PART FOUR: REGULATORY CHANGES

1. REGULATORY AMENDMENTS NEW REGULATIONS AND AMENDMENTS TO EXISTING REGULATIONS

I. SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003

- These regulations were notified on July 17, 2003.
- The earlier regulations viz. SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 have been repealed.
- The regulations have been framed to provide for the wider definition of fraud and to dispense with the requirement of intention for commission of fraud.
- The activities prohibited by the SEBI Act have been specifically provided.
- The powers regarding investigation and enforcement have been specifically provided in terms of the provisions of the SEBI Act.

II. SEBI (Ombudsman) Regulations, 2003

- These regulations were notified on August 21, 2003.
- To provide for the establishment of the office of the Ombudsman to redress the grievances of the investors against the intermediaries and the listed companies by mutual agreement or by award on adjudication.
- The Ombudsman may award compensation, costs and interest.
- The award of Ombudsman may be reviewed by the Board on the grounds of miscarriage of justice or an error apparent on record.
- Failure to obey the award of the Ombudsman or order of the Board is liable for penalty under Section 15C, section 11(4) and section 12 of the SEBI Act.
- In addition to the directions under the SEBI Act the action of suspension or cancellation of registration and issue of warning or censure has been provided.

III. SEBI (Central Listing) Authority, Regulations, 2003

- These regulations were notified on August 21, 2003.
- Earlier regulation viz. SEBI (Central Listing) Authority, Regulations, 2003 have been repealed.

New regulations

- Before making an issue of securities the applicant must obtain a letter precedent to listing from the CLA.
- The draft offer document will be filed only with CLA. SEBI may offer its observations, if any, to CLA.
- The CLA may call for information from the stock exchanges and the intermediaries in connection with the processing of the applications for letter precedent to listing.
- The CLA may impose condition while granting letter precedent to listing and also lay down further conditions subsequent to the grant of letter precedent. The letter precedent is to be valid for 90 days.

- CLA may withdraw the letter precedent to listing.
- In the earlier regulations SEBI could reconsider the decisions of CLA. In the new regulations this provision has been omitted.
- Against decision of the CLA, appeal may be filed before SAT.

IV. SEBI (Central Database for Market Participants) Regulations, 2003.

- These regulations were notified on November 20, 2003**.**
- The specified intermediaries i.e. the intermediaries other than FIIs and FVCIs and the entities specified by the Board in the notification, shall obtain a Unique Identification Number from a Designated Service Provider.
- No intermediary shall after the specified date deal in securities on behalf of an investor unless the investor has been allotted a Unique Identification Number.
- The specified intermediary, listed company and investor etc. have to make a application in the specified format alongwith the fees specified by the respective notifications to the Designated Service Provider.
- Vide notifications dated November 25, 2003 and December 9, 2003, all intermediaries except sub-brokers were required to obtain unique identification numbers for themselves and their related persons within March 31, 2004. This date has been extended to 30th June 2004.

V. SEBI (Self Regulatory Organizations) Regulations,2004

- These regulations were notified on February 19, 2004**.**
- A Self Regulatory Organization i.e. an organization (excluding a stock exchange) of intermediaries which is representing a particular segment of the securities market and which desires of being recognized as SRO may form a company under section 25 of the Companies Act and apply to the Board for certificate of recognition.
- The minimum networth for such a company is Rs. 1 crore. The certificate of recognition shall be valid for a period of five years which may be further renewed on an application by SRO. The majority of Board of Directors of SRO have to be independent directors who shall not be required to hold any qualification shares. The Board of Directors shall consist of 9 directors – 5 nominated by the Board and 4 elected by members of SRO. The Chairman shall be an independent professional appointed by the Board of Directors with prior approval of the Board. The general superintendence, direction and management of SRO shall vest in the Board of Directors. Chairman will be responsible for day to day administration of SRO. The SRO shall be responsible for investor protection and investor education and shall ensure observance securities laws by its members. The Board may conduct audit and inspection of SRO and take action in case of default. Such actions may include withdrawal of recognition, imposition of monetary penalty under SEBI Act, suspension or cancellation of certificate, direction to its office bearers under section 11 of the SEBI Act.

VI. SEBI (Foreign Institutional Investors) (Amendment) Regulations, 2003

- These regulations were notified on May 14, 2003.
- In respect of divestment of securities by the FII in response to an offer by Indian Companies in accordance with the Operative Guidelines for Disinvestment of Shares by Indian Companies in the overseas market through issue of American Depository Receipts (ADR) or Global Depository Receipts (GDR) and directions issued by Reserve Bank of India from time to time, the transactions will not be required to be done through a stock broker.

VII. SEBI (Mutual Funds) (Amendment) Regulations, 2003

- These regulations were notified on May 29, 2003.
- Fund of funds scheme has been introduced. Prohibition against investing in other schemes of mutual funds has been removed for such funds. CEO of AMC shall be responsible to ensure compliance with the regulations.

VIII. SEBI (Depositories and Participants) (Amendment) Regulations, 2003

- These regulations were notified on June 16, 2003.
- As per the existing regulations if the applicant is a registered stock broker, the Board may grant certificate if the stock broker has minimum networth of Rs.50 lakh and aggregate value of portfolio of securities of the beneficial owners does not exceed 100 times of the networth of the stock broker.
- After the amendment if the stock broker maintains the networth of Rs.10 crore the limit on aggregate value of portfolio of securities shall not be applicable.

IX. SEBI (Debenture Trustees) (Amendment) Regulations, 2003

- These regulations were notified on July 4, 2003.
- The earlier regulations did not provide for any capital adequacy or networth requirements for debenture trustees. After the amendment the networth requirement for the applicant is provided to be Rs.1 crore. The existing debenture trustees have to fulfill the networth requirement within two years from July 4, 2003.
- A debenture trustee shall not act as such in case of any issue or debenture of its associate or it has lent money or proposing to lend money to the body corporate. However this condition will not apply in case of debentures issued before the Companies (Amendment) Act, 2000 where recovery proceedings in respect of the assets charged have been initiated or the company has been referred to BIFR before July 4, 2003.
- A debenture trustee cannot relinquish its assignment in respect of debentures issued unless and until another debenture trustee is appointed by the body corporate.

X. SEBI (Prohibition of Insider Trading) Amendment Regulations, 2003

- These regulations were notified on July 11, 2003.
- Forms A, B, C and D have been provided in respect of the disclosure of details of acquisition of 5per cent

or more in a listed company, details of shares held by Director or officer of a listed company, details of change in shareholding in respect of persons holding more than 5per cent shares in a listed company and details of change in shareholding of director or officer of a listed company, respectively.

XI. SEBI (Issue of Sweat Equity) (Amendment) Regulations, 2003

- These regulations were notified on August 27, 2003.
- An officer not below the rank of Asst. General Manager may conduct inspection and an Officer not below the rank of Division Chief may conduct investigation.

XII. SEBI (Foreign Institutional Investors) (Second Amendment) Regulations, 2003.

- These regulations were notified on August 28, 2003.
- It shall be mandatory for an FII to fully disclose information concerning the terms of and the parties to the transactions of off-shore derivative instruments viz., participatory notes, equity linked instruments and any instruments of the like nature, entered into by it or its sub-accounts at the time and in the form required by the Board.
- The detailed Code of Conduct for FIIs specified.

XIII. SEBI (Depositories and Participants) (Amendment) Regulations, 2003

- These regulations were notified on September 2, 2003.
- **Redressal of investor grievances** The issuer / its agent / an intermediary shall redress the beneficial owners' grievances within 30 days of the date of receipt of the complaint and to keep the depository informed about the nature of grievance, number of disposed / pending complaints.
- **Manner of surrender of certificate of security** Within 15 days of receipt of certificate of securities, the issuer shall confirm to the depository that the securities comprised in the said certificate have been listed on the stock exchange where the earlier issued securities are listed and shall also after due verification immediately mutilate and cancel the certificate of security and substitute in its record the name of the depository as the registered owner and shall send a certificate to this effect to the depository and to every stock exchange where the security is listed.
- **Manner of handling share registry work** All matters relating to transfer of securities, maintaining of records of holders of securities, handling of physical shares and establishing connectivity with the depositories should be collectively handled and maintained at a single point i.e. either in-house by the company or by a SEBI registered share transfer agent.
- **Audit** Every issuer shall submit audit report on a quarterly basis, starting from September 30, 2003, to the concerned stock exchanges audited by a qualified Chartered Accountant or a practicing Company Secretary, for the purposes of reconciliation of the total issued capital, listed capital and capital held by depositories in dematerialized form.

XIV. SEBI (Stock Brokers and Sub-Brokers) (Amendment) Regulations, 2003

- These regulations were notified on September 23, 2003.
- The eligibility criteria for grant of certificate to a sub-broker. The applicant must be a person recognized by a stock exchange as a sub-broker affiliated to a member of that exchange.
- A director of the stock broker cannot act as a sub-broker of the same stock broker.
- A sub-broker cannot be affiliated to more than one stock broker of one stock exchange.
- A stock broker cannot deal with unregistered sub-brokers.
- The stock broker shall issue contracts notes to the clients of his sub-brokers also. The sub-broker has to assist the client in this regard.

XV. SEBI (Stock Brokers and Sub-Brokers) (Second Amendment) Regulations, 2003

- These regulations were notified on November 20, 2003.
- The regulations amended to provide for detailed parameters when the Board may ,after inspection or investigation, initiate actions as it may deem fit and appropriate including the action of minor or major penalties specified in Enquiry Proceedings Regulations, monetary penalty under chapter VIA of the SEBI Act or prosecution under section 24 of the SEBI Act.

XVI. SEBI (Procedure for Holding Enquiry and Imposing Penalty) (Amendment) Regulations, 2003

- These regulations were notified on November 27, 2003.
- The regulations amended to provide that when the enquiry is proposed against an intermediary, an officer of the Board as specified by the Chairman/ Member shall issue show cause notice to the intermediary requiring him to submit the reply alongwith necessary documents to the enquiry officer specifying his desire of personal hearing, if so desired.

XVII. SEBI (Ombudsman) (Amendment) Regulations, 2003

- These regulations were notified on December 5, 2003.
- The regulations amended to remove the eligibility that retired judge may be nominated as a member of the Selection Committee to recommend appointment of Ombudsman.
- As per the amendment the members of the Selection Committee shall be an expert in financial markets operations and a person having experience in the area of law, finance and economics and ED of the Board.
- The Ombudsman shall be appointed for a term of three years and shall be eligible for reappointment for another period of two years.
- The maximum age for holding office of Ombudsman is prescribed to be 65 years

XVIII. SEBI (Procedure for Holding Enquiry and Imposing Penalty) (Second Amendment) Regulations, 2003

- These regulations were notified on December 30, 2003.
- Any enquiry pending before any Enquiry Officer immediately before the date of commencement of the SEBI (Stock Brokers and sub-Brokers) (Second Amendment) Regulations, 2003 in respect of which adjudication proceedings may be initiated, may be transferred to an Adjudicating officer appointed under section 15I of the SEBI Act.

XIX. SEBI (Foreign Institutional Investors) (Amendment) Regulations, 2004

- These regulations were notified on January 27, 2004.
- An FII or sub-account may deal in off-shore derivative instruments viz., participatory notes, equity linked notes or any other similar instrument against underlying listed securities only in favour of those entities who are regulated by any regulatory authority in the countries of their incorporation or establishment subject to compliance of "know your client "requirement.
- The FII or sub-account is also required to ensure that no further down stream issue or transfer of such instruments is made to an un-regulated entity.

XX. SEBI (Foreign Institutional Investors) (Second Amendment) Regulations, 2004

- These regulations were notified on February 19, 2004.
- A Foreign Institutional Investor may directly sell the securities in response to an offer made by any promoter or acquirer in accordance with the Securities and Exchange Board of India (Delisting of Securities) Guidelines, 2003 and directly participate in bid for, or acquisition of, securities in response to an offer for disinvestment of shares made by the Central Government or any State Government. Such transactions can be made without routing them through a stock broker.

XXI. Companies (Issue of Indian Depository Receipts) Rules, 2004

These Rules, which are framed under Section 605A of the Companies Act, 1956 were notified on February 23, 2004 vide GSR No.131(E). The salient features of these Rules are as follows:

- These Rules apply to issue of Indian Depository Receipts (IDRs) by companies incorporated outside India.
- IDRs can be issued only against underlying equity shares of the issuer company.
- Such companies can issue IDRs only if the issuer company's pre-issue paid up capital and average turnover are US$ 100 millions and US$ 500 millions respectively. The company should also have been making profits for at least 5 years preceding the issue, must have been declaring a dividend of at least 10 per cent during the period and have a pre-issue debt equity ratio of 2:1.
- The issuer company has to obtain prior permission from SEBI and the necessary approvals / exemptions from the country of its incorporation (where required) for making the issue.

- The issuer shall appoint an overseas custodian bank, with whom the underlying equity shares shall be deposited and a domestic depository, which shall be authorized to issue the IDRs. For the issue of IDRs, a merchant banker should also be appointed.
- The draft prospectus shall be filed by the issuer with the ROC, New Delhi and SEBI. Copies of certain documents as specified have to be filed. SEBI may specify changes to be made in the offer document within a period of 21 days.
- The issuer company shall also take in-principle listing approval from one or more stock exchanges having nation wide trading terminals in India. Once issued, the IDRs shall be listed in such exchange(s) and shall be freely tradable among persons resident in India.
- The IDRs shall not exceed 15 per cent of the total paid up capital and free reserves of the company.
- The IDRs shall be denominated in Indian Rupees.
- Redemption of IDRs cannot be made within one year of their issue. Redemption would be subject to FEMA and other laws. In case of redemption, the underlying equity shares may be released to the IDR holder or may be sold directly by him.
- Statement of variation of utilization of funds from the projected figures and the quarterly audited financial results shall be published in English language newspapers in India.
- On receipt of dividends or other corporate action, the domestic depository shall distribute them proportionately among the IDR holders.

2. IMPORTANT COURT PRONOUNCEMNTS

I. SEBI vs Sangeeta J Valia – Bombay High Court

The appeal arises from the Order dated November 30, 2002 passed by the Securities Appellate Tribunal. Sangeeta J Valia (Acquirer) had acquired 6,98,500 equity shares of Cumulative Convertible Preference (CCP) and 11,76,895 shares of Vasparr Fischer Ltd (VFL) on January 6 ,1999. The Acquirer had failed to file report with SEBI within the required period of 21 days in terms of Takeover Regulations 1997. The Adjudicating Officer appointed by SEBI found that there was a delay of 328 days and imposed a penalty of Rs.1,50,000/- under Section 15A(b) of SEBI Act, 1992. This order was set aside by the Hon'ble SAT.

SAT held that there is a specific provision in clause (a) of Section 15A of the SEBI Act, providing for one time penalty, in case of each failure to furnish any report to the Board, and rule 3(4) of Takeover Regulation 1997 also requires to submit the report to the Board. Therefore, clause (b) of Section 15A could not have been invoked by SEBI. Clause (a) takes care of matters exclusively dealing with the Board, clause (b) is in exclusion of the matters dealing with Board. SAT also held that Sebi further supported the impugned orders on the ground that failure to file report or submit the report, could not be under clause (b), as report, contemplated was submitted by the Acquirer, to the Board and as specific provisions and penalties are provided for failure to furnish any report to the Board, therefore, SEBI's action in terms of clause (b) of the said section 15A, cannot be considered legal.

Aggrieved by the said order, SEBI preferred an appeal to the Hon'ble High Court, Bombay. The Hon'ble High Court held that "we find substance in the submission of the appellant that section 15A(a) deals with the situation where there is complete failure in furnishing documents, report, return, etc.. to SEBI whereas Section 15A(b) is attracted where there is delay in filing any return or furnishing any information, books or other documents within specified time. Because the expression 'report' has not been used in 15A9b) – the expression that is used in 15A(a) – would not distinguish the two provisions itself. The area of operation of the two provisions 15A(a) and 15A(b) is different for the reason that 15A(a) is invokable where there is total failure in furnishing requisite information while 15A(b) comes into play where though there is compliance by furnishing necessary information but the compliance is made belatedly. Section 15A(a) and 15A(b) are, thus, attracted in the different situation as noticed above. We are of the view that the interpretation put by the Securities Appellate Tribunal as well as the Learned Counsel, for the Respondent, is not correct. It is well settled that if the power to act in the authority exists in a fact situation, such exercise of power is not vitiated by the reference to wrong provision of law. Mention of wrong provision of law shall not render the exercise of power by the authority bad in law if the source of power can be traced in some other provision. The present is a case where the authority has exercised the power under Section 15A(b) and that cannot be faulted for the reasons we have indicated above. It may be mentioned here that the Adjudicating Officer in fact, after considering the bonafide and genuineness of the statement of Respondent levied a minimum penalty of Rs.500/- per day for the delay of 328 days with upper ceiling of Rs.1,50,000/- The penalty was to be paid within 45 days of the receipt of the said order. We are of the view that Adjudicating Officer had in fact taken into consideration all other factors as contemplated under section 15J of the SEBI Act, while adjudging the quantum of the penalty under section 15A(b). We see no reason to accept the contentions of the Respondent that factors as contemplated under Section 15J of SEBI Act, were not taken into consideration by Adjudicating Officer, while awarding the penalty as acquirer / Respondent failed to submit the detailed information and documents in standardized format of report in time as contemplated and under Regulation 3(4) and section 15A(b) of the SEBI Act.

For the reasons stated above, the common order passed by the Securities Appellate Tribunal dated 30.11.2000 in SBA No.17/2000 and 18/2000 is set aside. The Appeal is allowed and the order passed by the Adjudicating Officer dated 24.7.2000 is restored and maintained."

II. SEBI Vs Cabot International Capital Corporation - Bombay High Court

The appeal arises from the order dated January 25, 2001 passed by the Securities Appellate Tribunal. The appeal was preferred by SEBI.

Cabot International Capital Corporation (Cabot) was a foreign collaborator of the Indian company namely, Cabot India Ltd. (CIL), and held 51% of the paid up capital of CIL. During the preferential allotment by CIL, Cabot approached SEBI seeking exemption under Regulation 3 of SEBI (Substantial

Acquisition of Shares and Takeovers) Regulations, 1997. On examination of the proposal, SEBI found that the holding of Cabot in CIL had increased from 51% to 60% and accordingly, adjudication proceedings under Section 15A and 15H of SEBI Act, 1992 were initiated for violation of Regulations 3(4) and 11 of Takeover Regulations. The Adjudicating officer, after hearing, imposed a penalty of Rs.1,50,000 on Cabot for violation of Regulation 3(4) of Takeover Regulations i.e. failure to submit report to SEBI. Further, the Adjudication officer has given the benefit of doubt to Cabot on the ground of lack of clarity on the part of Cabot as to the applicability of 1997 Regulations and hence, no penalty under Section 15H (ii) was levied for the alleged violation of Regulation 11. The matter was taken in appeal by Cabot before SAT saying that there was no deliberate and dishonest conduct or any conscious disregard of SEBI Takeover Regulations of 1994/1997; it was only a technical or venial flaw from a bona fide belief that Cabot was not liable to act in a manner prescribed under the Takeover Regulations 1997. Hence mens rea was absent. SAT vide its order dated January 25th, 2001 allowed the appeal, holding that the order passed by SEBI was unsustainable as none of the factors of Section 15J of SEBI Act, 1992 was attracted in the instant case. SAT also viewed the differential treatment regarding the applicability of Section 15H to violations of Regulation 3(4) and Regulation 11 of Takeover Code, to be incorrect.

After extensive hearing in the matter, Hon'ble High Court held mens rea is not essential for imposing civil penalties under the SEBI Act and Regulations. According to the Hon'ble High Court, the adjudication proceedings under the SEBI Act are neither criminal nor quasi criminal proceedings. The relevant findings of the Hon'ble High Court are extracted hereunder:

"Therefore, for respective default or failure, penalty is provided under the Act. The scheme of the SEBI Act of imposing monetary penalty is very clear. This Chapter nowhere deals with criminal offence. These defaults or failures are nothing, but failure or default of statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of SEBI Act deals with the criminal offences under the Act and its punishment.

The adjudication for imposing penalty by Adjudicating Officer, after due inquiry, is neither a criminal nor a quasi criminal proceeding. The penalty leviable under this Chapter or under these Sections, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. The provisions and scheme of penalty under SEBI Act and the Regulations, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of any mens rea by the Appellants and it is not essential element for imposing penalty under SEBI Act and the Regulations.

The penalty imposable under the SEBI Act and the Regulations under Sections 15I and 15J, is deterrent in nature to see that the parties or person concerned complies with the Regulations strictly. The imposition of the penalty under SEBI Act and Regulations is civil in nature and cannot be equated with penal in character as referred and submitted by the respondents and/or observed by the Appellate Authority. It is also clear that

the word "penalty" has different colour and shades and facets and that has to be interpreted and imposed on the basis of particular act and policies or scheme. It is also clear that there can be two distinct liabilities under the same act i.e. civil and / or criminal. The Authorities or Regulatory Authority have ample power to initiate both proceedings, if case is made out, within the framework of the SEBI Act or the Regulations.

The SEBI Act and the Regulations, are intended to regulate the Security Market and the related aspects, the imposition of penalty, in the given, facts and circumstances of the case, cannot be tested on the ground of "no mens rea, no penalty". For breaches of provisions of SEBI Act and Regulations, according to us, which are civil in nature, mens rea is not essential. On particular facts and circumstances of the case, proper exercise of judicial discretion is a must, but not on a foundation that mens rea is an essential to impose penalty in each and every breach of provisions of the SEBI Act.

Now, the question, of the penalty, by the Adjudicating Authority, in the facts and circumstances of the case, was warranted or not. We find that the allotment in question was undoubtedly covered under the exemption provided in Regulation 3(1). There could not have been insistence by the Appellants-SEBI to comply with the requirements of Regulation 3(4). It is also clear that when an acquisition is covered under Regulation 3, the acquirer is required to report to the Board under the Sub-Regulation 3(4) within the specified time, as referred above. In view of this undisputed position, merely because there was no Report filed, that itself cannot be read as serious defect or non compliances of the said provisions. The Appellate Authority, after considering the material on record, including the events, referred in the pleadings, found that the respondents-Company had no intention to suppress any material information from the appellants or the share holders. The Company had informed the Stock Exchange, Registrar of Companies and complied with all other provisions of other laws, well in time. It cannot be overlooked that information about the preferential allotment was well within the knowledge of the appellants, as reflected from the letter dated 2nd January, 1997. The appellants were aware of the preferential allotment in question and in fact prevented the Respondent-company from monitoring and pursuing further course of action. It is also clear from the record that S.R. Batliboi & Associates, Chartered Accountants, being statutory Auditors of the company, had written on 14th January, 1997, to the respondents, the Reserve Bank of India and reported the Company's decision to make preferential allotment. It appears that there was no intention of the respondents to avoid filing of such a Report with the appellants, as the respondents had in fact complied with and notified the relevant details to all other concerned Authorities, like Registrar of Companies, Reserve Bank of India and Stock Exchange in respect of the preferential allotment and the relevant details. Therefore, SAT, cannot be said to have erred in the factual background of the case that the respondents never intended or consciously or deliberately avoided to comply with the obligations under the SEBI Act and the Regulations and the non filing of the Report in question was a technical and a minor defect or breach based on bonafide belief that respondents were not liable

or required to submit the said Report in view of the admitted exemption available under the SEBI Act and the Regulations. In the facts and circumstances of the present case the reversal of the order of the Adjudicatory Authority, by the SAT cannot be faulted.

However, we are not in agreement with the Appellate Authority in respect of the reasoning given in regard to the necessity of mens rea being essential for imposing one penalty. According to us, mens rea is not essential for imposing civil penalties under the SEBI Act and Regulations."

III. Kalpana Bhandari and Others Vs. SEBI and Others - Bombay High Court

The captioned petition is filed *inter alia* for a direction to SEBI to issue appropriate directions restraining Sesa Goa Limited and Sesa Industries Limited from taking any steps pursuant to or in implementation of or in furtherance of the letter of offer dated June 05, 2003.

Sesa Goa Limited and Sesa Industries Limited had issued a letter of offer dated June 05, 2003 to acquire up to 49,13,000 fully paid up equity shares representing 24.56% of the equity share capital of Sesa Industries Ltd. by Sesa Goa Ltd. The primary grievance of the petitioners was that Sesa Goa Ltd., must offer the petitioners price not less that Rs. 57/- per share for acquiring the shares of Sesa Industries from the petitioners and other investors.

The Hon'ble High Court vide its order dated August 05, 2003, dismissed the writ petition in view of the disposal of the similar writ petition (WP no. 1280/1999) filed by some of the shareholders. The Hon'ble High Court disposed WP no. 1280/1999 with an observation that no failure in discharge of any statutory duties on the part of SEBI.

The Hon'ble High Court further observed that even if Sesa Industries was not a listed public company nor was held to have intended to get their securities on any recognized stock exchange in India, the various provisions referred to in section 55 A relating to issue of transfer of securities and non payment of dividend was clearly administrated by the Central Government and the petitioners could always apply to the Central Government for the various grievances raised before the court.

IV. A S Upadhyay Vs BSE and Others – Bombay High Court.

The captioned petition is filed *inter alia* for canceling the notice issued by BSE and NSE dated September 23, 2003. BSE and NSE vide their aforesaid notices shifted nine scrips for trading and settlement on a Trade to Trade basis with effect from September 26, 2003. The petitioner alleged *inter alia* that there is violation of natural justice on the part of SEBI, NSE etc., as no notice was issued to the companies before shifting their scrips to Trade to Trade Segment.

BSE and NSE had issued the impugned circular after consultation with SEBI for the purpose of market safety and integrity. The Hon'ble Court had upheld the validity of the circular issued by BSE and NSE moving the scrip of HFCL to trade to trade category and *inter alia* observed that there was absolutely no substance in the writ petition which purported to challenge the legality and validity of the circulars issued by BSE and NSE. The Court also held that there was no illegality or impropriety in the said decision of the stock exchanges to issue the aforesaid circulars which are

obviously in the interest of the share holders and particularly in the interest of the small investors. The Hon'ble court further observed that there was no dispute that the expert committee consisting of the officials of SEBI, BSE and NSE was empowered to have surveillance to observe that the stock market reflects genuine trades and to ensure that false transactions are prevented. Such decisions were transitory decisions which were taken by SEBI, BSE and NSE considering the current market position and such decisions were always subjected to review. The Court also held that the said regulators were appointed to protect the small investors and to prevent manipulation in the stock market and it was exclusively for such expert bodies to take appropriate decisions to achieve their objectives of stabilizing the market.

Therefore, the court is not inclined to expand the vistas of article 226 of judicial review to take control and have surveillance over the decision of the SEBI, BSE and NSE. The Hon'ble court also observed that it had no expertise to study the share market and there was no malafide or arbitrariness or unreasonableness in the circulars issued by the above stock exchanges which was only a temporary measure to control the movement of certain scrips in the stock market.

V. Shivkumar Bissa Vs BSE and Others – Bombay High Court

The captioned petition was filed by the petitioner (member, BSE) *inter alia* for declaring the circular dated February 20, 2002 of SEBI to be invalid. SEBI vide letter dated February 20, 2002 had informed Mumbai Stock Exchange (BSE) that main broker is responsible for the acts of the sub broker . SEBI vide letter referred above had clarified that " In this regard we would like to clarify that the main broker is responsible for the acts , deeds and things of the sub broker affiliated to it or for whom it has issued contract note /consolidated contract notes".

The captioned petition arises as a constituent had filed an arbitration reference against the sub-broker and also the petitioner for an amount of Rs. 9,00,000/- The learned arbitrator after considering the rival contentions raised by the parties dismissed the claims of the constituent against the petitioner and passed an award against the Sub-broker. In spite of the claim of the constituent having being dismissed against the petitioner, BSE had advised the petitioner to immediately settle the complaint of the constituent regarding the non implementation of arbitration award. BSE had also forwarded the letter dated February 20, 2002 passed by SEBI to the petitioner, which was impugned letter in the matter. BSE had also called upon the petitioner to appear before the disciplinary committee. The petitioner challenged *inter alia* the letter dated February 20, 2002.

SEBI had contested the matter vehemently and argued that a broker is responsible for the Acts of the Sub-broker especially in view of the definition of the word sub-broker as provided in SEBI (Stock Brokers and Sub-Brokers) Rules, 1992. The Hon'ble High Court dismissed the writ petition and observed that the SEBI Regulations clearly mentions that the sub-broker is an agent acting on behalf of the broker and therefore the main broker is liable for the sub-broker for all the acts, deeds and things done. The Hon'ble Court had

further observed that in the agreement, the main broker can specify to what extend the sub-broker is responsible and can deal with the clients on behalf of the main broker. On the reasons mentioned above, the Hon'ble Court observed that there is no ground whatsoever to interfere in the matter. The Hon'ble High Court had further observed that there is nothing illegal, arbitrary or irrational in the said circular, which is in fact the basic principle of law of contract wherein the Principal is always liable for the actions of the agent.

VI. Banhem Securities Private Ltd. Vs. NSE, SEBI and Others - Bombay High Court

The petitioner has filed the captioned petition challenging the SEBI Circular dated 9/7/99 alleging that the enforcement of an award passed under the Arbitration and Conciliation Act, 1996 is governed by the said Act, and SEBI has no power or authority to override the provisions of the said Act by way of an administrative circular.

The petitioner had contended that by the said circular the SEBI has purported to direct the stock exchange to debit the security deposit placed by the members, towards the amount of any award passed against the member. As a consequence of such a debit the member would immediately have to meet the short fall failing which the trading facility of the member would be discontinued and he will suffer loss to his business. The petitioner submits that the power to require a party to submit, security is a power conferred on the Hon'ble Court, and SEBI cannot take upon itself such powers or authority to over ride the provisions of the statute. The said circular is clearly contrary to the provisions of the Arbitration and Conciliation Act, 1996, where an award cannot be enforced till it becomes a decree.

The petitioner sought for a declaration declaring the said SEBI Circular as illegal, unlawful, ultra vires and void and a direction to quash the said SEBI Circular, mainly, on the grounds that the SEBI Circular is merely an administrative instruction and cannot over ride the statute of Parliament i.e. the Arbitration and Conciliation Act, 1996 (the said Act).The SEBI direction as contained in the impugned circular is patently contrary to the provisions of Section 36 of the said Act. The said Circular is ultra vires the provisions of the SEBI Act, SC(R)A arbitrary and illegal as it makes the decree enforceable even though such decree may not be enforceable at law.

By its order the Hon'ble High Court has held that the challenge to the impugned circular is without any substance. The circular has been issued by the SEBI Board in exercise of powers under section 11 and 11B of the SEBI Act in order to protect interests of the investors. SEBI had taken note that arbitration awards passed in favour of the clients / investors are not implemented and the stock exchanges are unable to take appropriate action in order to ensure implementation of the awards. The Hon'ble High Court observed the decision taken by the SEBI is in the right direction. It helps to protect the investors. The circular issued by the SEBI is confined to members / brokers of the Stock Exchanges and there is no question of the circular being contrary to the provisions of section 36 or any other provisions of the Arbitration and Conciliation Act, 1996. The Hon'ble High Court did not find any illegality or arbitrariness in the circular.

VII. Rakesh Agarwal Vs. SEBI – Securities Appellate Tribunal

The captioned appeal was preferred against order dated 106.2001 of Chairman, SEBI against Shri Rakesh Agarwal (Appellant), directing that the appellant shall deposit Rs.17,00,000 each with Investor Protection Funds of The Stock Exchange, Mumbai and National Stock Exchange to compensate any Investor who may make any claim aggrieved with the sale of shares of ABS Industries to Shri I.P. Kedia during the period 9.9.96 to 1.10.96; that SEBI shall initiate prosecution under Section 24 of the SEBI Act and that SEBI shall initiate adjudication proceedings under Section 15I read with Section 15G of the SEBI Act.

The appellant was the Managing Director of ABS Industries Ltd. (ABS), a company incorporated under the Companies Act, 1956. ABS was subsequently acquired by Bayer AG. (Bayer), a company registered in Germany. Bayer acquired controlling stake in ABS Industries Ltd by acquiring 55,80,000 shares @ Rs.70/- per share in a preferential allotment made by ABS Industries Ltd. and 20% shares from existing shareholders @ Rs.80/- per share in a public offer made by them. Allegations were made regarding insider trading in purchase of shares of ABS Industries Ltd prior to announcement by Bayer of acquiring controlling stake in the company. SEBI conducted an investigation into the matter and found that prior to the announcement of the acquisition, the appellant through his brother in law, Shri I.P. Kedia had purchased shares of ABS from the market and tendered the said shares in the open offer made by Bayer thereby making a substantial profit. The appellant being the Managing Director of ABS and having been involved in the negotiations had access to unpublished price sensitive information. Further he was also an insider as far as ABS is concerned. By dealing in the shares of ABS through his brother-in-law while the information regarding the acquisition of 51% stake by Bayer was not public, the appellant had acted in violation of Regulation 3 and 4 of the Insider Trading Regulations.

The Hon'ble Securities Appellate Tribunal vide its order dated 3.11.2003 has allowed the captioned appeal finding that the appellant was not guilty of Insider Trading. The tribunal has held that the that merger was a price sensitive information; that merger of Bayer with ABS Industries was price sensitive and unpublished; that Rakesh Agrawal an 'insider' and that he had purchased the shares of ABS on the basis of unpublished price sensitive information. However, the tribunal held that since Rakesh Agrawal acted in the interest of the company he cannot be considered to have violated the Insider Trading Regulations. The tribunal also held that although Rakesh Agrawal had made profit out of the transactions but it was only incidental to the cause of the interest of the company.

The tribunal held that although it is true that Regulations 3 and 4 of the SEBI (Prohibition of Insider Trading) Regulations, 1992 are per se pure vanila sections without specific mention of the requirement of the motive or intention, if read with the objective of prohibiting insider trading it becomes clear that motive is built in and the insider trading without establishing the motive factor is not punishable. It found that if it is established that the person who had indulged in insider trading had no

intention of gaining any unfair advantage, the charge of insider trading warranting penalty can not be sustained against him

In view of the above, the Tribunal allowed the appeal in respect of the directions to him to deposit a sum of Rs. 34 Lakhs with the Investor Protection Funds. Aggrieved by the said order, SEBI has preferred an appeal against the above order of SAT before the Hon'ble Supreme Court of India and the Supreme Court has admitted the appeal.

VIII. Manu Finlease and Others Vs. SEBI – Securities Appellate Tribunal

The appeal arises from the order dated 29.11.2002 passed by SEBI debarring the company and its directors from accessing and being associated with the capital market for a period of five years, under Section 11B of SEBI Act, 1992 and Regulation 12 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995.

SEBI conducted investigations into the affairs relating to buying, selling and dealing in the shares of M/s. Manu Finlease Ltd. Investigations inter alia revealed various irregularities committed in the public issue by Manu Finlease Ltd. viz. forgery in the amount of Stock Invests, back dating of stock invests, acceptance of late applications and multiple applications, stock invests used for various applications, stock invests issued without proper securities, allotment of shares without waiting for realization of stock invests and false and misleading basis of allotment. The company was also found to have involved in grey market transactions and price manipulation of the scrip.

SAT vide its Order dated October 27, 2003 has upheld the order passed by SEBI. SAT in its order has inter alia held that by invoking Section 11B of the SEBI Act, SEBI had prevented these companies from repeating such manipulations by debarring them from accessing the capital market for specified period. SAT observed that viewed from the investor protection angle, which is the objective for which directions under Section 11B can be issued, the said Section is a preventive measure and such directions which are relatable to the violation of the FUTP Regulations in relation to the public issue made by the Appellant company should be upheld.

Aggrieved by the order of SAT, Manu Finlease and one of its directors filed Appeals before the Hon'ble Supreme Court. The matter came up for hearing on 08.03.2004 and upon hearing, the Hon'ble Supreme Court refused to grant interim stay of the order passed by SAT. However, the Hon'ble Supreme Court admitted the appeals.