

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.10.2021

DATE OF DECISION : 28.06.2022

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

AND

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

W.A.NOS.2303, 2304, 2305, 2307 & 2308 OF 2012

Tirupathi Kumar
S/o. Ravi Prakash

... Appellant in
W.A.No.2303 of 2012

Champa Devi
W/o. Ravi Prakash

... Appellant in
W.A.No.2304 of 2012

Shivani Devi
W/o. Tirupathi Kumar

... Appellant in
W.A.No.2305 of 2012

Ritu Devi
W/o. Raj Kumar

... Appellant in
W.A.No.2307 of 2012

Raj Kumar
S/o. Ravi Prakash

... Appellant in
W.A.No.2308 of 2012

.Vs.

The Securities and Exchange
Board of India,
Rep. by its General Manager,
Investigation Department,
Mitta Court,
'B' Wing, First Floor,
224, Nariman Point,
Mumbai.

... Respondent in all the
Writ Appeals

COMMON PRAYER:-

Appeals filed under Clause 15 of the Letters Patent against the order dated 22.03.2012 made in W.P.Nos.29375, 29376, 29377, 29379, 29380 of 2004.

PRAYER IN W.P.NO.29375 OF 2004:-

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the Respondent relating to letter in Ref.No.IVD/ID4/KVRR/PS/2004, dated 15/09/2004 and the accompanying summons issued under Section 11-C (3) & (6) of the Securities and Exchange Board of India, 1992 and quash the same.

PRAYER IN W.P.NO.29376 OF 2004:-

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the Respondent relating to letter in Ref.No.IVD/ID4/KVRR/PS/2004, dated 16/08/2004 and the accompanying summons issued under Section 11-C (3) & (6) of the Securities and Exchange Board of India, 1992 and quash the same.

PRAYER IN W.P.NO.29377 OF 2004:-

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the Respondent relating to letter in Ref.No.IVD/ID4/KVRR/PS/2004, dated 15/09/2004 and the accompanying summons issued under Section 11-C (3) & (6) of the Securities and Exchange Board of India, 1992 and quash the same.

PRAYER IN W.P.NO.29379 OF 2004:-

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the Respondent relating to letter in Ref.No.IVD/ID4/KVRR/PS/15778/2004, dated 20/07/2004 and the accompanying summons issued under Section 11-C (3) & (6) of the Securities and Exchange Board of India, 1992 and quash the same.

PRAYER IN W.P.NO.29380 OF 2004:-

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records of the Respondent relating to letter in Ref.No.IVD/ID4/KVRR/PS/2004, dated 15/09/2004 and the accompanying summons issued under Section 11-C (3) & (6) of the Securities and Exchange Board of India, 1992 and quash the same.

For Appellants : Mr.S.R.Rajagopal

For Respondent : Mr.R.Sankaranarayanan
Additional Solicitor
General of India
For Mr.Shivakumar
For the Sole Respondent

JUDGMENT

T.RAJA, J.

Having been unsuccessful in the challenge made to the respective impugned orders dated 20.07.2004, 15.08.2004, 16.08.2004, 15.09.2004 passed by the respondent in Reference No.IVD/ID4/KVRR/PS/2004 with the accompanying summons issued under Section 11-C(3), (5) & (6) of the Securities and Exchange Board of India Act, 1992 before the learned single Judge, the appellants/writ petitioners have preferred these writ appeals.

2. According to the respondent, the appellants/writ petitioners were involved in the business of buying, selling or dealing in shares of M/s Sai Televisions Limited during the period between April, 2001 and June, 2002 and by means of the orders impugned in the writ petitions, they were directed to furnish the details/information for such transactions held by them to enable the investigating authority to investigate into the allegations.

3. It is the claim of the appellants that the respondent/ Securities and Exchange Board of India (for short, "the Board") was established in the year 1988 by a Government resolution to promote orderly and healthy growth of the securities market. For the reason that the capital market in India witnessed a tremendous growth with increasing participation of the public, the Government of India, to sustain the investors confidence, decided to vest the Board with statutory powers. Therefore, the President of India promulgated the Securities Exchange Board of India Ordinance, 1992, since the Parliament was not in session. Later on, the Securities Exchange Board of India Act, 1992 (for short, "the Act") was enacted replacing the said Ordinance. The Act has been amended from time to time vesting certain powers with the Board and Section 11 of the Act defines the power of the Board. Additional powers were also vested with the Board by the amendment in the year 2002 by inserting Section 11-C through Act 59 of 2002 with effect from 29.10.2002 vesting investigative powers on the Board giving a prospective effect subject to the conditions enumerated under Section 11-C(1)(a) and (b) of the Act.

4. Mr.S.R.Rajagopal, learned counsel appearing for the appellants submitted that Section 11-C(6) creates a punishable offence, if any person fails without reasonable cause or refuses to furnish information under sub- section (3), with imprisonment for a term which may extend to one year or with fine which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues. Under Section 11-C(3), the person associated with the securities market is required to furnish information. But prior to the amendment of Section 11, the powers of the Board do not extend to any private individual. At the beginning of the year 2004, the respondent Board, by addressing a letter captioned as 'Investigation in the case of Sai Televisions Limited', requested for furnishing the details of transactions done for the period between April, 2001 and June, 2002. Therefore, the appellants/writ petitioners made a reply requesting the respondent to close the file, as they do not have the power to investigate. Subsequently, the respondent addressed the communications that were impugned before the learned single Judge, when the respondent does not have the power to issue summons in respect of the transactions prior to the amendment of the Act and even assuming but not admitting that the respondent has got power to issue the summons, such a power did not exist until 29.10.2002. It was the specific case of the appellants/writ petitioners before the learned single Judge that when the amendment came into force, more particularly, when the respondent did not have such power during the year 2001, they cannot exercise powers retrospectively for the transactions of the year 1996, as it is outside the scope and purview of the Act, therefore, such penal provision cannot be retrospective, it was pleaded. When the appellants/writ petitioners were not intermediaries or the persons associated with the securities market, they have not violated any of the provisions of the Act. Only due to ill-will and on instigation, the respondent has been misusing the powers without any reason or basis, because, if the respondent's interpretation of the provisions of the Act are to be taken, every investor in the share market could be victimized and that cannot be intention of the Legislature. Therefore the respondent has abused the power vested in them and is causing harassment to the appellants. On this score, it was attacked before the learned single Judge that the impugned communications and the accompanying summons issued under Section 11-C(3), (5), (6) of the Act are unsustainable on law and on facts, hence, they are liable to be set aside.

5. It was also pleaded that the impugned communications and summons were against the principles of natural justice and they are in violation of the fundamental rights as guaranteed by the Constitution of India, inasmuch as Section 11-C(1)(a) empowers

the respondent only insofar as the transactions that are being dealt and not in respect of past transactions. When Section 11-C (1)(a) requires the respondent to satisfy themselves that the transactions are dealt in a manner detrimental to the investors and the securities market, a reading of the impugned communication does not disclose that the respondent has come to the conclusion that the transactions dealt with by the appellants are detrimental to the investors and securities market. When Section 11-C has been introduced by Act 59 of 2002 that came into force from 29.10.2002, the respondent cannot seek to investigate the transactions pertaining to the year 1996, because, admittedly in the year 1996, the respondent did not have any power for investigation. Learned counsel appearing for the appellants also submitted that when the Board had no power to call for information or investigation into the affairs prior to 29.10.2002 that is prior to coming into force of the amendment Act and that the appellants do not fall within any of the category of persons mentioned under Section 11-C of the Act, because they cannot be considered as intermediaries or other persons associated with the securities market, the impugned summons are without jurisdiction.

6. Explaining further, learned counsel appearing for the appellants stated that when Section 11-C was inserted by the amendment Act 59 of 2002 with effect from 29.10.2002, the Board does not have power to invoke Section 11-C for the transactions that took place prior to 29.10.2002, because the language employed "are being dealt with" used in Section 11-C is in present continuous tense and clearly shows that the provision covers the transactions which are in progress and not the past transactions. Besides, Section 11-C is a standalone provision and creates criminal liability, therefore, the provision is substantive in nature and the same cannot be applied retrospectively. When it is a settled legal position that every statute will have prospective operation unless it is expressly provided for in the statute that it has retrospective operation, the new law ought to regulate what is to follow and not the past. This legal position has been affirmed by the Apex Court in the case of K.S.Paripoornan v. State of Kerala, (1994) 5 SCC 592 (paras 62-68) and in yet another judgment in Shanti Conductors Private Limitedv. Assam State Electricity Board, (2010) 3 SCC 765 (paras 60-68).

7. Arguing further, the learned counsel appearing for the appellants contended that Section 11-C cannot be invoked against the appellants who are individual investors, because they are not intermediaries or persons associated with the securities market, as Section 11-C(3) can be invoked to investigate into the affairs of any intermediary or any person associated with the securities market who had violated the provisions of the Act

as spelt out in the statement of objects and reasons of the amendment Act. When the intermediaries or the persons associated with the securities market are listed out exhaustively under Section 12 of the Act as stock broker, sub broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market, for the reason that the appellants are not falling within the definition of "any intermediary or any person associated with the securities market", Section 11-C cannot be invoked against them. Again referring to paragraph-8 of the counter affidavit filed by the respondent in the writ petitions, the learned counsel appearing for the appellants argued that the respondent has admitted that the appellants are investors. When the appellants are individual investors, they do not fall within any of the categories of persons mentioned in Section 11-C of the Act. This has been completely overlooked by the learned single Judge. Again referring to Section 11-C, it was contended that Section 11-C also cannot be supplemented to Section 11(1)(f) as contended by the learned Additional Solicitor General appearing for the respondent. If there was an allegation of insider trading, then the 1995 Regulations must have been invoked, but the summons have not been issued under the 1995 Regulations. When neither the summons nor the counter affidavit of the respondent held any insider trading, the summons are liable to be quashed.

8. Coming to the word 'or' employed between Section 11-C(1)(a) and Section 11-C(1)(b), Mr. Rajagopal argued that the word 'or' is to be read as 'and' making both conjunctive, because under Section 11-C, investigation can be ordered only when the Board has reasonable ground to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or any intermediary or any person associated with the securities market who has violated the provisions of the Act, the word employed should be read conjunctively and not disjunctively. Both Section 11-C(1)(a) and (b) need to be read together and both conditions ought to be satisfied for invocation of investigation under Section 11-C of the Act. Therefore, while reading together, Section 11-C can be invoked only against "intermediaries" and "persons associated with securities market" and only with regard to the transactions which are in progress and not the past transactions. In support of his submissions, he has referred to the judgment of the Apex Court in Indore Development Authority v. Manohar Lal and others, (2020) 8 SCC 129 and in Yashpal v. State of Chattisgarh, (2005) 5 SCC 420, wherein it is held that the persons should not be held liable or punished for the conduct not criminal when committed and this being the well settled basic principle of law, retrospectivity cannot be presumed to have been given to a

provision unless it contains so clearly through necessary implication. Again coming to yet another submission that the summons do not disclose subjective satisfaction, Mr.Rajagopal argued that Section 11-C can be invoked only when the Board has reasonable ground to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market, more particularly, when the intermediary or any person associated with the securities market has violated the provisions of the Act. But in the present cases, the summons do not disclose the subjective satisfaction or any reasons for invoking Section 11-C and as such the same are liable to be quashed. Moreover, paragraphs 9 and 11 of the counter affidavit also failed to show that the subjective satisfaction has been arrived at by the respondent before issuance of the summons.

9. Coming to the maintainability of the writ petitions, Mr.Rajagopal also argued that when the impugned summons are contrary to the provisions of the Act and have been issued without jurisdiction, the writ petitions under Article 226 of the Constitution of India challenging the same are legally maintainable, therefore, the question of applying the rule of exhaustion of alternative remedy will not arise. In support of his submissions, he referred to the following judgments:

(i) Civil Appeal No.3106 of 2008 (Deputy Commissioner, Central Excise & another v. Sushil and Company;

(ii) 1983 (13) E.L.T 1342 (SC) East India Commercial Co.Ltd., Calcutta v. Collector of Customs, Calcutta;

(iii) W.A.No.493 of 2021 dated 18.02.2021 Mahindra and Mahindra v. The Joint Commissioner (CT) Appeals;

(iv) W.P.(MD) No.4252 of 2021 M/s T.V.Sundaram Iyengar & Sons v. The Commissioner of CGST & Central Excise.

10. Arguing further, Mr.Rajagopal submitted that the case of Securities and Exchange Board of India v. Ajay Agarwal, (2010) 3 SCC 765 cannot be applied in the present cases, as it dealt with Section 11-B with regard to the applicability and the scope of the said section holding it as procedural in nature. When it is procedural in nature, it was held to have retrospective effect, whereas Section 11-C being substantive in nature and imposes penalty, cannot be applied retrospectively to the past transactions. Admittedly, in the present cases, Section 11-C has been invoked with retrospective effect with regard to the transactions prior to the amendment Act coming into force. Therefore, it has been pleaded emphatically that the impugned reasons and conclusions reached by the learned single Judge are liable to be quashed by allowing the writ appeals.

11. Mr.R.Sankaranarayanan, learned Additional Solicitor General appearing for the respondent, justifying the issuance of communications accompanied with summons to the appellants, has pleaded that the power to call for information is inherently available to the Board from its inception. Even prior to 29.10.2002, the Board has got powers to call for information and investigate into the affairs of any person dealing in securities. In view of rampant market malpractices, a need was felt by Parliament to further strengthen the powers of the Board including the mechanisms available to the Board for investigation, enforcement etc. Therefore, when the amendments were made to the Act by the Securities and Exchange Board of India (Amendment) Act, 2002, one of the provisions inserted by the said amendment Act was the insertion of Section 11-C which provided for investigation. When the investigation is only a process to find out the facts, collect evidence and material of a suspected offence/contravention or the role of persons so suspected, they are only procedural in nature. Therefore, when the learned single Judge has rightly held, following the judgment of the Supreme Court in Securities and Exchange Board of India v. Ajay Agarwal, (2010) 3 SCC 765, that Section 11-B of the Act under which a prohibitory order is passed, is only procedural and has got retrospective operation, there could be no difficulty at all in holding that Section 11-C(1), which deals only with investigation, is procedural and hence it is retrospective in operation.

12. Adding further, learned Additional Solicitor General submitted that Section 11-C(1)(a) and Section 11-C(1)(b) deal with separate subject matters and therefore the word 'or' employed between these two clauses may be read as 'or' only and not 'and', as wrongly submitted by the appellants, because Section 11-C(1)(a) deals with the transactions which are in progress, whereas Section 11-C(1)(b) deals with the past transactions as well, hence, clauses (a) and (b) do not deal with the same subject matter. When clause (a) deals with the transactions of current nature, clause (b) covers the past transactions, hence, when these two clauses deal with separate situations and they are separated/disjunctive, the same cannot be read by substituting the word 'and', as wrongly contended by the appellants.

13. Coming to the next submission that the appellants admittedly are investors and shareholders, it was argued that they fall within the realm of the expression "persons associated with the securities market" for the purpose of investigation under Section 11-C of the Act. Hence, when the show cause notices mention the role and complicity of the appellants in the said transactions, it is clear that the appellants are involved in buying, selling or dealing in shares of any company, doubting

the dealings made by the appellants, the Board had sought for information from the appellants, as they have played a role in the matter of Sai Television, they are duty bound to furnish information as sought for by the Board. In view of the delaying tactics, the respondent could not effectively conclude the investigation.

14. Replying to another contention of the appellants that Section 11-C contemplates subjective satisfaction, which is conspicuously absent in the summons issued to them, Mr.Sankaranarayanan submitted that the learned single Judge, in the present cases, after perusal of the records, has held that the respondent has satisfied the legal requirements. Moreover, the Division Bench in its order dated 11.08.2014 also permitted the investigation to go on with the documents furnished by the appellants. Pursuant thereto, the investigation has been carried out and show cause notices had been issued on 20.10.2015. Therefore, the writ petitions challenging the summons issued to the appellants during the investigation of the case have become infructuous. Hence, the reasoning given by the learned single Judge ought to be upheld by dismissing the writ appeals, he pleaded.

15. Heard learned counsel appearing for the parties.

16. It is the case of the respondent/Board that the appellants/writ petitioners were involved in the business of buying, selling or dealing in shares of M/s Sai Televisions Limited during the period between April, 2001 and June, 2002 and by means of the orders impugned in the writ petitions, they were directed to furnish the details/information for such transactions held by them to enable the investigating authority to investigate into the allegations. When the impugned proceedings were issued accompanied with summons under Section 11-C(3) and (6) of the Act, in order to ensure orderly and healthy growth of the securities market for protection of the interest of the investors and also to regulate the securities market, the Board has been vested with the statutory powers under Section 11-C(1) of the Act. Therefore, the respondent has power to call for information from anybody and to hold enquiry in respect of the persons involved in the securities market. Section 30 of the Act vest the power with the Board to make regulations consistent with the Act and the rules made thereunder. In exercise of the power under Section 30, the Board issued two regulations known as the Securities Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 and the Securities Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003. Under the 1995 Regulations, the Board was

vested with the power to order for investigation available in Chapter III. Therefore, it could be seen clearly that the respondent Board had power to investigate into the affairs of any person buying, selling or otherwise dealing with securities. When such investigating power can be entrusted by the Board to any officer nominated by the Board, in order to issue any direction under Section 11 of the Act, the Board used to either investigate directly or through any officer in respect of the affairs of any person or organization involved in the business of buying, selling or dealing in securities. However, the said 1995 Regulations were superseded by the 2003 Regulations. As per the 2003 Regulations also, the Board has been vested with the power to order investigation and such investigation can be entrusted to an Investigating Authority. Based on the report of the investigating authority, the Board can pass any order as it deems fit. When the power is vested in the Board under Section 11(2) providing for the regulation of stock exchanges, registration and regulating the working of various intermediaries in the securities market, by means of 1995 Regulations, the Board has been vested with the power to nominate any officer to investigate into the affairs. However, by amendment Act 59 of 2002, a specific provision has been made by way of Section 11-C in the Act, it is providing the Board for investigating into the affairs and the procedure to be followed. Therefore, after the introduction of Section 11-C, 2003 Regulations have been brought in place. Therefore, the respondent Board is justified in nominating an officer to investigate and submit a report.

17. An interesting argument has been advanced by the appellants that the respondent Board has no power to call for information to investigate into the affairs prior to 29.10.2002, as it is prior to coming into force of the Amendment Act 59 of 2002. But the learned single Judge has rightly rejected the said contention holding that in exercise of the power conferred under Section 30 of the Act, the Board has issued two Regulations, namely, the Securities Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 and the Securities Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003. When the Board has been vested with the power under the 1995 Regulations to order for investigation under Regulation 7(1) falling under Chapter III, the learned single Judge has rightly held that even prior to 1995, as per Regulation 7(1), the Board had the power to investigate into the affairs of any person buying, selling or otherwise dealing with the securities. When such investigation can be entrusted by the Board to any officer nominated by the Board, the impugned proceedings accompanied with the summons cannot be questioned, inasmuch as although the 1995 Regulations

were superseded by the 2003 Regulations, as per the 2003 Regulations also under Chapter III, the Board has been vested with the power to order investigation and such investigation can be entrusted to an investigating authority and thereafter if the investigating authority submits any report, based on the same, the Board can pass any order as it deems fit, as per Section 11-B of the Act. As the learned counsel appearing on either side had referred to Section 11-C, for the sake of convenience, Section 11-C of the Act is reproduced hereunder:-

"11C. Investigation.- (1) Where the Board 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, it may, at any time by order in writing, direct any person (hereafter in this section referred to as the Investigating Authority) specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

(2) Without prejudice to the provisions of sections 235 to 241 of the Companies Act, 1956 (1 of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in section 12 or every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorised by him in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

(3) The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person

authorised by him in this behalf as he may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

(4) The Investigating Authority may keep in its custody any books, registers, other documents and record produced under sub-section (2) or sub-section (3) for six months and thereafter shall return the same to any intermediary or any person associated with securities market by whom or on whose behalf the books, registers, other documents and record are produced: Provided that the Investigating Authority may call for any book, register, other document and record if they are needed again:

Provided further that if the person on whose behalf the books, registers, other documents and record are produced requires certified copies of the books, registers, other documents and record produced before the Investigating Authority, it shall give certified copies of such books, registers, other documents and record to such person or on whose behalf the books, registers, other documents and record were produced.

(5) Any person, directed to make an investigation under sub-section (1), may examine on oath, any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before him personally.

(6) If any person fails without reasonable cause or refuses-

(a) to produce to the Investigating Authority or any person authorised by him in this behalf any book, register, other document and record which is his duty under sub-

section (2) or sub-section (3) to produce; or

(b) to furnish any information which is his duty under sub-section (3) to furnish; or

(c) to appear before the Investigating Authority personally when required to do so under sub-section (5) or to answer any question which is put to him by the Investigating Authority in pursuance of that sub-section; or

(d) to sign the notes of any examination referred to in sub-section (7), he shall be punishable with imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.

(7) Notes of any examination under sub-section (5) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(8) Where in the course of investigation, the Investigating Authority has reasonable ground to believe that the books, registers, other documents and record of, or relating to, any intermediary or any person associated with securities market in any manner, may be destroyed, mutilated, altered, falsified or secreted, the Investigating Authority may make an application to the Judicial Magistrate of the first class having jurisdiction for an order for the seizure of such books, registers, other documents and record.

(8-A) The authorised officer may requisition the services of any police officer or any officer of the Central Government, or of both, to assist him for all

or any of the purposes specified in sub-section (8) and it shall be the duty of every such officer to comply with such requisition,

(9) After considering the application and hearing, the Investigating Authority, if necessary, the Magistrate may, by order, authorise the Investigating Authority-

(a) to enter, with such assistance, as may be required, the place or places where such books, registers, other documents and record are kept;

(b) to search that place or those places in the manner specified in the order; and

(c) to seize books, registers, other documents and record, if it considers necessary for the purposes of the investigation:

Provided that the Magistrate shall not authorise seizure of books, registers, other documents and record, of any listed public company or a public company (not being the intermediaries specified under section 12) which intends to get its securities listed on any recognised stock exchange unless such company indulges in insider trading or market manipulation.

(10) The Investigating Authority shall keep in its custody the books, registers, other documents and record seized under this section for such period not later than the conclusion of the investigation, as it considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person, from whose custody or power they were seized and inform the Magistrate of such return:

Provided that the Investigating Authority may, before returning such books,

registers, other documents and record as aforesaid, place identification marks on them or any part thereof.

(11) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches or seizures made under that Code."

18. A perusal of Section 11-C(1)(a) shows that where the Board has reasonable ground to believe that the transactions in securities are being dealt with in a manner detrimental to the investors of the securities market, the Board can order for investigation. Similarly, Section 11-C(1)(b) needs to be looked into carefully as the language used in Section 11-C(1)(b) is not similar to the language used in Section 11-C(1)(a), since it deals with the past transactions. The learned single Judge, after appreciating the language used in both the provisions, has rightly held that the Board has got power to order for investigation with regard to the past transactions as well by the investigating authority as it is relatable to the investigation against any intermediary or any person and both the provisions are to be read disjunctively and not conjunctively, more particularly, that was the reason for the Parliament to use the word 'or' in between these two provisions.

19. The Gujarat High Court in Karnavati Fincorp v. SEBI, 1996 SCC Online Guj 119, while considering the meaning of the expression "persons associated with the securities market" under Section 11, held the expression to mean and include all persons who have something to do with the securities market. Therefore, notice issued to the appellants is not without jurisdiction. Even before amendment, Section 11 of the Act has empowered the Board to take all measures as it deems fit for the protection of the interests of all investors to regulate and promote and regulate the securities market, hence, when Section 11-C is only supplemental to Section 11, more particularly, Section 11-C(6) imposes punishment only for non-compliance of notice under Section 11-C(1) which is issued only after the date of amendment, question of retrospective application of Section 11-C (6) or Article 20(1) does not arise.

20. Coming to the maintainability of the writ petitions, it has been mentioned that investigation has been initiated. When it is a settled legal position that investigation is only a process to find facts, collect evidence and material of a suspected offence/contravention and the role of the persons so

suspected, the stand taken by the appellants that the respondent cannot invoke Section 11-C of the Act to investigate or call for investigation pertaining to the transactions prior to 29.10.2002, is wholly unsustainable. It is also relevant to extract the preamble of the Act, which reads as follows:-

"An Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto."

A perusal of the above clearly shows that sufficient powers have been given to the Board to function as a statutory Board. Consistent with the preamble, it can be seen that the power to call for investigation is available to the Board since its inception. It has already been held that the Board has got power to call for information and also has got power to investigate into the affairs of any person dealing with the securities. When a need was felt by the Parliament to further strengthen the powers of the Board including the powers for investigation, enforcement, etc., the amendments were sought to be made to the Act by the Securities and Exchange Board of India (Amendment) Ordinance, 2002 (6 of 2002). The Ordinance was subsequently replaced by the Securities and Exchange Board of India (Amendment) Act, 2002 with effect from 29.10.2002. One of the provisions inserted by the amendment Act was the insertion of Section 11-C which provided for investigation. Section 11-C(1) is also reproduced below for perusal.

"11C. Investigation.- (1) Where the Board 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, it may, at any time by order in writing, direct any person (hereafter in this section referred to as the Investigating Authority) specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board."

21. A careful reading of the above provision shows that the investigation can be conducted after the Board has reasonable ground to believe that any person associated with the securities market has violated any of the provisions of the Act, rules or regulations. Since Section 11-C was inserted with effect from 29.10.2002, investigation under Section 11-C can be continued for the transactions occurred prior to 29.10.2002 as well, because the investigation is only a process to find facts, collect evidence materials of a suspected offence/contravention, therefore, the same being procedural in nature, it is retrospective in nature also. When the Board sought for information from the appellants who were found to have played a role in the matter of Sai Television, the appellants are duty bound to furnish information as sought for by the Board. The Apex Court also in SEBI v. Ajay Agarwal, (2010) 3 SCC 765, has held that Section 11-B is procedural in nature that prima facie applies to all actions, pending as well as future. When a provision that provides for imposition of directions which is in the nature of punishment itself is held to be retrospective, Section 11-C can very well be held to be retrospective in operation. In this context, it is relevant to extract paragraphs 36, 37, 40 & 41 of the judgment in SEBI v. Ajay Agarwal, (2010) 3 SCC 765, as follows:-

"36. From the Statement of Objects and Reasons of the Amendment Act of 2002, it appears that Parliament thought that in view of growing importance of stock market in national economy, SEBI will have to deal with new demands in terms of improving organisational structure and strengthening institutional capacity. Therefore, certain shortcomings which were in the existing structure of law were sought to be amended by strengthening the mechanisms available to SEBI for investigation and enforcement, so that it is better equipped to investigate and enforce against market malpractices. (See Paragraph 3 of the Statement of Objects and Reasons).

37. Section 11-B which empowers the Board to issue certain directions also came up by way of amendment in 1995 by Act 9 of 1995. The Statements of Objects and Reasons of such amendments show that one of the objects is to empower the Board to issue regulations without the approval of the Central Government. (See Para 3(e) of the Statements of Objects and Reasons). Section 11-B of the Act thus empowers the Board to give directions in the interest of the investors and for orderly development of securities market, which, as noted

above, is one of the twin purposes to be achieved by the said Act. Therefore, by the 1995 Amendment by way of Section 11-B the Board has been empowered to carry out the purposes of the said Act.

40. Provisions of Section 11-B being procedural in nature can be applied retrospectively. The Appellate Tribunal made a manifest error by not appreciating that Section 11-B is procedural in nature. It is a time-honoured principle if the law affects matters of procedure, then prima facie it applies to all actions, pending as well as future. [See K.Eapen Chako v. Provident Investment Co.(P) Ltd., AIR 1976 SC 2610, wherein A.N.Ray, C.J., laid down those principles.]

41. Maxwell in his Interpretation of Statutes also indicated that no one has a vested right in any course of procedure. A person's right of either prosecution or defence is conditioned by the manner prescribed for the time being by the law and if by the Act of Parliament, the mode of proceeding is altered, then no one has any other right than to proceed under the alternate mode. (Maxwell on Interpretation of Statutes, 11th Edn., p.216). These principles, enunciated by Maxwell, have been quoted with approval by the Supreme Court in its Constitution Bench judgment in Union of India v. Sukumar Pyne, (AIR 1966 SC 1206 at p.1209, para 9)"

A cursory perusal of the above observations clearly tells us that Section 11-C is retrospective in nature only.

22. Coming to the next question whether Section 11-C(3) covers past transactions also, a clear reading of Section 11-C (1) shows that there are two sub-clauses, namely, Section 11-C (1)(a) and Section 11-C(1)(b), while the former uses the expression "are being" meaning its application to the present transactions, the latter uses the expression "has violated", which clearly means the past transactions as well. Therefore, these two clauses are to be read disjunctively and not conjunctively, because even for past transactions the Section 11-C(1)(b) applies. Moreover, the writ petitions are not even maintainable, for the simple reason that when disputed questions have arisen as to whether the appellants/writ petitioners are individual investors or not, it is for them to prove that they are individual investors and that they have not violated any provisions before the Board. Now investigation has been ordered. The appellants have to furnish details/information regarding the transactions done by them during the particular

period. On receipt of report from the investigating authority, the Board shall pass an order strictly in accordance with law. If the Board, for the reasons best known to them, comes to the conclusion that the appellants are individual investors and they do not fall within any of the categories of persons mentioned under Section 11-C of the Act, the matter ends therein. If for any reason, the Board comes to the conclusion that the appellants are persons associated with the securities market, they have to work out their remedy by filing appeal before the appellate authority. Therefore, when the appellants have got an effective statutory alternative appellate remedy, this Court finds that the writ petitions are not maintainable. Therefore, in our considered opinion, the findings and conclusions reached by the learned single Judge dismissing the writ petitions do not call for any interference. Accordingly, the writ appeals are dismissed. Consequently, M.P.Nos.1 of 2012 are closed. However, there is no order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

The General Manager,
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+4ccs to Mr.S.R.Rajagopal, Advocate, S.R.No.40834
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W.A.NOS.2303 OF 2012 ETC.,

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