RITESH AGARWAL AND ANR. A

v.

SECURITIES AND EXCHANGE BOARD OF INDIA AND ORS.

(Civil Appeal No. 4681 Of 2006)

MAY 13, 2008 B

[S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ]

SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992: C

ss. 11 and 11B – Irregularities committed by 'promoters' of target company in its public issue and allotment of shares –SEBI holding the public issue by the promoters to be a hoax with an intention to perpetrate fraud on investors — Board directing all promoters to disassociate themselves in every D *respect from the capital market related activities and not to access the capital market for a period of ten years – Two of the promoters claiming themselves to be minor at the relevant time — Held: The persons who committed fraud in the names of the minors would be proceeded against not only for com-* E *mission of act of fraud on their own behalf but also on behalf of the minors – Minors being not party to the fraud, could not have been subjected to penalty under the Act – Contract Act, 1872.*

SEBI (PROHIBITION OF FRAUDULENT AND UNFAIR TRADE PRACTICES RELATING TO SECURITIES MARKETS) REGULATIONS, 1995: F

Regulations 3-6 and 11 – Penalty - Retrospective operation of Regulations—Held: A penal statute will not have any G *retrospective effect or retroactive operation – The Regulations coming into force w.e.f. 25.10.1995, would not apply where the cause of action arose prior thereto – In absence of any valid law operating in the field, there would not be any source for*

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imposing penalty — On facts, commission of fraud having completed prior to coming into force of Regulations, question of invoking penal provisions would not arise - Constitution of India, 1950 – Articles 19(1) (g) and (6).

SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1977:

Regulation 2(h) – 'Promoter' – Held: Wife and children of the promoter making contribution towards the target company would come within the purview of the term 'promoter'.

Securities and Exchange Board of India noticed irregularities in the matter of public issue of a company. The SEBI found that the public issue by the promoters of the company was hoax with an intention to perpetrate fraud on investors. It, therefore, directed the promoters of the company to buy back the shares from the allottees/ shareholders. It further, in exercise of powers u/s 4(3) r/w ss. 11 and 11-B of the Securities and Exchange Board of India Act, 1992 and Regulation 11 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 1995 (the FUTF Regulations) directed the company and its promoters including the two appellants to dissociate themselves from the capital market related activities and not to access the capital market for a period of ten years. The two appellants contended in appeal before the Securities Appellate Tribunal that they were minors when the company went in for the public issue and, therefore, the Board was not justified in issuing directions to them. The plea was rejected by the Tribunal.

In the instant appeal it was contended that the appellants being minors, no order of penalty could have been imposed on them; that they were not shown as promoters in the brochure; that the public issue of the company having been opened on 12.6.1995 and closed on 22.6.1995, the 1995 Regulations which came into force w.e.f. 25.10.1995, could not be said to have any application.

Partly allowing the appeal, the Court A

HELD: 1. It may be true that only the father of the appellants was shown as a promoter in the brochure along with two others, but, indisputably the two appellants and their mother also made contributions. They, therefore, come within the purview of the term 'promoter' as defined in Regulation 2(h) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. [para 11] [566-B,C, 565-A] B

2. The fact that the issue was under-subscribed is not in dispute. The question that the under-writers have not subscribed is also not in issue. The fact that there had been divergence of funds is also neither in doubt nor in dispute. The promoter's contribution has not come in, furthermore, is not in question. The findings of the Board are not in question. The Board, therefore, has rightly proceeded to take action in terms of the SEBI Act, 1992. [Para 11] [567-A,B,G,H] C D

Sterlite Industries (India) Ltd. V. Securities and Exchange Board of India (2001) 31 SCL 485: (2001) 45 CLA 195 (SAT); *BPL Limited vs. Securities and Exchange Board of India, SEBI* [2002] 38 SCL 310 (SAT) *and Videocon International Ltd. V Securities and Exchange Board of India, ShriD.R. Mehta, Chairman, SEBI and Dr. R.K. Kakkar, Division Chief, SEBI* [2002] 38 SCL 422 – referred to. E

3.1 In view of s. 11 of the Contract Act, 1872, a minor cannot enter into a contract. The appellants are said to be minors and, therefore, having regard to the provisions of the Contract Act, they could not have been proceeded against. The Tribunal unfortunately did not go into this question in detail. Finding of the Tribunal in this regard is wholly unsustainable. It is not based on any legal principle. No reason has been assigned therefor. (pare 11 and 19) [572-E,H, 573-A, 566-F,G] F G

3.2 If the appellants were minors, they being not party to the fraud, could not have been subjected to pen- H

A alty under the SEBI Act. The person who committed the fraud in their names, viz., their father, himself, should have been proceeded against not only for commission of act of fraud on his own behalf but also on behalf of the minors. [Para 11] [556-G, 567-A]

B 4.1 The SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 1995 are prospective in nature. Ex facie, a penal statute will not have any retrospective effect or retroactive operation. Indisputably, in respect of the irregularities committed by the Company C and/or its promoters, the Board issued a notice only on 28.1.2003. The FUTP Regulations, 1995 came into force w.e.f. 25.10.1995. If commission of fraud was complete prior to the said date, the question of invoking the penal provisions including Regulations 3 to 6 contained in the D said Regulations would not arise. A citizen of India has a right to carry on a profession or business as envisaged by Article 19(1)(g) of the Constitution of India. Any restriction imposed thereupon must be made by reason of a law contemplated under Clause (6) thereof. (para 8 and E 18) [563-D, 568-B,C,D]

4.2 In absence of any valid law operating in the field, there would not be any source for imposing penalty. A right to carry on trade is a constitutional right. By reason of the penalty imposed, the Board *inter alia* has taken away F the said constitutional right for a period of ten years which is impermissible in law as the Regulations were not attracted. (para 18) 568-D,E]

Sterlite Industries (India) Ltd. v. Securities and Exchange G *Board of India* (2001) 31 SCL 485 : (2001) 45 CLA 195(SAT) - referred to.

5. Subject to any other or further order which the Board may pass as against the promoter and his wife, the impugned directions would not be binding on the ap- H pellants. The other directions issued by the Board includ-

ing the action taken in respect of the offences purported to have been committed are upheld. Liberty is granted to the authorities to proceed against the offenders not only for other or further charges to which they made themselves liable under the SEBI Act but also under the Companies Act, 1956 and other penal statutes, if attracted. (para 20 and 23) [578-B;D,E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4681 of 2006

From the final Order and Judgment dated 31/7/2006 of the Securities Appellate Tribunal, Mumbai in Appeal Nos. 41 to 44/2004

C.A. Sundaram, Gaurav Goel, Mahesh Agarwal, Rishi Agrawala, A. Garg, Amit Sharma, Rohini Musa, Abhishek Gupta, Zafar, A. Agarwal and E.C. Agrawala for the Appellants.

Suruchii Aggarwal and Rakesh Kumar Singh for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J : 1. Ritesh Polysters Ltd. (Company) was a company incorporated and registered under the provisions of the Companies Act, 1956.

One Surender Kumar Agarwal was shown to be a promoter in the brochure issued by the Company. However, his wife Rookprekha Agarwal and their two sons Ritesh Agarwal and Deepak Agarwal (Appellants, who were said to be minors at the relevant time) also purported to have made contributions. The Company came out with a public issue of 30 lakh equity shares of Rs. 10/- each at a premium of Rs. 5/- per share aggregating to Rs. 450 lakhs. A prospectus therefor was issued. The issue opened on 12.06.1995. It closed on 22.06.1995. 15 lakh shares of Rs. 10/- each for cash at a premium of Rs. 5/- per share were reserved for firm allotment to the promoters and directors of the company and their friends and relatives. A sum

A of Rs. 2.25 crores (Rs. 225/- lakhs) was to be invested by the promoters. The issue went through. It later transpired that Pratha Investments, Ritesh Capital and Ritesh Agarwal asked for issuance of duplicate shares contending that the shares allotted in their favour had been misplaced. An advertisement was issued.
B A notice was also sent to the Stock Exchange. The Stock Exchange, however, on an enquiry made in that behalf, came to learn that the alleged lost shares had in fact been sold in the market. The trading in the scrip of the Company was suspended.

2. The matter was referred to the Securities and Exchange
C Board of India (for short "the Board"). In an enquiry conducted by the Board, it was discovered that only 7.96% of the public issue had been subscribed by the public till the closing date and the promoters who were required to subscribe Rs. 225/- lakhs had invested a sum of Rs. 35/- lakhs only. A large number
D of other irregularities were also found.

As the Board has noticed the said irregularities in great details, it is not necessary for us to repeat the same once over again. The Board, by its order dated 9.02.2004, directed:

E "40. Therefore, in the interest of the investors and safety and security of the capital market, in exercise of powers conferred on me under Section 4(3) read with Section 11 and 11B of SEBI Act and Regulation 11 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices)
F Regulations, 1995, I, hereby, direct M/s. Ritesh Polyster Limited and its promoters, viz., Ritesh Exports Ltd., Sh. Surendra Kumar Agarwal, Smt. Roop Rekha Agarwal, Sh. Ritesh Agarwal and Sh. Deepak Agarwal to disassociate themselves in every respect from the capital market related
G activities and not to access the capital market for a period of ten years.

41. Further, in light of the facts and circumstances of the case, it is already made out that the public issue by the promoters was hoax with an intention to perpetrate fraud
H on investors. Therefore, I am of the view that it would be

appropriate to pass a direction under section 11B of the SEBI Act as a remedial measure. I hereby direct the above named promoters of Ritesh Polyster Ltd. to buy back the shares from the allottees/ shareholders offering an amount at which the shares were issued i.e. Rs. 15/- per share if the shares are fully paid or @ Rs. 7.50 per share if the shares are partly paid and delist Ritesh Polyster Ltd. from the stock exchanges."

3. An appeal was preferred thereagainst before the Tribunal. However, none of the findings of fact were in question. The said findings of fact, therefore, had attained finality.

The Tribunal, by reason of the impugned judgment, negatived the plea of the appellants Ritesh Agarwal and Deepak Agarwal that they were minors at the relevant time, stating:

"The appellants in appeal no. 43/2004 have taken a plea that they were minors at the time when the company went in for the public issue and, therefore, the Board was not justified in issuing any direction to them. We are unable to accept this plea. We are informed that the Board has launched prosecution against the company and its promoters. In those proceedings it may be relevant for these appellants to contend that they were minors, but in the present proceedings which are of civil nature, the plea can have no relevance. At any rate, they had attained majority on the date when the impugned order was passed and, therefore, the direction restraining them from accessing the capital market could be issued by the Board."

4. The Tribunal opined that the Company and its promoters played fraud on the public and the Board was justified in debarring the promoters and the Company from having access to the capital market for a period of 10 years. It also agreed with the other directions of the Board.

5. In the aforementioned backdrop, the questions which

A have been raised before us by Mr. C.A. Sundaram, learned senior counsel appearing on behalf of the appellants, have to be noticed, which are as under:

(i) Ritesh Agarwal and Deepak Agarwal being minors, no order of penalty could have been imposed on them.

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(ii) Apart from Surender Kumar Agarwal, others having not been shown as promoters in the brochure, the impugned judgment cannot be sustained.

C (iii) The issue in question having been opened on 12.06.1995 and closed on 22.06.1995, the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating To Securities Markets) Regulations, 1995 (for short "the D FUTP Regulations) which came into force on and from 25.10.1995 cannot be said to have any application.

6. Ms. Suruchii Aggarwal, learned counsel appearing on behalf of the respondents, on the other hand, would contend:

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(i) Till the FUTP Regulations came into force, the matter used to be governed by the Securities and Exchange Board of India Act, 1992 (for short "the SEBI Act") and application thereof was not dependant upon the F coming into force of the FUTP Regulations.

(ii) In the proceedings before the Board, which is civil in nature, the appellants Ritesh Agarwal and Deepak Agarwal never claimed themselves to be the minors and, thus, such a plea cannot be raised where they G have been held guilty of defrauding the public fund.

(iii) The nature of the fraud practised being that they purported to have transferred their money to the Company on one day and on the next day they took the same back and, thus, the promoter having not

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admittedly contributed in the fund, the impugned judgment should not be interfered with. A

7. The SEBI Act was enacted to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto. B

"Board" has been defined in Section 2(1)(a) of the SEBI Act to mean "the Securities and Exchange Board of India established under Section 3" thereof. C

Chapter IV of the SEBI Act provides for powers and functions of the Board. Sub-section (1) of Section 11 thereof enjoins a duty upon the Board to protect the investors in securities and to promote the development of and to regulate the securities market by such measures as it thinks fit. The measures D referred to in Sub-section (1) of Section 11 may provide for, without prejudice to the generality of the foregoing provisions, inter alia the following:

"(a) regulating the business in stock exchanges and any other securities markets; E

(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment F advisers and such other intermediaries who may be associated with securities markets in any manner;

(ba) ***

(c) *** G

(d) ***

(e) prohibiting fraudulent and unfair trade practices relating to securities markets;

(f) *** H

A (g) prohibiting insider trading in securities;

(h) ***

(i) ***

(ia) ***

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(j) performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), as may be delegated to it by the Central Government;"

C Section 11A of the SEBI Act specifies the matters which are required to be disclosed by the companies. Section 11AA thereof provides for collective investment scheme. Section 11B provides for certain remedial measures which read as under:

D **"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-

E (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

F market; or

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

it may issue such directions,-

G (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."

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Section 12 of the SEBI Act provides for registration of stock brokers, sub-brokers, share transfer agents, etc. Chapter VI A of the SEBI Act provides for penalties and adjudication. Section 15H provides for penalty for non-disclosure of acquisition of shares and take-overs.

Section 24 of the SEBI Act provides for the offences committed under the SEBI Act.

Section 30 of the SEBI Act provides for regulation making power. The Board in exercise of its power conferred upon it under Section 30 of the SEBI Act made the FUTP Regulations. The said Regulations came into force on and from 25.10.1995.

8. Indisputably, when the irregularities committed by the Company and/ or its promoters came to the notice of the Board, it had issued a notice only on 28.01.2003.

The FUTP Regulations are prospective in nature. Chapter II of the FUTP Regulations provides for prohibition of fraudulent and unfair trade practices relating to securities market. Regulation 4 prohibits against market manipulation; Clause (a) whereof reads as under:

"4. No person shall -

(a) effect, take part in, or enter into, either directly or indirectly, transactions in securities, with the intention of artificially raising or depressing the prices of securities and thereby inducing the sale or purchase of securities by any person"

Regulation 5 of the FUTP Regulations provides for prohibiting misleading statements to induce sale or purchase of securities. Regulation 6 thereof prohibits unfair trade practices relating to securities. Regulation 11 empowers the Board to issue directions in the following terms:

"11. The Board may, after consideration of the report referred to in regulation 10 and after giving reasonable opportunity of hearing to the person concerned, issue

A directions for ensuring due compliance with the provisions of the Act, rules and regulations made thereunder, for the purposes specified in regulation 12."

Regulation 12 of the FUTP Regulations specifies the purpose of directions.

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9. We may also notice that a Company has certain duties and functions under the Companies Act, 1956. Section 63 thereof provides for criminal liability for mis-statements in the prospectus, which reads as under:

C "63 - Criminal liability for mis-statements in prospectus

(1) Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend D to two years, or with fine which may extend to fifty thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

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(2) A person shall not be deemed for the purposes of this section to have authorised the issue of a prospectus by reason only of his having given-

(a) the consent required by section 58 to the inclusion F therein of a statement purporting to be made by him as an expert, or

(b) the consent required by sub-section (3) of section 60."

Section 77 of the Companies Act provides for restrictions G on purchase or loans by Company for purchase of its own shares. Any person violating the provisions of the Companies Act may be proceeded thereunder.

10. The word "promoter", however, has not been defined either under the Companies Act or under the SEBI Act. The H

definition of promoter has, however, been provided in Section 2(h) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 in the following terms:

"2(h). 'Promoter' means -

(a) any person who is in control of the target company;

(b) any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later; and includes any person belonging to the promoter group as mentioned in Explanation I:

Provided that a director or officer of the target company or any other person shall not be a promoter, if he is acting as such merely in his professional capacity.

Explanation I: For the purpose of this clause, 'promoter group' shall include:

(a) ***

(b) in case the promoter is an individual -

(i) the spouse of that person, or any parent, brother, sister or child of that person or of his spouse;

(ii) any company in which 10% or more of the share capital is held by the promoter or an immediate relative of the promoter or a firm or HUF in which the promoter or any one or more of his immediate relative is a member;

(iii) any company in which a company specified in (i) above, holds 10% or more, of the share capital; and

(iv) any HUF or firm in which the aggregate share of the promoter and his immediate relatives is equal to or more than 10% of the total.

Explanation II: Financial Institutions, Scheduled Banks,

A Foreign Institutional Investors (FIIs) and Mutual Funds shall not be deemed to be a promoter or promoter group merely by virtue of their shareholding. Provided that the Financial Institutions, Scheduled Banks and Foreign Institutional Investors (FIIs) shall be treated as promoters or promoter
B group for the subsidiaries or companies promoted by them or mutual funds sponsored by them."

11. It may be true that only Surender Kumar Agarwal was shown as a promoter in the Brochure along with Shiv Shanker Agarwal and Mahender Kumar Agarwal, but, indisputably,
C Rooprekha Agarwal, Ritesh Agarwal and Deepak Agarwal who are wife and sons of Surender Kumar Agarwal made contributions. They, therefore, come within the purview of the said term.

Surender Kumar Agarwal ex facie suppressed the fact that
D Ritesh Agarwal and Deepak Agarwal were minors. Such a contention appeared to have been raised for the first time before the Tribunal.

It is one thing to say that as minors they could not have entered into a contract having regard to the provisions of the
E Indian Contract Act, 1872 and, thus, any act committed by them should be ignored, but, this, itself, goes to show how Surender Kumar Agarwal played an important role in resorting to wholly unfair practices and fraudulent acts. It is, therefore, not possible for us to hold that Surender Kumar Agarwal alone was the
F promoter.

However, a minor cannot enter into a contract. The Tribunal unfortunately did not go into this question in details. Finding of the Tribunal which has been noticed by us hereinbefore, with respect, is wholly unsustainable. It is not based on any legal
G principle. No reason has been assigned therefor.

If they were minors, they being not party to the fraud, could not have been subjected to penalty under the SEBI Act. The person who committed the fraud in their names, viz., Surender Kumar Agarwal himself, should have been proceeded against
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not only for commission of act of fraud on his own behalf but also on behalf of the minors.

The fact that the issue was under-subscribed is not in dispute. The question that the under-writers have not subscribed is also not in issue. The fact that there had been divergence of funds is also neither in doubt nor in dispute. The promoter's contribution has not come in, furthermore, is not in question.

The Board did not find any justification in the cause shown by the appellants herein.

The violations which have been found are:

"1) The entire amount collected as subscription was not kept in a separate account (public issue account) opened for this purpose and was being deposited in other account of other banks also.

2) Ritesh Polyster received only Rs. 35 lakhs as promoters contribution instead of Rs. 2.25 crores. However, they have fraudulently allotted shares worth Rs. 2.25 crores to the promoters and hence cheated the other genuine investors/ underwriters.

3) Ritesh purchased the shares back from the financiers who had bailed out the issue (under the garb of subscription) using the public issue proceeds. This is in violation of Section 77 of the Companies Act, 1956. Thus, the public issue proceeds have not been utilized for the purpose it has been raised. Hence, there has been misstatement in the prospectus to this effect.

4) The issue did not receive the minimum subscription of 90% even after the devolvement period. Hence, the issue should have been refunded which was not done. Thus, there has been a misstatement in the prospectus to this effect."

The said findings are not in question. The Board, therefore, has rightly proceeded to take action in terms of the SEBI Act.

A The question as to whether the provisions of the FUTP Regulations are attracted in this case may now be examined.

The FUTP Regulations came into force for the first time on 25.10.1995. Would it apply in a case where the cause of action arose prior thereto? Ex facie, a penal statute will not B have any retrospective effect or retroactive operation. If commission of fraud was complete prior to the said date, the question of invoking the penal provisions contained in the said Regulations including Regulations 3 to 6 would not arise. It is not that the Parliament did not provide for any penal provision in this C behalf. If the appellants have violated the provisions of the Companies Act, they can be prosecuted thereunder. If they have violated the provisions of the SEBI Act, all actions taken thereunder may be taken to their logical conclusion. A citizen of India has a right to carry on a profession or business as envisaged D by Article 19(1)(g) of the Constitution of India. Any restriction imposed thereupon must be made by reason of a law contemplated under Clause (6) thereof. In absence of any valid law operating in the field, there would not be any source for imposing penalty. A right to carry on trade is a constitutional right. By E reason of the penalty imposed, the Board inter alia has taken away the said constitutional right for a period of ten years which, in our opinion, is impermissible in law as the Regulations were not attracted.

In *Sterlite Industries (India) Ltd. v. Securities and Ex*- F *change Board of India* [(2001) 31 SCL 485: (2001) 45 CLA 195 (SAT)] , the Chairman of the Board vide its order had prohibited the appellant, a public limited company through its directors from accessing the capital market for a period of two years and also ordered to initiate prosecution proceedings un- G der Section 24 read with Section 27 of the Act for violation of Regulation 4(a) and 4(d) of the FUTP regulations against the appellant.

Setting aside the impugned order, the Tribunal on the applicability of Sections 11 and 11B of the Act on barring the ap- H

pellant from accessing the capital market while referring to its decision in Bank of Baroda opined:

> "104. It is seen from the order that the direction debarring the appellant accessing the capital market was issued invoking the powers vested in the respondent under sections 11 and 11B. ...The Tribunal had occasion to examine the scope and reach of these sections in Bank of Baroda v. SEBI [2000] 26 SCL 532 (SAT) (Mum.) and had expressed the following view:
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> "53. Section 11 and Section 11B are interconnected and co-extensive as both these sections are mainly focussed on investor protection. On a careful perusal of the said Section 13 referred to in the earlier paragraphs, it could be seen that the respondent has been in no uncertain terms mandated to protect the interests of investors in securities by such measures as it thinks fit. Of course those measures are subject to the provisions of the Act. The expression 'measure' has not been defined in the Act. So we have to go by its generally understood meaning. According to Corpus Juris Secundum measure means 'anything desired or done with a view to the accomplishment of a purpose, a plan or course of action intended to obtain some object, any course of action proposed or adopted by a Government'. However, I am not inclined to agree with the respondent's view that the power under Section 11 is unlimited. I am of the view that the legislature has circumscribed the power, by putting the caveat that these measures are subject to the provisions of the Act. The ambit of power is contained within the frame work of the Act. But within the statutory frame work such power reigns.
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> 54. While Section 11 deals with the functions of the Board, Section 11B is on the powers of the Board. Section 11B is more action oriented, in a sense it is a functional tool in the hands of the Board. In effect Section 11B is one of the

A executive measures available to the respondent to enforce its prime duty of investor protection. As could be seen from the text of the section reproduced above, the respondent is empowered to issue directions in the interests of investors of any person or class of persons
B referred to in Section 12 of the Act or associated with the securities market. In other words the section identifies the persons to whom and the purposes for which, directions can be issued.

55. The Gujarat High Court had examined the scope of
C Section 11 and Section 11B vis-a-vis the respondent's position, while deciding an appeal against the Single Judge's order in Alka Synthetics Ltd. case [1999] 19 SCL 460. The basic issue for consideration before the Division Bench in the said appeal was as to whether the respondent
D had the authority to issue an order under Section 11B of the Act for impounding or forfeiting the money received by stock exchanges, as per the concluded transactions under its procedure, until final decision is made..."

While negating the views of the Single Judge, and upholding the respondent's power to issue such a direction under
E Section 11B it was held that the Act provides for remedial measures and, thus, it was entitled to issue any direction.

It was, however, held :

F "106. It has to be noted that Section 11B does not even remotely empower the respondent to impose penalties."

It was furthermore held :

"108. The legislature has clearly spelt out the penal
G provisions in the Act at 3 places - Section 12(3) provides for suspension or cancellation of the certificate of registration granted to the market intermediaries in the event of their proven misconduct, provision under Chapter VIA, provides for imposition of monetary penalty for certain
H offences specified therein; section 24 empowers Courts

to award punishment for violation of offences under the Act etc. *Since legislature has deliberately chosen to create specific offences and penalties thereto, it is not possible to view that under Section 11B the respondent is competent to issue a direction which tantamounts to imposition of penalties, While widening the scope of 'such measures' used in Section 11, to include penalties, and thereby stretching the scope of issuing directions under Section 11B to cover imposition of penalties, the limitation stated above need be kept in mind. However, it is understood that the respondent has also been taking the view that Section 11B is not a penal provision, but preventive and remedial in its application. If that is so, it has to be seen whether the impugned direction prohibiting the appellant from accessing the capital market for a period of 2 years from the date of the order is preventive or remedial. In the absence of any explanation from the respondent as to what exactly is meant by 'accessing the capital market', it has to be understood as is understood in the common parlance - i.e., entry to the capital market for issuing/offering securities. In this context, it is to be noted that the charge against the Appellant is of market manipulation. The shares of the appellant are listed/traded in the stock exchanges even today. That being the case preventing the appellant raising further capital/offering shares to the public in the next two years cannot serve as a preventive measure to debilitate the appellant indulging in market manipulation. Similarly, by no stretch of imagination the said direction can be considered even remedial as prospective barring of a public issue cannot remedy an act of market manipulation allegedly indulged for a specific purpose, 3 years ago. A remedial action is normally seen as one intended to correct, remove or lessen a wrong, fault or defect. Purport of preventive or remedial directions which can be issued in a proven case of fraudulent and unfair trade practice is discernible*

A *from the provisions of regulation 12 of the Regulations, already cited in this order. In my view the impugned order is neither remedial nor preventive but punitive in effect as it takes away the appellant's right to mobilise funds from the public to carry on its business.* According to
B Webster's Encyclopaedic Unabridged Dictionary 'penalty means a punishment imposed or incurred for a violation of law or rule'. In the instant case it is seen that the order is made in the light of the finding - by the authority, that the appellant has violated the regulations. This nexus also
C strengthens the view that the order debarring the appellant from accessing the capital market is a penalty. In this view of the matter the order has no legal backing and therefore cannot sustain."

[Emphasis supplied]

D Similar observations were made in *BPL Limited v. Securities & Exchange Board of India, SEBI* [2002] 38 SCL 310 (SAT) and *Videocon International Ltd. v. Securities & Exchange Board of India, Shri D.R. Mehta, Chairman, SEBI and Dr. R.K. Kakkar, Division Chief, SEBI* [2002] 38 SCL 422.

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19. Ritesh Agarwal and Deepak Agarwal are said to be minors. As they were minors having regard to the provisions of the Indian Contract Act, they could not have been proceeded against strictly in terms of the provisions of the said Act. Apart
F from the actions taken by the Board, the persons who undertook those fraudulent actions may also be held to be guilty of making a mis-representation and commission of fraud not only before the prospective purchasers of the shares but also before the statutory authority. The same, however, would itself not
G mean that a minor would not be penalized for entering into a contract which per se was not enforceable. A contract must be entered into by a person who can make a promise or make an offer. If he cannot make an offer or in his favour an offer cannot be made, the contract would be void as an agreement which is not enforceable in law would be void. Section 11 of the Indian

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Contract Act provides that the person who is competent to contract must be of the age of majority. If Ritesh Agarwal and Deepak Agarwal were minors, as would appear from their birth certificates, they could not have entered into the contract.

20. We, therefore, are of the opinion that subject to any other or further order which the Board may pass as against Shri Surender Kumar Agarwal and Smt. Rooprekha Agarwal, the impugned directions would not be binding on Ritesh Agarwal and Deepak Agarwal.

21. We do not accept the contention of Ms. Aggarwal that the offence is a continuing one.

22. We do not also accept the contention that Rooprekha Agarwal was not a promoter and only promoters were Ritesh Polyesters Limited and Surender Kumar Agarwal. We, however, accept the contention of Mr. Sundaram that Ritesh Agarwal and Deepak Agarwal could not have proceeded against for violation of the FUTP Regulations.

23. We, however, uphold other directions issued by the Board including the action taken in respect of the offences purported to have been committed. We also grant liberty to the authorities to proceed against the offenders not only for other or further charges to which they made themselves liable under the SEBI Act but also under the Companies Act, 1956 and other penal statutes, if attracted.

24. For the reasons aforementioned, the appeal is allowed to the aforementioned extent. No costs.

R.P. Appeal partly allowed.