

SECURITIES APPELLATE TRIBUNAL, MUMBAI

Appeal No. 95/2002

Decided On: 28.03.2003

Appellants: M.P. Mehrotra and Somesh Mehrotra

Vs.

Respondent: Securities and Exchange Board of India

Hon'ble

C. Achuthan, Presiding Officer

Judges:

Counsels:

For Appellant/Petitioner/Plaintiff: Fredun De Vitre and Prarthana Awasthi, Advs.

For Respondents/Defendant: Ananta Barua, Jt. Legal Adviser, Babita Rayudu, Asstt. Legal Adviser and Sangeeta Uchhal, Asstt. General Manager

Subject: Company

Acts/Rules/Orders:

Companies Act, 1956 - Sections 61, 62, 63, 65, 68 and 300; Securities and Exchange Board of India Act, 1992 - Sections 11, 11(1), 11(2), 11(2A), 11(3), 11(4), 11A, 11B and 12; Securities and Exchange Board of India (Amendment) Act, 2002 - Section 11(4); Indian Contract Act

Disposition:

Appeal allowed

Case

Note:

Company – penalty - Section 11B of Securities and Exchange Board of India Act, 1992 - promoters of appellant company on preferential basis issued 10 Lakh optionally convertible non transferable warrants (OCNT) – promoters given undertaking to company that they would opt for conversion – promoters did not opt for conversion – on subsequent meeting promoters allotted one Lakh equity shares of ten rupees each against one lakh warrants - promoters contended that since warrants were optionally convertible they had right to opt for conversion into any number of equity shares – respondent rejected these grounds and advised appellant to honour their commitment as prescribed in prospectus of company – respondent issued notice under Section 11B on failure of non conversion – scope of Section 11B

empowered respondent to issue directions to protect interest of investors but such power does not extend to imposition of penalty – respondent being failed to establish charges no question arises as to whether direction merely prohibitory in nature or it was punitive – penalty imposed not proper – impugned order imposing penalty set aside and appeal allowed.

JUDGMENT

C. Achuthan, Presiding Officer

1. **VLS Finance Ltd.**, (the company) is a public limited company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of financing projects, leasing and investments. It had made a public issue of equity shares sometime in March, 1994. Shares of the company are listed on several stock exchanges in India. The company had decided to raise further capital from the market. For the purpose a prospectus was issued on 14.11.94. In the said public issue 36,66,600 equity shares of Rs.10/- each at a premium of Rs.390/- per share aggregating to Rs.146,66,40,000 were offered. The Public issue opened on 15.12.1994. It was reportedly oversubscribed by five times. The company in the said prospectus, under the head "Capital Structure" at item 7 of the notes (page 11) had made the following disclosure:

"The promoters have been issued 10 lakh optionally convertible non transferable warrants (OCNT), each convertible into 10 equity shares at their option which shall be exercised not earlier than 12 months and not later than 60 months from the date of allotment of the warrants. This OCNT warrants issue was approved by the shareholders in their meeting held on 2.8.94 and allotted to the promoters in the Board meeting held on the same day. The promoters have given an undertaking to the company that they shall opt for conversion at Rs.400/- per share. They have also undertaken that the conversion shall be opted in phases so that the growth rate in the Earning Per Share (EPS) is maintained every year. At each stage of conversion of OCNT Warrants with the promoters, it would be ensured that promoters' holding does not fall below 25% of the expanded capital. At each stage of conversion of the OCNT Warrants 25% of the shares arising out of such conversion would be locked in for a period of 5 years from the date of allotment of such shares."

2. Delhi Stock Exchange (DSE) one of the stock exchanges on which the company's shares are listed, vide their letter dated 20.11.1998 informed the Respondent that the company's promoters did not opt for conversion of the OCNT Warrants in 1996-97, and 97-98 and in 1998, that the Board of Directors of the company in their meeting held on 7.5.1998 allotted one lakh equity shares of ten rupees each against one lac warrants, that the company had taken the stand that since these warrants are optionally convertible, the

promoters had the right to opt for conversion of these warrants into any number of equity shares, which was at variance with the terms of the prospectus. The Respondent vide its letter dated 28.1.1999 called upon Shri Somesh Mehrotra of the company to honour the promoters' commitment relating to the conversion of the warrants as undertaken. In reply to the same, the company vide its letter dated 1.2.1999 stated that the warrants have been converted as per the terms of its issue. In the meantime the Respondent is stated to have received complaints from several investors/shareholders against the promoters' failure to convert the warrants as per the terms. The Respondent took up the matter with the company and also with the company's lead manager in the public issue. They explained their point of view. But the Respondent found those explanations unsatisfactory and again advised the promoters to honour their commitments as disclosed in the prospectus. In response to the same they reiterated their stand that the promoters had not failed to honour their commitments and as such no action from SEBI was warranted. Respondent issued a show cause notice to the Appellants on 3.4.2002 alleging that they had failed to honour their commitment relating to conversion of warrants as undertaken and represented by them in the prospectus and they were also informed that appropriate orders under section 11B of the Act would be considered for the said failure. The Appellants responded to the same by denying the charges. Respondent was not satisfied. Thereafter the Appellants were asked to show cause vide notice dated 7.6.2002 as to why they should not be debarred from accessing the capital market for a period of five years. The Appellants made oral and written submissions in response to the notice. But the Respondent was not impressed. In that context the Respondent viewed "that the promoters had made a promise in the prospectus without any intention of performing it which amounts to a fraud. One can reasonably state that cases like these make investors lose their confidence in the capital markets. Such promoters should not be allowed to back out of their undertaking made in the prospectus, by taking recourse to interpretation of the undertaking given by them in the prospectus." The Respondent felt that the action of the promoters of the company (the Appellants) was detrimental to the orderly development of securities market and to the interest of investors and therefore felt necessary to take action "in order to ensure that the investors in the securities market do not in any way suffer any losses and are not put to any harm and that the safety and integrity of the market remain unimpaired". The Respondent vide its order dated 20.9.2002 issued the following direction:

" Mr. M. P. Mehrotra, promoter of the company and Mr. Somesh Mehrotra, director of the company, honour their commitment relating to the conversion of warrants as undertaken or represented by them in the prospectus dated November 14, 1994 within a period of 30 days from the date of the order, failing which Mr. M. P. Mehrotra and Mr. Somesh Mehrotra and the other companies which they have promoted or in which they are holding or controlling a substantial interest, shall hereby be restrained, from accessing the capital market, directly or indirectly for a period of 5 years."

3. The Appellants claiming to be aggrieved by the said order filed the present appeal inter alia praying to set aside the same.

4. Shri Fredun De Vitre, learned Counsel, appearing for the Appellants briefly referred to the facts of the case. He submitted that the company being desirous of issuing OCNT Warrants on preferential basis to the promoters group, in its Annual General Meeting (AGM) held on 2.8.94 resolved to issue OCNT Warrants to the promoters, inter alia authorising the Board of Directors to resolve any question in implementing the said resolution. He referred to the text of the resolution passed by the shareholders on 2.8.94, filed along with the appeal memorandum and in particular to the following portion of the resolution:

"The consent of the company is hereby accorded to its Board of directors or their duly constituted committee, as the case may be (hereinafter referred to as the Board or Committee) to offer, issue and allot:

* On preferential basis to the Promoter Directors, their relatives, friends, associates and the companies promoted by the Promoter Directors or controlled by them or associates.(promoter group)

* In such manner and within such period and at such time or times and upon such terms and conditions and at such price including security, rate of interest etc. as may be deemed appropriate, by the Board of Directors,

* Equity shares/Fully Convertible Debentures/Partly Convertible Debentures and or any one or more of such securities and or other instruments with or without detachable warrants or naked warrants with a right exercisable by the warrant holders to convert or subscribe to equity shares;

* For cash at such price (including premium) as may be decided by the Board but not exceeding Rs.400/- per share upto an aggregate amount not exceeding Rs.400 crores (inclusive of such premium as may be fixed on such securities)"

5. He further submitted that by another resolution passed in the same AGM for the purpose of giving effect to all or any of the resolutions/decisions taken in the meeting, the Board was authorised "in its absolute discretion as the Board may deem fitto do all acts, deeds and things in connection therewith and incidental thereto as the Board in their absolute discretion deem fit without being required to seek any further consent or approval of the company."

6. Learned Counsel submitted that the general body of the shareholders had thus given the blanket authority to the Board of Directors to fix such price and such quantum of securities, subject to the upper limit of price and quantum specified by the general body.

He submitted that pursuant to the said resolution of the shareholders the Board of Directors in their meeting held on 2.8.1994 issued 10 lakh OCNT Warrants to the promoters subject to certain conditions which inter alia included:

- * The holder(s) of each warrant shall be entitled to apply for and obtain at their sole discretion ten equity shares at a price not exceeding Rs.400/- per share (i.e. including premium of Rs.390/- per share) on the date or dates between 12 months to 60 months from the date of issue of warrants as may be fixed by the Board
- * The holder(s) of warrant shall before exercising their option for conversion, shall give prior intimation/notice to the Board of Directors, at least 30 days in advance to enable the directors to determine and inform the warrant holder the price at which the warrants shall be converted into shares."

7. He submitted that on 2.8.1994, the company issued 10 lakh OCNT Warrants to the Appellants . Thereafter on 14.11.1994, through a prospectus the company made a public issue for 36,66,600 equity shares of Rs.10/- each at a premium of Rs.390/- each, which was oversubscribed by five times. Learned Counsel submitted that while processing the prospectus, the merchant banker to the issue i.e. SBI Capital Markets Ltd. wanted to disclose the precise price of conversion instead of leaving the same open ended and accordingly required the promoters to give an undertaking that the price for conversion of the warrants would be Rs.400/-and they gave the requisite undertaking. In this context he referred to the text of the said undertaking filed with the appeal and stated that as per the undertaking the Appellants had committed to convert the OCNT Warrants to shares at the price of Rs.400/- per share (equity shares of Rs.10 each at a premium of Rs.390). Learned Counsel submitted that it is clear from the undertaking that the commitment was only with reference to the conversion price pegging at Rs.400/- and there was nothing therein even to suggest that the Appellants had opted to convert the entire 10 lakh OCNT Warrants. He submitted that it was an optionally convertible warrant and the option was to be exercised at the sole discretion of the promoters, that by accepting that the warrants would be converted at Rs.400/-, the basic nature of the warrant i.e. the optional conversion right, was not given up or taken away in any manner. In this context he referred to note 7 in the prospectus relied on by the Respondent and submitted that the disclosure made therein is in tune with the undertaking given by the Appellants that "the promoters have been issued 10 lakh optionally convertible non transferable warrants each convertible into 10 equity shares at their option The promoters have given an undertaking to the company that they shall opt for conversion at Rs.400/- per share." He submitted that this disclosure is factually correct as could be verified from the resolutions on record. Learned Counsel submitted that the Respondent's contention that this para conveyed that the option was exercised or that option was given up and the Appellants had agreed to convert the entire OCNT Warrants to shares, is totally baseless. With reference to the Respondent's version that the company had taken into consideration with certainty the conversion of the entire 10 lakh OCNT Warrants for the purpose of "future projections" disclosed in the prospectus, learned Counsel submitted that it has to be noted

that the projections were made on certain assumptions and this fact has been clearly disclosed in the prospectus (p.42-43) under the head "Assumptions for Projections" He submitted that under the said heading the Appellants had reproduced the relevant material disclosed in note 7 verbatim at item 9 of the 'assumptions' and this clearly indicated the fact that the option had not been exercised. but was yet to be exercised. In this context he also referred to the statement made in the prospectus (p.43) that "As a matter of abundant caution, the attention of the investors is drawn to the fact that the above projections are only indicative and subject to change" and submitted that thus it is clear that projection was made subject to assumptions and hence subject to change, that one of the assumptions was that the OCNT Warrants would be converted, that it was only an assumption and not a firmed up position at that point of time.

8. Learned Counsel further submitted that OCNT Warrant issue has not in any way swayed the decision of the subscribers to the issue as alleged. It was not shown as a "Issue Highlight" that under 'Management perception' it was disclosed that "each OCNT Warrant can be converted into 10 shares." He submitted that the word "can" used therein also indicates that the option was not closed. Shri De Vitre submitted that the disclosure made, as alleged was not of any inducement, but was really of 'non inducement effect' because of the diminishing EPS as disclosed therein as a result of conversion of OCNT Warrants in future.

9. Learned Counsel referred to the resolution dated 2.8.1994 of the Board of Directors whereby the holders of each warrant was entitled to obtain ten equity shares at price not exceeding Rs.400/- (subsequently fixed at Rs.400/-) per share on conversion and submitted that the Board of Directors vide resolution dated 14.1.1998 modified the same as could be seen from the following resolution that :

" in super session of the resolution at the Board of Directors meeting held on 2.8.94 and 14.11.94 the terms of issue of 10,00,000 OCNT warrants issued to the Promoter Group on 14.11.1994, be partially modified by giving the option to promoters to opt for one equity share for each OCNT warrant as against earlier option of 10 equity shares to be exercised for each OCNT warrant."

10. In this connection he referred to the general body resolution dated 2.8.1994 empowering the Board of Directors to issue OCNT warrants to the promoters

"at such price as may be decided by the Board but not exceeding Rs.400/- per shares upto an aggregate amount not exceeding Rs.400 crores (emphasis given) and to do all acts, deeds and things in connection therewith and incidental thereto as the Board in their absolute discretion deem fit without being required to seek any further consent or approval of the company" (emphasis given)

11. Learned Counsel submitted that the Board resolution dated 14.1.1998 is thus well within the powers of the Board that the Respondent's contention that the modification is

unauthorized is therefore untenable. Learned Counsel further submitted that the Respondent has wrongly assumed that by the Board resolution dated 14.1.1998, the terms of the prospectus have been modified that it was not the terms of the prospectus which were modified that what was modified was the terms of allotment of the OCNT Warrant. Learned Counsel countering the Respondent's allegation that the promoters being directors of the company had passed the resolution, stated that at that point of time the company had 11 directors and therefore it was impossible to conclude that the 2 promoter directors in the Board of the company had passed the resolution. Shri De Vitre submitted that in 1998, when one lakh OCNT Warrants were converted the market price of the company's shares was around Rs.45/- and still the promoters converted the warrants and bought shares @ Rs.400/- per share, honouring their undertaking. He submitted that the company had also informed all the concerned stock exchanges about the Board Resolution dated 14.1.1998 amending the earlier Board Resolution dated 2.8.1994 and the transaction was transparent. Learned Counsel submitted that the Respondent's submission that the promoters did not fulfil the undertaking made by them, and that the modification of the earlier resolution of the Board by its subsequent resolution is not in accordance with the relevant laws etc. is untenable.

12. Learned Counsel submitted that after nearly 5 years from the issue of OCNT Warrants, on 28.1.1999 the Respondent issued a show cause notice to the Appellants calling upon them to honour their commitment relating to conversion of warrants as undertaken in the prospectus, that the company and the Appellants responded to the same explaining that there was no failure on their part as alleged, that their reply in this regard was sent sometime in the first week of February 1999, that thereafter the Respondent called the Appellants for a personal hearing on 22.3.1999 which was attended by the Appellants, that thereafter for 30 months nothing was heard from the Respondent, and another show cause notice dated 3.10.2001 was served on the Appellants charging that:

"In not having opted for conversion in the years 1996-97, 1997-98 and having opted for conversion in the year 1998 for conversion of one OCNT into one equity share instead of 10 equity shares, you have acted at variance with the terms and conditions of the prospectus. In doing so, you have failed to fulfil the undertaking as incorporated in the prospectus, have not acted as per the terms of the prospectus.

This amounts to making misleading statements in the prospectus in order to induce the public to invest money in the company's shares, particularly in view of the fact that the promoters indicated that they shall be investing more funds in the company over the years, thus giving an impression of their sincere commitment towards the company. The said disclosures may have worked in the minds of the public while deciding on investing in the company's shares.

In view of the above, your contention that "No investor, who had applied for the shares of the company could have been influenced by OCNTs to be taken by the promoters" lacks any merit.

You are advised to honour your commitment relating to conversion of warrants as undertaken and represented by you in the prospectus failing which we would be constrained to pass appropriate orders under section 11B of the SEBI Act, 1992....."

13. The show cause notice also stated that the Respondent had received complaints against the company.

14. Shri De Vitre submitted that the Respondent has relied on certain complaints. The Respondent has also referred to letter received by it from SBI Capital. However, the allegations in the complaint and the observation in the letter by SBI Capital were held back from the Appellants, that no copy of the same was furnished to them. He submitted that the Respondent by not furnishing these details has failed to follow the principles of natural justice. Learned Counsel submitted that the Appellants promptly replied to the show cause notice vide its letter dated 15.11.2001, that thereafter on 3.4.2002 another show cause notice was received and that notice was also promptly answered on 17.4.2002 and oral representations were also made in this regard. He submitted that the Respondent has not taken into consideration the detailed submissions made by the Appellants rebutting the charges, that the order dated 20.9.2002 has not dealt with most of the submissions made by the Appellants. According to the learned Counsel the order is unsustainable as it is based on wrong interpretation of the facts and law; it is based on surmises and conjectures. He further submitted that the order has gone beyond the show cause notice as it contains new facts and charges. In this context he referred to the observation that "it is clear that the action of the promoters of the company as elaborated above is detrimental to the orderly development of the securities market and to the investors" and submitted that the Appellants were never given an opportunity to rebut this, that it was the same case with reference to the observation that "the company does not have a good track record and its dealings in various fields related to the capital market", that the Respondent has gone even to the extent of stating that the "company has a rather dubious track record in the market".

15. Learned Counsel submitted that the Respondent has made baseless allegations in the order that the action of the Appellants amounted to "fraud", "cheating" etc. little realising the consequences of making such baseless observations on the interest of the investors in the company's shares.

16. Shri De Vitre submitted that the Respondent was going on adding new charges by issuing fresh show cause notices. He submitted that in its letter dated dated 7.6.2002, in reply to certain clarifications sought by the Appellants, the Respondent further expanded the charges stating that by incorporating note 7 to capital structure in the prospectus and thereafter not exercising the option to convert the OCNT Warrants, the company prima facie violated sections 62 and 63 read with 65 and 68 of the Companies Act and that the company had acted in a manner prejudicial to the interests of the investors and orderly development of the securities market, warranting action under sections 11 and 11B of the SEBI Act.

17. Learned Counsel submitted that in the show cause notice the charge against the Appellant was that of making misleading statements in the prospectus in order to induce the public to invest money in the company's shares, and in that context violated sections 62 and 63 read with 65 and 68 of the Companies Act. He submitted that for meeting violation of the provisions of the Companies Act, provisions of SEBI Act are not available, that the Companies Act is a self contained code providing measures to meet the defaulters under the said Act, that to read such powers not vested in the Respondent, into the Act and to pass such directions as impugned, is incorrect and is ultra vires the Act. He further submitted that there is nothing on record to show that because of the so called failure on the part of the Appellants the investors' interest in the past, has in any way suffered, that on the contrary the evidence on record is that investors had benefitted in the past, as the company had made two bonus issues and the business of the company has also improved. He further submitted that to meet the alleged charge of making misstatement in the prospectus dated 14.11.1994, sections 11A and 11B of the Act have been invoked, though the said sections came into force only with effect from 25.1.1995, that the provisions of these sections cannot be invoked retrospectively, to take action for some thing allegedly done in the year 1994, that in the year 1994 the person concerned did not even know the consequences provided in section 11A and 11B, as these sections were not in the statute book.

18. In response to the Respondent's argument on the applicability of the new section 11 (4)(b) of the Act as inserted by SEBI (Amendment) Act, 2002, and the claim that the Respondent is empowered in the interest of investors and the securities market, either pending investigation or enquiry or on completion of such investigation or enquiry, to restrain persons from accessing the securities market and prohibit any persons associated with the securities market to buy, sell or deal in securities, it was submitted that the same is inapplicable to the present case in as much as the fact that the present appeal is against an order dated 20.9.2002, which implies the completion of all enquiry and investigation against the Appellants in this matter, that the said amendment to the Act was made after the issue of the impugned Order. There is no implied or other statement that makes the provisions in the said Amendment Act, applicable with retrospective effect.

19. Learned Counsel submitted that in any case the impugned order is out and out penal in nature and the Respondent is not empowered to issue penal orders under section 11B of the Act. In this context he extensively cited this Tribunal's observation in *Sterlite Industries Ltd. V SEBI* (2001) 34 SCL 326) and in particular the categorical view held therein that "Section 11B does not even remotely empower the Respondent to impose penalties" With reference to the Tribunal's decision in *Integrated Amusements V SEBI* (2000) 27 SCL 458) cited by the Respondent learned Counsel submitted that the ratio of the said case has no application at all to the present case as the view held by the Tribunal in the said case was in the case of a vanishing company that it is not anybody's case that the subject company in the present appeal is a vanishing company. He further submitted that the Tribunal's decision in Sterlite which is subsequent to the decision in Integrated Amusements is directly on the scope of section 11B and as such the same requires to be followed.

20. Shri Ananta Barua, learned Representative appearing for the Respondent submitted that the Appellants have failed to fulfil the obligation arising out of their undertaking that they would convert 10 lakh OCNT Warrants, each convertible into 10 equity shares. In this context he referred to note 7 under the head "capital structure" in the prospectus and submitted that the disclosure made therein clearly indicates that the Appellants had undertaken to convert 10 lakh OCNT Warrants, each convertible into 10 equity shares in a phased manner during the specific period of 12 months to 60 months from the date of allotment, at the fixed rate of Rs.400/- per share. They had also made it clear that at each stage of conversion of OCNT Warrants it would be ensured that promoters' holding does not fall below 25% of the expanded capital.

21. Shri Barua submitted that from the undertaking given by the promoters as disclosed in the prospectus it is clear that the promoters had categorically committed to convert 10 lakh OCNT Warrants and each warrant was convertible into 10 equity shares and the conversion price was Rs.400/- per share. He further submitted that the factual position that the promoters had agreed to convert the entire OCNT Warrants is reflected in the disclosures made in the prospectus with reference to the finances of the company. In this connection he referred to the post capital structure of the company worked out, taking into consideration full conversion of OCNT Warrants, as disclosed on page 10 of the prospectus. He also referred to the shareholding of "the promoters in the expanded capital at each stage of conversion of the warrants" as disclosed on page 10 of the prospectus. He further referred to the projected financial position of the company - including the paid up capital on pages 42-43 of the prospectus and submitted that the said projection has been made, taking into consideration that the entire OCNT Warrants would be converted as agreed to by the promoters. The key financial ratios disclosed on page 43 of the prospectus and the assumptions for projections was also referred to and submitted that the undertaking that 10 lakhs OCNT Warrants would be converted to 100 lakh shares at a conversion price of Rs.400/- per share was taken into consideration for the purpose. Shri Barua referred to the disclosure made at note 9 therein in this regard. He submitted that the promoters have also undertaken that the conversion shall be opted in phases so that the increase in the Earnings Per Share (EPS) is maintained. He also referred to the note at Sl. No. 10 that "the proceeds received on OCNT Warrants will be used by the company fully for its business purposes in the same ratio of deployment as listed in a table under Requirement of Funds and Sources for meeting same given elsewhere in this prospectus". Learned Representative referred to the disclosure at item 11 that "in the projections the conversion of OCNT Warrants have been assumed from 1996-97 onwards in a phased manner on the basis of possible conversion points indicated by the promoters through a letter addressed to the company regarding conversion of Warrants. It has been taken that due to conversion of OCNT Warrants, the equity capital will increase by 1 crore in the year 1996-97, 3 crores each in the years 1997-98 to 1999-2000 and the EPS of the company on the enhanced capital for the said 4 years will be Rs.84/- Rs.106.52, Rs.153.37 and Rs.170.44." According to Shri Barua projections are made on the basis of the said affirmative statements, that the same position has also been reflected in the 'ISSUE HIGHLIGHTS' made in the prospectus. He submitted that the disclosures made in the prospectus read with the undertaking given by the promoters give a clear

impression that the promoters had agreed to opt to convert 10 lakh warrants to 1 crore equity shares at a conversion price of Rs.400/- per share.

22. Shri Barua submitted that the promoters' commitment that they would be converting the entire warrants to equity shares is clear from their letter dated 6.9.94 addressed to the Board of Directors of company. He referred to the following full text of the letter:

"REG: 10 Lacs Optionally Convertible Non Tradable Warrants

(OCNT Warrants) allotted.

Dear Sir,

With reference to the above we hereby confirm and undertake that:-

1. We shall convert the OCNT Warrants and take the resultant shares at the price of Rs.400/- per share (Equity share of Rs.10 each and at a premium of Rs.390 per share)
2. We shall opt for conversion in phases so that the growth rate in the earning per share of the company is maintained every year. The tentative period for conversion of OCNT Warrants is as under:
 - a. 1996-97 10% of total number of OCNT Warrants
 - b. 1997-98 30% of total number of OCNT Warrants
 - c. 1998-99 30% of total number of OCNT Warrants
 - d. 1999-2000 30% of total number of OCNT Warrants
3. At each stage as indicated in point 2 above, 25% of Shares arising out of conversion of OCNT Warrants shall be locked in for a period of 5 years from the date of allotment of shares in order to maintain 25% Promoters' contribution in the company at all times.
4. The terms of the issue of OCNT Warrants is fully agreeable to us and we, further confirm that the OCNT Warrants for the present held in the name of undersigned shall not be transferred to anyone else before conversion of

the same into Equity Shares except among the Promoters' Group of the Company and before any such transfer takes place we will ensure that the terms agreed to through this undertaking will be obtained from the transferee and furnished to the company."

(emphasis given)

23. It was also submitted by Shri Barua that the intention of the promoters is clear from their own statement as reflected in the company's letter dated 25.7.2002 to the Respondent that :

"the promoters intention was to exercise the option, and that is why, it was so assumed while making the financial projections. However, subsequent scenario in the capital market, particularly after M. S. Shoe fiasco, had changed considerably. The non availability of opportunity for deployment of funds in the market and the then capital market scenario, necessitated the promoters to exercise limited option for these Optionally Convertible Non-Transferable Warrants".

24. He submitted that all projections have been made on the basis of the firm commitment made by the promoters. In this context he referred to the disclosure in the prospectus (p. 47 item (I))that:

"The Book Value per share has consistently risen in the past due to high levels of retained earnings and low equity base. This trend is expected to continue in future also since the equity base will still be lower inspite of the present public issue and future issue of shares proposed to be made to the promoters."

25. Shri Barua referred to the company's letter dated 16.1.1998 addressed to the Delhi Stock Exchange wherein it has been stated:

"that the meeting of the Board of Directors of the Company was held at Mumbai on 14.01.98 to consider and approve the issue of equity shares to the promoters on account of conversion of Optionally Convertible Non-Transferable (OCNT) Warrants. In the said meeting, the proposal of the promoters, to exercise conversion of 1,00,000 OCNT Warrants and entitling them to convert each OCNT Warrants for one equity share, as against earlier option of 10 equity shares given by the Board in its meeting held on 02.08.94 was unanimously approved. Accordingly, 1,00,000 equity shares of Rs.10/- each are being offered to the promoters for subscription for cash at a premium of Rs.390/- per share."

26. He also referred to the following paragraph from the company's letter dated 14.2.1998 addressed to the Utter Pradesh Stock Exchange Association Ltd. (UPSE) that:

"We are sure that you would be aware that the present market price of the share is in the region of Rs.40 per share. Given this scenario, the promoters have voluntarily come forward to exercise their option and convert one lakh warrants into equity shares at a price of Rs.400 per share and thereby infusing Rs.4 crore into the company. The promoters could have very well bought 10 lakh shares from the market by investing the same amount instead of acquiring the one lakh shares by conversion. The company, in the present capital market scenario, cannot even think of issuing shares at Rs.400 per share. In such a case, it is in the best interests of the company to accept the offer of the promoters to convert warrants at Rs.400 per share. The promoters, by converting the warrants have not only infused funds but also have reiterated their commitment to the shareholders."

27. He submitted that UPSE had in response to the said letter conveyed to the company vide its letter dated 7.3.1998 that in its view "the optionally convertible means convertible at the option of the allottees, i.e. allottees have the absolute option whether or not to convert the warrants into 10 Equity shares for each warrant. To say that the option of the allottees also includes conversion into less than 10 equity shares per warrant would be hatching interpretation too far... the exercise of option to convert 1,00,000 warrants into 1,00,000 equity shares in the ratio of one Equity share per warrant as against ten equity shares per warrant as per original terms of the issue by the Board of Directors of your company does not appear to be in order." Shri Barua submitted that the terms of the undertaking as disclosed in the prospectus cannot be varied by a Board resolution that only the general body of share holders have the power under the Companies Act to vary the terms of the prospectus. He submitted that the fact that the matter was placed before the shareholders in their meeting held on 4.6.98 is of no relevance, as it was a post allotment action and further that the action was not in tune with disclosure of the undertaking already made in the prospectus. With reference to the Appellants' contention that no investor, who had applied for shares of the company could have been influenced by the OCNT Warrants to be converted as shares and taken by promoters, as the then prevailing market price per share was in the range of Rs.600-800, and that it was not an inducement for the investors to invest money in the shares of the company, Shri Barua submitted that the said contention is not correct that investors are normally swayed by the involvement of the promoters and the decision of the promoters to convert the OCNT Warrants within a period of 5 years @ 400 was viewed by the investors as indicative of the financial stability of the company and based on the said perception they invested, and that was one of the reasons to attract over subscription by 5 times.

28. Shri Barua, countering the Appellants' reliance on SBI Capital's letter dated 17.2.98 (produced a copy of the letter written by the Respondent to the SBI Capital on 17.2.1998) submitted that the Respondent had asked SBI Capital to explain as to on what basis they had satisfied themselves about the ability of the promoters to bring in monies for taking the said shares as undertaken in the prospectus, and in reply thereto they had stated vide letter dated 4.3.1999 (copy produced) that they had "obtained an undertaking from Mr. Somesh Mehtrotra, Director VLS Finance addressed to the Board of Directors of VLS

Finance Ltd. regarding conversion of the Optionally Convertible Non-Tradeable (OCNT) Warrants into shares....It would be seen that the undertaking, *inter alia* covers the price and time of conversion..." According to Shri Barua, the said letter supports his contention that the Appellants had agreed to convert the entire warrants to equity shares, as per the terms of the issue.

29. Shri Barua referring to the conduct of the Appellants' failure to fulfill their undertaking and the effect thereof on the investors, cited this Tribunal's decision in Status Management Services Ltd., V SEBI (2000) 26 SCL 491) and stated that it was viewed therein that investors are often taken for a ride by unscrupulous company management, and such management need be punished, that the Appellants did the same in the instant case by misleading the prospective investors and they should not be let off.

30. With reference to the Appellants' contention that section 11B was incorporated in the Act in 1995 and therefore it cannot be resorted to deal with the matters connected with the prospectus issued in November, 1994, Shri Barua submitted that the failure to comply with the undertaking was subsequent to the incorporation of 11B in the Act and in any case section 11 itself gave adequate powers to the Respondent to take appropriate action. In support he referred to the following observation of the Tribunal in Integrated Amusements Ltd., V SEBI (200) 27 SCL 458 that:

"Section 11 and 11B are inter connected and co-extensive as both these sections are mainly focused on investor protection. On a perusal of the said section 11 it could be seen that the Respondent has been in no uncertain terms mandated to protect the interests of investors in securities by such measures as it thinks fit. The expression measure has not been defined in the Act. So we have to go by its generally understood meaning. According to Corpus Juris Secundum measure means "anything desired or done with a view to the accomplishment of a purpose, a plan or course of action intended to obtain some object, any course of action proposed or adopted by a Government". "Measure" is also understood as "a means to an end". Thus measure in its generic sense is of wider amplitude."

31. It was submitted that Sections 11 and 11B of the Act, empower the Respondent to pass directions for the protection of interests of investors and the securities market, that on the basis of the facts and circumstances of the case, by the impugned order Appellants were given an opportunity to honour their commitments relating to the conversion of warrants as undertaken and represented by them in the prospectus dated 14.1.1994 within a period of 30 days and the consequences that would visit them in the event of their failure to do so was also stated therein. It was further submitted that by virtue of the amendment made to the Section 11 of the Act, in terms of section 11(4) (b) as inserted by SEBI (Amendment) Act, 2002, the Respondent is empowered, in the interest of the investors and the securities market, either pending investigation or enquiry or on completion of such investigation or enquiry, to restrain persons from accessing the securities market and prohibit any persons associated with the securities market to buy, sell or deal in securities, that the said amendment is clarificatory in nature in respect of

the power available under section 11 of the Act, that accordingly the direction given by the Respondent under section 11, dated 20.9.2002 need be upheld, to ensure protection of the interests of the investors and their continued confidence in the market.

32. Shri Barua reiterated that section 11B empowers the Respondent to pass the order which is impugned in the appeal. Shri Barua further submitted that it has been held by the Hon'ble Supreme Court in Union of India V Tulsiram Patel ((1985) Supp. 2. SCR 131) that "it is also well settled that where a source of power exists, the exercise of such power is referable only to that source and not some other source under which were that power exercised, the exercise of such power would be invalid and without jurisdiction. Similarly if a source of power exists by reading together two provisions, whether statutory or constitutional. and the order refers to only one of them, the validity of the order should be upheld by construing it as an order passed under both these provisions". He cited 2 more decisions of the Hon'ble Supreme Court - i.e. Municipal Corporation of the City of Ahmedabad V Ben Hiraben Manilal (1983) 2 SCC 422) and Collector of Central Excise V Pradyumna Steel Ltd. (1996) (82) E.L.T. 441 (SC) in support of his contention that mere mention of a wrong provision of law as power, when exercised is available even though under different provision, is by itself not sufficient to invalidate the exercise of that power. He submitted that the Respondent has exercised the power vested in it to protect the interests of investors and therefore even if there is any mistaken citation of the specific source of power that would not affect the validity of the order passed by the Respondent.

33. With reference to the Sterlite case relied on by the Appellants' Counsel, Shri Barua submitted that the facts of the said case are entirely different from the facts of the present case, that in the present case the direction given to the Appellants to honour their commitment as per the undertaking given by them within 30 days is a remedial measure and not a penalty.

34. I have carefully considered the submissions made on behalf of the parties and the material available on record.

35. Even though Shri De Vitre had submitted that the order has been passed by the Respondent, without following the principles of natural justice he did not press the said contention.

36. Before proceeding further in the matter it is felt that it will be rather useful to extract the core portion of the impugned order, for referral purpose. The findings, as revealed in the order, are as follows:-

"It is noted that the primary point of contention in the present case is whether or not the company has exercised the option of conversion of OCNTW in terms of the undertaking given by them which is disclosed in the prospectus and whether the promoter by giving undertaking in the prospectus to subscribe OCNTW has induced the investors to subscribe in

public issue and whether the promoters has committed breach of fulfillment of undertaking referred to in the prospectus.

The allegation as against the promoters is that the promoters had been allotted 10 lakh warrants, each convertible into 10 equity shares at their option, and had in the prospectus dated November 14, 1994 given an undertaking to the company that they shall opt for conversion of Rs.400/- per share, and that the conversion shall be opted in phases so that the growth rate in the earnings per share (EPS) is maintained every year. At each stage of conversion of the OCNTW with the promoters, it would be ensured that promoters' holding does not fall below 25% of the expanded capital. At each stage of conversion of the OCNTW, 25% of the shares arising out of such conversion would be locked-in for a period of 5 years from the date of allotment of such shares. The disclosure in respect of conversion of OCNTW of Rs.400/- per share and undertaking of promoters to exercise option, has to be seen in the context of premium of Rs.390/- for shares of Rs.10/- offered to the public for subscription.

Thus, as per the prospectus, the proposed conversion was to take place as per the following details:

Year	Stage	Number of Equity Shares held Capital By promoters	% Holding
1996-97	Capital Existing before the issue	2343048	3333400 70.29%
	Present issue	2343048	7000000 33.47%
	After conversion of 10% OCNTs.	3343048	8000000 41.79%
1997-98	After conversion of 30% OCNTs	6343048	11000000 57.66%
1998-99	After conversion of 30% OCNTs	9343048	14000000 66.47%
1999-00	After conversion of Balance OCNTs	12343048	17000000 72.61%

37. However, it is noted that contrary to the said undertaking, the promoters had opted for conversion of these OCNTW by converting one equity share per warrant instead of one warrant into 10 equity shares on the premise that the term "optionally" means the option to choose the number of shares the warrant can be converted into as opposed to the understanding that the term "optionally" means the option to convert the warrant into 10 equity shares which shall be optionally exercised either between one year or 5 years.

38. The promoters have contended that the term option means choice, discretion free decision, right to choose etc. They have referred to the term "option" as defined in the case of derivatives as a contract which gives the buyer (holder) the right but not the

obligation to buy or sell specified quantity of the underlying assets at a specific (strike) price on or before a specified time (expiration date). On that basis they have contended that an option is a contract which gives the buyer a right but not the obligation to buy or sell shares of the underlined security at a specific price on or before a specific date.

39. In this context, it would seem relevant to refer to those portions of the prospectus where the undertaking has been reproduced.

40. At page 10 of the prospectus, under the head "CAPITAL STRUCTURE" at points F & G, the details of "PAID UP CAPITAL AFTER THE PUBLIC ISSUE" and 'PAID UP CAPITAL IN 1999-2000 AFTER FULL CONVERSION OF OCNTW" has been mentioned. Further on the same page, immediately after the "capital structure" the details of "PROMOTERS HOLDING IN EXPANDED CAPITAL AT EACH STAGE OF CONVERSION OF OCNTW" has been given and the same has been reproduced at "B" above at page 16.

41. From the above, it is clear that the prospectus does not state "assuming" full conversion/the promoters holding "assuming" the conversion as proposed at each stage. Rather it gives definite figures after such conversion. The term option has to be construed in the context of the terms used in the prospectus for issue of OCNTW and not with reference to secondary market trading of derivative contract. Therefore reliance of the notices on definition of option as defined in the context of derivative contract is misplaced.

42. The term "options" is to be read with respect to the statement made in prospectus, with reference to :-

(a) the capital structure;

(b) the details of the promoters' holding in expanded capital at each stage of conversion of OCNTW incorporated at page 10 of the prospectus and reproduced at "B" above at page 16 and also

(c) the undertaking dated September 6, 1994 given by Shri Somesh Mehrotra, Director/promoter (the holder of warrants and representative of the promoters) on Rs.10/- non judicial stamp paper to that effect -

"We hereby confirm and undertake that :-

(1) we shall convert the ONCTW and take the resultant shares at the price of Rs.400/-

(2) .. we shall opt for conversion in phases ... the tentative period for conversion of ONCTW is as under:-

- a. 1996-97 10% of the total number of OCNTW
- b. 1997-98 30% of the total number of ONCTW
- c. 1998-99 30% of the total number of OCNTW
- d. 1999-2000 30% of the total number of OCNTW

(3)

(4) The term of the issue of the OCNTW is fully agreeable to us."

43. Thus, it can be reasonably concluded that the promoters had undertaken to exercise the option granted to them as per the terms and conditions and in the phased manner as specified and as detailed in the prospectus. More relevant it is to be noted that the word "shall" and not "may" has been used by the promoters in the prospectus." The option shall be exercised...."the promoters shall opt for conversion at Rs.400/- per share..." It should not be lost sight of the fact that the public issue price of VLS Finance was at a premium of Rs.390/- for a share of Rs.10/-. The undertaking in the prospectus to exercise the option of Rs.400/- by the promoters and conversion to be opted in phases to ensure that promoters' holding does not fall below 25% was *inter alia* to induce the investors to subscribe the issue of the company at a premium of Rs.390/-. The market price of the scrip of the company is now below par, i.e. Rs.8.50/-. Therefore, the promoters are now dragging their feet to exercise the option at price of Rs.400/- and seeking to give such interpretation to wriggle out from the undertaking given to the public/investors at the time of public issue to subscribe at premium of Rs.390/-

44. Thus the promoters are obliged to fulfill the undertaking made by them in the prospectus as regards their commitment to take the shares at specified stages as disclosed under the head "Capital Structure".

45. It would seem that the preferential issue under which the warrants were allotted to the promoters was approved at the General meeting held on August 2, 1994, prior to the public issue which came out during December, 1994. However, it has been contended by the promoters that the terms of the offer document were modified vide Board resolution dated January 14, 1998 by giving the promoters the option to opt for one equity share for each OCNTW as against the earlier option of 10 equity shares to be exercised for each OCNTW. If that were so, then it would be necessary to examine as to whether the said subsequent modification after the public has subscribed at premium of Rs.390/- in the public issue based as the disclosure made in the prospectus is permissible or took place in accordance with the relevant laws. Section 61 of the Companies Act, 1956 *inter alia*

requires that any change in the terms of the prospectus can be made only with the approval of the general meeting. Even if it is assumed that it is possible to vary such terms of the prospectus on the strength in which the public has subscribed, the same can be done by the company only with the authority given in the general meeting. Therefore the promoters or directors has no authority to vary the terms without the approval or authority given in the general meeting. Even if the general body gives such authority to the company, the promoters or the Board which consists of interested directors cannot vary such terms in view of section 300 of the Companies Act. It is noted that the provision of these sections have not been complied with. In view of the same, the modification that took place was void and the contention of the promoters that the resolution passed in the AGM dated August 2, 1994 was an enabling resolution and that there was no compulsion on their part to opt for 10 shares for each warrant and that their action was not in variance with the undertaking, is under these circumstances, not tenable.

46. It is to be noted that at page 10 of the prospectus, the table showing promoters' holding in expanded capital at each stage of conversion of OCNT warrant indicates that each of the said warrants would be converted into 10 equity shares in four stages. In addition, the undertaking by the promoters on page 11 states that the conversion will be at Rs.400 per share. Further the undertaking given by the promoters refers to both the price at which the conversion shall take place as well as the manner in which the conversion will take place, the exact figures for which have been provided in the table on page 10. Hence, there is no scope for any ambiguity on this issue. The promoters were obliged to convert the warrants into shares as per the schedule mentioned on page 10 at the price given in their undertaking.

47. The promoters contend that the market price of the company's share at the time of the public issue was in the range of Rs.600-800 which was the prime inducement for the investors to invest in the shares of the company.

48. Interestingly enough I have noted that during January 1994, the share price of the company was hovering around Rs.100 in the stock market. In July, 1994, it was quoting at Rs.250/- and suddenly shot up to Rs.850/- at the time the company came up with the public issue with the premium of Rs.390 per share. Now the price of the scrip is quoting below par i.e. Rs.8.50/-.

49. I find it difficult to accept the contention that as the warrants were optionally convertible, no investor can be induced by the options available to the promoters. It can not be ignored that one of the prime concerns, of any investor, while deciding on investment is the commitment of the promoters to the company to exercise option of Rs.400/- for a period of 4 years. The fact that the promoters' shareholding would increase gradually to 72% over 4 years would carry weight in the minds of the investors. Moreover, the fact that the promoters were ready to pay Rs.400/- per share even over a period of 4 years, thereby giving a level of confidence or inducement to the investor to invest at the issue price of Rs.400/-.

50. The said disclosure definitely induced the investors to subscribe to the issue on the basis of this undertaking of the promoters which promised a huge funds commitment by the promoters. The present market value is approximately Rs.8.50/- as against the issue/conversion price of Rs.400/-. The issuer company has collected a sum of Rs.146.20 crores on the promise that the promoters would take one crore shares at Rs.400/- each on conversion of the warrants. This is reflected under the head "Capital Structure". Thus the undertaking of the promoters to pay Rs.400 crores for the One crore shares is a material feature in the prospectus. If the promoter wish to back out of their undertaking, it would be a clear case of making a promise without any intention of performing it and would amount to "fraud " as defined in the Indian Contract Act and also a violation of Sections 63 and 68 of the Companies Act.

51. The contention that the disclosure regarding these instruments were made only to fulfill the requirements of the SEBI guidelines is an indication of the casual attitude of the promoters towards their obligation to investors and comply with the provisions of law. Therefore the promoters who have made such statements and given such undertaking based on which the investors have invested at Rs.400/- per share, cannot wriggle out from their promise. It is absolutely necessary that such promoters are sternly dealt with and that the interest of the investors is protected. If the promoters wriggle out on such pretext, it would erode the confidence of investors in the capital market and would be detrimental to the economy.

52. It has been mentioned that the present issue has basically arisen on account of the complaints of Shri SP Gupta of Sunair Hotel Ltd., who besides being a defaulter member of VLS Finance had indulged in fraudulent and illegal activities in Sunair Hotel Ltd. and is now involved in the efforts to defame VLS for ulterior motives. Wherever there is such violation or the interest of the investors is involved, SEBI would take necessary action irrespective of the receipt of such complaints.

53. On the basis of the above, it could be concluded that the promoters had made a promise in the prospectus without any intention of performing it which amounts to a fraud. One can reasonably state that cases like these make investors loose their confidence in the capital markets. Such promoters should not be allowed to back out of their undertaking made in the prospectus, by taking recourse to interpretation of the undertaking given by them in the prospectus.

54. As regards the applicability of Section 11 B of the SEBI Act to the present case, the same was inserted to empower SEBI to make directions for the protection of interests of investors and the securities market. Hence while action cannot be taken under a particular statute on the basis of events which took place prior to its enactment, it is well settled that past conduct, even that occurring prior to the enactment of the statute can be considered for imposing a posterior disqualification. If the object of a statute is not to inflict punishment but to protect the public from the activities of undesirable persons who bear the stigma of misconduct of their character, the misconduct of such a person before the operation of the statute may be relied upon. This proposition derives support from the

decision of the Supreme Court in State of Bombay v. Vishnu Ramchandra, AIR 1961 SC 307. Thus there is no infirmity in taking action under section 11 B in the present case.

55. Further under section 11, SEBI has been in no uncertain terms mandated to protect the interest of investors in securities by such measures as it thinks fit. Under Section 11, SEBI has framed guidelines for Disclosure and Investor Protection under which the public issue in question was made. Thus in view of Section 11 which was in the statute book since 1992, the promoters or the company cannot take shelter from those events that took place after the enactment of the SEBI Act containing Section 11. The Securities Appellate Tribunal in Appeal No. 7/2001 -- @ Integrated Amusement Ltd. Vs. SEBI has held that Section 11 and 11B are interconnected and coextensive as both these sections are mainly focused on investor protection. Therefore, even if Section 11B was inserted subsequently, SEBI has powers under Section 11 to take action.

56. The proposed action against the company and its promoters is not penal but preventive so as to prevent them from causing further damage to the securities market. The promoters have accessed the capital market making a statement in the prospectus to the effect that they will subscribe OCNTW at Rs.400/- . Hence, and the investors who have subscribed to the issue based on such a commitment of the promoters, would certainly feel cheated, if the promoters fail to act upon their commitment. If such a company is once again allowed to access the capital market, the same would shatter the confidence of the investors in the securities market. Hence, such directions are preventive and not punitive.

57. During the course of considering the various issues raised in this case, I have had the opportunity to peruse the previous track account of the company in its dealings in various fields related to the capital market and have noted that the company has a rather dubious track record in the market, some of which are as under:

1. VLS Fin acquired shares of Track parts, in violation of the SEBI(Substantial Acquisition of shares and Takeovers) Regulations, 1997. They made an application for exemption, to the takeover panel. The panel rejected the case on 19.2.2002 and the matter was referred to adjudication for violation of Regulation 15 H(ii) of the said Regulations.
2. Earlier, in the same case, a penalty of 5 lacs was imposed on the entity, for non-disclosure, which was reduced to Rs.25,000/- which was paid by the entity.
3. As per the data base of the investigation department of SEBI, an enquiry is under process against VLS Finance Ltd for their role as merchant banker in the issue of M/s. Best vision Electronics Ltd.

58. On the basis of the facts and circumstances of the case and the various issues deliberated upon, it is clear that the action of the promoters of the company as elaborated above is detrimental to the orderly development of securities market and to the interest of

the investors. It is also noted that the Company does not have a good track record in complying with the rules/regulations. Hence necessary action is required to be taken by SEBI in order to ensure that the investors in the securities market do not in any way suffer any losses and are not put to any harm and that the safety and integrity of the market remain unimpaired.

Order

59. Hence in exercise of the powers conferred upon me under section 4(3) of the SEBI Act, 1992 read with Sections 11 and 11B of the SEBI Act, 1992, I hereby direct that Mr. M. P. Mehrotra, promoter of the company and Mr. Somesh Mehrotra, director of the company, honour their commitment relating to the conversion of warrants as undertaken or represented by them in the prospectus dated November 14, 1994 within a period of 30 days from the date of this order, failing which Mr. M. P. Mehrotra, Mr Somesh Mehrotra and the other companies, which they have promoted or in which they are holding or controlling a substantial interest, shall hereby be restrained, from accessing the capital market, directly or indirectly for a period of 5 years."

60. The order has identified the following primary points of contention i.e. (i) whether or not the promoters have exercised the option of conversion of OCNT Warrants in terms of the undertaking given by them which is disclosed in the prospectus (ii) whether the promoters by giving undertaking in the prospectus to subscribe OCNT Warrants have induced the investors to subscribe in public issue and (iii) whether the promoters have committed breach of fulfillment of undertaking referred to in the prospectus.

61. Indisputably the whole issue evolves around the OCNT Warrants issued by the company to the promoters and the undertaking given by the Appellants in connection therewith. The clinching factor is the true interpretation of the said undertaking. In this connection disclosure in note 7 on page 11 of the prospectus has been considerably relied on by the parties. Even though the text of the said note has been already extracted while recording the submission of the parties, it is considered necessary, even though at the cost of repetition, to extract the same for ready reference. It is as follows:

"The promoters have been issued 10 lakh optionally convertible non transferable warrants (OCNT) each convertible into 10 equity shares at their option which shall be exercised not earlier than 12 months and not later than 60 months from the date of allotment of the warrants. This OCNT warrants issue was approved by the shareholders in their meeting held on 2.8.94 and allotted to the promoters in the Board meeting held on the same day. The promoters have given an undertaking to the company that they shall opt for conversion at Rs.400/- per share. They have also undertaken that the conversion shall be opted in phases so that the growth rate in the Earning Per Share (EPS) is maintained every year. At each stage of conversion of OCNT warrants with the promoters, it would be ensured that promoters' holding does not fall below 25% of the expanded capital. At each stage of conversion of the OCNT warrants 25% of the

shares arising out of such version would be locked in for a period of 5 years from the date of allotment of such shares."(emphasis supplied)

62. The "undertaking" referred to in the note is the one dated 6.9.94 given by Appellant No. 2 as the 'Representative of the Promoter group' vide his letter addressed to the Board of Directors of the company. Full text of the said letter has already been extracted in the earlier part of the order:

It is seen there from that the Appellant had undertaken to convert the OCNT Warrants and take the resultant shares at the price of Rs.400/- per share. They had also undertaken to opt for conversion in phases so that the growth rate in the earning per share of the company is maintained every year. The tentative period for conversion of OCNT Warrants as per the said undertaking was that (a) 1996-97 10% of total number of OCNT Warrants (b) 1997-98 30% of total number of OCNT Warrants (c) 1998-99 30% of total number of OCNT Warrants (d) 1999-2000 30% of total number of OCNT Warrants. It has been stated that at each stage of conversion 25% of Shares arising out of conversion of warrants would be locked in for a period of 5 years from the date of allotment of shares in order to maintain 25% Promoters' contribution in the company at all times. I have also noted that the Appellants had categorically stated therein that "the terms of the issue of OCNT Warrants is fully agreeable to us...."

63. The undertaking referred to above is in the context of the decision of the company conveyed through a special resolution passed in its general meeting held on 2.8.1994 authorising the Board of Directors to offer, issue and allot on preferential basis to the Promoter Group in such manner and within such period and at such time upon such terms and conditions and at such price such securities including warrants with right exercisable by warrant holders to convert or subscribe to equity shares, for cash at such price not exceeding Rs.400/- per share upto an aggregate amount not exceeding Rs.400 crores. It is also noted that for the purpose, the general meeting of the shareholders had authorised the Board of Directors of the company "to do all acts, deeds and things in connection therewith and incidental thereto as the Board in their absolute discretion deem fit without being required to seek any further consent or approval of the company". Pursuant to the said special resolution the Board of Directors in their meeting also held on 2.8.1994 resolved to issue OCNT Warrants to the promoters group inter alia stipulating that holders of each warrant shall be entitled to apply for and obtain at their sole discretion ten equity shares at a price not exceeding Rs.400 per share during the period of 12 months to 60 months from the date of issue of warrants. By a subsequent Board resolution as per the suggestion made by the Appellants' merchant banker (SBI Capital) the conversion price was fixed at Rs.400/-, instead of leaving it open ended. It is thus clear that the conversion ratio of 1:10 and the conversion price of the equity share at Rs.400/- per share was fixed by the Board of Directors.

64. The disclosure at note 7 on page 10 of the prospectus, to the extent I could see is a factual statement, based on the resolutions referred to earlier and the undertaking given

by the Appellants vide the letter dated 6.9.94. It is not in dispute that the company on 2.8.94 had issued to the promoters, 10 lakh ONCT Warrants each convertible into 10 equity shares. It was as per the terms left to the promoters to opt or not to opt for conversion. If they were exercising the option, it was to be exercised within the time frame prescribed. There is no quarrel upto this part of the disclosure. The dispute is with reference to the rest of the disclosure that "the promoters have given an undertaking to the company that they shall opt for conversion at Rs.400/- per share". The undertaking referred to herein is the one dated 6.9.1994 referred to earlier. According to the Respondent as per the said undertaking, the Appellants had committed to convert the entire 10 lakh OCNT Warrants to one crore equity shares at a conversion price of Rs.400/- per share in a span of 4 years. I have very carefully examined the text of the said undertaking, as available on record. But I do not find any indication therein that the Appellants had given any undertaking that they would convert the entire 10 lakh warrants to equity shares. The undertaking as it is couched is on their willingness to purchase shares on conversion at the rate of four hundred rupees per share. It is difficult even to infer that by the said statement they had given up their right of option. Even the conversion period recorded therein has been stated as tentative. Tentative means not definite. They have only referred to percentages and not any definite numbers. There is nothing definitely stated as to the quantum of the OCNT Warrants they had agreed to convert into shares. Respondent has not produced any reasonable evidence to indicate that the promoters had given an undertaking to the effect that they would be converting the entire 10 lakh OCNT Warrants. In this context it is to be noted that the underlying security is optionally convertible non transferable warrants. It has been made clear in the disclosure at note 7 that each OCNT warrant is convertible into 10 equity shares at the option of the promoters. The Respondent has also admitted that conversion is optional. But their contention that by the undertaking dated 6.9.94 the Appellants had exercised the option to convert the entire 10 lakh OCNT Warrants, in my view is unfounded. The Respondent had relied considerably on the statement that "the promoters have given an undertaking to the company that they shall opt for conversion at Rs.400/-. The relevant para in the Appellants' undertaking letter is para (1). It has been stated thereat "we shall convert the OCNT warrants and take the resultant shares at the price of Rs.400 per share". It is to be noted that full text of the 'undertaking' was not available to the prospective investors. They had only the disclosure made in note 7 before them. In my view it is not possible to construe the disclosure statement to give a meaning that it refers to the entire 10 lakh warrants. The statement has to be viewed in the context that the warrants were convertible at their option. "shall opt for conversion at Rs.400/-" is a composite part of the statement. It is not possible to interpolate the said portion by adding the words "of entire OCNT Warrants". It is a part of the contract underlying the issue of the OCNT Warrants. The parties to the contract are the Appellants and the company. The intention is, therefore, best known to them. The Respondent had also relied on the undertaking that we shall opt for conversion in phases. Here again there is no indication that the Appellants had agreed to opt for conversion of the entire 10 lakh warrants. This was a commitment limited to the periodicity of conversion of those OCNT Warrants on the Appellants deciding to convert the warrants.

65. The Respondent had referred to certain portions in the prospectus to show that by the undertaking dated 6.9.94, the Appellants had exercised their option to convert the entire 10 lakh OCNT Warrants and this is reflected in the disclosures;- 'Capital Structure' on page 10, 'promoters holding in expanded capital at each of conversion OCNT Warrants (on p.10). I have perused the said disclosures. The disclosures made therein are based on the assumption of converting the OCNT Warrants. It has to be noted that an assumption is not definitive, it means "an act or an instance of accepting without proof." In this context it is to be noted that in the prospectus "Paid up capital after issue" has been shown. Can one say that the said disclosure was based on certainty that the shares offered would be subscribed fully? In many cases the issue results in under subscription and the application money is returned. But in that event such companies are not charged for making untrue statement in the prospectus. In my view the disclosure made on the basis of assumptions cannot be relied on to support the contention that the Appellants had on 14.11.1994 (i.e. date of prospectus) committed to convert the entire 10 lakhs OCNT warrants. The Respondent's version that the prospectus does not state "'assuming' full conversion', in my view is not of much help to the Respondent, as an investor relying on the information furnished in the prospectus is capable of understanding the reliability of projections made on the basis of assumptions. In this connection the observation made by the Hon'ble Bombay High Court in Kisan Mehta & Anr. V Universal Luggage Manufacturing Co. Ltd. & Anr. (1988 (63) Co. Cases 398 (Bom) is to be noted. In the said case the Hon'ble Court was considering a suit filed by the plaintiffs, public interest litigants, for injunction against the defendant company alleging that the defendants had issued a prospectus in which they had shown various items as profits, but which were infact liabilities that, therefore, the prospectus did not give a fair and true picture of the company, with the result that statements contained in it might mislead the public and result in public injury. While dismissing the suit the Hon'ble Court viewed "....I am not prepared to accept that those voluntary public investors are so gullible enough as to fall a prey to such an invitation. It is well known that fluctuations in the stock market do not necessarily depend upon the profit and loss of any company. Investment in shares depend upon a variety of factors. The investors have their own calculations and the court cannot circumscribe the same. What is required in all matters of this type, assuming that there is some truth in what the plaintiffs say, is public knowledge and not any judicial interdiction."

66. The Respondent's contention that the disclosure of the undertaking made by the promoters which promised huge fund commitment by the promoters, made in the prospectus induced the investors to subscribe to the issue, by itself is not very sound. Investor no doubt, takes into consideration the credibility of the promoters and the extent of their stake in the company. It is to be noted that even at the time of public issue the promoter holding in the company's capital was to the tune of 70%. The most important attraction to invest in the shares, could be the then prevailing market rate. This is evident from the following observation found in the order itself. "Interestingly enough I have noted that during January 1994, the share price of the company was hovering around Rs.100/- in the stock market. In July 1994 it was quoting at Rs.250/- and suddenly shot upto Rs.850/- at the time the company came up with the public issue with the premium of Rs.390/- per share". There is no allegation in the order that the share price was rigged by

the promoters. In the normal course any ordinary investor would like to procure shares offered in a public issue at half the ruling market price (around Rs.850/-) and that could be the main reason for drawing the investors to the public issue resulting in over subscription by 5 times. The factual disclosure made in note 7, in my view cannot have such an "inducing effect" to draw such a big response to the public issue resulting in the issue getting oversubscribed by five times. In any case the said disclosure did not in any manner suggest with certainty that the promoters would be bringing Rs.400 crores from their side to the company's capital, as the OCNT Warrants' conversion was optional as the very description of the warrant suggested.

67. It has been stated in the order that it could be concluded that the promoters had made a promise in the prospectus without any intention of performing it which amounts to a fraud. In this context it is noted that Shri Barua, during the course of the arguments to prove that the promoters had failed to fulfill their commitment, had submitted that the promoters had the intention to convert the entire OCNT Warrants. In support he had referred to the following statement in the Appellants' letter dated 25.7.2002 to the Respondent that

"the promoters, in all fairness, had the intention to honour their undertaking and they have done it by opting to convert one lakh Optionally Convertible Non - Transferable Warrants into one lakh shares at Rs.400/- per share, whereas the price at that time was Rs.45/- only. Kindly see that the promoters intention was to exercise the option, and that is why, it was assumed while making the financial projections. However, subsequent scenario in the capital market, particularly after M. S. Shoe fiasco, had changed considerably."

68. This admitted position cannot be ignored. In any case the Respondent has not established in any manner that the Appellants had no intention of converting the OCNT Warrants to equity shares, at that point of time. In the order, the Appellants' alleged failure has been viewed as a fraud. It is a very serious charge and cannot be ignored. But it has to be proved. In the instant case charge has been made without adequate supporting evidence. In this context the observation made by the Hon'ble Supreme Court in Bishundeo Narain & Anr V Seogeni Rai & Ors. (AIR 38) 1951 Sc 280) is noted:

".....if there is one rule which is better established than any other, it is that in cases of fraud, undue influence & coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

69. According to the Respondent since the OCNT Warrants were allotted to promoters as per the special resolution passed in the general meeting of shareholders of the company

held on 2.8.1994, the Board resolution dated 14.1.98, modifying the said resolution allowing the promoters to opt for one share for each OCNT Warrants as against the original requirement of 10 shares is not as per the provisions of the Companies Act. It was submitted that section 61 of the Companies Act, 1956 requires that any change in the terms of the prospectus can be made only with the approval of the general body and further the Appellants being interested Directors the resolution passed by the Board of Directors is void. Both these contentions are untenable in the light of the facts of this case. It is noted that the resolution dated 2.8.1994 passed in the general meeting had only consented to the issue of shares/warrants to the promoters in a specific price band to the extent to raise funds upto the specified limit. It was a general approval leaving the specifics to the Board. It is clear from the resolution that the implementation of the said decision was left to the Board of Directors of the company. The resolution inter alia stated:

"the consent of the company is hereby accorded to its Board of directors or their duly constituted committee, as the case may be (hereinafter referred to as the Board or Committee) to offer, issue and allot:

- * on preferential basis to the Promoter Directors, their relatives, friends, associates and the companies promoted by the Promoter Directors or controlled by them or associates.
- * in such manner and within such period and at such time or times and upon such terms and conditions and at such price including security, rate of interest etc. as may be deemed appropriate, by the Board of Directors,
- * equity shares/Fully Convertible Debentures/Partly Convertible Debentures and /or any one or more of such securities and or other instruments with or without detachable warrants or naked warrants with a right exercisable by the warrant holders to convert or subscribe to equity shares;
- * for cash at such price (including premium) as may be decided by the Board but not exceeding Rs.400/- per share upto an aggregate amount not exceeding Rs.400 crores (inclusive of such premium as may be fixed on such securities)"

70. The shareholders, on the same day

"Resolved further that for the purpose of giving effect to all or any of the foregoing, the Board be and is hereby authorised in its absolute discretion as the Board may deem fit:

(a)

(b)

(c) to do all acts, deeds and things in connection therewith and incidental thereto as the Board in their absolute discretion deem fit without being required to seek any further consent or approval of the company (emphasis supplied)

71. It is thus clear that the Board was given all powers to do all acts, deeds and things in connection with OCNT Warrant issue and it was in exercise of such blanket authority so given, the Board originally decided (dated 2.8.94) to issue the 10 lakh OCNT Warrants subject to the condition that "the holder(s) of each warrant shall be entitled to apply for and obtain at their sole discretion ten equity shares at a price not exceeding Rs.400/- (subsequently fixed at Rs.400/-)" after 1 year but before expiry of 5 years from the date of allotment.

72. Subsequently the Board vide its resolution dated 14.1.1998 varied the original term by giving the promoters the option to opt for one equity share for each OCNT Warrant as against the earlier requirement of opting for 10 equity shares for each OCNT Warrant. Since the Board had acted well within the power given to it by the shareholders in the general meeting, it cannot be said that the said variation was unauthorized. With reference to the Respondent's contention that the requirement of section 61 of the Companies Act was not followed, it is to be first noted that the Appellants have not varied the terms and conditions of the prospectus. Variation of the terms and conditions in a prospectus and variation of the terms and conditions of a contract referred to in the prospectus is different. Section 61 is not on variation of the terms and condition of prospectus. It is on variation of the terms of contract mentioned in the prospectus. According to section 61:

"A company shall not, at any time, vary the terms of contract referred to in the prospectus or statement in lieu of prospectus except subject to the approval of, or except on authority given by, the company in general meeting."

73. This section is applicable when there is a variation of any contract which is referred to in the prospectus/statement in lieu of prospectus. It is not limited to the contract, a copy of which is required, by clause 16 of Schedule II, of the Companies Act, to be delivered to the Registrar of Companies along with the prospectus. The words "at any time" appearing in the section imply that the variation is permissible long after the prospectus has been issued or statement in lieu of prospectus has been filed, provided such variation is made on the authority of the General Body of the shareholders. It is not necessary that for the variation in the contract referred to in the prospectus or statement in lieu of prospectus, a meeting of the general body of shareholders must be called and approval obtained. In case the contract had already been entered into with the approval of

shareholders who had given the authority to the Board of Directors who may decide to vary the contract at any time, no further meeting of the shareholders is required to be called to obtain their approval. Where, however, the contract did not have the sanction of the general meeting of shareholders or the general meeting of shareholders had not specifically conferred the authority on any one to vary the terms of the contract, it will be necessary to go to the shareholders to obtain their approval. That is why this section gives both the alternatives so that a variation can not only be made with the approval of the company in general meeting but can also be made on the authority of the general meeting, if such an authority already exists. (Madan Gopal Jajoo V Union of India (1992) 9 CLA 1 (Delhi)

74. It is not the Respondent's case that contract underlying the issue of OCNT Warrants has no approval of the general meeting. As stated earlier the OCNT warrant was issued as approved by the general meeting of the shareholders of the company held on 2.8.1994 and the said meeting had authorised the Board of Directors of the company to do "all acts, deeds and things in their absolute discretion without being required to seek any further consent or approval of the company". The variation referred to above was done under the said authority.

75. It is true that the conversion was not done in a phased manner in 1996-97, 1997-98 as stated in the undertaking given by the promoters on 6.8.1994. But it is seen that the undertaking was to opt for conversion in phases so that the growth rate in the EPS of the company is maintained every year. But the time table put forth by them was not a definitive one, as they had mentioned the same as the "tentative period for conversion". This time schedule was not disclosed in the prospectus and therefore it cannot be said that the promoters had taken into consideration the said time schedule while subscribing to the shares. But in the light of the variation effected to the terms and the Appellants having opted to convert only one lakh OCNT Warrants in one go, and that there is no further scope for more conversion as the 60 months period is already over it is not possible to hold that the Appellants had breached their aforesaid commitment.

76. The Respondent's submission that since the promoters are the directors of the company and thereby being interested persons, the resolution passed by the Board varying the terms of the OCNT Warrants issue is not valid, is baseless. It is on record that the Appellants are not the only directors of the company. It has 11 directors. The Respondent has not produced any evidence to show that the Appellants had participated in the discussion or voting on the resolution effecting variation in the terms of the OCNT Warrants issued, that it was for the Respondent to adduce evidence to show that the section 300 of the Companies Act attracted. Except making a blatant statement that provisions of sections 61 and 300 have not been complied with, the Respondent has not substantiated the said version. Since the Appellants have refuted the said contention it was all the more necessary for the Respondent to bring in material in support of their contention.

77. In the light of the above discussion, I am of the view that the Appellants have exercised the option of conversion of OCNT Warrants into equity shares in terms of the

undertaking given by them as disclosed in the prospectus dated 14.11.1994 and there is nothing to show that the Appellants had given actually misleading information in the prospectus so as to induce the investors to subscribe to the shares offered in the public issue. From the material available on record, it is not possible to conclude that the Appellants had committed breach of the undertaking referred to in the prospectus.

78. The Appellants have contented that the Respondent has no power under the Act, to issue the impugned direction. Both the parties had advanced arguments in respect of the powers of the Respondent to pass the impugned order. In my view since the charge against the Appellants have not been established, the question of issuing any direction with reference to the charge does not arise. However, since the issue has been raised, it is felt that in fairness the same need be briefly dealt with.

79. Shri Barua had relied on section 11(4)(b) of the Act also to support the contention that the Respondent is empowered to issue the impugned direction. Section 11(4)(b) provides:

"11.(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:-

(a) xxxxxx

(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities."

80. This section was added to the Act with effect from 29.10.2002, i.e. after passing the impugned order on 20.9.2002. The section was not in position when the impugned order was made and as such Shri Barua's reliance on the said section in support of his contention that the Respondent is empowered to issue the impugned direction under the said section also, is untenable.

81. This Tribunal, in several of its decisions had dealt with in detail the powers of the Respondent to take measures under sections 11 and 11B of the Act to protect the interests of investors. Section 11 and 11B give adequate powers to the Respondent to protect the interests of investors.

82. Section 11 and 11 B are extracted below:

"11(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."

83. Sub section (2) enlists certain measures specifically without prejudice to the generality of the provisions of sub section (1).

"11B. Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary, --

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

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

it may issue such directions, --

(a) to any person or class or persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market."

84. In this context the decision of this Tribunal in Bank of Baroda V Securities and Exchange Board of India (2000) 26 SCL (532) and Sterlite Industries Ltd. V Securities and Exchange Board of India (20012) 34 SCL 485 refers to.

85. This Tribunal citing several authorities had held in Bank of Baroda:

"Section 11 and section 11B are interconnected and coextensive as both these sections are mainly focused on investor protection. On a careful perusal of the said section 11 referred to in the earlier paragraphs, it could be seen that the Respondent has been in no uncertain terms mandated to protect the interests of investors in securities by such measures as it thinks fit. Of course those measures are subject to the provisions of the Act. The expression 'measure' has not been defined in the Act. So we have to go by its generally understood meaning. According to Corpus Juris Secundum measure means "anything desired or done with a view to the accomplishment of a purpose, a plan or course of action intended to obtain some object, any course of action proposed or adopted by a Government". However, I am not inclined to agree with the Respondent's view that the power under section 11 is unlimited. I am of the view that the legislature has circumscribed the power, by putting the caveat that these measures are

subject to the provisions of the Act. The ambit of power is contained within the frame work of the Act. But within the statutory frame work such power reigns.

While section 11 deals with the functions of the Board, section 11B is on the powers of the Board. Section 11B is more action oriented, in a sense it is a functional tool in the hands of the Board. In effect section 11B is one of the executive measures available to the Respondent to enforce its prime duty of investor protection. As could be seen from the text of the section reproduced above, the Respondent is empowered to issue directions in the interests of investors to any person or class of persons referred to in section 12 of the Act or associated with the securities market. In other words the section identifies the persons to whom and the purposes for which, directions can be issued.

Gujarat High Court had examined the scope of section 11 and section 11B vis-a-vis the Respondent's position, while deciding an appeal against the Single Judge's order in Alka Synthetics Case (supra). The basic issue for consideration before the Division Bench in the said appeal was as to whether the Respondent had the authority to issue an order under section 11B of the Act for impounding or forfeiting the money received by stock exchanges, as per the concluded transactions under its procedure, until final decision is made. While negating the views of the Single Judge, and upholding the Respondent's power to issue such a direction under section 11B the Court observed:-

" The SEBI Act is an Act of remedial nature and, therefore, the preset cases could not be compared with the cases relating to the fiscal or taxing statutes or other penal Statutes for the purposes of collection of levy, taxes etc. As and when new problems arise, they call for new solutions and the whole context in which the SEBI had to take a decision, on the basis of which impugned orders were passed, cannot be said to be without authority of law in face of the provisions contained in section 11 and section 11B. As the language of section 11(1) itself shows and as the matters for which the measures can be taken are provided in sub-section(2) of section 11. It is clearly made out by the plain reading of the language of the section itself that the SEBI has to protect the interests of the investors in Securities and has to regulate the securities market by such measures as it thinks fit and such measures may be for any or all of the matters provided in sub-section (2) of section 11 and in due discharge of this duty cast upon the SEBI as a part of its statutory function, it has been invested with the powers to issue directions under section 11B.

Thus, so far as the authority of law in the SEBI to issue such directions is concerned, such authority to take measures as it thinks fit is clearly discernible on the basis of the provisions contained in section 11 read with section 11B of the SEBI Act. We have to therefore consider and interpret the power of SEBI under the provisions so as to see that the objects sought to be achieved by Act is fully served, rather than being defeated on the basis of any technicality..... The duty and function had been entrusted to take such measures as it thinks fit and in order to discharge this duty, the power is vested under section 11B. The authority has been given under the law to take appropriate measures as it thinks fit and that by itself is sufficient to cloth the SEBI with the authority of law".

One has to view the powers of the Respondent under the provisions of the Act in the context of the objects sought to be achieved by the Act and the duty cast on them in achieving the same. Section 11 and section 11B give enormous authority to the Respondent in this regard. As long as the power exercised under section 11B is subject to the provisions of the Act and well within the legal and constitutional frame work, intended to achieve the purposes of the Act and subjecting the persons specified in the section, the power will sustain. Since the exercise of power is subject to the provisions of the Act and the purposes for which it can be exercised and the persons to whom it can reach has been specified in the section, it can not be said that the power is unguided or unlimited. It is a wholesome provision designed to achieve the objectives of the Act."

86. This Tribunal had examined in detail the scope of Section 11B in Sterlite Industries case. In the said decision, citing several authorities this Tribunal had viewed that the Respondent is empowered to issue directions to protect the interest of investors. But it was also held that Section 11B cannot be invoked to issue directions which tantamount to imposition of penalties.

87. SEBI is empowered under section 11 to take appropriate measures to protect the interest of investors, as has been held in Bank of Baroda and Sterlite Industries. This Tribunal had held in Anand Rathi V Securities and Exchange Board of India (2002) 35 SCL that the Respondent is empowered to issue prohibitory orders as a preventive or remedial measure. The Appellants' argument that 11B was not in position when the prospectus was issued in 1994, is of no help to them, as the alleged violation is subsequent to the bringing in of section 11B to the Statute Book in 1995. In the order it has been stated that the direction was issued as a preventive measure. Whether a direction is preventive/remedial measure or is punitive action depends upon several factors. Facts specific to each case is also important in deciding the nature of the direction. In the instant case since the Respondent has failed to establish charges, I do not consider it

necessary to go into the question as to whether the impugned order is preventive/remedial or punitive.

88. For the reasons stated above the appeal allowed and the impugned order set aside.