

(2012) 01 DEL CK 0489

In the Delhi High Court

Case No : Writ Petition (C) 8128 of 2011 and C.M. No's. 18307-08 of 2011

DLF Ltd.

APPELLANT

Vs

Securities and Exchange Board of India and Others

RESPONDENT

Date of Decision : 03-01-2012

Acts Referred:

Companies Act, 1956 — Section 235, 236, 237, 55, 55A
Competition Act, 2002 — Section 19, 26, 26(1), 26(2), 26(6)
Constitution of India, 1950 — Article 136, 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 34
Penal Code, 1860 (IPC) — Section 420
Securities and Exchange Board of India Act, 1992 — Section 11(2A), 11(4), 11B(1), 11B(2), 11B(3)

Citation : (2012) 106 CLA 480 : (2012) 170 CompCas 22 : (2012) 4 CompLJ 524 : (2012) 186 DLT 145

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Soli Sorabjee, with Mr. Dhruv Dewan, Ms. Anannya Ghosh and Mr. Anand Misra, for the Appellant; Parag P. Tripathi, ASG, with Mr. Neeraj Malhotra, Ms. Mahima Gupta and Mr. Shourjyo Mukherjee, Advocates, for the respondent No.1, Mr. Amit Sibal, Ms. Priyanka Kalra Dar and Mr. Vinay Thripathi, Advocates, for the respondent No. 2, Mr. Arvind Nigam , with Mr. Shailesh Suman and Ms. Ranjana Roy Gawai, Advocates for the respondent No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—The petitioner assails and seeks the quashing of the order dated 20.10.2011 passed by Sh. Prashant Saran, whole time member of the Securities and Exchange Board of India (SEBI), whereby it has been held in relation to the complaints dated 04.06.2007 and 19.07.2007 made by respondent no.2 against the petitioner, that the SEBI shall investigate into the allegations leveled by the complainant/respondent no.2 in respect of the petitioner DLF Ltd. (DLF) and Sudipti Estates Private Limited (Sudipti), respondent no.3. The said investigation shall focus on the violations, if any, of

the provisions of the erstwhile SEBI (Disclosure and Investor Protection) Guidelines 2000 read with the relevant provisions of the Companies Act, 1956. It has been further decided that a formal order would be issued appointing an investigating authority who shall investigate the matter, without being prejudiced by any observations made in the said order, and shall complete the same as expeditiously as possible. If any violations are found in the investigation, the SEBI shall proceed in accordance with law.

2. Respondent no.2 claims to have entered into business transactions with respondent no.3, Sudipti in the year 2006. At that time of point of time, Sudipti was controlled by two promoters, namely, DLF Home Developers Ltd.(DHDL) and DLF Real Estate Developers Ltd.(DREDL), both of whom were wholly owned subsidiaries of DLF - the petitioner. Sudipti was claimed to have been incorporated on 24.03.2006. It was claimed that the aforesaid promoter companies were a part of DLF group, of which the flag ship company is DLF, the petitioner herein.

3. In connection with its proposed public issue, the petitioner herein filed a Draft Red Herring Prospectus (DRHP) with the SEBI on 12.05.2006. In the said DRHP, it was indicated that Sudipti was one of the joint ventures of DLF. However, this DRHP was subsequently withdrawn by the merchant bankers of the petitioner and a fresh DRHP was submitted on 02.01.2007, in which Sudipti was not mentioned as being associated with DLF.

4. Respondent no.2 claimed that the petitioner and Sudipti had ensnared and cheated him of Rs. 31,09,50,000/- towards sale proceeds of certain lands. A First Information Report (FIR) u/s 420 IPC was got registered at the instance of respondent no.2 against Sudipti and a few others on 26.04.2007 at P.S. Connaught Place, New Delhi.

5. The final DRHP submitted by the petitioner DLF on 25.05.2007, did not mention the name of Sudipti as a joint venture/associate of the petitioner. Thereafter, the public issue of DLF opened, shares were subscribed and the issue closed. Respondent no.2 addressed a letter on 04.06.2007 to SEBI in this regard. It appears that SEBI forwarded this communication on 25.06.2007 to Sudipti and the petitioner DLF for their response. The petitioner DLF, by its letter dated 11.07.2007 denied the allegations and claimed that it had no connection with Sudipti as on that date. It appears, the merchant bankers of the petitioner explained to SEBI that the shares of Sudipti, which were held by DHDL and DREDL, wholly owned subsidiaries of DLF, had been sold in 2006. It was, therefore, claimed that Sudipti ceased to be an associated company of DLF by the time the revised DRHP was filed in January 2007.

6. The aforesaid FIR was investigated by the police and a closure report was filed. Thereafter respondent no.2 claims to have filed a private complaint which is stated to be pending before the concerned criminal Court. It appears respondent no.2 also challenged the filing of the closure report by filing a petition before this

Court u/s 482 Cr.P.C.

7. Aggrieved by the inaction of SEBI on its complaints, respondent no.2 preferred W.P(C) 7976/2007 titled Kimsuk Krishna Sinha V. Securities Exchange Board of India & Ors. before this Court. In those proceedings, SEBI filed its counter affidavit and defended its position in relation to the complaint of respondent no.2. The writ petitioner, namely, respondent no.2 herein, filed certain additional affidavits. The learned single Judge, after considering the same allowed the writ petition and issued a direction to SEBI to undertake an investigation into the complaints of respondent no.2 by also looking into the averments in the affidavits and additional affidavits filed by the petitioner in the said writ petition.

8. The petitioner DLF, Sudipti and SEBI challenged the judgment of the learned Single Judge dated 09.04.2010 in the aforesaid writ petition, by filing their respective Letters Patent Appeals (LPAs). These LPAs (LPA Nos. 436/2010, 441/2010 and 488/2010) were taken up for hearing by the Court simultaneously and disposed of on 21.07.2011. The observations made by the Court and the directions issued by it in paras 4 and 5 of the order of the Division Bench, being relevant, are reproduced herein below:-

4. In course of hearing of the appeals, it is accepted that two complaints were made to the SEBI on 4th June, 2007 and 19th July, 2007, but no decision or outcome was communicated to the respondent. Thus, in the obtaining factual matrix the only mandamus that could have been issued to the SEBI is to take a decision on the basis of the complaints filed and communicate the decision to the complainant respondent. Needless to say, an appeal would lie from such a decision.

5. In view of the aforesaid, the order passed by the learned single Judge is set aside in entirety. SEBI shall examine the complaints and take a decision and communicate it to the parties. Needless to emphasize, SEBI, if so advised in law, can always call for documents. We hope and trust, the SEBI shall act with utmost objectivity regard being had to the law in the field and without being influenced by the counter affidavit filed by it in the writ petition. The decision shall be taken after hearing the parties within a period of three months from the date of receipt of the order passed today. It needs no special emphasis to mention that we have not expressed any opinion, even remotely, on the merits of the case. The appeals are accordingly disposed of without any order as to costs.

9. In pursuance of the directions of the Division Bench, SEBI granted hearing to the parties before its whole time member, Sh. Prashant Saran which has resulted in the passing of the impugned order.

10. The conclusion drawn by SEBI in the impugned order is contained in para-16, and it reads as follows:

16. In view of the foregoing, the following decision is taken in respect of the complaints dated June 4, 2007 and July 19, 2007:

I. The Securities and Exchange Board of India shall investigate into the allegations leveled by the complainant, Mr. Kimsuk Krishna Sinha in respect of DLF Limited and Sudipti Estates Private Limited.

II. The said investigation shall focus on the violations, if any, of the provisions of the erstwhile Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 read with the relevant provisions of the Companies Act, 1956.

11. The SEBI has decided to issue a formal order appointing the investigating authority. The investing authority shall investigate the matter without prejudice to any observation made in the impugned order, and shall complete the same as expeditiously as possible.

12. The first submission of Mr. Soli Sorabjee, learned senior counsel appearing for the petitioner DLF is that the procedure adopted by the respondent SEBI while granting hearing to the parties, was completely flawed and in gross breach of the principles of natural justice. He submits that the Division Bench had specifically directed in the order dated 21.07.2011 that SEBI shall arrive at its decision "after hearing the parties within a period of three months from the date of receipt of the order passed today". However, SEBI did not grant a hearing to the petitioner, inasmuch, as, the complainant i.e. the respondent no.2 was heard first in the absence of the petitioner, DLF, and thereafter the petitioner was called for a hearing, when respondent no.2 was not present. Consequently, the petitioner did not have the advantage of knowing as to what was submitted by respondent no.2 at the hearing and, therefore, obviously the petitioner could not respond to the complainant's submissions. Mr. Sorabjee submits that respondent no.2 filed detailed written submissions before the SEBI. These written submissions were also not provided to the petitioner.

13. He submits that the petitioner specifically recorded the aforesaid infirmity in the procedure adopted by SEBI in its submissions dated 03.10.2011. Mr. Sorabjee submits that such a procedure of holding one sided hearings has been held by the Supreme Court to be in breach of the principles of natural justice. In this regard, he places reliance on Payyavula Vengamma Vs. Payyavula Kesanna and Others, , wherein the Supreme Court while dealing with a case relating to arbitration proceedings, observed as follows:

8. There is thus no doubt that the arbitrator heard defendant 1 in the absence of the plaintiff. No notice of this hearing was given by the arbitrator to the plaintiff nor had she an opportunity of having the evidence of the defendant 1 taken in her presence so that she could suggest cross-examination or herself cross-examine defendant 1 and also be able to find evidence, if she could, that would meet and answer the evidence given by the defendant 1. As was observed by Lord Langdale M.R. in Harvey v. Shelton (1844) 7 Beav. 455 at p. 462,

It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the

Judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see, that this was an extremely indiscreet mode of proceeding, to say the very least of it. It is contrary to every principle to allow of such a thing, and I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side.

9. This case of *Harvey v. Shelton* (1844) 7 Beav. 455 at p. 462, is the leading case on this point and it has been followed not only in England but in India. (See *Ganesh Narayan Singh v. Malida Koer* (1911) 13 C.L.J. 399 at pages 401, 402. She had also no opportunity to have her say in the matter of the settlement of the 1st May, 1927. The course of proceeding adopted by the arbitrator was obviously contrary to the principles of natural justice.

(Emphasis supplied).

14. Mr. Sorabjee submits that the act of ordering an investigation u/s 11C seriously impinges on the reputation and good name of the petitioner, and an investigation u/s 11C cannot be ordered lightly.

15. In support of this submission, Mr. Sorabjee places reliance on the decision of the Supreme Court in *Rohtas Industries Vs. S.D. Agarwal and Others*, . The Supreme Court in this case was dealing with the power of the Central Government to take action u/s 235 of the Companies Act, i.e. to order an investigation into affairs of a company. The Supreme Court observed:

".... ... It may be noted that before the Central Government can take action u/s 235, certain preconditions have to be satisfied. In the case of an application by members of the company under Clause (a) or (b) of Section 235, the same will have to be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have goods reason for requiring the investigation, and the Central Government may, before appointing an Inspector, require the applicant to give security for such amount not exceeding Rs. 1,000, as it may think fit for payment of the costs of the investigation. From the provisions contained in Sections 235 and 236, it is clear that the Legislature considered that investigation into the affairs of a company is a very serious matter and it should not be ordered except on good grounds. It is true that the investigation u/s 237(b) is of a fact-finding nature. The report submitted by the Inspector does not bind anybody. The Government is not required to act on the basis of that report, the company has to be called upon to have its say in the

matter but yet the risk - it may be a grave one - is that the appointment of an Inspector is likely to receive much press publicity as a result of which the reputation and prospects of the company may be adversely affected. It should not therefore be ordered except on satisfactory grounds.

5. Before taking action u/s 237(b)(i) and (ii), the Central Government has to form an opinion that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other person, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any member or that the company was formed for any fraudulent or unlawful purpose or that the persons concerned in the formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members.... ..".

16. He submits that, similarly, an investigation by SEBI u/s 11C would have serious consequences for the petitioner as its reputation would be marred, and the confidence of the investors in the petitioner company would be shaken.

17. Mr. Sorabjee further submits that an investigation may be ordered by SEBI u/s 11C of the Securities & Exchange Board of India Act, 1992 (SEBI Act) in a case where SEBI "has reasonable ground to believe" that:

(a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or

(b) any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board thereunder.

18. Mr. Sorabjee submits SEBI that the jurisdictional requirement for invoking section 11C of the Act is that the board should have "reasonable ground to believe", as aforesaid. Before an investigation is ordered by SEBI u/s 11C, it is necessary that there exist circumstances which suggest that either the transaction in securities are being dealt with in a manner detrimental to the investors, or the securities market, or that any intermediary or person associated with the securities market has violated any of the provisions of the SEBI Act or the rules or the regulations made or directions issued by the Board thereunder.

19. In support of his submission that the jurisdiction u/s 11C to order an investigation is dependent on the existence of facts which give rise to "reasonable ground to believe", Mr. Sorabjee has placed reliance on S. Ganga Saran and Sons (Pvt.) Ltd., Calcutta Vs. Income Tax Officer and Others, . In para-6, the Supreme Court observed:

6. It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice u/s 147(a) . First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have

reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words u/s 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice u/s 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid. (emphasis supplied).

20. Reliance is also placed on *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, wherein the Supreme Court held:

It is true that two conditions must be satisfied in order to confer jurisdiction on the income tax Officer to issue the notice under s. 34 in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year. The first condition is that the income tax Officer must have reason to believe that the income, profits or gains chargeable to income tax had been under-assessed. The second condition is that he must have reason to believe that such "under-assessment" had occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under s. 22, or (ii) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the income tax Officer acquires jurisdiction to issue a notice under the section. But the legal position is that if there are in fact some reasonable grounds for the income tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the income tax Officer to issue the notice under s. 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the income tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the income tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the

reasons for the belief. Again the expression "reason to believe" in section 34 of the income tax Act does not mean a purely subjective satisfaction on the part of the income tax Officer.

The belief must be held in good faith: it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the income tax Officer in starting proceedings under s. 34 of the Act is open to challenge in a court of law. [See *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, "

(emphasis supplied).

21. Mr. Sorabjee lastly submits that while passing the impugned order, the Board has looked into a host of other documents produced by Respondent No.2 for the first time, and which did not form part of the original complaints made by him. He submits that the Division Bench had directed the Board to consider only the two complaints and in so far as consideration of the additional affidavits filed by Respondent No.2 in the writ proceedings is concerned, that direction of the learned Single Judge had been set aside. He submits that the impugned order is premised on irrelevant materials and considerations (contained in the additional documents) which the Division Bench had specifically directed to be kept out of its consideration by the Board.

22. Mr. Sorabjee also refers to various portions of the impugned order to submit that the same proceeds on the basis of submissions made, and information provided by respondent no.2 to SEBI, copies whereof were not provided to the petitioner, and the petitioner was not granted an opportunity to meet the same.

23. Mr. Sorabjee submits that the SEBI has been influenced by these submissions of respondent no.2/complainant in arriving at its decision which is assailed in these proceedings. However, the petitioner was not granted an opportunity to respond to the same.

24. The petition has been opposed on behalf of SEBI as well as on behalf of respondent no.2. Mr. Parag Tripathi, learned ASG, who appears for respondent no.1, SEBI raises a preliminary objection to the maintainability of the writ petition, by submitting that the petitioner has a statutory right of appeal against the impugned order u/s 15T, as any person aggrieved by an order of the Board may prefer an appeal to the Securities Appellate Tribunal (SAT) having jurisdiction in the matter. The petitioner thus has an efficacious alternate remedy available under the SEBI Act itself. He submits that this Court should not interfere with the impugned order in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India.

25. Mr. Tripathi also submits that SEBI, in exercise of its statutory powers, and

discharge of its statutory functions, not only exercises quasi judicial functions, but also functions as an investigative body. He submits that the impugned order has been passed by SEBI in exercise of its power to investigate into complaints made before it. He submits that the impugned order does not determine any rights of the parties, and it also does not return any finding adverse to one or the other party. The impugned order merely discusses the existence of facts which give reasonable ground to believe the existence of circumstances in Clauses (a) and/or (b) of Section 11C of the SEBI Act, and, therefore, directs an investigation by an investigating authority u/s 11C of the Act. He submits that the impugned order is a step-in aid of the proceedings, and not the final decision. He places strong reliance on the decision of the Supreme Court in *Competition Commission of India Vs. Steel Authority of India Ltd. and Another*, . He submits that in this case, while dealing with the provisions of the Competition Act, 2002, the Supreme Court has clearly drawn a distinction between the administrative/inquisitorial functions of the commission, and its adjudicatory function. The Supreme Court, in para 30, framed various questions arising for its determination. Amongst these questions, questions 2 and 5 read as follows:

(2) What is the ambit and scope of power vested with the Commission u/s 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case?"

(5) Whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act?"

26. Section 26 of the Competition Act, insofar as it is relevant, reads as follows:

26. Procedure for inquiry u/s 19(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received u/s 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director-General to cause an investigation to be made into the matter.

27. The conclusions drawn by the Supreme Court in answer to the aforesaid query read as follows:

(2) Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.

However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive. The Commission is expected to form such prima facie view without entering upon any adjudicatory or

determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17(2) of the Regulations to invite not only the information provider but even "such other person" which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be "preliminary conference", for whose conduct of business the Commission is entitled to evolve its own procedure.

(5) In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

28. The Supreme Court, while discussing the scope of Section 26 of the Competition Act, observed as follows:

"86. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. "Natural justice" is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Courts. Every quasi-judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

87. Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion u/s 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami Vs. Union of India and another, explained the expression "inquisitorial". The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but sui generis.

88. Referring to the investigation under criminal jurisprudence as well as scope of inquiry under service jurisprudence, the Court held as under: (Krishna Swami case (Supra), SCC P 646, Para 61)

61. The problem could be broached through a different perspective as well. In normal parlance, in a criminal case, investigation connotes discovery and collection of evidence before charge-sheet is filed and based thereon definite charges are framed. Inquiry by a Magistrate is stopped when the trial begins. The trial is a culminating process to convict or acquit an accused. In Service

Jurisprudence, departmental inquiry against a delinquent employee, bears similar insignia to impose penalty. At the investigation stage the accused or the charged officer has no say in the matter nor is he entitled to any opportunity. The disciplinary authority or inquiry officer, if appointed, on finding that the evidence discloses prima facie ground to proceed against the delinquent officer, the inquiry would be conducted. The criminal court frames charges after supplying the record of investigation relied on. Equally, the disciplinary authority/inquiry officer would frame definite charge or charges and would communicate the same together with a statement of the facts in support thereof sought to be relied on and would call upon the delinquent officer to submit his explanation or written statement of defence etc. At the trial/inquiry the person is entitled to reasonable opportunity to defend himself".

89. The exceptions to the doctrine of audi alteram partem are not unknown either to civil or criminal jurisprudence in our country where under the CPC ex-parte injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries.

90. Reference in this regard can be made to the case of Azienda Colori Nazionali (ACNA) S.P.A. v. Commission of the European Communities: (1972) ECR 0933, where the argument was raised that the Commission had infringed the administrative procedure laid down in Regulation No. 17/62 of the European Council Regulation. In that case the Commission of the European Communities sent the notice of the objections to the applicant at the time of informing the applicant about the decision to initiate procedure to establish infringement of rules on competition. The European Court of Justice while holding that sending notification of the above mentioned decision

simultaneously with the notice of objections cannot affect the rights of the defence, stated as under:-

10. Neither the provisions in force nor the general principles of law require notice of the Decision to initiate the procedure to establish an infringement to be given prior to notification of the objections adopted against the interested parties in the context of such proceedings.

11. It is the notice of objections alone and not the Decision to commence proceedings which is the measure stating the final attitude of the Commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced".

91. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at

length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (the Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act".

(emphasis supplied).

29. Mr. Tripathi submits that the procedure adopted by respondent no.1 in the present case, is no different from that adopted by it in other cases while considering the issue whether, or not, to order investigation u/s 11C of the SEBI Act. He submits that, in fact, there is no legal necessity that the SEBI should grant a personal hearing to the parties before ordering an investigation u/s 11C of the SEBI Act.

30. Mr. Tripathi further submits that the SAT, Mumbai has also ruled on the aforesaid aspect in the case of Bhoruka Financial Services Ltd. v. Securities and Exchange Board of India, in Appeal No.18/2006 decided on 10.05.2006. He submits that in the aforesaid case, information was provided to SEBI on a mere telephonic call, of violation of conditions of renewal of recognition granted to the Magadh Stock Exchange at Patna. That case related to purchase of shares of Bhoruka Financial Services Limited (BFSL) by DLF Commercial Developers Limited (DCDL). By an ex-parte order, DCDL was restrained from dealing in the scrip of BFSL, and a direction was issued that the proceeds of sale transaction be deposited in an escrow account with a Nationalised Bank.

31. Objections were filed to the passing of the said ex-parte order. On receipt of these objections, by an order dated 05.12.2005, the Board ordered investigation into the affairs of the trading conducted on the exchange. The Board, thereafter, afforded an opportunity of hearing to parties, and confirmed its ex-parte interim order, as aforesaid. This order was appealed before the SAT, Mumbai. In those proceedings, the argument of the appellant was that the Board is yet to investigate the matter, and that it was in the process of collecting material regarding the alleged illegal trading in the scrips of BFSL. Consequently, it was argued that the Board could not record any finding on the merits of the issues as that it would amount to pre-judging of the cause.

32. While examining Section 11C, the SAT observed:

It is not the requirement of Section 11C that opportunity of hearing is to be afforded to any intermediary of the market before ordering such investigation. The reason is obvious. Investigation by itself does not adversely affect any person or intermediary and no civil consequences flow from such an order".

33. The SAT further observed:

9... When the Board receives a complaint or otherwise has reason to believe that the securities market is being manipulated or there is some other wrong doing which brooks no delay and that immediate action needs to be taken by way of an interim order/direction it is open to it to immediately order an enquiry or investigation in the matter which can always be ordered ex-parte and simultaneously issue necessary directions in terms of Sub-section (4) of Section 11. It is not the requirement of Section 11C that opportunity of hearing is to be afforded to any intermediary of the market before ordering such investigation. The reason is obvious. Investigation by itself does not adversely affect any person or intermediary and no civil consequences flow from such an order.

Sub-section (4) of Section 11 in which it appears was introduced by the Amending Act 59 of 2002 and by the same amending Act the Parliament inserted Section 11C in the Act and gave powers to the Board which it did not possess earlier to investigate the affairs of any intermediary or persons associated with the securities market and ask for a report. The word "investigation" as it finds mention in Section 11(4) obviously refers to the investigation in terms of Section 11C as both these provisions were inserted simultaneously. When we read this newly added provision it becomes clear that where the Board has reasonable grounds to believe that the securities market is being dealt with in a manner which is detrimental to the investors or the securities market or any intermediary or person associated with such market, it may at any time, by order in writing direct any person to investigate the affairs of any intermediary or persons associated with the securities market and submit a report. It is, thus, clear that investigation can be made only by an order in writing and not otherwise....

34. Mr. Tripathi submits that the jurisdiction and responsibility of the Board to examine possible violations of its regulations and guidelines relating to listing/trading of securities in the securities markets cannot be curtailed by limiting the materials, evidences and facts that the Board may consider. He submits that in any event, a perusal of the impugned order shows that the Board has not gone into the additional documents/information placed by Respondent No.2 while passing the impugned order. These additional documents do not find any discussion in the impugned order. But the said information, if found relevant, cannot be shut out at the time of investigation.

35. The petition is also opposed on behalf of respondent no.2 by Mr. Amit Sibal, Advocate. Mr. Sibal submits that the statutory appeal provided u/s 15T cannot be by-passed. The petitioner should avail of its statutory remedy and this Court should not exercise its extraordinary writ jurisdiction, as an efficacious

alternative statutory remedy is available. He places reliance on the decision of the Calcutta High Court in *Rose Valley Real Estates and Constructions Ltd. and Another Vs. Securities and Exchange Board of India and Others*, .

36. Before the Calcutta High Court, the petitioner had contended that the appeal u/s 15T of the SEBI Act is no bar to move the writ court, since the order impugned in the writ petition had been passed without jurisdiction, and also on the ground that the same was vitiated by violation of the principles of natural justice. The Court, however, rejected this submission by observing as follows:

25. When the other remedy is a statutory remedy, e.g. a remedy of appeal, and after exhausting which the aggrieved person is entitled to seek the Article 226 remedy, it cannot be said that it is an alternative to the Article 226 remedy. A statutory remedy denotes one particular remedy as distinct from every other. And in such case what is relevant for deciding whether power under Article 226 should be exercised is not the question whether the available other remedy is as cheap, speedy and efficacious as the Article 226 remedy, but the exhaustion thereof; and the principle is that non-exhaustion of the available statutory remedy is not a bar to seek the Article 226 remedy when the order or decision or action is questioned raising the question of jurisdiction or violation of the principles of natural justice or both.

26. When the other remedy is a statutory remedy after exhausting which the aggrieved party has a further statutory remedy, the nature of the other remedy and the further remedy, none of which can be considered an alternative to the Article 226 remedy, is the decisive factor. If after exhausting the further remedy the Article 226 remedy is available, then the High Court when approached raising the question of jurisdiction or violation of the principles of natural justice or both is to exercise its discretion applying the principle that non-exhaustion of available statutory remedy is no bar to seek the Article 226 remedy; and when after exhaustion of the other or further remedy the Article 226 remedy is not available, the High Court, when approached, should not entertain an Article 226 petition unless it is absolutely necessary to exercise the power in the interest of justice or for preventing a miscarriage of justice.

27. Now in so far as this case is concerned s. 15T of the Act provides that any person aggrieved by an order of the Board under the Act or the rules or regulations made there under may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter; that the Tribunal may pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against; and that it shall deal with the appeal as expeditiously as possible and Endeavour to dispose of it finally within six months from the date of receipt thereof.

28. An extraordinary feature in this case is that s. 15Z of the Act provides that any person aggrieved by any decision or order of a Tribunal may appeal to the Supreme Court on any question of law arising out of such order. It is a remedy of

statutory appeal, as opposed to the Article 136 remedy. The present s. 15Z was substituted for the previous one with effect from October 29, 2002; and under the previous s. 15Z of the Act any person aggrieved by any decision or order of the Tribunal could appeal to the High Court concerned on any question of fact or law arising out of such order. Elimination of this forum resulting in tapering of the judicial examination of the decisions or orders of the Board and Tribunal is very significant.

29. In view of the provisions of s. 4(5) of the Act the Chairman and the other members of the Board shall be persons who have shown capacity in dealing with problems related to securities market or have special knowledge of or experience in law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board. The Board has been enjoined by s. 11 of the Act to take such measures as it thinks fit for protecting the investors in securities and promoting the development of, and regulating the securities market. It is evident that it is an expert regulatory body.

30. As provided in s. 15M of the Act, only a sitting or retired Judge of the Supreme Court or a sitting or retired Chief Justice of a High Court can be appointed as the Presiding Officer of the Tribunal whose the other members must be those persons who have already shown their capacity in dealing with problems related to securities market and have qualification and experience in corporate law, securities laws, finance, economics or accountancy. Thus the Presiding Officer and the other members of the Tribunal make a formidable combination collectively representing judicial and specific subject expertise of extraordinary level.

31. The High Courts judicially reviewing, under Article 226, decisions or orders of the Board and the Tribunal made under the Act or the rules or the regulations made there under, besides making the Tribunal take, of course, a back seat and idle the days away, will (a) make s. 15Z of the Act otiose by derailing the proceedings, and (b) slow the speed at which the proceedings are supposed to attain finality. It is not that the Tribunal is incompetent to decide whether a decision or order of the Board under appeal to it is without jurisdiction or vitiated by violation of the principles of natural justice. On the contrary, it is quite competent to do that.

32. In my opinion, in view of the charted specific statutory course, up to the highest Court of the country, that the proceedings initiated by the Board, the lowest in the three-tier machinery, are supposed to travel, it cannot be said that the remedy of appeal under s. 15T is an alternative to the Article 226 remedy. And, as to the s. 15Z remedy, under no circumstances, it can be considered an alternative to the Article 226 remedy. Hence, in my opinion, even if it is alleged that the decision or order of the Board is without jurisdiction or is vitiated by violation of the principles of natural justice, a petition under Article 226 should not be entertained for exercising the power of judicial review, unless there are

exceptional reasons, e.g. absence of a functioning Tribunal.

33. In my opinion, while the power under Article 226 can be exercised for (a) judicially reviewing a decision or order of the Board in absence of a functioning Tribunal, and (b) for examining the validity of the decision or order when its validity is challenged questioning the vires of the statute or the provision under which the decision or order is made, it can also be exercised in the interest of justice or for preventing a miscarriage of justice, e.g. when the aggrieved person is unable to appeal under s. 15T or s. 15Z for absence of decision or order of the Board or the Tribunal.

34. In this case there is no extraordinary situation that can be treated as a warrant for holding that it is necessary to exercise the power under Article 226 in the interest of justice or for preventing a miscarriage of justice. From the order of the Board the Petitioners were entitled to appeal to the Tribunal that has been functioning and is competent to decide all the questions including the questions of jurisdiction of the Board to pass the order and violation of the principles of natural justice. I am, therefore, of the view that this Court should not exercise the power under Article 226 to review the order of the Board judicially.

37. Mr. Sibal submits that, as noted by the Calcutta High Court, the petitioners remedy firstly lies u/s 15T before the SAT, and thereafter before the Supreme Court u/s 15Z. He, therefore, vehemently opposes the maintainability of the present petition.

38. Mr. Sibal has placed reliance on the decision of the Madras High Court in N. Narayanan Vs. Securities and Exchange Board of India, . The Court, after considering various decisions including those of the Supreme Court, concluded that it was open to the petitioner to invoke the alternate statutory remedy of appeal, and did not exercise its discretionary jurisdiction under Article 226 of the Constitution of India.

39. Mr. Sibal also relies upon the Supreme Court order passed in the case of Sahara India Real Estate Corp. Ltd. & Anr. v. Union of India & Ors., in SLP (C) No.11023/2011 on 15.07.2011. He submits that the Supreme Court directed the petitioners, namely, Sahara India Real Estate Corp. Ltd. to prefer an appeal u/s 15T of the SEBI Act, which lies before the Appellate Tribunal by observing that complex legal issues are involved in these matters, including the issue of jurisdiction. Mr. Sibal submits that the Appellate Tribunal is headed by a Presiding Officer, who of necessity, should be either a sitting or retired judge of the Supreme Court or sitting or retired Chief Justice of the High Court. He submits that the Appellate Tribunal is, therefore, fully geared and competent to determine all issues including the issue of jurisdiction as well as the issue of breach of the principles of natural justice, as alleged by the petitioner, in the passing of the impugned order.

40. Mr. Sibal submits that the argument of the petitioner that the investigation report made u/s 11C by the investigating authority may adversely affect the

reputation and business of the petitioner is neither here nor there. That cannot be a ground not to direct an investigation u/s 11C, if, otherwise, there is justification for directing such an investigation to be made. He submits that the report made by the investigating authority u/s 11C is to be submitted to the Board. Thereafter, it is for the Board to consider what appropriate action, if any, it has to take on the basis of the said report.

41. Mr. Sibal submits that the Chapter VIA of the Act deals with the aspect of penalties and adjudication. He submits that the right of the petitioner to be heard would arise only when action is taken under the provisions of Chapter VIA of the SEBI Act. In this regard, he places reliance on Section 15I, which provides that:

"15-I. Power to adjudicate - (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15HA and 15HB, the Board shall appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

42. He submits that there is no inherent right in the petitioner to be heard at the stage when the Board examines the existence of "reasonable ground to believe" that a case is made out under clauses (a) and (b) of Section 11C(1) of the SEBI Act.

43. He also places reliance on the decision of the Supreme Court in Competition Commission of India (supra). Mr. Sibal further submits that cognizance of an offence punishable under the Act or rules or regulations made thereunder can be taken by a Court only upon a complaint made by the Board, and not otherwise. He submits that if, on the basis of the investigating authority's report, the Board decides to file a complaint, the petitioner would get a right to defend the said proceedings, after cognizance has been taken. There is no right to plead his defence vested in an accused, before a Court where criminal complaint is filed, takes cognizance of the offence on the basis of the complaint and issues process.

44. Mr. Sibal submits that the order of the Division Bench did not purport to create any special rights in the petitioner, which are not vested by law. The Division Bench was careful while observing that "SEBI shall act with utmost objectivity regard being had to the law in the field and without being influenced by the counter affidavit filed by it in the writ petition". Therefore, the SEBI has followed the due procedure of examining the two complaints, and prima facie concluded the existence of facts giving reasonable ground to believe that the requirement of Section 11C(1)(a) and/or (b) are made out.

45. Mr. Sibal submits that SEBI has been vested with the exclusive jurisdiction to deal with, inter alia, the public companies which intend to get their securities listed on any recognized stock exchange in India. In this regard, he places reliance on Section 55A and 63 of the Companies Act, relevant extracts of which read as follows :

55A. Powers of Securities and Exchange Board of India.-

The provisions contained in sections 55 to 58, 59 to 84.....

(a). in case of listed public companies;

(b) in case of those public companies which intend to get their securities listed on any recognized stock exchange in India, be administered by the Securities and Exchange Board of India; and

(c) In any other case, be administered by the Central Government.

x x x x x x x x x

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 to two years, or with fine which may extend to 1[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.

(emphasis supplied)

46. Mr. Sibal submits that the petitioner has not made any allegations of malafides against any officer of the SEBI in relation to the passing of the impugned order. He submits that the impugned order is very carefully drafted. No definite conclusions have been drawn in the said order, so as to prevent any prejudice being caused to the case of either party. In paras 9,14 and 15 of the impugned order, the SEBI has observed as follows:

"9. However, at this stage, I do not want to reproduce the alleged manner of funding and purchase of lands by the Company as shown in the written submissions and to rely on the documents which were not part of the original complaints at this stage, so as to prejudice the interest of the Company as the same were not made available to the Company and Sudipti for counter submissions. No guilt, if any, can be fastened on the Company, at this stage, on the basis of the said documents without obtaining the submissions of the Company and Sudipti in that regard".

"14. Having considered the submissions and the fact that the first DRHP (filed in May 2006) was withdrawn and a fresh DRHP was filed in January 2007 after the sale of stake in Sudipti, an examination is required as to whether Sudipti was dissociated for the purpose of avoiding any relevant disclosures that could arise if the entity continued to be part of the DLF group".

"15 Therefore, in the fitness of things and considering the interest of the securities market, the investors and also in the interest of justice, it would not be proper on the part of SEBI to dispose off the complaints by holding that those

additional submissions are extraneous to the original complaints filed by the complainant. However, the material submitted by the complainant during the hearing cannot be relied upon, at this stage, to find out whether there was any contravention of the provisions of the securities laws. The same needs to be examined and if any allegations are made out, the Company should be afforded an opportunity to make its submissions in respect of such allegations and material. I would also like to make it very clear that, no observations are made, at this stage, on the merits of the documents submitted by the Complainant during the hearing. However, since the said documents are not examined, it is all the more relevant to undertake an investigation to ascertain whether there were any violations of the provisions of the erstwhile DIP Guidelines or the relevant provisions of the Companies Act, 1956. Therefore, on a consideration of the complaints and the submissions of the complainant during the hearing, the counter submissions made on behalf of the Company and Sudipti, I am of the considered view that the ends of justice would be effectively met if an investigation into the matter is ordered.

47. Mr. Sibal further submits that the submission that the petitioner was not aware of the respondents grievances, and the case advance by it before the SEBI in its complaints or written submissions, is a farce. He submits that respondent no.2 has not only narrated its grievances in the complaints which are available with the petitioner, but the grievances had been set out elaborately in the writ petition preferred by the respondent no.2 before this Court, as aforesaid, and the additional affidavits filed in those proceedings. The petitioner is, therefore, not correct in contending that it was not aware of the submissions made by respondent no.2 before SEBI.

48. Mr. Arvind Nigam, learned senior counsel who appears on behalf of respondent no.3, Sudipti submits that the impugned order, insofar it directs an investigation into the affairs of Sudipti, is without jurisdiction, since Sudipti is a private limited company and SEBI has no jurisdiction over its affairs. In this regard, he places reliance on Section 11 of the SEBI Act, which details the functions of the Board.

49. In his rejoinder, Mr. Sorabjee submits that the bar of the existence of an alternate remedy cannot be invoked in the facts of this case, inasmuch, as, the petitioner is alleging breach of the principles of natural justice and also the lack of the existence of jurisdiction in the Board to pass the impugned order.

50. He submits that the jurisdiction of this Court under Article 226 of the Constitution is extensive and the rule against exercise of jurisdiction in cases where an efficacious alternate remedy exists, is a self imposed restriction. However, the said restriction does not apply where, either, the action has been taken in breach of the principles of natural justice, or without jurisdiction. In support of his submission, he places reliance on Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , wherein the Supreme Court held as follows:

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....."

51. Having heard learned counsels, perused the impugned order and considered the submissions of the parties in the light of the case law cited before me, I am inclined to dismiss the present petition, not on the ground of the petitioner having an alternative efficacious remedy u/s 15T of the SEBI Act, but on the ground that the petitioner did not have a right to hear the submissions of the respondent No. 2 complainant, and it had only the right of making its own submissions before SEBI, i.e. respondent No. 1 in terms of the order of the Division Bench in the LPA Nos. 436/2010, 441/2010 & 488/2010 disposed of on 21.07.2011. The limited enquiry conducted by SEBI at this stage was merely to examine whether or not the facts disclosed the entertainment of a reasonable belief to cause an investigation u/s 11C of the SEBI Act, which is an inquisitorial exercise, and not an adjudicatory exercise conducted by SEBI.

52. Though I find much force in the respondent's argument that the petitioner has an alternative efficacious remedy of appeal u/s 15T of the SEBI Act before the SAT, and a further statutory appeal u/s 15Z before the Supreme Court, and even though I find great force in the judgment of the Calcutta High Court in *Rose Valley Real Estates and Constructions Ltd.* (supra), I am not inclined to dismiss this petition on the ground that the petitioner has an alternative efficacious remedy of preferring an appeal before SAT u/s 15T of the SEBI Act for the following reasons:

(i) Firstly, the case of the petitioner in the present petition is that there has been a breach of the principles of natural justice by SEBI while passing the order dated 20.10.2011, thereby concluding that an investigation u/s 11C of the SEBI Act is required to be held on the basis of two complaints of respondent No. 2.

(ii) Secondly, it is also the submission of the petitioner that the said order dated 20.10.2011 has been passed without jurisdiction, i.e. that the jurisdictional facts, which would give jurisdiction to SEBI to pass an order requiring an investigation, did not exist in the present case.

The aforesaid are well recognized grounds for exercise of its jurisdiction by the High Court under Article 226 of the Constitution of India, even though alternative efficacious remedy may be available to the petitioner (see *Whirlpool Corporation supra*).

(iii) SAT, Mumbai has already taken a view in case of Bhoruka Financial Services Ltd. (supra), that it is not the requirement of Section 11C that opportunity of hearing is to be afforded to any intermediary of the market before ordering an investigation under that Section, on the ground that such an investigation does not adversely affect any person or intermediary and no civil consequences flow from such an order. Therefore, to relegate the petitioner to filing an appeal u/s 15T of the SEBI Act would be of no avail. The Calcutta High Court in para 33 of its decision in Rose Valley Real Estates and Constructions Ltd. (supra) itself carves out a few exceptions under which the Court may exercise its power under Article 226 of the Constitution of India. The exceptions cited by the Court in Rose Valley Real Estates and Constructions Ltd. (Supra) cannot be said to be exhaustive. The exceptions noted by the Calcutta High Court, inter alia, are:

(a) When the Tribunal (SAT) is not functioning;

(b) In the interest of justice or for preventing miscarriage of justice, for example, when the aggrieved person is unable to appeal u/s 15T or Section 15Z for absence of decision or order of the Board or the Tribunal.

In my view, there is another circumstance in which the Court may decide to exercise its discretionary jurisdiction under Article 226 of the Constitution of India, and that is where the petitioner would be met with a *fait accompli* even if he were to be directed to avail of the alternative efficacious remedy of an appeal u/s 15T of the Act, as in the present case.

(iv) One of the reasons for the Court not exercising jurisdiction under Article 226 of the Constitution is that the matter involves technicalities, which are best left to be dealt with by experts in the field. This is one of the reasons given by the Court for its decision in Rose Valley Real Estates and Construction Ltd. (supra). But the issues raised by the petitioner in the present case are purely legal and not factual, and do not involve any technicality.

53. While I respectfully agree with the judgment of the Calcutta High Court in Rose Valley Real Estates and Constructions Ltd. (supra), in my view, the petitioner's case can be distinguished on facts and I am, therefore, not inclined to relegate the petitioner to seek its remedy of appeal u/s 15T of the SEBI Act.

54. I now turn to the primary submission of Mr. Sorabjee that the impugned order has been passed in violation of principles of natural justice and also that the respondent No. 1/SEBI did not have the jurisdiction to pass the said order, as the jurisdictional facts did not exist in the present case to reasonably conclude that SEBI had reasonable ground to believe that the conduct in question, namely the non-disclosure of the existence of a pending First Information Report against Sudipti in the revised DRHP, was detrimental to the investors or the securities market or that the petitioner had violated any of the provisions of the SEBI Act or rules made or directions issued by the respondent Board thereunder.

55. It is not in dispute that SEBI, before passing the impugned order dated

20.10.2011, did not provide an opportunity to the petitioner to hear the submissions of respondent No. 2, or to deal with or respond to the written submissions of respondent No. 2. Similarly, respondent No. 2 was not granted an opportunity to hear and deal with or respond to either the oral submissions of the petitioner or to their written submissions.

56. Reliance placed by Mr. Sorabjee on Rohtas Industries (supra), in my view, does not advance the petitioner's case. All that the Supreme Court has held in Rohtas Industries (supra) is that action u/s 235 of the Companies Act can be taken by the Central Government upon fulfillment of the statutory requirements and it being a serious matter, it should not be ordered except on good grounds. Pertinently, the Supreme Court notes that the investigation report u/s 237 (b) is of a fact finding nature and does not bind anybody. The Government is not required to act on the basis of that report, and the company has the right to have its say in the matter. As the launching of an investigation may impact the reputation and prospects of the company adversely, the investigation should not be ordered except on satisfactory grounds.

57. However, this decision does not say, and it cannot be taken to mean that even before launching an investigation u/s 235 of the Companies Act, the Central Government is required to hold a full-fledged hearing, by hearing all the persons concerned in the presence of each other; granting each concerned person the right to meet the case of the other; deciding issues of fact or law, or; returning a finding of fact. If the Central Government were to be expected to itself function in a quasi judicial capacity while considering whether, or not, to order an investigation u/s 235 of the Companies Act, the purpose of directing an investigation into the affairs of the company itself would get diluted, if not totally defeated, and the same would also impact the rights of the parties in the course of investigation, as any such investigation would be influenced by the decision of the Central Government. The petitioner has had its say in the matter, as it was made aware of the complaint against it and heard by SEBI on the said complaints. The submissions/case of the petitioner has been taken note of in the impugned order.

58. On the other hand, reliance placed by the respondents in the case of Competition Commission of India (supra), in my view, is most apposite. The Competition Commission of India functions in a dual capacity. It not only investigates into complaints of alleged anti-competitive transactions and activities, but it also adjudicates upon such complaints. As held by the Supreme Court, while discharging its functions u/s 26(1) of the Competition Act, the Competition Commission of India functions in an inquisitorial capacity, and not in a quasi judicial capacity. The Competition Commission of India has to only examine whether a prima facie case exists of alleged contravention of Section 3 (1) or Section 4 (1) of the Competition Act, and if it is of the opinion that a prima facie case exists, the Commission is obliged to direct the Director General to cause an investigation into the matter. The adjudicatory function of the

Competition Commission of India begins after the receipt of the report of the Director General. It is at that stage that the Competition Commission of India hears all the parties concerned and proceeds to pass appropriate orders under Sections 26(6) , 26(7) & 26(8) of the Competition Act. It is during these stages that the parties have a right of hearing before the Commission.

59. Similarly, SEBI has also been invested with powers & responsibilities to function in a dual capacity. It functions in an inquisitorial capacity while examining the issue, whether reasonable grounds exist to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market or, whether any intermediary or any person associated with the securities market has violated any of the provisions of the SEBI Act or the rules & regulations made thereunder, or directions issued by the Board. If it finds that reasonable grounds exist to believe the existence of the aforesaid state of affairs, it can direct an investigation by an investigating authority u/s 11C of the Act. Once the investigation has been ordered u/s 11C and an investigation report made, the SEBI while examining the said report and acting upon it, functions in its quasi judicial capacity. This is evident from Section 11(4) of the SEBI Act, which, inter alia, reads:

"(4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:-"

60. The submission of Mr. Sorabjee that the petitioner ought to have been granted a full-fledged hearing by the Board i.e, the Board should have heard the respondent No. 2 complainant in the presence of the petitioner, and the petitioner should have been provided with the written submissions of respondent No. 2 and should also have been provided opportunity to meet the case of respondent no.2 at the stage of consideration of the issue whether an investigation should be ordered by appointing an investigating authority, therefore, cannot be accepted. If accepted, it would lead to a piquant situation where the Board shall, only on the basis of a prima facie assessment return its findings which would, in turn, impinge upon the functions to be discharged by the investigating authority to be appointed to investigate into the matter. Pertinently, an investigating authority is extensively empowered to unearth facts (see Section 11C(2) to 11C(9) of the SEBI Act), and cause a detailed investigation into the matter. That exercise would get defeated if the Board were to, on the basis of a prima facie view, return findings of fact by itself holding a full fledged hearing. As in the case of Competition Commission of India, in the present case as well, the functions to be performed by SEBI cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated by the plain language of Section 11C.

61. The decision of the Supreme Court in Payyavula Vengamma (supra) has no

application in the facts of this case, as that was a case dealing with arbitration proceedings which, undoubtedly, are quasi-judicial in character. Turning to the submissions of Mr. Sorabjee that the impugned order has been passed without jurisdiction inasmuch, as, the jurisdictional facts were lacking, to cause the Board to have reasonable grounds to believe that an investigation is called for into the affairs of the petitioner-company, either on account of;

(a). the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or

(b). any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board thereunder,

once again, I do not find any merit in the submission. I have endeavoured to put in general terms the principles set out in M/s. S Ganga Saran and Sons (Pvt.) Ltd., Calcutta (Supra) and in S. Narayanappa & Others (Supra), by the Supreme Court as follows:

(1). The Court cannot go into the adequacy or sufficiency of the reasons which have weighed with the authority concerned in coming to the belief. In other words, the sufficiency of the grounds which induced the concerned authority to act is not a justiciable issue. But the Court can certainly examine whether the reasons are relevant, and have a bearing on the matters in regard to which the authority is required to entertain the belief before the authority can direct an investigation.

(2). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the authority concerned could not have reason to believe that the circumstances may exist, which call for investigation.

(3). If there are in fact reasonable grounds for the authority concerned to believe that there exist facts, which could have a material bearing on the question of breach of the relevant rules/regulations, that would be sufficient to give jurisdiction to the concerned authority to direct an investigation.

(4). It is open for the person being investigated into, to contend that the concerned authority did not hold the belief that there had been a breach of the rules and regulations which warrant an investigation. In other words, the existence of the belief can be challenged by the person being investigated, but not the sufficiency of the reasons for the belief.

(5). The expression "reason to believe", or the like, in the Statute does not mean a purely subjective satisfaction on the part of the concerned authority.

(6). The belief must be held in good faith: it cannot be merely a pretence. To put it differently, it is open to the Court to examine the question whether the reasons

for the belief have a rational connection or a relevant bearing to the formation of the belief, and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the concerned authority in starting proceedings/ investigation is open to challenge in a court of law.

62. It is these principles enunciated by the Supreme Court which have to be kept in mind while examining the submission of the petitioner with regard to the lack of jurisdiction in the SEBI to order an investigation u/s 11C of the SEBI Act.

63. Section 11C mandates that the Board should have "reasonable ground to believe" the existence of the state of affairs as mentioned in Clauses (a) & (b) above.

64. As already noticed hereinabove in paragraphs 2 to 5, the stand of the petitioner-DLF was that DHDL and DREDL were wholly owned subsidiaries of the petitioner-DLF. They had sold their entire share holding to Sudipti in the year 2006 and, consequently, ceased to be an associated company of the petitioner-DLF at the time of filing of the revised DRHP in January, 2007.

65. A perusal of the impugned order shows that the Board has taken note of the submissions of respondent no. 2 - the complainant as well as those of the petitioner-DLF, and of Sudipti (though Sudipti did not appear at the stage of hearing). The Board also records the submission of the petitioner that it was not required to mention the FIR registered against Sudipati in its DRHP filed in January, 2007, as it had no knowledge of the allegations of the respondent no.2-complainant. The re-structuring of the petitioner viz-a-viz its associated companies (which included Sudipti) had taken pleas in November, 2006, whereas the FIR was registered on the complaint of respondent no. 2 in April, 2007. The petitioner had contended that Sudipti was controlled by the spouses of its employees and that, by itself, would not lead to a conclusion that the petitioner exercised to control over Sudipti. It was also the contention of the petitioner before the Board that petitioner was not aware of the FIR registered against Sudipti at the relevant time.

66. While dealing with the said allegations, the Board firstly sought to ascertain whether Sudipti itself was aware of the FIR registered against it. The Board notes that the FIR was registered against Sudipti and Mr. Arun Kumar Bhagat, Mr. Vipain Jindal, Mr. Praveen Kumar and Mr. Pradeep Singh. The Board also notes that Sudipti did not take the plea that it was not aware of the FIR. The Board also takes note of the fact that the closure report filed by the police stated that they had interrogated the aforesaid individuals in connection with the FIR. The Board, therefore, observes that in all probabilities, Sudipti was aware of the FIR registered against it. In relation to the ignorance feigned by the petitioner-DLF about the filing of the FIR, the Board observes that it is unable to be convinced with the submission of the petitioner-company that it was not aware of the registration of the FIR against Sudipti. The Board records the following reasons for its said observation:

In the FIR (submitted alongwith the complaint dated June 4, 2007), it was stated that Mr. Praveen Kumar represented himself to be a authorized signatory/director of Sudipti and related to the promoters of DLF Group and was also in the board of many DLF Group companies including DLF Estate Developers Limited, which according to the complainant is one of the two shareholders of Sudipti during the relevant period. During the course of hearing, it is submitted that Mr. Praveen Kumar is the nephew of Mr. K.P. Singh, the promoter/Chairman of the Company. In terms of the DRHP of the Company filed in 2007, Mr. Praveen Kumar is also mentioned as one of the key managerial persons in Company and reports to the board. The complainant further stated that Sudipti was incorporated on March 24, 2004 as a wholly owned subsidiary of the Company and that during the period of his transaction, Sudipti was controlled by the promoters through their key management personnel, namely, Mr. Praveen Kumar, Mr. Jaiprakash Gaur and Mr. Pradeep Singh. It was further stated by the complainant that Mr. Praveen Kumar and Mr. Jaiprakash Gaur were the signatories to the bank account of Sudipti and that the entire transaction (from price negotiation, payment of consideration for purchase of additional land till execution of sale deeds for and on behalf of the Sudipti) was done by Mr. Praveen Kumar and Mr. Pradeep Singh. The complainant has also stated that as on the date of complained transaction, 100% shareholding of Sudipti was owned by the two group companies of the Company. He further submitted that the two signatories to the bank account of Sudipti, i.e. Mr. Praveen Kumar and Mr. Jaiprakash Gaur hold a position of authority and power in many other subsidiaries/associate companies of the Company and therefore stated that it was apparent that the directors of Sudipti as well as the signatories to the bank account of the said entity were the senior executives in the employment with the Company. Besides, the complainant also submitted during the course of hearing that the control over Sudipti was transferred (in the year 2006) ultimately to the spouses of three employees of the company who were mentioned in the DRHP of the Company, under the caption "Key Managerial Persons". The aforesaid facts could lead to an inference that the company was aware of the FIR, prior to the receipt of the copy of the complaint from SEBI."

67. Having, prima facie observed that petitioner-DLF was aware of the registration of the FIR against Sudipti, the Board proceeds to deal with the question whether it was the petitioner's duty to disclose the same in the prospectus. This issue has been dealt with in the impugned order in the following manner :-

"I note that, in terms of Clause VII(c) of Schedule II of Companies Act, 1956, a duty is cast upon the issuer company to disclose any material development which could impact performance and prospects. For the said purpose, it would be necessary, in the interest of justice, to determine as to how Sudipti was related to the company at the relevant period. It is an admitted fact that Sudipti was once an associate of the Company and ceased to be so since November 2006. Sudipti was originally promoted by two of the DLF group companies namely, DLF

Home Developers Limited and DLF Estate Developers Limited. The said two companies were holding 50% each of the equity of Sudipti. Further, Mr. Praveen Kumar, who was disclosed as the key managerial person of the Company, was one of the directors of Sudipti and was one of persons against whom the FIR was registered. Mr. Praveen Kumar, who was closely associated with the Company through Sudipti and the DLF group companies before the Company's dissociation with Sudipti, is also mentioned as a key managerial person of the Company in its DRHP (filed in 2007). Thus, Mr. Praveen Kumar continues to be closely associated with the Company even after the alleged dissociation of Sudipti from the Company. As stated above, the Complainant has alleged that Sudipti is now being indirectly controlled by the spouses of certain key managerial persons of the company whose names were mentioned in the DRHP of the Company filed during January 2007. The company has in its written submission stated that three of its subsidiaries who were holding shares in Felicite Builders and Constructions Private Limited had transferred their holding to several persons who were unconnected to the promoters of the Company. However, there is no dispute to the fact that the spouses of the key managerial persons of the Company are the shareholders in Felicite Builders and Constructions Private Limited which in turn holds shares of Shalika Estate Developers Private Limited. The entire shareholding of Sudipti is being held by Shalika Estate Developers Private Limited. It is an admitted fact that the erstwhile shareholders of Felicite Builders and Constructions Private Limited, Shalika Estate Developers Private Limited and Sudipti were the wholly owned subsidiaries of the Company and were shown as entities under the control of the key management personnel of the Company and their relatives in the DRHP filed by the Company during May 2006, which DRHP was subsequently withdrawn. In the DRHP filed in the year 2007, the aforesaid companies were not shown as the entities under the control of the key management personnel of the Company and their relatives. The submission is that between the filing of the aforesaid DRHPs, the Company had dissociated itself from the said companies due to internal restructuring. It is also stated that in the DRHP filed during 2006, 357 companies were mentioned as the associate companies of the Company and that out of such companies, 336 companies (including Sudipti) ceased to be the associates of the Company by time the Company filed its fresh DRHP dated January 2, 2007 with SEBI. Though, during the course of hearing, the Company was specifically advised to submit the details of its dissociation with the companies, no such details were submitted by the company in the written submissions or thereafter."

68. The Board notes the case of the respondent-complainant that DLF used Sudipti along with a maze of intermediary companies to purchase land which forms part of the land disclosed in the DRHP. The case of the complaint is that the DLF purchases land through a maze of intermediary companies controlled by it, through a series of back to back purchases of debentures through which the purchase money flows to an entity that purchases the land and that the company enters into a series of back to back development rights agreements whereby it

acquires the development rights in the land so purchased, by paying the same amount of money to the entity purchasing the land in lieu of the development rights, which money is then used to redeem the back to back debentures.

69. The case of the complainant/Respondent No.2 is that the DLF did not, in its DRHP, disclose its modus operandi for the purchase of lands and selectively avoided disclosure of information about the intermediary companies it uses to purchase lands, so as to avoid disclosure of any potential liability, civil or criminal proceedings that have arisen or may arise in connection with land purchases.

70. The Board also takes note of the fact that DLF in its DRHP filed in the year 2007 disclosed that out of the total land holdings of approximately 10,000 acres, only 0.5% holding was held by the company and the balance holding was held in the name of the company's subsidiaries/associate/group company/companies under the control and management of key management personnel of the company.

71. The complainant produced before the Board additional submission to support the allegation against the petitioner. The Board observes that it does not deem it proper to disregard the same without testing the veracity of such submissions in the interest of justice and in the interest of the securities market and the investors. The Board further observes that :

Having considered the submissions and the fact that the first DRHP (filed in May 2006) was withdrawn and a fresh DRHP was filed in January, 2007 after the sale of state in Sudipti, an examination is required as to whether Sudipti was dissociated for the purpose of avoiding any relevant disclosures that could arise if the entity continued to be part of the DLF group."

72. While observing that the original complaints dated 4th June, 2007, 19th July, 2007 did not contain allegations of the petitioner funding Sudipti indirectly through a series of transactions involving its subsidiaries/associates and the manner of purchasing lands and creating development rights on the land acquired by the companies subsidiaries by indirect funding of such purchases, the Board observes that in the interest of the securities market, the investors, as also the interest of justice, it would not be proper on the part of SEBI to dispose of the complaint by holding that those additional submissions are extraneous to the original complaint filed by the complainant/respondent no.2.

73. The aforesaid observations of the Board leave no manner of doubt that the Board has not per se relied upon the additional documents filed by Respondent No.2 before it. This is clear from a bare perusal of the impugned order. All that the Board has said is that "the said material cannot be relied upon to find out whether there was any contravention of the provisions of the securities law. The same need to be examined and if the allegations are made out, the company should be the petitioner company should be afforded an opportunity to make its submission in respect of such allegations and material. While passing the impugned order, the Board has made it clear that no observation is made."

Pertinently, the Division Bench has also observed in its order "Needless to emphasize, SEBI, if so advised in law, can always call for documents."

74. There is no bar or impediment cast on the Board by the SEBI Act, to say that it would not entertain or look into evidence that the complainant may rely upon in support of his complaint earlier made, while considering whether, or not, to direct an investigation. There is no reason to put any such fetters on the powers of the Board or to read such restrictions into the statute, which are clearly not there. The Board is the Sole authority created by law to deal with complex issues which arise in the management and supervision of the securities markets. Any such restrictions, artificially introduced would denude the Board of its powers and hamper its functioning. It appears, the Division Bench was conscious of this position when it made its aforesaid observations.

75. I do not agree with the petitioner's submission that the Division Bench in its judgment had precluded the Board from looking into any additional information/ documents that Respondent No.2/ Complainant may produce in support of his complaints. Reading and understanding of the petitioner of the judgment of the Division Bench in the three LPAs does not appear to be correct. A perusal of the order of the Division Bench in the three LPAs shows that the Division Bench set aside the judgment of the learned Single Judge because the learned Single Judge had himself directed investigation into the complaints of respondent No.2, rather than requiring SEBI to examine the two complaints of respondent No.2, and discharge its statutory duty u/s 11C of the SEBI Act. This is clear from reading of para 4 of the order of the Division Bench. I, therefore, reject the submission of the petitioner that the Board has taken into consideration the extraneous or irrelevant material while passing the impugned order.

76. A perusal of the impugned order shows that it certainly cannot be said that it has been passed arbitrarily or irrational. The impugned order is clearly based on reasons which are relevant and material. The adequacy or sufficiency of the reasons which weighed with the Board in entertaining the reasonable belief with regard to the possible existence of circumstances mentioned in Clauses (a) and (b) of Section 11C(1) cannot be gone into. However, it cannot be said that the reasons are not relevant, or have no bearing on the matters in regard to which the Board had formed its belief. It also cannot be said that there is no rational or intelligible nexus between the reasons contained in the impugned order, and the reasonable belief entertained by it because, if, the allegations levelled by respondent no.2, and the materials relied upon by him are established, and, on the other hand, the defence of the petitioner is not substantiated, it may tantamount to violation of the provisions of the SEBI Act; of the Rules, and; of the Regulations made or the direction issued by the Board under the Act, which have been taken note of in the impugned order itself.

77. Pertinently, it is not even the petitioner's case, that the Board while passing the impugned order has acted out of bad faith against the petitioner. It is clear that the belief entertained by the Board has a rational connection with the

reasons given by it in the impugned order, which are not extraneous or irrelevant. Therefore, I find no merit in the submissions of Mr. Sorabjee, and reject the same.

78. The submission of Mr. Nigam, learned Senior counsel appearing for Sudipti, that SEBI has no jurisdiction over Sudipti for the reason that it is a privately held company and is not traded in the Securities Market, and therefore no investigation could have been ordered by SEBI against Sudipti, also has no merit. The SEBI by the impugned order has directed investigation into the allegations leveled by the complainant-respondent no.2 against the petitioner about the breach of the SEBI (disclosure of Investor Protection Guidelines) 2000, read with the relevant provisions of the Companies' Act, and in relation to the disclosure of information required to be made in the red herring prospectus by the petitioner-DLF. The involvement of Sudipti in the said investigation is only to ascertain whether, or not, at the relevant time, the petitioner was liable to make a disclosure with regard to Sudipti in the DRHP which, admittedly, was not made. It is not that SEBI has directed investigation against Sudipti. However, since the allegations against the petitioner-DLF pertain to the disclosure of information about the registration of FIR against Sudipti, which, the complainant alleges, to be a subsidiary and an associate company of the petitioner-DLF, at the relevant time, the investigation in that respect can and should be made in relation to Sudipti.

79. For all the aforesaid reasons, I dismiss the writ petition with costs quantified at Rs. 2 lacs to be shared between the respondents no. 1 and 2 equally. Cost to be paid within four weeks.

80. It is however, made clear that no observation made by me in this judgment shall, in any manner, prejudice the case of the parties during the course of investigation to be conducted u/s 11C of the SEBI Act.