IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED :26/9/2013

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THE HONOURABLE Mr. JUSTICE M. VENUGOPAL

W.P.No.29352 of 2012

and

M.P.No.1 of 2013

Arun Jain
C/o. Polaris Financial Technology Ltd
Polaris House
244 Anna Salai
Chennai 600 006. ... Petitioner

Vs

Securities and Exchange Board of India
Having Office at
SEBI Bhavan
Bandra Kurla Complex
Mumbai 400 051. ... Respondent

PRAYER: Writ Petition filed under Article 226 of Indian Constitution for a writ of Certioreri to call for the records pertaining to (1) Show Cause Notice dated 26/12/2011 in proceeding having reference No.IVD/ID7/SG/PSLL/38995/2011 and (2) the Impugned Order dated 9/10/2012 in proceeding having reference No.WTM/RKA/ID7/48/2012 passed by the respondent herein and quash the same as ultravires, having arbitrary, illegal and unconstitutional.

For Petitioner : Mr.V.T.Gopalan,
Senior Counsel
for M/s.Abudukumar Rajarathinam

For Respondent : Mr.A.Muthukumarasamy,
Senior Counsel
for M/s.Shivakumar & Suresh

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O R D E R

The Petitioner has focused the instant Writ of certiorari in calling for the records relating to

(1) Show Cause Notice dated 26/12/2011 in reference No.IVD/ID7/SG/PSLL/38995/2011 and

(2) the Impugned Order bearing Reference No. No.WTM/RKA/ID7/48/2012 dated 9/10/2012

and to quash the same.

2. Long Summation of Writ Facts:-

The Petitioner is the Founder, Chairman and Managing Director of Polaris Financial Technology Ltd., (formerly known as Polaris Software Lab Ltd), a Company registered under the provisions of the Companies Act. According to the Petitioner, the said Company is engaged in the business of providing financial software products and services to banking and financial services Industry. The Company is listed and its shares are quoted in the Madras Stock Exchange, BSE Limited and National Stock Exchange of India Ltd.

3. During the early part of the year 2000, the Company was negotiating to acquire a US based Company named 'Data Inc'. The negotiations resulted in a Memorandum of Understanding (MOU) on 1/4/2000, signed between the Company, represented by the Petitioner and Data Inc., represented by its President Mr.Arun Verma.

4. In accordance with the terms of the 'Memorandum of Understanding', the Company engaged an external consultant and a firm of certified Public Accountants to conduct due diligence on Data Inc including on matters pertaining to tax and accounts. The Company received the report from the firm of certified Public Accountants on 17/7/2000 and due diligence report from the External Consultant on 17/8/2000.

5. The Audit Committee of the Board of Directors of the Company met on 30/9/2000 and reviewed the proposal for acquisition. Based on the diligence report and the report of the Certified Public Accountant, the Audit Committee was of the strong view that the acquisition of Data Inc was not at all in the interest of the shareholders of the Company. The Audit Committee felt that 'Memorandum of Understanding' should not be converted into a comprehensive agreement and recommended no further negotiations should be held. The Company accepted the recommendations of the Audit Committee and the acquisition of Data Inc was called off. On the very same day, i.e., 30/9/2000, the Company informed the various

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Stock Exchanges about the decision not to proceed with the acquisition of Data Inc.

6. The Petitioner's Company Board of Directors, in the meeting held on 18/10/2000, took on record the recommendations of the Audit Committee. Thereafter, the Board of Directors, ratified the decision of the Company to cancel the 'Memorandum of Understanding.' In and around February 2002, the Respondent started addressing letters to the Company, requesting information pertaining to the trading of the Company shares. The Company co-operated with the Respondent in the fullest measure and from time to time, furnished all the information required by the Respondent. Some of the officials connected with the Petitioner's Company and he also appeared before the Respondent and gave statements as required by the Respondent.

7. However, to his shock and surprise, during the first week of October, 2005, more than five years, since the proposal to acquire Data Inc was cancelled, he received a show cause notice in Reference No.EAD/PG/50892/2005 dated 30/9/2005 from the Adjudicating Officer appointed by the Respondent under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer), Rules 1995. The Adjudication Show Cause Notice enclosed the findings of the Respondent's investigation and alleged that the Petitioner was liable for a penalty under Section 15 G of the Securities and Exchange Board of India Act, 1992.

8. The key findings of the investigation so far as it relates to the Petitioner are:

(i). The Petitioner, as Chairman and Managing Director of PSLL is an 'insider' for purposes of the Regulations;

(ii). The Due Diligence reports were received by PSLL in July/August, 2000 indicating the non-viability of the proposed acquisition. The findings in the Due Diligence Report represented price sensitive information, which, if passed into the public domain earlier, would certainly have impacted the price of the scrip, which it did when it was made public on September 30, 2000.

(iii). The Petitioner also was aware if the information about the failure of the proposed acquisition of Data Inc was made public, it would have an adverse impact on the marked price of the scrip.

(iv). The Petitioner as the Chairman and Managing Director and Chairman of PSLL had dealt in the shares of PSLL on the basis of this unpublished price sensitive information, during this period, on behalf of PHPL.

(v). The petitioner had engaged in insider trading with the intention of gaining unfair advantage for which he is liable to appropriate action under the SEBI Act."

9. The Petitioner challenged the Adjudication Show Cause Notice and the order of the Respondent appointing an Adjudicating Officer by way of filing a Writ Petition before this Court in W.P.Nos.40158 and 40261 of 2005 and sought quashing of the Adjudication Show Cause Notice on numerous grounds. This Court, by means of an interim order, restrained the Respondent from proceeding with the Adjudication Show Cause Notice.

10. The Respondent preferred a Writ Appeal No.241 of 2007 as against the interim order granted by this Court in the Writ Petition and during the pendency of the Writ Appeal and Writ Petitions, on 20/4/2007, the Respondent issued a Circular No.EFD/ED/Cir-1/2007 on "Guidelines for (i). Consent Orders and (ii). For considering requests for composition of offences under the SEBI Act, SC (R) Act and Depositories Act" (Consent Guidelines).

11. The Consent Guidelines enable the Petitioner who has reasonable grounds to believe or who has been notified as a potential securities law violation, to seek passing of a consent order to settle the matter, by filing an application in a prescribed format along with an affidavit of "Undertakings and Waivers".

12. The Petitioner applied for a comprehensive settlement of the cause of action (conduct) in regard to the 'Adjudication Show cause Notice' by way of an application dated 1/8/2007 in the prescribed format with an affidavit of "Undertaking and Waivers" (Consent Application) in terms of the Consent Guidelines with a view to settle the cause of action based on which the Adjudication Show Cause Notice was issued and proposed a full and final settlement, without accepting or denying guilt and sought passing of a consent order by the Respondent.

13. Based on the discussions with the respondent, the Petitioner, through letter dated 18/2/2008, revised the proposed settlement to Rs.7,00,000/- (Rupees Seven Lakhs only) towards full and final settlement of the matter subject to the undertaking and waivers. On 19/2/2008, the terms as proposed by the Petitioner (in

accordance with the consent guidelines) were placed before the High Powered Advisory Committee (HPAC).

14. The said HPAC recommended that the case be settled on a payment of Rs.7,00,000/- (Rupees Seven Lakhs only). The Petitioner, on 24/3/2008, through a Demand Draft, paid a sum of Rs.7 lakhs to the Respondent. In view of the aforesaid order of HPAC and taking cognisance of the consent terms, this Court, on 11/6/2008, dismissed the Writ Petition and Writ Appeal stating inter alia as under:-

> "When the matter is taken up for orders, the Learned Counsel on either side submitted that during the pendency of the writ petition, the writ petitioner moved the first respondent by an application dated 1/8/2007 for consent order along with an undertaking and waiver against the show cause notice dated 30/9/2005. In that application, the first respondent has passed an order on 17/3/2008 to the effect that the High Power Advisory Committee (hereinafter referred to as "HPAC") has recommended that the case might be settled on payment of Rs.7,00,000/- towards settlement and legal expenses in the matter. In view of the recommendation of the HPAC, SEBI has in principle agreed to accept the terms of the revised consent terms proposed by the Writ Petitioner, subject to certain change in the undertaking and waiver. The said amount was also paid by the Petitioner on 24/3/2008. Therefore, there remains nothing to be adjudicated either in the Writ Appeal or in the Writ Petition as the matter has already reached finality. The Learned Counsel for the Writ Petitioner has also produced before this Hon'ble Court a photostat copy of the order dated 17/3/2008 made by the Securities and Exchange Board of India."

15. Accordingly, the Adjudicating Officer, on 21/7/2008, passed the Consent Order which among other things mentioned as follows:-

> "6. In view of the above, it is hereby ordered that,
>
> (i). This consent order disposes of the said proceedings pending against the Notice under the Securities Exchange Board of India Act, 1992 in the matter of Polaris Software Lab Ltd., and
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> (ii). Passing of this order is without prejudice to the right of SEBI to take enforcement actions including

commencing/reopening of the pending proceedings against the Notice if SEBI finds that

(a). any representation made by the Noticee in the consent proceeding is subsequently discovered to be untrue.

(b). the Noticee has breached any of the clauses/conditions of undertakings/waivers filed during the current consent proceedings."

16. While this being so, on 26/12/2011, the Petitioner was surprised to receive a show cause notice from the Whole Time Member of the Respondent in purported exercise of powers under Sections 11, 11 B and 11 (4) of the SEBI Act. As a matter of fact, the facts and cause of action set forth in the Show Cause Notice are identical, adverbatim and are pari materia or identical to the Adjudication Show Cause Notice issued to the Petitioner at an earlier point of time.

17. The Petitioner, on 11/1/2012, filed a Preliminary Objection to the jurisdiction of the Respondent to issue the Show Cause Notice in view of the Consent Order passed by the Respondent. In spite of the objections raised by the Petitioner, the Respondent directed the Petitioner to be present for a personal hearing. In the course of personal hearing, the Petitioner raised the question of jurisdiction of the Whole Time Member of the Respondent to initiate proceedings in respect of a cause of action that was the subject matter of Consent Application and conclusively disposed off by the Consent Order. Also that, the Petitioner filed written submissions on 28/5/2012 and 20/6/2012 reiterating the Respondent's manifest lack of jurisdiction to issue the Show Cause Notice in the light of the Consent Order. However, the Respondent rejected the submissions of the Petitioner on the issue of jurisdiction and proceeded to adjudicate the matter on merits and passed the impugned order dated 9/10/2012 by restraining the Petitioner from accessing the securities market and further prohibited him from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner for a period of two years from the date of the impugned order.

18. Therefore, the Petitioner pleads that the impugned order dated 9/10/2012 was passed without jurisdiction and is contrary to the Consent Guidelines.

19. The Resume of Respondent's Counter averments:-

The Respondent (SEBI) is a statutory authority constituted by the Securities and Exchange Board of India Act, 1992 with a mandate to protect the interest of investors in securities and to promote the

development of, and to regulate the securities market. The Petitioner's Company shares are listed at Madras Stock Exchange, Bombay Stock Exchange and National Stock Exchange. The Petitioner's Company informed the Exchange that the Company had signed the "Memorandum of Understanding" dated 22/5/2000 with New Jersey based Data Inc for a strategic acquisition, which was expected to further strengthen the focus on providing software solutions to the Adjudicating financial services and insurance segments. In pursuance to the said Memorandum of Understanding, KPMG was assigned the work of doing the due diligence and the matters pertaining to tax and accounts of Data Inc., were assigned to Pandya Kapadia & Associates, CPA. The report from KPMG was received on 7/8/2000 and the report from Pandya Kapadia was received on 17/8/2000.

20. That apart, starting from the receipt of due diligence of the professional experts till the formal announcement of calling of the deal on 30/9/2000, the sequence of the events can be broadly stated as under:-

DATE	EVENT
21/8/2000	Petitioner sent an e-mail to Mr.Arun Verma of M/s. Data Inc., giving gist of findings of the Due Diligence Reports and seeking clarifications.
22/8/2000	Mr.Arun Verma replied to the e-mail giving necessary clarifications to the queries raised by the Petitioner and assuring him that assignment of contracts with the clients will not be a problem at all. As regards the audited financial statements, Mr.Arun Verma conveyed that he would The petitioner visited the US but no meeting was held with Mr.Arun Verma. A meeting fixed for 9/9/2000 was cancelled. The petitioner sent an e-mail to Mr.Vinay Gard with a copy to Mr.V.Thyagarajan (of the company) asking Mr.Vinay Gard to discuss the matter (with both the mails dated 5/9/2000 and 6/9/2000) with Mr.Paul Rajan, an attorney and "to prepare a draft letter for deal closure".
11/9/2000	Mr.Vinay Garg sent an e-mail to Mr.V.Thyagarajan of the company informing that the petitioner had already met Paul and asked him to send a draft letter to go from the petitioner side to Data Inc., pulling out of the deal.

DATE	EVENT
14/9/2000	Mr.Arun Verma in an e-mail to Monica Wadhera, representative of Data Inc., informed that the company "does not want to go forward with the transaction" and that "they want to close this out with minimal impact to all concerned."
30/9/2000	The Company had sent an e-mail to Mr.Arun Verma at 8.41 p.m., informing that the MOU between the company and Data Inc., has "expired" and is, therefore, "called off".

21. The Financial and Legal Due Diligence Reports brought out certain serious deficiencies/discrepancies/lapses in material aspects related to the proposed acquisitions. The Petitioner after taking a decision of "deal closure" on 6/9/2000, there was no justification to defer the formal communication of the said decision to stock exchanges till 30/9/2000. Not only the Company of which the Petitioner is the CMD delayed the communication of this decision to the Stock Exchanges till 30/9/2000, the petitioner also traded in the shares of the Company through his holding Company M/s.Polaris Holdings Pvt., Ltd., during the period from August 23, 20000 to September 19, 2000 while having access to unpublished price sensitive information in the form of the said adverse Due Diligence Reports. The Polaris Holdings Private Limited sold 15080 shares of the Company during the relevant period, sending these to the company after getting them 'completed this week."

22. On 5/9/2000, another e-mail was sent by the Company to Mr.Arun Verma mentioning inter alia that as per SEBI Rules, the entire transaction/acquisition must have been completed within 90 days, i.e., by August 23, 2000 which had already lapsed. This means that as per current RBI Rules, the Company will not be entitled to pursue the "Fast Track" route for acquisition, instead will have to cross many obstacles and obtain several clearances from RBI, FIPB and other appropriate authorities. The main cause of delay should be attributed to the discovery of the fact that Data Inc's accounts were only compiled and not audited as stated in the MOU. Under these circumstances, it was felt that it would be prudent for both the company and Data Inc., to revisit the proposal afresh separately at an appropriate time in future.

23. On 6/9/2000, Arun Verma replied to the Company conveying his "uneasy feeling" at the e-mail dated 5/9/2000. He expressed his strong disagreement with the representation that "the main cause of delay" in the matter was that the accounts of M/s. Data Inc., were

"only compiled and not audited." He also pointed out that he stood by the accuracy of the financials and that if an audited statement was imperative, the Company should have got it done as a part of the due diligence process. He also conveyed that he was "committed to the consummation of this transaction" and that he would be looking forward to meet the Petitioner on 8/9/2000 on his visit to the US to discuss the draft of the comprehensive agreement between the Company and M/s. Data Inc.

24. The share of the said Company was trading in the range of Rs.620/- and when the said Polaris Holdings Pvt Ltd., started selling the shares, the price touched a high of Rs.766 on 8/9/2000 and stood at Rs.711/- on 13/9/2000. During the month of October 2000, there was a rapid fall in the price of the scrip, which went down to as low as Rs.390 on 23/10/2000. Thus, the Petitioner was able to earn profits/avoid losses by gaining an unfair advantage over others who did the access to such information. The Petitioner's contention that acquisition of M/s.Data Inc was cancelled on the recommendation of the Audit Committee does not hold good as consideration of the Due Diligence Reports in matters of merger and acquisition (M & A) was outside the scope of functions of the Audit Committee. There was no statutory obligation or mandatory requirement for the Company under either the SEBI Act/Rules/Regulations or the provisions of the Listing Agreement to refer the matter under reference for consideration of the Audit Committee. Non-consideration of the Due Diligence Reports by the Audit Committee would not have involved any violation of the Listing Agreement/norms of corporate governance prescribed by SEBI. Moreover, final decision to call off the deal was already taken by the Petitioner as CMD of the Company on 6/9/2000.

25. The price of the scrip of the Company experienced varied degrees of fluctuations during the period between 28/8/2000 to 3/10/2000 and hence the Respondent by virtue of the powers bestowed on him under SEBI Act and directed an investigation into the dealings of the scrip of the Company of which the Petitioner is the CMD with a view to ascertain whether there was any violations of the provisions of the SEBI Act, the SEBI (Prohibition of Fraudulent & Unfair Trade Practices relating to Securities Market) Regulations 1995. The Petitioner's statement in the said investigation was recorded as per Section 11 C (5) of the SEBI Act, 1992. The said investigation would point out that the Petitioner had violated the provisions of the said Regulations. Pursuant to the findings, the Respondent appointed an Adjudicating Officer to enquire into the violations of the said Regulations on the part of the Petitioner as per order dated 5/9/2005 under Section 15 I of the SEI Act, 1992 read with Section 19 of the SEBI Act and Rule 3 of the SEBI (Procedure for Holding Enquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. The Adjudicating Officer also issued the show cause notice dated 30/9/2005.

26. The Respondent, on 20/4/2007, issued guidelines for Consent Orders. Based on the above guidelines, the Petitioner projected necessary application for passing of Consent Orders as regards the said adjudication proceedings. The said Consent Order was approved by this Court as per Order dated 11/6/2008 which recorded the Consent Order and disposed of the pending Writ Petitions.

27. Coming to the plea of the Petitioner that the facts and cause of action mentioned in the show cause notice are identical, ad verbatim and are pari materia or identical to the Adjudication Show Cause Notice issued to the petitioner, it is the stand of the Respondent that the said plea is not correct because of the settled legal position that SEBI Act empowers SEBI to take both civil and criminal action, if any person contravenes any of the provisions of the SEBI Act of the Rules and Regulations made therein. Indeed, the civil enforcement action including directions under Sections 11, 11 (B) of the SEBI Act and imposition of the monitoring penalty under the adjudication proceedings under Chapter VI A of the Act. In terms of Section 24 of the SEBI Act, the criminal action by way of prosecution is taken. Based on the facts and circumstances of the case, the nature, gravity and seriousness of the violations involved, the impact thereof on the Investors and Securities, market and illegal gains made or loss avoided etc., the SEBI may initiate one or all of those three actions.

28. The impugned show cause notice dated 26/12/2011 is therefore, independent of the proceedings settled under the consent order dated 21/7/2008. These proceedings are initiated independent of the adjudication proceedings and were not pending at the time of the consent order. The Consent Order dated 21/7/2008 only disposed of the pending adjudication and not the contemplated proceedings.

29. The power exercised under the impugned order was initiated under Section 19 r/w. Section 11 (1) and Section 11 (B) of the SEBI Act, 1992, r/w. Regulation 11 of SEBI (Prohibition of the Insider Trading) Regulation, 1992. Also, that the Reference of Waiver reproduced refers only to the adjudication proceedings and not to the action initiated under Section 11 or 11 (B).

30. The contention of the Respondent that the present show cause notice received is in violation of fundamental rights of the Petitioner is not correct. To invoke the principle of 'Double Jeopardy' under Article 20 (2) of the Constitution of India, it is necessary to establish that there was

(i). Prosecution

(ii). As a result of which an accused was punished

(iii). Punishment for the same offence under Section 26 of the General Clauses Act, 1897, when an Act or omission is an 'offence' under two or more enactments. In the instant case, the purported violation is not an offence contemplated to be punished twice under two different enactments. The Courts have held that adjudication proceedings under SEBI Act are civil proceedings.

31. The Respondent through its order dated 19/10/2012 held with the trades of PHPL done instructions of the Petitioner that he was in position of the unpublished price sensitive information. The above Company was modified by the information that was available with him. Hence, there was a clear finding that trading of the shares was modified by the Petitioner on the basis of unpublished price sensitive information. Therefore, the Petitioner was restrained from exercising the market in terms of the powers vested under Section 11 and 11 (B) of the SEBI Act, 1992 and SEBI (Insider Trading Regulations) 1992.

32. This Court, had not passed any orders on merits and merely recorded the terms of the Consent Order. The Consent Order had not disposed of the proceedings but only disposed of the adjudication proceedings. Also that the two proceedings, adjudication order and 11 B are separate since the Petitioner through his letter sought settlement of only one of the said proceedings viz., by letter dated 15/2/2008 addressed by the Respondent to SEBI setting out the revised consent terms in the context of show cause notice bearing Reference No.EAD/PG/5892/2005 dated 30/9/2005.

33. The Law permits multiple course of action on the same cause of action and the cause of action of adjudication and action under Section 11 B are permitted. The 'Doctrine of Estoppel' is not applicable for multiple course of action. The adjudication proceedings only dispose of the said proceedings and it had not disposed of the contemplated proceedings. The show cause notice was no longer an issue since already the final order was passed. The purported delay for the proceedings under Sections 11 and 11 (B) of the SEBI does not have any relevance to the issue of the consent order. The Respondent had not reopened the adjudication proceedings. Therefore, the principle of Estoppel or Waiver would not apply.

34. Section 15 T of the SEBI Act, 1992 provides for filing of an appeal before the Securities Appellate Tribunal by any person aggrieved by an order of the Board made on and after the commencement of the Securities Laws (Second Amendment) Act, 1999 etc. or to file an appeal against the order made by an Adjudicating Officer under this Act and as such, the filing of the Writ Petition by the Petitioner would make the Appellate Authority an otiose one.

35. Reply averments of the Petitioner:-

In respect of the same offence under the same enactment if an action was to be pursued, it should be pursued under all the Sections relevant to the alleged irregularity under Section 11 (2) (g) of the SEBI Act. The action that could be taken in respect of violation of Section 11 (2) (g) may be under Section 11 B, 11 (4) and Section 15 (G). The authority has no power or jurisdiction to take action in instalments, first under Section 11 (2) (g) and after the said action being compromised, to start over and action and proceedings under Sections 11 B and 11 (4) would be in clear breach of violation of Article 20 sub-clause (2) of the Constitution of India. The respondent by accepting the sum of Rs. 7 lakhs and dropping the proceedings under Section 15 G of the SEBI Act cannot after termination of the proceedings turn around and say that they would again in respect of the same offence under Section 11 (2) (g) now proceed for the said irregularity under Section 11 B and 11 (4) of the Act. The SEBI for a moment cannot forsake various clauses in the consent guidelines and then start the impugned proceedings once again. The acceptance of consent application and affidavit of undertaking is accepted by the Respondent was reported before the Division Bench of this Court and by an order dated 11/6/2008 in W.A.No.241 of 2007 and W.P.Nos.40158 and 40261 of 2005, this Court was pleased to hold that

> "Therefore, there remains nothing to be adjudicated either in the Writ Appeal or in the writ petition as the matter has already reached finality"

and recording the said submission, the Writ Appeal and Writ Petitions were dismissed as nothing remains to be adjudicated.

36. Consequent upon the final order passed by this Court in pending Writ Appeal and Writ Petition, the Adjudicating Officer/Respondent, sent a letter to the Petitioner enclosing the consent letter and the relevent portion of the consent order reads thus:-

> "6. In view of the above, it is hereby ordered that
>
> (i). This consent order disposes of the said proceedings pending against the Noticee under Securities and Exchange Board of India Act, 1992 in the matter of Polaris Software Lab Ltd., and
>
> (ii). Passing of this order is without prejudice to the right of SEBI to take

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enforcement actions including commencing/reopening of the pending proceedings against the Noticee, if SEBI finds that

a. any representation made by the Noticee in the consent proceedings is subsequently discovered to be untrue.

b. the Noticee has breached any of the clauses/conditions of undertakings/waivers filed during the current consent proceedings."

37. When a reference was made to the letter of the Petitioner dated 15/2/2008 described to be setting out revised consent terms which letter was missing in Petitioner's office and when the same was requested for the Respondent, wanted to deliberately deny the copy of the said letter and significantly the alleged letter dated 15/2/2008 was not reflected in the impugned order and therefore, it would be idle to contend about such a latter.

38. Further, in the impugned order, in paragraph 7, it is mentioned as follows:-

"..... I, therefore, find that this consent order settled only the adjudication proceedings that were pending before the Adjudicating Officer. It has not settled whole cause of action and all the proceedings, whether contemplated or pending. The present proceedings before me are independent of the proceedings already settled vide consent order dated July 21, 2008 and the said settled adjudication proceedings have not been reopened by the instant SCN."

But, there was no communication in the impugned order about the alleged letter of the Petitioner dated 15/2/2008.

39. The Petitioner's contentions:- The Learned Senior Counsel for the Petitioner contends that the Consent Guidelines do not permit the Respondent/SEBI to adjudicate on matters where the underlying cause of action which was (conducted) already settled by a Consent Order.

40. It is the submission of the Learned Senior Counsel for the Petitioner that the impugned order dated 9/10/2012 suffers from an error in seeking to distinguish the proceedings initiated under Section 15 G of the SEBI Act, 1992. In short, the argument advanced on behalf of the Petitioner by the Learned Senior Counsel is that the Consent Guidelines do not make any distinction and a matter of fact envisage settlement of "any/all disciplinary action that SEBI may

take" arising out the cause of action (conduct).

41. The Learned Senior Counsel for the Petitioner urges before this Court that originally a notice dated 30/9/2005 was issued under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 was issued to the Petitioner by the Adjudicating Officer of the Respondent mentioning that the Company in respect of the alleged insider trading committed by him on the basis of unpublished price sensitive information in the shares of Polaris Software Lab Ltd., the Adjudicating Officer was appointed through an order dated 5/9/2005 by the Respondent to enquire into and adjudicate under Section 15 I r/w. Section 15 G of the SEBI Act, an investigation was conducted into the alleged insider trading done by him in violation of Regulation 3 of SEBI (Prohibition of Insider Trading) Regulations, 1992 etc., and therefore, he was advised to show cause as to why an enquiry could not be held against him in terms of Rule 4 of SEBI (Procedure for holding enquiry and imposing penalty by Adjudicating Officer) Rules, 1995 and penalty not be imposed under Section 15 G of the SEBI Act, 1992.

42. The Learned Senior Counsel for the Petitioner brings it to the notice of this Court that the show cause notice dated 30/9/2005 was issued to the Petitioner by SEBI in regard to an incident that took place in the year 2000 and this Court, on 16/12/2005 granted interim stay in W.P.M.P.No.43068/05 in W.P.No.40158 of 2005 filed by the Petitioner (as against the show cause notice as well as the appointment of the Adjudication Officer on the ground that the same was done without jurisdiction) and later, the said interim stay was made absolute by this Court in W.P.M.P.No.43068 of 2005 in W.P.No.40158 of 2005 on 29/1/2007. Further, the Respondent/SEBI preferred Writ Appeal as against the order of interim stay being made absolute in W.A.No.241 of 2007 and on 20/4/2007, during the pendency of the Writ Petition and Writ Appeal, the Respondent/SEBI issued a circular specifying Consent Guidelines for

(i). Consent Orders

(ii). for considering request for composition of offences.

43. The Learned Senior Counsel for the Petitioner brings it to the notice of this Court that on 1/8/2007, the Petitioner applied for settlement of cause of action (conduct) in respect of adjudication of show cause notice dated 30/9/2005 without accepting or denying the guilt. Added further, the Learned Senior Counsel for the Petitioner submits that High Powered Advisory Committee (HPAC) on 18/2/2008, considered the consent terms of the Petitioner and recommended that the case be settled on payment of Rs.7 lakhs towards settlement charities and legal expenses. Also that the Respondent on 17/3/2008, informed the Petitioner that his consent proposal was accepted by High Powered Advisory Committee and directed the

Petitioner to pay Rs.7 lakhs within 15 days. It is not in dispute that on 24/3/2008, the Petitioner paid Rs.7 lakhs towards settlement charges and legal expenses.

44. Continuing further, the Learned Senior Counsel for the Petitioner draws the attention of this Court to the common final order passed by this Court dated 11/6/2008 in W.A.No.241 of 2007 and W.P.Nos.40158 and 40261 of 2005 whereby and whereunder in paragraph 5, it is inter alia observed that

> ".... In view of the recommendation of the HPAC, SEBI has in principle agreed to accept the terms of the revised consent terms proposed by the writ petitioner, subject to certain change in the undertaking and waiver. The said amount also paid by the petitioner on 24/3/2008. Therefore, there remains nothing to be adjudicated either in the writ appeal or in the writ petition as the matter has already reached finality etc.,"

and ultimately dismissed the writ Appeal and Writ Petitions without costs.

45. According to the Learned Senior Counsel for the Petitioner, the Consent Order dated 21/7/2008 passed by the Adjudicating Officer of the Respondent in EAD-5/VSS/RK/132523/2008 (communicated through Registered Post with Acknowledgment Due), wherein in paragraph 6 (i) has pellucidly stated that

> "This consent order disposes of the said proceedings pending against the Noticee under Securities and Exchange Board of India Act, 1992 in the matter of Polaris Software Lab Ltd.,"

and further in paragraph 6 (ii), it is mentioned that

> "Passing of this order is without prejudice to the right of SEBI to take enforcement actions including commencing/reopening of the pending proceedings against the Noticee, if SEBI finds that
>
> (a). any representation made by the Noticee in the consent proceedings is subsequently discovered to be untrue.
>
> (b). the Noticee has breached any of the clauses/conditions of undertakings/waivers filed during the current consent proceedings."

46. The impugned show cause notice dated 26/12/2011 issued by the Respondent to the Petitioner under Sections 11, 11 B and 11 (4) of the Act for the very same cause of action which was concluded by virtue of the consent order dated 21/7/2008 and it could not be ignored that the present show cause notice dated 26/12/2011 was a verbatim, line by line identical to the earlier show cause notice dated 30/9/2005 and as such, the same is not legally valid in the eye of law.

47. At this stage, the Learned Senior Counsel for the Petitioner projects an argument that the Respondent/SEBI in the consent order dated 21/7/2008 (which was passed in view of the Division Bench order of this Court dated 11/6/2008 (in W.A.No.241 of 2007 and W.P.No.40158 and 40261 of 2005) has not reserved any power to take further action against the Petitioner. Therefore, the impugned show cause notice is an illegal one.

48. The Learned Senior Counsel for the Petitioner refers to the Respondent/SEBI circular No.EFD/ED/Cir-1/2007 dated 20/4/2007, wherein the Guideline No.13 categorically among other things mention that

> "Consent order may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved."

49. But in the present case on hand, the Respondent/SEBI has not reserved its rights explicitly by mentioning that it has reserved an issue or claim to be settled at a later point of time.

50. Expatiating his submissions, the Learned Senior Counsel for the Petitioner forcefully contends that in the application for consent dated 1/8/2007 in paragraph 17 (K) (xiii), it was stated that

> "The Applicant submits that by the alleged sale of the shares, there was no fraud committed by him. There was no market manipulation and no undue benefits was intentionally derived."

and further in paragraph 17 (K) (XV), it was inter alia mentioned that

> "For the purposes of settlement, the applicant was not giving various disputed legal and factual submissions though few of them mentions in the petitions filed before the Madras High Court."

etc., and in the Undertaking/Waiver furnished by the Petitioner, Clause 7 specifies that

> "The Order passed pursuant to this application shall conclude any/all disciplinary action the SEBI could bring against me for the conduct (cause of action) set forth in this application (SCN)."

51. Also, Clause X of the Undertaking/Waiver furnished by the Petitioner together with application for consent dated 1/7/2007, latantly and patently shows that the Petitioner neither admit nor deny the findings of fact and the conclusions of law to be the part of the Consent Order etc., and further, by virtue of Clause 19, the petitioner has agreed that he would not plead limitation issue for reopening the case, if he violates/do not comply with the consent order and on 17/3/2008, the Respondent, passed an order relating to the acceptance of consent proposal and in paragraph 4, clearly the petitioner was advised to pay Rs.7,00,000/- (Rupees Fifty thousands only) to the respondent by way of a Demand Draft in favour of "Securities and Exchange Board of India" and in para 5, it was also stated that Demand Draft sent by the Petitioner to the Respondent pursuant to this letter shall be realised to them subject to the consent terms by the Honourable Court and disposing of the said cases by passing an appropriate order in the matter.

52. The Learned Senior Counsel for the Petitioner submits that the Respondent/SEBI never levied penalty of Rs.25 crores to the Petitioner and in the order dated 17/3/2008 of the Respondent, accepting the consent proposal submitted by the Petitioner, it was mentioned that HPAC had recommended that the case may be settled on payment of Rs.7 lakhs. Further, the consent terms proposed by the Petitioner were examined by HPAC and only thereafter, the case was settled on payment of Rs.7 lakhs by the Petitioner and when once the matter was compounded by the Respondent, it is the end of the matter and it is not open to the Respondent/SEBI to rake up the matter once again or resurrect the subject matter in issue by issuing the second show cause notice dated 26/12/2011 in an identical fashion viz., like that of the show cause notice issued on 30/9/2005.

53. The Learned Senior Counsel for the Petitioner submits that according to the Respondent, the incident of 'Insider Trading' took place during the year 2000 and the investigation was made in 2002 and that show cause notice was issued firstly on 30/9/2005 and that the consent order was passed on 17/3/2008 and the Respondent cannot harass the Petitioner by issuing the second show cause notice dated 26/12/2011, in a concluded matter/issue.

54. The Learned Senior Counsel for the Petitioner contends that in regard to a 'Insider Trading Issue', the investigation was already

made and that was mentioned as the reason for the issuance of the second show cause notice dated 26/12/2011 by the Respondent and in fact, the Respondent/Authority cannot take action in a brazen manner against the Petitioner and that too in an unconstitutional manner. To put it succinctly, the Learned Senior Counsel for the Petitioner strenuously contends that the Respondent/Authority is proceeding in instalment against the Petitioner and taking belated action by the Respondent is a jurisdictional issue and therefore, the Petitioner need not go before the Authority constituted under the SEBI Act.

55. The Learned Senior Counsel for the Petitioner refers to paragraph 7 of the impugned order dated 9/10/2012, wherein the Whole Time Member of the Respondent had mentioned that

> "The consent order dated July 21, 2008 clearly declared that it disposed of the adjudication proceedings pending against the Noticee found that this consent order settled only the adjudication proceedings that were pending before the Adjudicating Officer and that it had not settled whole cause of action and all the proceedings, whether contemplated or pending.

56. Also, in the impugned order dated 9/10/2012, the Whole Time Member of the respondent had found that the

> "present proceedings before him are independent of the proceedings already settled vide consent order dated July 21, 2008 and the said settled adjudication proceedings were not reopened by the instant show cause notice and these conclusions/observations/findings according to the petitioner were all perverse and an arbitrary one.

57. The Learned Senior Counsel for the Petitioner contends that the question of limitation being a jurisdictional issue, the present writ petition filed by the writ petitioner is perfectly maintainable before this Court.

58. To lend support to this contention, the Learned Senior Counsel for the Petitioner relies on the decision of the Honourable Supreme Court in STATE OF PUNJAB AND OTHERS Vs. BHATINDA DISTRICT CO-OPERATIVE MILK PRODUCERS UNION LTD (2007 (11) SCC at page 363), wherein at special page 364, it is held as follows:-

> "The question of limitation being a jurisdictional question, the writ petition was maintainable. Of course, ordinarily the writ Court would not entertain the writ application

questioning validity of a notice only, particularly, when the writ petitioner has an effective remedy under the Act itself. The present case, however, posed a different question."

59. Also in the aforesaid decision at page 76, in paragraph 17, it is observed as follows:-

"A bare reading of Section 21 of the Act would reveal that although no period of limitation has been prescribed therefor, the same would not mean that the suo motu power can be exercised at any time."

60. Further more, in the aforesaid decision at page 369, in paragraph 23, it is observed as follows:-

"The question as to what would be the reasonable period did not fall for consideration therein. The binding precedent of this Court, some of which had been referred to us heretobefore, had not been considered. The counsel appearing for the parties were remiss in bringing the same to the notice of this Court. Furthermore, from a perusal of the impugned notice dated 4/9/2006, it is apparent that the revisional authority did not assign any reason as to why such a notice was being issued after a period of 5 1/2 years."

61. The Learned Senior Counsel for the Petitioner submits that according to the Respondent, the incident of 'insider trading' took place in the year 2000, the investigation was carried out during the year 2002 and the first show cause notice was issued on 30/9/2005 and the consent order was passed on 21/7/2008 and it is not open to the Respondent to issue the second show cause notice dated 26/12/2011 at a belated point of time or with an inordinate delay. In this connection, the Learned Senior Counsel submits that if any action is to be taken by the Respondent, it should be taken within a reasonable time and what is the reasonable time cannot be decided by the Tribunal and in the second show cause notice dated 26/12/2011, no reasons were furnished for the inordinate delay in question and with a delay of nearly six years, the purported action was initiated by the Respondent in issuing the second show cause notice dated 26/12/2011 which cannot be countenanced in the eye of law.

62. The Learned Senior Counsel for the Petitioner on the question of delay relating to the issuance of second show cause notice dated 26/12/2011, cites the decision of this Court in

B.LOGANATHAN Vs. 1. UNION OF INDIA (rep. by SECRETARY TO GOVERNMENT OF UNION TERRITORY OF PONDICHERRY, DEPARTMENT OF LOCAL AIMINISTRATION), PONDICHERRY AND ANOTHER (2000 (3) LLN - 605), wherein it is held that

> "The inordinate and unexplained delay in service of charge memo would amount to violation of principles of natural justice and would vitiate the charge memo."

63. The Learned Senior Counsel for the Petitioner, in regard to his plea 'delay and latches' seeks in aid of the decision of this Court in C.P.HARISH AND 1. CENTRAL WAREHOUSING CORPORATION (represented BY ITS MANAGING DIRECTOR), NEW DELHI AND ANOTHER (2000 (3) LLN - 975), at special page 976, whereby and whereunder, it is mentioned that

> "inordinate delay will constitute denial of reasonable opportunity to the petitioner to defend himself and would amount to violation of principles of natural justice."

64. The Learned Senior Counsel for the Petitioner submits that an appeal as against the order passed by the Adjudicating Officer of the Respondent is to be filed by an aggrieved party within 45 days from the date of receipt of the copy of the order passed by the consent authority and in the present case, an inordinate and unexplained delay in issuing the second show cause notice dated 26/12/2011 to the Petitioner by the Respondent is not tenable and in this regard, he relies on the decision of this Court in M.ELANGOVAN Vs. THE TRICHY DISTRICT CENTRAL CO-OP. BANK LTD, REP. BY ITS GENERAL MANAGER, NO.1, FORT STATION ROAD, TIRUCHIRAPALLI 620 002 AND ANOTHER (2006 (2) CTC 635), wherein at special page 637, in paragraph 7, it is observed as follows:-

> "7. The learned Senior Counsel would rely upon the latest judgment of the Apex Court rendered in P.V.Mahadevan V. M.D., Tamil Nadu Housing Board, 2005 (4) CTC 403, for the proposition that inordinate delay in initiating the disciplinary proceedings and protracted disciplinary proceedings was more than punishment and on that basis, the charge memos were quashed."

65. Also in the aforesaid decision, at page 638 and at page 639, in paragraph 16, it is laid down as follows:-

> "Applying the said dictum in the present case, it can be safely concluded that the

petitioner has already suffered enough on account of the disciplinary proceedings and as pointed out and the mental agony and sufferings of the petitioner due to the protracted disciplinary proceedings would be much more than the proposed punishment itself. For the mistakes committed by the department in inordinate delay in the initiating proceedings and also during the conducting of the proceedings the petitioner shall not be made to suffer any further."

66. The Learned Senior Counsel for the Petitioner submits that the Principle of Law in regard to the 'unexplained and inordinate delay' in initiating a charge memo or show cause notice cannot be differently applied to a matter arising out of the SEBI Act.

67. The Learned Senior Counsel for the Petitioner refers to the last paragraph viz., 18 of the impugned show cause notice dated 26/12/2011 which proceeds to the following effect:-

"From the foregoing, it is clear that You, CMD and Promoter of PSLL had sold shares when you were in full knowledge that the price of the scrip may fall in the event of price sensitive information being made public. You have also, by your aforesaid dealing in shares of PSLL made unfair gains/profits to the tune of Rs.27.26 lakhs. It is clear that You are an "insider" within the meaning of Section 2 (e) of the SEBI (Prohibition of Insider Trading) Regulations 1992, by virtue of occupying the position of CMD and promoter of PSLL and that You are reasonably expected to have an access to unpublished price sensitive information in relation to the proposed acquisition by PSLL by virtue of your said position."

and submits that the Respondent has pre-judged the matter in issue against the Petitioner and therefore, the present Writ Petition No.29352 of 2012 filed by the Petitioner is very much maintainable before this Court.

68. In support of his contention, the Learned Senior Counsel for the Petitioner relies on the decision of the Honourable Supreme Court in SIEMENS LTD Vs. STATE OF MAHARASHTRA AND OTHERS (2006 (12) SCC 33), wherein it is held as follows:-

"Although ordinarily a writ Court may not exercise its discretionary jurisdiction in

entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction, but the question herein has to be considered from a different angle viz., when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice."

69. He also cites the decision of Honourable Supreme Court IN ORYX FISHERIES PRIVATE LIMITED Vs. UNION OF INDIA AND OTHERS (2010 (13) SUPREME COURT CASES - 427), wherein at special page 434 and 435, in paragraph Nos.22 and 23, it is observed as follows:-

"22. For a proper appreciation of the points involved, the show-cause notice is set out in extenso:

"Sub: Show-cause notice

Your attention is invited to our HQ's Letter No.IV/53/06-MS/HO dated 25/10/2007 and subsequent joint meeting with the buyer held at our head office on 5/9/2007 on the trade complaint received from M/s. Cascade Marine Foods, LLC, Sharjah.

At the meeting it was convincingly proved that the cargo shipped by you to the above mentioned buyer was defective and you have not so far settled the complaint. Therefore, in exercise of the powers vested in me vide Office Order Part II No.184012005 dated 25/11/2005 read with Rule 43 of the MPEDA Rules. I hereby cal upon you to show cause why the Certificate of Registration as an exporter granted to you should not be cancelled for reasons given below:-

1. It has been proved beyond doubt that you have sent sub-standard material to M/s. Cascade Marine Foods, LLC, Sharjah.

2. You have dishonoured your written agreement with M/s. Cascade Marine Foods, LLC,

Sharjah to settle the complaint made by the buyer as you had agreed to compensate to the extent of the value of defective cargo sent by you and have now evaded from the responsibility.

3. This irresponsible action have brought irreparable damage to India's trade relation with UAE.

Your reply should reach the undersigned within 10 days from the date of receipt of this letter failing which it will be presumed that you have no explanation to offer and we will proceed with action for cancellation of your registration certificate without further notice to you. If ultimately, a decision is reached to deregister you under the provisions of the MPEDA Rules, it will automatically entail deregistration under Registration Exporters' policy also."

23. Relying on the underlined portions in the show-cause notice, the learned counsel for the appellant urged that even at the stage of the show-cause notice the third respondent has completely made up his mind and reached a definite conclusion about the alleged guilt of the appellant. This has rendered the subsequent proceedings an empty ritual and an idle formality."

70. Also in the aforesaid decision at page No.437, in paragraph Nos.32 to 34, it is observed as follows:-

"32. Therefore, while issuing a show cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.

34. A somewhat similar observation was made by this Court in Kumaon Mandal Vikas Nigam Ltd V.

Girja Shankar Pant. In that case, this Court was dealing with a show-cause notice-cum-charge sheet issued to an employee. While dealing with the same, this Court in para 25 (SCC p.198 of the Report) by referring to the language in the show-cause notice observed as follows:-

"25. Upon consideration of the language in the show-cause notice-cum-charge sheet, it has been very strongly contended that it is clear that the officer concerned has a mindset even at the stage of framing of charges and we also do find some justification in such a submission since the chain is otherwise complete."

After para 25, this Court discussed in detail the emerging law of bias in different jurisdictions and ultimately held in para 35 (SCC p.201 of the Report), the true test of bias is:

"35. The test, therefore, is as to whether a mere apprehension of bias of there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom - in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained."

71. The pith and substance of the submission of the Learned Counsel for the Petitioner is that the Respondent/SEBI in the impugned show cause notice dated 26/12/2011 had given all findings against the Petitioner in the show cause notice dated 26/12/2011 and therefore, the said issuance of show cause notice dated 26/12/2011 was issued against the Petitioner in a predetermined manner and whether a person is an insider is an issue to be decided ancillarily and in fact, mentioning of the word 'insider' is redunt in the show cause notice.

72. The Learned Senior Counsel for the Petitioner submits that the show cause notice dated 26/12/2011 issued to the Petitioner is to keep the Company on tenter hooks and it is not known as to how by issuance of show cause notice, the investors are affected. Also that when the Respondent has issued the show cause notice dated 26/12/2011 against the Petitioner in a pre-determined manner, the Petitioner need not go before the alternative authority under the SEBI Act.

73. The next submission of the Learned Senior Counsel for the

Petitioner is that Article 20 (2) of the Constitution of India does not in terms mentions about the 'Double Jeopardy' but it is in practice in India that this constructive Doctrine applies to the suit proceedings. Although 'Double Jeopardy' is not a punishment in criminal sense. The term 'transaction' in English can be used in so many ways.

74. The Learned Senior Counsel for the Petitioner cites the decision of the Honourable Supreme Court in LT. GOVERNOR, DELHI AND OTHERS Vs. HC NARINDER SINGH ((2004) 13 SUPREME COURT CASES - 342, wherein at paragraph No.4, it is observed and held as follows:-

> "Reading of the show-cause notice suggests as if it is in continuation of the departmental proceedings. Lack of devotion to duty is mentioned as the reason for the proposed action which was the subject-matter of the earlier proceedings as well. The second proposed action based on the same cause of action proposing to deny promotion or reversion is contemplated under the impugned show-cause notice. Second penalty based on the same cause of action would amount to double jeopardy. The Tribunal was, therefore, right in law in annulling such an action. We are not expressing any opinion on the ambit or scope of any rule."

75. The Learned Senior Counsel for the Petitioner contends that 'Principle of Double Jeopardy' is extended to administrative proceedings. He also cites the decision of Honourable Supreme Court in LARSEN & TOUBRO LTD., Vs. COMMISSIONER OF CENTRAL EXCISE, PUNE II ((2007) 9 SUPREME COURT CASES - 617), wherein at special page 624, in paragraph 18, it is mentioned as follows:-

> "Furthermore, extension of the period of limitation entails both civil and criminal consequences and, therefore, reasons therefor must be specifically stated in the show-cause notice, in absence whereof the Court would be entitled to raise an inference that the case was not one where the extended period of limitation could be invoked (CCE VS. PUNJAB LAMINATES (P) LTD - (2006) 7 SCC - 431)".

76. It is the stend taken on behalf of the Petitioner that in law, same facts cannot be repetitively allowed to be raised by a party.

77. The Learned Senior Counsel for the Petitioner while adverting to the impugned order passed by the Respondent dated 9/10/2012 draws the specific attention of this Court to paragraph Nos.6 and 7 of the averments, viz.,

> ".... Though the proceedings under Section 11 B were also decided and contemplated in 2005, no show cause notice with regard to the same was issued till December 26, 2011 when the present SCN was issued.
>
> 7. I find that under the consent Circular dated April 20, 2007 of SEBI, a person can apply for a consent order inter alia in case of pending as well as contemplated proceedings. I note that the consent order dated July 21, 2008 clearly declared that it disposed of the adjudication proceedings pending against the noticee. I, therefore, find that this consent order settled only the adjudication proceedings that were pending before the Adjudicating Officer."

and submits that it is not open to the Respondent to dissect the cause of action and delay with it in parts as it likes. Also, he refers to paragraph No.9 of the impugned order dated 9/10/2012, wherein the Whole Time Member of the Respondent has found that the present proceedings do not undermine the Honourable High Court order in any way as contended by the Noticee and also further made a reference to the Circular dated 20/4/2007 for consent order issued by the Respondent, wherein in paragraph 13, it is crystal clearly mentioned that

> "Consent Order may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved."

and in the instant case, the Respondent/SEBI has not reserved its right to take further action.

78. The Learned Senior Counsel for the Petitioner proceeds to submit that HPAC confirmed the High Court order in W.A.No.241 of 2007 and W.P.Nos.40158 and 40261 of 2005 dated 11/6/2008 and in the instant case on hand, the Respondent has not exercised its jurisdiction properly, but in fact, grabbed the jurisdiction.

79. Apart from the above, the Learned Senior Counsel for the Petitioner submits that there is also a 'Principle of Constructive Res Judicata' which applies to the present proceedings before this Court and in fact, the 'Principle of Res Judicata' is extended to the administrative proceedings as per decision in HOPE PLANTATIONS LTD

Vs. TALUK LAND BOARD, PEERMADE AND ANOTHER {(1999) 5 SUPREME COURT CASES - 590}, at special page Nos.607 and 608, in paragraph No.26, it is held as follows:-

> "It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "case of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

80. The Learned Senior Counsel for the Petitioner relies on the decision of the Honourable Supreme Court in HEENA KAUSAR Vs. COMPETENT AUTHORITY {(2008) 14 SUPREME COURT CASES - 724}, wherein in paragraph No.16, it is observed as follows:-

> "The principle of "constructive res judicata", it is trite, applies also to a writ proceeding. Furthermore, admittedly, such a

contention has not been raised even in the second writ application. The documents which were necessary to be taken into consideration for determining the said question are also not before us. We, therefore, are of the opinion that it is not possible for us to go into the said question."

81. He also cites the decision of the Honourable Supreme Court in RAGHAVENDRA RAO AND OTHERS Vs. STATE OF KARNATAKA AND OTHERS {(2009) 4 SUPREME COURT CASES - 635}, at special page 639, wherein in paragraph 13, it is observed as follows:-

"As noticed hereinbefore, leave had been granted to avail any other remedy available only to those petitioners who had not been paid their salary for the period during which they worked as Accountants. The claim of the appellants is, thus, barred under the principles of res judicata/constructive res judicata, the earlier judgment having attained finality. It is now a well-settled principle of law that the principle of res-judicata applies also the writ proceedings."

82. The Learned Senior Counsel for the Petitioner submits that the 'Principle of Res Judicata' applies to the writ proceedings and as per Guidelines/Circular issued for consent order dated 20/4/2007, no matter is reserved and in this connection, he cites the decision of Honourable Supreme Court in VIRGO INDUSTRIES (ENG.) PRIVATE LIMITED Vs. VENTURETECH SOLUTIONS PRIVATE LIMITED {(2013) 1 SUPREME COURT CASES - 625}, at special page Nos.626 and 627, wherein it is held as follows:-

"Order 2 Rule 1 CPC requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 CPC contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. Leave of the Court is contemplated by Order 2 Rule 2 (3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In

such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is clear from a conjoint reading of the provisions of Order 2 Rule 2 (2) and (3) that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

The object behind the enactment of Order 2 Rules 2 (2) and (3) CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be

granted upon due satisfaction and for good and sufficient reasons.

GURBUX SINGH V. BHOORALAL (AIR 1964 SC 1810); DEVA RAM V. ISHWAR CHAND (1995) 6 SCC - 733) BENGAL WATERPROOF LTD., VS. BOMBAY WATERPROOF MFG. CO (1997) 1 SCC - 99 (followed).

The cardinal requirement for application of the provisions contained in Order 2 Rules 2 (2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. In the instant case though leave to sue for the relief of specific performance at a later stage was claimed by the plaintiff, admittedly, no such leave was granted by the Court."

83. The Learned Senior Counsel for the Petitioner submits that when the Respondent has not reserved its right to take further action

against the Petitioner as per consent order dated 21/7/2008 then it is estopped from

taking action against the Petitioner by issuance of second show cause notice dated 26/12/2011.

84. Also that the Learned Senior Counsel for the Petitioner invites the attention of this Court that the Respondent has no time limit for passing an order.

85. Respondent's submissions: Conversely, it is the submission of the Learned Senior Counsel for the Respondent that Whole Time Member of the Respondent has passed the impugned order dated 9/10/2012 and by virtue of paragraph 31, the Petitioner PAN No.AAHPJ6020W was restrained from accessing the securities market and further prohibit him from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner for a period of two years from the date of this order and this was passed by the concerned Authority by exercising powers conferred under Section 19 r/w. Section 11 (1) and 11 B of the Securities and Exchange Board of India Act, 1992 and Regulation 11 of the SEBI (Prohibition of Insider Trading) Regulations, 1992.

86. Further, it is the contention of the Learned Senior Counsel for the Respondent that as against the impugned order dated 9/10/2012 passed by the Respondent under Section 15 T of the SEBI Act, 1992, an appeal lies before the Securities Appellate Tribunal, refers to Section 15 T (1) and (2) which reads as under:-

> 15 T: Appeal to the Securities Appellate Tribunal:-
>
> (1) Save as provided in Sub-Section (2), any person aggrieved -
>
> (a). by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or
>
> (b). by an order made by an adjudicating officer under this Act,
>
> may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.
>
> (2). No appeal shall lie to the Securities Appellate Tribunal from an order made -

(a). by the Board on and after the commencement of the Securities Laws (Second Amendment) Act, 1999;

(b). by an adjudicating Officer."

87. The Learned Senior Counsel for the Respondent submits that the subject of 'insider trading' is a technical subject and as such filing of the present writ petition by the petitioner in W.P.No.29352 of 2012 is ex facie not maintainable in Law. Also, the Learned Senior Counsel for the Respondent contends before this Court that the Securities Appellate Tribunal being a viable and alternative remedy available to the Petitioner and circumventing the said remedy, filing of the present Writ Petition of the Petitioner is not legally tenable.

88. The Learned Senior Counsel for the Respondent submits that the present show cause notice dated 26/12/2011 issued under Sections 11, 11 (B) and 11 (4) of the SEBI Act is an independent proceeding not connected with earlier show cause notice dated 30/9/2005.

89. Further, according to the Learned Senior Counsel for the Respondent, Consent Order dated 21/7/2008 only disposes the show cause notice dated 30/9/2005 and in fact, the consent circular dated 20/4/2007 r/w. consent order dated 21/7/2008 that clearly point out that the consent order disposes of the proceedings under Section 15 (g) of the SEBI Act pending against the Noticee and in fact the adjudication proceedings under Section 15 of the SEBI Act is different from the scope of the proceedings under Section 11 of the SEBI Act.

90. The prime contention of the Learned Senior Counsel for the Respondent is that the Consent Order dated 21/7/2008 passed by the Adjudicating Officer of the Respondent only speaks of the settlement of show cause notice dated 30/9/2005.

91. At this stage, the Learned Senior Counsel for the Respondent cites the decision of the Honourable Supreme Court in SECURITIES AND EXCHANGE BOARD OF INDIA V. AJAY AGARWAL {(2010) 3 Supreme Court Cases 765}, wherein at special page No.766, it is held as follows:-

"Article 20 (1) applies where an accused has committed an "offence" and has been subjected to a "penalty". The respondent has not been held guilty of any offence, nor has been subjected to any penalty. He has merely been restrained from associating with any corporate body in accessing the securities for a specified period. "Offence"

is an act of omission or commission which is punishable by any law for the time being in force. Protection under Article 20 (1) of the Constitution is not available to the respondent."

92. In support of the contention that the present writ petition No.29352 of 2012 filed by the Petitioner is not maintainable before this Court, the Learned Senior Counsel for the Respondent cites an order of this Court dated 24/7/2009 between N.NARAYANAN Vs. SECURITIES AND EXCHANGE BOARD OF INDIA (W.P.(MAD) No.6090 of 2009) reported in MANU/TN/2309/2009, wherein in paragraph 37, it is observed and laid down as follows:-

"Therefore, having regard to the fact that alternative remedy is available to the petitioner and that alternative remedy is effective and efficacious as the Securities Appellate Tribunal is presided over by a retired Judge of High Court and two persons, having full expertise in respect of securities and further appeal remedy is provided to the Hon'ble Supreme Court against the decision of the Tribunal, the present writ petition filed by the Petitioner cannot be entertained and hence, it is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. No costs."

93. The Learned Senior Counsel for the Respondent submits that as per Section 11 (4) of the SEBI Act, 1992, the Board may pass an order for the reasons to be recorded in writing in the interests of investors or securities market and take any of the following measures, either pending, investigation or inquiry or on completion of such investigation or inquiry, namely:-

"(a). suspend the trading of any security in a recognised stock exchange;

(b). restrain persons from accessing the securities market and prohibit any person associated with

securities market to buy, sell or deal in securities;

(c). suspend any office-bearer of any stock exchange or self-regulatory organisation from holding such position;

(d). impound and retain the proceeds or securities in respect of any transaction which is

under investigation;

(e) attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided that only the bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached;"

and in fact, Section 11 (4) of the Act permits post directional hearing and that the consent order passed is for adjudication proceedings and there is no embargo or no provision under the SEBI Act which restricts the exercise of power under Section 11 of the Act. Furthermore, the consent order dated 21/7/2008 is not a 'waiver' in not taking action under Section 11 of the SEBI Act.

94. In short, the contention of the Learned Senior Counsel for the Respondent is that the consent order dated 21/7/2008 does not bar other statutory powers given to the Respondent and in fact, the consent order disposes of the proceedings under Section 15 I of the SEBI Act.

95. Repelling the contention of the Learned Senior Counsel for the Petitioner that the principle of double jeopardy under Article 20 of the Constitution would apply to the Petitioner's case, the Learned Senior Counsel for the Respondent submits that the principle of double jeopardy will only apply in respect of criminal action and in the present case, direction issued under Section 11 is of civil nature and as such, the principle of double jeopardy will not apply to the present case on hand.

96. At this stage, the Learned Senior Counsel for the Respondent relies on the decision in SECURITIES AND EXCHANGE BOARD OF INDIA V. AJAY AGARWAL ((2010) 3 Supreme Court Cases 765), wherein in paragraph Nos.7 and 9, it is observed as follows:-

"7. Pursuant to such show cause notice, the respondent gave his reply on 1/3/2000 and 10/7/2002. Thereafter, an opportunity of personal hearing was granted to the respondent on 14/5/2002

and the same was adjourned to 5/7/2002 and on that date, the Board made its submissions. Ultimately, on 31/3/2004, the Chairman of the Board passed an order, the concluding portion whereof is as under:

> "Therefore, in exercise of the powers conferred upon me by virtue of Section 4 (3) read with Section 11 and Section 11 - B of the SEBI Act, I hereby direct that Shri Ajay Agarwal be restrained from associating with any corporate body in accessing the securities market and also be prohibited from buying, selling or dealing in securities for a period of five years.
>
> This direction shall come into force with immediate effect.
>
> ....
>
> 9. Thus, the question arose whether any direction can be issued under Section 11 B for the alleged misconduct said to have been committed prior to introduction of Section 11 B. The Appellate Tribunal was of the view that the provision of Section 11 B cannot be invoked in respect of the alleged misconduct which took place at a point of time when Section 11 B was not on the statute book. While passing the said order the appellate forum recorded that the respondent before the said forum, the appellant herein, wants to withdraw the impugned order."

97. Also, in the aforesaid decision, at page 772, in paragraph No.24, it is observed as follows:-

> "The right of a person of not being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a fundamental right guaranteed under our Constitution only in a case where a person is charged of having committed an "offence" and is subjected to a "penalty".

98. Also, in the said decision, at page 773, in paragraph Nos. 27 and 31, it is observed as follows:-

"27. If we look at the definition of "offence" under the General Clauses Act, 1897 it shall mean any act or an omission made punishable by any law for the time being in force. Therefore, the order of restrain for a specified period cannot be equated with punishment for an offence as he has been defined under the General Clauses Act.

.....

31. Even if penalty is imposed after an adjudicatory proceeding, persons on whom such penalty is imposed cannot be called an accused. It has been held that proceedings under Section 23 (1-A) of the Foreign Exchange Regulation Act, 1947 are adjudicatory in character and not criminal proceedings [see Director of Enforcement v. MCTM Corpn. (P) Ltd - {(1996) 2 SCC 471 : 1996 SCC (Cri.) 344}. Persons who are subjected to such penalties are also not entitled to the protection under Article 20 (1) of the Constitution."

99. Also, in page Nos.774 and 775,in paragraph Nos.34, 37, 38 and 40, it is observed an laid down as follows:-

"34. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are all small investors. It is a well-known canon of construction that when the Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it. Keeping this principle in mind if we analyse some of the provisions of the Act, it appears that the Board has been established under Section 3 as a body corporate and the powers and functions of the Board have been clearly stated in Chapter IV and under Section 11 of the said Act.

37. Section 11 - B which empowers the Board to issue certain directions also came up by way of amendment in 1995 by Act 9 of 1995. The Statements of Objects and Reasons of such amendments show that one of the objects is to empower the Board to issue regulations without the approval of the Central Government. [See Para 3

(e) of the Statements of Objects and Reasons.] Section 11 - B of the Act thus empowers the Board to give directions in the interest of the investors and for orderly development of securities market, which, as noted above, is one of the twin purposes to be achieved by the said Act. Therefore, by the 1995 Amendment by way of Section 11 - B, the Board has been empowered to carry out the purposes of the said Act.

38. As noted above, there is no challenge to those provisions which came by way of amendment. In the absence of any challenge to those provisions, it cannot be said that even though the Board is statutorily empowered to exercise functions in accordance with the amended law, its power to act under the law, as amended, will stand frozen in respect of any violation which might have taken place prior to the enactment of those provisions. It is nobody's case that the Board has exercised those powers in respect of a proceeding which was initiated prior to the enactment of those provisions. In fact, the Board has issued the show cause notice in terms of Section 11 B and considered the reply of the respondent. In such a situation, there has been no infraction in the procedure.

40. Provisions of Section 11 B being procedural in nature can be applied retrospectively. The Appellate Tribunal made a manifest error by not appreciating that Section 11 B is procedural in nature. It is a time-honoured principle if the law effects matters of procedure, then prima facie it applies to all actions, pending as well as future. [See K. Kapen Chako v. Provident Investment Co. (P) Ltd., wherein A.N.Ray, C.J. laid down those principles."

100. The gist of the submission of the Learned Senior Counsel for the Respondent is that Section 11 speaks of 'Functions of the Board [SEBI] and Section 11 (B) specifies the 'Power to issue directions' and precisely, the power of issuance of directions is available to the Respondent/Board and notwithstanding the power to adjudicate by the Board under the Act. Therefore, the 'Principle of Double Jeopardy' will not apply to the present case on hand because of the second show cause notice dated 26/12/2011 issued under Sections 11, 11 B and 11 (4) of the SEBI Act r/w. Regulation 11 of SEBI (Prohibition of Insider Trading) Regulations, 1992 is not a criminal proceeding and moreso, it is a distinct procedure envisage

under the SEBI Act.

101. Coming to the plea of 'Res Judicata' or constructive 'Res Judicata' raised on behalf of the Petitioner, the Learned Senior Counsel for the Respondent submits that in the Consent Order dated 21/7/2008, there is no finding or any decision being rendered on merits and as a matter of fact, the proceeding under Sections 11 and 15 I of the SEBI Act are different and in fact, the purpose of the SEBI Act is to protect the interest of investors. Also, that the ingredients of Order 2 Rule 2 of C.P.C., cannot come into operative play because it applies only to the Court proceedings not to the proceedings of the Respondent/Board.

102. The Learned Senior Counsel for the Respondent submits that no limitation is prescribed under the SEBI for the Board to take further action and therefore, the contra plea taken on behalf of the Petitioner in regard to the purported delay of issuance of second show cause notice dated 26/12/2011 is to be rejected.

103. The Learned Senior Counsel for the Respondent submits that in the second show cause notice dated 26/12/2011 issued by the Respondent, the Petitioner submitted his replies through Advocate letters dated 11/1/2012 and 7/2/2012 and only after considering the same, the impugned order dated 9/10/2012 was passed by the Respondent. As such, the question of prejudging or pre-determination of the subject matter in issue by the Respondent does not arise on any score.

104. The Learned Senior Counsel for the Respondent cites the Division Bench judgment of this Court dated 22/8/2013 in W.A.Nos.405 and 406 of 2013 between A.VENKATRAMANI AND ANOTHER Vs. 1. SECURITIES AND EXCHANGE BOARD OF INDIA, SOUTHERN REGIONAL OFFICE, OVERSEAS TOWERS, 7TH FLOOR, 756 - L, ANNA SALAI, CHENNAI 600 002 AND ANOTHER, wherein in paragraph 5, it is observed and held as follows:-

> "In view of the constitution of the Securities Appellate Tribunal, the appellants herein are at liberty to invoke the appeal remedy before the said Tribunal and file appeals within a period of two weeks from the date of receipt of a copy of this judgment and pending disposal of the appeals, are also at liberty to move interlocutory applications for grant of interim orders and till the appeal petitions are entertained and orders are passed in the interlocutory applications, the interim order granted by this Court on 7/3/2013, and extended from time to time, shall continue. The Securities Appellate Tribunal need not insist

upon the limitation for filing the appeals before it if the same are filed within the period of two weeks from the date of receipt of copy of this judgment. Both these writ appeals are disposed of accordingly. No costs. Consequently, connected MPs are closed."

105. The Learned Senior Counsel for the Respondent also relies on the order dated 20/12/2013 in W.P.Nos.1214 and 1292 of 2013 between M/S. RAM KAASHYAP INVESTMENT LTD., REP. BY ITS DIRECTOR, 33/8 B.R.COMPLEX, II FLOOR, C.P.RAMASWAMY ROAD, ALWARPET, CHENNAI 600 018 AND SECURITIES AND EXCHANGE BOARD OF INDIA, SOUTHERN REGIONAL OFFICE, OVERSEAS TOWERS, 7th FLOOR, 756-L, ANNA SALAI, CHENNAI 600 002, wherein in paragraph Nos.14 and 15, it is observed and held as follows:-

"14. Therefore, I am to hold that these two writ petitions are not maintainable before this Court and the petitioners have to avail the statutory appellate remedy available under the Act.

15. In the result, both the writ petitions are dismissed as not maintainable. No costs. Consequently, other Miscellaneous Petitions are closed. Liberty is given to the petitioners to file appropriate appeal before the Appellate Tribunal in accordance with law."

106. Reply Submissions of the Petitioner's side:- The Learned Senior Counsel for the Petitioner, by way of reply, submits that the first show cause notice dated 30/9/2005 refers to the initiation of proceedings under Section 15 I r/w. Section 15 G of the SEBI Act by the Respondent and for the issuance of second show cause notice dated 26/12/2011, after 11 years of delay, without assigning proper reasons by the Respondent is an improper one.

107. It is the plea of the Learned Senior Counsel for the Petitioner that 'Limitation' means one has to act within a reasonable time. But the aspect of delay being one of limitation which is a jurisdictional issue and therefore, there is no question of availing of an alternative remedy by the Petitioner.

108. In other words, the Learned Counsel for the Petitioner contends that the Writ Petition filed by the Petitioner is maintainable and availing of an alternative remedy is not an embargo for the Petitioner to file the present Writ Petition before this

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Court.

109. The Learned Senior Counsel for the Petitioner submits that in paragraph 9 of the decision of Honourable Supreme Court SECURITIES AND EXCHANGE BOARD OF INDIA V. AJAY AGARWAL ((2010) 3 Supreme Court Cases 765), wherein at special page No.770, the question arose whether any direction could be issued under Section 11 - B for the alleged misconduct said to have been committed prior to introduction of Section 11 B of the SEBI Act and as such, the said decision would not apply to the facts of the present case on hand.

110. Also, in the aforesaid decision at page 775, in paragraph 40, it was observed inter alia that

111. Provision of Section 11 B of SEBI Act cannot be applied retrospectively and these observations cannot be used for any other purpose and in fact, like 'Interpretation of Statues', we do for principles of law where the judgment has to be interpreted.

112. The Learned Senior Counsel for the Petitioner cites the decision of the Honourable Supreme Court in UNION OF INDIA Vs. CHAJJU RAM (DEAD) BY LRS AND OTHERS ((2003) 5 SUPREME COURT CASES - 568), at page 36, wherein in paragraph 23, it is held as follows:-

> "It is now well settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion."

113. The Learned Senior Counsel for the Petitioner relies on the decision of the Honourable Supreme Court in AIR 2003 SC 3724, at page 3773, wherein in paragraph 136, it is mentioned as follows:-

> "A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case of the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. [See Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others v. N.C.Budharaj (Deceased) by LRs and others (2001) 2 SCC 721."

114. The Learned Senior Counsel for the Petitioner with all emphasis submits that it cannot be said that after issuance of show

cause notice, nothing could be done and in fact, the Writ cannot be refused.

115. The Learned Senior Counsel for the Petitioner by referring to the decision of the Honourable Supreme Court in LT.GOVERNOR, DELHI AND OTHERS Vs. HC NARINDER SINGH ((2004) 13 SUPREME COURT CASES - 342) and submits that even though the decision refers to a service matter, the Honourable Supreme Court at any cost has said that issuance of second show cause notice would amount to double jeopardy.

116. The Learned Senior Counsel for the Petitioner submits that if one action is taken and another is not taken, then a person must reserve it and there is no public interest involved when the Respondent has acted after nearly 12 years in issuing the second show cause notice.

117. Another contention of the Learned Senior Counsel for the Petitioner is that the Petitioner has approached this Court by filing the present Writ Petition and somebody should raise his/their voice against the Respondent.

118. Glimpse of decisions relied on petitioner's side:- At this point of time, this Court refers to the decisions relied on by the Petitioner.

(i). In the decision of the Honourable Supreme Court in HIMMATLAL HARILAL MEHTA Vs. STATE OF MADHYA PRADESH AND OTHERS (AIR 1954 SUPREME COURT - 403), it is held as follows:-

> "The contention that because a remedy under the impugned Act is available to the assessee, he is disentitled to relief under Art.226 stands negatived by the decision in AIR 1953 SC 252 of this Court in the State of Bombay v. The United Motors (India) Ltd. The principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available does not apply where a party has come to the Court with an allegation that his fundamental right had been infringed and sought relief under Art.226. Moreover, since the remedy provided by the C.P. and Berar Sales Tax Act is of an onerous and burdensome character and before the assessee can avail of it he has to deposit the whole amount of the tax, such a provision can hardly be described as an adequate alternative remedy. (AIR 1953 SC 252.)

(ii). In the decision of the Honourable Supreme Court in M.P.STATE AGRO INDUSTRIES DEVELOPMENT CORPN. LTD AND ANOTHER Vs.

JAHAN KHAN ((2007) 10 SUPREME COURT CASES - 88), at special page 89, it is held as follows:-

> "It is trite that the power to punish an employee is within the discretion of the employer and ordinarily the Courts do not interfere, unless it is found that either the enquiry, proceedings or punishment was vitiated because of non-observance of the relevent rules and regulations or principles of natural justice or denial of reasonable opportunity to defend, etc., or that the punishment was totally disproportionate to the proved misconduct of the employee."

(iii). . In the decision of the Honourable Supreme Court in COMMITTEE OF MANAGEMENT AND ANOTHER VS. VICE-CHANCELLOR AND OTHERS ((2009) 2 SUPREME COURT CASES - 630), at special page Nos.631, it is held as follows:-

> "Availability of an alternative remedy by itself may not be a ground for the High Court to refuse to exercise its jurisdiction. It may exercise its writ jurisdiction despite the fact that an alternative remedy is available, inter alia, in a case where the same would not be an efficacious one. Furthermore, when an order has been passed by an authority without jurisdiction or in violation of the principles of natural justice, the superior courts shall not refuse to
>
> exercise their jurisdiction although there exists an alternative remedy."

(iv). In the decision of the Honourable Supreme Court in STATE OF TRIPURA Vs. MANORANJAN CHAKRABORTY AND OTHERS ((2001) 10 SUPREME COURT CASES - 740), it is held that

> "Where gross injustice is done justifying interference then existence of alternative remedy by way of appeal or revision would be no bar to exercise of writ jurisdiction."

(v). In the decision of the Honourable Supreme Court in GODREJ SARA LEE LIMITED Vs. ASSISTANT COMMISSIONER (AA) AND ANOTHER ((2009) 14 SUPREME COURT CASES 338), it is held that

> "If order of a statutory authority is

questioned on the ground of lack of jurisdiction, alternative remedy is not a bar."

(vi). In the decision of the Honourable Supreme Court in STATE OF H.P AND OTHERS Vs. GUJARAT AMBUJA CEMENT LTD., AND ANOTHER ((2005) 6 SUPREME COURT CASES 499), wherein at page 503, it is held as follows:-

> "Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess, these can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute."

(vii). In the decision of the Honourable Supreme Court in SANGEETABEN MAHENDRABHAI PATEL Vs. STATE OF GUJARAT AND ANOTHER ((2012) 7 SUPREME COURT CASES - 621), it is held as follows:-

> "The fundamental right which is guaranteed under Article 20 (2) enunciates the principle of "Autrefois convict" or "double jeopardy" i.e, a person must not be put in peril twice for the same offence. The doctrine is based on the ancient maxim nemo debet bis punire pro uno delicto, that is to say, that no one ought to be punished twice for one offence. The plea of autrefois convict or autrefois acquit avers that the person has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned."

(viii). In the Division Bench decision of this Court in 1. SHEEBA PHILOMINAL MERLIN AND ANOTHER Vs. 1. THE REPATRIATES CO-OP FINANCE & DEVELOPMENT BANK LTD., (GOVT. OF INDIA ENTERPRISE) NO.33, NORTH USMAN ROAD, T.NAGAR, CHENNAI 600 017 AND 3 OTHERS (2010 (4) L.W.497), wherein at page Nos.498 and 499, it is held as follows:-

> "It is well settled law that availability of an alternative remedy is not an absolute bar for exercising the writ jurisdiction and it is only a self-imposed restraint on its power. Tribunal is not competent to look into violation

of fundamental rights and constitutional rights and this Court being a custodian of Constitutional rights is entitled to examine the matter. Therefore, as injustice is writ large and glaring, necessarily the judicial arm of this Court has to reach there, and it cannot be prevented by plea of availability of alternative remedy.

119. Besides the above, on the side of the Petitioner, the following decisions are cited before this Court.

(a). HEENA KAUSAR Vs. COMPETENT AUTHORITY ((2008) 14 SUPREME COURT CASES - 724) at special page No.726, it is observed as follows:-

> "The contention raised before the Supreme Court were not raised before the appellate authority or before the High Court. The order of the High Court dated 15/12/1999 attained finality. The flats in question stood forfeited to the Government. The said proceedings cannot be permitted to be reopened. Only because in relation to the confiscation of bank accounts the matter was remanded, during pendency whereof, the proviso appended to Section 68 C was amended, the same by itself, would not give rise to another cause of action so as to enable the appellant to raise the contentions which she could and ought to have raised in the earlier proceedings. Only because at a later stage, a period of limitation was prescribed for initiation of proceedings for forfeiture of the properties (in respect of issuance of a detention order), the same, by itself would not be sufficient to arrive at a conclusion that the same attracts the wrath of Article 14 of the Constitution of India. The principle of "constructive res judicata" applies also to a writ proceeding. Furthermore, admittedly, such a contention has not
>
> been raised even in the second writ application."

(b). In the decision of the Honourable Supreme Court in RAGHAVENDRA RAO AND OTHERS Vs. STATE OF KARNATAKA AND OTHERS ((2009) 4 SUPREME COURT CASES - 635), at special page No.636, it is held as follows:-

> "The claim of the appellants is barred under the principles of res judicata/constructive res judicata, the earlier judgment having attained

finality. The principle of res judicata applies also to the writ proceedings."

120. More importantly, this Court, at this juncture, pertinently makes a significant reference to the fact that the Respondent/SEBI has been empowered to provide measures for preventing 'insider trading' and in pursuance of the same, SEBI (Prevention of Insider Trading Regulations 1992) has been framed.

121. A Panoromic Spectrum of Some Provisions of SEBI Act:- In terms of Section 4 (5) of the SEBI Act, the Chairman and other members of the Board are noted experts. In fact, SEBI/Board, under Section 11 of the Act has been empowered to take appropriate measures for protecting the Investors in Securities and to promote the development of, and to regulate the securities market.

122. Indeed Section 15 M of the SEBI Act, prescribes the Qualification for appointment as Presiding Officer or Member of Securities Appellate Tribunal.

123. Under Section 15 T of the Act any person aggrieved by an order of the SEBI may file an appeal to the Securities Appellate Tribunal having jurisdiction in the matter. The Tribunal is enjoined with duty to deal with an Appeal as expeditiously as possible and endeavor it and dispose of the same finally within six months from the date of receipt of the Appeal.

124. Section 15 G of the Act deals with 'Penalty for Insider Trading'. An 'Insider Trader' is the trading of a Company's stock by individuals who have accessed to non-public information about the Company. An 'Insider' of a related party cannot trade on such information obtained during the performance of insiders duties. As it is a Breach of Fiduciary relationship, this conduct in regard to Securities Market will give an Insider an undue advantage in trade, which would not be available to other investors. Law insists that Insiders should not trade till non-public information comes within the public domain so that there is a level playing field for all Traders/Investors in the Security Market.

125. The words 'an order' figuring in Section 15 T of the SEBI Act is very wide and comprehensive enough to take within its fold every order or decision taken by the Board which adversely affects the right of parties. Though Section 11 B of the SEBI Act employs the word 'direction' as opposed to order. It is to be treated synonymously and the directions issued are indeed appealable under Section 15 T of the Act, in the considered opinion of this Court.

126. Discussions:- No wonder, an affected/aggrieved person is one who has a genuine/reasonable grievance because an order has been made which prejudicially affects his interest.

127. It is to be noted that to impose penalty under Section A to 15 H B of the SEBI Act there has to be an adjudication by an Officer or authority who is entrusted with the power of adjudication as per Section 15 I (1) of the Act. The Act of the said authority in the adjudication mechanism is quasi-judicial in nature. It is to be remembered that Rule 3 of SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 envisages that whenever the Board is of the opinion that there are grounds for adjudicating under any of the provisions in Chapter 6 A of the Act, it may appoint any of its Officer not below the rank of Division Chief to be an Adjudicating Officer for the purpose of conducting an enquiry for the said purpose. It cannot be gain said that the opinion of the Board is to be formed only after applying its mind and examining the record which is not an exercise of mere acting on the recommendations of the Investigating Officer.

128. An Adjudicating Officer under the SEBI is to hold an 'Enquiry' in the prescribed manner for the purpose of holding an enquiry for awarding penalties. SEBI (Procedure for Holding Enquiry and imposing penalties by Adjudicating Officer) Rules 1995 have been framed by the Central Government in exercise of power under Section 29 (2) (d) (c) of the Act. The Adjudicating Officer in the first instance is required to send a show cause notice giving the notice a time period of minimum 14 days to reply. Such notice is to indicate the nature of defaults alleged. An opportunity to represent against an envisaged action is the prime essence rather than form of hearing. Proviso to Rule 4 (5) of the SEBI (Procedure for holding enquiry and imposing penalties by Adjudicating Officer) Rules 1995 provides that personal hearing can be waived at the request of the Noticee only. Also that, an Adjudicating officer while taking/recording the evidence is not bound by the provisions of the Indian Evidence Act, 1872. (Rule 4 (5) of the SEBI Act (Procedure for holding enquiry and imposing penalties by Adjudicating Officer) Rules 1995).

129. Further, he has the power to summon and enforce the attendance of any person acquainted with the facts and circumstances and to give evidence or to produce any document which in his case may be useful or relevant. Of course, an order imposing penalty must be a speaking order. As per Rule 5 (3) of SEBI (Procedure for Holding Enquiry and imposing penalties by Adjudicating Officer) Rules 1995, an important fact of principles of natural justice is that action must be initiated within the reasonable time period and an inordinate delay is to be avoided.

130. The Adjudication for imposing penalty by an Adjudicating Officer after due enquiry is neither a criminal nor a quasi-criminal proceedings. The penalty leviable under Chapter VI A of SEBI Act is in respect of cases of default or failure of statutory obligation or in other cases, breach of civil obligation. Really speaking for

fixing the quantum of penalty under Section 15 A to 15 HB by means of adjudication process, guidelines have been made mention of in Section 15 J of the Act.

131. A scrutiny of the provisions of the scheme of penalty unerringly point out that there is no element of criminal offence or punishment envisaged in criminal proceedings. For breach of provisions of SEBI Act and Regulations which are civil in nature and 'Mens Rea' is not essential.

132. Under Section 15 T (2) of the Act, an order passed by the Board or the Adjudicating Officer with consent of parties shall not be appeal against, before Securities Appellate Tribunal Forum. Section 15 (2) of the SEBI Act is used to gather support for the stand that the SEBI Act empowers SEBI to pass orders with the consent of parties in nature of compromise, in the absence of a provision expressly authorising SEBI to settle the matter of civil liability. Similar provision is seen in Section 23 A of the Depositories Act, 1996. As far as compounding of proceedings which are criminal in nature and explicit provision is made under Section 24 (A) of the SEBI Act. Composition of offences is also permitted under Section 23 N of Securities Contract (Regulation) Act 1996 and Section 22 A of the Depositories Act. There cannot be two opinion of the fact that the consent scheme of SEBI is similar to the 'Amnesty Scheme Stock Exchanges'.

133. The Securities Appellate Tribunal, as per Section 15 T of the SEBI Act has power to plenary review where it lies and is empowered to look into all relevant materials and consider the law and decide those facts based on which an order can be passed in respect of Appeals filed before it. Also, the Securities Appellate Tribunal has powers to examine the facts of the case afresh, evaluate the evidence and test the benefit of the order passed with reference to the applicable law.

134. A statutory obligation is showered on the Securities Appellate Tribunal as per Section 15 (6) of the SEBI Act to dispose of Appeals finally within six months from the date of receipt of the appeals.

135. 15 U (1) of the SEBI Act, 1992 specifies that the Securities Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5) but shall be guided by the principles of natural justice and subject to other provisions of the Act and of any Rules, the Securities Appellate Tribunal shall have the power to locate. There is no procedure including the places on which they shall have their sittings. Also, Section 15 U (2) enjoins that the Securities Appellate Tribunal shall have for the purposes of discharging their functions under this Act, the same powers are vested in a Civil Court under the Code of Civil

Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, specified therein.

136. It is to be noted that the Honourable Supreme Court in the decision DEVENDRA PRATAP NARAIN RAI SHARMA Vs. STATE OF UTTAR PRADESH AND OTHERS (AIR 1962 SUPREME OURT - 1334), at special page 1337, in paragraph 12. has observed and laid down as follows:-

> "The High Court has disallowed to the appellant his salary prior to the date of the suit. The bar of O.2 R.2 of the Civil Procedure Code on which the High Court apparently relied may not apply to a petition for a high prerogative writ under Art. 226 of the Constitution, bt the High Court having disallowed the claim of the appellant for salary prior to the date of the suit, we do not think that we would be justified in interfering with the exercise of its discretion by the High Court."

137. It cannot be lost sight of the plea of the bar should be specifically pleaded as per the decision of the Honourable Supreme Court in RIKABDAS A.OSWAL Vs. DEEPAK JEWELLERS AND OTHERS ((1999) 6 SUPREME COURT CASES - 40).

138. Moreover, the provision of Order 2 Rule 2 CPC, has no application when the suits are based on separate and distinct cause of action, in the considered opinion of this Court.

139. It is well settled principle that under Article 20 (2) of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once. In fact, Article 20 (2) of the Constitution of India encompasses within its ambit the plea of 'Autre fois convict' has known to English jurisprudence or the plea of 'Double Jeopardy' in American Constitution. However, the circumscribe is that there should not only be a prosecution but also the punishment at the first stage in order to operate as a bar to a second prosecution and punishment for the same offence, as per the decision MAQBOOL HUSSAIN Vs. STATE OF BOMBAY (AIR 1953 SC - 325).

140. As far as the present case is concerned, at the risk of repetition, it is to be pointed out by this Court that the Petitioner was issued with the show cause adjudication proceedings dated 30/9/2005 by the Respondent under Section 15 I r/w. Section 15 G of the SEBI Act. Ultimately, on 21/7/2008, a consent order was passed by the Respondent, whereby the said order disposed of the said proceedings pending against the Petitioner/Noticee under the SEBI Act in the matter of Polaris Software Lab Limited and in fact, the said consent order para 6 (2) clearly points out that

Passing of this order is without prejudice to the right of SEBI to take enforcement actions including commencing/reopening of the pending proceedings against the Noticee, if SEBI finds that

a. any representation made by the Noticee in the consent proceedings is subsequently discovered to be untrue.

b. the Noticee has breached any of the clauses/conditions of

undertakings/waivers filed during the current consent proceedings.

141. In the present case on hand before this Court, the Respondent issued the second show cause notice dated 26/12/2011 to the Petitioner under Sections 11, 11 B and 11 (4) of the SEBI Act, 1992 r/w. Regulation 11 of SEBI (Prohibition of Insider Trading) Regulations, 1992. The petitioner submitted his reply/objections dated 11/1/2012 to the second show cause notice dated 26/12/2011. On 20/6/2012, the petitioner filed an application before the Whole Time Member of the Respondent praying for request of the show cause notice dated 26/12/2011 and closing of the proceedings or dropping the proceedings against him. In the said application, the Petitioner inter alia pleaded that the second show cause notice dated 26/12/2011 is hit by the provisions of Section 26 of the General Clauses Act, 1897. In fact, the Petitioner has taken a stand that 'a person who was earlier acquitted has been prosecuted for an identical offence a fresh prosecution for the same offence is a complete bar by virtue of Section 26 of General Clauses Act, 1897.' His specific plea is that no person should be vexed twice and no person should be liable for punishment twice or again for the same offence. Precisely, he has also stated that 'paragraphs 18 and 19 of the show cause notice dated 26/12/2011 are absolutely the same offence for which he was earlier prosecuted, which ended in consent order wherein a penalty was imposed/proposed.

142. No doubt, in the Circular for consent order dated 20/4/2007, Clause 13 inter alia reads that "the consent order may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved." and also that the consent order dated 21/7/2008, in paragraph 6 (1) only disposes of the show cause adjudication notice dated 30/9/2005 in respect of the Petitioner (issued under Section 15 I r/w. Section 15 G of the SEBI Act). In fact, the said order according to the Petitioner has not specified any issue or claims which were reserved. However, the Learned Senior Counsel for the Respondent submits that the second

show cause notice is independent of the proceedings already settled vide consent order dated 21/7/2008 and further, an argument is projected and on behalf of the Respondent that the contextual manner is to be given to the consent order relating to paragraph 6 (2) wherein it is categorically mentioned that 'passing of this order is without prejudice to the right of the SEBI to take enforcement actions including commencing/reopening of the pending proceedings against the Noticee etc' after the issuance of second show cause notice dated 26/12/2011 to the petitioner, the impugned order dated 9/10/2012 has been passed by the Respondent against the Petitioner invoking the power under Section 19 r/w. Section 11 (1) and 11 (B) of the SEBI Act coupled with Regulation 11 of the SEBI (Prohibition of Insider Trading) Regulations, 1992, in and by which the show cause notice dated 26/12/2011 was disposed of.

143. It is not out of place for this Court to make an apt mention that before entertaining a Writ Petition, the High Court should consider parameters relating to the existence of an alternate remedy and in appropriate facts and circumstances regulate the Petitioner to avail of such remedy at the first instance as per decision of the Honourable Supreme Court in CCT.ORISSA AND OTHERS Vs. INDIAN EXPLOSIVES LTD ((2008) 3 SUPREME COURT CASES - 686).

144. This Court also recalls the further decision of the Honourable Supreme Court in A.P.FOODS Vs. SAMUEL (2006 (5) SCC at page 469, it is held that

> "Where statutory remedy is provided, the Writ Petition may not be entertained."

145. Be that as it may, on a careful consideration of respective contentions and in view of the fact that the parties have taken a divergent view in the subject matter in issue and also, this Court taking note of an important fact that SEBI Act being an in-built one which provides for an effective, efficacious, viable and alternative remedy of filing of an Appeal by an aggrieved before the Securities Appellate Tribunal (Specific Disputs Redressal Mechanism) under Section 15 T of the Act, this Court without expressing any opinion and also not delving into the merits of the matter holds that the present writ petition No.29352 of 2012 filed by the writ petitioner per se is not maintaineble before this Court. Consequently, the writ petition fails.

146. Conclusion:- In the result, the writ petition is dismissed, leaving the parties to bear their own costs. Liberty is granted to the petitioner to approach the Securities Appellate Tribunal by way of filing of an Appeal under Section 15 T of the SEBI Act as against the second show cause notice dated 26/12/2011 and the order dated 9/10/2012 within three weeks from the date of receipt of a copy of this order. It is made clear that the plea of limitation

need not be put against the Petitioner as and when he files an appeal, pertaining to the subject matter in issue, within the time limit fixed by this Court before the Securities Appellate Tribunal. It is open to the Petitioner to raise all factual and legal pleas before the Securities Appellate Tribunal. Consequently, the connected Miscellaneous Petition is also dismissed.

-s/d-
Assistant Registrar

True Copy 18/10/13

Sub-Assistant Registrar

mvs
To,
The Securities and Exchange Board
having office at SEBI Bhavan
Bandra Kurla Complex, Mumbai-400 051

+1 cc to Mr.AbuduKumar Rajaratnam Advocate sr.51288
+1 cc to M/S.shivakumar and Suresh Advocate sr.51174

W.P.No.29352 of 2012
and
M.P.No.1 of 2013

aa9/10/2013

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