

IN THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing 16.11.2005
Date of Decision 8.12.2005

Appeal No.345/2004

In the matter of:

DSQ Securities Ltd.,

Appellant – Represented by
Mr. I. Subramanian, Sr.
Advocate and Mr. Vaidyanathan

Versus

Securities & Exchange Board of
India

Respondent – Represented by Mr.
Rafique Dada, Sr. Advocate
and Mr. Kumar Desai,
Advocate.

Appeal No.346/2004

In the matter of:

Dinesh Dalmia

Appellant – Represented by
Mr. I. Subramanian, Sr.
Advocate and Mr. Vaidyanathan

Versus

Securities & Exchange Board of
India

Respondent – Represented by Mr.
Rafique Dada, Sr. Advocate
and Mr. Kumar Desai,
Advocate.

Coram:

Justice Kumar Rajaratnam, Presiding Officer
C. Bhattacharya, Member
R. N. Bhardwaj, Member

1. The appeals are taken up for final hearing with the consent of all the parties by a common order as both the appellants challenge a common order of SEBI.

2. Briefly stated, the facts of the case are that DSQ Software Ltd., formerly known as Square D Software Ltd., was a company engaged in Software business with its registered office initially in Kolkata but later shifted to Chennai. Shri Dinesh Dalmia and his group concerns were the main promoters of the company. The Board of directors consisted of the following persons apart from Shri Dinesh Dalmia as on 31/12/2000:
 - i. Mohammed Ghulam Ghouse
 - ii. Brigadier (retd) V. M. Sundaram
 - iii. S. K. Bhatnagar (deceased in 2001)
 - iv. B. K. Pal
 - v. J. Narayanamurthy (IDBI Nominee)
 - vi. K. M. Venkateswaran

3. A sharp fluctuation in the price of the scrip of the company was noted during the period October, 1999 to March, 2001. The price increased from Rs.250/- in October, 1999 to Rs.2631/- in March, 2000, but fell to Rs.150/- only in March, 2001. The said movements in price were also accompanied by very large volume on all the stock exchanges i.e. BSE, NSE and Kolkatta Stock Exchange. Investigations by SEBI revealed serious irregularities in the allotment of shares by the company as also in the dematerialization of shares so allotted and subsequent sale of such shares by brokers and entities associated with the promoters of the company. The following

are the main findings of SEBI Investigation extracted in the impugned order:

Quote “(a) It is observed from the listing application dated February 26, 2001 submitted to the Stock Exchanges by the company that 1.70 crore shares were allotted to the following entities:

Date of allotment	No. of shares	Distn.Nos.	Name of allottees
20-5-2000	30,00,000	30250001-33250000	New Vision Investments Ltd.,
12-01-2001	1,40,00,000	33250001-47250000	Pref. allotment to shareholders of Fortune technologies Inc.USA viz: 1. Technology Trust, Mauritius 2. Softec Corporation Ltd., Mauritius 3. New Vision Investments Ltd.,

However, the investigation revealed that the company had allotted 1.30 crore shares to the following entities in the year 2000 itself as given below.

Name of Entities	Allotted on	Dematted	Distinctive Nos.	Remarks
30 Lakh shares to New Vision Investment Ltd., UK	20/05/2000	30/05/2000	30250001-33250000	Pref. allotment
30 Lakh shares to Dinesh Dalmia, Trustee, Technology Trust	05/10/2000	17/10/2000	33250001-36250000	Pref. allotment
40 Lakh shares to Dr. Suryanil Ghosh, Trustee, Softec Corporation	24/10/2000	31/10/2000	36250001-40250000	Pref. allotment
30 Lakh shares to Dinesh Dalmia, Trustee, Technology Trust	4/12/2000	10/12/2000	40250001-43250000	ESOP

In 2001, 40 lakh shares were allotted in physical form as given below:

Name of Entities	Allotted on	Dematted	Distinctive Nos.	Remarks
40 Lakh shares to New Vision Investment Ltd., New Delhi.	12/01/2001	Not dematerialized	43250001-47250000	Pref. allotment

(b) The shares allotted to New Vision Investment Ltd., UK, Dinesh Dalmia, Trustee, Technology Trust & Dr. Suryanil Ghosh, Trustee, Softec Corporation were subsequently transferred/sold by these entities in the market without listing/ obtaining listing permission, at the stock exchanges. It was revealed that around 52.12 lakh of shares were transferred from these entities to DSQ Holding Ltd., around 15.25 lakh shares were transferred to Powerflow Holding & Trading P. Ltd., around 3.75 Lakh shares were transferred to Hulda Properties & Trades Ltd., and around 58.70 Lakh shares transferred to various brokers' pool accounts and beneficiary accounts during May 2000 to January 2001." Unquote

4. During the pendency of the Investigation on the unusual fluctuation in price and volumes in the shares of the company which SEBI had initiated by order dated 29/3/2001 the following Interim order was passed by SEBI vide its order dated July 20, 2001.

1. DSQ cancel the acquisition of Fortuna Technologies being done on swap basis after following the procedure laid down under the Companies Act.
2. DSQ be prohibited from accessing capital market for a period of one year or completion of investigation and action thereupon whichever is later.
3. Shri Dinesh Dalmia, Managing Director, of the company be debarred from dealing in securities for a period of one year or completion of investigation and action thereupon whichever is later.

Subsequently SEBI vide its order dated December 20, 2001 confirmed the aforesaid action.

5. The shares allotted to New Vision Investment Ltd, UK, Dinesh Dalmia, Trustee, Technology Trust & Dr. Suryanil Ghosh, Trustee Softec Corporation were subsequently transferred/ sold by

these entities in the market without listing / obtaining listing permission, at the stock exchanges. It was revealed that around 52.12 lakh of shares were transferred from these entities to DSQ Holding Ltd, around 15.25 lakh shares were transferred to Powerflow Holding & Trading P. Ltd., around 3.75 Lakh shares were transferred to Hulda Properties & Trades Ltd., and around 58.70 lakh shares transferred to various brokers' pool accounts and beneficiary accounts during May 2000 to January 2001.

6. On examination of the demat account of New Vision Investment U K, it was revealed that all the 30,00,000 shares allotted to it in May 2000 were sold by it till December 2000. It is noteworthy that that partly paid up shares were dematerialized as fully paid up and sold in the market as "good delivery", although at the time of the sale of the shares on the BSE / NSE, the shares were not listed.

7. In respect of 30 lakh shares allotted to New Vision Investment on 20/5/2000 it was alleged that the shares were allotted on partly paid up basis. However, in its application to the Depository NSDL for dematerialization, the company had indicated that the shares were fully paid up and given the same ISIN in which the shares issued earlier were credited. These shares were then sold by the entities controlled by Shri Dinesh Dalmia. All the shares allotted were sold by December, 2000 i.e. within 7 months. Listing application was made afterwards in January, 2001. Moreover, by a Board resolution of the company passed on 29//3/2001 these 30 lakh partly paid shares were later on forfeited on account of non payment of call money. Another lot of 30 lakh equity shares were allotted to Dinesh Dalmia Technology Trust on 5/10/2000 on preferential allotment

basis. The address of the Trust was 407, Annasalai, GR Complex, Nandanam, Chennai - 600 035 which is also the registered office address of the company. The trust deed was made on 3/10/2000 appointing Shri Dinesh Dalmia as one of the Trustees of the DSQ Employees Stock Option Trust and calling the Trust as Technology Trust. The authorized signatory of the account was Shri Dinesh Dalmia himself. It was alleged that these 30 lakh shares were later credited to the demat account of DSQ Holdings Ltd., (Client ID 10257027) from Dinesh Dalmia Technology Trust in three lots of 15 lakhs, 10 lakhs and 5 lakhs shares on 17/10, 18/10 and 19/10/2000 respectively. SEBI's investigation later brought out that majority of these shares were sold by DSQ Holdings in the market. The investigation also brought out that another lot of 30 lakh shares of the company were credited to the demat account of Dinesh Dalmia Technology Trust on 19/12/2000. These shares were ostensibly issued under ESOP scheme and allotted in electronic form in the same ISIN in which the shares of the company were traded. These shares were not given listing permission by BSE or NSE. These shares were also moved to DSQ Holdings, Hulda Properties & Trust Ltd./and Powerflow Holdings which are all entities associated with Shri Dinesh Dalmia. Thus out of the total of 60 lakh shares which were allotted to Dinesh Dalmia Technology Trust (30 lakh on preferential allotment basis and another 30 lakh on ESOP) 51 lakh shares were transferred to DSQ Holdings and balance 9 lakh shares were transferred to 2 other entities controlled by Shri Dinesh Dalmia. All these were then sold in the market although these were not listed. Thus, more shares were made available in the market for trading than were actually issued and listed on stock exchange.

8. The impugned order observes that on 31/10/2000 a lot of 40 lakh shares was allotted Dr. Suryanil Ghosh Trustee Softec Corporation. These shares were reportedly allotted by the company on preferential allotment basis and were in the electronic form under the existing ISIN of the company. These shares were not permitted to be listed by BSE/NSE. The address of the Trust was the same as the registered office address of the company and Shri Dinesh Dalmia was one of the trustees. Shri Dinesh Dalmia was the authorized signatory to the account. It has been alleged that out of these 40,00,000 shares, 26,50,000 shares were transferred to the pool account of brokers, 10,00,000 shares were transferred to beneficiary account of Powerflow, an associate company of Shri Dinesh Dalmia and 1,12,000 shares were transferred to beneficiary account of DSQ Holdings and 2,20,000 shares were transferred to other beneficiary accounts of Shri Dinesh Dalmia. There was thus a meager balance of only 18,000 shares in the account. It has thus been alleged that 1 crore shares were fraudulently allotted by the company - 60 lakh shares to Dinesh Dalmia Technology Trust and 40 lakh shares to Dr. Suryanil Ghosh Trustee Softec Corporation. None of these were listed on BSE/NSE but were sold in the market by entities associated with DSQ group. In both the trusts Shri Dinesh Dalmia who was the Managing Director of DSQ Software Ltd., the share issuing company was the trustee and authorized signatory. These shares were then brought into the account by transferring them to the pool account of the brokers by first transferring the shares to the account of group entities and then selling them in to the market.

8. Investigations revealed that out of the 1.3 crore shares fraudulently allotted and dematted (30 lakh in May 2000, 70 lakh in October 2000 and 30 Lakh in December 2000), except for 18,000 shares in the account of Dr. Suryanil Ghosh Trustee Softec Corporation, all other shares were transferred and sold in the market.

9. Subsequently, 40,00,000 shares were also fraudulently allotted to New Vision Investment Ltd., New Delhi, in physical form. Personal visit of SEBI official to the address No.207 Paras Apartments, Madhu Vihar, Pratapganj, New Delhi, which was given in the demat account opening form, revealed no evidence of any company existing at that address. Investigations revealed that there was promoter-broker nexus between Shri Dinesh Dalmia and the broker, Biyani Securities for the 10,00,000 shares. It was brought out that out of 40,00,000 shares, 10,00,000 shares were given to broker – Biyani Sec in physical form for tiding over his payment crisis and were then deposited by Biyani Sec with the Calcutta Stock Exchange. The broker admitted that it spoke to Shri Dinesh Dalmia who said he would try to help him and shares in the name of New Vision Investment Private Ltd. were given to it. The balance 30 lakh shares were not traceable as New Vision Investments Pvt. Ltd was not available at the registered address as stated earlier.

10. It is alleged that Shri Dinesh Dalmia as Managing Director himself had written to the Registrar, NSDL about the allotment of these shares and applied for Demat credit. A total of 1 crore shares which were allotted to the two trusts viz. Dinesh Dalmia Technology Trust and Dr. Suryanil Ghosh Trustee Softec Corporation also had Shri Dinesh Dalmia as one of the trustees. He had in fact opened the

demat account on behalf of these trusts and in these two names by entering into agreement with the DPs signed the relevant demat account opening form with the DPs etc.

11. In the background of the above facts the impugned order lists the following violations by the company and Shri Dinesh Dalmia.

- a The company did not inform the said allotments of 1.30 crore shares to the stock exchange where its shares have been listed when these shares were actually allotted and dematted during year 2000 to the aforesaid entities. 30 lakh shares allotted to New Vision Investment Ltd., UK on 20-05-2000 are partly paid (10% of allotment money) and 90% of allotment money has not been paid. However these shares were introduced into market as fully paid shares and without listing. There is no evidence to suggest that the company received any consideration for allotment of 60 lakh shares to Technology trust and 40 lakh shares to Softec Corporation. However these shares were also introduced into market as fully paid shares and without listing.
- b The company vide letter dated December 15, 2000 to NSDL submitted a certified true copy of the extract of the resolution passed at the allotment committee meeting of the company held on December 14, 2000. As per the said resolution the company allotted 30 lakh equity shares to Dinesh Dalmia, trustee, Technology Trust, (which received 1250 applications for 30 lakh shares of Rs.10/- each at a premium of Rs.250) against Employees Stock

Option Scheme. However, these shares were transferred to various entities other than the employees and without any lock-in period. The said trust was operated by Shri Dinesh Dalmia, Managing Director of the company.

- c. Shri Dinesh Dalmia, Managing Director of the company is the authorized signatory and one of the trustees in both the above mentioned trusts viz. Technology Trust and Softec Corporation Trust. It was also noted that none of the allottees are traceable in their given addresses. These 1.30 crore shares which were allotted by the company to various associated entities as mentioned above were not listed on the stock exchanges. However, the allottees offloaded the said shares through the trading system of the exchange misrepresenting the same as listed shares on the stock exchange with the assistance of certain persons and entities like DSQ Holdings Ltd., Hulda Properties and Trades Ltd., Mehta & Ajmera, Powerflow Holdings Ltd., Radha Dalmia, Himanshu Ajmera, Maya Trade Links Ltd., Mittal Securities, Khandwala Finance Ltd., Dinesh Singhania and Doe Jones Investments & Consultants P. Ltd.
- d. The company knowingly gave false information to the Stock Exchanges vide its letter dated February 26, 2001 that the company received full money due from the applicants towards allotment of 30 lakh shares allotted to New Vision Investment Ltd. Further the company knowingly gave false information to the Stock Exchanges vide its letter dated February 26, 2001 that the company

received the entire application money from the allottees consideration other than cash towards allotment of 1.40 crore shares allotted on January 12, 2001 to New Vision Investment Ltd.(Mauritius), Softec Corporation Ltd.(Mauritius) and Technology Trust (Mauritius).

- e. The company knowingly gave wrong information of allottees and date of allotments to the Stock Exchanges. They gave the same distinctive numbers which were already allotted to different entities and were already sold/introduced in to the market/system before listing. Due to the company's non-disclosure of the allotments of 1.30 crore shares to the various entities during the year 2000 to the Stock Exchanges the company has defrauded innocent investors who bought unlisted shares during the year 2000.
- f. The company through its associate/front entities sold/introduced around 1.30 crore unlisted demat shares of the company in to the market/system. By this act, fraud was perpetuated on the investors who bought the said shares. As the company concealed the material facts pertain to above allotments from its shareholders, fraud was also perpetuated on them.
- g. The company advanced moneys to DSQ Holdings Ltd. amounting to Rs.15 crore, Rs.54 crore to Mehta & Ajmera, Rs.25 crore to Accord Capital Ltd., and Rs.20 crore to Wood Stock Securities Pvt., Ltd. It is observed that among other entities, these entities also dealt in the

shares of the company to create artificial volume in the trading of the company's shares. It is also observed that the said entities entered into synchronized trades to create the artificial volume and also to offload the unlisted demat shares of the company into the market/system through associated / front entities.

12. The appellants were issued Show Cause Notices on 7/10/2003 enumerating the findings of SEBI Investigation and asking them to show cause why action of the following nature should not be taken against them:

(a) They be directed to deposit a sum of Rs.840 Crore in a separate escrow account till completion of investigation by SEBI

(b) They be prohibited from accessing the capital market and dealing in securities for a period of 10 years.

13. Both the company and Shri Dinesh Dalmia were given opportunity for personal hearing and were also granted inspection of documents etc. on various dates. After a series of adjournments for personal hearing the company did not make any submissions on the merits of the case mentioned in the show cause notice. Nor did they submit any reply to the allegations leveled against them in the show cause notice dated 7/10/2003. Shri Dinesh Dalmia however, submitted his reply to the show cause notice vide his letters dated 4.3.2004 and 19.3.2004. His submissions in brief were as follows:-

a. Chapter III of the FUTP Regulations, 2003 provides for investigation and Regulation 9 of the said regulations provides that the investigating authority shall on completion of investigation after taking into account all relevant facts shall submit a report to the appointing

authority. They stated that they are entitled to a copy of the report submitted to the Board by the investigating authority. They further submitted that they had sought for inspection of certain documents which have been referred to and / or relied upon by SEBI and / or those which are necessary for them to file a proper and complete reply.

- b. They referred to several letters wherein they sought inspection of documents and further submitted that their request for inspection of documents relied upon by SEBI in passing orders dated 20.7.2001 and 20.12.2001 was refused.

14. After considering the facts of the matter, the findings of the investigation, the submissions of the company, Shri Dinesh Dalmia and other directors on record, the Chairman of SEBI framed the following issues for consideration:

- (a) Whether the allotment and dematerialization of the shares issued on a preferential basis by the company on 20.5.2000, 5.10.2000, 24.10.2000 and 14.12.2000 were done in an irregular manner.

After analyzing the facts, the respondent concluded that both the company and Shri Dinesh Dalmia had acted in a fraudulent manner while issuing these shares and thereafter getting them introduced in the market without listing. The impugned order also alleges that the allotment made on 12/1/2001 was not genuine and were intended to regularize the allotment made during the period May to December, 2000 in a fraudulent manner. The impugned order mentions that Regulation 3 of SEBI (Prohibition of Fraudulent

and Unfair Trade Practices relating to the Securities Market) Regulations, 1995 provided that no person shall buy, sell or deal in securities in a fraudulent manner. I find that by its actions as outlined above, the company has acted in a fraudulent manner. The impugned order concludes that by the actions as outlined there, both the company and Shri Dinesh Dalmia have acted in a fraudulent manner and thus have violated the said regulations.

- (b) **Another issue framed for consideration was whether Shri Dinesh Dalmia being the promoter and one of the directors of the company is liable for the fraudulent and irregular activities.**

The impugned order notes that Dinesh Dalmia, as Managing Director of the company had been instrumental in making the allotments, some even without the knowledge of the Board of Directors, as stated by the members of the Board. Thus, Shri Dinesh Dalmia has allotted shares to entities that were controlled by him. After considering the various facts the impugned order concludes that Dinesh Dalmia being the promoter – director of the company and the person in control of the company and its associated entities was responsible for the fraudulent acts of the company. Therefore, Shri Dinesh Dalmia was alleged to have violated Regulation 3 of the FUTP Regulations, 1995. It has been alleged that Shri Dinesh Dalmia was the final beneficiary of the profits made by the connected entities through their fraudulent actions as detailed in the impugned order. It has also been alleged that out of the total of 1.70 crore shares fraudulently allotted by the company during the period 2000-01, 1.30 crore shares were allotted in dematerialized form and 40 lakh shares

were allotted in physical form. These 1.30 crore shares worth Rs.630 crore which were allotted in demat form were introduced into the market by entities associated with DSQ Software and Shri Dinesh Dalmia and the sale proceeds which were credited to the account of those entities associated with the company and controlled by Shri Dinesh Dalmia, its promoters. 40 lakh shares which were issued in physical form are not in circulation in the market.

15. Having regard to these facts, the Chairman, SEBI, issued the following directions under Section 11 and 11B of the SEBI Act, 1992 read with Regulation 11 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 2003 to DSQ Software Ltd., and Shri Dinesh Dalmia:

- (i) Shri Dinesh Dalmia is prohibited from buying, selling or otherwise dealing in securities in any manner, directly or indirectly, for a period of 10 years and is also prohibited from holding any office of responsibility in a company/entity or other institution associated with the securities market for a period of 10 years.
- (ii) DSQ Software Limited is prohibited from accessing the securities market and buying, selling or otherwise dealing in securities in any manner, directly or indirectly in securities for a period of 10 years.
- (iii) Shri Dinesh Dalmia and DSQ Software Ltd shall deposit a sum of Rs.630 crore (being the value of 1.30 crore shares calculated by taking into account the average price of the scrip in the relevant settlement) within a period of 45 days in a separate escrow account to be maintained with a nationalized bank, till completion of investigation by various Police agencies including The Calcutta Police and Central Bureau of Investigation.

- (iv) Shri Dinesh Dalmia shall buy 1.30 crore shares of DSQ Software Ltd, circulated into the secondary market within a period of 45 days and retain the same in a separate demat account to be opened for the purpose, till permission for reduction in capital is obtained by the company from the competent authority.
- (v) The amounts deposited in the escrow account and shares retained in the demat account shall not be withdrawn without prior permission in writing from SEBI.

Being aggrieved by the above order the appellants have filed the appeals.

16. During the course of hearing the learned counsel for the appellants submitted that in the course of its fast expansion of business at the material time the company had explored the possibility of acquiring a reputed software service provider overseas. In this process the company identified Fortuna Technologies INC, USA. The negotiations with Fortuna resulted in an agreement under which the entire consideration for the acquisition would be in the form of allotment of equity shares of DSQ Software Ltd., One of the conditions was that the shares should be issued in advance so that they could be exchanged on completion of necessary formalities for the acquisition. Accordingly the company made allotment of 17 million equity shares on preferential basis but in this process overlooked procedural compliance provided under the Companies Act and SEBI Regulations. The lapse was solely due to paucity of time and urgency to expedite the acquisition. He also mentioned that before the acquisition could be completed there was a slump in the business of IT companies resulting in a sharp fall in the share prices of such companies world wide. The transaction with Fortuna did not

materialize. Meanwhile, the respondent commenced an enquiry into the acquisition and advised DSQ Software Ltd., to cancel the acquisition. The company was, therefore, unable to complete the requisite formalities. The shares issued had however, gone into the secondary market in the intervening period. The appellants' counsel further submitted that none of the shareholders who had purchased those additional shares has suffered a loss or damage on account of the issue. The company alone has to receive the amounts due on these shares.

16. The learned counsel for the appellants further submitted that under the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 2003 the respondent has no power to direct the company or Shri Dalmia to buy back the shares. Section 11 of FUTP Regulations, 2003 which empowers the Board to take action or issue directions does not contain any such power for issuing directions to buy back the shares. Regarding the direction contained in the impugned order for the appellants to deposit a sum of Rs.630 crores in an escrow account in a nationalized bank, the learned counsel vehemently argued that there is no provision both in the Act and the regulations empowering the Board to either direct the appellant to buy back the shares or to compel the appellant to deposit any such sum in an escrow account. In his written submissions the learned counsel sums up his arguments as follows:

1. *"It is the admitted case of SEBI that 1.70 crores shares were issued and allotted during the period 2000 - 2001. In view of Article 20 of the Constitution of India, only the law that prevailed at the time of commission of the*

violation/offence would apply. Hence the provisions of Section 11 and 11B of the SEBI Act, as it stood on that date, and Regulations 11 and 12 of the FUTP Regulations, 1995 would apply. The action of the SEBI in issuing directions in accordance with Section 11 and 11B as amended by SEBI Amendment Act, 2002 which came into force on 29.10.2002 read with Regulation 11 of FUTP Regulations 2003 is unconstitutional.

- 2. In view of the earlier orders passed on 20.7.2001, the power under Section 11 and 11B of the Act and Section 11 and 12 of the FUTP Regulations, 1995 stood exhausted. Moreover, the Show Cause Notice dated 7.10.2003 and the impugned order dated 9.9.2004 are barred by resjudicata/doctrine of double jeopardy.*

The three directions issued by SEBI are as follows:

- 1) Prohibiting the Appellant from buying, selling, or otherwise dealing with securities in any manner, directly or indirectly, for a period of ten years and from holding any office of responsibility in a Company/Entity or other institution associated with the Securities Market for a period of ten years.*
- 2) Directing the Appellant herein and M/s. DSQ Software Ltd., to deposit a sum of Rs.630 crores within a period within a period of 45 days in a separate escrow account to be maintained in a Nationalised Bank till completion of investigation by various police agencies including the Kolkata police and the Central Bureau of Investigation.*

3) *Directing the Appellant to buy 1.30 crore shares of DSQ Software Ltd., circulated to the Secondary Market, within a period of 45 days and to retain the same in a separate demat account to be opened for the purpose, till permission for reduction in capital is obtained by the Company from the Competent Authority.*

It is respectfully submitted that the Authority/Power to issue the aforesaid directions was not available to the Respondent under Section 11 and 11B of the SEBI Act, 1992 as it stood prior to 29.10.2002 on which date extensive amendments to the said provisions were made. Likewise, Regulation 11 and 12 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 1995, did not empower SEBI to issue such directions. It was only on 11.7.2003 that the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003, came in to force and for the first time, Regulation 11(1)(b) conferred power on SEBI to restrain persons from accessing the Securities Market and prohibit any persons associated with the Securities Market and prohibit any person associated with the Securities Market to buy, sell or deal in securities. Thus, it is evident that the direction issued by SEBI restraining the Appellant from accessing the Securities Market was beyond its power as it existed during the period in which the transactions allegedly

took place. Therefore, the direction debarring the Appellant from accessing the Stock Market is without jurisdiction and hence non est.

It would be significant to point out the direction issued by SEBI debarring the Appellant from holding any office in any Company/Institution associated with the Securities Market was not even proposed/contemplated by the Show Cause Notice. However, by the impugned order, the Appellant has been debarred from holding such an office for a period of 10 years. Needless to state that the said direction apart from being violative of the principles of natural justice is also devoid of authority since the power to issue such a direction is not found either in the SEBI Act, 1992 or the FUTP Regulations, 1995.

The direction to deposit Rs.630 crores in an Escrow Account to be maintained in a Nationalised Bank till completion of investigation by of investigation by various police agencies including the Kolkata Police and the Central Bureau of Investigation is once again devoid of authority. An analysis of the SEBI Act, 1992 and the FUTP Regulations, 1995 do not vest in SEBI the power to issue such a direction. On 29.10.2002, when the SEBI Act was amended, Section 15HA providing for penalty for fraudulent and unfair trade practices was introduced. This provision reads as follows:

“If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty not exceeding Rs.25 crores or three times the amount of profits made out of such practices, whichever is higher. Obviously, realizing that the penalty contemplated by Sec.15HA could not be imposed, the Adjudicating Authority under the guise of issuing a direction under Sec.11 and 11B of the Act read with FUTP, 1995, has indirectly/colourably exercised the power contained in Sec.15HA by directing the Appellant to deposit Rs.630 crores.

This submission is made without prejudice to the contention that even Section 11 and 11B of the SEBI Act, 1992 read with Regulations 11 and 12 of the FUTP 1995, do not empower the SEBI to issue such a direction.”

In Bank of Baroda vs. SEBI (Appeal Nos.2 and 4 of 2000) this Hon'ble Tribunal vide its order dated 27.7.2000, has observed as follows:

“Section 11 and Section 11B are interconnected and co-extensive as both these sections are mainly focused on investor protection. On a careful perusal of the said Section 11, it would be seen that SEBI has been in no uncertain terms mandated to protect the interest of investors in securities by such measures as it thinks fit..... However, the power under Section 11 is not unlimited. 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 framework of the Act. But within the statutory framework, such power reigns.”

It is apparent from the aforesaid extract that though the SEBI has wide powers to protect investor interest, the power should be exercised within the framework of the Act. The nature and purpose of the directions which SEBI may issue are contained in Sections 11 and 11 B of the SEBI Act, 1992 and Regulations 11 and 12 of the SEBI FUTP Regulations, 1995. As demonstrated supra, the directions issued by SEBI in the impugned order were not provided for under the Amended Act and Regulations. Therefore, such directions which were issued without statutory authority are ultra vires and consequently non est.

It must also be pointed out that the treatment meted out to the Appellant herein has been to say the least, harsh. The ban issued by SEBI under the FUTP Regulations, 1995 never obliged the alleged delinquent from depositing any sum as compensation. There is an apparent contradiction on the very face of the directions 1 and 2. While the third direction may be permissible by law, the second direction is not permissible in law and the second and third directions run counter to each other. If the third direction is complied with, there cannot be any question of depositing the sum of Rs.630 crores as directed in the second direction unless it is the nature of a penalty. It has already been shown that a penalty is contemplated only by Section 15HA which was introduced by the Amendment Act on 29.10.2002 whereas the alleged transactions took place

between the year 2000 and 2001 which is much prior to the introduction of the penal provision. The Respondents have only relied on one judgement passed in Agarwal's case, which again will not apply to the facts involved in the present appeal since the case referred to above dealt with insider trading. Even the judgement of this Hon'ble Tribunal in the aforesaid case has been challenged in appeal and is pending before the Hon'ble Supreme Court of India.

In deference to the observation made by this Hon'ble tribunal, an application has already been filed undertaking to purchase 1.7 million shares at par value. This offer however, is without prejudice to the contention raised by the Appellant that the SEBI has no power whatsoever to issue directions contained in the impugned order."

16. Notwithstanding the above contentions, the learned counsel submitted that it is the earnest desire of the appellant Shri Dinesh Dalmia who was the key promoter of DSQ Software Ltd., to resolve the crisis in which the company was placed and to resurrect its activities. He stated that the company which had a huge clientele can still be revived and with this end in view he submitted an affidavit giving the following proposal:

- 1) The promoter will buy at par and cancel 17 million shares of the company which were unlisted. This will be in line with the SEBI directions as also the directions of the Department of Company Affairs. The shares will be purchased by the promoter entities from the market at par and will be

converted into physical shares by following the process of demat. The company will simultaneously follow the provisions of Sec. 100 of the Companies Act, 1956 for canceling these shares and reducing the issued capital of the company. This reduction requires the approval of the members of the company as also the permission of the High Court. The company will take necessary steps for these compliances.

2) The promoter of the company will bring in Rs.50 crores in a phased manner over two years time for revival of the company. These amounts will be brought in the forms of Redeemable/Convertible Preference shares of the company at a token coupon rate. These amounts will be utilized to repay the dues to the Banks and Financial Institutions as also revive the operations of the company. The company has got a revival plan ready and a copy of the same was enclosed with the affidavit of the appellant dated 7th November, 2005.

The company proposes to utilize the amounts brought in to clear the debts of the company besides improving the business as detailed in the revival plan.

The company has following liabilities at present:

Industrial Development Bank of India	Rs.50.50 crores.
Indusind Bank	Rs.31.80 crores.
ING Vysya Bank	Rs. 2.20 crores.

The banks and institutions have filed recovery applications in the Debt Recovery Tribunal and the company proposes to settle all these dues out of the amounts brought in. the profits will be utilized to improve the business and infrastructure and the company proposes to increase its asset base by going in for owned premises in a phased manner. This will improve the company's as also Shareholder's Wealth. The company will also have the latest in technology assets which will be built out of its retained earnings.

17. The learned counsel for the Respondent Shri Rafique Dada quite forcefully argued that Regulation 11(h) of FUTP Regulations empowers the Board "to direct the person concerned to dispose off any such securities acquired in contravention of these regulations in such manner as the Board may deem fit for restoring the status quo ante." He pleaded that once the Board is convinced that status quo ante needs to be restored, the manner in which it is to be carried out, is left entirely at the discretion of the Board and the empowerment by this regulation includes the power to issue direction to a person to buy back the shares which were fraudulently issued and introduced in the market to the detriment of the interest of genuine investors. However, he agreed that only those to whom such fraudulently issued shares were sold have the right to get back their money.

18. The appellants have themselves filed an affidavit offering *suo moto* that the promoter will buy from the market all the 17 million

shares at par and will cancel these 17 million equity shares of the company which are unlisted. We do not therefore, feel it necessary, at this stage, to make any judicial pronouncement as to whether regulation 11(h) of the FUTP Regulations empowers the Board to direct the company to buy back its shares. Both sides have agreed on the main objective that the promoter will bring in funds to purchase 1.70 crores unlisted shares and thereafter ultimately cancel these unlisted shares in terms of provisions of section 100 of the Companies Act, 1956 by going through the due process of law. A question arose at what price these shares would be bought by the promoter. These unlisted shares were sold to the unsuspecting investors way back in 2000-01 at a price of several hundred rupees for each share. The current market price is below par. So the market price or par value at which the appellants offer to buy back these shares from the market will be a small fraction of the original price paid by the investors. It is only equitable that the unsuspecting investors to whom such unlisted shares were sold are paid back at least that much amount as they had paid as purchase price for those shares. In other words, equity demands that such unsuspecting investors should at least get full refund of their principal amount, if not any return on such investment. The other related question which need to be examined in this connection is how to avoid unjust enrichment of any investor. If the promoter is directed to buy back any share at a price determined by the regulator or by this Tribunal there is every possibility that some investors who had got these unlisted shares at a lesser price get windfall gain which would be against the principle of "No unjust enrichment". As such it will be necessary to ensure that while the investor gets back his money and

no genuine investor loses his principal at least, each investor gets only that much as he had paid at the time of buying these unlisted shares. Merely directing the promoter or the company to deposit some estimated amount to an escrow account in a bank will not serve this purpose of bringing justice to the unsuspecting investors who had bought such unlisted shares. To our suggestion that SEBI may appoint an authority to undertake and oversee the whole process, Shri Rafique Dada, the learned senior counsel agreed that SEBI is the proper body for this work. Accordingly the following directions are given:

- (a) SEBI to appoint an appropriate authority who will be entrusted with the task of identifying the scrips which were not listed and were alleged to have been issued from 20th May, 2000 to 12th January, 2001 and introduced into the market by Shri Dinesh Dalmia and his Associates. The authority to be appointed by SEBI may be either one of its senior official not below the rank of GM or a person from outside considered fit for the purpose.
- (b) The said authority will identify, in consultation with the representative of the appellant, the eligible shareholders who had bought such unlisted shares during the period mentioned above. The authority will also verify and satisfy itself (by reference to original purchase contract or such other evidences as are available) about the price at which these unlisted shares were originally sold to the investors during the material

period and thereafter arrange for refund of the purchase price to the investor after he surrenders those shares. The above arrangement of buying back at original purchase price will be applicable to those original investors who had bought the unlisted shares during 20th May, 2000 to 12th January, 2001 and continue to retain them at the time of tendering these shares to the authority appointed by SEBI with proof.

- (c) Apart from the above Shri Dinesh Dalmia shall buy from the market (either at par or at market rate whichever is higher) the remaining unlisted shares of DSQ Software Ltd., circulated in the secondary market as expeditiously as possible and retain the same in a separate Demat account and Shri Dinesh Dalmia shall seek reduction of capital in accordance with law.
- (d) The promoter of DSQ Software Ltd., Shri Dinesh Dalmia, will have to fund this entire operation. For this purpose he will deposit Rs.30 crores (minus the amount already deposited with SEBI pursuant to the order dated 03/02/2005 on Interlocutory Application) as a first installment in an escrow account in a Nationalised Bank within a period of one month from the date the authority appointed by SEBI calls open to do so. The bank in which the account is to be opened will be selected in consultation with the authority

appointed by SEBI. Shri Dalmia or his power agent must undertake, in writing, to further fund this escrow account to the extent needed and whenever called upon to do so by the authority appointed by SEBI for the purpose of purchasing the unlisted shares if tendered.

- (e) The refund of the original purchase price as per item (b) above has to be effected only to those investors who had purchased these unlisted shares during 20/05/2000 to 12/01/2001 and are still holding these unlisted shares; similarly, the buy back by the company at market price or at par, as per item (c) above, has to be arranged only for those investors who had purchased such unlisted shares from secondary market after 20/05/2000 and are still holding those shares. If any of the investors has already exited by selling those shares and thereby incurred any loss he cannot look to the authority for compensation.
- (f) The authority appointed by SEBI should advertise through the media inviting original investors who are still holders of such unlisted scrips to submit claims with required documentary evidence about the price paid etc. The authority to be appointed by SEBI may devise its own procedure about the manner in which it is to be satisfied about the veracity of the claims submitted in the presence of the representative of the appellant. Similarly,

those who bought such unlisted shares from secondary market at a later date should also be called upon to submit their claims to the authority with such evidence as the authority may decide.

- (g) As and when the amount deposited in the escrow account is exhausted in making payments to the satisfaction of such claims, the authority shall call upon Shri Dinesh Dalmia, promoter of DSQ Software Ltd., or his power agent to deposit further amounts in multiples of Rs.5-10 crores as the authority made decide. It will be incumbent upon Shri Dinesh Dalmia or his power agent to comply with the directions of the authority from time to time by placing such funds as he is called upon to do to the credit of the escrow account within 2/3 weeks (as the authority may decide) from the receipt of such instruction from the authority.
- (h) The authority should endeavour to complete the whole process preferably within a period of not more than six months from the time the authority is set up by SEBI. With a view to achieving this objective it will be in order for the authority to fix adequate time limit for submission of claims from the date of publication of the advertisement in the media. SEBI is to provide necessary office infrastructure and adequate secretarial and legal support to the authority.

- (i) A senior official from SEBI, who is not below the rank of ED, should be entrusted with the work of overseeing the whole process and the working of the authority. It would be his bounden duty to personally oversee the whole process and submit progress report in this matter to SEBI .
- (j) With respect to directions at clause (iv) of the impugned order that Shri Dinesh Dalmia shall buy 1.30 crore shares of DSQ Software Ltd., circulated into the secondary market, we direct that Shri Dinesh Dalmia shall buy back such of the unlisted shares of DSQ Software Ltd., from out of the 1.30 crores unlisted shares which are not tendered to the authority but which continue to be held by the shareholders. In other words, if there are not enough tenderers to satisfy the respondent, the balance unlisted shares shall be bought in the secondary market by Dinesh Dalmia which together will amount to 1.30 cores unlisted shares. Such buy back of shares from the market by him shall be at higher of face value or market price.
- (k) Particulars of all such shares for which the original purchase price is refunded to the original investor by the authority in terms of item (b) above or from whom the shares are bought back at par/market price by Shri Dinesh Dalmia in terms of item (j) above will be passed on to the company who will take necessary steps for removing them

from the list of demat shares (1.3 crores share unlisted were demated) and ultimate cancellation of these shares in accordance with the Law and after obtaining necessary approvals from all concerned authorities. In respect of 40 lakh shares which were issued in physical form (out of the total 1.70 crore unlisted shares) urgent steps would be initiated to cancel them by observing due process of law.

- (l) If any surplus amount is left lying in the escrow account after the authority declares the whole operation as closed, such surplus shall be credited to DSQ Software Ltd., which could use it for paying its creditors as submitted by the learned senior counsel for the appellants to this Tribunal in his affidavit.
- (m) Items (iii), (iv) and (v) of the impugned order dated 9th September, 2004 stand modified accordingly.
- (n) Items (i) and (ii) of the impugned order are upheld subject to the following modification:

The period of debarment shall be from the date when the interim order was passed by SEBI on 27.1.2001 and will run for a period of 10 years from that date and the order to that extent also is modified. There is no provision in law to direct the appellant not to hold any office in any other institution associated with the securities market particularly since the show cause notice did not propose to

impose any such restriction. The impugned order is accordingly modified.

Appeals are disposed of accordingly.

No order as to costs.

Justice Kumar Rajaratnam
Presiding Officer

R. N. Bhardwaj
Member

C. Bhattacharya
Member

Place: Mumbai
Date: December 8, 2005.

Smn/23/11