IN THE SECURITIES APPELLATE TRIBUNAL AT MUMBAI

DATED THIS THE 24TH DAY OF OCTOBER, 2024

CORAM: Justice P. S. Dinesh Kumar, Presiding Officer
Ms. Meera Swarup, Technical Member
Dr. Dheeraj Bhatnagar, Technical Member

Appeal No. 743 of 2023

Between

1. Metropolitan Stock Exchange of India Ltd.
Agastya Corporate Park, Building A,
Unit 205A, 2nd Floor, Piramal, Lal
Bahadur Shastri Marg, Kurla West,
Mumbai – 400 070.

2. Latika Kundu
Khaitan & Co.
One Forbes Building, A Wing, 4th Floor,
Dr. V. B. Gandhi Marg, Kala Ghoda,
Fort, Mumbai – 400 001.

3. Saket Bhansali
Khaitan & Co.
One Forbes Building, A Wing, 4th Floor,
Dr. V. B. Gandhi Marg, Kala Ghoda,
Fort, Mumbai – 400 001.

…. Appellants

Mr. Pesi Modi, Senior Advocate with Mr. Tomu Francis, Mr. Neville Lashkari, Ms. Zarnaab Aswad, Ms. Ankita Roy, Advocates i/b Khaitan & Co. for the Appellants.

And

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

…. Respondent

Mr. Chetan Kapadia, Senior Advocate with Mr. Ratan Singh, Mr. Anuj V. R., Advocates i/b Agama Law Associates for the Respondent.

THIS APPEAL IS FILED UNDER SECTION 15T OF SEBI ACT, 1992 TO SET ASIDE ORDER DATED JULY 31, 2023 (EX-A) PASSED BY AO, SEBI.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR ORDERS ON JULY 30, 2024, COMING ON FOR PRONOUCEMENT OF ORDER THIS 24TH DAY OF OCTOBER 2024, THE TRIBUNAL MADE THE FOLLOWING:

O R D E R

Per: Dr. Dheeraj Bhatnagar, Technical Member

This appeal is filed challenging the order dated July, 31, 2023, as amended on August 2, 2023, passed by the Learned AO[1] of

[1] AO- Adjudicating Officer

SEBI[2], under Section 15-I of the SEBI Act, 1992 and Section 23-I of the Security Contracts (Regulations) Act, 1956.

2. Brief facts of the case are as under :-

- Metropolitan Stock Exchange of India (MSEI) (Appellant No. 1) is a recognized stock Exchange in India.
- Noticing mismanagement in the affairs of MSEI, SEBI carried out investigation in 2019 and based on the investigation report, the then CEO & MD was asked to proceed on indefinite leave.
- Thereafter, Ms. Latika Kundu (Appellant No. 2) was appointed as CEO&MD by the Board of MSEI and the same was approved by the SEBI.
- After joining MSEI on March, 12, 2020, she noted certain irregularities in an IT infrastructure project called “U-trade” and instituted inquiry in the matter. The two key members of the authorized team of the project soon submitted their resignations, which was approved by the NRC/ Board.
- Within a week of joining, she also recommended appointment of one Mr. Saket Bhansali (Appellant No. 3) for a new position of Head-new initiatives, which was approved by the

[2] SEBI - Securities & Exchange Board of India

NRC and the Board. After a few months, he was selected as CFO of MSEI, as per the due process.

- SEBI received complaints from various persons including certain ex-employees, alleging irregularities in the management of MSEI.
- In view of the same, vide letters dated June 9, 2021 and July 9, 2021, SEBI advised the MSEI to appoint a reputed Forensic Auditor to conduct audit with regard to the complaints and to submit an Action Taken Report (ATR) on the auditor's report within 15 days of receipt of the Audit report.
- In pursuance of this, MSEI appointed M/s Earnst & Young (E&Y) as Forensic auditors, who submitted their report on November 11, 2021. The ATR thereon was submitted to the Board by the chairman, MSEI on March 2, 2022.
- Based on the FAR/ATR, SEBI levied penalty against the appellants, which is the subject-matter of this appeal

3. We find that there are primarily four allegations against the appellants, based on which penalty has been levied in the impugned order against different appellants. These allegations and charges against respective appellants are as per Table-1 below:-

Table-1: Appellant-wise charges and penalty imposed

Appellant	Allegations	Provisions	Penalty
Appellant No. 1	A. .Failure to comply with conditions of Accounting Standard-1	Reg. 33(1) of SECC Regulations r/w Reg. 4(1) of LODR Regulations and Cl. 25 & 26 of AS-1	Rs 2 lakhs
	B. Non-designation of an employee as KMP	Reg. 2(1)(j) r/w Reg. 27(2), 27(3) and 27(5) of SECC Regulations	Rs. 2 lakhs
Appellant No. 2	A. Non-compliance with SOP while appointing employees	1.Cl. 4(a), 4(b), 5(b) and 5(f) of Code of Conduct in Part-A of Schedule II read with Reg. 26(1) of SECC Regulations; and 2. Cl. 1(a), 1(b), 1(c), 3(c), 3(e) and 3(f) of Code of Ethics in Part-B of Schedule II read with Reg. 26(2) of SECC.	Rs. 4 lakhs
	B. Non designation of an employeeas KMP	1.Reg. 2(1)(j) r/w Reg. 27(2), 27(3) and 27(5) of SECC Regulations and 2. Cl. 4(a), 4(b), 5(b),5(e) and 5(f) of Code of Conduct in Part-A of Schedule II read with Reg. 26(1) of SECC Regulations; and 3. Cl. 1(a), 1(b), 1(c), 3(c), 3(d), 3(e) and 3(f) of Code of Ethics provided in Part-B of Schedule II r/w Reg. 26(2) of SECC Regulations.	
	3. Grant of clean chit to 2 ex-employees	1. Cl. 4(b), 5(b), 5(e) and 5(f) of Code of Conduct provided in Part-A of Schedule II r/w Reg. 26(1) of SECC Regulations 2.Cl. 1(a), 1(c), 3(c) and 3(e) of Code of Ethics provided in Part-B of Schedule II r/w Reg. 26(2) of SECC Regulations.	
Appellant No. 3	Grant of clean chit to 2 ex-employees	Cl. 1(a), 1(c), 3(c) and 3(e) of Code of Ethics provided in Part-B of Schedule II r/w Reg. 26(2) of SECC Regulations.	Rs. 2 lakhs

4. We have heard Mr. Pesi Modi, learned senior Advocate for the appellant and Mr. Chetan Kapadia, learned senior Advocate for the respondent. In the light of rival submissions, following points arise for our consideration:-

(i) Whether there was failure on the part of the Appellant No. 1 in making compliance with Accounting Standard No. 1?

(ii) Whether there was failure on the part of the Appellant Nos. 1 and 2 in designating employees as KMPs?

(iii) Whether there was failure to comply with the Standard Operating Procedure on the part of the Appellant No. 2 while appointing employees?

(iv) Whether appellant Nos. 2 and 3 gave clean chit to the erring employees?

(i) Whether there was failure on the part of the Appellant No. 1 in making compliance with Accounting Standard-1?

5. Regarding the alleged failure in making compliance with Accounting Standard No. 1, it was alleged that the appellant No. 1 failed to comply with the Clause-25 and 26 of Ind. AS–1 requiring the management to assess whether the company is a "*going concern*" or whether it intends to liquidate the entity or cease trading.

5.1 In reaching to this finding, the Ld. AO referred to the Statutory Auditor's report for the FY 2019-20, which is as under :-

> *"8. Report on Other Legal and Regulatory Requirements*
>
> *a. . ...*

b. As required by Section 143(3) of the Act, based on our audit, we report that:

…….

(iv) Except for the matters described in the Basis for Qualified Opinion paragraph, in our opinion, the aforesaid standalone financial statements comply with the Accounting Standards specified under Section 133 of the Act, read with Companies (India Accounting) Rules, 2015, as amended. "

5.2 In their comments, the auditors have made the following qualifications:-

"Auditor's qualifications

The auditors in their report on the annual financial statements for the year ended on March, 31, 2020, expressed certain qualifications emphasis of matters, key audit matters which are summarized below along with the management's comments on the same:

22. The company continues to prepare financial statements on going concern basis even though it has continued to incur significant losses during the current and preceding period. As advised, the company is adequately capitalized, it has gone live on inoperability, operations are functioning appropriately and gross revenues are expected to grow in future years and accordingly the company continues to prepare financial statements on going concern basis. However, the business volumes are not sufficient, and there is no clarity on increasing revenues and making profits and the company could not achieve its projected revenues so far. The management has also considered the GST credit available amounting to Rs. 4171 lakhs and MAT Credit entitlement of Rs. 186 lakhs as recoverable treating the company as going concern. ***We are unable to comment***

> ***on the preparation of accounts on going concern basis*** *and not making for provisions for impairments for the above and other adjustments, if any, that will be arising out of the same."* ***[Emphasis supplied].***

5.3 Subsequently, vide email dated September 4, 2021, the statutory auditors clarified to the appellant that the qualification made by them is in the nature of a 'disclaimer' and has no effect on the net worth of the Exchange. In the said email, it has been recorded that management is confident that the Exchange shall be continuing as a 'going concern' and they have provided to the statutory auditors with details of compliance and various steps taken/being taken by them in this regard.

5.4 The forensic auditors were asked to verify the allegation that the Exchange has made no provision for impairment on the fixed assets and GST/CENVAT credit despite consistent erosion of net worth and qualifications made by the statutory auditors regarding their inability to comment on the preparation of accounts on 'going concern' basis and not making provision for impairment and other adjustments, if any. For the purpose of their report dated November 11, 2021, the forensic auditors have reviewed the minutes of management meeting, auditor's report for FY 2019-20 and FY 2020-21 and limited review report for FY 2021-22 with regard to the

qualification and also reviewed the management representation made to the auditors. The forensic auditors have taken cognizance of management's response to statutory auditors stating that :-

- "*The company is adequately capitalized.*
- *It has gone live on interoperability.*
- *Operations are functioning appropriately.*
- *Gross revenue is expected to increase in future years.*
- *As a result of improved revenue earnings in future years, the unutilized CENVAT Credit will be fully utilized in the future years and has therefore been considered as good for recovery".*

5.5 The forensic auditors have also acknowledged the SEBI letter dated July 2, 2021, by which the appellant No. 1 was advised to calculate the net worth after making adjustments keeping in view the auditor's qualification. The Forensic auditors commented that in the net worth certificate dated March 31, 2021 drawn by MSEI, impairment of GST Credit and MAT Credit have not been given effect to in view of the auditor's qualification on 'going concern' basis. It was, however, mentioned that even if such impairment is made, the net worth of the Exchange as on March 31, 2021 was Rs. 119.32 crore, which is above the required bench mark figure of Rs. 100 crore, as per Regulation 14(1) of SECC. Without prejudice, the forensic auditors noted that as per the expert opinion obtained from

M/s. S. S. Gupta CA, CENVAT credit/GST credit can be carried forward for any number of years and neither it is to be written off nor does it lapse. On the limited review of Quarter 1 of FY 2021-22, forensic auditors noted that statutory auditors maintained the qualification with regard to 'going concern' status, however they did not comment on the qualifications with regard to impairment of GST Credit and MAT Credit entitlement from the net worth. Further, the forensic auditors have also taken note of further response of the management stating that income from core transaction has increased based on the increased volume, adoption of various costs reduction measures and initiatives being taken to increase volumes /revenues.

5.6 It is held in the impugned order that MSEI could not present before the statutory auditors, required financial projections to justify its 'going concern' assumption for preparation of the financial accounts for FY 2019-20. We find that the findings in the impugned order are based on the above qualified opinion of the Statutory Auditors, as confirmed by the Forensic Auditors. It is held in the impugned order that appellant No. 1 has not complied with Clause 25 and 26 of Ind AS–1 and thereby violated Regulation 33(1) of the

SECC Regulations[3] read with Regulation 4(1) of the LODR Regulations[4].

In arriving at his findings, the AO has also referred to the letter dated January 25, 2022 addressed by the Chairman of the appellant Exchange to SEBI stating that appellant is incurring losses and its net worth is continuously eroding.

5.7 The appellant has relied upon an e-mail dated September 4, 2021 addressed by the statutory auditor to SEBI, in which it is stated that their qualification on the 'going concern' basis is in the nature of 'disclaimer' as no quantification of qualification was possible.

5.8 Further, it was submitted that as per Clause-25 of **Ind AS-1**, an entity shall prepare financial statements on a 'going concern' basis unless the management either intends to liquidate the entity or cease trading and has no realistic alternative but to do so. It was pleaded that none of these applied to the appellant.

5.8.1 Furthermore, it was submitted that neither the statutory auditors nor the forensic report had opined that the Exchange was not a 'going concern' and neither of them have held that there were any

[3] SECC Regulations – SEBI (Stock Exchange and Clearing Corporation) Regulations, 2018
[4] LODR Regulations – SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

material uncertainties that may cause doubt on Exchange's ability to continue as a '*going concern'*. It was submitted that on August 21, 2020, it was informed that the appellant Exchange had made assessment of its ability to continue as a 'going concern' basis, which was explained in the management note provided to the respondent and none of the submissions of the appellant were denied.

5.8.2 The learned Senior Advocate for the appellant also submitted that it was undisputed that despite incurring losses in the earlier years, the appellant Exchange's net worth continues to be above the benchmark figure of Rs. 100 crore, for allowing it to continue its operations as a recognized Stock Exchange.

5.8.3 The appellant also raised a preliminary objection on the jurisdiction of SEBI in respect of their interpretation of accounting standards on the ground that in reaching out to its finding that the appellant is not a 'going concern' as per Accounting Standard-1, the respondent did not make reference to NAFRA[5], which is a specialized statutory authority to maintain and enforce compliance of Accounting Standards and Audit standards.

[5] NAFRA - National Financial Reporting Authority

5.8.4 Lastly, the Learned Senior advocate for the appellant submitted that there were mismanagement problems in MSEI, under the previous management, which was investigated by SEBI in 2019 and based on the Inspection Report, the previous CEO-cum-MD was asked to proceed on indefinite leave and the new management was put in place. The new management under the Appellant No. 2, after taking over on March, 12, 2020, identified inappropriate manner of allotment of 'U-trade' contract and took reasonable steps to address it, including removal of the authorized team for that project and initiated positive steps for reviving the Exchange and improving its performance, which is evident in its performance in subsequent years, which is as follows:

In this regard, the appellant brought before us the details of financial performance of the Exchange in the subsequent years.

Business Volume / Open Interest						
Particulars	***FY 2018-19***	***FY 2019-20***	***FY-2020-21***	***FY2021-22***	***FY 2022-23 (Q1)***	***FY 2022-23 (Q2)***
Volumes – in crores (Both Sides)	*76,331*	*83,082*	*1,96,561*	*1,80,531*	*47,954*	*84,321*
Transaction Charges (INR)	*61,84,480*	*67,77,554*	*1,57,58,875*	*1,46,25,029*	*37,96,827*	*64,50,000*
Average Daily Trading Volume (INR Crores)	*194*	*187*	*401*	*373*	*400*	*680*

It was submitted that the initiatives taken by the new management have been acknowledged by the Learned AO too in the impugned order as well.

5.9 Refuting the same, the Learned Senior Advocate representing the respondent vehemently submitted that in arriving its findings SEBI has relied upon the report of the forensic auditor and also the letter dated January 25, 2022 of the Chairman of MSEI, and hence it already had the benefit of expert advice in the matter to conclude that the appellant had followed the Ind. AS-1, which is broader than AS-1.

5.9.1 It was submitted by the learned senior Advocate for the respondent that the Standards of Audit, more particularly, SA-705 provide that if the Opinion of the Auditor is qualified, such qualification can be of three kinds viz. (a) Qualified Opinion, (b) Adverse Opinion and (c) Disclaimer of Opinion. Therefore, since the Auditing Standards are clear and categorical, it cannot be argued that "qualified opinions" are in the nature of "disclaimers". It is clear from the language and phraseology used by the Auditor in its Report that the qualified opinion in the Auditor's Report arises from inability to obtain sufficient appropriate audit evidence. The Statutory Auditor has not given an unmodified Auditor's Report with the certification that accounting standards have been followed.

5.10 We have carefully considered the facts of the case in the light of the rival submissions.

5.10.1 Section 133 of Companies Act, 2013 r/w Rule 4A of the Companies (Accounts) Rules, 2014 makes Ind AS (Indian Accounting Standards) applicable to financial statements of all companies. Clause 25 of Ind AS-1 requires every entity to make an assessment of its ability to continue as a 'going concern'.

5.10.2 Clause 26 of Ind AS-1 provides that for assessing the going concern assumption, concerned management is required to take into account all available information about its future, at least twelve months from the end of the reporting period. In cases where the company is continuously suffering losses (like the present case), the management may need to consider wide range of factors relating to current and expected profitability, debt repayment schedules and potential sources of replacement financing, before it can satisfy itself that the going concern basis is appropriate.

5.10.3 In our view, the aforesaid observations of the statutory auditors are in the nature of *disclaimer* only and no further meaning can be imputed to that. The observation of the statutory auditors that "*we are unable to comment on the preparation of accounts on going concern basis*" itself is clearly a disclaimer. The statutory auditors have clearly held in the Clause 8(b) of their report that-

> *"Except for the matters described in the Basis for Qualified Opinion paragraph, in our opinion, the aforesaid standalone financial statements comply with the Accounting Standards specified under the Section 133 of the Act, read with Companies (India Accounting Standard Rules, 2015, as amended."*

The said disclaimer does not necessarily mandate the appellant Exchange to assess itself as a company 'not to be a going concern'. As per the AS-25 or Ind AS-1, a corporate entity is required to prepare financial statements on a 'going concern' basis, which is the norm, unless the management either intends to liquidate the entity or cease trading. So far as appellant No. 1 is concerned, in its own assessment, it neither intends to liquidate the entity or cease trading and therefore, had no reason for not treating itself to be a company on a 'going concern' basis. Moreover, considering effective steps taken by the new management, *inter-alia*, bringing in new technology, inviting strategic investors, identifying mismanaged project and taking action against the erring employees, the management was confident of turnaround in performance.

5.10.4 We find that the respondent has not brought on record any adverse finding with regard to the decisions/actions of the new management that may have an adverse bearing on the Exchange's performance in the current and subsequent years. The learned AO has observed that the appellants have not shared any projections of

financial performance with the statutory auditors, which in his view was necessary, considering the losses incurred by the Exchange over last few years. This was also noted by the Forensic auditors.

5.10.5 On careful consideration, we find that with respect to the 'going concern' assumption, the following has been prescribed under AS-1:-

- *For preparation of financial statements, management shall assess an entity's ability to continue as a going concern.*
- *Financial statements shall be prepared on a going concern basis unless management either intends to liquidate the entity or to cease trading or has no realistic alternative but to do so.*
- *However, in cases, where an entity does not have a history of profitable operations and ready access to financial resources, management may need to consider a wide range of factors relating to current and expected profitability, debt repayment schedules and potential sources of replacement financing before it can satisfy itself that the going concern basis is appropriate.*

5.10.6 Undisputedly, the management of appellant No. 1 intends neither to liquidate the entity nor to cease trading but considering their strategy for reviving the Exchange, in its assessment, it is confident of turnaround, In view of this, it would be too technical to

hold that only by not providing financial projections to the statutory auditors, the company cannot be held as a ‘going concern’.

5.10.7 The Clause 26 of Ind AS-1 also requires that if the Exchange has been making losses, then the management “*may need to consider various factors to satisfy itself that it’s a going concern”*. Based on the above, it is evident that the assessment with regard to going concern basis is to be made by the company and its management. The discretion to consider various factors relating to expected profitability entirely lies with the company management and there is no compulsory requirement to consider financial projections as the only factor for its assessment of ‘going concern’ assumption. It is understood that in making the assessment, the board of the company has taken into consideration the future projections of profits, revenue Exchange and also in reducing the losses.

5.10.8 We also note that the AO has also referred to the letter dated January 25, 2022 written by the Chairman, by which poor performance of exchange and increasing losses has been highlighted as a cause of concern. In our view, the contents of the chairman’s letter are only a matter of fact, being financial statements of the Exchange, which are already in public domain and cannot be

considered as an expert opinion in the matter. Moreover, the same chairman has signed over the financial statements for 2019-20 treating the company as a going concern. In our view, such a letter is devoid of any expert value and more likely to be result of internal dynamics of the organization.

5.10.9 We also note that the appellant's Board was consistent in their 'going concern' assumption, while corresponding with the statutory auditors for the purpose of audit of financial statements. Indeed, the improvement in performance of the appellant Exchange in subsequent years also justifies that the assessment of the appellant Exchange in this regard was not unfounded.

5.10.10 In our view, the letter dated July 2, 2021 of SEBI itself carried a pre-conceived notion that the benefit of carry forward of GST/CENVAT and MAT credit would not be available to a company held as not a going concern. The forensic auditors have taken cognizance of another expert opinion from M/s. S. S. Gupta CA taken by the MSEI which states that CENVAT/GST credit can be carried forward to any number of years by a company and the balance credit available is not required to be written off nor does it lapse. Further, as per Section 115JAA of the Income Tax Act, the Minimum Alternate Tax (MAT) Credit available to a company can

be carried forward for the prescribed number of years, irrespective of whether the company has been held a going concern or otherwise.

In view of this, we find that the starting point of the SEBI's action with issue of letter dated July 2, 2021 was itself faulty. This was also considered by the statutory auditors in the subsequent financial years, who while continuing to make disclaimer about going concern assumptions of the company, have not made any qualification on the impairment on account of GST Credit and MAT Credit, as departure from their comments in FY 2019-20.

5.10.11 In view of this, we find that the assessment of the appellant Exchange in treating it as a 'going concern' was justified, considering its strategy and efforts intended for bringing in improvement in its performance in subsequent years. The statutory auditor has a limited role in making such an assessment about future growth of the company, which is a derivative of appropriate business strategy and initiatives to be taken by the company. In any case, we have also taken note of the observations of the statutory auditors, which, as per further clarification given by them, are in the nature of a *disclaimer*. We also note that in recording the findings in this regard, the respondent has relied upon the aforesaid observations of the statutory auditor without making any reference to the expert

body, namely, National Financial Regulatory Authority set up under Section 132 of the Companies Act, 2013.

5.10.12 It is not in dispute that the Exchange continues to have net worth above the benchmark figure of Rs. 100 crore and hence, it does not suffer primary disqualification to function as per the respondent's guidelines.

5.10.13 Considering the above, we don't find merit in the penalty levied against the appellant on this ground. Accordingly, we answer that point No. (i) in the ***negative*** and hold that there was no failure on the part of the Exchange in complying with the Accounting Standards.

(ii) **Whether there was failure on the part of the Appellants No. 1 and 2 in designating employees as KMPs?**

6. Regarding the issue whether there was failure on the part of the Appellants No. 1 and 2 in designating employees as KMPs, we find that in the impugned order, the appellant nos. 1 and 2 have been held guilty for failing to identify one Mr. Ajit Singh as KMP and for not seeking any exemption from the SEBI in this regard.

6.1 The learned Senior Advocate for the appellant submitted that at the relevant time, the Exchange had such a flat organisation structure

that even very junior employees would also fall within two-levels below the MD&CEO. Therefore, the NRC on February 12, 2020 decided to designate only those employees as KMP, who headed the regulatory department or were in decision making roles and to seek exemption qua all other employees, which was duly applied for since July 7, 2020.

6.2 Further, Regulation 20 of the SECC *inter alia* provides that the Exchanges must ensure that the KMPs are persons having "**good reputation and character**". Drawing our attention to the Forensic Report, it was submitted that the employment of Mr. Ajit Singh was terminated by the Exchange noticing repeated instances of indiscipline, non-performance, and making unauthorized presentations to the media, etc., and that in June 2021, the Board of Directors refused to grant him a promotion and KMP designation. It was submitted that it was not mandatory on the part of the appellant to designate him as KMP.

6.3 Refuting the allegation of not seeking exemption from the SEBI in this regard, it was submitted that admittedly from time to time, the CRO, through quarterly compliance report had sought exemption from SEBI for non-designation of certain persons as KMPs. The same is also admitted in the Impugned Order. In SEBI's

Affidavit-in-Reply, the contention raised is that for seeking the said exemption, a separate specific application ought to have been made. It was submitted that at the relevant time, there was no such requirement prescribed as to the form and manner of applying for such exemption, nor did SEBI advise the Exchange to make separate application in any particular form or manner in response to the quarterly compliance reports.

The Learned Senior advocate for the appellant submitted that the requirement of seeking exemption by a separate application along with fees has only recently been introduced vide the SECC (Amendment) Regulations, 2023 effective from August 28, 2023. Vide the same amendment, the definition of KMP set out in Reg. 2(1)(j) of SECC Regulations was modified w.e.f. August 28, 2023.

6.4 Refuting the finding in the Impugned Order that the CRO of the Exchange was given a warning by the Board of Exchange for not designating KMPs, it was submitted that the Board's warning to the CRO was in respect of his failure to place the issue raised by SEBI's Inspection Report dated July 9, 2020 before the Board and the Board directed him to seek exemption from SEBI. Therefore, the same does not amount to any admission of any breach as alleged in respondent's Affidavit-in-Reply. It was also submitted that the CRO

had no authority to designate KMPs and it is the responsibility of the Board of Directors to identify, appoint and designate KMPs as per Sec. 203(2) of the Companies Act and Regulation 4 of the LODR Regulations.

6.5 Addressing on behalf of the appellant No. 2, the Ld. Senior advocate submitted that the NRC, comprising of Public Interest Directors including the erstwhile Chairman, was responsible for deciding as to who should be/should not be appointed as KMPs and their decision could not have been overruled by Appellant No. 2. Hence, Appellant No. 2 as MD & CEO cannot be blamed for any alleged deficiency in respect thereof.

6.6 We find that prior to February, 12, 2020, there was no clear policy of MSEI with regard to designation of KMPs. Later, keeping in view the SEBI's advice after inspection in 2017-18, the NRC in its meeting on February 12, 2020 laid down the policy in this regard, which was approved by the Public Interest Directors of the company (including the Chairman). Noticing that the Exchange had a flat organization structure, which could lead to classifying employees even two levels below MD & CEO as "KMPs", in view of the definition of the KMP as per Regulation 2(1)(j) of the SCCA

Regulations, the NRC[6] decided to treat only such employees as "KMP" who 'headed any regulatory department' or were in 'decision making roles' and decided to seek exemption qua all other employees.

6.7 We note that the said employee (Mr. Ajit Singh), was not classified as KMP while he was in the same job of "Head-business development" since his joining in 2017. Later too the Exchange did not classify Mr. Ajit Singh as KMP within the ambit of the new policy laid down by the NRC on February 12, 2020, as ostensibly the department of "business development" is not a regulatory department. Secondly, whether the said employee was in a decision-making role or not, is a matter of fact as all employees in a decision-making chain contribute to decision-making but the extent of freedom to exercise discretion in final decision-making is governed by the level of trust reposed by the management. If the company does not consider him 'fit and proper' to be KMP, reflects his limited role in decision-making in his work area. Moreover, a KMP is deemed to be a person in the know of insider information within PIT Regulations. Considering the charges of indiscipline and non-performance, the company did not promote him nor classified him as a key member of the management. Hence, the Exchange did not find

[6] NRC – Nomination & Remuneration Committee

him ‘Fit and Proper’ to be given a decision-making role. Subsequently, in 2021, on these grounds he was denied promotion as KMP status.

6.8 With regard to seeking exemption from SEBI in the matter, we find that prior to August 28, 2023, there was no specific requirement under the SECC Regulations for an Exchange to seek exemption by filing a separate application for exemption from SEBI. It was since August 28, 2023, that vide the Securities Contract (Exchanges and Corporation) Amendment Regulation, 2023, a specific procedure has been laid down. It is seen that as per the decision of the NRC, the Compliance Regulation Officer (‘CRO’) of the company sought exemption in this regard in the quarterly compliance report as mentioned in the impugned order.

6.9 Based on Forensic Audit Report (FAR), CRO was issued direction to seek specific exemption through a separate letter. In view of this, it cannot be denied that the appellant had not sought exemption from the SEBI. Moreover, on merit, the exemption sought by the appellant No. 1 is justified, considering the flat structure of organization, which necessitated the new policy in this regard, which was approved by the Board of Directors.

6.10 Considering the above, we find the action of SEBI in punishing the Exchange and its CEO for not classifying an errant employee as KMP as arbitrary and not in the best interest of the Exchange. Further, the insistence on form and manner of making application for seeking exemption even though it was not prescribed at the relevant time, without paying any credence to the merit of exemption, is arbitrary and not justified. We also note that penalty has been levied on appellant No. 2 in respect of alleged violation in financial year 2019-20, while she joined the Exchange on March 12, 2020 only, and hence worked for less than 3 weeks during the financial year. Moreover, on her own, she could not have taken any decision in this short time, undoing the established practice followed earlier, nor could have disregarded the policy dated February, 12, 2020, which was laid down by NRC comprising PIDs and the chairman.

6.11 In view of this, we find that acts of omission or commission do not warrant harsh action of levy of penalty on the appellant Nos. 1 and 2 on this ground. Accordingly, we answer this point in the ***negative*** and hold that there was no failure on the part of appellant Nos. 1 and 2 in not designating the KMPs.

(iii) Whether there was failure to comply with the Standard Operating Procedure on the part of the Appellant No. 2 while appointing employees?

7. The CEO & MD of the company have been alleged of not adhering to the SOP while appointing two employees Mr. Saket Bhansali, 'Head-New initiatives' (who was later appointed as CFO) and Mr. Sushil Limbulkar, 'Head of Exchange Technology Projects', who were appointed after she took over the reins of the Exchange on March 12, 2020.

7.1 It is alleged that the selection of Mr. Saket Bhansali, though based on his qualifications and experience, was in violation of the HR policy of the company, which provides that- *"For each vacancy HR should offer maximize closure of any particular requirements by aiming at shortlisting and sending across at least 3 matching candidates for interview".*

With regard to the appointment of Sushil Limbulkar, adverse note was made of the fact that there was no discussion between the candidate and functional head.

7.2 The learned Senior advocate for the appellant has submitted that the internal policy of the Exchange required that only the HR

department should endeavour/aim to shortlist at least 3 candidates and hence it was not a mandatory requirement. Elaborating the circumstances of appointment of Mr. Bhansali, it was submitted that at the relevant time, when Appellant No. 2 took charge of her office, there was no Company Secretary or any Head of HR who could shortlist candidates. In fact, the appointment of Mr. Saket Bhansali was for, *inter-alia*, filling up the vacant position of Head of HR itself, as per the Minutes of the NRC Minutes dated March 20, 2020 and the Board Resolution dated March 20, 2020, by which he was appointed. Simultaneously a Company Secretary was also appointed by following the same process, which included NRC and the Board's Approval. Further, in case of Mr. Saket Bhansali, a panel appointed by the Board interviewed and selected Mr. Bhansali. It was submitted that if the Board/NRC had not found merit or considered the need for three candidates, it could have rejected the recommendations made by the appellant No. 2.

7.3 Further, it was submitted that at the relevant time in March 2020, because of the onset of the Covid-19 pandemic, it was nearly impossible to find or recruit suitable candidates. Even SEBI had substantially relaxed the strict compliance of several rules and regulations by market participants during the Covid-19 pandemic.

7.4 It was submitted that reliance of the Ld. AO on the finding that the Appellant No. 2 has admitted that she was not aware of the requirement at the relevant time was treated as adverse finding, while conveniently ignoring that Appellant No. 2 also relied upon the Employment Agreement, which did stipulate that as the MD&CEO she would have the power and authority to employ the required personnel and did not require consideration of three candidates.

7.5 It was also submitted that the Impugned Order finds no fault whatsoever with Appellant No. 3 as regards his competence and ability for the said roles for which he was employed, nor does it dispute the submission that he was a suitable and ideal candidate. In fact, in the Impugned Order itself, the AO appreciates the role of Appellant Nos. 2 & 3 in improvement of the Appellant No.1 Exchange.

7.6 With regard to the appointment of Mr. Sushil Limbulkar, which was alleged to be in violation of the internal policy requiring that there should have been a discussion between the candidate and the 'functional head', it was submitted that Appellant No. 2 as the MD & CEO had discussions with the candidate and was the 'functional head' for this new division. In this regard, reliance was placed on the Appellant No. 1's internal email dated October 1, 2022,

which clearly shows that Mr. Sushil Limbulkar was reporting to Appellant No. 2, the MD & CEO.

7.7 We have carefully considered the facts of the case. We have taken note of the background under which the appointment of appellant No. 2 was approved by SEBI. Undisputedly, SEBI based on inspection in 2019 noticed certain mismanagement in the Exchange took strong action, which included sending of the previous MD & CEO on indefinite leave. The appellant No. 2 was appointed as the new MD and CEO through the defined procedure. Upon taking over, the appellant No. 2 in a short period identified areas facing mismanagement and persons responsible for this. It was noted that there were irregularities in a project known as 'U-Trade' project, which was an IT project for creation and supply of a new matching engine. Preliminary evidences were placed before the board of directors in April 2020. At this time, there was no CS or head of HR who could scrutinize candidates to build up new team for the Exchange. Considering that urgency to clean up the organization and with a view to improve functioning, to justify trust placed on her, the appellant No. 2 initiated the process of making recommendation for appointments of key persons within a week of joining based on her understanding of the terms and condition of her employment contract, which in her explanation allowed her to make

such appointments. This explanation finds merit as subsequently the relevant clause of the employment contract was got changed in the light of the issue. We also note that recommendation of appellant No. 2 for appointment of Mr. Saket Bhansali as 'Head–New Initiatives' got the approval of NRC on March 20, 2020 and later was approved by the Board on March 24, 2020. Further, following the same procedure, the Company Secretary (CS) was also appointed.

7.8 The HR policy was only advisory in nature with the use of the term '*by aiming at'* which is only the best possible scenario and not a statutorily mandatory provision. Considering the poor functional state of the Exchange, the new incumbent CEO & MD was justified in her efforts to improve the performance, through filling up HR gaps and bringing in new technology. It is not the case that the recommendations were not bonafide. Moreover, the same were endorsed by the NRC/Board.

7.9 We note that no doubts were raised by the AO about the merit of selection of Mr. Bhansali considering his 20 years' experience and qualifications or regarding any ulterior motives of the appellant. The short issue on which adverse view was taken was that a panel of three candidates was not prepared for appointment of

Head of HR. As per the Action taken report by company on the forensic auditor's report, the Appellant No. 2 admitted that she was not aware of the need for screening of three candidates and has tendered apology, while also arguing that she was empowered within the scope of her employment contract, which states as under:-

> *"1(v). To appoint or employ for the company's transactions and management of affairs and from time to time to discharge or remove or suspend or re-appoint and re-employ or replace managers, officers, clerks, workmen, employees and other members of the staff of the company, bankers, all kinds of agents, consultants, employees on contract, brokers, advocates, barristers, solicitors, pleaders, lawyers, mechanics, engineers, merchants, retail and wholesale commission dealers, technicians and experts with such powers and duties and upon such terms as to duration of employment, remuneration or otherwise as the Managing Director & CEO may deem fit. The MD & CEO shall keep the Board of Directors informed about the appointment and removal of the key managerial personnel;"*

7.10 Considering the above facts, we hold that in the extra-ordinary circumstances that the exchange was facing, the action of the appellant of recommending appointment of a qualified person as Mr. Saket Bhansali within 10 days of her appointment, without making a panel of 3 candidates, was in good faith for improving the functioning of organization. There cannot be two views about the general virtues of competition. However keeping in view the exceptional circumstances impacting the functioning of the

Exchange, which was at the brink of collapse, it required quick handling and considering that the appellant No. 2 was new to the job, in our view, her action in making recommendation to fill in HR gaps cannot be held as unusual. No adverse view can be taken of the apology tendered by the appellant No. 1, who had moved from USA to a different work milieu and thought of tendering apology in good faith, without prejudice to her substantive arguments. In view of this, the appellant No. 2 cannot be held exclusively responsible for alleged act of omission or commission with regard to appointment of Mr. Saket Bhansali as *'Head-new initiatives'.*

7.11 We note that subsequently Mr. Bhansali was appointed as CFO of the company. As noted in the forensic audit report, on April 24, 2020, opening for position of CFO was placed on the Exchange's website and various job portals. In the board meeting dated May 3, 2020, after shortlisting by the CEO& MD and the management, the shortlisted CVs received for the post of CFO were placed before the Board, which were submitted to the screening committee comprising of three Independent Directors (IDs) and shareholders directors. The shortlisted candidate presented themselves before the screening committee and were interviewed by a panel comprising of MD & CEO and CFO and legal CS. The panel shortlisted three candidates having experience of more than 20 years. Out of these three

shortlisted candidates, one candidate was eliminated and out of the remaining two in respect of whom reference check was carried out, Mr. Bhansali was selected and his candidature was placed before the NRC. We find no allegations made in the impugned order regarding his appointment as CFO.

7.12 Further, with regard to the allegation in respect of appointment of Mr. Sushil Limbulkar, as *Head-Exchange Technology projects*, a new position, we find that the Appellant No. 2 felt the need for creating a new division (Exchange Technology Projects) in the Exchange. We do not find that there was any objection with regard to the need for creating this position and the qualifications of Mr. Sushil. But the only objection of SEBI was that no consultation with the functional head was carried out. We find merit in the explanation of the appellant that since this division was not in existence, no specific functional head was in place and the MD & CEO, who had conceived of the need for creating this division based on functional grounds, could alone be termed as the functional head for '*Head-Exchange Technology Projects'* till that division is manned, which was done with the appointment of Mr. Sushil Limbulkar.

7.13 In view of this, we hold the action of respondent in levying penalty on the appellant No. 2 as harsh and arbitrary, which cannot be sustained on merit. Further, the Regulation 49(2) of the SECC Regulations, which provides that various factors are to be taken into consideration while levying penalty for violation of SECC Regulations reads as under:-

> *'Explanation–*
>
> *For the removal of any doubt, it is clarified that the power of the Board to take appropriate action under sub regulation (2) is without prejudice to the exercise of its powers under the provisions of the Act, or the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder:*
> *Provided that the Board while taking action under clauses (a) and (b) above shall have due regard to the factors, including but not limited to any or all of the following: —*
>
> *(i) a mala fide intent; or*
> *(ii) an act of commission or an act of omission; or*
> *(iii) negligence, or*
> *(iv) repeated instances of genuine decision making that went wrong.*

We find that the recommendations made by the appellant No. 2 for appointment of 'HR-new initiatives' were for improving technological efficiency of the exchange and in the best interest of the Exchange and no element of malafide intention was alleged. Since this was the first instance and no further instances were

reported by the respondent, such an act cannot be held as repetitive in nature.

Moreover, appellant's recommendation was duly approved by the experienced members/chairman of NRC/Board, and hence the appellant cannot be held guilty of any act of omission or negligence exclusively. Since none of the members of NRC/ Board have been charged in the matter, to penalize only the appellant No. 2 is unsustainable.

7.14 Keeping in view the same, the penalty imposed on the appellant cannot be sustained. Hence, we answer this point in the ***negative*** and hold that there was no failure on the part of appellant No. 2 in complying with the SOP for making appointments.

(iv) Whether appellants number 2 and 3 gave clean chit to the erring employees?

8. It was alleged that appellant No. 2 (being the CEO & MD) and appellant No. 3 (being the CFO), had given clean chit to Mr. Kunal Sanghavi and Mr. Kundan Zamwar, who were held responsible for mis-management in the U-trade project, by accepting their resignations and relieving them on full payment of dues.

8.1 It is noted that the Appellant No. 2 upon joining the Exchange in March, 2020, had started enquiry in the matter of mis-management in the U-trade project, and presented the preliminary report of investigation to the board of directors. The internal report was submitted before the Board on March 22, 2020, which confirmed gross irregularities. Following this, Mr. Kunal Sanghavi resigned on April 13, 2020 which was placed before NRC on April 16, 2020 and the resignation was accepted by the board on April 21, 2020. Similarly, Mr. Kundan resigned on October 13, 2020 which was accepted by NRC on October 15, 2020. It is alleged that both of them were advised to resign. It is seen that while they were allowed a notice period of three months but they preferred resigning without waiting for notice period. The pay for the notice period however was released only later in January, 2021.

8.2 In this regard, the learned Senior advocate for appellant submitted that on joining the MSEI on March 12, 2020, the Appellant No. 2 as the MD&CEO discovered certain irregularities in the “Utrade Project”, and commenced an internal investigation and the Board was informed of the same. The preliminary findings were placed before the Board of Directors in April, 2020 and the same implicated Mr. Kunal Sanghavi, Mr. Kundan Zamwar and others. The Board directed for detailed investigation. The final internal

report dated May 22, 2020 was placed before the Exchange's Board of Directors, which confirmed involvement of Mr. Kunal Sanghavi and Mr. Kundan Zamwar and others in the said gross irregularities.

It was submitted that only after all investigations were completed and Reports were considered that the respective dues of Mr. Kunal Sanghavi and Mr. Kundan Zamwar were released on March 23, 2021 and March 30, 2021, since no financial claims were found against them. However, both of them were issued reprimand letters dated March 18, 2021.

8.3 With regard to the observations made in the Impugned Order that accepting the resignations of Mr. Kunal Sanghavi and Mr. Kundan Zamwar before completion of the investigations "*raises doubts and concerns on the conduct of Noticee 2 & 3",* the Ld. Senior Advocate for the appellant submitted that SEBI has not identified any provision of any regulation or circular which contains any such requirement that errant employees cannot be permitted to resign pending an investigation.

8.4 With regard to the allegation that Appellant No. 3 '*advised'* Mr. Kunal Sanghavi and Mr. Kundan Zamwar to resign, it was submitted that as the Head of HR, Appellant No. 3 had to deal with the issues relating to misconduct of employees and confront them.

Obviously, Mr. Kunal Sanghavi and Mr. Kundan Zamwar were aware of the ongoing investigations and there was nothing wrong in Appellant No. 3 informing them about it and ask that they could either resign or face disciplinary action. This cannot justify any finding of "doubts and concerns" about his conduct. The Ld. Senior Advocate submitted that undisputedly, the investigation in the matter against the said employees was commenced at the behest of the Appellant No. 2, once she took over the charge as CEO&MD. Further both Appellant No. 2 and Appellant No. 3 were also part of the investigation team. In view of this, questioning their conduct in the matter and levying penalty for violation of code of conduct was unwarranted. It was submitted that since the conduct of the said employees was found prejudicial, which could warrant considering even termination of their services, it was obvious that acceptance of their voluntary resignations was totally appropriate.

8.5 Mr. Modi pleaded that SEBI has not disputed or controverted any of the allegations against Mr. Kunal Sanghavi and Mr. Kundan Zamwar and in fact the SCN made the same allegations against them as were in the said investigation reports. Accordingly, it was deemed prudent by the management/NRC/Board that their resignation be accepted with immediate effect and they be released from all duties.

8.6 The learned Senior Advocate submitted that despite these charges, SEBI accepted the settlement proposal of Mr. Kundan Zamvar and Mr. Kunal Sanghvi and not passed any adverse orders against them but charged the Appellants, who discovered their mischief, for accepting their resignations.

8.7 On careful consideration of facts, we find that undoubtedly the irregularities in ‘U-trade” project were unraveled by the appellant No. 2 within a few weeks of assuming the charge of CEO&MD. The two errant employees had preferred to voluntarily resign without receiving the notice period dues, apparently to avoid forced termination.

8.8 We note that despite the grave charges, SEBI preferred to accept the settlement proposal of Mr. Kundan Zamvar and Mr. Kunal Sanghvi and did not pass any adverse orders against them. Also, it is noticed that though this project was ongoing even before the appellant No. 2 took over as CEO& MD but the irregularities later unearthed by the appellant No. 2 had not come to the notice of erstwhile members/chairman of the Board. It is evident that while SEBI preferred to impose penalty on her, no action was contemplated against the then members/Chairman of the Board, who failed to even notice such irregularities. Notably, the same

NRC/Board had approved the actions in respect of the two errant employees for which appellant Nos. 2 and 3 have been charged but no other Board members were charged.

8.9 In the ATR to the forensic report, the Exchange has mentioned that the errant appellants were not left scot-free and were not given any reference for future jobs. For an employee in the private sector, the stigma of resignation and denial of reference from previous employer for future employees itself is a harsh action. Moreover, as submitted by Mr. Modi, the NRC had actually recommended payment to both employees for settlement of dues on completion of notice period. However, the said dues were withheld by the appellant Nos. 2 and 3 till completion of investigation, and were released only in March 2021, when no financial claims were ascertained.

8.10 In the light of the above discussion, in our considered view levy of penalty against appellant Nos. 2 and 3 is unsustainable in law. Accordingly, we answer this point in the ***negative*** and hold that action taken by the appellants Nos. 2 and 3 do not suffer from any legal infirmity.

8.11 In the result, the following:

ORDER

(i) The Appeal is ***allowed.***

(ii) The impugned order of penalty is quashed.

(iii) No costs.

Justice P. S. Dinesh Kumar
Presiding Officer

Ms. Meera Swarup
Technical Member

Dr. Dheeraj Bhatnagar
Technical Member

24.10.2024
PTM