

(2002) 05 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 9093 of 2000 arising out of order dated 12-11-1999 passed by S.E.B.I.

Hindustan Finstock Ltd.

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

Date of Decision : 06-05-2002

Acts Referred:

Securities and Exchange Board of India Act, 1992 — Section 11B

Citation : (2002) 3 GLR 717 : (2003) 47 SCL 530

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : S.N. Soparkar, for the Appellant; V.D. Nanavaty and S.N. Shelat, for the Respondent

Judgement

Jayant Patel, J.—Rule. Mr. S.N. Shelat, Sr. Counsel appears and waives service of rule on behalf of respondent. With the consent of the learned Counsel for the parties matter is finally heard.

2. The present petition arises against the order dated 12-11-1999 passed by the Securities and Exchange Board of India (hereinafter referred to as "the S.E.B.I.") and its confirmation by the appellate authority as per order, dated 29-2-2000.

3. Brief facts of the case are that the petitioner is a Public Limited Company and the respondent is S.E.B.I. constituted under the provisions of Securities & Exchange Board of India Act, 1992 (hereinafter referred to as "the Act"). In the year 1995, a public issue was floated by the petitioner-Company wherein the prospectus was filed on 22-3-1995 and the issue came to be opened on 20-4-1995 and closed on 24-4-1995 and the allotment of shares came to be made on 26-5-1995. On 25-7-1997 the S.E.B.I. issued show-cause notice in exercise of powers u/s 11B of the Act to Managing Director of the petitioner-Company to show cause as to why the direction should not be issued u/s 11 of the Act to refund the issue proceeds as minimum subscription of 90% was not received till the time of closure of the issue and why the Company should not be

barred from entering the capital market for various violations as mentioned in the show-cause notice and the attempt to create a false market etc. It is the case of the petitioner that ultimately after receipt of show-cause notice letter dated 16-8-1997 was addressed to the S.E.B.I. for supplying the preliminary investigation report made in respect to the public issue by the petitioner-Company and it was revealed in the said preliminary investigation that though in reality the issue was not subscribed by 90%, an artificial subscription was shown by the Company. The petitioner, as per letter dated 18-8-1997 demanded the copy of preliminary investigation report, statements recorded and it was also mentioned that the petitioners are desirous of cross-examining certain persons who have given statements. On 8-9-1997 S.E.B.I. addressed letter to the petitioner-Company stating that the powers u/s 11B of the Act are quasi judicial powers and not judicial powers, and there is no plausible reason for cross-examining the witnesses and there is no practice of allowing the cross-examination of witnesses in the proceedings u/s 11B of the Act. It was also stated that all the documents which were relied upon by the S.E.B.I. have been provided to the petitioner to enable the petitioner-Company to send a reply, and therefore, the principles of natural justice have been fully followed. Thereafter, on 15-9-1997 the petitioner-Company, once again, addressed a letter requesting the S.E.B.I. to allow the petitioner to cross-examine by reconsidering the earlier decision communicated as per letter dated 8-9-1997. On 6-10-1997 ultimately, the petitioner submitted reply reiterating the demand for cross-examination and supplying of certain statements and the petitioner also submitted reply to the show-cause notice on merits contending that the statement of R.K. Agarwal is taken by the S.E.B.I. under acute pressure and disturbed state of mind and so was the case of Mr. Mukesh Mehta. It was also stated that the funds received by the Company have already been used in the business and to withdraw the money at this stage is impossible, and therefore, the Company may not be in a position to comply with the direction to refund and the Company may have to be taken in liquidation, and therefore, the direction would be impracticable. That thereafter, the hearing was fixed but the petitioner did not avail of the same. It is the case of the S.E.B.I. that several opportunities were granted to the petitioner on 15-7-1998, 24-8-1998, 23-10-1998, 19-11-1998, 31-3-1999, 29-4-1999, 7-6-1999, 1-7-1999, 21-7-1999, 30-9-1999 and 15-10-1999 and the matter was adjourned from time to time at the request of the petitioner, but in spite of the same, the petitioner did not avail of the opportunity granted to it, and therefore, ultimately, on 12-11-1999 the order came to be passed by the S.E.B.I. u/s 11B of the Act whereby the direction is issued to the petitioner-Company to refund the subscription received from public issue together with interest at the rate of 15% p.a. and the direction was issued without prejudice to the right of the S.E.B.I. to initiate prosecution against the petitioner under the Act.

4. The petitioner thereafter on 3-1-2000 filed appeal u/s 20 of the Act to the Central Govt. which came up for hearing before the appellate authority on 25-4-2000 and ultimately on 29-5-2000 the appellate authority passed the order

after hearing the petitioner. The appellate authority confirmed the findings of S.E.B.I. as made in the order dated 12-11-1999 and further observed that the opportunity of cross-examination cannot be read and the principles of natural justice have been complied with by supplying the material which is used against the petitioner-Company and the appellate authority also found that there is strong evidence that false market was created, and therefore, ultimately dismissed the appeal. The aforesaid orders, dated 12-11-1999 of the S.E.B.I. and the order, dated 29-5-2000 of the appellate authority are under challenge in this petition.

5. Mr. Soparkar appearing for the petitioner mainly raised the contentions that the order is in breach of principles of natural justice inasmuch as he submitted that there is absolute denial of opportunity to cross-examine the witnesses, and therefore, since the order has been passed in breach of principles of natural justice he submitted that the order passed by the S.E.B.I. which is confirmed by the appellate deserves to be quashed. In furtherance of this submission, he has submitted that in view of Section 11(3) of the Act when the S.E.B.I. is clothed with the power of calling the witnesses, there is no reason to deprive the opportunity of cross-examination and Mr. Soparkar further submitted that since the provisions are made u/s 11(3) of the Act, empowering the authority to have all powers as that of a Civil Court, it is clear that the legislature intended a full-fledged inquiry which would include the right of cross-examination, and therefore, since the petitioner-Company was entitled for cross-examination and since the opportunity has not been given, the order would be rendered in the breach of principles of natural justice and hence void. Mr. Soparkar also submitted that such an opportunity of cross-examination is more required in view of the fact that the discretion is vested with for giving various directions u/s 11B of the Act, and therefore, widest meaning of the principles of natural justice is called for in view of the discretionary powers of S.E.B.I. u/s 11B of the Act. In support of the submission, Mr. Soparkar relied upon the judgment of the Apex Court in the matters of (i) Union of India (UOI) Vs. T.R. Varma, , (ii) Khem Chand Vs. The Union of India (UOI)and Others, , (iii) Town Area Committee, Jalalabad Vs. Jagdish Prasad and Others, , (iv) S.L. Kapoor Vs. Jagmohan and Others, and Swadeshi Cotton Mills Vs. Union of India (UOI), respectively, (v) Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, and (vi) State of Kerala Vs. K.T. Shaduli Yusuff etc., . Mr. Soparkar also submitted that one of the grounds of denying cross-examination is the delay as stated by the S.E.B.I. However, he submitted that the issue was of 1995 and the proceedings are initiated in 1997, and therefore, when such period of two years was taken by the S.E.B.I. itself there was no valid reason for S.E.B.I. to deny the opportunity of cross-examination on the ground of delay. Mr. Soparkar also submitted that even otherwise also the Company which has already used the fund for investment in the business cannot be directed to refund the amount of public issue after a period of 4 years, and therefore, Mr. Soparkar submitted that the order for giving such direction is not only impracticable but is impossible to be conceived u/s 11B

of the Act.

6. On behalf of respondent, Mr. S.N. Shelat, the learned Sr. Counsel submitted that there is concurrent finding by both the authorities that a false market was created, and therefore, this Court would not re-appreciate the evidence for upsetting the finding in exercise of powers under Articles 226/227 of the Constitution. Mr. Shelat also submitted that even on facts it does transpire that a false market was created by the promoters of the petitioner-Company at the time of public issue and he further submitted that though the issue was closed on 24-4-1995 cheques were issued in the month of May, 1995 and the payment thereof was made in the month of June, 1995 by Khandwala family comprising of Shri Parmanand Khandwala, Smt. Kinnari Khandwala, Shri Vimal Khandwala and Smt. Sonal Khandwala totalling to Rs. 50 lacs and Mr. Shelat submitted that if the amount of Rs. 50 lacs which was shown as artificial subscription is taken out from the total subscription, the issue subscribed would be less than 90%, and therefore, as per the terms the Company was bound to refund the money, but with a view to see that the Company is not required to refund the money to the public at large the aforesaid subscription of Rs. 50 lacs was shown and upon investigation it was found by the S.E.B.I. that the Company has indulged itself into showing artificial subscription and false capital market, and therefore, Mr. Shelat submitted that it is in the larger interest of public the S.E.B.I. has exercised powers u/s 11B of the Act and it should not be interfered with by this Court, more particularly, when such directions are confirmed by the appellate authority.

7. On the observance of principles of natural justice, Mr. Shelat submitted that all the documents upon which the reliance was placed were supplied to the petitioner-Company by the S.E.B.I. and Mr. Shelat further submitted that in the procedure for exercising powers u/s 11B of the Act, it is true that the principles of natural justice are required to be followed, however, observance of principles of natural justice varies from case to case and he submitted that in the matter like this the right of cross-examination of witnesses cannot be read while observing principles of natural justice. Mr. Shelat also submitted that in any case even if it is accepted for the sake of argument that right of cross-examination is there, then also the Court would not strike down the order passed by the authority unless and until it is established that any prejudice is caused to the person concerned. Mr. Shelat submitted that in any case no prejudice is caused to the petitioner, and therefore, also the order cannot be said to be in breach of principles of natural justice. Mr. Shelat submitted that, as a matter of fact, an ingenuine device is found by the Company to create certain ground of breach of principles of natural justice and the same is apparent from the conduct of the Company inasmuch as they have been wrongly pursuing the right of cross-examination and number of opportunities were given for making submissions at the time of hearing, but the Company went on seeking adjournments and this shows that the Company has the only intention of delaying the proceedings and to create a ground of breach of principles of natural justice. Mr. Shelat submitted

that the perusal of both the orders of the lower authorities shows that there is sufficient explanation for artificial subscription made by Khandwala family, more particularly, the petitioner has not denied that the amount of stock invest from Khandwala family was paid in the month of June, 2000 i.e. after the closure of issue in April, 1995. Therefore, the opportunity of cross-examining them which the petitioner is pursuing is even otherwise meaningless since neither any prejudice is caused nor the said cross-examination would have any bearing upon the decision taken by the S.E.B.I.. Mr. Shelat submitted that the direction given is only of refund and the other directions as mentioned in the show-cause notice for barring the petitioner from entering the capital market etc. are not given, and therefore, when the authority which is well-versed with all relevant aspects of the subject has upon the material found that false market was created it cannot be said that the order would be bad on the so-called ground of denial of cross-examination of witness, more particularly when the petitioners are unable to show any prejudice caused on account of denial of cross-examination of witnesses. Mr. Shelat ultimately submitted that the orders passed by both the authorities are legal and valid and this Court having limited scope of judicial scrutiny should not interfere with the orders under challenge. Mr. Shelat relied upon the judgments of the Apex Court in the matters of (i) R. V. Secretary of State for the Home Department, ex parte Mughal reported in 1973 (3) All ER 796, (ii) State of Kerala Vs. K.T. Shaduli Yusuff etc., , (iii) A.K. Roy and Others Vs. Union of India (UOI) and Others, , (iv) Ravi S. Naik and Sanjay Bandekar Vs. Union of India and others, . Mr. Shelat relied upon the judgment in the case of R. V. Secretary (supra) to contend what could be ingredients of principles of natural justice. Mr. Shelat also relied upon the judgments of the Apex Court in the matters of (i) State Bank of Patiala and others Vs. S.K. Sharma, and Rajendra Singh Vs. State of Madhya Pradesh and others, respectively, (ii) Aligarh Muslim University and Others Vs. Mansoor Ali Khan, , (iii) State of U.P. Vs. Harendra Arora and Another, . (iv) Neycer India Ltd. Vs. GMB Ceramics Ltd., and (v) H.P. Thaker v. State of Gujarat reported in 2002 (1) GLH 564. The aforesaid judgments were relied upon by Mr. Shelat to contend that if any prejudice is caused on account of denial of cross-examination it must be proved by the petitioner and in the absence thereof, it cannot be said that the principles of natural justice are not followed or the order cannot be quashed on such grounds. Mr. Shelat for contenting that the cross-examination is not an integral part of principles of natural justice relied upon the judgment of the Apex Court in the matters of (i) A.K. Roy and Others Vs. Union of India (UOI) and Others, , (ii) K.L. Tripathi Vs. State Bank of India and Others, , (iii) Kanungo and Company Vs. Collector of Customs and Others, and (iii) Surjeet Singh Chhabra Vs. Union of India and others, .

8. Before the rival contentions of the parties are examined, it is necessary to refer to the provisions of Sections 11 & 11B of the Act :

"11. Functions of the Board :-- (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests 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, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets, in any manner,

(ba) registering and regulating the working of the depositors, participants, custodians of securities, foreign institutional investors, credit-rating agencies and such other intermediaries as the Board may, by notification specify in this behalf,

(c) registering and regulating the working of venture capital funds and collective investment schemes including mutual funds,

(d) promoting and regulating self-regulatory organisations,

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

(f) promoting investors' education and training of intermediaries of securities markets,

(g) prohibiting insider trading in securities,

(h) regulating substantial acquisition of shares and take over of companies,

(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 organisations in the securities market.

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

(k) levying fees or other charges for carrying out the purpose of this Section, (1) conducting research for the above purposes,

(la) calling from or furnishing to any such agencies as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions;

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

(3) Notwithstanding anything contained in any other law for the time-being in force while exercising the powers under Clause (i) of Sub-section (2) the Board

shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely -

- (i) the discovery of production of books of account and other documents at such place and such time as may be specified by the Board,
- (ii) summoning and enforcing the attendance of persons and examining them on oath,
- (iii) inspection of any books, registers and other documents of any person referred to in Section 12 at any place,

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

- (i) in the interest of investors or orderly development of securities market, or
- (ii) to prevent the affairs of any intermediary or other persons referred to in Section 12 being conducted in a manner detrimental to the interests of investors of securities markets, 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, at may be appropriate in the interests of investors in securities and the securities markets."

9. A perusal of the aforesaid provisions show that the S.E.B.I. is enjoined with the duty of protecting the interests of investors in the securities market and to promote the development of and regulate the securities markets by such measures as it thinks fit. Sub-section (2) of Section 11 provides that the S.E.B.I. may undertake various measures as provided under Clauses (a) to (m). Sub-section (3) of Section 11 provides the enabling power of S.E.B.I. like that of a Civil Court under the CPC for trial of the suit in respect to discovery or production of books of account etc, summoning and enforcing the attendance of persons and examining them on oath and inspection of any books or register or other documents etc. Section 11B of the Act provides that when the Board is satisfied that it is necessary in the interest of investors or orderly development of securities market or to prevent the affairs of any intermediary or other persons or to secure the proper management of any such intermediary or person the S.E.B.I. may issue such directions to any person or class of persons or to any Company in respect of the matters specified in Section 11A. There is no dispute raised in this petition challenging the powers of S.E.B.I. to issue directions. However, the petition is preferred mainly on the procedural aspects of breach of principles of natural justice. Before such contention of breach of principles of natural justice is dealt with, I find it proper to deal with the last contention of Mr.

Soparkar that after a period of about four years S.E.B.I. could not issue directions for refund of money to its investors. In this regard, it cannot be lost sight of that the Act is enacted by Parliament for establishment of Authority/ Board to protect the interests of investors in the securities and to promote the development and to regulate the securities markets of the matters connected therewith or incidental thereto. The constitution of Board as per the provisions of Section 4 shows that the same is comprising of experts in the field and the said aspect is apparent from the perusal of Section 4 of the Act. It is true that the power of appointment of various persons is vested with the Central Govt., but at the same a perusal of the scheme of the Act shows that the Board is constituted of persons who are experts in the field of capital markets or securities markets. If any fraud is played by any Company at the time of public issue, it is the duty of the S.E.B.I. to take proper action and also to issue necessary consequential directions because the powers of the S.E.B.I. are coupled with the public duty and the intention of the legislature is to protect the interests of investors in the securities market. In the present case at the time of public issue one of the conditions was that if the issue is not subscribed by 90% from public, then the investors or subscribers to the public issue were required to get the money refunded by the Company. The S.E.B.I. has found on examination of the record that an artificial subscription was shown by creating false capital market and if the artificial subscription is taken out from the total subscription the actual subscription was below 90%, and therefore, the Company was bound by the condition of refunding the money to the investors. Therefore, if the S.E.B.I., which is expert body in the field having found that the Company was bound to refund the money as per the terms and conditions of public issue, it is not open to the Company to contend that the money is already invested in business and therefore it cannot be refunded now. I am afraid that such contention can be accepted when raised by the Company on account of directions issued by the S.E.B.I.. If one who is party to the illegality or wrong-doing raise defence that he or it is unable to make good of the benefits procured by wrong-doing, the same cannot be tolerated under any circumstances. If the Company has used or wrongly retained the money of the investors in the public issue, I am of the view that it is within the powers of the S.E.B.I. to give such directions to the concerned Company to refund the money. Merely because the period has expired and the amount is used by the Company is no legitimate ground to contend that the said directions cannot be issued by the S.E.B.I. in exercise of its powers u/s 11B of the Act, and therefore, the contention of Mr. Soparkar that the Company cannot be directed to refund the money of public issue fails and hence is rejected.

10. Much grievance is raised on behalf of the petitioner regarding breach of principles of natural justice and more particularly the denial of opportunity to cross-examine the persons whose statements were recorded by the S.E.B.I. As such, the perusal of Section 11B of the Act shows that the legislature has not provided for any observance of principles of natural justice while exercising powers u/s 11B of the Act. In the given case, it may be impracticable for S.E.B.I.

to give predecisional hearing considering the emergency of the situation. However, Mr. Soparkar is right in contending that when the legislature has not provided opportunity of hearing, since the power u/s 11B may ensue civil consequences such powers are to be read with the principles of natural justice, more particularly, in the present case when the action is initiated after the period of two years from the date of public issue. Therefore, proceeding on the basis that the powers u/s 11B are to be exercised with the principles of natural justice, the contention of Mr. Soparkar will have to be examined as to what will be the scope and ambit of principles of natural justice in exercise of powers u/s 11B of the Act and as to whether the opportunity of cross-examination will be included in the principles of natural justice which are to be followed while exercising powers u/s 11B of the Act.

11. In the case of Sanjay Bandekar (supra) the Apex Court has observed that the principles of natural justice have an important place in Administrative Law. They have been defined to mean "fair play in action". An order of an authority exercising judicial or quasi judicial functions passed in violation of principles of natural justice is procedurally ultra vires, and therefore, suffers from a jurisdictional error. That is the reason why in spite of finality imparted to the decision of the Speakers/Chairmen by Paragraph 6(1) of the Tenth Schedule such a decision is subject to judicial review on the ground of non-compliance with rules of natural justice. The Apex Court has observed that while applying the principles of natural justice it must be borne in mind that "they are not immutable but flexible" and they are not cast in a rigid mould and they cannot be put in a legal straight jacket. Whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case. There are catena of decisions on the aforesaid subject and the law settled on the point. The ingredients of principles of natural justice vary from facts of each case and there cannot be any straight jacket formula. Much emphasis is laid by Mr. Soparkar on the denial of right of cross-examination. In case of Union of India (supra), the Apex Court was dealing with the case of termination of Govt. employee and observed that the law requires that the tribunals should observe rules of natural justice in the conducting of inquiry and has further observed that the rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies. That the evidence of the opponent should be taken in his presence and that he should be given the opportunity of cross-examining the witnesses examined by that party. So far as holding departmental inquiry for termination of services of a Govt. employee is concerned there are statutory rules regarding -the inquiry and further that the rules are to be read with Article 311 of the Constitution of India which is not in the present case, and therefore, the aforesaid judgment of the Apex Court is of no help to the petitioner. In the case of Khemchand (supra) was also the case of departmental inquiry under Article 311 of the Constitution and so was the case of Town Area Committee, Jalalabad (supra). The case of State of Kerala (supra) was under Taxing Statute

and in the said case while considering the proviso of Section 17(3) of Kerala General Sales Tax Act, the Apex Court observed that in the facts of the case and in view of the scheme of Kerala General Sales Tax Act, the reasonable opportunity of being heard must extend to the whole inquiry including both stages before making the best judgment assessment which would include his right of cross-examination. The scope of inquiry under a taxing statute namely Kerala General Sales Tax Act cannot be equated with the inquiry contemplated u/s 11B of S.E.B.I. Act and therefore I am of the view that the said judgment is of no help to the petitioner. Much reliance is placed by Mr. Soparkar upon the judgment of the Apex Court in the case of S.L. Kapoor (supra) and in case of Swadeshi Cotton Mills (supra) to contend that when the final discretionary orders are to be passed requirements of principles of natural justice should be applied to its fullest extent. However, in the aforesaid case, the Apex Court in Para 24 of its judgment in S. L. Kapoor's case (supra) observed that where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue writ to compel the observance of principles of natural justice not because it is not necessary to observe natural justice but because Courts do not issue futile writs. In the present case, the perusal of show-cause notice shows that the S.E.B.I. contemplated to issue directives for refund of money of public issue and also for barring the Company from entering into the capital market and also for prosecuting the Company u/s 24 of the Act. As against the three contemplated action the perusal of the final order shows that the minimum action is that of directing the Company to refund the money and the said action has been taken. Therefore, the question of observance of principles of natural justice may be relevant, if the maximum penalty called for is imposed. Then, on the ground of prejudice, possibly, one might contend that the lesser penalty might have been imposed. In the case before the Supreme Court the maximum penalty of superseding the elected body was taken whereas in the present case, the minimum action is taken, and therefore, I am of the view that the facts of the above case are different, and hence, the said judgment of the Apex Court is of no help to the petitioner. The case of Olga Tellis (supra) is on maintaining principles of natural justice, but it does not lay down the scope and ambit of principles of natural justice including the right of cross-examination in every case, and therefore, the same is of no help to petitioner.

12. As against the above, Mr. S.N. Shelat appearing for the respondent has relied upon the judgment in the case of Surjeet Singh Chhabra (supra) to contend that under the Customs Act, the Apex Court has observed that failure to give opportunity to cross-examine the witnesses is not violative of principles of natural justice. In the case of K.L. Tripathi (supra), the Apex Court has observed in Para 32 of its judgment that the basic concept is fair play in action administrative, judicial or quasi judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or

if the version or the statement of the person who has testified is in dispute, right of cross-examination must inevitably form part of play in action, but where there is no lis regarding the facts but certain explanation of the circumstances, there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, that no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision aggrieved at fair play. In the facts and circumstances of the instant case, while observing the principles of natural justice it was not necessary for the S.E.B.I. to accede to the request of the petitioner to cross-examine the witnesses since in the facts of the present case, it cannot be said that the cross-examination of witnesses could have been contemplated while observing the principles of natural justice. In view of the above, it is well settled that the Courts would not issue writs in futility, and therefore, in this case whether denial of cross-examination has caused any prejudice to the petitioner or not will have to be considered also while testing the legality and validity of the order passed by the S.E.B.I.

13. In case of State of U. P. (supra) the Apex Court observed that if non-furnishing of inquiry report before the final disciplinary action is taken has not prejudiced to the employee, it cannot be said that the order of dismissal is in violation of principles of natural justice. In case of Aligarh Muslim University (supra), the Apex Court has observed that the party complaining breach of principles of natural justice in addition to the breach of principles of natural justice, must also establish prejudice is caused on account of breach of principles of natural justice. Therefore, ultimate analysis of various case-laws comes to conclusion that the Court may strike down the action of the authority if taken in breach of principles of natural justice only if the prejudice is shown or proved and the action is in breach of principles of natural justice. In the facts of the present case, the whole premise of the petition from the very beginning is that of denial of cross-examination itself is a prejudice which cannot be accepted. In the facts and circumstances of the present case, however, no case is made out by the petitioner from the averments made in the petition as well as from the proceedings of the appellate authority or before the first authority namely the S.E.B.I. that on account of denial of cross-examination any prejudice is caused to the petitioner. As a matter of fact, issuance of stock invest in favour of Khandwala family on 13-5-1995 and the realisation of cheque amount on 7-6-1995 which are the crucial evidence are to be decided from the bank record and the same is coupled with the acceptance of M.O.U. which is not denied by the petitioner. Therefore, considering the facts of the present case, the fact that the M.O.U. is entered into and that the stock invest were issued on 13-5-1995 and the cheques were released open 7-6-1995 in any case all these dates are after the closure of public issue on 24-4-1995 coupled with existence of M.O.U. shows that the S.E.B.I. was justified in issuing directions to refund the money. It is not the case of the petitioner that the stock invest were not of later date or

that the cheques were not released on later date or that the M.O.U. was not in existence, and therefore, under the circumstances, I find that in any case the denial of cross-examination has not in any manner prejudiced more particularly when the S.E.B.I. has taken decision of issuing minimum direction to refund the money of public issue and has not taken any decision of barring the Company from entering the capital market and of lodging prosecution. Under the circumstances, there is considerable force in the contention of Mr. Shelat that when the facts of the present case do not show any prejudice caused to the petitioner on account of denial of cross-examination to the petitioner, the Court should not accept the contention of denial of cross-examination itself is sufficient to show that the prejudice is caused.

14. Mr. Shelat also submitted that from the very beginning the intention was on the part of the petitioner-Company to create a lacuna for assailing the order on the ground of procedural lapse, and therefore, an ingenuine device was found by the Company for the allegation of denial of opportunity to cross-examine. The perusal of the record shows that though the cross-examination of witnesses was not required the petitioner continued to insist upon the same. Not only that it further shows that about 11 times the matter was adjourned for making oral submissions, but the petitioner-Company did not avail of the same and allowed the S.E.B.I. to pass the order, and thereafter, preferred the appeal complaining the denial of cross-examination. Overall conduct of the petitioner shows that the contention of denial of cross-examination lacks bona fide more particularly when denial of such cross-examination has not prejudiced the petitioner. Said aspect is coupled with the fact that the defence of the petitioner was that the statements of the Directors of the Company were taken when they were not in sound mind and the said statements were taken under pressure. Therefore, the contention of denial of cross-examination cannot be accepted even otherwise since it lacks bona fide.

15. At this stage, it would be worthwhile to refer to the recent observations of the Apex Court at Para 12 of the judgment in the case of Roshan Deen Vs. Preeti Lal, :

"The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look-out of the High Court is, therefore, not merely to pick out any error law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such injustice in the name of correcting the error of law."

16. Therefore, the S.E.B.I., which is an expert body in the field and the appellate authority which is also an expert body on the subject, itself found that in the larger interest of investors and the public, the directions should be issued to the petitioner-Company to refund the money of public issue which is wrongly retained by the petitioner-Company by creating false capital market, I am of the

view that this Court even otherwise also shall not undertake the judicial review as that of a Court of Appeal and when there is fair play in action on the part of the authority there is no reason to set aside the directions issued by the S.E.B.I. which is confirmed by the appellate authority.

17. In the result, petition fails and Rule is discharged with costs which is quantified at Rs. 10,000/-.