(2001) 05 BOM CK 0013

In the Bombay High Court

Case No : Writ Petition No. 628 of 2001

Anand Rathi and Others — APPELLANT

Vs

Securities and Exchange Board of India and Another — RESPONDENT

Date of Decision : 02-05-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 21, 226
Public Utility Holding Company Act, 1935 — Section 11(2)
Securities and Exchange Board of India Act, 1992 — Section 1(3), 11, 11(2), 11(3), 11(4)

Citation : (2002) 2 ALLMR 646 : (2002) 2 BomCR 403 : (2002) 1 BOMLR 150 : (2002) 110 CompCas 837 : (2002) 1 MhLj 522

Hon'ble Judges : S.J. Vazifdar, J;A.P. Shah, J

Bench : Division Bench

Advocate : Abhishek Singhvi and Amit Desai and Zal Andhyarujina, instructed by Amarchand Mangaldas and Co, for the Appellant; G.E. Vahanvati, Gen, Kumar Desai, instructed by Maneksha Sethna and Co., Virag Tulzapurkar and Sagar Divekar, instructed by Wadia Gandhy and Co., for the Respondent

Final Decision : Dismissed

Judgement

A.P. Shah, J.—Rule is issued and is made returnable forthwith.

2. This Writ Petition under Article 226 of the Constitution has been filed for the issue of writ of certiorari to quash and set aside the order dated 12-3-2001 and the Circular of even date issued by the Securities and Exchange Board of India (SEBI) in exercise of powers u/s 11 read with Section 11B of the Securities and Exchange Board of India Act 1992, hereinafter referred to as the said Act. The petitioners are also seeking to quash orders dated 30-3-2001 and 13-4-2001 passed by the SEBI confirming the order dated 12-3-2001.

3. The 1st petitioner is a broker at the Bombay Stock Exchange and he was President of the Stock Exchange during the relevant period. The petitioners Nos. 2 to 5 are private limited companies engaged in broking, investments, banking

etc. The respondent No. 1 SEBI is constituted u/s 3 of the said Act. The respondent No. 2 is the Bombay Stock Exchange which is recognized under the said Act and is a leading Stock Exchange in the country. The respondent No. 2 is regulated by the SEBI under the Securities Contracts (Regulations) Act 1956 and the said Act.

4. A few months ago on 28-2-2001, the Finance Minister introduced what was widely seen as "an investor friendly budget". The general expectation was that the stock markets in the country would be buoyed by such a budget. In fact between 28-2-2001 and 1-3-2001 itself, as a reaction to the budget, the sensex rose by 201 points. However, on the next day i.e. 2-3-2001 there was sudden and unexpected fall in the stock market and the sensex dropped by a total of 176 points. In the wake of the drastic and totally unexpected fall in the market and apprehending possible attempts to manipulate the securities market, investigations were undertaken by the SEBI. Some news papers carried articles alleging that the 1st petitioner who was the President of Stock Exchange had illegally obtained some price/market sensitive information, obtained from an officer of the surveillance department in the presence of certain other brokers. During the investigation the transcripts of telephonic conversation revealed that the 1st petitioner had obtained information in respect of certain specific scrips and brokers on 2-3-2001 from Shri Aran Dhanawade, a junior officer of the Surveillance Department of the Bombay Stock Exchange. The 1st petitioner resigned from the post of President on 7-3-2001.

5. On 12-3-2001 the Chairman of the SEBI in exercise of powers u/s 11 read with Section 11B of the said Act passed me impugned order which reads as follows --

"SECURITIES AND EXCHANGE BOARD OF INDIA " "ORDER UNDER SEC. 11 & 11B OF THE SEBI ACT"

"There have been allegations that a broker office bearer of the Bombay Stock Exchange obtained information from the surveillance department of the Exchange on March 2, 2001 the day on which the sensex fell by 175 points. It has been verified as to whether Mr. Anand Rathi (Ex President of the BSE) had obtained information in respect to certain specific scrips and brokers on March 2, 2001 from Mr. Arun Dhanawade an official of the Surveillance Department of the Bombay Stock Exchange.

In this connection it may be mentioned that SEBI had issued circular No. IEM/LKS/MI/2990/95 on August 8,1995 regarding setting up of Surveillance Department. It was stated in the said circular that it is the responsibility of the stock exchanges to monitor brokers positions, margins etc. Therefore it was directed by SEBI that each stock exchange shall have a separate surveillance department. This department would report solely to the Executive Director. In this regard in the subsequent circular dated December 6, 1995 it was stated that Executive Director would be directly responsible for the proper and independent functioning of the surveillance department, in the stock exchange. It was also advised in the circular dated May 25, 2000 that there should be no interference in the functioning of the surveillance department which should be done in a very professional, and objective manner. The spirit behind such stipulation was that there should be no interference from individual directors, member brokers or any other vested interest in the surveillance functioning of the exchange.

It appears that Anand Rathi as a member and President of the Mumbai Stock Exchange has obtained information from Arun Dhanawade from the surveillance department. Such action is against the stated directives of the SEBI and also leads to an absence of a level playing field amongst all brokers wherein some brokers have more information than the other brokers. Further such an action would also cause harm to the fairness, transparency and integrity of the stock exchanges and capital markets at large. In other words it would adversely affect the confidence of investors in the integrity and fairness of the stock exchanges.

After taking into consideration the material and evidence gathered during the enquiry against Shri Anand Rathi and the gravity and the seriousness of his action, I am of the prima facie opinion that the integrity of the capital market has been affected. In order to ensure that no further harm or detriment is caused to the market or that investors are not adversely affected or that the safety and security of the markets remains unimpaired I, in exercise of the powers conferred on me under the provisions of Section (3) of Section (4) read with Sections 11 and 11B of the SEBI Act, pass the following directions:--

Shri Anand Rathi and his concerns i.e. Anand Rathi Securities Pvt. Ltd. Navratan Capital and Securities Pvt. Ltd., Rathi Global Finance Limited and Rathi Capital and Securities Pvt. Ltd. are directed not to undertake any fresh business as a broker till further orders are passed by SEBI in this regard.

It is further directed that Shri Anand Rathi is restrained from acting as a director member of the Governing Board of the Stock Exchange Mumbai till further orders.

Shri Anand Rathi and/or any representative of the concerns mentioned above is given an opportunity of post decisional hearing on 21st March 2001. This order will come into effect from 13th March 2001."

DATED I2th DAY OF MARCH, 2001

DR. MEHTA CHAIRMAN SECURITIES AND EXCHANGE BOARD OF INDIA"

6. Being aggrieved by the impugned order, the petitioners filed the present petition on 14-2-2001. At the hearing on 19-3-2001, by consent of parties, the petition was directed to be listed for hearing on 31-3-2001 so that in the meanwhile SEBI could complete the post decisional hearing and pass a reasoned order. On 20-3-2001 petitioners were granted personal hearing by the Chairman and Prof. J. R. Verma, a member of the SEBI. Thereafter the petitioners were given a de novo hearing by the entire board consisting of the Chairman and three other members on 28-3-2001. By an order dated 30-3-2001 the Board was

pleased to confirm the order dated 12-3-2001. A perusal of the order of the SEBI Board shows that it is an admitted position that the 1st petitioner secured information from Shri Dhanawade relating to institutional sales in certain specific scrips. However, he maintained that being President of the Stock Exchange, he was duty bound to monitor and be aware of the cause of abnormal trends in the market and in the course of discharge of his duties, he sought certain information from the surveillance department. Incidentally the surveillance department was established pursuant to the directions issued by SEBI to carry out functions of monitoring, broker positions, trading limits, market manipulations etc. It is the responsibility of the surveillance department to monitor price movements including price rigging and any abnormality therein to enable the Stock Exchange Management to take effective measures like suspension, trading etc. Various circulars issued by the SEBI in this behalf made it amply clear that this department would function under the executive director of the Stock Exchange or the senior most official of the Exchange in his absence and there should be no interference in the functioning of the department from individual directors, member brokers or any other vested interests. The SEBI Board expressly rejected the plea of the petitioner that in his capacity as a President he was entitled to call for the information. According to the Board, such an interpretation of the bylaws cannot be accepted as it would go against the very concept of confidentiality, surveillance and a level playing field. The explanation of the 1st petitioner that he did not seek any price sensitive information and the information sought by him was of a general nature was found to be equally unacceptable. In this regard the Board observed :

"The petitioner''s defence that he was seeking information only of institutional sales and that also only because of the market conditions is not tenable. The BSE starts its operations at around 10.00 in the morning. As per the petitioner''s contention, there was a sharp fall in the market from morning, an emergent situation had arisen. According to Mr. Rathi he reached his office at BSE in ordinary course at about 2.00 p.m. and he was in a meeting from 2.00 o clock onwards. It is quite inexplicable why during the course of this meeting at around 3.00 p.m. Mr. Rathi suddenly realised that he had to discharge his duty as President and decided to call for price sensitive information and that too in the presence of brokers who were not even member of the Board. Even assuming that the petitioner brokers contention that he was seeking information on institutional sales is accepted even then the petitioner broker was not justified in seeking such information. It is beyond doubt mat the institutional sales and purchases, have an impact on the market and therefore seeking such information is not within the powers of any broker. Nowhere in the transcript had Shri Rathi wanted to know from the surveillance department the information regarding abnormal movements, margin defaults, abnormal behaviour of the scrips, etc. The President appeared to be keen on seeking information regarding the transactions by certain persons in certain scrips. If he was so concerned with the movement of the scrip he would have asked for an analysis, a report of significant movement or abnormal movements of the index, etc. The questions posed by the President appear to be questions of a person interested in having specific information of sales by certain market players and institutions in certain scrips."

7. The Board came to a prima facie conclusion that the information sought by the president was price sensitive and in conclusion they observed --"In view of the above there is no doubt in our minds that Shri Rathi has misused his official position to gain certain price sensitive information from the surveillance department in violation of the SEBI circulars. He has obtained information which no broker or a President has a right to obtain."

8. We may hasten to add that one of the Board members namely Professor J. R. Varma, expressed that the proper course of action would be to proceed against the petitioners in accordance with the procedure laid down by the SEBI (Stock Broker and Sub-Brokers) Regulations and, therefore, he did not agree with the majority view of imposing interim suspension. Nevertheless he agreed with the majority that the action of the 1st petitioner as the President of the BSE seeking detailed and highly price sensitive information from the surveillance department was totally improper and unacceptable and constituted a clear subversion of the governance regime of the Stock Exchanges which led to erosion of investor confidence in the integrity of the stock markets.

9. We may also mention that during the pendency of the petition the case of the petitioners was again reviewed by the Board and vide order dated 23-4-2001 the earlier order of suspension was confirmed. It was observed by the Board that the preliminary report has thrown up prima facie evidence of the involvement of the petitioners in the price manipulation and that the gravity of the charges, which require further investigation and the need for not permitting anyone suspected of such serious charges from operating on the Stock Exchange, has been considered for subserving the public interest. A further direction was issued to appoint an inquiry officer to investigate into the charges against the petitioners. Prof. Varma however, recorded a dissenting opinion on a technical legal aspect holding that the Regulations need to be amended to confer powers upon the SEBI to implement the majority view that "anyone suspected of such serious charges should not be permitted to operate on the Stock Exchanges".

10. Dr. Singhvi, the learned Counsel appearing for the petitioners, strenuously contended that the SEBI has no powers u/s 11 or 11B of the said Act to pass the impugned order. He submitted that the legislative intent of Section 11B is to empower the SEBI to issue directions in the nature of general policy and its implementation and does not permit or empower the SEBI Board to adopt punitive action against any broker. Unless Section 11B is read as suggested by him, it is ultra vires Article 14 and Article 19(1)(g) of the Constitution as it would confer unrestricted, un channeled and unguided powers upon SEBI. It would mean mat SEBI could suspend the licence of a broker without following the mandatory procedure prescribed by the Act and Regulations. He submitted that

suspension can be ordered only after full-fledged enquiry in accordance with the procedure prescribed. Dr. Singhvi further submitted that even assuming that SEBI is empowered by Section 11B to impose temporary suspension, the impugned order cannot stand judicial scrutiny as it is vitiated due to violation of principles of natural justice and fair play. Dr. Singhvi urged that where civil consequences of the administrative action - as in the present case - are grave and its effect is highly prejudicial to the rights and interests of the persons affected and there is nothing in the language and scheme of the statute which unequivocally excludes a fair pre decisional hearing, the Court should be loath to infer a legislative intent to exclude even a minimal fair hearing at the pre decisional stage merely on the ground of urgency. It is submitted that a post decisional hearing is not a remedial hearing as the authority who embarks upon the post decisional hearing will naturally proceed with a closed mind and there is very little or no chance of getting a proper consideration of the representation at such post decisional opportunity. He submitted that post decisional hearing in law can only be warranted where the mischief attempted to be cured represents a grave and imminent danger and a personal hearing would preclude the grave and imminent danger from being averted. He submitted that me principle of post decisional hearing must be so confined and any extension thereof would render the action of the authority ultra vires Article 14 of the Constitution. Applying these principles to the facts of the instant case, Dr. Singhvi submitted that there was ample time at the disposal of the SEBI to give even a reasonably short notice to the petitioners to present their case. In this connection, it is pointed out that the transcripts of the telephonic conversation on the basis of which the impugned order was passed, were not disclosed to the petitioners till after the petitioners had filed the present petition to challenge the impugned order. It is emphasised that if the transcripts were to contain something adverse to the petitioners, there was time enough for giving reasonable opportunity to the petitioners to explain the adverse material against them. It is urged that even if there was urgency, situational modifications could be made to meet the requirements of fairness by reducing the period of notice; that even the manner and form of such notice could be simplified to eliminate the delay; that a telephonic notice or short opportunity for furnishing their explanations to the SEBI Board might have satisfied the requirements of natural justice.

11. Reference in this connection has been made to Swadeshi Cotton Mills Vs. Union of India (UOI), ; H.L. Trehan and Others Vs. Union of India (UOI) and Others, , K.I. Shephard and Others Vs. Union of India (UOI) and Others, ; Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , S.L. Kapoor Vs. Jagmohan and Others, and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another,

12. The impugned order was further attacked by Dr. Singhvi on the ground that there was absolutely no material available with the SEBI to substantiate or support the said order. He submitted that there was nothing inappropriate nor in breach of the SEBI Circulars for the President of the Stock Exchange to have

made the enquiries that he did. His actions were perfectly consonant with his role and responsibility as a President of the Exchange as he is expected to be aware of circumstances causing the exceptional activities and fall in the sensex. It is emphasised that no price sensitive information was sought or obtained or otherwise utilised by the petitioners or any one of them. A detailed chart of movements of scrips was filed on record by the learned Counsel in order to show that the information sought by the 1st petitioner did not affect the market in any way. He also submitted that a total and complete ban on trade is in violation of Article 19(1)(g) of the Constitution. In this regard he referred to Ghulam Rasool Misger and etc. Vs. The State and Others, and Smt. Shama Bai and Another Vs. State of Uttar Pradesh, Lucknow and Others, . Finally, the learned Counsel submitted that the order imposing a complete ban is not only arbitrary and unreasonable but it is excessive and totally disproportionate. It is submitted that even assuming that further investigation is necessary into the alleged act of the market manipulation, SEBI could have, at the highest, imposed restrictions like banning trading in certain scrips or not permitting forward transactions or to restrict the volumes of the trade. According to the learned Counsel, there was absolutely no justification to impose a complete ban on trading. He submitted that the principle of proportionality can be invoked where the Court is examining whether restrictions on fundamental freedoms imposed by the authorities are within the constitutional limits. In this regard he referred to the decision of the Supreme Court in Union of India and another Vs. G. Ganayutham (Dead) by LRs., .

13. As against this, Shri Gulam Vahanvati, the learned Advocate General appearing on behalf or the SEBI, contended that the 1st petitioner had no authority to seek price sensitive information from the surveillance department, knowing full well that by this act he would be violating the SEBI''s Circulars and further that he himself was a member/broker of the Exchange and information which was sought was sensitive and confidential. By these means, the 1st petitioner had abused his position as a President of the Stock Exchange by seeking information which in his normal course of business could never have been available or made available to him. It was submitted that there is a prima facie case to investigate and enquire into the manner and means by which the 1st petitioner together with associate companies have acted or traded and whether this was done on the basis of inside information procured illegally and surreptitiously and also whether this particular information was legally obtained. In countering the argument of Dr. Singhavi that the impugned order is punitive in nature, the learned Advocate General submitted that this action of the SEBI cannot be termed as either punishment or penalty. It is only an interim measure to prevent further possible mischief of tampering with the security market. He submitted that SEBI has certainly a power to regulate the Stock Market and to intervene in volatile and serious situations where orders can always be passed as interim measures pending further investigation and enquiry. He submitted that Section 11 of the Act casts a duty on the SEBI Board to protect the interest of

the investors in securities to promote the development and regulate me securities market by such measures as it thinks fit. Section 11B empowers the Board to issue necessary directions. While making a pointed reference to Section 11(1), and Section 11(2)(a), (e), (g), (i) it was submitted that in due discharge of its function envisaged under the aforesaid clauses directions have been issued to the petitioners not to undertake any fresh business as brokers till the inquiry proceedings are completed. In this connection, a reference was made to a Division Bench judgment of this Court in Ramrakh R. Bohra v. SEBI 1998 18 Clr 543 wherein SEBI''s power to ban trading as an interim measure pending enquiry was categorically upheld. Our attention was also drawn to the decision of the Division Bench of Gujarat High Court in SEBI v. Aika Synthetics and Ors. 1999 95 Comp cas 772.

14. The learned Advocate General submitted that the impugned order was passed only by way of an interim measure. Hence, no question arises of complying with the principles of natural justice at this stage. He submitted that the Supreme Court has repeatedly held that in matters of urgency and possible or supervening public interest the rules of natural justice with all the religious rigidity with which they have to be observed need not be applied. He submitted that the post decisional hearing was given in the interest of fairness. The fact that such hearing was given did not imply that principle of natural justice was required to be complied with at the pre decisional stage. When such a hearing is given what is required to be seen is whether the person concerned got a fair opportunity to present the case in such post decisional hearing. The petitioners themselves appeared before the Board and made submissions. There is, therefore, no substance in the plea of failure to comply with the principles of natural justice. Reliance was placed on Karnataka Public Service Commission and others Vs. B.M. Vijaya Shankar and others, ; Liberty Oil Mills and Others Vs. Union of India (UOI) and Others, ; Lewis v. Heffer and Ors. (1978) 3 All E.R. 354; R. V. State, ex. p. Pegasus Holidays (1989) 2 All E.R. 481.

15. The main issue raised in this petition is concerning the limits of powers of the SEBI Board which regulates capital market of the country. The capital market has acquired a status of the system as a part and parcel of the national economy where companies seek to raise funds for different types of transactions in the course of their business and individuals invest their savings. Previously there was Securities Contracts (Regulation) Act, 1956 to prevent undesirable transactions in securities by regulating business or dealings therein and providing for certain other matters connected therewith. This Act provided for recognised stock exchanges and the control of the Central Government on such recognised stock exchanges. With the passage of time the Government felt more concerned with the healthy growth of the securities market and taking into consideration the relevant factors influencing the growth of the capital market it realised the necessity to pass a comprehensive legislation for setting up a statutory apex board to promote orderly and healthy growth of the securities market. SEBI was constituted vide Resolution dated 12-4-1988 of the Ministry of Finance,

Department of Economic Affairs (Investment Division). On 30-1-1992 the Securities and Exchange Board of India Ordinance 1992 was promulgated by the President and ultimately the Securities and Exchange Board of India Act, 1992 was enacted and notified on 12-4-1992. It was deemed to have come into force on 30-1-1992 in terms of Section 1(3) of the said Act. The Statement of Objects and Reasons appended to the Bill when the enactment was made stated that "The capital market has witnessed tremendous growth in recent times, characterised particularly by the increasing participation of the public: Investors confidence in the capital market can be sustained largely by investors protection. With this end in view, the Government decided to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market....."

16. Section 3 of the Act provides for establishment of SEBI Board and Section 4 provides for management of the Board. Sections 11 and 11B so far as they are material for the purpose of this petition read as under :

11. Functions of Board. -- (1) Subject to provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for --

(a) regulating the business in stock exchanges and any other securities markets.

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

(ba) to (d) .....

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

(f) .....

(g) prohibiting insider trading in securities.

(h) .....

(i) calling for information from, undertaking inspection, conducting inquiries and audits of the (stock exchanges, mutual funds, other persons associated with the securities market) intermediaries and self-regulatory organisation in the securities market.

(j) to (la) .....

(m) performing such other functions as may be prescribed.

(3) .....

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 interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person, it may issue such directions;

(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 insecurities and the securities market."

17. The plain reading of Section 11 itself shows that SEBI has to protect interests of the investors in securities and to regulate the securities market by such measures as it thinks fit and such measures may be for any or all of the matters provided in Sub-section (2) of Section 11 and in due discharge of its duty cast upon SEBI as part of its statutory functions, it has been invested with the powers to issue directions u/s 11B. Section 12 deals with registration of Stock Brokers, sub-brokers, share transfer agents etc. Subsection (3) empowers the Board by passing an order to suspend or cancel a certificate of registration in such manner as may be determined by regulations. Proviso to Sub-section (3) of Section 12 reads as under :

"Provided that no order under this Sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard".

The aforesaid proviso in Section 12 is in regard to the penalty of suspension or cancellation of a certificate of registration. This, under the proviso, no doubt can be done only after affording a reasonable opportunity of being heard. In the present case we are not concerned with Section 12(3). If an order suspending or cancelling a registration certificate had been passed in proceedings u/s 12(3) the same would have been void as being not only contrary to the rules of natural justice but contrary to the rules of natural justice as expressly mandated by a statutory provisions. The impugned order of 12-3-2001 passed u/s 11B was an interim order pending inquiry and does not mandate a pre-decisional hearing by the very nature of the situation and circumstances in which it was required to be invoked. SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992 have been framed in exercise or powers conferred by Section 30 of the said Act. Regulations 26 to 29 lay down the procedure in the matter of suspension or cancellation of the certificate. However, the impugned order cannot be termed as either punishment or penalty. It is only an interim measure to prevent further possible mischief of tampering with the securities market. A preliminary enquiry into the conduct of the petitioners, has been conducted. A preliminary report is also submitted and it is found prima facie that the petitioners have been indulging in manipulations of securities market. Hence, in order to safe guard the interests of the investors and to maintain the integrity of the market, the petitioners have been directed not to undertake any fresh business as brokers till the enquiry proceedings are completed and further proceedings in the matter are taken. In our opinion, the impugned order as passed by SEBI is only an interim measure which the SEBI is fully empowered in taking.

18. While considering the question as to whether the SEBI has authority of law under Sections 11 and 11B to order interim suspension, we have to bear in mind that SEBI is invested with statutory powers to regulate securities market with the object of ensuring investors protection, orderly and healthy growth of securities market so as to make SEBI''s control, over the capital market to be effective and meaningful. It cannot be gainsaid that SEBI has to regulate speculative market and in case of speculative market varied situations may arise and looking into the exigencies and requirements, it has been entrusted with the duty and functions to take such measures as it thinks fit. Section 11B is an enabling provision enacted to empower the SEBI Board to regulate securities market in order to protect the interest of the investors. Such an enabling provision must be so construed as to subserve the purpose for which it has been enacted. It is well settled principle of statutory construction that it is the duty of the Court to further Parliament''s aim of providing of a remedy for the mischief against which enactment is directed and the Court should prefer construction which will suppress the mischief and advance remedy and avoid evasions for the continuance of the mischief. We may quote the words of Denning'', L.J. In Seaford Court Estates, Ltd. v. Asher (1949) 2 All E.R. 155, namely :-- ".....when a defect appears, a Judge cannot simply fold his hands and blame the draftsmen. He must set to work on the constructive tasks of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which give rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give force and life to the intention of the Legislature." We have, therefore, to adopt the construction that gives force and life to the legislative intention rather than the one which would defeat the same and render the protection illusory. In the matter of construction of enabling statute, the principle applicable is that if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose or carrying out the purpose in view. We thus find that the SEBI has ample authority in law to take the action u/s 11B as has been taken by it.

19. We may also mention that the issue as to the power of the SEBI, to order interim suspension in pending investigation is no more res Integra. In Ramrakh

Bohra''s case (supra) the Division Bench has considered this issue and categorically held that SEBI has power u/s 11 read with Section 11B to issue order of suspension by way of interim measure. Speaking for the Bench, Agarwal J. (as he then was) observed thus :

"20. Having regard to the aforesaid provisions, it is strenuously contended on behalf of the petitioners that the impugned order has virtually put a death-knell on the business of the petitioners. The same has undoubtedly, stopped their entire business. It is, therefore, virtually an order passed u/s 12 and this can be done only after affording the petitioners a reasonable opportunity of being heard. In our, prima facie, view the impugned order cannot be said to have been passed u/s 12 as contended but the same has been passed u/s 11B. It is in the nature of a direction restraining the petitioners from carrying on their business of dealing in shares. The same has been passed pending the inquiry into the manipulations. The same has been passed in the interests of investors and in the interest of the securities market.

21. Section 11B is an enabling provision enacted to empower SEBI to protect interest of investors and to promote the development of and to regulate the securities market and to prevent malpractices and manipulations inter alia by brokers. Such an enabling provision must be construed so as to subserve the purpose for which it is enacted. It would be the duty of the court to further the legislative object of providing a remedy for the mischief. A construction which advances this object should be preferred rather than one which attempts to find a way to circumvent it. In the case of Reserve Bank of India and others Vs. Peerless General Finance and Investment Company Ltd. and another, the Supreme Court has observed as under :

"22. It would thus appear that Section 45-K (3) is an enabling provision enacted to empower the Bank to regulate the conditions on which deposits may be accepted by non-banking companies or institutions and (the) to prevent malpractices in the matter of acceptance of such deposits. Such an enabling provision must be construed as to subserve the purpose for which it has been enacted. It is a well accepted canon of statutory construction that "it is duty of the Court to further Parliament''s aim of providing a remedy for the mischief against which the enactment is directed and the Court should prefer a construction which advances this object rather than one which attempts to find some way of circumventing it....."

"27. Section 45-K is in the nature of an enabling provision. In the matter of construction of enabling statutes the principle applicable is that if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensible for the purpose of carrying out the purpose in view (see : Craies on Statutes, 7th Edn. p. 258). It has been held that the power to make a law with respect of any subject carries with it all the ancillary and incidental powers to make the law effective and workable and to prevent evasion. (See Sodhi Transport Co. and others Vs. State of U.P. and others, .

23. In the case of ITO v. M. K. Mohammed Kunhi AIR 1969 SC 430 it has been observed, as under :

"4..... It is firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective....."

24. If one has regard to the aforesaid principles, it would follow that the power which has been conferred by Section 11B to issue direction are of a widest possible amplitude and are exercisable in the interests of investors and in order to prevent inter alia a broker from conducting his business in a manner detrimental to the interests of the investors or the securities market. The said power to issue directions u/s 11B must carry with it, by necessary implication, all powers and duties incidental and necessary to make the exercise of these powers fully effective including the power to pass interim orders in aid of the final orders. The provision of Section 11B it is to be noted has been introduced by an amendment brought about in 1995 and the same seeks to confer additional power on the board, by way of interim measures, pending inquiry. The same is intended for the protection of the interests of the investors and the securities markets.

20. In the case of Alka Synthetics (supra) the division bench of Gujarat High Court has observed as under :

"We have to, therefore, consider and interpret the power of the SEBI under the provisions so as to see that the objects sought to be achieved by the Act is fully served, rather than being defeated on the basis of any technicality. Instead of general principles of law in such cases we have to consider the matter on first principles. The first principle is that the provisions of an Act have to be given a meaning so as to advance the object sought to be achieved by that Act, The duty and function had been entrusted to take such measures as it thinks fit and in order to discharge this duty, the power is vested u/s 11B. In such a situation it cannot be said that there was no authority of law with the SEBI to take appropriate measures. Now the question arises as to whether such measures should essentially be provided and published in advance. No one can be expected to do any task which is impossible and whereas we have already observed that the measures have to be taken to meet a particular eventuality, which may or may not be conceived earlier, there is no question of laying down such measures in advance and publishing the same. Thus there is an authority under law to take the measures and merely because the measures have not been laid down in advance and published, it cannot be said that SEBI had no authority under law to issue the directions, as contained in the impugned orders. The authority has been given under the law to take appropriate measures as it thinks fit and that by itself is sufficient to clothe the SEBI with the authority of law. In Corpus Juris Secundum at page 477 the word, "measure" has been given the following meaning :

"Anything devised 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."

This court finds that the decision taken by the SEBI as contained in the impugned order dated July 4, 1996, is certainly a measure for accomplishment of the requisite purpose and the order manifests me course of action intended to achieve the required object and the said course of action has been adopted by the SEBI".

While we are in respectful agreement with the above observations we hasten to add that we should not be taken to have approved the following in Alka Synthetics Ltd :

"Therefore, we have no hesitation in holding that the courts must be very slow to read, construct, and enforce an implied obligation to follow natural justice even in cases of bodies dealing with the property rights particularly when the activity is only a trading activity based on speculation in a market controlled by such body under law. In our opinion the present case is certainly a case of this nature;"

21. In the light of the above decisions and also in the light of the fact that the SEBI as regulator of securities market is empowered to take all necessary measures to protect the interest of the investors and the capital market, we have no hesitation in holding that the SEBI is fully competent and is empowered by Sections 11 and 11B to pass interim order in aid of the final orders. In this connection, a reference may be made to the decision of Court of Appeal for British Columbia in Exchange Bank and Trust v. British Columbia Securities Commission, 2000 BCCA 389 wherein the following observations of Ontario Securities Commission were cited with approval. :

"There are few areas in our public life that are as dynamic and as innovative as our capital markets. For the most part, that dynamism and innovation enure to the benefit of the economy at large and individual investors in particular. But that same dynamism and innovation can, and does, lead to abuse. A regulatory agency charged with oversight of the capital markets must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets."

Like a Section 144(2) (now Section 161(2) temporary cease trade order or a Section 73 (now Section 89) halt order, a freeze order enables the Commission to respond immediately to information that, in its opinion, warrants regulatory intervention to prevent or minimize prejudice to the public interest. Often it is necessary to take these steps before any investigation is commenced or concluded. The ability of the Commission to act in this fashion is necessary to instill and maintain public confidence in the integrity of the capital markets."

SEBI is charged with duty to protect the public and the integrity of the capital markets and as a Regulator, it is certainly empowered to order suspension as an interim measure pending investigation into serious allegations of manipulations and insider trading. We, therefore, overrule the submission that the SEBI had no power to pass the impugned order.

22 The next point for consideration is whether, as a matter of law, it was necessary, in accordance with the rules of natural justice, to give a pre-decisional hearing to the petitioners before the impugned order was passed. Dr. Singhvi contends that the provisions of Sections 11 and 11B do not rule out natural justice and there was time between the alleged discovery of transcripts and passing of the order when opportunity of hearing could have been given to the petitioners and the principles of natural justice observed but the SEBI refrained from doing so. It is urged that natural justice was not to be excluded except by clear and unmistakable language of the statute, though ''quantum'' of natural justice to be afforded in an individual case may vary from case to case. Our attention was drawn to the observations of the Supreme Court in Swadeshi Cotton Mills v. Union of India (supra) (SCC page 69 para 44) :

"In short, the general principle - as distinguished from an absolute rule of uniform application - seems to be that where a statute does not in terms exclude this rule of prior hearing but contemplates a "post decisional hearing amounting to a full review of the original order of merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences pf a grave nature, and no full review or appeal on merits against that decision is provided courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory futures at the pre decisional stage unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short mis rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But to recall the words of Bhagwati, J. the core of it must however, remain namely that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

23. A reference was made to the observations of Krishna Iyyer J, in Mohindersingh Gill''s case (supra), namely, ".....subject to Certain necessary limitations natural justice is now a brooding omnipresence although varying in its play..... Its essence is good conscience in a given situation nothing more - but nothing less" (SCC page 434 paras 47 and 48). After noticing the observations of Lord Upjohn that "while urgency may rightly limit such opportunity timeously,

perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable", the Court explained that mere invocation or existence of the urgency does not preclude the duty of giving a fair hearing to the person affected : (SCC page 437 paras 56 and 57).

"It is untenable heresy, in our view, to lock-jaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection, is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation: The procedural precondition of fair hearing, however, minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness.....

We may not be taken to say that situational modifications to notice and hearing are altogether impermissible ..... The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life''s processes, if we may mix metaphors."

The Court further pointed out that the competing claims of hurry and hearing can be reconciled by making situational modifications in the audi alteram partem rule (SCC pp. 439 & 440, paras 63 and 66).

"(Lord Denning M.R., in Howard v. Bomeman, summarised the observations of the Law Lords in this form. No doctrinaire approach is desirable but the court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel could be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour''s notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining pr setting aside the action to the extent feasible. It is quite on the cards, that the Election Commission, if pressed, by circumstances may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could have afforded an opportunity of hearing to the parties, and revoke the earlier directions...... All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty."

24. Reliance is also placed by Dr. Singhvi on the observations of the Supreme Court in K. I. Shephard and ors, v. Union of India (supra) which read as follows : (SCC pp. 448-49, para 16)

"We may now point out mat the learned Single Judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, mere is no justification to mink of a post-decisional hearing. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could not represent and their case could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."

25. Our attention was drawn to H.L. Trehan v. Union of India (supra) wherein following the decision in Shephard''s case, Dutt J. observed that the post decisional hearing does not subserve the rules of natural justice. The authority who embarks upon a post decisional hearing will naturally proceed with a closed mind and there is hardly any chance of giving a proper consideration of the representation at such a post decisional opportunity.

26. The next judgment relied upon by Dr. Singhavi is in the case of S. L. Kapoor v. Jagmohan and Ors. (supra) wherein Chinnappa Reddy, J. speaking for the Bench observed as follows : (SCC pp. 388 and 389 para 11).

"Another submission of the learned Attorney-General was that Section 238(1) also contemplated emergent situations where swift action might be necessary to avert disaster and that in such situations if the demands of natural justice were to be met, the very object of the provision would be frustrated. It is difficult to visualise the sudden and calamitous situation gloomily foreboded by the learned Attorney Genera] where there would not be enough breathing time to observe natural justice, at least in a rudimentary way. A municipal committee under the Punjab Municipal Act is a public body consisting of both officials and non-officials and one cannot imagine anything momentous being done in a matter of minutes and seconds, and, natural justice may always be tailored to the situation. Minimal natural justice, the barest notice and the "littlest" opportunity, in the shortest time, may serve. The authority acting u/s 238(1) is the master of its own procedure. There need be no oral hearing. It is not necessary to put every detail of the case to the committee; broad grounds sufficient to indicate the substance of the allegations may be given. We do not think that even minimal natural justice is excluded when alleged grave situations arise u/s 238. If indeed such grave situations arise, the public interest can be sufficiently protected by appropriate prohibitory and mandatory action under the other relevant provisions of the statute in Sections 232 to 235 of the Act. We guard ourselves against being understood as laying down any proposition of universal application, Other statutes providing for speedy action to meet emergent situations may well be construed as excluding the principle audi alteram partem. All that we say is that Section 238(1) of the Punjab Municipal Act does not."

27. Indeed, the principles of natural justice, like ultra vires and public policy, is a branch of public law and is formidable weapon which can be wielded to get justice to a citizen. In Maneka Gandhi''s case Bhagwati, J. emphasised that audi alteram partem is a highly effective rule devised by the Courts, to ensure that a statutory authority arrives at a just decision and it is calculated to act as a health check on the abuse or misuse of power. Where authority functions under a statute and the statute provides for observance of natural justice in a particular manner natural justice will have to be observed in that manner and in no other. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. It is equally well settled that natural justice cannot be imprisoned in a straight jacket of cast-iron formula. In Swadeshi Mills, case (SCC page 705 para 78), the Supreme Court emphasised that "the audi alteram partem rule..... is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. Thus, in the ultimate analysis, the question (as to what extent and in what measure), this rule of fair hearing will apply at the pre-decisional stage will depend upon the degree of urgency, if any, evident from the facts and circumstances of the particular case". A reference may also be made to the case of Karnataka Public Service Commission v. B. M. Vijaya Shankar and Ors. (supra) wherein the Supreme Court noted; (SCC page 211 para 4).

"Natural justice is a concept which was succeeded in keeping the arbitrary action within limits and preserving the rule of law. But with all the religious rigidity with which it should be observed since it is ultimately weighed in balance of fairness, the courts have been circumspect in extending it to situations where it would cause more injustice than justice. Even though the procedure of affording hearing is as important as decision on merits yet urgency of the matter, or public interest at times, require flexibility in application of the rule as the circumstances of the cases and the nature of the matter required to be dealt may serve interest of justice better by denying opportunity of hearing and permitting the person concerned to challenge the order itself on merits not for lack of hearing to establish bona fide or innocence but for being otherwise arbitrary or against the rules. Present is a case which in our opinion, can safely be placed in a category where natural justice before taking any action stood excluded as it did not involve any misconduct or punishment".

28. In the instant case the impugned order has been passed not by way of punishment or penalty but only by way of an interim measure, pending enquiry into the manipulations. There is a well settled distinction in law between the suspensions which are made us holding operation pending enquiry and

suspensions by way of punishment. As observed by Lord Denning in Lewis v. Heffer (supra), (cited with approval by the Supreme Court in Liberty Oil Mills) there is a distinction between the suspensions which are inflicted by way of punishment, as for instance, when a member of the Bar is suspended for six months or when a solicitor is suspended from practice. He said : (All E.R. page 364 para 13)

"But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply, see Fumell v. Whangarei High Schools Board."

29. In R. V. Secretary of State, ex. p. Pegasus Holidays (supra) wherein the Secretary of State provisionally suspended the permit of Romanin pilots, pending enquiry into the licence requirements and pilots ability to comply with them; the Court held :

"The requirement of natural justice that a party affected by an administrative action should have a reasonable opportunity of presenting his case would be waived where the action contemplated was merely the provisional suspension of a licence or permit in an emergency situation which might result in the loss of many lives if action was not taken. In the circumstances the Secretary of State had had good cause for alarm about the competence of T''s pilots and the safety, of aircraft operated by it and passengers flying in them and was justified in taking swift action to suspend T''s permit provisionally pending further inquiry, since the possible saving of life outweighed both the short-term financial disadvantage to the parties and also the duty of fairness to provide the parties, with an '' opportunity to be heard. Accordingly, the applicant''s challenge to the Secretary of States action on the ground of unfairness and irrationality failed."

30. In Liberty Oil Mills case (supra), the Supreme Court observed : (SCC page 486 para 15)

"We do not think that it is permissible to interpret any statutory . Instrument so as to exclude natural justice, unless the language of the instrument leaves no option to the court. Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties. It may be that the opportunity to be heard may not be pre decisional; it may necessarily have to be post decisional where the danger to be averted or the act to be prevented is imminent or where the action to be taken can brook no delay. If an area is devastated by flood, one cannot wait to issue show cause notices for requisitioning vehicles to evacuate population. If there is an outbreak of an epidemic, we presume one does not have to issue show cause notices to requisition beds in hospital, public or private. In such situation, it may be enough to issue post decisional notices providing for an opportunity. It may not even be necessary in some situations to issue such notices, but it would be sufficient but obligatory to consider any representation that may be made by the aggrieved person and that would satisfy the requirement of procedural fairness and natural justice. There can be no tape measure of the extent of natural justice. It may and indeed it must vary from statute to statute, situation to situation and case to case. Again, it is necessary to say that pre decisional natural justice is not usually contemplated when the decisions taken are of an interim nature pending investigation or enquiry. Ad interim orders may always be made ex parte and such orders may themselves provide for an opportunity to the aggrieved party to be heard at a later stage. Even if the interim orders do not make provision for such an opportunity, an aggrieved party has, nevertheless, always the right to make an appropriate representation seeking a review of the order and asking the authority to rescind or modify the order. The principles of natural justice would be satisfied if the aggrieved party is given an opportunity at his request. There is no violation of principle of natural justice if an ex parte ad interim order is made unless of course, the statute itself provides for a hearing before the order is made as in Clause 8A.

Natural justice will be violated if the authority refuses to consider the request of the aggrieved party for an opportunity to make his representation against the ex parte ad interim order."

31. It is thus clearly seen that pre-decisional natural justice is not always necessary when ad-interim orders are made pending investigation or enquiry, unless so provided by the statute and rules of natural justice would be satisfied if the affected party is given post decisional hearing. It is not that natural justice is not attracted when the orders of suspension or like orders of interim nature are made. The distinction is that it is not always necessary to grant prior opportunity of hearing when ad-interim orders are made and principles of natural justice will be satisfied if post decisional hearing is given if demanded. In this regard the following observations of Chinnappa Reddy J. In Liberty Oil Mills case are pertinent : (SCC page 490 para 20).

"We have referred to these four cases only to illustrate how ex parte interim orders may be made pending a final adjudication. We however, take care to say that we do not mean to suggest that natural justice is not attracted when orders of suspension or like orders of an interim nature are made. Some orders of that nature, intended to prevent further mischief of one kind, may themselves be productive of greater mischief of another kind. An interim order of stay or suspension which has the effect of preventing a person, however temporarily say, from pursuing his profession or line of business, may have substantial serious and even disastrous consequences to him and may expose him to grave risk and hazard. Therefore, we say that there must be observed some modicum of residual, core natural justice sufficient to enable the affected person to make an adequate representation (These considerations may not, however, apply to cases of liquor licensing which involve the grant of a privilege and are not a matter of right; See Chingleput Bottlers v. Majestic Bottling Company. That may be and in some cases it can only be after an initial exparte interim order is made."

32. Thus, it is a settled position that while ex parte interim orders may always be made without a pre decisional opportunity or without the order itself providing for a post decisional opportunity, the principles of natural justice which are never excluded will be satisfied if a post decisional opportunity is given, if demanded. In the present case the order of 12-3-2001 itself provided a post decisional hearing on 21-3-2001. The same was availed of by the petitioners. At the post-decisional hearing, full opportunity was given to them to produce evidence and documents and the ex parte order was confirmed only after considering the submissions made by them. In these circumstances, the plea of Dr. Singhvi that there was violation of principles of natural justice, cannot be accepted.

33. We may add that if interim action, which is of a drastic nature is to be taken ex parte, it must necessarily be animated by sense of urgency and to quote, the words, of Chinnappa Reddy, J. : (SCC pg.492 493 paras 23, 24). "The sense of urgency may be infused by a host of circumstances such as trafficking and unscrupulous piddling in licences, large scale misuse of imported goods, attempts to monopolise or corner the market, whole sale prevalence of improper practices among classes of importers, public sentiment etc. etc.....Public interest must nolens volens be the paramount consideration....." Bearing in mind the above, it cannot be denied that the SEBI was justified in taking the action as it did. A regulatory agency entrusted with the duty to protect the investors must have the capacity to move quickly to curb further mischief and to take action that, in its opinion, is necessary to instil and maintain public confidence in the integrity of the capital markets. In the wake of the downfall of the market, preliminary inquiry that was conducted by SEBI, revealed prima facie involvement in market manipulations. And to prevent further mischief an order was passed restraining the petitioners from undertaking any fresh business as brokers. The fall in the market was contrary to the general expectation in view of the budget. It does not require to be emphasised that this fall demoralized investors, big and small, Indian and foreign, individual, institutional and corporate. In the present case there is a clear case for SEBI to act swiftly.

34 Dr. Singhvi then contended that there was absolutely no valid ground for passing the restraint order. It was urged that the SEBI''s order is based on no material. It was emphasised that the information sought was not price sensitive and in any event the petitioners have not used the information nor passed the same to any other person. It was contended that the Circulars relied upon by

SEBI do not in any manner, preclude the President of the Exchange from making bona fide enquiries into the causes of the downfall of the market. And, the fact that such inquiries were made is not sufficient to infer any possible role of the President in the alleged manipulations. Dr. Singhvi took us through the transcripts sentence by sentence analysing each word with a view to show that the information sought by the President was of a general nature in discharge of his duty. The learned Advocate General on the other hand placed an entirely different interpretation on the two transcripts. SEBI by its impugned orders has also analysed parts of the transcripts. Regarding these portions of the transcripts discussing specific scrips and brokers Dr. Singhvi submitted that the same were volunteered by Arun Dhanawade and were not solicited by the 1st petitioner. He also submitted that the information collected by him on 2-3-2001 could not be used in future and therefore there was no purpose in issuing the impugned order. Dr. Singhvi submitted that, the information obtained by him was available to anyone at anytime. The learned Advocate General on the other hand submitted that this price sensitive information would not have been available to anyone at anytime. We decline the invitation to assess the material including an analysis of the transcripts. It is not for the Courts, especially while exercising powers under Article 226, to analyse the evidence in detail and come to conclusion on the merits of the case. The operation of Stock markets and the functioning of brokers is not only highly technical but very complex. The exercise to be carried out will invoke not merely the interpretation of the above circulars and the parameters of the authority of the President of the BSE but also the collection of the material relating to innumerable transactions, the correlation of the same with various factors such as the time, and rate at which they were entered into and also the relationship between the conflicting entries thereto. It is the SEBI and not the Court that must carry out this analysis.

35. SEBI has recorded a prima facie finding that the information sought was price sensitive and further investigation is required in order to find out the role of the petitioners in the manipulations. The reason why the index fell, whether there was any bear cartel in operation, the role played by the petitioners, or any of them in such manipulations are the subject matter of the investigation and inquiry. The reason why the President was anxious to get this information is also the subject matter of the investigation and inquiry. The extent to which the President used the information is precisely what is being probed by the SEBI. SEBI as a regulatory agency has been constituted with avowed object of protecting the interest of the investors. The decision taken by the regulatory agency in exercise of its powers is entitled to the greatest weight and the Courts will be slow to interfere with such decisions or orders.

36. In American Power & Light Company, Petitioners v. Securities and Exchange Commission 329 US 90, the U.S. Supreme Court held :

"20. Where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy, the relation of remedy to policy is peculiarly a matter of administrative competence.

21. The judgment of the Securities and Exchange Commission in dealing with the problem of adjusting holding company systems in accordance with the legislative standards prescribed by Section 11(b)(2) of the Public Utility Holding Company Act of 1935, is entitled to the greatest weight; and only if the remedy chosen is unwarranted in law or is without justification in fact should a Court attempt to intervene in the matter,"

37. Dr. Singhvi submitted that the interim order should not completely stop the petitioners business. He submitted that at the most mere should be restrictions on the petitioners business such as the volume of business or a restriction on trading in respect of certain specified shares. We are unable to accept this submission for more than one reason. Firstly SEBI''s order and the need for the same was directed not against any particular security or in respect of the extent/ volume of transactions but against the petitioners personal involvement in the securities market in general. The question is not whether the petitioners should be permitted to trade in any particular scrip but whether in public interest they should be permitted to trade at all pending investigation into the allegations. Secondly, this very question would involve weighing the nature of the allegations the extent of the petitioners involvement and, most importantly the element of public interest. But there are all matters for the consideration of the authority making the order which in this case is SEBI. In the facts of this case it cannot be said that SEBI''s orders are unwarranted in law or without any justification. The SEBI is charged with the duty to protect the public. What will protect the public must involve an exercise of discretionary powers. And so the question of the appropriate remedy is necessarily a matter of administrative competence. To judge the validity of any decision or order passed by the SEBI, normally, the Wednesbury test is to be applied to find out if the decision was illegal and suffered from procedural improprieties or was one which no sensible decision maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not, however, go into correctness of the choice made by the authority amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the authority. The application of the principle of proportionality which is sought to be invoked by Dr. Singhvi is debatable qua its application to the executive actions [see Tata Cellular Vs. Union of India, and State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., . In Union of India v. G. Ganayutham (supra) the Supreme Court held that where no fundamental freedoms are involved, the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury or CCSU principles, as explained by Lord Greene and Lord Diplock respectively to

find out if the executive or administrative authority has reasonably arrived at his decision as the primary authority. The question whether the Courts in our country will apply the principle of "proportionality" and assume a primary role was left open to be decided in a case where such action is alleged to offend fundamental freedoms under Articles 19, 21 etc. and not under Article 14.

38. In the light of the principles set out above, in our view, it is not possible to interfere with the interim orders passed by the SEBI. It cannot be said that SEBI''s orders are absurd or based on no material.

39. In our view, the submission of Dr. Singhvi based on Article 19(1)(g) is equally untenable. The decision of Jammu and Kashmir High Court and Allahabad High Court have no application to the facts of the present case. What is laid down in these cases is that where the effect of a restrictive legislation is to totally prevent a citizen from carrying on trade, business or profession, such a restriction is unreasonable and void. In the instant case the order impugned is of interim nature which is passed by SEBI in a pending inquiry. The question of any violation of Article 19(1)(g) does not arise.

40. Before parting with the judgment we may mention that. Dr. Singhvi tried to distinguish the case of the petitioner No. 3 viz. Capital and Securities Pvt. Ltd. on the ground that the 1st petitioner had only 18% share in the said company. However it has been brought to our notice, that majority share holding in this company is that of the son-in-law of the 1st petitioner. It is also pointed out that the 1st petitioner himself has described this company as his associate concern to the Stock Exchange. Whether the petitioner No. 3 company is really involved in the aforesaid acts is also to be investigated by the SEBI. SEBI is directed to complete the inquiry and pass final orders within 4 months from today. All contentions of the parties are expressly kept open. SEBI shall decide the matter on its own merits without being influenced in any manner by the observations made in this order. We express no opinion at all on merits of the matter.

41. In the result, for the foregoing reasons, petition is dismissed. No order as to costs.

42. Petition dismissed.

