BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Date of Hearing : 02.02.2022
Date of Decision : 09.06.2022

Appeal No. 214 of 2019

Geofin Comtrade Ltd.
10th Floor, Geojit Financial Services Building,
34/659-P, Civil Line Road,
Padivattom, Kochi – 682024. ….. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Zerick Dastur, Advocate with Ms. Sneha Sheth, Ms. Palak Agrawal, Mr. Kunal Kothary, Advocates i/b Zerick Dastur, Advocates and Solicitors for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Arvind Lakhawat, Advocate with Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b. Vaish Associates for the Intervenors.

With
Appeal No. 217 of 2019

Philip Commodities India Pvt. Ltd.
No. 1, 18th Floor, Urmi Estate,
95 Ganpatrao Kadam Marg,
Lower Parel (West), Mumbai - 400013,
Maharashtra India. ….. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Neville Lashkari, Advocate with Mr. Prakash Shah, Advocate i/b Prakash Shah & Associates and Mr. Alauddin Shaikh, Authorized Representative for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Arvind Lakhawat, Advocate with Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b. Vaish Associates for the Intervenors.

With
Appeal No. 218 of 2019

IIFL Commodities Ltd.
erstwhile India Infoline Commodities Ltd.

Registered Office :
143, MGR Road, Perungudi,
Chennai, Tamil Nadu - 600 096.

Corporate Office at
IIFL Centre, Kamala City,
Senapati Bapat Marg, Lower Parel,
Mumbai – 400 013. ….. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Mustafa Doctor, Senior Advocate with Ms. Tanmayi Rajadhakshya, Mr. R. S. Loona, Mr. Ankur Loona, Ms. Aparna Wagle, Ms. Siddhi Somani, Advocates i/b Alliance Law for the Appellant.

Mr. Rafique Dada, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Arvind Lakhawat, Advocate with Mr. Mahim Sharma, Advocate for the Intervenor.

With
Appeal No. 288 of 2019

Anand Rathi Commodities Ltd.
Express Zone, A Wing, 10th Floor,
Western Express Highway, Goregaon (E),
Mumbai – 400 063. ….. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Pradeep Sancheti, Senior Advocate with Mr. Prateek Seksaria, Mr. Ameya Gokhale, Mr. Vaibhav Singh, Mr. Rishabh Jaisani, Mr. Harit Lakhani, Advocates i/b Shardul Amarchand Mangaldas & Co. for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Arvind Lakhawat, Advocate with Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b. Vaish Associates for the Intervenors.

With
Appeal No. 289 of 2019

Motilal Oswal Commodities Broker Pvt. Ltd.
Motilal Oswal Tower, 5th Floor,
Rahimtullah Sayani Road,
Opp. Parel ST Depot,
Prabhadevi, Mumbai – 400 025. ….. Appellant

Versus

Securities and Exchange Board of India

SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. … Respondent

Mr. Paras Parekh, Advocate with Mr. Samyak Pati, Advocate i/b Parinam Law Associates for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Arvind Lakhawat, Advocate with Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b. Vaish Associates for the Intervenors.

With
Appeal No. 567 of 2019

National Spot Exchange Ltd.
6th Floor, Chintamani Plaza, B wing,
Andheri-Kurla Road, Chakala,
Andheri (East), Mumbai - 400 053. ….. Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No. C-4A, G Block,
   Bandra Kurla Complex, Bandra (East),
   Mumbai - 400 051.

2. Phillip Commodities India Private Limited
   No. 1, 18th Floor, Urmi Estate,
   95 Ganpatrao Kadam Marg,
   Lower Parel (West), Mumbai - 400013,
   Maharashtra India. … Respondents

Mr. Vikram Nankani, Senior Advocate with Mr. Arvind Lakhawat, Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b Vaish Associates for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent Nos. 1.

Mr. Prakash Shah, Advocate with Mr. Kushal Shah, Chartered Accountant i/b Prakash Shah & Associates for the Respondent Nos. 2.

With
Appeal No. 568 of 2019

National Spot Exchange Ltd.
6th Floor, Chintamani Plaza, B wing,
Andheri-Kurla Road, Chakala,
Andheri (East), Mumbai - 400 053. ….. Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No. C-4A, G Block,
   Bandra Kurla Complex, Bandra (East),
   Mumbai - 400 051.

2. Anand Rathi Commodities Ltd.
   Express Zone, A Wing, 10th Floor,
   Western Express Highway, Goregaon (E),
   Mumbai – 400 063. ...Respondents

Mr. Arvind Lakhawat, Advocate with Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b Vaish Associates for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent Nos. 1.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Prateek Seksaria, Mr. Ameya Gokhale, Mr. Vaibhav Singh, Mr. Rishabh Jaisani, Mr. Harit Lakhani, Advocates i/b Shardul Amarchand Mangaldas & Co. for the Respondent Nos. 2.

With
Appeal No. 569 of 2019

National Spot Exchange Ltd.
6th Floor, Chintamani Plaza, B wing,
Andheri-Kurla Road, Chakala,
Andheri (East), Mumbai - 400 053. ….. Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No. C-4A, G Block,
   Bandra Kurla Complex, Bandra (East),
   Mumbai - 400 051.

2. Motilal Oswal Commodities Broker Pvt. Ltd.
   Motilal Oswal Tower, 5th Floor,
   Rahimtullah Sayani Road,
   Opp. Parel ST Depot,
   Prabhadevi, Mumbai – 400 025. ...Respondents

Mr. Arvind Lakhawat, Advocate with Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b Vaish Associates for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent Nos. 1.

Mr. Paras Parekh, Advocate with Mr. Samyak Patil, Advocate i/b Parinam Law Associates for the Respondent Nos. 2.

With
Appeal No. 570 of 2019

National Spot Exchange Ltd.
6th Floor, Chintamani Plaza, B wing,
Andheri-Kurla Road, Chakala,
Andheri (East), Mumbai - 400 053. ….. Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No. C-4A, G Block,
   Bandra Kurla Complex, Bandra (East),
   Mumbai - 400 051.

2. India Infoline Commodities Ltd.
   (currently names as IIFL Commodities Ltd.)
   Registered Office :
   143, MGR Road, Perungudi,
   Chennai, Tamil Nadu - 600 096. ...Respondents

Mr. Arvind Lakhawat, Advocate i/b Mr. Mahim Sharma, Advocate for Appellant.

Mr. Rafique Dada, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent Nos. 1.

Mr. Mustafa Doctor, Senior Advocate with Ms. Tanmayi Rajadhakshya, Mr. R. S. Loona, Mr. Ankur Loona, Ms. Aparna Wagle, Ms. Siddhi Somani, Advocates i/b Alliance Law for the Respondent Nos. 2.

With
Appeal No. 571 of 2019

National Spot Exchange Ltd.
6th Floor, Chintamani Plaza, B wing,
Andheri-Kurla Road, Chakala,
Andheri (East), Mumbai - 400 053. ….. Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No. C-4A, G Block,
   Bandra Kurla Complex, Bandra (East),
   Mumbai - 400 051.

2. Geofin Comtrade Ltd.
   10th Floor, Geojit Financial Services
   Building, 34/659-P, Civil Line Road,
   Padivattom, Kochi, Ernakulam,
   Kerala – 682024. ...Respondents

Mr. Janak Dwarkadas, Senior Advocate with Mr. Chirag Kamdar, Mr. Melvyn Fernandes, Ms. Supriya Majmudar, Ms. Krithika Dineshan, Advocates i/b Vaish Associates for Appellant.

Mr. Mihir Mody, Advocate with Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b K. Ashar & Co. for the Respondent Nos. 1.

Mr. Zerick Dastur, Advocate with Ms. Sneha Sheth, Ms. Palak Agrawal, Mr. Kunal Kothary, Advocates i/b Zerick Dastur, Advocates and Solicitors for the Respondent Nos. 2.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M. T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. Even though different orders have been passed by the Whole Time Member (hereinafter referred to as 'WTM') of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') against the appellants, the facts and the issue raised is common and, therefore, all the appeals are being decided together. For facility, the facts stated in Appeal No. 218 of 2019 IIFL Commodities Ltd. vs. SEBI are taken into consideration.

2. Five appeals have been filed by the five different brokers whereby their applications for registration as a commodity broker under the Securities and Exchange Board of India (Intermediaries) Regulations, 2008 (hereinafter referred to as 'Intermediaries Regulations') has been rejected on the ground that the appellant is not a 'fit and proper person' to hold a registration certificate. Even though National Spot Exchange Limited (hereinafter referred to as 'NSEL') is not a party in these proceedings, nonetheless, five appeals have been filed against the five orders praying for a variety of reliefs but has confined the relief praying that the ex-parte observations /

findings made against the appellant in the impugned order should be expunged and that SEBI should be directed to conduct an independent inquiry against the commodity broker, its associates and other connected entities with regard to their involvement in NSEL matters.

3. The facts leading to the filing of the present appeal is, that the appellant in Appeal No. 218 of 2019 is a company and is the commodity derivative broker and is also a member of National Commodity and Derivatives Exchange Ltd. (hereinafter referred to as 'NCDEX') and was also a member of NSEL. The appellant became a member of NSEL in 2007 and ceased to be a member on August 6, 2013 pursuant to stoppage of spot trading activities for NSEL. Similar is the case of the other appellants in Appeal Nos. 214, 217, 288 and 289 of 2019.

4. In May 2005, NSEL was incorporated as a Spot Exchange for trading in commodities under Section 27 of the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as 'FCR Act'). The Government of India issued a notification dated June 5, 2007 exempting all forward contracts of one day duration for the sale and

purchase of the commodities traded on NSEL from the operation of the provisions of the FCR Act subject to certain conditions mentioned therein. One such condition was that all trades should result in physical delivery. In September 2009, NSEL introduced paired contracts. Paired contracts means buying and selling the same commodity through two different contracts at two different prices on the exchange platform and investors could buy a short duration settlement contract and sell a long duration settlement contract and vice versa at the same time. Thus, trades for buy and sell used to happen on the exchange at the same time at different prices. Paired contracts were being executed on the NSEL platform by various brokers as per the bye-laws of that exchange.

5. On July 12, 2013, the Government of India directed NSEL to settle all the existing contracts executed on its platform. NSEL was unable to settle the contracts and accordingly committed defaults causing huge losses to the trading clients. On July 31, 2013, NSEL was dissolved and was also prohibited from providing a trading platform for paired contracts with effect from July 31, 2013.

6. On September 28, 2015, FCR Act was amended by Finance Act, 2015 (hereinafter referred to as 'Finance Act'). By this amendment, recognized exchange under FCR Act was given deemed recognition under the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as 'SCR Act') and were thus brought under the administration of SEBI. Needless to say, NSEL was not an exchange under FCR Act and, therefore, NSEL was not brought under the administration of SEBI by the Finance Act. The commodity derivative brokers such as the appellants were permitted to continue dealing in commodity derivatives provided they made an application for grant of registration certificate to SEBI within three months from September 28, 2015 and if they filed such an application, they would continue to trade in commodities till the disposal of their application.

7. Based on the aforesaid, the appellant filed an application for certificate of registration under Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992 (hereinafter referred to as 'Stockbrokers Regulations') on November 16, 2015 and again on November 26, 2015. In 2016, SEBI appointed

a chartered accountant to carry out performance audit / inspection of the appellant's activities at NSEL and other commodity exchanges like Multi Commodity Exchange of India Limited (MCX), NCDX in respect of trades of the financial years 2008-09 to 2013-14. Based on the audit report which, *prima-facie*, found the appellant to have violated the provisions of the FCR Act and the Code of Conduct specified in Schedule II of the Stockbrokers Regulations as well as NSEL circulars, provision of Prevention of Money Laundering Act, 2002, KYC norms, etc. SEBI appointed a Designated Authority under Regulation 24 of the Intermediaries Regulations. The Designated Authority issued a show cause notice under Regulation 25 alleging in brief that the appellant had violated the provisions of conditions prescribed under the Government notification dated June 5, 2007 which, in turn, resulted in violation of Section 27 of the SCR Act and made false representation in respect of an assured / risk free returns, arbitrage, opportunity in spot market by way of paired contracts, making assurances that paired contracts are backed by collaterals in the form of stock / sufficiency of commodities in warehouses, client code modifications with manipulative artifice. Further, the appellant had done trading in clients name and did not

segregate the clients funds from own account, etc. The notice alleged that the appellant had not conducted its operations as a commodity broker in a fair and transparent manner and that the integrity, reputation and character was, thus, questionable from the conduct of its business at NSEL as a commodity broker.

8. Based on the reply filed by the appellant, the Designated Authority submitted a report recommending that the registration of the appellant as a commodity broker may not be considered and further recommended initiation of prosecution proceedings. On the basis of the recommendation of the Designated Authority, the designated member issued the first show cause notice dated April 24, 2017 under Regulation 28(1) read with Regulation 7(2) of the Intermediaries Regulations to show cause as to why action should not be taken on the recommendations given by the Designated Authority.

9. The appellant filed its reply dated June 18, 2018 alleging that SEBI has no jurisdiction to issue the show cause notice under Regulation 28(1) read with Regulation 7(2) of the Intermediaries Regulations as the appellant was not registered under the Intermediaries Regulations and that the Intermediaries Regulations

was only applicable to persons who were registered under the said Regulations and that the Regulations could only be invoked if there was non-compliance of any conditions of certificate of registration which, in the instance case, did not arise as the appellant was not holding a registration certificate. It was further contended that the notification dated September 28, 2015 was prospective in nature and that SEBI had no jurisdiction to issue a show cause notice which is based on the allegations prior to September 28, 2015. It was also urged that the appellant had requested for certain documents which were not provided and consequently, the principles of natural justice were violated. It was also urged that respondent have initiated proceedings only against a handpick of brokers including the appellant whereas more than 600 brokers who were trading on the NSEL platform have not been issued notice, therefore, the appellant has been discriminated.

10. During the pendency of the proceedings the appellant moved an application dated August 17, 2018 for withdrawal of its application for registration as a broker. By a letter dated September 4, 2018 the Dy. General Manager, Markets refused to entertain the

application of the appellant for withdrawal of its registration application on the ground that the proceedings have been initiated pursuant to an enquiry report which are pending. The appellant being aggrieved by the aforesaid order of the Dy. General Manager, Markets filed Writ Petition No. 3295 of 2018 before the Hon'ble Bombay High Court praying for the quashing of the letter dated September 4, 2018 issued by the Dy. General Manager, Markets as well as the show cause notice dated April 24, 2017 issued by the Designated Member under the Intermediaries Regulations. Similar Writ Petitions were also filed by the other appellants (other than NSEL). The Hon'ble Bombay High Court by an order dated October 4, 2018 passed a detailed order rejecting the contentions of the appellant holding that the appellant cannot be allowed to withdraw the application for registration pending enquiry and consequently declined to entertain the Writ Petition.

11. It transpires that the Serious Fraud Investigation Office (hereinafter referred to as 'SFIO'), Ministry of Corporate Affairs forwarded an investigation report dated August 31, 2018 to SEBI on November 1, 2018, based on which SEBI issued a second show

cause notice dated December 27, 2018 alleging that in view of various observations made by the courts and certain authorities including the observations made in SFIO report, the appellant was not a fit and proper person and consequently directed the appellant to show cause as to why an appropriate action should not be taken. The appellant filed a reply and denied the charges levelled against it contending that the charges were not proved and no order has been passed by any court of law and, therefore, these observations which are not against the appellant cannot be used for holding that the appellant is not a fit and proper person.

12. The WTM after considering the replies and the submissions made by the appellant passed the impugned order holding that the appellant is not a fit and proper person because of its participation as a broker on NSEL platform and being a close associate of NSEL. The WTM held that various courts and authorities have made serious adverse observations against NSEL and paired contracts observing that these transactions are violative of FCR Act and were in the nature of financing transactions which are violative of Maharashtra Protection of Interest of Depositors (in Financial Establishments)

Act, 1999 (hereinafter referred to as 'MPID Act') and even though these observations are yet to be established in the court of law, SEBI was justified in considering them for the purpose of assessing the reputation of the appellant and finding that the appellant by virtue of being a broker had facilitated transactions in paired contracts, for its clients on the NSEL platform which establishes a close connection between the appellant on one hand and paired contracts on NSEL on the other. Such close association with NSEL has eroded the reputation of the appellant and, therefore, the appellant is not a fit and proper person to hold directly or indirectly a certificate of registration as a commodity derivative broker. The WTM accordingly rejected the application for grant of registration certificate.

13. The WTM repelled the submissions of the appellant holding that SEBI has jurisdiction to determine whether the appellant is a fit and proper person as it had applied for registration and that the proceedings under Chapter IV and VI of the Intermediaries Regulations would be applicable upon the appellant. The WTM further contended that SEBI did not discriminate the appellant since

other brokers have also been issued notice subsequently. The WTM further contended that the proceedings under the Intermediaries Regulations as well as the Brokers Regulations can be clubbed together while deciding the application of the appellant for grant of the registration certificate.

14. We have heard Mr. Mustafa Doctor, Mr. Pradeep Sancheti, Mr. Janak Dwarkadas, the learned senior counsel with Mr. Zerick Dastur, Ms. Sneha Sheth, Ms. Palak Agrawal, Mr. Kunal Kothary, Mr. Neville Lashkari, Mr. Prakash Shah, Ms. Tanmayi Rajadhakshya, Mr. R. S. Loona, Mr. Ankur Loona, Ms. Aparna Wagle, Ms. Siddhi Somani, Mr. Prateek Seksaria, Mr. Ameya Gokhale, Mr. Vaibhav Singh, Mr. Rishabh Jaisani, Mr. Harit Lakhani, Mr. Paras Parekh, Mr. Samyak Pati, Mr. Chirag Kamdar, the learned counsel for the appellants and Mr. Rafique Dada, Mr. Kevic Setalvad, the learned senior counsel with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, the learned counsel for the respondent SEBI and Mr. Vikram Nankani, the learned senior counsel with Mr. Arvind Lakhawat, Mr. Melvyn Fernandes, Ms.

Supriya Majmudar, Ms. Krithika Dineshan, Mr. Mahim Sharma, the learned counsel for NSEL at length.

15. One of the contentions raised is, that the show cause notice dated April 24, 2017 was issued without jurisdiction. It was urged that the show cause notice was issued under Regulation 28(1) read with Regulation 7(2) of the Intermediaries Regulations, whereas the appellant was not registered under the provisions of the Intermediaries Regulations at that point of time on the date when the show cause notice was issued. It was thus urged that the proceedings under Regulations 23 to 28 of the Intermediaries Regulations could not have been initiated against the appellant as the appellant was not at that relevant time registered under the provisions of the Intermediaries Regulations. It was contended that proceedings can only be initiated against those persons who held the certificate of registration whereas the appellant did not hold any registration certificate. On the other hand, the stand of the respondent is, that this issue has been considered and decided by the Hon'ble Bombay High Court in its judgment dated October 4, 2018. The appellant however disputed this fact vehemently contending that this issue was not

decided by the Division Bench of the Hon'ble Bombay High Court and that the said issue was left open.

16. We have perused the order of the Division Bench of the Hon'ble Bombay High Court dated October 4, 2018 and we find that this issue has extensively been dealt with in the judgment. The Hon'ble Bombay High Court has held that the provisions of the Intermediaries Regulations are applicable upon the appellant and that SEBI had the jurisdiction to issue the show cause notice. In view of the aforesaid, we are of the opinion that once the controversy has been decided in a Writ Petition by the Hon'ble Bombay High Court, it is no longer open to the appellant to raise same issue before this Tribunal. The principle of res judicata is squarely applicable.

17. The contention that SEBI committed an error in not allowing the withdrawal application is again patently erroneous and cannot be raised. This issue has squarely been dealt with by the Hon'ble Bombay High Court in its judgment dated October 4, 2018 and, therefore, again it is no longer open to the appellant to raise the same issue again before this Tribunal.

18. The entire edifice in the impugned order revolves on the question as to whether the appellant is a fit and proper person to hold a certificate of registration under the Intermediaries Regulations. In this regard, the application for grant of registration is required to be filed under Regulation 3 and the same is required to be considered under Regulation 7 of the Intermediaries Regulations. For facility, Regulation 7 is extracted hereunder :-

> *"7. (1) For considering the eligibility of the applicant and grant of certificate to such applicant, the Board shall take into account all matters which it deems relevant to the activities in the securities market, including but not limited to the following –*
>
> *(a) whether the applicant or any of its associates have in the past been refused certificate by the Board and if so, the ground for such refusal;*
>
> *(b) whether the applicant, its directors or partners, or trustees, as the case may be or its principal officer is involved in any pending litigation connected with the securities market which has an adverse bearing on the business of the applicant or on development or functioning of the securities markets;*
>
> *(c) whether the applicant satisfies the eligibility criteria and other requirements as specified in these regulations and the relevant regulations;*

(d) whether the grant of a certificate to the applicant is in the interest of the investors and the development of the securities market.

(2) Any application for grant of certificate:-

(a) which is not complete in all respects and does not conform to the requirements in Form A and the requirements specified in the relevant regulation;

(b) which does not contain such additional information as required by the Board;

(c) which is incorrect, false or misleading in nature;

(d) where the applicant is not in compliance with the eligibility requirements as set out under these regulations or the relevant regulations;

(e) where the applicant is not a 'fit and proper person' as stated in Schedule II;

(f) where the principal officer does not have the requisite qualification or experience as required under the relevant regulations;

shall be rejected by the Board for reasons to be recorded by the Board in writing.

(3) Before rejecting an application, the applicant shall be given an opportunity in writing to make good the deficiencies within the time specified by the Board, for the purpose:

***Provided** that where an application is rejected for the reason that it contains false or misleading information, no such opportunity may be given and the applicant shall not make any application for*

grant of certificate under these regulations or any other regulations for a period of one year from the date of such rejection."

19. For considering the eligibility of a broker for grant of a certificate, SEBI is required to take into account all matters which it deems relevant to the activities in the securities market but is not limited to the following criteria mentioned therein, meaning thereby, that the criterias mentioned therein are not exhaustive. One of the criteria provided under Regulation 7(2)(e) is to the effect as to whether the appellant is a fit and proper person as stated in Schedule II. Schedule II provides as under :-

SCHEDULE II
SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES) REGULATIONS, 2008
[See regulation 7]

Criteria for determining a 'fit and proper person'

"For the purpose of determining as to whether an applicant or the intermediary is a 'fit and proper person' the Board may take account of any consideration as it deems fit, including but not limited to the following criteria in relation to the applicant or the intermediary, the principal officer [the director, the promoter] and the key management persons by whatever name called -

(a) integrity, reputation and character;

(b) absence of convictions and restraint orders;

(c) competence including financial solvency and net worth;

(d) absence of categorization as a willful defaulter."

20. While determining whether an applicant is a fit and proper person, the board may take into account in consideration as it deems fit the following criteria, namely, integrity, reputation and character, etc. The language used in Regulation 7 read with the second Schedule makes it abundantly clear that the concept of fit and proper person is of vital amplitude and SEBI can take into account in consideration as it deems fit for the purpose of determining whether an applicant is a fit and proper person or not. One such consideration is, that the applicant should have a good reputation, character and integrity. Thus, while considering under Regulation 7, some subjective satisfaction and discretion is given to the authority. However, in our opinion, such subjective satisfaction should be judicious and should be based on some material which satisfies a rational mind and should not be based on surmises and conjunctures

nor should it be arbitrary otherwise the exercise of power would be illegal. Such exercise of power should stand the test of scrutiny.

21. The WTM has relied upon the decisions of this Tribunal ***Jermyn Capital LLC vs. SEBI Appeal No. 26 of 2006 dated September 6, 2006 and Mukesh Babu Securities Ltd. vs. SEBI and Anr. Appeal No. 53 of 2007 decided on December 10, 2007***, and concluded that for the purpose of granting a registration, SEBI could take into account as it deems fit good reputation, competence, integrity and character of the applicant which are the basic material parameters.

22. In this regard, while considering the reputation of the appellant, the WTM considered the findings / observations in :

a. Writ Petition No. 2743 of 2014 dated December 4, 2017 in the matter of 63, Moons Technologies Ltd. & Ors. vs. Union of India & Ors.

b. Enquiry Report of the Designated Authority dated April 11, 2017.

c. Order dated August 22, 2014 by the Hon'ble Bombay High Court in Criminal Bail Application No. 1263 of 2014 in the matter of Jignesh Prakash Shah vs. The State of Maharashtra.

d. Observations by the various courts / authorities regarding NSEL and paired contracts in :-

(i) FMC order dated December 17, 2013

(ii) Observations made in the letter dated December 30, 2014 by the Ministry of Finance, Department of Economic Affairs.

(iii) Findings / observations in the order dated December 4, 2017 in Writ Petition No. 2743 of 2014 in the matter of 63, Moons Technologies Ltd. & Ors. vs. Union of India & Ors.

(iv) SFIO Report.

(v) Findings / observations in the order of Writ Petition No. 1403 of 2015 in the matter of NSEL vs. State of Maharashtra & Ors. dated October 1, 2015.

23. Based on the aforesaid, the WTM came to the conclusion that the adverse observations impacted the reputation of the appellant even though such observation was, *prima-facie*, in nature. Further, the observations / findings against NSEL indicate the existence of a close association of the appellant with NSEL even if it was a *prima-facie* observation. The WTM concluded that since the appellant facilitated the trading of its clients on the NSEL platform and provided services to its clients, it was sufficient to establish the close association of the appellant with NSEL and paired contracts. The WTM further went on to hold that since the reputation of NSEL and its paired contracts had been seriously impacted by adverse observations of various courts and authorities then by virtue of the close association of the appellant with NSEL the reputation, honesty, integrity and character of the appellant has also been seriously eroded.

24. Having heard the learned counsel for the parties, we find that the WTM has placed extensive reliance on two decisions of the Hon'ble Bombay High Court in the matter of ***63 Moons Technologies Ltd. & Ors. vs. Union of India & Ors. dated December 4, 2017 in Writ Petition No. 2743 of 2014 and decision dated October 1, 2015 in Writ Petition No. 1403 of 2015 in the matter of National Spot Exchange Ltd. vs. State of Maharashtra & Ors.*** Writ Petition No. 2743 of 2014 was filed by 63 Moons Technologies Ltd. & Ors. challenging the order of the Central Government passed under Section 396 of the Companies Act, 1956 ordering the compulsory merger between NSEL and 63 Moons Technologies Ltd. & Ors. The Division Bench of the Hon'ble Bombay High Court dismissed the Writ Petition and the observation made in this order was relied upon by the WTM. The said order of the Division Bench was set aside in toto by the Hon'ble Supreme Court by its judgment dated April 30, 2019 passed in Civil Appeal No. 4476 of 2019. Thus, we are of the opinion that once the order of the Hon'ble Bombay High Court has been set aside by the Hon'ble Supreme Court, the said decision of the Division Bench of the

Hon'ble Bombay High Court no longer exist and consequently, no reliance can be made on any finding or observations made therein.

25. The WTM has also relied upon the certain observations made by the Hon'ble Bombay High Court in ***Writ Petition No. 1403 of 2015 in the matter of NSEL vs. State of Maharashtra & Ors. dated October 1, 2015*** in respect of the invocation of MPID Act by the investigating agency. The central issue in this Writ Petition which arose for consideration was whether the NSEL was a financial establishment which could accept deposit from the members of the public and whether the provisions of MPID Act was applicable to NSEL. The Writ Petition was dismissed by the Hon'ble Bombay High Court on the ground that the investigation was going on. The WTM relied upon the observations made by the Hon'ble Bombay High Court while dismissing their Writ Petition at the admission stage. Subsequent to the passing of the order, another Writ Petition No. 1181 of 2018 was filed by 63 Moons Technologies Ltd. vs. The State of Maharashtra in which the Division Bench of the Hon'ble Bombay High Court held that NSEL was not a financial establishment and, therefore, the provisions of the MPID Act were

not applicable. While passing the order, the Division Bench dealt with its earlier order dated October 1, 2015 in Writ Petition No. 1403 of 2015 and observed that the *prima-facie* observations made in its order of October 1, 2015 was not binding and that the same was observed since further investigation was in process at that relevant stage. The Division Bench observed that the *prima-facie* observation made in the order dated October 1, 2015 was made for the limited purpose for considering the relief for the quashing of the action of invocation of the provisions of the MPID Act at that stage and such observation does not foreclose the issue about the applicability of the provisions of the MPID Act.

In view of the aforesaid, we are of the opinion that reliance on the observations made in Writ Petition No. 1403 of 2015 dated October 1, 2015 of the Division Bench of the Hon'ble Bombay High Court is misplaced. Such prima-facie, observation cannot be utilized to judge the reputation, character or integrity of NSEL.

26. The WTM has also relied upon certain observations made in the ***bail rejection order dated August 22, 2014 passed by the Hon'ble Bombay High Court in the matter of Jignesh Prakash***

Shah vs. The State of Maharashtra. We are of the opinion that grant of bail depends on certain parameters which involves the question as to whether liberty that should be granted or not. Such restriction on liberty is based on several restrictions and factors. Such observation made in the order is limited to the fact as to whether the bail should be granted or not. Such observations cannot be utilized to judge the reputation, integrity or character of the applicant. In any case, there is nothing on record to indicate any close association of the appellant with Jignesh Shah, and, on this basis, a presumption that the appellant had a close association with Jignesh Shah and, therefore, his reputation is eroded, in our opinion, is too farfetched and is not based on any cogent evidence much less *prima-facie* evidence.

27. Reliance on the SFIO investigation report dated August 31, 2018 is also misplaced. The investigation report only directs the Economic Offence Wing (hereinafter referred to as 'EOW') or the police to initiate appropriate proceedings against NSEL, its directors and promoters under the provisions of the Indian Penal Code (IPC). Based on the direction, criminal proceedings were initiated and the

Special Session Judge took cognizance by order dated July 29, 2019 which came to be challenged by NSEL and two other accused before the Hon'ble Bombay High Court in Criminal Application No. 94 of 2020 on the ground that SFIO does not have jurisdiction to direct the initiation of the proceedings under the IPC. The Single Judge of the Hon'ble Bombay High Court by an order dated January 15, 2020 passed an interim order staying the effect and operation of the impugned order dated July 29, 2019 and further restrained the Additional Session Judge from proceedings any further in the matter.

28. We find that no complaint as yet has been filed against the appellant pursuant to the SFIO report. Under Section 212(15) of the Companies Act, 2013, SFIO report is deemed to be a report under Section 173 of the Code of Criminal Procedure, 1973. Whether such report could be treated as evidence in law is a moot point which has not been considered by the WTM.

29. We further find that observations made by the Designated Authority in its report have been relied upon. In our opinion, such observations cannot be relied upon in as much as based on such recommendation, a show cause notice was issued and, therefore, an

appropriate finding pursuant to the first show cause notice regarding the alleged violation is required to be given and thereafter an appropriate assessment is to be made as to whether in terms of such findings, the appellant is a fit and proper person or not. Thus, reliance on the observations made by the Designated Authority without considering the reply given by the appellant appears to be arbitrary.

30. A lot of effort have been made by the WTM in relying upon the judgments of this Tribunal in ***Jermyn Capital LLC and Mukesh Babu Securities Ltd. (supra)*** and concluding that even on *prima-facie* basis, the WTM can consider whether the applicant is a fit and proper person. In our opinion, the decisions in ***Jermyn Capital LLC and Mukesh Babu Securities Ltd. (supra)*** cannot be treated as having a precedent value. The said decisions are distinguishable on its own facts. In the case of ***Jermyn Capital LLC (supra),*** the facts were that Jermyn Capital LLC also had a 100% subsidiary which subsidiary was managed by one Dharmesh Doshi. Dharmesh Doshi had a direct link and close association with Ketan Parekh. Ketan Parekh was debarred by SEBI from accessing the securities market

for a period of 14 years. Considering the close association and direct link and the possibility that Ketan Parekh may enter the securities market through Dharmesh Doshi, a show cause notice was issued to Jermyn Capital LLC, based on which an interim order was passed restraining Jermyn Capital LLC from accessing the securities market on the criteria that the said entity was not a fit and proper person. Since the matter was one of urgency, an ex-parte ad-interim order was passed and ultimately a final order was passed debarring Jermyn Capital LLC from accessing the securities market for a period of two years. We are of the opinion that the criteria for passing an ad-interim order / injunction order is based on different criterias, namely *prima-facie case*, balance of convenience and irreparable injury which are distinct and different while considering the application for grant of a registration certificate. We are of the opinion that while considering the application, the reputation, integrity and character of the applicant cannot be lightly considered and cannot be based on certain observations which are not directly related to the appellant. Such culling out observations and holding the appellant to have a loose character or bad reputation would create a havoc and unnecessarily tarnish the reputation which is not based on any

findings of violation of any provisions of the securities laws. In our opinion, the WTM is required to consider these aspects and not close the issue on the presumption that the appellant while acting as a facilitator to carry out the trades on behalf of his clients is closely connected to NSEL. All brokers facilitate the trades on behalf of their clients on the exchange platform. It does not mean that all brokers are closely connected to the exchange. Such finding given by the WTM appears to be farfetched and arbitrary.

31. Similarly, in ***Mukesh Babu Securities Ltd. (supra),*** a chargesheet was filed. A criminal case was registered against the chairman based on which SEBI came to a conclusion that Mukesh Babu Securities Ltd. was not a fit and proper person to be granted registration during the pendency of the proceedings. This Tribunal held that considering the seriousness of the charges which if established would involve moral turpitude, the Tribunal concluded that SEBI was justified in the peculiar circumstances not to grant registration in view of the fact that the company *prima-facie*, was not a fit and proper person. Needless to say here that the distinguishing feature was that a criminal complaint was filed against the chairman

of the company. In the instant case, there is no evidence to show that any proceedings have been initiated against the appellants.

32. In so far as the finding of the close association of the appellant with NSEL is concerned, some of the appellants contended that the forensic report which was made at the behest of SEBI has exonerated the appellant on this charge. This fact has not been considered by the WTM while holding the appellant to be closely connected with NSEL. In this regard, "associate" has been defined under Regulation 2(1)(b) to mean any person controlled, directly or indirectly, by the intermediary, or any person who controls, directly or indirectly, the intermediary, or any entity or person under common control of such intermediary. There is no finding in the instant case indicating that the appellants have any control directly or indirectly over NSEL and, therefore, the question as to whether the appellant is a close associate of NSEL has not been considered in the right perspective.

33. In the instant case, we find that the application for grant of registration certificate has been rejected. Nothing has been stated as to how long the rejection of the application would continue. We are of the opinion that such rejection cannot continue indefinitely and if

an application is rejected, a period should be prescribed within which the broker cannot apply for grant of a fresh registration certificate but after the expiry of the period he could file such an application.

34. It was urged by the learned senior counsel for the respondent that in spite of the orders of the Hon'ble Bombay High Court being set aside, there are still other materials before this Tribunal which if considered would support the findings given by the WTM. It was contended that this Tribunal can consider the observations / findings given in the EOW report, EOW charge sheet, the complaint letters given by NSEL and the observations against the appellant in SFIO report and consequently contended that based on these observations the impugned order can be sustained. Having pondered over this aspect, additional documents can be considered by the first appellate court provided they are filed and admitted as additional evidence and an opportunity is given to the respondent to rebut these documents which in the instant case is lacking. In any case, in our opinion, the WTM is required to consider these documents and arrive at its own opinion as to whether these documents are germane to the issue or not and whether the observations / finding could bring any

conclusion on the reputation, integrity and character of the appellant. Thus, it is neither feasible nor advisable for this Tribunal to delve into the observations and findings given in these reports / charge sheets.

35. Five appeals have been filed by NSEL bearing Appeal Nos. 567, 568, 569, 570 and 571 of 2019 challenging the findings given by the WTM in the order passed against the five brokers. The said NSEL has also filed intervention application in the five appeals filed by the brokers. The appeal and the intervention application is on a common issue. NSEL has prayed for variety of reliefs but has confined its relief on two aspects, namely, that the observations / findings given by the WTM against the appellant in the impugned orders should be expunged and that this Tribunal may direct SEBI to conduct an independent inquiry proceeding against the connected entities and persons associated with the commodity brokers against whom evidence is available on record for their involvement in NSEL matter and to determine their fit and proper person status for holding registration as an intermediary with SEBI.

36. Admittedly, NSEL is not a party to the proceedings initiated by SEBI against the brokers despite which it is alleged that several observations and findings have been rendered against NSEL and, on that basis, a finding has been given that the brokers were closely associated with NSEL. Further, adverse observations and findings have been passed on the reputation, character and integrity of NSEL without issuing any notice or providing any opportunity of hearing.

37. In this regard, the brokers has filed their objections contending that NSEL is not an aggrieved person as NSEL was not a party to the proceedings and, in any case, the adverse observations against NSEL does not create any impact and, therefore, NSEL is not an aggrieved person nor has any locus-standi to file an appeal. We also find that no objection has been raised by SEBI with regard to the appeals filed by NSEL and / or the intervention application filed by NSEL.

38. In this regard, Section 15T of the Securities and Exchange Board of India Act, 1992 provides that any person aggrieved by an order can file an appeal before this Tribunal. The word 'any person' can include even a person who is not a party to the proceedings. The

only embargo is that the person should be aggrieved by the order. In the instant case, admittedly, observations / findings have been made against NSEL touching upon the reputation, integrity and character of NSEL. Further, such findings against NSEL have been used for the purpose of judging the character and reputation of the brokers. In our opinion, the appellant is an aggrieved person and has a right to intervene in the appeals filed by the brokers and also has an individual right to file separate appeals.

39. We also find that the first show cause notice dated April 24, 2017 has been issued by SEBI to the stockbrokers pursuant to the recommendation made by the designated authority against the commodity brokers. Based on the recommendation, a show cause notice to some of the brokers has been issued. NSEL in their complaints have alleged that the five brokers who are also the appellants before us had indulged in illegal activities such as funding of clients by way of PAN lending, name lending through their NBFC and other related entities and that funding was totally disproportionate to the networth and income level of these clients. It was also alleged that the brokers have misused their in house NBFC

and have funded clients who have no capacity to take such exposure. Further, these brokers channelized funds for trading without permission and knowledge of that clients' and were engaged in market capturing practices by large scale unique client code modifications.

40. The allegations made in the complaints *prima-facie*, appears to be serious. At this stage, we may observe that on one hand a finding has been given by the WTM that the appellant is closely associated with NSEL and, on the other hand, the respondents are relying upon the complaint letters which have been filed by NSEL in the connected appeals. If the NSEL has filed the complaints, then the respondents have a lot to explain as to how NSEL is closely connected to the broker and vice versa.

41. We also find that NSEL's grievance before this Tribunal is that certain observations / findings made by the WTM in the impugned orders has directly affected the reputation, character and integrity of the appellant and such observations and findings which have been passed ex-parte without giving notice to the appellant would adversely affect other proceedings against NSEL pending

before various courts of law / authorities. The details of the adverse observations and findings have been culled out in the appeals filed by NSEL. We also find that adverse findings / observations have been made ex-parte against NSEL's reputation and character. These adverse observations have been made against NSEL in which NSEL is not a party to these proceedings. Culling out adverse observations ex-parte against NSEL is unwarranted and violative of the principles of natural justice. We are of the opinion that observations and findings given by the WTM which is adverse to NSEL cannot be sustained especially when no notice or opportunity of hearing was provided. These observations and findings as have been specified in the memo of appeal are violative of the principles of natural justice as envisaged under Article 14 of the Constitution of India and, therefore, cannot be sustained and are expunged.

42. In view of the aforesaid, the impugned orders passed by the WTM against the brokers cannot be sustained and are quashed. The appeals of the brokers are allowed. The matters are remitted to the WTM to decide the matter afresh in the light of the observations made aforesaid in accordance with law after giving an opportunity of

hearing to the brokers. All issues raised by the brokers for which a finality has not been reached remains open for them to be raised before the WTM. It will be open to the WTM to rely upon other material such as the complaint letters of NSEL, EOW report, EOW charge sheet, etc. provided such copies are provided to the brokers and opportunity is given to rebut the allegations. Such additional documents relied upon by the respondent should form part of the show cause notice for which purpose, it will be open to the WTM to issue a supplementary show cause notice. It will also be open to SEBI if it considers necessary, to conduct an independent enquiry proceeding against the connected entities and persons associated with the brokers against whom evidence is available. SEBI will decide the matter afresh within six months from today.

43. The appeals of NSEL are also allowed. The adverse observations / findings against the appellants in the impugned orders are expunged and will not be utilized against NSEL in any court of law or before any authority.

44. In the circumstances of the case, parties shall bear their own costs.

45. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala
Presiding Officer

Justice M. T. Joshi
Judicial Member

09.06.2022
PTM