A MORGAN STANLEY MUTUAL FUND

v.

KARTICK DAS

MAY 20, 1994

B [M.N. VENKATACHALIAH, CJ., S. MOHAN AND DR. A.S. ANAND, JJ.]

Consumer Protection Act 1986, Secs. 2(1)(i), 2(1)(d)(i); 2(1)(i); 2(1)(c), 2(1)(c)(i), 14: 26:

C

Shares before allotment, held are not "goods"—Prospective investor, held, not a "Consumer"—Forum under Act, held, has no power to grant interim or ad-interim relief.

D *Code of Civil Procedure, 1908—Order 39 Rules, 1,2,3 & 5 Constitution of India, Article 226—Factors for grant of injunction in public issues laid down—Need for venue restrictions specified.*

Securities and Exchange Board of India (Mutual Funds) Legislation, 1993—Regulation 27—Disclaimer clause, held, does not amount to non-approval—"First come first served" under the Scheme of allotment, held, does not deceive investors.

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Practice and procedure—Costs—Vexatious litigation Penal Costs of Rs. 25,000 awarded—Constitution of India, Article 142.

F **The Appellant in C.A. No. 4384 of 1994 is a domestic mutual fund registered with the SEBI along with its investment management agency. The Memorandum and Articles of Association of the appellant along with the draft scheme were approved by SEBI after due scrutiny and examination. SEBI also approved in writing all advertisements and publicity material. While approving the scheme, SEBI also put in a disclaimer clause which is a standard requirement in all issues. The appellant started advertising the public issue on 13-12-1993.**

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One P, filed a suit before the Sub-Judge at Delhi for injunction restraining the public issue from being floated. An interim order was passed by the Sub-Judge but the High Court on being moved by the

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appellant stayed the same on 4-1-1994. One A, filed a Writ Petition (W.P. No. 14 of 1994) before the Delhi High Court against the SEBI, seeking *inter alia* a stay of the public issue, which was dismissed *in limine*. Civil Appeal 4587 of 1994 at the instance of the unsuccessful writ petitioner arises from this proceeding. Seeking the same relief as were sought in the writ petition, one K, moved the Calcutta District Consumer Disputes Redressal Forum alleging *inter alia* that the Fund's Offering Circular was not approved by SEBI and that the basis of allotment was arbitrary and unfair. The Forum passed *an exparte* interim order dated 4-1-1994 restraining the Fund from proceeding with the further issue against which the Fund appealed before the Supreme Court by Special Leave (Civil Appeal No. 4587 of 1994).

The appellants contended that shares that are to be allotted in future are not goods under s.2(1)(i) of the Consumer Protection Act, 1986 and that even assuming that shares are goods, prospective shareholders are not consumers and are therefore not entitled to file a complaint. The respondents on the other hand submitted that when SEBI regulations (R.27) are violated, a prospective applicant would be entitled to seek an injunction.

Allowing C.A.No. 4587 of 1994 and dismissing C.A. No. 4548 of 1994, this Court

Held : 1. As per the definition under Section 2(1)(d)(i) of the Consumer Protection Act, 1986, "Consumer" is the one who purchases goods for private use or consumption. In order to satisfy the requirement of the definition, there must be a transaction of buying goods for consideration. The definition contemplates the pre existence of a completed transaction of a sale and purchase of goods. In view of Section 2(1)(i) of the Consumer Protection Act, the meaning of "goods" is the same as defined in Section 2(7) of the Sale of Goods Act, 1930. All actionable claims and money are thus excluded from the definition. Till the allotment of shares takes place "the shares do not exist." Therefore, till then they can never be called goods. At the stage of application, an applicant is only a prospective investor in future goods. If regard be had to the definition of "complaint" under the Act, it will be clear that no prospective investor could fall under the Act. [153-E, 155E, 153-G, 155-E]

2. The expression "unfair trade practice" as per Section 2(1)(r) has the same meaning as defined under Section 36-A of Monopolies and

A Restrictive Trade Practices Act, 1969. That again cannot apply because the company is not trading in shares. "Share" means a share in the Capital. The object of issuing the same is for building up capital. To raise capital means making arrangements for carrying on the trade. It is not a practice relating to the carrying of any trade. Creation of share capital without
B allotment of shares does not bring shares into existence. In view of the above position the question of the appellant company trading in shares does not arise. Therefore, a prospective investor is not a "consumer" under the Act. It follows that the Consumer Disputes Redressal Forum has no jurisdiction whatsoever. [156-C, D, E, F]

C 3. As principle, *ex parte* injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of *ex parte* injunction are - [156-H]

(a) Whether irreparable or serious mischief will ensue to the plaintiff;

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(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of im-
E proper order against a party in his absence is prevented;

(d) The court will consider whether the plaintiff had acquiesced for sometime. In such circumstances it will not grant ex parte injunction;

F (e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application;

(f) even if granted, the ex parte injunction would be for a limited period of time;

G (g) general principles like *prima facie* case, balance of convenience and irreparable loss would also be considered by the court. [157-A to E]

In this case, the public advertisement was given on 13- 12-1993, the petition was filed on 4-1-1994 and the impugned order of Consumer Forum
H came to be passed on the following day. As to why the respondent chose to

come at the eleventh hour and where was the need to pass an urgent order of injunction are matters which are not discernible. Besides, tested in the light of the decreed cases the impugned order which is bereft of reason and laconic cannot stand a moment's scrutiny. [159-G] A

4. Today the Corporate sector is expanding. To prevent disgruntled litigants from indulging in adventurism, it has become necessary to evolve certain venue restrictions. In India, the residence of the Company is where the registered office of the Company is located. Normally cases should be filed only where the registered office of the company is situate. Courts outside the place where the registered office is located, if approached, must have regard to the fact that invariably suits are filed seeking to injunct either the allotment of shares or the meetings of the Board of Directors or again the meeting of the general body. The Court is approached at the last minute. If injunction is granted even without notice to the respondent it will cause immense hardship and administrative inconvenience. It may be some times difficult even to undo the damage by such an interim order. Therefore, the Court must ensure that the plaintiff comes to court well in time so that notice may be served on the defendant and he may have his say before any interim order is passed. [160-A, 160-G, H; 161-A] B C D

5. There is no power under the Act to grant any interim relief or even an ad interim relief. Only a final relief could be granted. If jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under section 14, no interim injunction could never be granted disregarding even the balance of convenience. [162-A] E

6. The argument that SEBI should have acted in accordance with Section 11(2)(e) of the SEBI Act 1992 to prohibit "Fraudulent and unfair trade practices" related to the securities market is without substance. The disclaimer clause required to be incorporated at the beginning of the offering circular by SEBI while approving the scheme is a standard requirement and nothing peculiar to the present case. The object of this is to bring to the notice of the investors that they should take the firm decision on the basis of the disclosures made in the documents. It is meant for the investor's protection. In fact by such a course the SEBI informs the investors that they have approved the scheme but they did not recommend to the investors whether such investment is good or not and leave it to their discretion. Therefore, the allegation that the SEBI has not ap- F G H

A **proved the other documents is totally baseless. [146-B, 150-F, G]**

7. The challenge to the method of allotment is without force. The "first come first served" scheme was an invitation to the subscribers to apply early so that the scheme be closed quickly. The appellants had made it very clear that those who applied during the opening period of the scheme would
B **be given full allotment. [152-E, F]**

8. There is an increasing tendency on the part of some litigants to indulge in speculative and vexatious litigation and adventurism which the fora seem readily to oblige. Such a tendency should be curbed. Having regard to the frivolous nature of the complaint, it is a fit case for award of
C **costs, more so, when the appellant has suffered heavily. Therefore, costs of Rs. 25,000 are awarded in favour of the appellant. [162-E]**

Maneckji Pestonji Bharucha **v.** *Wadilal Sarabhai & Co.*, **AIR (1926) PC 38-53 IA 92 = 28 Bom L R 777;** *Madholal Sindu of Bombay* **v.** *Official*
D *Assignee of Bombay*, **AIR (1950) FC 21 = 1959 FCR 441 and** *State of West Bengal* **v.** *Swapan Kumar Guha and Sanchita Investments*, **[1982] 1 SCC 561, referred to.**

CIT **v.** *Standard Vacuum Oil Co.*, **AIR (1966) SC 1393 and** *United Commercial Bank* **v.** *Bank of India*, **[1981] 2 SCC 766, relied on.**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4584 of 1994.

From the Judgment and Order dated 4.1.94 of the Calcutta District Consumer Disputes Redressal Forum in C.D.F. Case No. 35 of 1994.

F WITH

Civil Appeal No. 4587 of 1994.

From the Judgment and Order dated 5.1.94 of the Delhi High Court in W.P. No. 14 of 1994.
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Ashok H. Desai, Arun Jaitley, R.Karanjawala, Ms. Dina Wadia, Ms. Nandini Gore and Mrs. M. Karanjawala for the Appellants.

In-person in Pertr. No. 321/94.

H K.V. Vishwanathan and L.P. Agrawala for the Respondents.

The Judgment of the Court was delivered by

MOHAN, J. Leave granted.

2. The appellant is a domestic mutual fund registered with Securities and Exchange Board of India (hereinafter referred to as 'SEBI') under Registration No. MF/005/93/1, dated 5.11.93. The appellant is managed by a Board of Trustees. Pursuant to the SEBI (Mutual Fund) Regulations, the investment management company of the appellant, Morgan Stanley Asset Management India Private Limited was registered with SEBI on 5.11.93. Under such registration Morgan Stanley Asset Management India Private Limited is constituted as the asset management company of the appellant. Morgan Stanley Asset Management India Private Limited is a subsidiary of Morgan Stanley Group Inc. which holds 75% of equity, the balance being held by Indian shareholders such as Housing Development Finance Corporation (HDFC), Stock Holding Corporation of India etc. Morgan Stanley Asset Management India Private Limited was granted certificate of incorporation on 18th October, 1993 by the Registrar of Companies, Bombay. Its Memorandum and Article of Association have also been approved by the SEBI as per the provisions of the said Regulations.

3. The draft scheme of the appellant was approved by the Board of Trustees by Circular Resolution dated 8.11.93. This was forwarded to SEBI for its approval on 10.11.93. The scheme was duly scrutinised and examined by the SEBI and SEBI gave its approval and certain amendments were suggested.

Upon receipt of such approval for the scheme, the appellant and the Investment Manager took necessary steps to begin marketing the scheme by issue of advertisements. All advertisements and publicity material were approved by SEBI in writing before publication as required by the Regulations. Pursuant to such approval the appellant commenced advertising the public issue.

4. On 18th December, 1993 the advertisements and hoardings were released. One Piyush Aggarwal filed a suit before the learned Sub-Judge, Tees Hazari Courts, Delhi for injuction restraining the public issue from being floated by the appellant. On 24th December, 1993 an interim order was passed. Aggrieved by the same, the appellant moved the High Court in C.M. (M) No. 543 of 1993. On 3rd January, 1994 the said order passed

A by the learned Sub Judge - was stayed. That was subsequently confirmed on 4th January, 1994. One Dr. Arvind Gupta filed Writ Petition No. 14 of 1994 against SEBI. In effect, he sought to stay the public issue from being floated. That writ petition was rejected.

5. On the same grounds, as were urged in the writ petition, the B respondent moved the Calcutta District Consumer Disputes Redressal Forum seeking to restrain the public issue from being floated. The principal grounds taken were that the appellant's Offering Circular was not approved by the SEBI. There are several irregularities in the same. The basis of allotment is arbitrary, unfair and unjust. The appellant was seeking C to collect money by misleading the public.

The following order was passed on 4.1.1994 by the Calcutta District Consumer Disputes Redressal Forum :

"Petitioner files the complaint today. Register. Issue notice of D show cause against OPs.

Considering the utmost urgency of the case as cited by the Ld. Lawyer for the petitioner we are inclined to pass an interim order otherwise the application would be frustrated.

E Accordingly we direct OP 1 and OP 2 and its men, agent, collecting Banks not to proceed any further with the issue of 30 crores Morgan Stanley Growth Fund units due to be opened on 6th January, 1994 till proper clarification is made in its prospectus and with the leave of this Ld. Forum. OP 3 i.e. SEBI is also directed F not to issue clearances until Regulation 28 of Schedule V of SEBI Regulations is complied by the OP 1 and OP 2.

OP4 & OP5 i.e. The Bankers to the offer are specifically restrained from accepting any application form of Morgan Stanley Growth Fund from anybody until further orders from this Ld. G Forum.

OPs are at liberty to apply for vacation/variation of this order. Next date fixed on 19.1.94."

Aggrieved by this order, civil appeal arising out of SLP(C) No. 272 H of 1994 has come to be preferred.

Against the dismissal of Writ Petition No. 14 of 1994 by the High Court of Delhi civil appeal arising out of SLP No. 321 of 1994 has come to be preferred. A

6. Mr. Ashok Desai learned counsel for the appellant (Morgan Stanley Mutual fund) urges the following : B

(a) A prospective investor is not a consumer to prefer a complaint under the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act'). If that be so, a voluntary consumer association cannot complain about the issue of shares. The shares are not goods as defined under Section 2(i) of the Act. Even otherwise, there can be no consumer association of prospective applicants for future properties. The issue of shares was to open on 27th April, 1993. The so called consumer has yet to apply for allotment of final shares and make payments in respect thereof. Therefore, it is submitted that no member of this association could be held to be a consumer of future shares within the meaning of the definition (supra). C D

(b) In law, a prospective investor does not become a consumer as denined under the Act. Even assuming that shares could be goods before allotment, the so-called consumer has neither purchased the goods for a consideration nor hired the services of the company for consideration. Hence, he is not entitled to make any complaint. E

(c) There being no transaction of buying goods for consideration the requirement of section 2(1)(d)(i) of the Act defining consumer is not satisfied.

(d) No member of the public has a right or entitlement to a share of the company making an issue of capital for the first time. A prospective investor has no say in the valuation of shares issued. That is determined by the general body of share holders. Should a prospective investor have any legal right and if the issue of capital is not to his desire, he may not opt to subscribe. He cannot intentionally with the objection of which he is personally aware, subscribe into the issue and challenge its very terms. F G

(e) Under the scheme of the Consumer Protection Act, a consumer forum is competent to deal with the complaint if it relates to goods bought or services rendered. Thus the District Consumer Forum has no jurisdiction whatsoever to deal with this case. H

A (f) Section 2(c) of the Act defines a complaint and lists four cases where investigation, inquiry and relief could be granted. The complaint in relation to public issue of shares namely future goods does not fall within any one of four categories of which a complaint can be filed under the provisions of the Act.

B (g) Section 14 of the Act deals with the nature of relief that can be granted. This Section does not envisage grant of any interim relief of an ad-interim relief. The Section contemplates only a final relief. In the instant case, the grant of injunction against the public issue of the appellant company is a relief not provided for under the statute.

C (h) The principles relating to grant of injunction including the balance of convenience have not been borne in mind. Even assuming that the Forum is conferred with the power to grant injunction it has not examined whether there were overwhelming reasons for urgency and why the grievance could not have been made earlier. In this case, the party had D gone to the Forum on the last date when the issue was about to open after the issue had been advertised. The public advertisement was issued on 13.12.93; the petition was filed on 4.1.1994, the orders were passed on the following day. The Calcutta District Consumer Disputes Redressal Forum was approached on the last day, obviously with unclean motives. There is E also suppression of material facts on the part of the respondent. In matters of this kind there must be an undertaking as to the damages on the part of the party seeking the injunction.

For these reasons, it is prayed that the impugned order may be set-aside. In this case, since the appellant has suffered very much in that F not even the copy of the injunction was served on the appellant which copy came to be obtained only through the bankers, it is a fit case in which the appellant should be compensated with exemplary costs.

7. Mr. K.G. Vishwanathan, learned counsel for the respondent urges that there are well-known principles for the grant of *ex-parte* injunction. G Should the court he satisfied that there is a *prima facie* case, on balance of convenience, it can always grant. Where the issue of public share is nothing but an attempt to gain an undue advantage, the Court is not powerless. This is a case to which the Regulations would apply. Therefore, if those Regulations are not conformed to, a prospective applicant would be en- H titled on to seek an injunction. There has been a violation of Regulation

27 and that the appellant did not have any approval as is clear from their own document. Only a letter from SEBI seeking the clarification from the appellant is produced. This does not, it is urged, amount to an approval in law.

It is further urged by Mr. Vishwanathan that the bankers to the issue at Calcutta were really non-existent. The brochure indicates that the application forms could be received in Calcutta at the Bank of Broda, Old Court House Street and Corporation Bank. Cappling Street. Both these branches, it is urged, are non-existent while there is no branch of Bank of Baroda at Old Court House Street. There is no street called Cappling Street at Calcutta.

The basis of allotment what is styled 'first come, first served' was, it is urged, intended to confuse and designed to deceive the innocent investors. The applications were received in 45 centres simultaneously. No priority number was given. Hence, the appellant would be in a position to deny to each one of the investors on the ground that he had not come or approached the appellant first. As a result, the appellant will be able to amass enormous sums of money by way of interest and thereafter return the amount to the respective investors.

The failure to stipulate the period before which the refund would be effective is, it is further urged, a serious irregularity violating Regulation 23.

The Calcutta District Forum has, it is claimed power to issued the restraint order under the Act. Such injunctions are not unknown to law as seen from the Financial Services Act, 1986 of the United Kingdom. Therefore, no interference is called for.

In S.L.P. (c) 321/94, the appellant would urge that the High Court has dismissed the writ petition without a speaking order. There were important points raised in the writ petition. The announcement of the impugned scheme of public issue of units by the appellant is, it is contended, without the approval of SEBI and is illegal and that by proposing the allotment of units based on first come first served basis, fair treatment is not meted out to small investors. There is contravention of Sections 55, 63 and 68 of the Indian Companies Act, 1956. To hold out, as the appellant has done, that the allotment of units will be based on firm allotment basis

A and with a charged sponsor in the advertisement is, it is contended, illegal in law, apart from it being violative of the norms and practices in the capital market. In such a case, the impending disaster could be avoided only by a *quia-timet* interference of the Court. It is also urged that by piercing the corporate veil, it could be easily seen that the real sponsor is no other than the Morgan Stanley Group, New York. Therefore, SEBI Should have acted B in accordance with Section 11(2)(e) of the SEBI Act, 1992 for prohibiting fraudulent and unfair trade practices relating to securities market. It is also urged that the writ petition came to be filed and dismissed without consideration of these aspects. So, it requires interference of this Court.

C 8. We have already extracted the impugned order. The correctness of the same can be determined with reference to the following questions :

(i) Whether the prospective investor could be a consumer within the meaning of Consumer Protection Act, 1986?

D (ii) Whether the appellant company 'trades' in shares?

(iii) Does the Consumer Protection Forum have jurisdiction in matters of this kind?

(iv) What are the guiding principles in relation to the grant of an E ad-interim injunctions in such areas of the functioning of the capital-market and public issues of the corporate sectors and whether certain 'venue restriction clauses' would require to be evolved judicially as has been done in cases such as *State of West Bengal & Ors.* v. *Swapan Kumar Guha and others and Sanchaita Investments and others,* [1982] 1 SCC 561 etc.? F

(v) What is the scope of Section 14 of the Act?

The answers to these questions will decide not only the fate of this civil appeal but also the appeal arising out of SLP (C) No. 321/94.

G 9. In order to decide these questions, it will be necessary to set out the factual matrix. On 11.4.1988, Government of India by an administrative circular constituted the Securities and Exchange Board of India (SEBI) for investors protection. On 30.1.1992, an Ordinance known as SEBI Ordinance was promulgated. On 21.2.1992, a bill was introduced namely the H SEBI Bill of 1992 which became the Act on 4th April, 1992. It came into

force on 13.1.1992 as stated in Section 1(iii) of the SEBI Act. A

On 29.5.1992, the Capital Issues Control Act, 1947 was repealed.

10. Mutual funds in India are regulated by SEBI pursuant to the Securities & Exchange Board of India (Mutual Funds) Regulations, 1993. Under the said Regulations, all mutual funds in India as also the asset B management companies and the custodians of the mutual funds assets are required to be registered with the SEBI. No mutual fund in India can approach the market with a scheme unless scheme has been fully approved by SEBI which is the sole authority for granting approval to such funds. The SEBI examines the scheme and suggests modifications, if any, and C allows the scheme to be advertised and published.

11. The appellant is a domestic mutual fund registered with SEBI. Its registration number is MF/005/93/1 dated 5.11.1993. The certificate of registration is as under :

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"SECURITIES AND EXCHANGE BOARD OF INDIA
(MUTUAL FUND) REGULATIONS, 1993
(Regulation 9)
CERTIFICATE OF REGISTRATION

1. In exercise of the powers conferred by Section 30 of the E Securities and Exchange Board of India Act, 1992 (15 of 1992) read with Securities and Exchange Board of India (Mutual Fund) Regulations, 1993 made thereunder the Board hereby grants a certificate of registration to

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MORGAN STANLEY MUTUAL FUND

as a Mutual Fund.

ii) Registration code for the Mutual Fund is MF/005/93/1

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By order."

The appellant company is managed by a board of Trustees. In accordance with the said Regulations, the investment management company of the appellant Morgan Stanley Asset Management India Pvt. Ltd. is also registered with SEBI. The certificate to this effect is as under : H

A SECURITIES AND
EXCHANGE BOARD OF INDIA

Little & Co.

Central Bank Building
B Bombay 400 023

II MARP/22996/93
November 5, 1993.

Dear Sir,

C RE: Morgan Stanley Mutual Fund

This has reference to the application made by Morgan & Stanley Grup, Inc., to sponsor a Mutual Fund.

D In terms of Regulation 20 of the Securities and Exchange Board of India (Mutual Funds) Regulations 1993, we hereby grant our approval to "Morgan Stanley Asset Management India Pvt. Ltd.", to act as the Asset Management Company for Morgan Stanley Mutual Fund.

E We also grant registration to "Morgan Stanley Mutual Fund" in terms of Regulation 9 of the Regulations subject to the execution of the Custodian Agreement between the Board of Trustees and Stock Holding Corporation of India Ltd. The certificate of Registration in form B is enclosed. Please quote the Registration
F number in your future correspondence with us.

Your faithfully.,

Sd/-
J B Ram."

G Morgan Stanley Asset Management India Pvt. Ltd. is a subsidiary Morgan Stanley Group incorporated which holds 75% of the equity, the balance being held by Indian shares holders such as HDFC, Stock Holding Corporation of India etc. Morgan Stanley Asset Management India Pvt. Ltd. was granted the certificate of incorporation on 12.10.1993 by the
H Registrar of Companies, Bombay and its Memorandum and Article of

Association has also been approved by the SEBI as per the provisions of the said Regulations. A

Regulation 27 of the said Regulations provides that no mutual fund shall announce the scheme unless such scheme has been approved by the Trustees of the Mutual Fund and by SEBI. On 8.11.1993, the Board of Trustees, by a circular Resolution approved the draft scheme, the same was forwarded to SEBI on 10.11.1993. The scheme was duly scrutinised and examined by the SEBI. By its letter dated 23.11.1993, addressed to Enam Financial Consultants Pvt. Ltd., one of the join Lead Managers, SEBI gave its approval. It is stated that the scheme has been examined by them in terms of the provisions of the Regulations. It suggested certain amendments as detailed in enclosures thereto. SEBI also advised the said Enam Financial Consultants Pvt. Ltd. to submit three copies of the printed offering circular and the abridged offering circular of the scheme and the new schemes return in the prescribed format. This requirement of SEBI was complied with. It is after this the appellant took the necessary steps and began marketing the scheme by issuing advertisements in the press, holding presentations with brokers etc. All advertisements and publicity material have been approved by SEBI as under : B C D

"Securities and Exchange
Board of India. E

Enam Financial Consultants Pvt. Ltd.
24 BD Rajabahadur Compound,
Ambalal Doshi Marg,
Bombay- 400 001 F

II MARP/24655/93
November 25, 1993.

Dear Sir,

Re : Advertisement campaign of Morgan Stanley Group Inc. G

With reference to your letter dated 22nd November, 1993, we advise that the enclosed revised set of advertisement of the proposed advertising campaign of Morgan Stanley Inc., are in H

A order.

Yours faithfully,

K. Ravikanth".

B "December 20th, 1993.

Mr. Ronan Basu
Fortune Communication Ltd.
Bombay.

C Sub : MORGAN STANLEY GROWTH FUND

Dear Sir,

I enclose a copy of letter received from SEBI in regard to the changes suggested in the 'Scheme Campaign'. Please carry out the
D changes as required by SEBI and get the approval of Morgan Stanley Assest Management before its release.

Thanking you,

Your faithfully,
E for Enam Financial Consultant Pvt. Ltd.

N.G.N. Puranik".

It has to be carefully noted that the disclaimer clause required to be incorporated at the beginning of offering circular by SEBI while approving
F the scheme is a standard requirement and nothing peculiar to the present case. The object of this is to bring to the notice of the investors that they should take the firm decision on the basis of the disclosures made in the documents. It is meant for the investors protection in fact by such a course the SEBI informs the investors that they have approved the scheme but
G they did not recommend to the investors whether such investment is good or not and leave it to their discretion. In view of this, it will be clear that the allegations of respondents that the SEBI has not approved the other documents is totally baseless.

12. There is also a challenge to the method of allotment. The relevant
H clause pertaining to the method of allotment is as under :

"The offer : The targeted amount to be issued is Rs. 300 crores. Units are to be issued at a price of Rs. 10 per unit, payable in full upon application. The offer will be open for subscription commencing 6th January, 1994 and will remain open until one day after notice of the date of closure is given through advertisement in major national daily newspapers, with the latest date of closure being twelve working days after the opening date. If subscriptions for at least 18 crores units have not been received by the closure date, the offering will be terminated and all subscriptions will be returned within 78 days from the closure date. In the event that the issue is over subscribed, allotments will be made on a "first come first served" basis. However, MSMF reserves the right to accept or reject any subscriptions, including subscriptions in excess of the targeted amount. See "Terms of the issue." Date of closure: The issue will be kept open for a minimum of three working days and a maximum of twelve working days. The Board will proceed to close the issue by giving one day's notice of the date of closure through advertisements in the major national daily newspapers when approximately 75% of the targeted amount is collected. Only those subscriptions which are received before the expiry of the notice period will be retained. If subscriptions for at least 18 crore units have not been received by the closure date of the issue, the offering will terminate and the board will return the entire amount received within 78 days from such closure date. "Basis of Allotment & Despatch of Unit Certificate" The arrangements for closure of the issue and allotment have been designed with the objective of making allotments on a "first come first served" basis. It is hoped, however, that all applicants will received their full allotment. Accordingly, MSMF reserves the right to accept or reject any subscription, including accepting subscription in excess of the targeted amount. Allotment of MSMF Units and despatch of certificate will be made within ten weeks after the closure of the date of the issue.

The above clauses indicate the following :

(i) the Petitioners clearly have a desire to retain over subscription and the offering circular (and the SEBI Guidelines) empower them to do so.

(ii) that there is a minimum period for which the issue will be kept open namely 3 days;

(iii) that those who apply for the units before the closure of the issue would have the same priority and would be allotted units to the extent applied for;

(iv) that there is a provision for a closure notice, which provision has been discussed with and examined by SEBI. This particular method of closure of the scheme and allotment was chosen to break away from the system followed by other mutual funds.

(v) By encouraging prospective investors to apply early the scheme can be closed quickly, allotments can be finalised earlier (thereby blocking the money of the first applicants for a shorter period of time) and most important of all the proceeds can be invested quickly to benefit from the market opportunities. This reduces the cost of collection that the investor has to bear. In this manner by adopting the "First come first served basis "the scheme becomes more investor friendly.

13. The respondent entertained a misconception - whether honestly or confused the concept of the "First come first served" scheme. As stated, it is an invitation to the subscribers to apply early and the scheme be closed quickly. The appellants have made it very clear that those who applied during the opening period of scheme would be given full allotment. This was clarified by the appellant at a press conference held at Calcutta 16th December, 1993. Regular clarifications were issued in this regard by the appellant. The scheme came to be advertised by the appellant on 13th December, 1993. The respondents chose to make an application to the Consumer Forum on the eve of opening of the Scheme. It was on that application, the impugned order came to be passed. In this factual background, we will take up the questions set out for determination.

14. Q. 1. *Whether a prospective investor could be a consumer within the meaning of Consumer Protection Act, 1986?*

The definition of consumer is contained under Section 2(d) of the

Act which read as under : A

"2(d)(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose ; or B

(ii) hires any services for a consideration which has been paid C or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment when such services are availed of D with the approval of the first mentioned person;".

The meaning of goods is same as defined under Sale of Goods Act, 1930. It is so stated in Section 2(i) of the said Act.

The consumer as the term implies is one who consumes. As per the E definition, consumer is the one who purchases goods for private use or consumption. The meaning of the word 'consumer' is broadly stated in the above definition so as to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and F services. The consumer deserves to get what he pays for in real quantity and true quality. In every society, consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacture, producer, supplier, wholeseller and retailer.

In the light of this, we will have to examine whether the "shares" for G which an application is made for allotment would be "goods". Till the allotment of shares takes place, "the shares do not exist". Therefore, they can never be called goods. Under the Sale of Goods Act, all actionable claims and money are excluded from the definition of goods since Section 2(7) of the Sale of Goods Act, 1930 is as under : H

A "'goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale".

B It will be useful to refer to clause (6) of Section 2 of the Sale of Goods Act, 1930. That reads :

"'further goods' means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale."

C As to the scope of this clause, reference may be made to *Maneckji Pestonji Bharucha & Ors.* v. *Wadi Lal Sarabhai & Com.*, AIR (1926) PC 38 at page 40. It was observed thus :

"The Company is entitled to deal with the share-holder who is
D on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the
E registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with the certificate and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would
F have been choses in action and he delivered choses in action. But in India, by the terms 'of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of choses in action, are goods. Hence equitable considera-
G tions not applicable to goods do not apply to shares in India."

Again in *Madho Lal Sindhu of Bombay* v. *Official Assignee of Bombay & Ors*, AIR (1950) FC 21 at page 26, it was held thus :

"A sale according to the Sale of Goods Act (and in India goods
H include shares of joint stock companies) takes place when the

property passes from the seller to the buyer." A

Therefore, *at the stage of application* it will not be goods. After allotment different considerations may prevail.

A fortiori, an application for allotment of shares cannot constitute goods. In other words, before allotment of shares whether the applicant B for such shares could be called a consumer? In *Commissioner of Income-tax (Central) Calcutta* v. *Standard Vacuum Oil Co.*, AIR (1966) SC 1393 at 1397 while defining shares, this Court observed :

> "A share is not a sum of money; it represents an interest measured by a sum of money and made up of diverse rights C contained in the contact evidenced by the articles of association of the company."

15. Therefore, it is after allotment, rights may arise as per the contract (Article of Association of Company). But certainly not before D allotment. At that stage, he is only a prospective investor of future goods. The issue was yet to open on 27.4.1993. There is not purchase of goods for a consideration nor again could he be called the hirer of the services of the company for a consideration. In order to satisfy the requirement of above definition of consumer, it is clear that there must be a transaction of buying goods for consideration under clause 2(i) of the said Act. The E definition contemplates the pre-existence of a completed transaction of a sale and purchase. If regard is had to the definition of complaint under the Act, it will be clear that no prospective investor could fall under the Act.

What is that he could complain of under the Act? This takes us to F the definition of complaint under section 2(c) which reads as follows :

> "2(c) "complaint" means any allegation in writing made by a complainant that -
>
> (i) as a result of any unfair trade practice adopted by any trader, G the complainant has suffered loss or damage;
>
> (ii) the goods mentioned in the complaint suffer from one or more defects;
>
> (iii) the services mentioned in the complaint suffer from H

A deficiency in any respect;

(iv) a trade has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods, with a view to obtaining any relief provided
B by or under this Act."

16. Certainly, clauses 2(iii) & (iv) of the Act do not arise in this case. Therefore, what requries to be examined is, whether any unfair trade practice has been adopted. The expression trade practice as per rules shall
C have the same meaning as defined under Section 369(a) of Monoplies and Restrictive Trade Practices Act of, 1969. That again cannot apply because the company is not trading in shares. The share means a share in the capital. The object of issuing the same is for building up capital. To raise capital, means making arrangements for carrying on the trade. *It is not a practice relating to the carrying of any trade.* Creation of share capital without
D allotment of shares does not bring shares into existence. Therefore, our answer is that a prospective investor like the respondent or the association is not a consumer under the Act.

17. Q. No. 2 : Whether the appellant company trades in shares?

E For the above discussion, it is clear that the question of the appellant company trading in shares does not arise.

18. Q. No. 3 : Does the Consumer Protection Forum has jurisdiction in matters of this kind?

F In view of our answers to questions No. 1 & 2, it follows that the Consumer Protection Forum has no jurisdiction whatsoever.

19. Q. No. 4 : What are the guiding principles in relation to the grant of an ad-interim injunction in such areas of the functioning of the capital-
G market and public issues of the corporate sectors and whether certain 'venue restriction clauses' would require to be evolved judicially as has been done in cases such as *Sanchaita's* case (supra) etc.?

As a principle, ex-parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the Court
H in the grant of ex-parte injunction are :

"(a) where irreparable or serious mischief will ensure to the plaintiff; A

(b) whether the refusal of ex-parte injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented; B

(d) the court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant ex parte injunction; C

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) even if granted, the ex parte injunction would be for a limited period of time. D

(g) General principles like *prima facie* case, balance of convenience and irreparable loss would also be considered by the court.

E

In *United Commercial Bank* v. *Bank of India*, [1981] 2 SCC 766, this Court observed :

"No injunction could be granted under Order 39, Rules 1 & 2 of the Code unless the plaintiffs establish that they had a *prima facie* case, meaning thereby that there was a *bona fide* contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case there is a *prima facie* case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on the material on record that the plaintiffs have a *prima facie* case. It cannot be disputed that if the suit were to be brought by the Bank of India, the High Court would not have granted any injunction as it was bound by the terms of the contract. What could not be done directly cannot be achieved indirectly in a suit brought by the plaintiffs. F G H

A Even if there was a serious question to be tried, the High Court had to consider the balance of convenience. We have no doubt that there is no reason to prevent the appellant from recalling the amount of Rs. 85,84,456. The fact remains that the payment of Rs. 36,52,960 against the first lot of 20 documents made by the appellant to the Bank of India was a payment under reserve while that of Rs. 49,31,496 was also made under reserve as well as against the letter of guarantee or indemnity executed by it. A payment 'under reserve' is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted.

D 20. This Court had occasion to emphasise the need to give reasons before passing ex-parte orders of injunction. In *Shiv Kumar Chadha* v. *Municipal Corporation of Delhi*, [1993] 3 SCC 161 at 176, it is stated as under :

E "The Court shall record the reasons why an *ex-parte* order injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a F right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restrain against a party, without affording an opportunity to him of being heard, must satisfy the G court about the gravity of the situation and court has to consider briefly these factors in the ex-parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court of the authority concerned to record reasons before exercising power vested in them. In respect of some H of such provisions it has been held that they are required to be

complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exception circumstances. Such ex-parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of order 39 of the Code, attracts the principle, that if a statue requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well-known cases of *Taylor* v. *Taylor*, (1875) i CH D 426 and *Nazir Ahmed* v. *Empror*, AIR (1936) PC 253 (2). This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of *Ramchandra Keshav Adke* v. *Govind Joti Chavare*, [1975] 1 SCC 915.

As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an *ex-parte* order is not passed."

21. In this case, the public advertisement was given as seen above, on 13.12.1993; the petition was filed on 4.1.1994 and the impugned order of Consumer Forum came to be passed on the following day. As to why the respondent chose to come at the eleventh hour and where was the need to pass an urgent order of injunction, are matters which are not discernible. Besides tested in the light of the case law set out above, the impugned order which is bereft of reason and laconic cannot stand a moment's scrutiny.

22. Today the corporate sector is expanding. The disgruntled litigants

A indulge in adventurism. Though, in this case we have come to the conclusion that the District Consumer Forum will have no power to grant injunction yet in general cases it becomes necessary to evolve certain venue restrictions.

As to the effect of incorporation it is stated in Halsbury's Law of
B England (4th Edition, Volume 7, Page 55, para 83) as under :

> "When incorporated, the company is a legal entity or persona distinct from its members, and its property is not the property of the members. The nationality and domicile of a company is deter-
> C mined by its place of registration. A company incorporated in the United Kingdom will normally have both British nationality and English or Scottish domicile, depending upon its place of registration, and it will be unable to change that domicile.....
>
> The residence of a company is of great importance in revenue
> D law, and the place of incorporation is not conclusive on this question. In general, residence depends upon the place where the central control and management of the company is located. It follows that if such central control is divided, the company may have more than one residence. The locality of the shares of a
> E company is that of the register of shares. The head office of a company is not, however, necessarily the registered office of the company, but is the place where the substantial business of the company is carried on and its negotiations conducted. Like an individual or a firm, a company can, for the purposes of the Rules of the Supreme Court, carry on business in more places than one."

F

As far as India is concerned, the residence of the company is where the registered office is located. Normally, cases should be filed only where the registered office of the company is situate. Courts outside the place where the registered office is located, if approached, must have regard to
G the following :

Invariably, suits are filed seeking to injunct either the allotment of shares or the meetings of the Board of Directors or again the meeting of general body. The court is approached at the last minute. Could injunction be granted even without notice to the respondent which will cause immense
H hardship and administrative inconvenience. It may be sometimes difficult

even to undo the damage by such an interim order. Therefore, the court must ensure that the plaintiff comes to Court well in time so that notice may be served on the defendant and he may have his say before any interim order is passed. The reasons set out in the preceding paragraphs of our judgment in relation to the fact which should weigh with the court in the grant of ex-parte injunction and the rulings of this Court must be borne in mind.

23. Q. No. 5: What is the scope of Section 14 of the Act?

The said Section reads as under :

"(1) If, after the proceeding conducted under Section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to take one or more of the following things, namely :

(a) to remove the defect pointed out by the appropriate laboratory from the goods in question ;

(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

(2) Every order made by the District Forum under sub-section (1) shall be signed by all the members constituting if and, if there is any difference of opinion, the order of the majority of the members constituting it shall be the order of the District Forum.

(3) Subject to the foregoing provisions, the procedure relating to the conduct of the meetings of the District Forum, its sittings and other matters shall be such as may be prescribed by the State Government."

A 24. A careful reading of the above discloses that there is no power under the act to grant any interim relief of even an ad-interim relief. Only a final relief could be granted. If the jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under Section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience.
B

25. We have dealt with in the preceding paragraphs as to the approval of SEBI and the compliance with the Regulation 27 of the Regulations, 1993. We have also explained what exactly is a concept of 'first come first served' basis. On these two aspects, the respondent is suffering under
C a labyrinth of confusion. Therefore, we hold the grounds urged by the respondent seeking to support the impugned order, are untenable.

The appellant has suffered immensely because it has not even been served with copy of order of injunction. The application of the respondent is clearly actuated by *mala fides*. The Forum should have examined whether
D ex-parte injunction without notice to the opposite side could ever be granted at all. The grounds urged in the injunction application were insufficient for the grant of such a relief.

26. There is an increasing tendency on the part of litigants to indulge
E in speculative and vexatious litigation and adventurism which the fora seem readily to oblige. We think such a tendancy should be curbed. Having regard to the frivolous nature of the complaint, we think it is a fit case for award of costs, more so, when the appellant has suffered heavily. Therefore, we award costs of Rs. 25,000 in favour of the appellant. It shall be recovered from the first respondent. C.A. 4584/94 arising out of SLP (C)
F No. 272/94 is allowed accordingly.

CIVIL APPEAL NO. 4587 OF 1994 (Arising out of S.L.P. No. 321/94) :–

27. In view of what we have observed above, the writ petition has
G rightly come to be rejected though in our view, it would have been better had the High Court given reasons instead of dismissing it summarily. Hence, C.A. No. 4587/94 arising out of S.L.P. (C) No. 321/94 is dismissed. No costs.

R.R. CA No. 4587 of 97 allowed.
CA No. 4548 of 97 dismissed.