BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 152 of 2011

Date of Decision: 06.08.2013

National Securities Depository Limited
Trade World, A Wing, 4th Floor,
Kamala Mills Compound,
Senapati Bapat Marg,
Lower Parel,
Mumbai 400 013. …Appellant

Versus

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

Mr. Janak Dwarkadas, Senior Advocate with Mr. Somasekhar Sundaresan, Mr. Ravichandra Hegde and Mr. Paras Parekh, Advocates for the Appellant.

Mr. Darius Khambata, Advocate General with Mr. Mihir Mody, and Mr. Prateek Seksaria, Advocates for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
A S Lamba, Member

Per : Justice J.P. Devadhar

1. In this appeal filed under Section 15T of the Securities and Exchange Board of India Act, 1992 ('SEBI Act' for short) the appellant seeks to challenge the directions contained in the order passed by the respondent on December 4, 2008 ('impugned order' for short) which was served upon the appellant on July 29, 2011. By the said belatedly served order, the appellant is called upon to carry out two directions which

according to the appellant are wholly unjustified in view of the events that took place prior to the passing of the impugned order and subsequent to passing of the impugned order.

2. The controversy in the present case arises on account of fraud unearthed by the Securities and Exchange Board of India (SEBI) constituted under the SEBI Act relating to the first sale of shares by 21 private companies to the general public known as Initial Public Offering (‘IPO’s’ for short).

3. SEBI Act is enacted by the Parliament with a view to promote orderly and healthy growth of securities market and for investor’s protection. SEBI, interalia monitors the activities of the stock exchanges, mutual funds, merchant banker’s etc. to achieve goals with which the SEBI Act has been enacted.

4. Prior to 1995, securities such as share certificates were issued by the Companies in physical form. With the introduction of depository system regulated under the provisions contained in the Depositories Act, 1996, holders of securities who would have otherwise held their securities in the physical form could hold the said securities in the electronic form through the Depository Participants (‘DPs’ for short), another class of market intermediaries with whom ‘Beneficial Owner Accounts’ (‘BO Accounts’ for short) are opened. Thus, under the depository system, securities such as shares are held in dematerialized form and trading in the said shares is regulated through electronically dematerialized accounts, also known a demat accounts. In the register of members maintained by

the issuing company, the depository's name is entered as the registered holder while in the register of beneficial owners maintained electronically by DPs, the name of the security holder would be shown as owner of the securities. Though appellant is the registered holder of securities in the register maintained by the company issuing securities, in terms of The Depositories Act, the person whose name appear in the register of Beneficial Owners maintained by DPs is entitled to all rights and benefits and be subjected to all liabilities in respect of his securities held by a depository. BP Accounts so held are credited and debited with securities bought and sold by security holders thereby eliminating the risk of handling paper share certificates and share transfer deals which consequently ensures clean, transparent and investor friendly framework for trading and settlement in the securities market.

5. Appellant and Central Depository Services (India) Ltd. ('CDSL' for short) are the only two depositories providing depository services in India. The basic function of depositories is to regulate the demat accounts opened by investors with DPs. Under the depository system, depositories do not deal directly with the individual investors who are demat account holders and it is DPs who have investors as clients to whom the said DPs serve directly. The transactions of individual investors are reflected in the demat accounts maintained by DPs on the basis of intimations given to the concerned DP. The detailed duties, responsibilities and obligations of the depositories and the DPs are laid down in the Depositories Act & the Regulation framed thereunder as also under the bye-laws framed by the depositories which are duly approved by SEBI.

6. During the period 2003 to 2005, SEBI in the course of its surveillance activity investigated into affairs relating to buying, selling or dealing in shares through IPOs of 21companies. The investigation revealed that many entities (hereinafter referred to as the 'key operators') had cornered/acquired shares in IPOs of the aforesaid companies by making fictitious applications in the category reserved for retail investors through the medium of thousands of fictitious/ benami applications for IPOs. On allotment of shares in the category of retail investors in IPOs, the said shares were transferred to the demat accounts of the 'key operators'. Thereafter the said key operators transferred the shares through off market deals to the ultimate financiers (hereinafter referred to as 'financiers'). Thus by opening multiple demat accounts in fictitious names, key operators cornered/acquired shares through IPO's to the detriment of retail investors.

7. On the basis of above investigation, ex-parte ad-interim orders were passed by the respondent against concerned DPs with whom fictitious demat accounts were opened and also against both depositories viz, the appellant and CDSL on December 15, 2005, January 12, 2006 and April 27, 2006, in the case of IPOs of Yes Bank Limited, IDFC Limited and 19 other companies under Section 11, 11B & 11(4) of SEBI Act read with Section 19 of the Depositories Act 1996 respectively. By the said ex-parte orders the appellant and CDSL were inter-alia directed to verify the "Know Your Customer" documents known as KYC documents in respect of certain demat accounts opened by DPs named therein. By the said ex-

parte ad-interim orders, some of DPs named therein were directed to stop opening fresh demat accounts and the depositories namely the appellant and CDSL were directed to take all appropriate actions including revamping of the management so as to ensure that the lapses noticed during the investigation do not occur again.

8. Based on findings recorded in the ex-parte ad-interim order dated April 27, 2006, and based on data furnished by the appellant and CDSL, disgorgement order was passed by the respondent on November 21, 2006. By the said disgorgement order both the depositories viz, the Appellant (NSDL) and the CDSL as also DPs named therein were directed to pay disgorgement amount of ₹ 115.82 crores within the time set out therein. This disgorgement liability was payable jointly and severally by those entities.

9. Subsequently, by a show cause notice dated November 23, 2006 appellant was called upon to show cause as to why inquiry should not be held and if found guilty, why penalty should not be imposed under Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 and Depositories (Procedure for Holding Inquiry and Imposing Penalties By Adjudicating Officer) Rules, 2005, on account of alleged failures and irregularities on the part of the appellant in regulating/monitoring demat accounts as more particularly set out in the show cause notice. By its letter dated December 15, 2006 the appellant replied to the show cause notice wherein all the allegations set out in the show cause notice were denied.

After giving personal hearing to the appellant, the Adjudicating Officer by an adjudication order dated April 27, 2007 held that the explanation offered by the appellant was not acceptable and accordingly for the reasons stated therein imposed penalty of ₹ 5 crore under Section 15HB of the SEBI Act read with Section 19G of the Depositories Act, 1996. By another adjudication order dated April 27, 2007 penalty of ₹ 3 crore was imposed upon CDSL by the respondent.

10. Challenging the ex-parte ad-interim order dated April 27, 2006, disgorgement order dated November 21, 2006 and adjudication order dated April 27, 2007 the appellant had filed separate appeals before SAT. Similarly, CDSL had also filed appeals before SAT challenging the orders passed against it by the respondent.

11. On November 22, 2007 SAT disposed of Appeal No. 78 of 2006 filed by the appellant against the ex-parte ad-interim order dated April 27, 2006 by recording a statement made by the counsel for the Board to the effect that observations made in the said ex-parte ad-interim order dated April 27, 2006 regarding the alleged failures and directions for revamping the management were only prima facie observations. By another order also dated November 22, 2007 SAT allowed Appeal No. 147 of 2006 filed by the appellant, whereby disgorgement order passed by respondent on November 21, 2006 was set aside. By a common order dated January 14, 2009 Appeal no. 68 of 2007 filed by appellant and Appeal No. 69 of 2007 filed by CDSL were allowed by SAT thereby setting aside the adjudication orders passed against the appellant and CDSL both dated

April 27, 2007. Admittedly, the respondent has not challenged the aforesaid orders passed by SAT in the case of the appellant as well as CDSL and thus the said orders passed by SAT have attained finality.

12. Thereafter, in the case of CDSL, Whole Time Member of the respondent passed an order on January 15, 2009 to the effect that since SAT has deleted the penalty and has set aside the adjudication order passed against CDSL, the proceedings against CDSL may be treated as disposed.

13. So far as the appellant is concerned, it is relevant to note that on February 15, 2008, Central Government had appointed Mr. C.B. Bhave, then Chairman & Managing Director of the appellant as Chairman of the respondent. In the press release dated February 15, 2008, the Central Government recorded that Mr. C. B. Bhave had requested that in the proceedings initiated by respondent against the appellant, he should be recused from participating in the said proceedings. It was further stated in the press release that the Central Government has advised SEBI Board that in order to ensure objectivity in handling/conduct of the said proceedings, neither Mr. Bhave nor nominee of the Ministry of Finance on SEBI Board will participate in the said proceedings and that a three Member Committee comprised of part time Members of the Board would oversee the proceedings pending against the appellant.

14. It appears that the said three member committee after considering the matter, recommended to the Board to consider establishing a general policy framework for dealing with matters involving a conflict of interest

of the Chairman and to constitute a committee comprising of one or more members of the Board (from amongst members other than Whole Time Members and Chairman).

15. On August 13, 2008, SEBI Board accepted the recommendations and constituted a two member committee consisting of Dr. G. Mohan Gopal and RBI nominee on the Board in relation to the following matters:-

> *" i) The Committee will take over and dispose of the on-going quasi-judicial proceedings as on 18th February 2008 against NSDL, irrespective of its stage. The Legal Department of SEBI will provide necessary support for this purpose.*
>
> *ii) The Committee will determine the approach to be taken by SEBI in respect of the on-going proceedings in respect of NSDL before SAT or any other Court as on 18th February, 2008. Legal Department of SEBI will take instruction directly from the Committee in this regard."*

16. On October 8, 2008 the newly constituted two member committee issued a general notice of hearing and thereafter on October 14, 2008 officials of the appellant were also heard by the said committee. It appears that the said two member committee passed an order on December 4, 2008 (which is impugned in this appeal) listing therein various lapses on the part of the appellant as well as the respondent in relation to IPO investigation and directed both the appellant as well as the respondent to carry out certain directions as more particularly set out therein. On the same day i.e. on December 4, 2008, two more orders were passed by the said two member committee i.e, in the case of DSQ Software Ltd. and in

the case of Rajnarayan Capital Market Services Ltd. where in similar lapses on the part of the appellant were noticed.

17. In SEBI Board meeting held on November 9, 2009 impugned orders both dated December 4, 2008 relating to IPO investigation and DSQ software Ltd. were considered and it was resolved that the findings recorded in the above two orders to the extent it related to the respondent were outside the mandate of the delegation and since the findings recorded against the appellant cannot be segregated from the findings recorded against the respondent, both the said orders are liable to be treated as null and void and non-est and that SEBI Board as a whole (excluding Chairman Mr. Bhave) would dispose of the said two matters afresh.

18. Thereafter, Full Board of SEBI heard matters afresh relating to IPO investigation and DSQ Software Ltd. and after considering all orders including order passed by SAT on January 14, 2009 concluded by two separate orders both dated February 2, 2010 that since SAT has found that the appellant cannot be faulted for any lapses or deficiencies, none of the directions contained in the ex-parte ad-interim orders need be confirmed.

19. The appellant had filed Appeal No. 21 of 2010 before SAT to challenge certain adverse remarks made against the appellant in the case of Rajnarayan Capital Markets Services Ltd. by the two member committee of the respondent in its decision dated December 4, 2008. On June 22, 2010 said appeal was allowed by SAT and the adverse remarks

made against the appellant in the two member committee decision dated December 4, 2008 in the Rajnarayan's case were expunged by consent of both the appellant and the respondent.

20. On September 6, 2010 a Public Interest Litigation ('PIL' for short) was filed by Social Action Forum For Manav Adhikar, before Delhi High Court interalia seeking investigation by an appropriate agency, regarding the alleged acts committed by Mr. C. B. Bhave in his capacity as Chairman of the respondent with a view to do undue favours to the appellant. In the said PIL, the petitioner therein had sought implementation of orders passed by two member committee of the respondent on December 4, 2008, quashing orders passed by the respondent on November 9, 2009 and February 2, 2010 and quashing order passed by SAT on June 22, 2010 in Appeal No. 21 of 2010.

21. Delhi High Court by its order dated September 29, 2010 dismissed the aforesaid PIL interalia on the ground that proper forum for challenging the decision of SAT dated June 22, 2010 was to file an appeal before Supreme Court under Section 15Z of the SEBI Act and not by way of PIL.

22. Challenging the aforesaid order of Delhi High Court a Special Leave Petition ('SLP' for short) was filed before the Apex Court. On March 28, 2011 the Apex Court passed an order in the said SLP as follows:-

> *"The Securities and Exchange Board of India (SEBI) to consider whether its Board will re-consider the order/Report of its Special Committee dated 4.12.2008 with reference to NSDL/DSQ and*

pass appropriate resolution and place it before this Court for further consideration.

The costs awarded by the High Court stands deleted.

Adjourned by four weeks."

23. Thereafter, on May 9, 2011 the Apex Court passed further order in the said SLP as follows:-

"On 28.03.2011, this Court made the following order:

The Securities and Exchange Board of India (SEBI) to consider whether its Board will re-consider the order/Report of its Special Committee dated 4.12.2008 with reference to NSDL/DSQ and pass appropriate resolution and place it before this Court for further consideration."

In pursuance of the same, the SEBI has considered the matter at its 137th meeting held on 26.04.2011 and resolved to reconsider the decision dated 9.11.2009 by which it treated the reports dated 4.12.2008 of the sub-Committee in respect of IPO/DSQ of NSDL as non-est. It has further resolved that it would reconsider the Order/Report of its sub-Committee dated 4.12.2008 with reference to NSDL/DSQ with a view to accept it except the portion relating to SEBI which was passed ex-parte.

On examination of the reports dated 4.12.2008 of the sub-Committee, we find that the sub-Committee in its order dated 4.12.2008 has not made any order, much alone ex-parte order, against SEBI. It has only made certain suggestions /recommendations for the consideration by SEBI. In fact, being a sub-Committee of SEBI, the question of the said Committee issuing any direction does not arise. Therefore, there is no need to exclude the suggestions by the Sub-Committee from consideration. Be that as it may. As the Board has decided to reconsider the reports of the sub-Committee dated 4.12.2008, list the matter in the first week of August, 2011, to await the decision of SEBI on such reconsideration."

24. Ultimately on September 5, 2011 the said SLP was disposed of by the Apex Court interalia recording as follows:-

> *"9. SEBI has now filed an affidavit dated 2.9.2011 stating that at its meeting dated 28.7.2011, it has decided to accept and release the Orders/Reports dated 4.12.2008 of the Special Committee for compliance by NSDL. In pursuance of it, SEBI has also addressed a letter dated 28.7.2011 to NSDL calling upon NSDL to comply with the said two Orders/Reports. In view of the same, the prayer in the PIL in regard to orders dated 9.11.2009 and 2.2.2010 of SEBI, will not survive for consideration."*
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> *10. What remains for consideration is the challenged to the order dated 22.6.2010 passed by the Securities Appellate Tribunal in the appeal filed by NSDL, in regard to the Order/Report dated 4.12.2008 with reference to Rajnarayan Capital Markets Services Ltd. The Tribunal, by order dated 22.6.2010, observed that it was satisfied that no prejudice had been caused to the beneficial owners of the depository participant, namely, Rajnarayan Capital Markets Services Ltd. whose certificate of registration had since been cancelled, and in the interest of the securities market, it expunged the observations made in the impugned order, in so far as they were adverse to NSDL.*
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> *11. Learned counsel for the appellant submitted that the Orders/Reposts dated 4.12.2008 with reference to IPO/DSQ have now been accepted; that the Order/Report dated 4.12.2008 in regard to Rajnarayan Capital Markets Services Ltd. was accepted by SEBI on 26.8.2009; and therefore the direction of the Tribunal expunging the remarks against NSDL in the order dated 4.12.2008 relating to Rajnarayan Capital Markets Services Ltd. was not warranted.*
>
> *12. We find that the order of the Securities Appellate Tribunal is not a reasoned order, in so far as the direction to expunge the remarks against NSDL. In fact, the Tribunal has noted that as the counsel for SEBI and NSDL had agreed that reasons need not be recorded for expunging the remarks against NSDL it*

was not recording reasons. In the changed circumstances, we are of the view that a reasoned order would be necessary. The order of the Tribunal cannot be sustained in the absence of reasons.

13. In view of the above, this appeal is allowed in part. The public interest litigation filed by the appellant in so far as the challenge to the order of the Tribunal dated 22.6.2010 is allowed and the said order is set aside and the matter is remitted to the Securities Appellate Tribunal for fresh consideration in accordance with law. It is open to the appellant to get itself impleaded as the second respondent in the said appeal before the Tribunal and assist the Tribunal. In so far as prayers relating to order of SEBI dated 9.11.2009 and 2.2.2010, the Public Interest Litigation is disposed of as having become infructuous in view of the subsequent events."

25. Thus, the impugned order dated December 4, 2008 relating to IPO irregularities has been served upon the appellant on July 29, 2011 in the circumstances set out here in above. Challenging the impugned order dated December 4, 2008 relating to IPO irregularities, the present appeal is filed.

26. Mr. Dwarkadas learned Senior Advocate appearing on behalf of the appellant submitted as follows:-

a) The impugned order dated December 4, 2008 was never made public or put in to transmission (till it was served belatedly on July 29, 2011) and therefore it is not an order in the eye of law which can be enforced at this belated stage.

b) Once SEBI Board resolves that the impugned order of the two member committee cannot be implemented and accordingly declares the impugned order to be non-est on any ground

whatsoever, then the Board becomes functus officio and in such a case the Board could not once again reconsider the matter and decide to implement the impugned order passed by the two member committee. The issues considered by the Full Board represent conclusive determination of all issues involved in the matter and therefore, by applying the principle of issue estoppel, the respondent cannot be permitted to litigate on any issue set out in the impugned order. In support of the above contention counsel for the appellant relied upon the decision of the Apex Court in the case of Hope Plantations Ltd. vs. Taluk Land Board, Peermade & Anr. reported in (1999) 5 SCC 590.

c) The Apex Court in its order dated September 5, 2011 has merely recorded the resolution passed by SEBI Board on July 28, 2011 to the effect that the Board has decided to accept the impugned order and release the same for compliance by the appellant, and the Apex Court has not expressed any opinion on the merit of impugned order and therefore the appellant is entitled to challenge the impugned order by filing the present appeal.

d) In view of SAT order dated January 14, 2009 (which has attained finality) the findings recorded against the appellant in the ex-parte ad-interim order as also in the adjudication order passed by the respondent do not survive and consequently impugned order based on the adjudication order would not survive.

e) The decision of the respondent to continue the proceedings against the appellant to the exclusion of CDSL is wholly unreasonable, arbitrary, discriminatory and violative of Articles 14 & 19 of Constitution of India, because, the alleged lapses recorded in the adjudication orders passed against the appellant and CDSL were common and after the said adjudication orders were set aside by SAT on January 14, 2009, the respondent, having dropped the proceedings against CDSL could not have decided to continue to proceed against the appellant.

f) Even on merits, first direction contained in the impugned order does not survive, because, requisite investigation has already been carried out by the appellant and after SAT order dated January 14, 2009 by which the charges levelled against the appellant have been set aside, there is no question of conducting fresh inquiry to fix individual responsibility. Moreover, remedial measures to strengthen the system in the context of IPO irregularities have been taken from time to time by the appellant on its own and at the instance of the respondent. Moreover, correspondence exchanged between the appellant and the respondent conclusively demonstrate that remedial steps taken by the appellant are on par with remedial steps taken by CDSL and therefore it is wholly improper on part of the respondent, at this belated stage, to single out the appellant and continue to proceed against the appellant by seeking implementation of the impugned order.

g) As regards second direction contained in the impugned order which requires appellant to conduct an independent audit in respect of the systems named therein, counsel for the appellant submitted that necessary steps have already been taken in that behalf to the satisfaction of the respondent and therefore conducting independent audit once again under the impugned order does not arise at all.

27. Mr. Khambata learned Advocate General appearing on behalf of the respondent submitted as follows:-

a) The SEBI Board on April 26, 2011 decided to reconsider its decision dated November 9, 2009 keeping in view the spirit of observations made by Apex Court on March 28, 2011 and hence no fault can be found with the aforesaid decision of the Board. The Apex Court in its order dated September 5, 2011 has clearly recorded that in view of the respondent accepting the impugned decision dated December 4, 2008, the contrary decisions of the Board dated November 9, 2009 and February 2, 2010 do not survive. Therefore, it is not open to the appellant to contend that the impugned order dated December 4, 2008 cannot be implemented on account of the Board resolutions dated November 9, 2009 and February 2, 2010.

b) There can be no dispute that on account of the IPO irregularities noticed during the period 2003-2005 the retail investors were deprived of their right to get allotment of shares. By the impugned order the appellant is directed to investigate and find

out as to whether, IPO irregularities were due to systems failure or operational failure and to take remedial measures in this regard. Unless root cause for the IPO irregularities is found out and individual responsibility is fixed, it would not be possible to take effective remedial steps. The mere fact that two member committee in the impugned order dated December 4, 2008 has also attributed certain lapses on the part of the respondent, the appellant cannot question the sanctity behind the directions contained in the impugned order.

c) The first direction contained in the impugned order merely requires the appellant to conduct an independent inquiry and fix individual responsibility for failures on the part of appellant, in discharge of its legal duties and responsibilities identified in the impugned order. This direction contained in the impugned order neither casts any stigma on the appellant nor seeks to penalize the appellant or its officers and hence grievance against impugned order is wholly unjustified.

d) From correspondence exchanged between the parties it is seen that second direction contained in the impugned order stands complied with and only thing required to be done by the appellant is to effectively implement the same, in future.

e) The argument of the appellant that in view of SAT order dated January 14, 2009 the impugned order does not survive is not correct. The SAT order dated January 14, 2009 deals with issue of supervision/physical inspection of DPs during pre-registration

period and not in relation to supervision/compliance by DPs after they are registered. Therefore, contention of the appellant that SAT order dated January 14, 2009 covers the issues raised in the impugned order, cannot be accepted.

f) Dealing with plea of discrimination, it is submitted that the appellant, if permitted, is ready and willing to issue similar direction to CDSL as contained in the impugned order.

g) The directions contained in the impugned order are issued in public interest and since the said order merely calls upon the appellant to put its house in order, no fault can be found with the impugned order.

28. We have carefully considered the rival contentions.

29. First question to be considered herein is, whether it was legally permissible for SEBI Board to review its earlier resolutions passed on November 9, 2009 and February 2, 2010 relating to implementation of the impugned order dated December 4, 2008. In our view, ordinarily it would not be open to the SEBI Board to review resolutions passed by it in its earlier Board Meetings. This is because, once finality is attached to a proceeding, it would not be open to the respondent to re-agitate the issues by reviewing its earlier orders, unless there are compelling reasons to do so. The dispute in the present case, arises from a PIL filled before the Delhi High Court wherein it was alleged that the Board decisions of the respondent dated November 9, 2009 and February 2, 2010 interalia to treat the impugned decision dated December 4, 2008 as non-est was with

a view to confer undue benefit to the appellant, because at the material Mr. Bhave, the then Chairman of the appellant had become Chairman of the respondent. Although, Delhi High Court dismissed the PIL, on filing SLP, the Apex Court by its order dated March 28, 2011 called upon the respondent to consider as to whether the SEBI Board would reconsider its decisions taken on November 9, 2009 and February 2, 2010 relating to implementation of the impugned order dated December 4, 2008. Since Apex Court, had raised the above query in public interest, in the facts of present case, decision of the respondent to reconsider its earlier decisions taken on November 9, 2009 and February 2, 2010 cannot be faulted.

30. No doubt that the respondent could have taken a stand before the Apex Court that after passing aforesaid resolutions on November 9, 2009 and February 2, 2010 SEBI Board became functus officio in relation to implementation of the impugned order dated December 4, 2008. However, in this case, since Apex Court having wide powers under Article 142 of the Constitution to pass such order as is necessary to do complete justice in any matter had called upon the respondent to consider whether its Board would reconsider passing appropriate resolutions in the matter, the decision of the Board to reconsider its resolutions relating to implementation of the impugned order dated December 4, 2008 cannot be faulted. Accordingly, we hold that ordinarily, SEBI Board cannot review its own resolutions, however, in the facts of the present case, for the reasons stated hereinabove, decision of the Board to review its earlier decisions cannot be faulted.

31. The question then to be considered is, whether the statement of the respondent recorded in Apex Court order dated September 5, 2011 to the effect that the respondent has decided to accept the impugned order dated December 4, 2008 and release the said order for compliance by the appellant amounts to Apex Court endorsing the correctness of the impugned order dated December 4, 2008.

32. Plain reading of the Apex Court order dated September 5, 2011 makes it abundantly clear that Apex Court has merely recorded decision taken by respondent in the matter of accepting and releasing the impugned order for compliance by the appellant and Apex Court has not expressed any opinion on merits of impugned order dated December 4, 2008. In fact, PIL in question was filed with a view to seek enforcement of the impugned order dated December 4, 2008 and not with a view to challenge the said order. In the SLP filed before Apex Court, neither the Apex Court was called upon to consider the correctness of the impugned order nor the Apex Court has recorded any finding regarding the correctness of impugned order. Therefore, the fact that Apex Court in its order dated September 5, 2011 has recorded the decision of the respondent to accept and seek compliance of impugned order from the appellant, would not amount to Apex Court expressing any opinion on correctness of the impugned order and it would be open to the appellant who was not even a party to the proceedings before the Apex Court to challenge the impugned order dated December 4, 2008.

33. Therefore, core issue to be considered in this appeal is, whether the impugned order dated December 4, 2008 suffers from any infirmity and whether on the facts and in the circumstances of the case, the respondent was justified in deciding to accept and release the impugned order for compliance by the appellant.

34. By impugned order, the appellant is directed to carry out the following two directions:-

> *"(1) We direct the NSDL Board to conduct an independent inquiry, in accordance with terms of reference satisfactory to SEBI, to establish individual responsibility for the failure of NSDL to meet its legal duties and responsibilities identified above; and to take necessary action to ensure individual accountability for such failure. Such inquiry should be completed within six months of the date of this Order, an inquiry report should be provided to SEBI and to the NSDL Board and follow up action should be taken by the NSDL Board within three months of the receipt of the report, and SEBI should be duly informed.*
>
> *(2) We direct the NSDL Board to conduct an independent audit of the following systems and their operation to assess whether they are adequate to ensure the integrity of the overall depository system and the securities market; and identify any remedial measures needed: (i) selection of DPs; (ii) opening and operation of depository accounts including the KYC system; (iii) audit, (iv) supervision; (v) inspection and (vi) penalties and sanctions. Such audit should be in accordance with terms of reference satisfactory of SEBI and should be completed within six months. Within three months of the receipt of the audit report NSDL should send to SEBI its own independent assessment of the above and a comprehensive set of proposed measures necessary to correct any deficiencies."*

35. As noted earlier, counsel for the respondent has fairly stated before us that the 2nd direction set out here in above has already been complied

with. Therefore, the only question to be considered is, whether the grievance of the appellant against 1st direction set out hereinabove is justified or not.

36. The 1st direction contained in the impugned order requires the appellant to conduct an independent inquiry to establish individual responsibility for failures of the appellant in performing its legal duties and responsibilities in relation to IPO irregularities noticed during investigation.

37. The documents on record show that immediately after the ex-parte ad-interim order dated April 27, 2006, the Board of Directors of the appellant constituted a committee to look into issues raised in the ex-parte ad-interim order dated April 27, 2006, and the said committee headed by Dr. R. H. Patil as Chairman, investigated issues relating to IPO irregularities and submitted a detailed report on June 10, 2006 (see page 288 of the compilation). In the said report (see page 310) it is recorded that the committee does not see complicity of NSDL with any entity involved in the IPO scam, however, the committee suggested several remedial measures to be taken by the appellant in the matter. Thus the fact that the appellant has already investigated the matter to ascertain the individual accountability cannot be disputed.

38. In the impugned order, neither the two member committee of the respondent has found fault with the inquiry report of the appellant dated June 10, 2006 nor has it recorded any reason on the basis of which fresh investigation to fix the individual accountability has been ordered.

Therefore, in the absence of any cogent reason for rejecting the investigation already carried out, directing fresh investigation is wholly unjustified.

39. The ex-parte ad-interim order dated April 27, 2006 as well as the adjudication order dated April 27, 2007 were passed on the basis of detailed investigation carried out by the respondent. Neither in the investigation report of the respondent nor in the ex-parte ad-interim order dated April 27, 2006/adjudication order dated April 27, 2007 it is stated that the investigation carried out by the appellant is inadequate or there is any individual involvement which needs to be investigated. Therefore in the absence of any material on record to suggest individual involvement which has not been investigated, the two member committee could not have ordered the appellant to conduct fresh investigation with a view to fix individual responsibility, merely because, the investigation revealed certain lapses on the part of the appellant as also the respondent.

40. If lapses on the part of the appellant in discharging its regulatory responsibilities noticed during the course of investigation itself were sufficient to fix individual responsibility, then, by applying the same yardstick, the two member committee, in view of the lapses on the part of the respondent in discharging its regulatory responsibilities, would have directed the respondent to investigate and fix individual responsibility on their part. The very fact that the two member committee has not passed any such direction against the respondent, clearly shows, that lapses noticed while discharging regulatory responsibilities could not be the

basis for ordering fresh investigation. Therefore, the mere fact that certain lapses were noticed during the course of investigation could not be a ground for ordering fresh inquiry to fix individual responsibility especially when the investigation already conducted did not suggest any individual complicity and no fault was found with such investigation carried out by the appellant.

41. Moreover, in the SAT orders both dated January 14, 2009, various commissions and omissions on the part of the appellant/ CDSL in the matter of IPO irregularities set out in the respective adjudication orders were considered and while setting aside the penalty of ₹ 5 crore/ 3 crore imposed under the said adjudication orders, the SAT observed that the charge in the show cause notice as well as the findings in respect thereof recorded against both the depositories viz., the appellant and CDSL were based on a wrong premise and cannot be sustained. Admittedly, both the said orders have attained finality. Therefore in the facts of the present case, where the Adjudication order stands setaside by SAT and the investigation conducted by the respondent does not suggest any individual involvement, it is wholly unreasonable on the part of the respondent to direct the appellant to conduct fresh investigation, especially when such investigation has already been carried out by the appellant.

42. Apart from the above, the respondent has found lapses on the part of both the depositories viz., the appellant and CDSL. However, the proceedings in the case of CDSL have been closed on the basis of the SAT order dated January 14, 2009 but not in the case of appellant. It is

not the case of respondent that the case of CDSL is different from the case of appellant. Therefore, when the appellant and CDSL stand on the same footing in the matter of IPO irregularities, the decision of the respondent to close the file in the case of CDSL on the basis of the SAT order and continue to proceed against the appellant inspite of the SAT order is unreasonable and unjustified.

43. Although SEBI Board, keeping in view the spirit of the observations made by Apex Court, had passed resolutions on April 26, 2011 and July 28, 2011, in our opinion, in view of the subsequent SAT order dated January 14, 2009 which has attained finality and in view of the decision of the Whole Time Member dated January 15, 2009 on the basis of which the proceedings against CDSL were treated as closed, the SEBI Board was not justified in accepting and releasing the impugned order for compliance by the appellant.

44. As noted earlier, the Depository system is regulated by both the Depositories and the respondent acts as the Apex regulatory authority. After noticing IPO irregularities, both the Depositories as also the respondent have carried out independent investigations. After ascertaining that there is no individual complicity, various remedial measures have been taken from time to time by the two Depositories on their own and also at the instance of the respondent. Therefore, at this belated stage directing the appellant to institute fresh inquiry to fix individual accountability to the exclusion of CDSL is wholly unjustified and unreasonable. Accordingly, we quash and set aside the impugned order

dated December 4, 2008. This order, however, will not come in the way of the respondent to seek compliance of any other remedial measures that may be suggested by the respondent with a view to strengthen the Depository system.

45. For the reasons stated hereinabove, the impugned order dated December 4, 2008 relating to IPO irregularities is quashed and set aside and the appeal is allowed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
A S Lamba
Member

06.08.2013
Prepared & Compared By: Pk