IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JAIPUR BENCH, JAIPUR

ORDER

1. D.B. Civil Writ Petition No.4333/2010
21st Century Entertainment Pvt. Ltd.
Versus
Union of India and others

2. D.B.Civil Writ Petition No.6438/2010
Gopal Aggarwal and others
Versus
Union of India and others

3. D.B.Civil Writ Petition No.4581/2010
M/s. Cyberinfo Zeeboomba Com and others
Versus
Union of India and others

4. D.B.Civil Writ Petition No.4582/2010
M/s. Eskay K N I T (India) Ltd. and others
Versus
Union of India and others

5. D.B.Civil Writ Petition No.5075/2010
M/s. Hanuman Cultivation Pvt. and others
Versus
Union of India and others

6. D.B.Civil Writ Petition No.5132/2010
M/s. Axon Realpro Pvt. Ltd. and others
Versus
Union of India and others

7. D.B.Civil Writ Petition No.5133/2010
M/s. Alpha (India) and others
Versus
Union of India and others

8. D.B.Civil Writ Petition No.5134/2010
M/s. Expro Const. Pvt. Ltd. and others
Versus
Union of India and others

9. D.B.Civil Writ Petition No.5135/2010
M/s. Avon Realcon Pvt. Ltd. and others
Versus
Union of India and others

10. D.B.Civil Writ Petition No.5136/2010
M/s. Siddhi Cultivation Pvt. Ltd. and others
Versus
Union of India and others

11. D.B.Civil Writ Petition No.5137/2010
M/s. Allcon Estate Pvt. Ltd. and others
Versus
Union of India and others

12. D.B.Civil Writ Petition No.5271/2010
M/s. Punit Mercantile Pvt. Ltd. and others
Versus
Union of India and others

13. D.B.Civil Writ Petition No.5272/2010
M/s. Akshar Mercantile Pvt. Ltd. and others
Versus
Union of India and others

14. D.B.Civil Writ Petition No.5273/2010
A M Azam and others
Versus
Union of India and others

15. D.B.Civil Writ Petition No.5274/2010
M/s. Anoop Multitrade Pvt. Ltd. and others
Versus
Union of India and others

16. D.B.Civil Writ Petition No.5316/2010
M/s. Pallash Construction Pvt. and others
Versus
Union of India and others

17. D.B.Civil Writ Petition No.6439/2010
M/s. Avera Properties Pvt. Ltd.
Versus
Union of India and others

18. D.B.Civil Writ Petition No.6440/2010
Vijay Sawant and others
Versus
Union of India and others

19. D.B.Civil Writ Petition No.64412010
Beta Trading Pvt. Ltd. and others
Versus
Union of India and others

20. D.B.Civil Writ Petition No.6442/2010
M/s. Jaybhart Textiles and others
Versus
Union of India and others

21. D.B.Civil Writ Petition No.6443/2010
Nitish Nayak and others
Versus
Union of India and others

Date of Order :: 29th October, 2010

PRESENT

HON'BLE THE CHIEF JUSTICE MR. JAGDISH BHALLA
HON'BLE MR. JUSTICE M.N. BHANDARI

Mr.Paras Kuhad)
Mr.R.N.Mathur)
Mr.Nitin Jain)
Mr.Rajendra Prasad)
Mr.Virendra Lodha)
Mr.Lokesh Atrey)-for the petitioners.
Ms.Gunjan Pathak)
Mr.Manish Sharma)
Mr.Samit Vishnoi)
Mr.A.S.Saxena)
Mr.Sudhanshu Joshi)
with Mr.Alok Sharma)
Ms.Arpita Mathur)
Mr.Rajiv Surana)

Mr.Kamlakar Sharma)
Mr. Manish Sharma)

Mr.G.K.Garg)
Smt.Anita Agrawal)
Mr.Ashok Mehta)-for the respondents.
Mr.S.P.Sharma)
Mr.S.S.Raghav)
Mr.S.S.Sharma)
Mr.Sanjay Joshi)

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BY THE COURT : (Per Bhandari, J.)

Since on same set of facts, similar issues have been raised, all these writ petitions are decided by this common order.

For the purpose of appreciating arguments of all the parties, we have taken D.B. Civil Writ Petition No.4333/2010 - 21st Century Entertainment Pvt. Ltd. Versus Union of India and others as leading writ petition with the consent of all the learned counsel for the parties.

The aforesaid writ petition has been filed with the following prayers:-

> "(i) The section 11(4) and section 11(B) of the Securities & Exchange Board of India Act, 1992 (for short 'the SEBI Act') be declared invalid and ultra vires to the Constitution of India.
>
> (ii) The impugned order dated 8.3.2010 passed by the respondent No.2 being illegal and arbitrary be quashed and set aside.
>
> (iii) This Hon'ble Court may be pleased to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, order or direction calling for the records and papers pertaining to the impugned order and investigation of the respondent No.2 in the matter of Bank of Rajasthan.
>
> (iv) Any other appropriate writ, order or direction which may be considered just and proper in the facts and circumstances of the case may kindly also be issued in favour of the petitioner."

Perusal of aforesaid reveals that while challenging the order dated 8.3.2010 passed by the respondent No.2 – Securities and Exchange Board of India (for short 'the SEBI'), the constitutional validity of Sections 11(4) & 11 (B) of the SEBI Act has also been challenged.

The petitioners are aggrieved by an ad-interim ex-parte order dated 8.3.2010 passed by the SEBI restraining them from accessing security market and prohibiting from buying, selling and dealing in the securities in any manner whatsoever till further orders.

Aforesaid order dated 8.3.2010 is under challenge mainly on the ground that same is without jurisdiction and offend fair play apart from violation of principles of natural justice. By the interim order, harsh and excessive penalty has been imposed upon the petitioners. The directions in the impugned order are in respect of shareholding in the Bank of Rajasthan Ltd. The property of the Bank of Rajasthan Ltd. is situated in the State of Rajasthan apart from its registered office. The part of cause of action thereof arose in the State of Rajasthan.

It is urged that on 20.2.2005, the Reserve Bank of India (for short 'the RBI') came out with certain guidelines viz. Guidelines on Ownership and Governance in Private Sector Banks (hereinafter referred to as 'the RBI Guidelines' for the short). The RBI Guidelines, *inter-alia*, require private sector banks to ensure that ultimate ownership and control of private sector banks is well diversified. The objective of the same was to ensure that no single entity or group of related entities has shareholding or control, directly or indirectly, in any bank in excess of 10 per cent of the paid-up capital of the private sector bank. Where ownership is that of a corporate entity, no single individual/entity has

ownership and control in excess of 10 per cent of that entity. Pursuant to the aforesaid Guidelines, promoter shareholding in the bank was to be reduced to the extent indicated above. The promoter accordingly diversified their shareholding, though the RBI Guidelines are not statutory in character. The Bank of Rajasthan Ltd. had disclosed to the Stock Exchanges regarding decrease in the promoter shareholding. The RBI, however, recorded that the Bank of Rajasthan has made incorrect disclosures regarding shareholding pattern led by Mr. Pravin Kumar Tayal and others. The RBI thereafter, made a reference to SEBI based on observations set up under their AFI Report showing that reported reduction by the promoter did not appear to be correct. The SEBI thereupon, made so-called investigation followed by passing of the impugned order. The impugned order mainly discloses allegations regarding incorrect disclosures to Stock Exchange for promoter shareholding. It is by presuming that shareholding by Yadav Group and Silvassa Group represents violation of takeover regulations. The petitioners were accordingly restrained from accessing security market and prohibited from buying, selling and dealing in securities.

Learned counsel appearing on behalf of the petitioners, at the first instance, submitted that Sections 11(4) & 11(B) of the SEBI Act are unconstitutional. The provisions aforesaid are hit by Articles 14 & 19 of the Constitution of India. It imposes penalties in the garb of remedial measures, that too, without providing procedural safeguards. The Board has been empowered to pass punitive order without following the principles of natural justice. The petitioners have been restrained from accessing security market and prohibited from buying, selling and dealing in securities though, as per the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India, the petitioners are entitled to carry on any occupation, trade and business. To substantiate the arguments, learned counsel for petitioners placed reliance on the judgments of the Hon'ble Supreme Court in the case of **Ritesh Agarwal Versus SEBI** reported in **(2008) 8 SCC 205**. Therein, similar issues were held to be penal in nature. A specific reference of paras 25 to 28 was made to show that such orders are violative of Article 19(1)(g) of the Constitution of India.

It is further urged that if the provisions of

Regulations 44 & 45 of SEBI (Acquisition of Shares and Takeovers) Regulations of 1997 are looked into, then it becomes clear that any orders passed under Sections 11 (4) & 11(B) of the SEBI Act are considered to be penalties for non-compliance. The Legislature's intention therefore clearly coming out to treat such orders to be punitive. An order of penalty has been passed without affording even opportunity of hearing more so when in Raitesh Agarwal's case (supra), it was held to be unconstitutional. Thus, the impugned order deserves to be set aside on this count itself.

The fact further remains that the provisions of Sections 11(4) of the SEBI Act does not apply to the petitioners as the petitioners are not the persons accessing the security market or persons associated with security market, which is a pre-requirement to invoke the provisions of Sections 11(4) & 11(B) of the SEBI Act and they are not the listed public companies. The SEBI yet invoked the provisions of Section 11(4) of the SEBI Act for passing the impugned order. So far as provisions of Section 11(B) of the SEBI Act is concerned, the type of the order to be passed therein cannot prohibit persons to buy, sell or deal in securities. Purpose and scope of the

aforesaid provisions is quite different, thus, for the aforesaid reasons, impugned order remains without authority of law. It is a settled proposition of law that in absence of source, prohibition or restrain to do business or trade cannot be imposed. However, ignoring the aforesaid aspect, the respondents have passed the impugned order. This is more so when the provisions of Sections 11(4) & 11(B) of the SEBI Act so as the impugned order provide unreasonable restriction on trade and business. The prayer is accordingly to set aside the impugned order and, at the same time, to declare provisions of Sections 11(4) & 11(B) of the SEBI Act to be unconstitutional.

Learned counsel appearing for respondent No.2 has, at the very outset, raised preliminary objections. It is submitted that the impugned order was passed by the SEBI at Mumbai. The petitioners are also residing at Mumbai, hence, no cause of action arose within the territorial jurisdiction of this Court. The retrain order was even conveyed to the petitioners outside territory of the State of Rajasthan. Reference of the following judgments have been made to substantiate the arguments: (i) **Eastern Coalfields Ltd. Versus State of Sikkim**

reported in **(2008) 3 SCC 456**; (ii) **Kusum Ingots & Alloys Ltd. Versus Union of India** reported in **(2004) 6 SCC 254**; (iii) **Alchemist Ltd. & Ors. Versus Kalyan Banerjee** reported in **(2007) 11 SCC 335** and (iv) **National Textile Corpn. Ltd. and others Versus Haribox Swalram and others** reported in **(2004) 9 SCC 786**.

Other preliminary objection is regarding availability of efficacious alternative remedy. Referring to the provisions of Sections 15(T) of the SEBI Act, it is urged that any order passed by the Board can be challenged by maintaining an appeal to the Securities Appellate Tribunal. Further appeal lies before the Hon'ble Supreme Court. The petitioners without invoking the jurisdiction of the Securities Appellate Tribunal, directly approached this Court though grounds raised for challenge to the order passed by the SEBI can be raised before the Securities Appellate Tribunal. In the light of the availability of efficacious alternative remedy, these writ petitions deserve to be dismissed.

It is lastly urged that the impugned order is only an interim order. Aforesaid order was passed in the interest

of investors and for their protection. The petitioners therein called upon to submit their objections. Without representing the case before the Board, petitioners have directly challenged the interim order. The writ petitions are not maintainable against the interim order. In reference to the preliminary objections, a prayer has been made to dismiss the writ petitions as not maintainable. This is more so when the Attorney General has not been made the party respondent though vires of the provisions of the SEBI Act are under challenge. In this regard, a reference of the judgment in the case of **Basant Lal Versus State of U.P. and another** reported in **(1998) 8 SCC 589** has been made wherein Hon'ble Apex Court held that a statute cannot be struck down unless notice has been given to the Attorney General.

Coming to the merits of the case, learned counsel for respondent No. 2 firstly addressed the issue in regard to the challenge to provisions of Sections 11(4) & 11(B) of the SEBI Act. It is submitted that provision aforesaid does not impose unreasonable restriction on trade and business. If the object of the SEBI Act is looked into, it comes out that it is to protect the interest of the

investors in securities and promote development of security market apart from to regulate it. To achieve the aforesaid object, measures have been provided in various provisions of the SEBI Act, which include Sections 11(4) & 11(B) of the SEBI Act. The Hon'ble Apex Court has considered those aspects in a recent judgment in the case of **Securities and Exchange Board of India Versus Ajay Agarwal** reported in **(2010) 3 SCC 765**. Therein, object of the SEBI Act were loudly focused wherein similar controversy came up for consideration.

The argument that provisions of Sections 11(4)(b) and 11B of the SEBI Act eliminates the principles of natural justice in violation of Article 14 of the Constitution of India is not tenable so as the argument regarding violation of Article 19(1)(g) of the Constitution of India. The Hon'ble Supreme Court had an occasion to consider the aforesaid aspect wherein elimination of the principles of natural justice was made. Therein, it was not held to be unconstitutional. A reference of the judgment in the case of **Union of India and Another Versus Tulsiram Patel** reported in **(1985) 3 SCC 398** has been given apart from the judgment in the case of **Ajit Kumar Nag Versus General Manager (PJ),**

Indian Oil Corpn. Ltd., Haldia and Others reported in **(2005) 7 SCC 764**. A further reference of the judgment in the case of **Swadeshi Cotton Mills Versus Union of India** reported in **(1981) 1 SCC 664** has been given to substantiate the argument aforesaid.

Coming to the facts of this case, it is submitted that if the impugned order is looked into, it comes out to be interim in nature and therein petitioners have been called to submit their objections within a period of 21 days. This is to provide an opportunity of hearing. The impugned order has been passed only as an interim measure to protect interest of investors. Few petitioners herein failed to raise their objections before the Board within the stipulated period and straightway approached this Court. Second Proviso to Section 11(4) of the SEBI Act does not eliminate principles of natural justice, rather it provides for an opportunity of hearing to the intermediaries or persons concerned. In the light of aforesaid fact, a case is not made out to hold that there is a violation of principles of natural justice. The interim orders are passed by the Courts, Tribunals and Quasi Judicial Authorities while exercising their inherent powers. In this case, such powers are contained in the SEBI Act itself.

Thus, mere passing of ex-parte interim order during pendency of the proceedings cannot mean elimination of principles of natural justice. The petitioners would be provided opportunity of hearing and for that purpose they must file their objections, if so chooses. The period for filing objections has already expired during pendency of the writ petitions, yet the Board will consider their objections if it is submitted within a period of 10 days from the date of decision of this Court.

So far as other aspect is concerned, it is submitted that looking to the violation of the RBI Guidelines, the respondent Board made preliminary enquiry/investigation and thereupon found prima facie violation of the RBI Guidelines and accordingly interim order was passed. Aforesaid is, however, subject to objections by the petitioners. In the light of aforesaid, the issue focused on the merits may not be addressed by the Court and be left for its decision by the SEBI itself. The allegation against the petitioners is that in follow up action pursuant to the Guidelines, the reduction of promoter shareholding and declaration thereupon is found to be incorrect. They acquired and retained the securities, which is only with a view to manipulate shareholding of the promoter.

Looking to the prima facie case on the aforesaid aspect, the SEBI has rightly passed the impugned order by invoking provisions of Sections 11(4) & 11(B) of the SEBI Act. The power invoked by the Board is not simplicitor under Section 11 of the SEBI Act as after making or causing enquiry, necessary orders can be passed under Section 11(B) of the SEBI Act. It is under those statutory provisions, the Board passed the order in the interest of investors. The prayer is, accordingly, to dismiss the writ petitions.

Learned counsel, Mr. S.P. Sharma, appearing on behalf of applicants for impleadment as party respondents, submits that applicants represent shareholders and accordingly want to be impleaded as party respondents. He otherwise supports the arguments made by learned counsel for respondent No.2 – SEBI.

All other respondents have also adopted arguments of learned counsel for respondent No.2 – SEBI.

We have heard learned counsel appearing on behalf of the parties and scanned the matter carefully.

Since constitutional validity of Sections 11(4) & 11 (B) of the SEBI Act is under challenge, we are dealing the aforesaid issue first. It is mainly on the ground that it is hit by Articles 14 & 19(1)(g) of the Constitution of India. Aforesaid provisions do not provide an opportunity of hearing, thus are violative of Article 14 of the Constitution of India and it otherwise puts restriction on trade and business by the person, thus are hit by Article 19(1)(g) of the Constitution of India. This is more so when orders are punitive in nature and not the remedial.

The first issue is as to whether provisions of Sections 11(4) & 11(B) of the SEBI Act are hit by Article 14 of the Constitution of India. We are reproducing aforesaid provisions for ready reference:-

> "11. **Functions of Board** :
>
> (1) .....
> (2) ....
> (3) ....
>
> (4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, 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 recognized 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 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.

(f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation:

Provided that the Board may, without prejudice to the provisions contained in sub-section (2) or sub-section (2A), take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which

intends to get its securities listed on any recognized stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market:

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

11B. **Power to issue directions** : Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary -

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interests of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person,

it may issue such direction -

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market."

Perusal of the provisions of Sections 11(4) & 11(B) shows that the Board is given powers to take few measures either pending investigation or enquiry or on

its completion. The Second Proviso to Section 11, however, makes it clear that either before or after passing of the orders, intermediaries or persons concerned would be given opportunity of hearing. In the light of aforesaid, it cannot be said that there is absolute elimination of the principles of natural justice. Even if, the facts of this case are looked into, after passing the impugned order, petitioners were called upon to submit their objections within a period of 21 days. This is to provide opportunity of hearing to the petitioners before final decision is taken. Hence, in this case itself absolute elimination of principles of natural justice does not exist. The fact, however, remains as to whether post-decisional hearing can be a substitute for pre-decisional hearing. It is a settled law that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, the requirement of giving reasonable opportunity exists before an order is made. The case herein is that by statutory provision, principles of natural justice are adhered to after orders are passed. This is to achieve the object of SEBI Act. Interim orders are passed by the Court, Tribunal and Quasi Judicial Authority in given facts and circumstances of the case showing urgency or

emergent situation. This cannot be said to be elimination of the principles of natural justice or if ex-parte orders are passed, then to say that objections thereupon would amount to post-decisional hearing. Second Proviso to Section 11 of the SEBI Act provides adequate safeguards for adhering to the principles of natural justice, which otherwise is a case herein also. In the case of Tulsiram Patel (supra) aforesaid issue was taken into consideration. Therein, similar arguments were raised in reference to Article 14 of the Constitution of India when departmental enquiry allowed to be dispensed with in three situations given under Proviso-II to Article 311(2) of the Constitution of India. Therein, in Paras 97, 98, 101 & 102 following was held thus:-

> "97. Though the two rules of natural justice, namely, nemojudex in causa sua em audi alteram part, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established the are none the less not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible. These rules can be adapted and modified by statutes andstatutory rules and also by the Constitution of the Tribunal which has to decide particular matter and rules by

which such Tribunal is governed. There is no difference in this respect between the law in England and in India. It is unnecessary to refer to various English decisions which have held so. It will suffice to reproduce what Ormond, L.J., said in Norwest Holst Ltd. v. Secretary of State for Trade and others L.R. [1978]1 Ch.201 (at page 227):

"The House of Lords and this Court have repeatedly emphasised that the ordinary principles of natural justice must be kept flexible and must be adapted to the circumstances prevailing in any particular case. One of the most important of these circumstances, as has been said throughout the argument, is, of course, the provisions of the statute in question: in this case sections 164 and 165 of the Companies Act 1948."

98. In India, in Suresh Koshy George v. The University of Kerala and others this Court observed (at page 322):

"The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

After referring to this case, in A.K.Kraipak and others etc. v. Union of India and others Hegde, J., observed (at page 469) :(SCG p. 272, para 20)

"What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been

contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

101. Not only, therefore, can the principles of natural justice be modified but in exceptional cases they can even be excluded. There are well-defined exceptions to the nemo judex in causa sua rule as also to the audi alteram partem rule. The nemo judex in causa sua rule is subject to the doctrine of necessity and yields to it as pointed out by this Court in J.Mohapatra & Co. and another v. State of Orissa and another [1985] 1 S.C.R. 322,334-5. So far as the audi alteram partem rule is concerned, both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. This right can also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion; nor can the audi alteram partem rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands, as pointed out in Maneka Gandhi's case at page 681. If legislation and the necessities of a situation can exclude the principles of natural justice including the audi alteram partem rule, a fortiorari so can a provision or the Constitution, for a Constitutional provision has a far greater and all-pervading sanctity than a statutory provision. In the present case, clause (2) of Article 311 is expressly excluded by the opening words of the second proviso and particularly its key-words this clause shall not apply. As pointed out above, clause (2) of Article 311 embodies in express words the audi alteram partem rule. This principle of natural justice having been expressly excluded by a Constitutional provision, namely, the second proviso to clause (2) of Article 311, there is no scope

for reintroducing it by a side-door to provide once again the same inquiry which the Constitutional provision has expressly prohibited. Where a clause of the second proviso is applied on an extraneous ground or a ground having no relation to the situation envisaged in that clause, the action in so applying it would be mala fide, and, therefore, void. In such a case the invalidating factor may be referable to Article 14. This is, however, the only scope which Article 14 can have in relation to the second proviso. but to hold that once the second proviso is properly applied and clause (2) of Article 311 excluded, Article 14 will step in to take the place of clause (2) would be to nullify the effect of the opening words of the second proviso and thus frustrate the intention of the akers of the Constitution. The second proviso is based on public policy and is in public interest and for public good and the Constitution - makers who inserted it in Article 311(2) were the best persons to decide whether such an exclusionary provision should be there and the situations in which this provision should apply.

102. In this connection, it must be remembered that a government servant is not wholly without any opportunity. Rules made under the proviso to Article 309 or under Acts referable to that Article generally provide for a right of appeal except in those cases where the order of dismissal, removal or reduction in rank is passed by the President or the Governor of a State because they being the highest Constitutional functionaries, there can be no higher authority to which an appeal can lie from an order passed by one of them. Thus, where the second proviso applies, though there is no prior opportunity to a government servant to defend himself against the charges made against him he has the opportunity to show in an appeal filed by him that the charges made against him are not true. This would be a sufficient compliance with the requirements

> of natural justice. In Maneka Gandhi's case and in Liberty Oil Mills and others v. Union of India and others [1984] 3 S.C.C. 465 the right to make a representation after an action was taken was held to be a sufficient remedy, and an appeal is a much wider and more effective remedy than a right of making a epresentation."

Perusal of aforesaid paras shows that the issue raised herein was dealt with by the Hon'ble Apex Court in detail. Taking into consideration not only earlier judgment but even provisions of Article 309 of the Constitution of India, it was held that a provision of appeal is in sufficient compliance of the principles of natural justice. The Second Proviso to Section 11 provides a right of hearing by the same authority apart from a provision of appeal, thus it cannot be said to be a case of exclusion of principles of natural justice altogether. The hearing even after decision and that too, by maintaining appeal, is found to be in-compliance to the principles of natural justice as specifically referred in Para 102 of Tulsiram Patel' case (supra). The same view was taken by the Hon'ble Apex Court in the case of Ajit Kumar Nag (supra). Paras 27, 37 & 44 of aforesaid judgment are quoted hereunder for ready reference:-

> "27. The appellant in Hari Pada Khan relied

upon Hindustan Steel Limited (II), and submitted that in that case, this Court struck down a similar provision being violative of natural justice and also violative of Article 14. The Court, however, held that the principles of natural justice had no application when the authority was of the opinion that it would be inexpedient to hold an enquiry and it would be against the interest of security of the Corporation to continue in employment the offender workman when serious acts were likely to affect the foundation of the institution. The Court also noted that a similar provision was held valid and intra vires by this Court in Mathura Refinery Mazdoor Sangh v. Deputy Chief Labour Commissioner & Others.

37. **It is well settled that a provision which is otherwise legal, valid and intra vires cannot be declared unconstitutional or ultra vires merely on the ground that there is possibility of abuse or misuse of such power. If the provision is legal and valid, it will remain in the statute book. Conversely if the provision is arbitrary, ultra vires or unconstitutional, it has to be declared as such notwithstanding the laudable object underlying**.

44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. **We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing**. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten forbidden fruit. [See R.v. University of Cambridge. **But we are also aware that principles of natural justice are not rigid**

> **or immutable and hence they cannot be imprisoned in a straight-jacket. They must yield to and change with exigencies of situations**. They must be confined within their limits and cannot be allowed to run wild. It has been stated; " 'To do a great right' after all, it is permissible sometimes 'to do a little wrong' ". [Per Mukharji, C.J. in Charan Lal Sahu v. Union of India, (Bhopal Gas Disaster); (1990) 1 SCC 613] While interpreting legal provisions, a court of law cannot be unmindful of hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'."

In the aforesaid judgment, issue of post-decisional hearing was also considered and dealt with.

In the case of Swadeshi Cotton Mills (supra), similar issue came up for consideration before the Hon'ble Apex Court and therein, in the light of the statement made by learned Solicitor General, the Hon'ble Apex Court refused to quash the impugned order, rather a direction was given for providing hearing to the aggrieved person within a reasonable period. Learned counsel for respondent No.2 – SEBI has already conceded that though period of 21 days has already passed for submission of objections, if any objection is made by the petitioners within a period of 10 days from the date of order of this Court, same be considered by the Board.

In view of aforesaid and what has been stated by the Hon'ble Apex Court in Basant Lal's case (supra), we are of the view that provisions of Sections 11(4) & 11(B) of the SEBI Act are not hit by Article 14 of the Constitution of India. Para 3 of the said judgment is also quoted hereunder for ready reference:-

> "3. It apparently needs to be stated that statutory provisions are to be assumed to be constitutional, that constitutionality is to be considered only where absolutely necessary, that a statute cannot be struck down unless notice has been given to the Attorney General in the case of a Central statute, as here, or the Advocate General in the case of a State statute. According to learned counsel for the husband-appellant, the contention that Section 125(2) was unconstitutional had not even been raised in the pleadings. There is no doubt that the judgment must be set aside insofar as it holds that Section 125(2) is unconstitutional."

The question now comes as to whether aforesaid provisions are hit by Article 19(1)(g) of the Constitution of India. According to learned counsel for petitioners, provisions of Sections 11(4) & 11(B) of the SEBI Act do not impose reasonable restriction to fall within Clause (6) of Article 19(1)(g) of the Constitution of India. We have

considered aforesaid argument also. Before appreciating the argument of the petitioners, it is necessary to refer the objects for which the SEBI Act was enacted. It provides establishment of Board to protect interest of the investors in securities and to promote development and to regulate the security market and matters connected with or incidental thereto. Aforesaid object was elaborately discussed by the Hon'ble Apex Court in a recent judgment in the case of Ajay Agarwal (supra). Though, in the aforesaid case, constitutional validity of the provision was not challenged, the Hon'ble Apex Court, however, taken into consideration provisions of Sections 11(B) & 11(4)(b) of the SEBI Act. Paras 20, 25, 27, 33, 34 & 35 of the said judgment deal with the aforesaid issue, thus are quoted hereunder for ready reference:-

> "20. In this connection it may be noticed that Section 11-B of the Act was invoked even at the show-cause stage. Therefore, it cannot be said that any provision has been invoked in the midst of any pending proceeding initiated by the Board. The respondent was, thus, put on notice that the Board is invoking its power under Section 11-B which was available to it under the law on the date of issuance of show-cause notice.
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> 25. In the instant case, the respondent has not been held guilty of committing any offence

nor has he been subjected to any penalty. He has merely been restrained by an order for a period of five years from associating with any corporate body in accessing the securities market and also has been prohibited from buying, selling or dealing in securities for a period of five years.

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 from the time being in force. Therefore, the order of restrain for a specified period cannot be equated with punishment for an offence as has been defined under the General Clauses Act.

33. If we look at the legislative intent for enacting the said Act, it transpires that the same was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of the investors. The requirement of such an enactment was left in view of substantial growth in the capital market by increasing the participation of the investors. In fact such enactment was necessary in order to ensure the confidence of the investors in the capital market by giving them some protection.

34. That said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are 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 purpose 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.

> 35. A perusal of Section 11, sub-section 2(a) of the said Act makes it clear that the primary function of the Board is to regulate the business in stock exchanges and any other securities markets and in order to do so it has been entrusted with various powers. Section 11 had to be amended on several occasions to keep pace with the "felt necessities of time". One such amendment was made in sub-section (4) of Section 11 of the said Act, which gives the Board the power to restrain persons from accessing the securities market and to prohibit such persons from being associated with securities market to buy and sell or deal in securities. Such an amendment came in 2002."

Perusal of aforesaid paras shows that the SEBI Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors. A restrained order for same period from accessing the security market and prohibiting buying, selling and dealing in security was not held to be a penalty. Looking to the object of the SEBI Act, provisions of Sections 11(4) & 11(B) of the SEBI Act imposes a reasonable restriction in conformity to Clause (6) of Article 19 of the Constitution of India. This is in the larger interest of the investors and to achieve the objects of SEBI Act. In the light of aforesaid, we do not find that provisions of Sections 11(4) & 11(B) of the SEBI Act are violative of Article 19(1)(g) of the Constitution of India.

Accordingly, challenge to the constitutional validity of the aforesaid provisions is not accepted. Thus, the provisions are held to be intra-vires.

A reference of Regulations 44 & 45 of Regulation of 1997 has also been given to show that the order impugned herein is taken to be penal in nature as it is specified as one of the penalties. Aforesaid argument is considered in the light of the provisions of Sections 11(4) & 11(B) of the SEBI Act. The provisions aforesaid shows that pending investigation/enquiry, Board can pass certain orders of the nature indicated therein. In the instant case, restrained and prohibitory order has been passed during intervening period. In view of aforesaid and as we have treated the provisions of Sections 11(4) & 11(B) of the SEBI Act as intra-vires. It clearly comes out that within the framework of Sections 11(4) & 11(B) of the SEBI, certain orders can be passed. The issue as to whether such orders can be passed against the petitioners in ignorance to the provisions of Section 11 (4) of the SEBI Act, is an issue which can be raised in the form of objections by the petitioners before the SEBI itself. The regulation cannot control or nullify provisions of Act, however, if any order is passed under regulation,

it will take its colour accordingly.

It has been submitted by learned counsel for respondents that looking to the incorrect disclosure, the matter was inquired upon/investigated by the SEBI and thereupon interim order was passed. If the petitioners can otherwise focus or show that there exist no incorrect disclosures, the matter would be heard and decided by the Board itself. Thus, objection regarding applicability of Section 11(4) & 11(B) of the SEBI Act is also an issue, which can be raised and decided by the SEBI. Any comment on aforesaid aspect may cause prejudice to either parties, thus, we are restraining ourselves to make any comment on aforesaid aspect.

In the light of the discussion made above and also the judgments of the Hon'ble Apex Court in the case of Ajay Agarwal (supra), we are of the view that the petitioners may raise their objections before the SEBI itself, more so when impugned order is interim in nature. We are accordingly not inclined to interfere therein.

Before parting with the judgment, it is necessary to observe that during the course of arguments, learned

counsel for petitioners prayed that if they are left for hearing by the Board, at least a direction may be given to the Board to decide the matter within the time frame by providing opportunity of hearing. Aforesaid prayer was not opposed, rather, conceded by respondent No.2 – SEBI and others.

Accordingly, while not interfering with the impugned order, we give a liberty to the petitioners to submit their objections against the impugned order within a period of 10 days from the date of this order, if they so chooses. If objections are submitted, respondent No.2 will provide opportunity of hearing to the petitioners and thereupon pass appropriate orders deciding the matter finally within a period of 2 months from the date of submission of objections. It is expected that the SEBI would not guide itself by the interim order challenged herein and will take proper view after hearing the parties. Any observation made in this judgment may also not affect the order.

Since we are not interfering in the impugned order and accordingly not entertaining the writ petitions, the preliminary objection regarding territorial jurisdiction and of alternative remedy are not required to be addressed.

The writ petitions are, accordingly, disposed of in the light of the directions and observations made above.

(M.N. BHANDARI), J. **(JAGDISH BHALLA)C.J.**

Sunil
Jr.P.A.