other financiers also. The appellants and other entities of the Panchal group made thousands of IPO applications in the retail individual category. The findings of the Board further revealed that some entities of the Panchal group opened afferent accounts, some used them for making applications in retail category of IPOs, some helped in transfer of shares to financiers and some disposed of the shares. All of them did not play the same role but they complimented one or the other in executing the game plan. Therefore, the persons involved in the IPO can be put in three categories, namely the 'key operators', 'financiers' and others who are beneficiaries of the shares and who helped in making the scam successful. The appellants were found to be the major beneficiaries of this whole game plan and they fall in the last category except in respect of IPO of TV Today Networks where Dipak Panchal was also found to be a key operator. The total shares received by each members of the Panchal group are set out in the table below:-

	Devangi D. Panchal	**Deepak J. Panchal**	**Rupalben Panchal**	**Hena Panchal**	**Bharghav Panchal**	**GRAND TOTAL**
Amar Remedies	2,21,000					
TCS	52,336	10,842			1,581	
NTPC	15,00,000			21,400		
Shoppers Stop	5,775					
Nandan Exim	43,750				1,750	
Yes Bank	2,57,250				2,550	
Nectar	45,625					
SPL	7,100					
IL&FS	1,06,450				600	
IDFC	10,80,169	17,10,374		11,000	8,684	
Sasken	10,800		1404			
FCS	22,015		12600		2,400	
Suzlon	1,248		2367			
TV Today	41,200	35,500				
Dishman		17,000				
Datamatics		8,400				
Patni		1,15,250				
T O T A L	**33,94,718**	**18,97,366**	**16,371**	**32,400**	**17,565**	**53,58,420**
Percentage	**63.35**	**35.41**	**.30**	**.60**	**.33**	**100**

It is seen that the appellants before us are the major beneficiaries of the shares received out of the said IPO scam. The Board worked out the gains made by the appellants from the shares so received by them as under:-

Unlawful gains made by Devangi D Panchal (Appeal No. 200 of 2011)

Name of IPO	Name of Key operator form whom shares were received	No of shares received from key Operator	Issue Price (Rs) (3)	Date of sale	Market/ Off market	No of Shares sold (1)	Sale price* (2)	Actual Profit (1) *(2 - 3)
Amar	Roopalben Panchal	221000	28	16.09.05	Market Off market	204000 17000	50.02 56.05	44,92,080 4,76,850
TCS	Roopalben Panchal	52336	850	-	Pledge	52336	987.95	72,19,751
NTPC	Roopalben Panchal	1500000	62	05.11.04 to 24.12.04	Off Market Pledge	985918 514082	75.50 75.50	1,33,09,893 69,40,107
Shoppers Stop	Roopalben Panchal	5775	238	13.07.05	Market	5775	372.60	7,77,315
Nandan	Roopalben Panchal	43750	20	10.06.05	Off Market Balance	41000 2750	50.20 50.20	13,21,250 83,050
YBL	Roopalben Panchal	257250	45	12.07.05	Market Balance	175000 82250	62.83 60.80	31,20,250 12,99,550
Nectar	Roopalben Panchal	45625	240	20.07.05	Market ASE Balance	31223 10000 4402	267.95 260.10	11,52,183 88,480
SPL	Roopalben Panchal	7100	70	26.07.05	Market	7100	104	2,41,400
ILFS	Roopalben Panchal	106450	125		Balance	106450	185.15	64,02,967
IDFC	Roopalben Panchal	1080169	34	12.08.05-18.08.05	Market Off Market Balance	575586 403063 101520	67.78 69.50 69.50	1,94,43,295 1,43,08,736 36,03,960
Sasken	Roopalben Panchal	10800	260	09.09.05	Off Market Balance	10450 350	464.55 464.55	21,37,547 71,592
FCS	Roopalben Panchal	22015	50		Balance	22015	179.10	28,42,136
Suzlon	Roopalben Panchal	1248	510	08.11.05	Off Market	1248	692.85	2,28,197
TV Today	Self	86200	95		Market	41200	181.35	33,57,620
Total								**9,29,18,209**

*In respect of off-market transfer and balance in the demat account, closing price on the day of listing has been taken into consideration for the purpose of calculating gains.

Unlawful gains made by Dipak Panchal (Appeal No. 198 of 2011)

Name of IPO	Name of Key operator form whom shares were received	No of shares received from Key Operator	Issue Price (Rs) (3)	Date of sale	Market/ Off market	No of Shares sold (1)	Sale price* (2)	Actual Profit (1) * (2 - 3)
Dishman	Roopalben Panchal	17000	175	22/04/04	ASE	17000	541.25	62,26,250
TCS	Roopalben Panchal	10842	850	13/09/05 to 11/10/05	Off market	10842	987.95	14,95,654
Datamatics	Roopalben Panchal	8400	110		ASE	8400	127.20	1,44,480
IDFC	Roopalben Panchal	1710374	34	11-12/08/05	Market Balance	1180374 530000	69.20 69.50	4,15,49,165 1,88,15,000
Patni	Arjav Panchal	115250	230	23.02.04	Off market	113000	233.20	3,68,800
TV Today	Devangi Panchal	35500	95		Market	35500	181.35	30,65,425
Total								**7,16,64,774**

*In respect of off-market transfer and balance in the demat account, closing price on the day of listing has been taken into consideration for the purpose of calculating gains.

Keeping in view the role played by the appellants in the game plan of the Panchal group alongwith other entities, the Board was of the view that the appellants have indulged in fraudulent and manipulative activities within the meaning of the Act

and the regulations and employed deceptive schemes to corner shares reserved for retail individual investors.

5. A show cause notice dated June 14, 2006 was issued to Dipak Panchal under Rule 4 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by the Adjudicating Officer) Rules, 1995 (for short, inquiry procedure rules) setting out the charge against him and asking him to show cause as to why enquiry should not be held against him and penalty imposed. A supplementary show cause notice was also issued on October 20, 2009 and findings of the enquiry report were also made available. Similarly, show cause notice was issued to Devangi Panchal on June 7, 2006 followed by two supplementary show cause notices issued on June 14, 2006 and October 20, 2009. The reply received from them was duly considered. Opportunity of personal hearing was also afforded. However, it appears from the details recorded in the impugned order that the opportunity of personal hearing was not availed of by the appellants and, therefore, the adjudicating officer proceeded with the matter on the basis of information/material available on record and the submissions made by the appellants in response to the show cause notices issued to them. After considering the material available on record, the adjudicating officer found the appellants guilty of the charges leveled against them and imposed penalties as stated above. Hence these appeals.

6. We have heard Mr. Sunit S. Shah, senior Advocate for the appellant in Appeal No. 200 of 2011, Mr. Dipak R. Shah Advocate for the appellant in Appeal no. 198 of 2011 and Mr. Kumar Desai, Advocate for the respondent Board who have also taken us through the records in detail. At the outset, learned counsel for the respondent Board submitted that all the facts and the material documents which formed the basis of the show cause notice to the appellants are the same which formed the basis of show cause notice issued by the whole time member of the Board in separate proceedings under Section 11/11B of the Act. On the basis of the said facts and material, as set out in the show cause notice, order was passed by the whole time member of the Board against all members of the Panchal group

on February 25, 2011. While issuing directions against all the members of the Panchal group, the whole time member had observed that the acts of serious irregularities have enriched the appellants at the cost of retail individual investors and threatened the market integrity. Therefore, after taking into account the period of prohibition already undergone by the members of the Panchal group, pursuant to the interim order, they were further prohibited from buying, selling or dealing in the securities market, in any manner for a period of three months. In addition, the members of the Panchal group were also directed to disgorge the unlawful gains including interest thereon amounting to ₹ 36,03,37,542/-. Devangi Panchal was directed to disgorge the unlawful gains of ₹ 9,01,05,278/- alongwith interest of ₹ 4,50,52,639/- (total ₹ 13,51,57,917/-) and Dipak Panchal was directed to disgorge unlawful gains of ₹ 7,16,64,774/- alongwith interest of ₹ 3,58,32,387/- (total of ₹ 10,74,97,161/-). It was pointed out by the learned counsel for the Board that none of the members of the Panchal group, including the appellants, has filed any appeal against the said order which has now become final and binding on all members of the Panchal group including the appellants. Since the issues of both fact and law already stand concluded against the appellants by the order of the whole time member dated February 25, 2011, which has become final, the appellants cannot now reagitate/reargue the issues either on facts or on law.

7. To deal with this argument, let us have a look at the scheme of the Act. The Act was enacted to provide for establishment of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market and for matters connected there with or incidental thereto. Powers and functions of the Board are defined in Chapter IV of the Act. This chapter not only cast a duty on the Board to protect interest of investors in securities and to regulate the securities market by such measures as it thinks fit, it also empowers the Board to make regulations in matters relating to issue of capital, transfer of securities etc. and also issue joint or special orders prohibiting any company from issuing of prospectus, any other documents, or advertisement for soliciting money from the public for the issue of securities. It also empowers the Board to issue directions to any person or class of persons referred to in

Section 12 (i.e. intermediaries) or persons associated with the securities market. Admittedly, the Board had issued directions prohibiting members of the Panchal group from dealing in the securities market. A consistent view has been taken by this Tribunal in the past that exercise of this power is preventive and remedial and not punitive in nature. There is a separate chapter i.e. Chapter VIA of the Act which provides for penalties and adjudication. This Chapter provides for penalties and procedure for adjudication before any penalty, as stated in the Act, can be imposed. These are the proceedings which are subject matter of consideration in these appeals. The Act also empowers the Board to suspend or cancel a certificate of registration under Section 12(3) of the Act. It also provides for punishing a person under Section 11(6) of the Act for not cooperating in the investigations carried out by the Board. There is yet another provision in the Act i.e. Section 24 which provides that without prejudice to any award of penalty by the adjudicating officer, if any person contravenes or attempts to contravene or abets the contravention of the provisions of the Act or any rules or regulations made thereunder, he shall be punishable with imprisonment for a term or fine or both as provided therein. It will, thus, be seen that the Act contemplates three types of proceedings, namely,

1) remedial and preventive under Chapter IV of the Act;
2) penalties under Chapter V and VIA (proceedings civil in nature); and
3) prosecution under Section 11C(6) and Section 24 (proceedings criminal in nature)

There is no bar under the Act in taking all the three actions simultaneously or taking only one of the actions as the Board may deem fit. It does not automatically follow that if Board has initiated action under one of the powers enumerated above, there is no need to follow the laid down procedure for initiating action in exercise of powers conferred under other sections of the Act. The procedure laid down in all the three situations is different and authorities competent to take action are also different. Therefore, procedure, as laid down for each of the actions stated above, will have to be followed. We are, therefore, not

inclined to agree with learned counsel for the respondent Board that since the order passed by the whole time member in exercise of powers under Chapter IV of the Act has become final, the allegations against the appellants in adjudication proceedings under Chapter VIA of the Act cannot be agitated. However, we may hasten to add that in the absence of any additional material or facts placed on record, the earlier order passed by a competent authority will have a persuasive value, though not a conclusive proof, in respect of the findings arrived at by the Board. The charge in adjudication proceedings must stand and be proved on the basis of material that may be placed on record and considering the defence of the appellants as placed on record in adjudication proceedings.

8. Having said so, let us now deal with the arguments advanced on behalf of the appellants. Learned counsel for the appellants vehemently contended that there has been violation of principles of natural justice as the respondent Board has not followed the procedure laid down for holding enquiry under the enquiry procedure rules. It was further contended that extracts of the investigation report made available are unsigned, undated and without page numbers. The findings of the enquiry officer have not been provided. Learned counsel for the appellants also submitted that hearing could not be availed of on the scheduled dates for genuine reasons and the adjudicating officer of the Board has failed to provide inspection and hearing as prayed for by the appellants.

9. We find that on the basis of enquiry conducted by the Board, the adjudicating officer has clearly brought out the charge against the appellants in the show cause notice issued to them. Simply because the extract of the enquiry report annexed to the show cause notice does not contain page numbers or are not dated it is of no consequence if the parties are not disputing the contents thereof. If the show cause notice itself provides details of the charge against the appellants and they are given full opportunity to present their case, no prejudice can be said to have been caused resulting in violation of principles of natural justice. With regard to the submission that the hearing could not be availed of for genuine reasons, we find that the adjudicating officer has dealt with this aspect under the

heading ‘show cause notice, reply and personal hearing’ in paragraphs 5 to 19 of the impugned order. We find that as many as nine dates for hearing were fixed and the appellants failed to avail of the opportunity of personal hearing granted to them. The adjudicating officer also fixed two dates granting inspection of documents and the appellants neglected to take inspection of the documents referred to and relied upon in the show cause notice. Perusal of the aforesaid paragraphs of the impugned order clearly shows that the appellants were adopting dilatory and delaying tactics. Under such circumstances the allegation of breach of principles of natural justice is without any basis. A person alleging breach of natural justice must show that prejudice has been caused to him as a result of inspection not having been granted or opportunity of hearing not being afforded. It is, in fact, the appellants who failed to avail of this opportunity. Learned counsel for the appellants has relied on the decisions reported as **Canara Bank & Ors. Vs. Shri Debasis Shah [(2003) 4 SCC 557], Reckitt & Colman of India Ltd. vs. Collector of Central Excise [1996 (88) ELT 641 SC], Amrit Foods vs. Commissioner of Central Excise, UP [2005 (190) ELT 433 SC], Hindustan Polymers Co. Ltd. vs. Collector of Central Excise, Guntur [1999 (106) ELT 12 SC]** to contend that adherence to principles of natural justice is of supreme importance when a quasi judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequence is in issue. We have gone through these judgments. These judgments were given in the facts and circumstances of each case. Though the principle laid down in these judgments for adhering to rule of *audi alteram partem* is not in dispute, the appellants have failed to bring any material on record that either the opportunity of hearing was not granted or that the charges were such which are not understood by the appellants or they were not aware of the case which they are required to meet. The detailed narration given in the impugned order in paras 5 to 19 makes it clear that the adjudicating officer was more than willing to accommodate the appellants and it is in fact the appellants who were not willing to avail of the opportunity afforded to them. In the case of **Haryana Financial Corporation vs. Kailashchand Ahuja [2008 (9) SCC 31],** the Supreme Court has observed that

the theory of reasonable opportunity and principles of natural justice have been evolved to uphold the rule of law and to assist the individual to indicate his just rights. Whether, in fact, prejudice has been caused to the employee or not on account of denial to him of the report has to be considered on the facts and circumstances of each case. Even in cases where procedural requirements have not been complied with, action cannot be *ipso facto* illegal or void, unless it is shown that non observance has prejudicially affected the delinquent. In the case in hand, only reference has been made to the report of the enquiry officer. The show cause notice is a self contained document containing the allegation against the appellants and they were given opportunity to give reply, opportunity to inspect the documents and opportunity of personal hearing. If they have failed to avail of any such opportunity, no fault can be found with the Board. Since the show cause notice itself contains details of the charges against them, the appellants cannot contend that the principles of natural justice have been violated by not making available to them the enquiry report.

10. It was further contended by the learned counsel for the appellants that the procedure laid down for holding enquiry under Rule 4 of the enquiry procedure rules has not been followed. According to the learned counsel for the appellants, the adjudicating officer should have first issued a notice requiring the appellants to show cause as to why an enquiry should not be held against them and such notice should contain only the nature of offences that are committed by the appellants. It is only after considering the reply of the appellants that the decision to hold an enquiry should have been taken. However, only one notice under Rule 4(1) of the enquiry procedure rules was issued calling upon the appellants to show cause why penalty should not be imposed upon them. It was also contended that Sections 15HA and 15HB of the Act have been included in Rule 4(1) of the enquiry procedure rules only with effect from November 14, 2006 whereas appellants' transactions relate to the period 2003 to 2005. No enquiry, therefore, can be held under the said enquiry procedure rules for imposing penalty under Sections 15HA and 15HB of the Act.

11. Rule 4 of the enquiry procedure rules prescribes the procedure for holding enquiry and reads as under :-

> **"Holding of inquiry.**
>
> **4.**(1) In holding an inquiry for the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15HA and 15HB whether any person has committed contraventions as specified in any of sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15HA and 15HB the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than fourteen days from the date of service thereof) why an inquiry should not be held against him.
>
> (2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.
>
> (3) If, after considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative.
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> (4) On the date fixed, the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.
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> (5) The adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary the hearing may be adjourned to a future date and in taking such evidence the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872 (11 of 1872):
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> **Provided** that the notice referred to in sub-rule (3), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.
>
> (5A) The Board may appoint a presenting officer in an inquiry under this rule.
>
> (6) While holding an inquiry under this rule the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which, in the opinion of the adjudicating officer, may be useful for or relevant to, the subject-matter of the inquiry.
>
> (7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the adjudicating officer, the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so."

The enquiry procedure rules were issued by the Central Government in exercise of the powers conferred by clause (d)(a) of sub-section (2) of Section 29 of the Act for holding enquiry for the purpose of imposing penalty under Chapter VIA of the Act. The power to impose penalty does not flow from these rules. Power to adjudicate flows from Section 15-I of the Act, relevant portion of which reads as under :-

> "**15-I.Power to adjudicate.** – (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB, the Board shall appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty."

It may be noted that Sections 15H, 15HA and 15HB were substituted for Section 15H by Act no. 54 of 2002 with effect from October 29, 2002. Therefore, the power of the adjudicating officer to adjudicate for penalties to be imposed under Sections 15HA and 15HB was conferred in October 2002 and not in October 2006 when Rule 4 was amended. We are also of the view that the enquiry procedure rules only govern the procedure to be followed by the adjudicating officer while holding an enquiry and can be applied retrospectively to all the pending proceedings. On the issue that the adjudicating officer has issued only one notice under Rule 4(1) of the enquiry procedure rules, we are not inclined to accept the argument of the learned counsel for the appellants that the procedure was not followed. Simply because the adjudicating officer has referred to the section under which penalty can be imposed in the notice itself will not vitiate the proceedings. Perusal of the record shows that after issuing the show cause notice and after considering the reply to show cause notice, the adjudicating officer has issued a further notice fixing the date for appearance of the charged persons. This appears to be strictly in accordance with the procedure laid down in Rule 4 of the enquiry procedure rules. We, therefore, reject the arguments of the learned counsel for the appellants in this behalf.

12. It was then argued by the learned counsel for the appellants that action under Section 15HA of the Act can be initiated only if a person indulges in fraudulent and unfair trade practices relating to securities. The appellants have not dealt in securities and have not defrauded anyone. The appellants are only buyers of securities for consideration and that too after listing of the shares on the stock exchanges. Therefore, they are not part of the IPO scam. It was then argued that the provisions of Sections 12A(a), (b) and (c) are *in peri materia* with the provisions of regulation 3(b), (c) and (d) of the FUTP regulations. The Board has found the appellants guilty of violating these provisions without identifying the specific provision which has been violated. It was submitted that penal provisions are to be strictly construed and without identifying a specific provision, the appellants cannot be held guilty. Referring to the definition of fraud as contained in regulation 2(c) of the FUTP regulations, learned counsel for the appellants further submitted that their action does not fall within the definition of fraud nor are they persons dealing in securities. They are buyers of the securities in the ordinary course of dealings on payment of consideration. Such transactions cannot be construed to be fraudulent.

13. We are unable to agree with these submissions of the learned counsel for the appellants. The appellants may not fall within the category of intermediaries referred to in Section 12 of the Act but they are definitely persons associated with the securities market. The High Court of Gujarat in the case of **Karnavati Fincap Ltd. vs. Securities and Exchange Board of India [1996] 87 CompCas 186 (Guj)**, had an occasion to deal with this issue and this is what the High Court has held:-

> "The words "other persons associated with the securities market" have not been defined in the Act. The question then arises whether "persons associated with the securities market" takes its colour from persons enumerated in clause (ba)? If one has to go by the literal meaning, the interpretation which restricts the meaning of "persons associated with the securities market" to the persons enumerated in clause (ba) is not acceptable. In ordinary meaning, the persons associated with the securities market would include all and sundry who have something to do with the securities market. It is to be noted that the securities market in the sense is not confirmed to stock exchanges only. The words "persons associated with the securities market" are of much wider import than intermediaries. "Persons associated with" denotes a person having

> connection or having intercourse with the other, in the present case that "other" with whom a person is to have connection or intercourse in the securities market". The term "securities market" has not been defined under the statute. But taking the meaning of "securities" as defined in the Securities (Contracts) Regulation Act, 1956, because that is the definition of "securities" adopted under the SEBI Act, and the ordinary meaning of the word "market", it will mean a place or institution where the business of selling or buying of securities is carried on. Selling, buying or dealing with securities is the essential ingredient of a market. Though "securities market" has not been defined, the definition of "stock exchange" under section 2(i) of the Securities Contracts (Regulation) Act means any body of individuals whether corporate or not, constituted for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities. "Securities" has been defined under section 2(h) to include shares, scrips, stocks, debentures, debenture stock or other marketable securities of like nature in or of any incorporated company or other body corporate, etc., etc. What in noticeable is it refers to "marketability" of it. A stock exchange is more than a mere selling, buying or dealing place for securities, but adorns the role of an assisting agency in smooth conduct of securities business by suitable regulating or controlling authority. None the less a market cannot be conceived of without a seller or buyer who are the primary persons for whose purpose the market exists. All activities of business of selling and buying are related to the seller or the buyer. It is inconceivable to think that a buyer or seller of a scrip is not a person associated with the securities market, where or through which he transacts his business, whether as trader or as investor, of selling or buying the required scrip"

We have already noted that the findings of the Board are that some entities of Panchal group opened afferent accounts, some used them for making applications in retail category of IPOs, some helped in transfer of shares to the financiers and some disposed of the shares. We have also noted that all of them did not play the same role but they complemented one or the other in executing the game plan. The appellants fall in the category of those who are the beneficiaries of these shares and who made money by selling the shares which were transferred to their demat accounts by the key operators or the financiers. The definition of fraud, as contained in regulation 2(c) of the FUTP regulations, is wide enough to encompass the activity of the appellants within its fold. Penalty under Section 15HA can be imposed on "any person" who indulges in a fraudulent activity. The provisions of this section are not confined to intermediaries alone. Therefore, this argument of learned counsel for the appellants is also rejected.

14. Learned counsel for the appellants further argued that the investigation carried out by the Board was with regard to opening of alleged fictitious bank

accounts and demat accounts before allotment of shares. There is no allegation with regard to sale of shares after they were allotted in the IPO. The show cause notice has not brought out clearly the charge against the appellants. The show cause notice must be precise, unambiguous, person centeric and must clearly allege the role of each appellant. The appellants have simply purchased shares from Roopalben Panchal at prevailing market price/negotiated price and paid legal consideration. The adjudicating officer has ignored the relevant material and thereby committed a serious jurisdictional error in arriving at the conclusions. He has also ignored the fact that the alleged fictitious demat accounts were opened prior to the opening of the bank accounts. Roopalben Panchal has confirmed the sale of shares to the appellants indicating the number of shares sold, price at which these were sold and acknowledgement of the consideration received for the same. The appellants also submitted declaration of Roopalben Panchal confirming dealing in the shares. All the transactions have been reflected in the income tax returns which were filed much earlier than the order passed by the Board. Therefore, the appellants cannot be said to have committed any fraud as alleged by the Board and the findings of the adjudicating officer needs to be set aside on these grounds.

15. We are unable to accept these submissions of learned counsel for the appellants. As per the records available, the investigation was not confined to the alleged fictitious bank accounts or the demat accounts but was pertaining to the IPO scam. As discussed in the earlier part of this order, various entities have played different roles to make the whole IPO scam successful. The role of the appellants, as discussed above, pertains to permitting use of their bank accounts for opening fictitious demat accounts and arranging finance using these bank accounts, getting the shares allotted in the IPO to their accounts and ultimately selling these shares in the market thereby earning profit. In the facts and circumstances of the case, it cannot be said that it was a purchase simplicitor of the shares by the appellants from Roopalben Panchal who was another active member of the Panchal group in making the IPO scam successful. We are inclined to agree

with the learned counsel for the respondent Board that the confirmation letters submitted by Roopalben Panchal with regard to the number of shares sold, price at which they were sold and acknowledgement of consideration received from the appellants are self serving documents which were not produced at the first available opportunity. In none of these documents, amounts tally with the consideration for the shares purchased. The declaration given by Roopalben Panchal confirming dealings of the shares other than IPO and transactions in 1999 does not, in any way, mitigate the case against the appellants with regard to transactions in respect of shares under the IPO scam. On the basis of material placed on record, the transfer of shares from Roopalben Panchal to appellants is not in dispute. These were the shares which were purchased using fictitious demat accounts is also not in dispute. If the earnings under these shares are shown in the income tax returns, that by itself, cannot be a mitigating factor if transactions are otherwise found to be vioaltive of regulatory framework. Learned counsel for the appellants have referred to certain judgments including the order of this Tribunal in **Jatin Manubhai Shah & Ors. vs. Adjudicating Officer (Appeal no. 16 of 2010 decided on March 1, 2011), Moneygrowth Investment and Consultants Pvt. Ltd. vs. SEBI (Appeal no. 1 of 2008 decided on August 27, 2008), Rajendra G. Parikh vs. SEBI (Appeal no. 44 of 2009 decided on January 21, 2010), Sanjay Kumar Gupta vs. SEBI (Appeal no. 107 of 2007 decided on July 8, 2008) and Vikas Ganeshmal Bengani vs. Adjudicating Officer (Appeal no. 283 of 2009 decided on March 8, 2010)** to contend that the charge levelled against the delinquent must be precise and unambiguous. Vagueness in the show cause notice is fatal to the case. We have looked into these orders. While agreeing with the preposition that the charges in the show cause notice must be clear and unambiguous, we find that there is no such infirmity in the impugned order. When a case is to be established on the basis of circumstantial evidence, establishing the complicity of persons involved in fraudulent or unfair schemes is a challenge. There are situations where different layers of the transactions, each of which may fall within the four corners of law, but, if analysed cumulatively, may bring them within the fraudulent transactions as prescribed in the regulations.

Whether a transaction or series of transactions integrally connected with each other will fall within the purview of fraudulent transactions, as defined in the regulations, will depend upon the facts brought out on record during the investigation and the connection established between the parties. Examined in that perspective, the Board has placed sufficient material on record to prove that the transactions entered into by the appellants fall within the definition of 'fraud' as provided in regulation 2(c) of the FUTP regulations.

16. It was then argued by the learned counsel for the appellants that the Board has not indicated in the impugned order as to which provisions of regulation 3(a) to (d) and 4(1) of the regulations or section 12A(a) to (c) of the Act are violated. Let us have a look at these provisions:-

> "3. No person shall directly or indirectly-
>
> a) buy, sell or otherwise deal in securities in a fraudulent manner;
>
> b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act ort the rules or the regulations made thereunder;
>
> c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;
>
> d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder.
>
> **4. Prohibition of manipulative, fraudulent and unfair trade practices**
>
> (1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

> **12A. Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.-** No Person shall directly or indirectly-
>
> a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognised stock exchange any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;
>
> b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on recognised stock exchange;
>
> c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions if this Act or the rules or the regulations made thereunder;
>
> (d) to (f) .....”

It may be noted that the provisions of regulation 3 (b), (c) and (d) of the FUTP regulations are *in peri materia* with the provisions of section 12A(a), (b) and (c) of the Act and are couched in a general term to cover wide range of manipulative practices. Similarly, regulation 3(a) and 4(1) of the FUTP regulations prohibits dealing in securities in a fraudulent manner. Once a conclusion is arrived at that fraud has been perpetrated while dealing in securities, all these provisions get attracted in a situation like the one under consideration. We are not inclined to agree with the learned counsel for the appellants that Board should have identified as to which particular provision of the Act or the FUTP regulations has been violated.

17. After perusing the material placed on record and after hearing learned counsel for the parties, we are convinced that the appellants are part of the Panchal group. Some members of the Panchal group opened bank accounts with Bharat Overseas Bank and Indian Overseas Bank and these bank accounts were used to open several other afferent bank accounts and thousands of afferent demat accounts in the name of fictitious persons. These afferent demat accounts were used by members of the Panchal group to make applications in various IPOs. The

applications were made on the basis of loans taken from the two banks or Karvy, the depository participant, in the name of the afferent bank account holders or other demat account holders. Loans were also raised by members of the Panchal group from private financiers. On allotment of shares, these shares were transferred from the afferent accounts to the accounts of the Panchal group who further transferred the shares either in the demat accounts of the financiers or other members of the Panchal group including the appellants. The appellants then sold these shares and made substantial profit. On the basis of material placed on record, we cannot find any fault with the findings arrived at by the adjudicating officer of the Board that the appellants have indulged in fraudulent/manipulative activities and employed deceptive devise to corner the shares reserved for retail individual investors in the IPOs to defraud the retail individual investors and such activity is not only in breach the integrity of the market, but also vioaltive of the provisions of section 12A (a), (b) and (c) and Regulation 3 (a), (b), (c) and (d) and 4(1) of the FUTP regulations. There is a clear finding of the Board that the provisions, as noted above, stand violated and it was not necessary for the Board to give specific finding with regard to violation of each of the sub-regulation of the FUTP regulations or the sub-section of the Act.

18. Learned counsel for the appellants then argued that the penalty of ₹ 25 crores imposed on Devangi Panchal and ₹ 20 crores imposed on Dipak Panchal is too high and not commensurate with the violations alleged to have been committed by the appellants. The role of the appellants is that of selling the shares after they were listed and making profit thereon. They are neither key operators nor financiers. Even the key operators or the financiers who were the main perpetrators of the IPO scam have not been imposed such a heavy penalty. A chart has been made available by the appellants indicating the penalties imposed by the adjudicating officer in other cases relating to this IPO scam and the same is reproduced here for the sake of convenience :-

Annexure 3

"Details of orders of Ld. Adjudicating Officer u/s 15 I in case of IPO Ir

Sr.	Name of Financers	Date of orders passed by Ld. AO	Unlawful gains alleged by Ld. Ao	Penalties of AO	Note
1	Jayantilal Jitmal	29.09.09	10,64,354	31,00,00	
2	Sarvani Choudhary			6,00,000	
3.	Anand Choudhary			6,00,000	
4.	Netanand B Choudhary			2,00,000	
5.	Netanand B HUF Choudhary			5,50,000	
6.	Vinita Choudhary	30.09.09	9,58,959	7,00,000	
7.	Bhanuprasad Trivedi	31.03.10	3,63,00,000	4,00,00,000	1
8.	Ashok Bagrecha	31.12.08	16,931	1,00,000	
9.	Chandrakant A Parekh	11.01.10	22,45,120	66,00,000	
10.	Deepakkumar S Jain	31.12.08	84,08,495	10,00,000	
11.	Dushyant Dalal Puloma Dalal	02.06.11	4,94,19,379	14,00,00,000	2
12.	NSDL	27.04.07		5,00,00,000	3
13.	Opee Stock Link Ltd.	30.12.08	24,00,000	25,00,000	4
14.	Rajkumar Jain	30.10.09	10,00,000	15,00,000	5
15.	Roopal Panchal	31.01.12	22,02,162	15,00,000	
16.	Arjav Panchal	31.01.12		1,00,000	

Note:

1	Hon'ble SAT reduced the penalty to Rs. 2,00,00,000/- (Rupees Two Crores Only) vide
	Order dated 05-07-2010 in Appeal No. 197/2009
2	Hon'ble SAT remanded back the said Appeal No. 184/2011 decided on date 03-10-2012
3	Hon'ble SAT set aside the penalty vide order dated 14-01-2009 in Appeal No.68/2007
4	Hon'ble Sat set aside the penalty vide order 30-12-2009 in Appeal No. 20/2009
5	Hon'ble SAT set aside the penalty vide order dated 14-06-2010 in Appeal No.6/2010
6	It is pertinent to note that in many other entities in IPO Irregularity cases, order of Ld. WTM have been passed but no order u/s 15I of Ld. AO has been passed.
7.	When Karvy Group of Companies are admittedly Kingpin in the IPO Irregularity case, order of Ld. WTM is not passed after remand back by Hon'ble SAT on 30-06-2008. It is pertinent to note that, Ld. AO has not passed any order against Karvy Group of Companies till date."

19. It was further submitted that the whole time member of the Board, while passing the order under Section 11 and 11B of the Act, has not only debarred the appellants from dealing in securities, a disgorgement order has also been passed whereby the members of the Panchal group have been directed to disgorge the unlawful gains including the interest thereon amounting of ₹ 36,03,37,552/-. Devangi Panchal has been directed to pay a total amount of ₹ 13,51,57,917/- and Dipak Panchal has been directed to disgorge an amount of ₹ 10,74,97,161/-. In view of the lower monetary penalties on others and the order of disgorgement against the appellants and the role played by the appellants, only a nominal penalty should have been imposed on the appellants.

20. On the other hand, learned counsel for the respondent Board submitted that though the quantum of penalty is justiciable and can be gone into by the appellate authority, the appellate authority should not normally interfere with the quantum of penalty if the adjudicating officer has taken into account relevant factors for the purpose of arriving at the quantum. The penalty imposed by the adjudicating officer is appropriate and correct and ought not to be interfered with except to correct certain inadvertent errors/inaccuracies. Learned counsel for the respondent Board has also placed on record a chart indicating the proceedings initiated against persons involved in the IPO scam. It is a detailed chart running into five pages and giving the details of the proceedings initiated under Section 11B, adjudication proceedings, prosecution proceedings, CBI proceedings and consent proceedings under the Act and it contain details of 82 such entities. Suffice it to say that in the said chart the maximum amount of disgorgement against any other entity is in the case of M/s. Excell Multi Tech Limited, where it has been asked to disgorge an amount of ₹ 22,05,86,584/- and an interest of ₹ 8,82,34,634/-. No order in the adjudication proceedings appears to have been passed against the said entity, although, the said entity has played the role of a financier to make the IPO scam successful. The chart also indicates that a large number of cases have been settled in consent proceedings and no further action was initiated against the entities who settled the matters through consent proceedings.

21. We have given our thoughtful consideration to the submissions made by the learned counsel on both sides. Section 15HA of the Act under which the penalty has been imposed by the adjudicating officer on these appellants reads as under :-

> **"15HA. Penalty for fraudulent and unfair trade practices.-** If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher."

Section 15J of the Act also enumerates the factors to be taken into account by the adjudicating officer while adjudging the quantum of penalty and it reads as under :-

> **"15J. Factors to be taken into account by the adjudicating officer.-** While adjudging the quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-
>
> (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
>
> (b) the amount of loss caused to an investor or group of investors as a result of the default;
>
> (c) the repetitive nature of the default."

No doubt, while passing the order, the adjudicating officer of the Board has made reference to the above noted provisions and has imposed maximum penalty which could have been imposed under the Act. Simply because the Act provides for heavy penalties, does not mean that invariably heavy penalty alone should be imposed. Imposition of penalty depends on many factors including the factors enumerated in Section 15J of the Act. We cannot lose sight of the fact that the key operators and the financiers were more culpable for the whole IPO scam as compared to the appellants. In none of the cases made available by the appellants and the respondent Board, as noted above, such a heavy penalty has been imposed on any other entity involved in the case except on Excell Multi Tech Limited which was held to be guilty of financing the IPO transactions. We also notice that a large number of cases have been settled through consent proceedings. The

appellants were restrained from trading in the market for a sufficiently long period and in the order passed under Section 11 and 11B of the Act, they have been directed to disgorge an amount of more than ₹ 24.26 crores. Keeping in view the order passed by the whole time member of the Board against the appellants, the quantum of penalty imposed on other entities involved in the scam and also the fact that a large number of entities have been permitted to settle the matter through consent proceedings, we are of the view that ends of justice would be met by reducing the penalty in the case of the two appellants before us to ₹ 2 crores each.

22. While upholding the findings arrived at by the adjudicating officer, we reduce the penalty to ₹ 2 crores in respect of each of the appellants.

The appeals stand disposed of accordingly with no order as to costs.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S. S. N. Moorthy
Member

12.11.2012
Prepared & Compared by
ptm