BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.150 of 2006

Date of decision: 17.8.2010

M/s. Prashant J. Patel
21-28, Gokul Arcade,
S.N. Road, Vile Parle (E),
Mumbai. ….. Appellant

Versus

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

Mr. P. N. Modi, Advocate with Mr. Neville Lashkari, Advocate and Ms. Preeti Salaskar, Advocate for the Appellant.

Mr. J. J. Bhatt, Senior Advocate with Dr. Poornima Advani, Advocate and Mr. Omprakash Jha, Advocate for the Respondent.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member
P.K. Malhotra, Member

Per : Justice N.K. Sodhi, Presiding Officer

The appellant before us is a stock broker who is a member of the National Stock Exchange of India Limited (NSE) and is registered with the Securities and Exchange Board of India (hereinafter called the Board). He claims that he has 18 branches and 191 trading terminals spread across the country through which he services his clients and that he has an annual turnover of approximately Rs.9000 crores. The Board ordered investigations into the affairs relating to the buying, selling and dealing in the shares of Ranbaxy Laboratories Limited (for short the company). Investigations revealed that the price of the scrip moved significantly from Rs.270 in January, 1999 to about Rs.1200 in October, 1999 and that the price rise was accompanied with significant increase in volumes. It also transpired that buy and sell orders had been placed simultaneously or within seconds of each other for same quantity of the scrip at the same price and that these trades were synchronized. The Board felt that synchronized trades could not be

possible without prior understanding and that these were meant to influence the volume of trading in the scrip and were fictitious in nature. On receipt of the investigation report, the Board served the appellant with a show cause notice dated February 20, 2003 alleging that he had violated the provisions of Regulation 7 read with Schedule II to the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992 (for short stock broker regulations) and the provisions of Regulation 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 (for short FUTP regulations) and also the Board's circular dated September 14, 1999 banning negotiated, cross deals etc. In one of the articles of charges attached to the show cause notice it is alleged that "The dealings of Prashant Jayantilal Patel which is one of Ketan Parekhs entity in the scrip" (sic) and these words have been scored off though they are legible. In the very next paragraph it is further alleged that the appellant "aided and abetted Ketan Parekh group i.e. Panther Fincap etc", and these words too have been scored off though they are also legible and the word 'was' has been written in hand. The show cause notice thereafter goes on to make similar allegations and it is alleged that the appellant entered into a number of synchronized deals with the members of Ketan Parekh entities/associates in the group and that the shares of the company were being rotated among the Ketan Parekh entities without actual change in the beneficial ownership. Having made all these allegations, the show cause notice concludes as under:

> **"Further member through these dealings in the scrip has aided, assisted and abetted KP entities in violation of provisions of Regulation 4 (a) (b) (c) and (d) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995, which provides that ……"** (emphasis supplied)

It is pertinent to mention here that Ketan Parekh and his entities have been found by the Board to have manipulated the securities market in a big way during the years 1999 to 2001 and by order dated December 12, 2003 he and his entities had been debarred from accessing the securities market for a period of 14 years and that order has been upheld by this Tribunal. The appellant was called upon to show cause why action be not taken against him and an enquiry held in accordance with the Securities and Exchange Board of India (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty)

Regulations, 2002 (for short the enquiry regulations). Immediately on receiving the show cause notice, the appellant by his letter of February 28, 2003 sought some clarifications from the Board particularly in regard to the words that had been scored off in paragraphs 4 and 6 of the articles of charges. The appellant was then summoned for a personal hearing and he appeared before the enquiry officer on March 13, 2003 and again on November 6, 2003. It was thereafter that he filed a detailed reply on November 18, 2003 to the show cause notice denying all the allegations made against him. This is what he has said in paragraphs 9 and 10 of the reply:

> "9. The SEBI has not provided any documentary evidence or any other relevant material relied upon by it in support of its allegation that "it is clear that Prashant Jayantilal Patel was putting fictitious, non-genuine and deceptive trades with a view to create misleading appearance of trading. Member also aided, assisted and abetted in creating artificial volumes and false market in the scrip of Ranbaxy Laboratories Ltd. through circular trades and synchronized trades."
>
> 10. The transactions in the scrip of Ranbaxy during the period under investigation **were negotiated trades executed in accordance with the Exchange guidelines under the Exchange-specified NEAT trading system and as per the SEBI Circular dated 14/09/1999** (copy enclosed). This circular states is that all negotiated deals should be put through the NEAT system which is exactly what we have done in the present matter under reference which may please be noted." (emphasis supplied)

The appellant not only denied the allegations but also furnished the details of the clients on whose behalf he had traded in the shares of the company. These details were furnished in paragraph 16 of his reply. He also categorically denied his association or that of his clients with Ketan Parekh or with his entities/associates and this is what he has said in paragraphs 30, 31 and 37 of his reply which are reproduced hereunder for ease of reference:

> "30. There is no documentary evidence or any other relevant material relied upon by SEBI in support of its allegations against us that "The member had entered into a number of synchronized deals with the members of the Ketan Parekh Group / associates in the scrip. The shares were being rotated among the KP entities without actual change in the beneficial ownership.
>
> 31. We wish to reiterate that in the 4th Paragraph of the document titled "Finding of Investigation" appended to the captioned letter the words "The dealings of Prashant Jayantilal Patel which is one of Ketan Parikhs entity in the scrip." have been struck off. Thus it is presumed (and rightly so) that SEBI accepts that Prashant J. Patel is indeed not part of any Ketan Parekh group of entities. Notwithstanding anything stated hereinabove, we wish to place on record we never were or are neither a part of nor do we have any

> connection whatsoever with the so-called "Ketan Parekh group of entities."
>
> …….
> ……
>
> 37. With further reference to my clients, that to the best of my knowledge and belief I can state with a reasonable degree of certainty that none of them are even remotely connected with or known to any individual by the name of Ketan Parekh or any of his related entities or any of the so-called KP group of entities as alleged by SEBI."

Since in some of the paragraphs of the show cause notice reference to Ketan Parekh and his associates had been scored off whereas the same had been retained in others where the charge had been formulated, the appellant pleaded that the show cause notice was contradictory and he made a prayer that all the allegations against him be withdrawn. On a consideration of the show cause notice and the reply furnished by the appellant and also the material that was collected during the course of the investigations and the enquiry, the enquiry officer concluded that the allegation that the appellant had any association or dealings with Ketan Parekh entities as mentioned in the show cause notice was erroneous. He, however, found that the appellant had executed as many as 54 trades in the scrip of the company on behalf of his clients where buy and sell orders had been placed simultaneously or within seconds of each other for the same price and also for the same quantities and, therefore, the trades were synchronized deals. He then jumped to the conclusion that such trades were fictitious/non genuine and executed to create artificial volumes. This is what he has said in his report:-

> "There was allegation of association and dealings of the member broker with KP entities as mentioned in the show cause notice issued by the erstwhile Enquiry Officer. **The undersigned finds from the facts available and from the clarification received from the erstwhile Enquiry Officer that it was mentioned erroneously in the show cause notice**.
>
> ……..
> ……..
>
> In light of the above facts, the undersigned is of the view that such trades are not genuine trades and have resulted into generation of artificial volumes. Therefore, the member broker is responsible for the irregularities and violations for which show cause notice was issued to them as mentioned on page 1-2 of this report. These trades also affect the integrity and safety of the market and undermine investors' confidence in the securities market." (emphasis supplied)

The enquiry officer also found that the appellant as a stock broker had executed 54 trades for 7 clients giving them 14 different client codes and this, according to him, was done with an ulterior motive to create an impression that the transactions were being executed for a larger number of clients. In view of these findings, the enquiry officer in his report dated March 26, 2004 recommended that the certificate of registration of the appellant as a stock broker be suspended for a period of one month. A copy of the enquiry report was sent to the appellant alongwith a notice dated September 24, 2004 to explain why penalty as recommended by the enquiry officer or any other penalty deemed appropriate be not imposed. The appellant filed his reply on November 29, 2004 reiterating his earlier stand in the reply to the show cause notice and also responded to the new issues not mentioned in the show cause notice but on which the enquiry officer recorded findings against the appellant in his report.

2. The whole time member then considered the show cause notice, the reply filed by the appellant alongwith the enquiry report and the submissions made during the course of the personal hearing and concluded that even though synchronized trades per se were not illegal, the appellant had executed 54 such trades on behalf of his clients (which have no concern with Ketan Parekh or his entities) with a view to create misleading appearance of trading. This is what he has observed in his order:-

> "5.10 In the instant case, the broker could have simply identified the continuous sell and buy orders in a synchronized manner and should not have entertained the clients who carried out such synchronized deals. I find that the broker has not disputed the execution of 54 synchronized trades but he has taken a stand that they are not responsible for the trades of their clients. This stand of theirs is against the concept of broking business and hence not tenable.
>
> 5.11 Further, I am of the view that number of synchronization of trades can not be treated as mere coincidence or without knowledge and are only possible if the trades are put in the system with prior understanding. I find that all the aforementioned 54 transactions give an impression that these were all synchronized and traded in circular manner, otherwise there was no possibility of such perfect matching of quantity and price etc. The intention of the parties to execute such synchronized transactions could be inferred from the above attending circumstances especially execution of several synchronized transactions in a single day, circular trading and reversal of transactions etc. Further, I observe that the standard of proof required in a proceeding of this nature is at variance with the standard of proof required in criminal cases. It is sufficient if the preponderance of probabilities suggests towards the indulgence of the delinquent in the misconduct.

> 5.12 In view of these, I find that that broker has put these trades with a view to create misleading appearance of trading. This synchronization of trades tampers with price discovery mechanism of stock exchange and is against the concept of transparency. The synchronized deals entered into by the broker abetted in creating artificial volumes and false market in the scrip of Ranbaxy Laboratories Ltd. These acts of broker are in violation of the provisions of Regulation 4(a) to (d) of PFUTP Regulations, 1995, which provides that……..”

By his order dated December 7, 2006 he imposed a minor penalty on the appellant and suspended his certificate of registration for a period of 7 days. It is against this order that the present appeal has been filed.

3. We have heard Shri P.N. Modi, Advocate on behalf of the appellant and Shri J.J. Bhatt, senior Advocate on behalf of the respondent and are of the view that the appeal deserves to succeed. In the show cause notice dated February 20, 2003 referred to above, the only charge that has been levelled against the appellant is that he entered into a number of synchronized deals with the members of Ketan Parekh group/associates in the scrip of the company and that the shares were being rotated among the Ketan Parekh entities without actual change in the beneficial ownership. In other words, the gravamen of the charge is that the appellant as a stock broker was aiding and abetting Ketan Parekh and his entities in executing synchroised trades in the scrip of the company. The enquiry officer found that this was not so. He has recorded a categoric finding in his report that the appellant had no association or dealings with Ketan Parekh entities and reference to Ketan Parekh entities in the show cause notice was erroneous. The whole time member has not disagreed with this finding. In view of this finding of the enquiry officer, the entire show cause notice and the enquiry proceedings must collapse. When the charge is that the appellant was aiding and abetting Ketan Parekh or his entities and on the failure to establish this charge, it cannot be held that he was aiding and abetting someone else. We are really amazed to note that the enquiry officer instead of closing the proceedings, latched on to the 54 synchronised trades which the appellant had executed on behalf of his clients which were not Ketan Parekh entities, to hold that these were fictitious, non genuine and deceptive resulting in the creation of artificial volumes. Though he has not said so in so many words that the appellant had aided and abetted his clients in executing these trades but the insinuation is obvious. He did not realize that this was not the charge in the show cause notice. As already noticed, the charge was that the appellant

aided and abetted Ketan Parekh entities but the finding is that he aided and abetted his clients which were not Ketan Parekh entities. We are equally amazed that the whole time member did not advert to this aspect at all though specifically pleaded before him and he went on to accept the enquiry officer's report to hold that the appellant was guilty of executing synchronized trades on behalf of his clients and thereby violated the code of conduct and the FUTP regulations. It must be remembered that violation of FUTP regulations involves commitment of fraud which is, indeed, a serious market offence and a high degree of probability is required to establish such a charge. It is by now well settled that the foundation of an enquiry under the enquiry regulations is a valid notice and the charge levelled therein has to be clear, precise and unambiguous so that the delinquent knows what exactly he is charged with and that the enquiry should not travel beyond the charge as levelled. The charge of fraud must be substantially proved as laid and that when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it. This has been so held by their Lordships of the Supreme Court in Brijendranath Srivastava vs. Mayank Srivastava and Others (1994) 6 SCC 117. Having charged the appellant with aiding and abetting Ketan Parekh and his entities in the matter of executing synchronized trades, the appellant cannot be held guilty of aiding and abetting his clients which were not linked to Ketan Parekh at all. Such shifting of the charge is violative of the principles of natural justice and is impermissible. The impugned order which records a finding which is at variance with the charge as laid in the show cause notice deserves to be set aside on this ground alone.

4. There is yet another reason why we cannot uphold the impugned order. Even if one were to assume (though we have held otherwise) that the findings recorded in the impugned order were in accordance with the show cause notice and that the appellant was aiding and abetting his clients while executing the synchronized trades, we cannot lose sight of the fact that it were the clients who were actually trading in the scrip and that the appellant as a broker was only carrying out their directions. If that were so, we are surprised that none of the clients has even been questioned in regard to the impugned trades let alone being charged for executing synchronized trades. Since no action has been taken against any of the clients, it would be reasonable to assume that the Board treated them as innocent and found nothing wrong with their trades which were only

executed by the appellant. It is quite paradoxical that persons who actually executed the trades with which fault has been found have not been proceeded against and the broker who only carried out the instructions of the clients and executed the trades on the trading system has been found guilty. We are, therefore, of the considered view that since the clients have not even been questioned, the appellant alone cannot be held guilty of executing synchronized trades.

5. Since the appellant has been found guilty of executing a number of synchronized trades on behalf of his clients, we may now examine whether such trades are really impermissible. As already noticed, the appellant in paragraph 10 of his reply to the show cause notice (reproduced in the earlier part of the order) had stated upfront that the trades executed by him on behalf of his clients in which he was a common broker were "negotiated trades" executed in accordance with the Board's circular dated September 14, 1999. A negotiated deal, as the term suggests, is a deal which involves consensual bargaining in which the parties agree on the scrip to be traded, the quantity to be bought/sold and the price at which the scrip will be bought and/or sold. In order to implement such a deal through the trading system of an exchange, the buy and sell orders will necessarily have to be synchronized by the parties and put into the system simultaneously and, therefore, in a negotiated deal the parties also agree on the time when the orders will be put into the system. Even though the parties may put in the buy and sell orders simultaneously, there is no guarantee that they will automatically match or result in an instant trade. The whole or a substantial part or may be a small part of the quantity put into the system may result in a trade and it is also possible that buy and sell orders may not result in a trade at all. This is so because the screen based trading system of the exchange will process the buy and sell orders, notwithstanding the synchronization done by the parties, according to its own programme which will match such orders subject to **price time priority** which is also known as the price and order matching mechanism. Price time priority signifies two things; first is the matching of price and second is the priority in point of time. Let us elaborate. When a buy order is placed through the system, it will be matched with the best sell order (lowest price) available on the system subject to the condition that no buyer will be made to buy at a price more than what he entered. If more than one pending sell orders match the buy order, the sell order

placed earlier in point of time will be picked up by the system to complete the trade. Similarly, a sell order will match with the best buy order (highest price) again subject to the condition that no seller will be made to sell at a price lower than what he fed into the system. If more than one pending buy orders match the sell order, the buy order placed earlier in point of time will be matched first. This is how the price discovery mechanism of the system works and it is based on the free inter play of the forces of demand and supply and the price which the system determines is truly the price which a willing buyer would pay to a willing seller.

6. As already observed, if a negotiated deal has to be executed through the trading system, it has to be synchronized by the parties. The question as to what a synchronized deal is and whether it is per se illegal and, if not, when does it become illegal had come up for the consideration of this Tribunal in Ketan Parekh vs. Securities and Exchange Board of India, Appeal no.2 of 2004 decided on July 14, 2006 and this is what the Tribunal observed:

> "The word 'synchronise' according to the Oxford dictionary means "cause to occur at the same time; be simultaneous". A synchronised trade is one where the buyer and seller enter the quantity and price of the shares they wish to transact at substantially the same time. This could be done through the same broker (termed a cross deal) or through two different brokers. Every buy and sell order has to match before the deal can go through. This matching may take place through the stock exchange mechanism or off market. When it matches through the stock exchange, it may or may not be a synchronised deal depending on the time when the buy and sell orders are placed. There are deals which match off market i.e., the buyer and the seller agree on the price and quantity and execute the transaction outside the market and then report the same to the exchange. These are also called negotiated transactions. Block deals (when shares of a company are traded in bulk) are an instance of trades that match off market. Such trades have always been recognised by the market and also by the Board as a regulator. It has recently issued a circular requiring all bulk deals to be transacted through the exchange even if the price and quantity are settled outside the market. When such deals go through the exchange, they are bound to synchronise. It would, therefore, follow that a synchronised trade or a trade that matches off market is per se not illegal. Merely because a trade was crossed on the floor of the stock exchange with the buyer and seller entering the price at which they intended to buy and sell respectively, the transaction does not become illegal. A synchronized transaction even on the trading screen between genuine parties who intend to transfer beneficial interest in the trading stock and who undertake the transaction only for that purpose and not for rigging the market is not illegal and cannot violate the regulations. As already observed 'synchronisation' or a negotiated deal ipso facto is not illegal. A synchronised transaction will, however, be illegal or violative of the Regulations if it is executed with a view to manipulate the market or if it results in circular trading or is dubious in nature and is executed with a view to avoid regulatory detection or does not involve change of beneficial ownership or is executed to create false volumes resulting in

> upsetting the market equilibrium. Any transaction executed with the intention to defeat the market mechanism whether negotiated or not would be illegal. Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available. The nature of the transaction executed, the frequency with which such transactions are undertaken, the value of the transactions, whether they involve circular trading and whether there is real change of beneficial ownership, the conditions then prevailing in the market are some of the factors which go to show the intention of the parties. This list of factors, in the very nature of things, cannot be exhaustive. Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn."

It is, thus, clear that synchronized trades are per se not illegal but if they are executed with the object to manipulate the market in any manner whatsoever, they would be unlawful.

7. A trade has first to be negotiated and then synchronized. The fact that such trades are not per se illegal is further borne out from the circulars issued by the Board from time to time. We may now notice these circulars on "negotiated deals". The first circular which has been brought to our notice is dated March 31, 1997 which required all negotiated deals on the stock exchanges to compulsorily result in delivery of securities. This circular is not very relevant for our purpose in this case but it does indicate that negotiated deals were recognized as such by the Board. It is obvious that there was no prohibition in entering into such deals. The next circular on the subject is dated August 4, 1998 which defined a negotiated deal for purposes of regulation. Any transaction the value of which was not less than Rs.25 lacs or volume of not less than 10,000 shares and which had been executed at a price not formed through price and order matching mechanism of the exchange was termed as a negotiated deal and all such deals were required to be reported to the stock exchanges. We are not concerned with the other details of this circular. On September 18, 1998 the Board re-circulated the earlier circular of August 4, 1998 containing the same reporting requirements. Then came the circular of January 14, 1999 which made the price band (circuit filters) applicable to normal trades to negotiated trades as well. In other words, a negotiated trade could be executed off market but within the price band applicable to the scrip on the exchange. The other details in this circular do not concern us. Finally, came the circular of September 14, 1999 which was discussed at great length during the course of the hearing. The show

cause notice issued to the appellant alleges that he had, among others, violated "SEBI circular dated 14th September, 1999 banning negotiated, cross deals etc…". Since much has been debated on this circular, it is necessary to refer to the same. The relevant part of this circular reads as under:

> **"Negotiated Deals**
>
> Please refer to our earlier circulars dated March 31, 1997, August 04&12, 1998 and January 14, 1999 relating to negotiated deals. The following decisions have been taken based on the recommendations of the Committee on Negotiated Deals, which met on September 01, 1999:
>
> 1. **All negotiated deals (including cross deals) shall not be permitted in the manner prescribed in circulars mentioned above and all such deals shall be executed only on the screens of the exchanges in the price and order matching mechanism of the exchanges just like any other normal trade.**
>
> **Provided ……**
>
> The above decision was taken as negotiated deals avoid transparency requirements, do not contribute to price discovery and some investors do not have benefit of the best possible price and militate against the basic concept of stock exchanges, which are meant to bring together a large number of buyers and sellers in an open manner."

A bare reading of the circular leaves no room for doubt that negotiated deals have not been banned. On the other hand, this circular permits negotiated deals and prescribes the manner in which they shall be executed. This circular prescribes a new mode of executing negotiated deals including cross deals and mandatorily requires that all such deals shall be executed only on the screen of the exchange in the price and order matching mechanism of the exchange just like any other normal trade. The price and order matching mechanism of the exchange has been discussed hereinabove and this circular brings the negotiated deals at par with the normal trades. The Board in its wisdom felt, and rightly so, that when a negotiated deal is executed through the screen based trading system of the exchange, it will bring about transparency and will not hamper the price discovery. It would also help the investors whose buy and sell orders are pending in the system to get the benefit of the best price including the negotiated price. It really surprises us how the show cause notice alleges that this circular bans negotiated deals. In this view of the matter, we have no hesitation to hold that far from

being banned, negotiated deals are permissible and have to be executed like any other normal trade through the price and order matching mechanism of the exchange.

8. We may now deal with the negotiated/synchronized trades executed by the appellant on behalf of his clients. We have already held that negotiated/synchronized trades are not by themselves illegal but if a synchronized trade is executed with a view to manipulate the market or if it results in circular trading or is dubious in nature and is executed with a view to avoid regulatory detection or does not involve change of beneficial ownership or is executed to create false volumes resulting in upsetting the market equilibrium, it would be illegal. In other words, the intention with which a synchronized trade is executed would be the material factor to determine whether the trade is fraudulent. In the case before us, it is the appellant's own case that he executed negotiated deals/trades on behalf of his clients whose details were furnished by him to the Board in the reply to the show cause notice. The motive with which the appellant's clients executed negotiated deals can best be explained by the clients themselves and not by the appellant who was only a broker. It is really surprising that the Board did not question the clients in this regard. Since negotiated trades are legal and the appellant was the broker on both sides, he had no reason to suspect any foul play and it was no part of his due diligence to question his clients as to why they were executing such trades. A stock broker is required to execute faithfully the instructions of his clients if they are not in conflict with any rules, regulations or circulars issued by the Board. The whole time member though analysed the legal position correctly in paragraph 5.4 of the impugned order yet misdirected himself in recording the following finding against the appellant in paragraph 5.8 of the order.

> "It is clear from the above facts and analysis of the trade details of the broker in this scrip that they were hand in glove with their clients and entered into synchronized deals in the form of circular trading. The fact that the broker entered into 54 instances of synchronized trade clearly indicates his manipulative intent".

The whole time member appears to have jumped to the conclusion that merely because 54 synchronized trades had been executed by the appellant, his intention was manipulative. This finding is based on no material on the record and it shows that the whole time member has not properly appreciated the concept of negotiated/synchronized trades. Again, in paragraph 5.12 of the impugned order he has concluded that by

executing synchronized trades the appellant had abetted in creating artificial volumes and false market in the scrip of the company. We wonder whom the appellant had abetted and, as already noticed, the insinuation is that he abetted his clients in creating artificial volumes. We cannot agree with this conclusion either and would like to reiterate that a synchronized trade by itself is neither manipulative nor does it create artificial volumes. There has to be something more to hold it to be so.

9. At this stage we may take note of another objection raised by the learned senior counsel for the respondent Board. He pointed out that 7 trades out of the 54 trades had been reversed by the clients on whose behalf the appellant was acting as a broker and these trades, according to him, were definitely fictitious. Undoubtedly, reverse trades are non genuine, fictitious and artificially contribute to the volumes. However, we are not inclined to hold so in the facts and circumstances of this case. The period of investigation was from January 1, 1999 to October 31, 1999 and during this period the scrip of the company was traded for 119 days on NSE. The total number of shares traded on this exchange during the period of investigation was 25,99,31,769 and the appellant while executing 54 trades traded in merely 5,70,434 shares which accounts for only 0.22 % of the total traded quantity on NSE. Out of the 54 trades only 7 trades were reversed. The market capitalization of the company during the period of investigation was an astronomical figure ranging from Rs.12000 to Rs.14000 crores. In this background it is inconceivable that a broker whose share in the trading of the scrip was a drop in the ocean could possibly have created artificial volumes. Having regard to the total volumes traded and the miniscule number of reversed trades the possibility of these trades being reversed by coincidence cannot be ruled out and, therefore, we have no hesitation in giving the appellant a benefit of doubt in this regard.

10. We may now deal with the last submission made by the learned counsel for the appellant. He argued that the enquiry officer for the first time in his report pointed out that the appellant while executing the 54 impugned transactions allotted 14 different client codes to his 7 clients and this, according to the enquiry officer, was done with an ulterior motive to create an impression that the transactions were being executed on behalf of large number of clients in the normal course of business. The whole time member in the impugned order has also referred in great detail to this aspect and has

attributed motives to the appellant and eventually found him guilty. This allegation against the appellant must also fail. There was no charge laid in the show cause notice and in the absence of any such allegation in this regard, the appellant had no opportunity to explain his position. The findings cannot, therefore, be upheld. It was for the first time that the enquiry officer in his report found the appellant guilty on this ground without there being a charge and attributed motives to him for allotting different client codes for his clients. When the enquiry report was furnished to the appellant he objected to the findings on the ground that he had no opportunity to explain as there was no allegation in the show cause notice. On merits, he pleaded that there was no legal bar on assigning different client codes to the same client and that he had assigned different codes for different types of trading namely, arbitrage, speculative trading, investment etc. The learned counsel for the appellant pointed out that the appellant had a very large client base consisting of individual, corporate and high net worth entities and, therefore, it was necessary for business purposes to assign different codes for different nature of transactions. We are in agreement with the learned counsel for the appellant. The reason mentioned by the appellant for assigning different client codes makes ample business sense and in the absence of any legal bar, he was justified in doing so and no motive could be imputed to him.

11. Before concluding, we cannot resist observing that there appears to have been total non application of mind of the respondent during the entire proceedings of this case. In the show cause notice that was issued there was reference made to Ketan Parekh and his entities which was scored off in two paragraphs and not in others. The charge as formulated was that the appellant had aided and abetted Ketan Parekh entities which was not so. If someone had applied his mind at that stage, a proper charge could have been framed. Again, the show cause notice alleged that the circular of September 14, 1999 had banned negotiated/synchronized trades and the appellant had violated the same. Only, if someone had read the circular before framing the show cause notice, such an allegation would not have been made. Again, the enquiry officer did not apply his mind and recorded findings on charges that were not there in the show cause notice. If he had seen the show cause notice he would have realised that the enquiry could not travel beyond that notice and that the charges as laid had to be established. Finally, the whole time

member accepted the findings in the enquiry report without appreciating that those were beyond the show cause notice even though this plea was taken before him. He did not care to meet the argument. Having said this, we leave the matter at that.

For the reasons recorded above, we allow the appeal and set aside the impugned order leaving the parties to bear their own costs.

Sd/-
Justice N.K.Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

Sd/-
P.K. Malhotra
Member

17.8.2010
Prepared and compared by
RHN